



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC. 271 OF 2017

MUIRURI NJURU.....1ST PLAINTIFF/APPLICANT

STEPHEN MWANGI MAINA.....2ND PLAINTIFF/APPLICANT

SIMON NJOROGE KAMUNGE.....3RD PLAINTIFF/APPLICANT

STEPHEN MUREGI CHEGE.....4TH PLAINTIFF/APPLICANT

DAVID GICHOHI WAIHAGA.....5TH PLAINTIFF/APPLICANT

JOHN THINDI KABAYA.....6TH PLAINTIFF/APPLICANT

-VERSUS-

ESTHER MUCHIRI.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants filed this suit on **12th July 2016**, and sought for various orders against the Defendant. Among the orders sought are:-

a. A mandatory injunction to issue against the Defendant compelling her to remove the gates erected as access points to LR.No.14270/23, 14270/24 and 14270/25 through Kugeria North Crescent Road and to restore the hedge and close the entries created to the said plots through Kugeria North Crescent Road.

Simultaneously, the Plaintiffs filed a **Notice of Motion** application even dated and sought for various interlocutory orders. These orders are:-

1. Spent.

2. That this Honourable Court be pleased to order a mandatory injunction against the Defendant to compel her to remove the gates erected as access points to LR.Nos.14270/23, 14270/24 and 14270/25 through Kugeria North Crescent Road and to restore the hedge and close all entries created to the said plots through Kugeria North Crescent Road.

3. Spent.

4. Spent.

5. That this Honourable Court be pleased to order a temporary injunction restraining the Defendant by herself, her servants, tenants, agents, employees and/or any othe person acting at her behest from accessing LR.Nos.14270/23, 14270/24 and 14270/25, using Kugeria North Crescent Road and/or creating a gate along the hedge adjacent to the said road pending the hearing and determination of this suit.

6. That this Honourable Court be pleased to order a temporary injunction restraining the Defendant by herself, her servants, tenants, agents, employees and/or any other person acting at her behest from interfering with the Plaintiff's right to use Kugeria North Crescent Road and from trespassing on the said road pending the hearing and determination of this suit.

7. That the Officer Commanding Kiambu Police Station be directed and/or authorized to supervise the enforcement of these orders.

8. That the costs of this application be provided for.

The said application is supported by grounds stated on the face of the application and the affidavits of *Muiruri Njuru* and *Joan Wanguh Kibathi*. These grounds are:-

1. That the Applicants are the owners of LR.Nos.17239, 17238, 17237, 17242, 17241 and 17240, respectively located within Kiambu County, and they have the right to access their plots using Kugeria North Crescent Road.
2. That the Defendant, who owns LR.No.14270/23, 14270/24 and 14270/25, adjacent to Kugeria North Crescent Access Road has opened her hedge and purported to put gates along the access road for purposes of accessing her plots using the said very narrow access road.
3. That the Defendant has separate access to her plots through the main public murram road and also from behind her plots on the other side of her property and she has no right whatsoever to use Kugeria North Crescent Access Road to access her plots.
4. That's the said Access Road was part of LR.No.7022/53 which after subdivision into fifteen plots, the owner, Winfred Wanjiku Kibathi (deceased), surrendered part of her land to create an access road to LR.Nos.17239, 17238, 17237, 17242, 17241 and 17240 that are now owned by the Plaintiffs.
5. That the Respondent at the time of submitting the survey plan for the subdivision indicated that LR.Nos.14270/24 and 1420/25 would be accessed through the main public murram road and LR.No.14270/23 would be accessed from behind where there is a road.
6. That the Respondent, by erecting a gate and opening up her hedge has fully indicated that she intends to use the Kugeria North Crescent access road used by the Plaintiffs to access her plots which is illegal amounting to trespass and ought not be allowed.
7. That unless the orders sought herein are granted, the Applicants are at risk of losing their right to use the access road to their plots and will also create a security risk as they have no control of the strangers who shall be using the said access road which will render the suit herein useless.
8. That the Respondent stands to suffer no harm or loss if the prayers sought herein are granted as she already has an access road to her plots.
9. That it is just and equitable that the application herein be granted as prayed.

In his Supporting Affidavits, *Muiruri Njuru*, one of the Plaintiff/ Applicant averred that he had been authorized by the other Plaintiffs to swear the affidavits on their behalf and on his own behalf averred that the access road used by themselves is very narrow and it was created purposely to give the Plaintiffs access to their plots but not for the general public use. He further reiterated the contents of the grounds in support of the application.

In her *Supporting Affidavit*, *Joan Wanguh Kibathi*, averred that she is one of the beneficiaries of the estate of the initial owner, *Winfred Wanjiku Kibathi* (deceased). Further that she holds beneficial interest together with her brothers and sisters in *LR.No.17249, 17250, 17251, 17247, 17244, 17245, 17246, 17248* and *17243*. She also confirmed that her mother owned plot *No.7022/53*, which she subdivided into *15 plots* in *1992* and sold six of the plots to the Plaintiffs being *LR.No.17239, 17238, 17237, 17242, 17241* and *17240*, which were at the rear end of the property. Further that in order for the owners of the above plots to access their plots, her mother surrendered part of her land so as to create an access road to them. That the surrendered land resulted in the creation of *Kugeria North Crescent Road* which was purposely created for the exclusive use by the Plaintiffs herein and her family.

It was her contention that that Defendant/Respondent has her own access road to her property through the main public murram road and another behind one of the plots and should not insist on using the private access road – *Kugeria North Crescent*. She urged the Court to allow the instant application.

This application is opposed by the Defendant/Respondent herein who filed a *Notice of Preliminary Objection*, on *22nd March 2017* on the following grounds.

1. That the Plaintiffs/Applicants suit is predicated upon a public land as provided by Article 62 of the Constitution of Kenya.
2. That the road in issue does not fall under the category of private land as provided for under Article 64 of the Constitution of Kenya.
3. That the road in question was as a result of the conversion of private land to public land by way of surrender as provided for under Section 9(2)(c)(iv) of the Land Act 2012 hence the said road is a public road.

4. That the road in question been a public land falls under the exclusive management and administration of the National Land Commission created under Article 67 of the Constitution of Kenya.
5. That consequently the Plaintiffs/Applicants lacks any locus standi to institute this suit which is aimed at disentitling the Defendant/Respondent their constitutionally and statutory guaranteed public right of way.
6. That the Plaintiffs/Applicants claim is untenable in law as the orders sought therein if granted will amount to a derogation of the Defendant/Respondent right to movement as provided for under Article 39(1) of the Constitution of Kenya.
7. That the issues raised by the Plaintiffs/Applicants in their pleadings are nonjusticiable for being in conflict with the explicit constitutional and statutory provisions hence the Honourable Court lacks jurisdiction to entertain the suit.
8. That the Plaintiffs/Applicants claim is frivolous, vexatious and an abuse of the process of the court riddled with clear ignorance of the law hence should be dismissed forthwith.

The Defendant/Respondent further filed her *Replying Affidavit* on 7th July 2017, and averred that the application herein is frivolous, vexatious and tantamount to an abuse of the Court process and she urged the Court to dismiss it with costs. It was her allegation that *Kugeria North Crescent Road*, falls under the category of public land and not private land and thus she has a right to use the same and the applicants have no exclusive rights to the said road to the exclusion of everyone else. She further averred that the Applicants attempts to deny her the use of *Kugeria North Crescent Road* amounts to infringement of her right to freedom of movement as guaranteed under Article 39 and also right to property as provided by Article 40 of the Constitution. She also contended that the Applicants herein will not suffer any irreparable harm if order sought are not granted whereas, she stands to suffer irreparable harm if the orders sought are granted, given that she will be compelled to tear down the structures already erected.

The application was canvassed by way of written submissions. The *Law Firm of Ngugi & Wamuyu Advocates* for Plaintiffs/Applicants filed their written submissions on 28th July 2017, and urged the Court to allow the Applicants' application. The Applicants relied on various decided cases among them the case of *Alexander Ngotho Ngunyi & Another...Vs.... John Ngugi Gachau, Nakuru CA No.123 of 2010 (4R 97/2016)*, where the Court of Appeal while dismissing their appeal stated that:-

“though the Applicants’ claimed that the said road was a public access, no evidence in the form of the documents were produced to support the allegations”.

It was the Applicants submissions that though the Respondent alleged that *Kugeria North Crescent Road* was a public road, no evidence was produced to back her said allegations.

The Defendant/Respondent filed her written submissions on 14th November 2017 through the *Law Firm of Gichamba & Co. Advocates* and urged the Court to dismiss the instant application. The Respondent relied on various decided cases among them the case of *Mary Njeri Gatuha & 3 Others...Vs...George Muniu & 5 Others (2017) eKLR*, where the Court stated that:-

“ lack of an application by the Applicants to convert or seek approval to convert an access road into a private road as provided under the Act would bar any Applicant from claiming the same”.

The Respondent further relied on the case of *Homescope Properties Ltd & Another...Vs...David Gachuki & Pamela Odera sued as Chairman & Secretary of Karen Ngong View Estate & Another (2014) eKLR*, where the Court held that:-

“...having regard to the provisions of the Public Roads and Roads of Access Act, the Court is persuaded that there is a distinction between a public road and a road of access. A Public Road is set apart and designed as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by relevant authorities. Limitation as to use may be as to the nature or type of vehicles that may not use such a road. On the other hand, road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as public road, railway station or a halt”.

The Respondent therefore submitted that the Applicants herein have not made any application as envisaged under the Public Roads and Roads of Access Act to convert the instant road into a private one.

It was further submitted that a public road cannot lose its status by virtue of the fact that certain parties had taken positive steps to change its circumstances. For this, the Respondent relied on the case of *George Munge...Vs...Sanjeev Pancho Sharma & 3 Others (2012) eKLR*, where the Court held that:-

“I take judicial notice that residents associations in various parts of the city have evolved as necessary parties to fill in the void left by the City Council or security agents. But in carrying out this mandate, they should not infringe upon private property rights or the right to the public to access or use public or city roads”.

This Court has now carefully considered the pleadings and the annexures thereto. The Court has also considered the written submissions, cited authorities and the relevant provision of the law and it renders itself as follows:-

The Respondent has raised a *Notice of Preliminary Objection* and enumerated various grounds to support the same. The Court will have to

deal with the said **Preliminary Objection** before delving into the substantive **Notice of Motion**.

Before going into the merit of the **Preliminary Objection**, the Court will have to first determine whether what has been filed meets the qualifications of what a preliminary objection is. In the case of **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696**, the Court describes what amounts to a Preliminary Objection and stated as follows:-

“....so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....”

The Court went further and held that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial decision”.

Further, in the case of **Oraro....Vs...Mbaja (2005) 1KLR 121**, the Court held that:-

“Any assertion which claims to be a preliminary objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle a true preliminary objection which the court should allow to proceed. Where a court need to investigate facts, a matter cannot be raised as a Preliminary Point....Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which it stands to be tested by normal rules of evidence”.

The Court has considered all the eight grounds raised by the Respondent herein. None of the said grounds raises a pure point of law. The stated grounds have to be ascertained by looking at evidence or facts from elsewhere. The Respondent has alleged that the road in question is a public access road. For the Court to ascertain that, it has to call for evidence and ascertain facts. The said objection does not stem from the pleadings. Further, she has alleged that the road in question was a result of conversion of private land to public land. That fact has to be ascertained by calling of evidence. Therefore the said objection has not raised pure points of law and does not qualify to be a Preliminary Objection as envisaged in the **Mukisa Biscuits Case (supra)**.

Therefore the Court finds that the **Notice of Preliminary Objection** filed by the Respondent on **22nd March 2017**, does not qualify to be a **Preliminary Objection** and the same is dismissed entirely with no orders as to costs.

The Court will now turn to the instant **Notice of Motion**. The Applicants have sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others (1990) KLR 554**, where the court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further, the Court will also take into account that at this juncture, it is not called upon to decide the disputed facts with finality. All that the Court is called upon to determine is whether the Applicants are deserving of the injunctive orders sought based on the usual criteria. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria to be considered is the one stated in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These criterias are:

- a. **The Applicant must establish that he has a prima facie case with probability of success.**
- b. **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c. **When the Court is in doubt, to decide the case on a balance of convenience.**

Further the Applicants have sought for a mandatory injunction which orders are granted in very special circumstances. See the case of **Kenya Breweries Ltd & Another ...Vs...Washington O. Okeyo (2002) eKLR**, where the Court held that:-

“A mandatory injunction can be granted in an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not usually be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a match on the Plaintiffs.... a Mandatory injunction will be granted on an interlocutory application”.

The Court has considered the pleadings and noted that this prayer of mandatory injunction is one of the prayers sought in the main suit.

Granting it now means that the Court has partially granted the prayers sought in the Plaintiff. That could be done without the advantage of having called for evidence and deciding the matter on merit. The Court has further noted that there is a dispute on whether the road herein is a private or public road. That is an issue that will have to await the calling of evidence at the main trial. It is indeed true that the Defendant has erected some three gates from her three plots to the disputed parcel of land. However, this Court cannot hold and find that the case herein is a clear one which needs to be decided at once. Further the Court should be cautious when called upon to issue final orders at the interlocutory stage. See the case of *Nahendra Chaganlal Solanki...Vs...Neepu Auto Spares Ltd, Kisumu HCCC No.90 of 2003*, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise cautionary steps”.

Therefore for the above reasons, the Court finds that the Applicants are not deserving of the mandatory injunction sought in prayer no.1 of the instant *Notice of Motion*.

The Court will now deal with the two prayers of temporary injunctions sought in *prayers nos.4 and 5*. The two prayers have basically sought to bar the Respondents and her servants or agents from accessing plots *No.14270/23-14270/25* using *Kugeria North Crescent Road* and from interfering with the Plaintiff's right to use the said Road.

As the Court stated earlier, it will be cautious not to determine the matter herein with finality. The Applicants needed to establish that they have a prima-facie case with probability of success. It is not in doubt that Applicants bought their respective parcels of land from one *Winfred Wanjiku Kibathi* in *1992*. Further the said *Winfred Wanjiku Kibathi*, surrendered part of her land to create access road to the Plaintiffs parcel of land. The Plaintiffs alleged that this was indeed a private road specifically for their use and access to their respective plots but not for the public. Indeed the Plaintiffs have used the said road since *1992* and have been maintaining the same.

It is also not in doubt that the Respondent has not been using the said road to access her plot. However, she has now created three gates with intention of using the instant road as an access road. The Respondent has alleged that the road in dispute is a public road which allegation has vehemently been denied by the Applicants. The issue of whether the road is a public road or private road is not a matter to be decided at this juncture, but after calling of evidence. However, it is clear that the Plaintiffs have been using this road since *1992*, exclusively and the Respondent has only attempted to gain access to it recently. If the said road was curved by the previous owner of the suit land just to serve the Applicants herein, then it is a private road to them and they have been using it so since *1992*. However, the evidence at the main trial will determine that allegation. For now the Court finds that the Plaintiffs have established that they have a prima-facie case with probability of success.

On the second limb, the Applicants needed to establish that they will suffer irreparable loss which cannot be compensated by an award of damages. The allegations that the said road will now be opened to the general public and that will pose a security threat to them is neither here nor there and that argument does not hold any water.

On the 3rd limb that if the Court is in doubt to decide the matter on the balance of convenience, it is not in doubt that the Respondent herein has not been using the disputed road. The Plaintiffs have been using the same exclusively *since 1992*. The Court finds that the purpose of injunction is to preserve the *status quo* and the Court further finds that the balance of convenience herein tilts in favour of maintaining the *status quo*. The *status quo* herein is that the Respondent has not been using the disputed road. That should be the *status quo* for now until the suit is heard and determined. See the case of *Esso Kenya Ltd...Vs...Mark Makwata Okiyo, Civil Appl. No.69 of 1991*, where the Court held that:-

“Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court”.

Considering the balance of convenience herein, the Court finds that it is fair and just that the *status quo* herein be maintained and the Respondent should not access her plots using the disputed road until the matter is heard and determined. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

On *prayer no.7* that the *OCS Kiambu Police Station* be directed and/or authorized to supervise the enforcement of these order, the Court finds that there is no evidence that the Respondent will not comply with orders granted herein so as to call for police assistance. The Court declines to grant the said prayer.

Having now carefully considered the instant *Notice of Motion* dated *12th July 2016*, the Court finds it merited in terms of *prayers no.5* and *6* of the said application and consequently the same are allowed. The Applicants are also entitled to costs of the application.

However, the Court declines to allow *prayers no.1* and *7* of the said application at this juncture.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Ali holding brief for M/S Kagucia for Plaintiffs/Applicants

Mr. Macharia holding brief for Mr. Gachamba for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

9/2/2018