



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 7 OF 2017

MILIKI LIMITED.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT LAMU.....1ST DEFENDANT/RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF

HOUSING & URBAN DEVELOPMENT...2ND DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

1. By an Amended Notice of Motion dated 13th March 2017, the Plaintiff Miliki Limited prays for orders that pending the hearing and determination of the suit herein, the Defendants by themselves, their officials and/or agents be prohibited from trespassing, constructing or engaging in any conduct such as to constitute an interference with the lawful use and occupation by the Plaintiff over the suit property.

2. The said application is premised on the grounds inter alia, that:-

- i) The Plaintiff is the owner of all that parcel of land known as Lamu/Block II/119 measuring approximately 21.6 acres;***
- ii) The Plaintiffs acquired the property through a proper and lawful sale and was issued with a title deed thereto on 28th August 2007;***
- iii) On or about 15th November 2016, the Defendants' officials in collusion with some politicians in an attempt to take over ownership of the suit property embarked on a construction of a 6m wide road cutting across the suit property;***
- iv) As a result of the aforesaid construction of the road, a considerable portion of the suit property has been hired off and is now used as a public road;***
- v) The actions of the Defendants of constructing a road on the suit property without compensating the Plaintiff is illegal, high handed and constitutes trespass to land; and***
- vi) It is in the interest of justice that the relief of prohibitory injunction issues to restrain the Defendants from interfering with the Plaintiff's ownership and possession of the suit property.***

3. In a Replying Affidavit sworn by its Director of Lands, Physical Planning and urban Developments Erick Randu, the County Government of Lamu(the 1st Defendant) avers that they are aware that the National Government through the Ministry of Transport, Infrastructure Housing and Urban Development has embarked on a project named Kenya Slum Upgrading Programme(KENSUP) which has identified Kashmir Slums in Lamu town, as one of its beneficiaries and has contracted a company to upgrade the Kashmir Road by constructing a 1.5 km paved footpath.

4. The 1st Defendant further avers that the road being constructed is not a new road as alleged by the Plaintiff but rather, the upgrading of the existing road, by the construction of a paved foot path. It is their case that the road under construction has always been open to use by members of the public since time immemorial and even after the alleged acquisition by the Plaintiff-and the Plaintiff is aware that it has a

duty to surrender the same for road access.

5. The 1st Defendant further contends that it has not compulsorily acquired the Plaintiff's land for purposes of road construction and the issue of compensation does not therefore arise.

6. The 1st Defendant further avers that the access road the Plaintiff purports to have created through the centre of the suit property is essentially for the private use of the occupier and not outsiders who might be denied access by erection of gates and imposition of security guards.

7. According to the 1st Defendant, as a matter of practice and procedure, an access road for public use is supposed to be on the periphery of the property and not running across the centre of a private property.

8. On behalf of the 2nd and 3rd Defendants, the Honourable the Attorney General has by Grounds of Opposition dated and filed herein on 13th April 2017 opposed the grant of the Orders sought on the grounds that:-

i) The issuance of injunction militates against public interest since an injunction against a public interest project will result in delay of infrastructural development and massive loss of public funds through payment for idle manpower and plant charges to the contractor;

ii) That the on-going construction is lawful and procedurally done pursuant to a development permission granted by the Defunct County Council of Lamu;

iii) The application is misconceived and lacking in merit as the allegations of collusion and land grabbing have not been proven as against the 2nd Respondent;

iv) The planning of sites where access roads are to be constructed is the mandate of the National and/or the County Governments and as such the application as filed is devoid of merit; and

v) That the balance of convenience and the public interests tilts against the grant of the orders sought.

9. In an application for an interlocutory injunction the Court ought to be guided by the principles enunciated in the celebrated case of ***Giella –vs- Cossman Brown & Company Ltd (1973) EA 358***. These are:-

i) That the Applicant must establish that he has a prima facie case with a probability of success;

ii) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages; and

iii) When the Court is in doubt, it will decide the case on a balance of convenience.

10. In ***Mrao Ltd –vs First American Bank of Kenya and 2 Others (2003)KLR 125***, the Court of Appeal stated the following in describing what constitutes a prima facie case:-

“...a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, as to call for an explanation or rebuttal from the latter.

11. Accordingly, the question then that this Court must consider first and foremost is whether the Plaintiff has established a prima facie case with a probability of success.

12. From the material placed before me, the Plaintiff accuses the Defendants of colluding with certain politicians and embarking on the construction of a 6m wide road across the suit property. It is the Plaintiff's case that as a result of the aforesaid construction, a considerable portion of the suit property has been hived off and is now being used as a public road.

13. The Defendants have not denied that the construction of the road referred to is being undertaken. According to the 1st Defendant, they are aware that the National Government has embarked on a project named Kenya Slum Upgrading Programme (KENSUP) which has identified Kashmire Slums in Lamu town as one of the beneficiaries and has contracted a company to upgrade the Kashmire road by constructing a 1.5 km paved foot path.

14. It is however the 1st Defendant's case that the road being constructed is not a new road as alleged by the Plaintiff, but rather, the upgrading of the existing road through the construction of a paved foot-path.

15. I note however that the Defendants do not dispute the fact that the Plaintiff is the lawful proprietor of the suit property. In the Supporting Affidavit to the application, the Plaintiff has exhibited a copy of the Title Deed issued to them on 28th August 2007 for the suit property which measures approximately 21.6 acres.

16. In an apparent acknowledgment that the Plaintiff is the proprietor of the suit property, the 1st Defendant avers that its predecessor, the defunct County Council of Lamu had given conditional leave to the Plaintiff to sub-divide the land but only subject to the plaintiff surrendering a portion thereof to the Government for road access. They accuse the Plaintiff of failure to adhere to this condition and to provide an access road as stipulated.

17. From the material placed before me, it is clear that on or about 14th February 2008, the Plaintiff applied to the said County Council of Lamu to sub-divide the suit property in the manner it proposed in a sub-division Map which was attached to the application. By a letter dated 25th February 2008, the Country Council wrote to the Plaintiff as follows:-

“RE: NOTIFICATION OF APPROVAL/REFUSAL/DEFERMENT OF DEVELOPMENT PERMISSION

TO: MILIKI LTD

P.O. BOX 421

LAMU

Your application number as above, submitted on 14/2/2008 for permission to sub-divide Plot No. Lamu/Block II/119 situated in Lamu-Mashambani has been approved on 25/2/2008 by the County Council of Lamu for the following reasons/subject to the following conditions:-

a) Recommended approval pursuant (sic) to the Physical Planning Act Cap 286 Section 41(1) (2) & (5) also comply to the Local Government Act Cap 265 subsection 166.

b) Surrender to the Government any land meant for road access.

c) Surrender the free hold interest in exchange of a 99 years lease with reversible annual rent.

d) Obtain land Control Board consent, and

e) Land should not constitute part of any disputed public utility.

Signed”

18. It is the Plaintiff’s case that all the conditions given by the defunct council were wholly met and the sub-division Map with an access road to be surrendered to the Government was submitted to the defunct council and was subsequently approved.

19. The Defendants however contend that the access road to the Plaintiff created through the centre of the suit property is essentially for the private use of those who take up and occupy various sub-divisions of the suit property and not for outsiders who risk being denied access. It is indeed the Defendants’ position that as a matter of practice and procedure an access road for public use is supposed to be on the periphery of the property and should not run across the centre of a private property as is the case herein.

20. From the foregoing, and the material placed before me it is apparent that the defendants have constructed a road on the suit property and on a portion other than the area that had already been earmarked for that purpose.

21. Section 26 of the Land Registration Act, 2012 provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner; subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

22. Section 25 of the said Act guarantees the proprietor of such land certain rights and privileges appurtenant and belonging to such proprietorship subject only to certain restrictions and conditions specified therein.

23. Accordingly and in light of the fact that the Plaintiff is the registered owner of the suit property, it was not open for the Respondent to proceed arbitrarily as they did and proceed to construct a road upon the Plaintiff’s land without any prior consultation and or information. Even if it were granted that the Respondents were of the view as claimed, that an access road can only be built on the periphery of the suit property, it was incumbent upon them to notify the Plaintiff prior to taking such action in a reasonable and fair manner as provided under Articles 40, 47 and 50 of the Constitution. In any event nothing was placed before me to show that there is any requirement either as a matter of law or practice that demands that an access road should be on the periphery of a property.

24. In *Nguruman Ltd –vs Jan Bonde Nielsen & 2 Others (2014) eKLR*, the Court of Appeal stated that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

25. In the matter before me, I find that there is evidence the Defendants have proceeded to construct a road on private property without any notification, consultation and/or compensation to the owner. Such brazen acts of impunity constitute trespass to private property and this Court has an obligation to stop them in the interest of justice.

26. Accordingly, I find merit in the Plaintiff’s application dated 13th March 2017. I allow the same with costs against the Defendants.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE