



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 928 OF 2017

EVANS KAMUYU GATHUNGU.....1ST PLAINTIFF

EDITH WANJIRU GATHUNGU.....2ND PLAINTIFF

SAMUEL MBIRIRI.....3RD PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Chambers Summons dated the 15th November, 2017 where they seek various prayers pursuant to Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is premised on the following grounds, which in summary is that the Applicants are the registered proprietors of land parcel numbers NGONG/ NGONG/51693; NGONG / NGONG/ 51691 and NGONG/ NGONG/ 51692 hereinafter referred to as the 'suit lands'. The Respondent has without any justification put murrum and hardcore on the suit lands hence blocking access to a bus park/matatu stage in front of the Plaintiffs' land. The Respondents' actions are manifestly illegal, unfair, unlawful and unconstitutional hence amounting to trespass. The Applicants' were not given any notice and Respondent's action amount to unfair administrative action. The Applicants have a right to protection of their private property as per the Constitution.

The application is supported by the affidavit of EVANS KAMUYU GATHUNGU who is the 1st Plaintiff herein where he adopted all the averments contained in their Complaint as well as the list of documents filed herein. He deposes that he is the registered proprietor of LR. NO. NGONG / NGONG/ 51693 while the 2nd and 3rd Plaintiffs are the registered owners of NGONG/ NGONG/ 51691 and NGONG / NGONG/ 51692 respectively. He confirms the boundaries and beacons of the suit lands are very clear and elaborate leaving a wide space for a road reserve on Magadi Road. He claims the Defendant has without any colour of right invaded and ploughed into his land a distance of 5 metres from the road reserve and put murrum and hardcore with the intention of building a buspark/matatu stage. He insists the area is not a designated bus park and this is a blockage to access the suit lands. Further that the tenants on the suit lands have complained and considering vacating them. He contends that the trespass is unwarranted, in bad faith and intended to defeat the Plaintiffs' rights as proprietors of the suit lands. Further that the Defendant has threatened to continue with the development and ploughing unless restrained by the Court.

The application is opposed by the Defendant who filed a replying affidavit sworn by JOSHUA LEMAIKAI the County Surveyor where he deposes that the Complaint, Application and supporting affidavit are full of falsehoods, contradictions and concealment of material facts pertinent to the suit. He insists that the mutation form dated the 25th December, 2010 annexed to the affidavit duly indicated land distance but not the width hence no demonstration of the alleged encroachment. He contends that the titles to the suit lands shows the said lands are meant for agricultural purposes and not commercial hence no change of user has ever been sought for and obtained by the Plaintiffs and this amounts to violation of the law under the Physical Planning Act Cap 286. He denies that the Defendant embarked on felling the Plaintiffs' fence, beacons and boundaries without their authority and insists the averments on trespass are misleading, as they are not supported with any evidence. He claims that the Defendant has not in any way encroached nor put up a murrum as well as hardcore or blocked access to any of the suit lands as alleged. He explains that the road herein namely Magadi Road Highway falls under class C of the highway roads which is under the jurisdiction of KENHA and all activities being carried by the Defendant are legal and equally within the Physical Planning Act Cap. 286 which provides a road reserve of width 4 to 6 metres for the benefit of the entire public including the applicants, taking into account the principles of planning as well as facilitation objectives. He avers that the building lines along the said road shows the design of the road that can only be determined by a visit to the site and not photographs which cannot demonstrate accurate position of the ongoing works. Further that the Defendant is executing its functions in accordance with the provisions of Article 186 of the Constitution and Section 5 of the County Government Act and duly complied with the principles of public communication as well as access to information to the public. He reiterates that the Defendant has spent huge sums of money on the project which is almost complete and within the planned development programs and the intention of the Plaintiffs to stop the construction is baseless and ill founded. Further, that the Defendant undertook the project after taking into account the inclusion and integration of the minorities and marginalized groups. He states that the Plaintiffs have not established a prima facie case and their case is an abuse of the court process as there is no imminent mischief or inconvenience that is likely to arise if the prayers sought are not granted. Further that the applicants have not demonstrated utmost good faith in making the application owing to the contradictions and misleading statements and therefore this breaches the dictum of disclosure to court.

The Plaintiffs filed a rejoinder through a further affidavit sworn by EVANS KAMUYU GATHUNGU where he reiterated the contents of his supporting affidavit and denied the contents of the replying affidavit. He insists the Defendant wishes to build a bus park/matatu stage. Further that a complaint was lodged by the Postal Corporation of Kenya against the encroachment and/or trespass by the Defendant herein which complaint was never responded to by the Defendant. He reiterates that the acts of encroaching into the suit lands, removing beacons and boundary and the placing of murrum as well as hardcore with the intention of building a bus park has been clearly elaborated and displayed by the annexed photographs attached to the supporting affidavit. He claims the area is not a bus park/matatu stage and that the Defendant should provide Kiserian Town development plan clearly showing where the matatu stage/ bus park should be built but not on a road reserve through which their tenants access the suit lands. Further that no evidence has been provided by the Defendant to confirm due procedure was adhered to, before it commenced on the project. He further insists that the Defendant did not provide evidence that a notice of intention to build the aforementioned bus terminus was issued. Further that they have established a prima facie case with a probability of success.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

On perusal of the Chamber Summons dated the 15th November, 2017 including the supporting affidavit, replying affidavit and supplementary affidavits as well as the parties submissions, the only issue for determination at this juncture is whether the Plaintiffs' are entitled to the orders of interlocutory injunction pending the outcome of the suit.

The fulcrum of the suit revolves around acts of trespass where the Plaintiffs' contend that the Defendant without notice and colour of right commenced constructing a bus park/matatu stage on the suit lands, deposited murrum and this has interfered with their tenants who are threatening to vacate. The Defendant insists the suit lands are agricultural and that the Plaintiffs' did not obtain a change of user from agricultural to commercial. Further it adhered to all the requisite procedures before commencing on the project of constructing the bus terminus which is in the interest of the public including the Plaintiffs. The Plaintiffs' in their submissions relied on the following authorities: **Pastoli Vs Kabale District Local Government Council and Others (2008) 2 EA 300; Real Deals Limited & 3 Others V Kenya National Highways Authority & Another (2015) eKLR; Sylvia Wambui Kuria Vs Kenya Electricity Transmission Company Limited (KETRACO) (2016) eKLR; and Machareus Obaga Anunda Vs Kenya Electricity Transmission Co. Ltd (2015) eKLR.** I note most of the authorities cited by the Plaintiffs are on compulsory acquisition and compensation yet this suit revolves around alleged encroachment.

While the Defendant relied on the following authorities: **Giella Vs Cassman Brown & Another (1973) EA 358; Mrao Limited Vs First American Bank of Kenya Limited & 2 Others (2003) IKLR 125; Civil Case No. 315 of 2014 High Court of Kenya at Nairobi (Milimani) – CFC Stanbic Bank Limited Vs Consumer Federation of Kenya (COFEK) & Another; Nairobi ELC Case No. 214 of 2013 Hardy Residents Vs Andrew Nganga; Nairobi ELC Case No. 988 of 2014 Robert Nganga Maburu Vs Julius Mboya Munyora alias Wamunyora & 3 others; and Nairobi HCCC No. 242 of 2013 Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Another.**

The principles for granting an injunction are well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** where the Court held as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

As to whether the Plaintiffs' have established a prima facie case with a probability of success. It is not disputed that the Defendant is constructing a bus terminus. It is also not disputed that the Plaintiffs' are proprietors of the suit lands. What is in dispute is the position of the bus terminus and whether the Defendant consulted the Plaintiffs before doing so. The Defendant insists as a County Government it is mandated under the County Government Act to set up a bus park to benefit the public. The Defendant further insists the suit lands are agricultural land and the Plaintiffs did not obtain change of user before making them commercial entity, which fact has not been controverted by the Plaintiffs. I note the Plaintiffs have admitted in their supplementary affidavit that the area where the terminus is being constructed is a road reserve but used by their tenants to enter the demised suit lands. The Plaintiffs insist their tenants intend to move out of the suit lands but the Defendant contend that Plaintiffs' allegations are full of falsehood and contradictory. I further note the project herein is for public interest but the Plaintiffs insist no public participation and public communication was done before the project was undertaken in accordance with section 91 and 95 of the County Government Act. Since the project is for public interest and has not been undertaken on the suit lands, and I note by the time the Defendant was filing its replying affidavit, it intimated that the project was almost nearing completion, I find that at this juncture the Plaintiffs have not established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs' can suffer irreparable injury, which would not adequately be compensated by an award of damages. I note the Plaintiffs have title deeds to their parcels of land. Further, the Defendant is not putting up the bus park or terminus on the suit land but on a road reserve in front of the suit lands. The Defendant further avers that the project was already nearing completion.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held as '....**The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.**'

I note the Plaintiffs claim their tenants intend to vacate the suit premises due to the illegal actions of the Defendant. The Plaintiffs claim the Defendant has encroached on their land. I however note the Plaintiffs have admitted that there is a road reserve where the bus terminus is being constructed. From the photos the Plaintiffs have annexed to their supporting affidavit, it is not clear whether the construction has

commenced. What is visible are some stones and lorries parked thereon. It is trite law that a road reserve is a public property and the County Government is vested with authority to manage the same in their respective counties. In this instance, the County Government is putting up a bus terminus on the land they claim to be a road reserve. But the Plaintiffs insist they have heaped stones and blocked their entrance and the tenants want to vacate. In relying on the above case, and the facts above, I find that the alleged injuries suffered by the Plaintiffs are speculative.

On the question of balance of convenience, from the evidence presented by the parties, I find that at this juncture the balance does not tilt in favour of the Plaintiffs as the alleged bus park is being put up on a road reserve and not on the suits land and is set to benefit the public including the Plaintiffs.

I find that the application dated the 15th November, 2017 is not merited and dismiss it.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Ngong this 18th day of April, 2018.

CHRISTINE OCHIENG

JUDGE