



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 7 OF 2018

JAMES WAHOME NDEGWA

BERNARD KINYUA NJOGU

GEOFREY NDERI NDIANI

(Suing as Chairman, Secretary and

Treasurer for and on behalf of)

NYAHURURU SPORTS CLUB.....PLAINTIFF/APPLICANTS

VERSUS

KENYA URBAN ROADS AUTHORITY1st DEFENDANT/RESPONDENT

HANAMAL CONSTRUCTION LTD.....2nd DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/applicants herein filed their Notice of motion dated the 29th January 2018, and filed on the same day, pursuant to Section 63 (c) of the Civil procedure Act, Order 40 Rule 1,2,3,4, and 5 as well as Order 51 Rule 1 of the Civil Procedure Rules, wherein they ought for injunctive orders to be issued against the Defendant/Respondents herein from constructing a bypass through their property herein being Land Reference No. 6585/334 (Grant No. I.R. 17690) which was a private property owned by the sports club of Nyahururu. The Applicant's application was premised on the grounds set out on the face of the Application as well as on the sworn affidavit of Bernard Kinyua Njogu.

2. The Applicants were issued with ex-parte orders of Status quo on the 30th January 2018 whereupon service of the application for inter-parties hearing of the same, parties with the approval of the court, consented to dispose the matter by way of written submissions and thereafter highlight on their submissions.

Plaintiff/ Applicant's Case.

3. It was the Applicant's case while relying on the grounds of their application and supporting affidavit and their authorities thereto that they were the registered proprietors of the suit land pursuant to the registered grant no. 17690.

4. That subject to condition No. 11 of the grant, it was clear that should the government ever wish to acquire the land, it was incumbent upon them to issue a written notice to that effect. The Applicants contention was that no such notice had been sent to them in this effect.

5. It was further their contention that since the suit land was private property, the Respondents herein were in breach of the provisions of Articles 64, and 40(2) of the Constitution thereby violating the Applicant's rights.

6. That by establishing that their rights were in danger of being infringed upon by the Respondents, the Applicants submitted, that they had established a prima facie case herein.

7. They submitted that Respondents had not denied that they had infringed on the Applicant's rights. Further, there was no evidence adduced by the Respondents showing that they had called upon the Applicants to contribute to the drawing of the development plan but instead the Respondents went ahead to unlawfully acquire the Applicants land which is private land. The Applicants relied on the case of **Evelyn College of Design Ltd vs. Director of Children's Department and another [2013] eKLR** to buttress their submissions.

8. The Applicants also submitted that the Respondent had forcefully entered into the suit land and had started interfering with the golfing activities of the golf club. That if allowed to proceed with the said construction of the road through the golf club, then the Applicants would incur a lot of financial expenses for the reconstruction, re-planning and re-development and alignment of the Golf course there by incurring substantial loss. They relied on the case of **Aikman and Others vs. Muchoki and Others (1984) KLR 353**.

9. It was the Applicant's submission that they had also sought for mandatory injunctive orders to issue against the Respondents to remove the pegs that they had placed on the suit and which were inconveniencing to the golfers.

10. The applicant further submitted that the Government Proceedings Act was declared unconstitutional in the case of **Council of Governors and 3 Others vs. the Senate and 53 Others [2015] eKLR** for which reason therefor they did not deem it fit to serve Notice prior to the filing of the suit against the Respondents herein. They also made reference to the case of **Stanley Kanunga Nkarichia vs. Meru Teachers College and Another [2016] eKLR** wherein the court held that the issuance of Notice prior to filing proceedings was no mandatory. That in the present case the Respondents had already entered on the suit land with their machine and it would have been useless to issue them with the 30 days' Notice. Further the correspondences between the parties was sufficient Notice.

11. The Applicant submitted that the Respondent's argument that if the injunction was granted they (Respondents) would lose billions of shillings, was farfetched.

1st Defendant Respondents case.

12. The 1st Respondent, represented by State Counsel from the Hon Attorney General's Office and while relying on the affidavit sworn on the 5th February 2018 by Abdukadir Ibrahim Jatani, opposed the application and submitted that the corridor of the said road had been in existence before the Applicant's club was founded and was specifically provided for as condition No. 11 in the Applicants Grant to its property No. LR 17690 of 1960 and also through the physical planning vide an approved Development Plan (PDP) Ref No. C2/77/5 of 30th September 1977.

13. That the applicant herein has alluded that they would suffer if they were not compensated meaning that the loss would not be irreparable as they could be compensated.

14. That the construction of the road was for the benefit of the wider society and for the development of the town thus the public interest outweighed the interest of the club, they relied on the case of **Veronica Waithira Trustee of inter-Christian Churches and 3 others vs. Kenya National Highways Authority [2014] eKLR**.

15. They submitted that the Applicant's loss if any could be compensated and that the wider Public good interest was of paramount importance.

2nd Respondent's submission

16. Counsel for the 2nd Respondent submitted that the plans for the road were issued way back in the year 1960, the suit land was transferred in the year 1994 wherein the conditions of the grant were the same and as such the transfer of the suit land to the Nyahururu sports club did not affect the terms of the grant. That condition 11 applied throughout.

17. That the Applicant's main prayer was a declaration of permanent injunction and that the issue for compensation was on the alternative which is without prejudice to the main prayer.

18. That the law was clear on the issue of Public interest vs. private interest. The court was thus referred to the case of **Nahason Ngige Nyagah vs. Abdullahi Ahmednasir Maalim and 2 others [2017] eKLR** where it was held that it was not correct to say that where public interest conflicts with private interest, that the Public interest shall prevail. That each case depended on its own peculiar circumstance. That in this case, the 1st Respondent was in breach of the law because they had not followed the procedures set out in the Land Act.

19. That the 1st Respondent had not even tried to establish whether the title held by the Applicants was illegal or fraudulent. That since the title was protected under Section 26 of the Land Act that due process had to be followed and it was not enough to submit that the Applicants would be compensated. That they had not even set down the process for compensation. The 2nd Respondent confirmed that the Application was merited and ought to be allowed as prayed.

Determination

20. I have reviewed the affidavits and the annexures thereto and have also considered the filed submissions by the parties. The issue for determination is whether on the material and evidence presented to the court, the Applicants had established a prima facie case with a probability of success to enable the court to grant to them the order of injunction.

21. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

22. I have considered the application herewith together with the affidavits that were filed in support thereof. I have also considered the

responses that were filed by the Defendants in opposition to the application. Finally, I have considered the submissions by counsel for the parties. The application for injunction is based on the fact that the Applicants' club is the registered owner of the suit land by virtue of Grant No. I.R. 17690 which was registered on the 12th August 1960.

23. The Plaintiff/Applicant herein is still in possession of the said Grant. As the holder of a grant that is not cancelled, then as provided by Section 23 of the Registration of Titles Act, Cap 281(now repealed), the Plaintiff is deemed to be the absolute and indefeasible proprietor of the said parcel of land. Section 23 of Registration of Titles Act provides:-

“the certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon”

24. The current land regime is set out in the section 25 and section 26(1) of Land Registration Act, Act No. 3 of 2012.

25. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows:-

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer 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 and the title of that proprietor shall not be subject to challenge...”

27. That the suit land has always been private land and the Respondents have never followed the proper and prescribed legal and procedural steps to acquire private land for private public purpose. Further there has been neither notice as stipulated under clause 11 of the Grant nor has the club executed any deed for surrender of the suit land.

28. That although the location Map marked as AIJ 1 provided for proposed Nyahururu bypass, yet the Sports Club was not notified of the same even though the Respondents Knew that it was the proprietor of the suit land and was in possession of the same herein therein convening the provisions of Article 10(2) of the Constitution.

29. That the Part Development Plan (PDP) Ref No. C2/77/5 of 30th September 1977 was not in existence in 1960 when the grant was issued and no notification was issued to the club at the time it was being drawn so that they could also have an input since they were on the ground.

30. I also note that on the 16th January 2018, the 1st Respondent entered onto the suit property without its permission and/or notice wherein they surveyed and pegged a portion of the suit land thereon intending to commence the construction of a by-pass. That the 1st Respondent contracted the 2nd Respondent herein to construct the said by-pass through the suit land.

31. I have also considered the fact that the said construction of the by-pass will occupy a substantial and critical area of the golf course and will adversely affect the club's golf course and activities.

32. The 1st Defendant is a body corporate established under the Kenya Roads Act and is mandated under the said Act to manage, develop, and maintain all urban roads in the Republic of Kenya. That in the purported exercise of the said mandate, the 1st Defendant contracted the 2nd defendant to construct a bypass road through the Plaintiff's parcel of land Reference No. 6585/334 (Grant No. I.R. 17690) which is private property owned by the sports club of Nyahururu. The 1st Defendant has also confirmed that no notice was issued to the Plaintiff for the said construction and although they would wish for the court to find that the suit land is public, yet no evidence has been laid to support their submission.

33. Under clause 11 of the Grant the same was clear as to terms and conditions to be met before the club could surrender the suit land to the government. Of importance was that there ought to be a six month notice in writing served upon the club of the intention by the Government to have the land surrendered. I find that none of the above captioned steps were taken.

34. Acquisition by the government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act**. The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012. The process involves:

i. National Land Commission (NLC) receives a request for acquisition from the acquiring body for public purposes or in public interest vide a Preliminary Notice under Sec. 107(1) and (5)

ii. Under Section 107(2) of the Act, the NLC will require the acquiring body to provide a comprehensive list of the affected parcels of land and the respective owners, title search details, cadastral maps of the affected areas, a Resettlement Action Plan accompanied by a list of Persons Affected by Project. Compensation should address all the rights of affected persons in an equitable manner.

iii. Notice of intention to acquire under Sec. 107 (5) of the Act is then published in the Kenya Gazette after the commission certifies in writing that the land is required for public purposes or in public interest. Upon certification, the commission shall publish notice of intent and shall deliver a copy of the notice to the registrar and to every person who appears to have an interest in the land.

iv. Under Sec. 108 of the Act, all land to be compulsorily acquired shall be authenticated by the authority responsible for survey both at the national and county governments as per the Land Act Sec 107(8).

v. Notice of inquiry, Land Act Sec. 112 (1,a): The NLC shall appoint a date for inquiry at least 30 days after publishing the notice of intention to acquire, and at least 15 days before the actual date of the inquiry. A copy of the notice is served on every person who appears to have an interest in the land.

vi. Receipt of claims Sec. 112 (2): Any written claim for compensation is delivered to the commission not later than the date of inquiry. The inquiry determines who are the persons interested in the land.

vii. Award of compensation, Sec. 113 and 114(1): Upon conclusion of the inquiry, the commission shall make a separate award of compensation for every person whom it has determined to be interested in the land. The commission shall then serve on each person a notice of the award and offer of compensation.

viii. Payment of compensation, Sec 115: Upon acceptance of the award, the commission shall promptly pay compensation. If the award is not accepted or there is a dispute, the amount is paid into a special compensation account held by the commission.

35. In the present case, I find that the Plaintiff herein was not served with any copy of a Gazette Notice on the impending acquisition for reasons that no such Gazette Notice had been published by the Commissioner of Lands on the said acquisition meaning that unlike what the 1st Defendant had purportedly informed the plaintiff, the Government did not acquire the plaintiff's land.

36. Further that since the Government had not acquired the plaintiff's land, the actions of the 1st Defendant amounted to forceful taking of the plaintiff's property without due process in violation of his right to property which is protected under Article 40 of the Constitution

37. In the premises having regard to all the material presented by the plaintiff and the Defendant, I am satisfied the plaintiff has established that they have a prima facie case with a probability of success. The Plaintiff/Applicant's case meets the threshold of what constitutes a prima facie case as defined by **Bosire, JJA in the case of Mrao Limited – vs- First American Bank (2003) KLR 125.**

38. On the second issue that the Applicants stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted, the Applicants submitted that the Respondents forcefully entered onto their land, which was private land with a golf club, wherein they started interfering with the golfing activities therein by placing pegs on the ground in preparation to start with the road construction. That if allowed to proceed with the said construction of the road through the golf club, then the Applicants would incur a lot of financial expenses for the reconstruction, re-planning and re-development and alignment of the Golf course thereby incurring substantial loss.

39. The 1st Defendant/Respondent on their part contended that that the corridor of the said road had been in existence before the Applicant's club was founded and was specifically provided for as condition No. 11 in the Applicants Grant to its property No. I.R 17690 of 1960 and also through the physical planning vide an approved Development Plan (PDP) Ref No. C2/77/5 of 30th September 1977. The Respondent has contended that the interim orders issued by the court have interfered with the public use of the said road which has been constructed with tax payer's money which is likely to go to waste if the said orders are not discharged.

40. That the construction of the road was for the benefit of the wider society and for the development of the town thus the public interest outweighed the interest of the club, further, the Plaintiff/Applicant's loss if any is capable of being compensated by way of damages.

41. *Article 40 sub-Article 3 of the Constitution of Kenya* provides that the State shall not deprive a person of property of any description or any interest in or right over property of any description unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with Chapter 5 or is for a public purpose or in public interest and is carried out in accordance with the Constitution or any act of parliament that requires prompt payment in full, of just compensation to the person and allows any person who has an interest in, or a right over, the property a right to access a court of law. The import of the provisions of Article 40(6) is that the rights under the Article do not extend to any property that has been found to be unlawfully acquired.

42. Section 28 (e) of the Land Registration Act No. 3 of 2012 declares rights of compulsory acquisition as an overriding interest over registered Land which does not need to be noted on the register meaning that the Government through the National Land Commission can at any time compulsorily acquire any property for the purposes spelt out under Article 40 (3) of the Constitution provided the acquisition process and procedure is adhered to. The plaintiffs cannot stand in the way if their property is identified as required for a public purpose as all the Government would need to do is to initiate the process of compulsory acquisition under the law.

43. However in respect of whether an award of damages would adequately compensate the plaintiff, I am persuaded to agree with finding of

Hon. Justice Warsame in the case of **Joseph Siro Mosiomo Vs Housing Finance Company of Kenya and 3 others [2008] eKLR** wherein he held:-

"Damages are not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction".

44. The Defendant/Respondents cannot be allowed to benefit from breach of the law even if he is able to compensate the plaintiff by way of damages.

45. In prayer No. 4 of the Applicants' Application, they have sought for mandatory injunctive orders to issue against the Respondents. However the threshold in mandatory injunctions is higher than in the case of prohibitory injunctions. The Court of Appeal in the case of **Kenya Breweries Ltd vs. Washington Okeyo (2002) EA 109** had occasion to discuss and consider the principles that govern the grant of mandatory injunctions where it held that the test for grant of a mandatory injunction as stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 that:-

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

46. In the English case of **Locabail International Finance Ltd vs. Agro Export & Another (1986), ALI ER 901** which the Court of Appeal in Kenya has followed with approval in may decisions, the court held that:-

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction."

47. I find that the Applicant/Plaintiffs have not established any special circumstances to deserve an order for a mandatory injunction. This limb of the application therefore fails.

48. The upshot is that I partially allow the Applicant/Plaintiff's application dated 29th January 2018 to the effect that pending the hearing and determination of this suit, a temporary injunction do issue restraining the respondents by themselves, their servants, employees, agents or otherwise however from entering on, moving their machines on, constructing a by-pass, erecting any structures, damaging trees and the golf course or carrying out any acts of waste or activity whatsoever on Land Reference No.6585/334, (Grant No.I.R.17690) or any part thereof.

49. I decline to grant an order for a mandatory injunction.

50. The parties are herein directed to move with speed to comply with the provisions of order 11 of the Civil Procedure Rules within the next 21 days upon the delivery of this ruling, to expedite the hearing and determination of the suit.

51. The injunction granted herein will last for a period of 12 months from the date hereof and will lapse at the expiry of that period unless the same is extended by the court vide an application to court in that regard.

52. The costs of this application shall be in favour of the Applicants.

Dated and delivered at Nyahururu this 30th day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE