



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 424 OF 2017

NOAH CHEGE MUTURI (Being the Administrator of the estate of NUHU

NJOGO GATHAMBIRI (Deceased) - PLAINTIFF/APPLICANT

VS

COUNTY COUNCIL OF MURANG'A - 1ST DEFENDANT/RESPONDENT

LAND SURVEYOR, MURANG'A COUNTY - 2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 18/7/2017 seeking the following orders;

a. That this application be certified as urgent and heard ex-parte in the first instance for want of urgency.

b. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants/Respondents by themselves, their servants, agents and/or whomsoever in any means howsoever from damaging, destroying, demolishing, pulling down and/or in any other way interfering with the boundary to Title LOC.19/NYAKIANGA/461 and further from altering the road of access bordering Title No. LOC.19/NYAKIANGA/461.

c. That pending the hearing and determination of the main suit, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants/Respondents by themselves, their servants, agents and/or whomsoever in any means howsoever from damaging, destroying, demolishing, pulling down and/or in any other way interfering with the boundary to Title LOC.19/NYAKIANGA/461 and further from altering the road of access bordering Title No. LOC.19/NYAKIANGA/461.

d. That status quo be maintained.

e. That the OCS, Murang'a Police Station do oversee the enforcement of court order issued.

f. That cost of this application be provided for.

2. The application is based on the grounds, *inter-alia*,: that the Plaintiff is the registered owner of the suit land, as an administrator of the estate of Nuhu Njogo Gathambiri – deceased; the suit land is in the process of being sub-divided to pave way for transmission to the beneficiaries in accordance with confirmation of grant issued on 18/1/17; The Respondent intends to work out the suit land for purposes of expanding the borders of the road thus reducing the acreage of the suit land; the Applicants have not been consulted nor compensated for the land.

3. In his Supporting affidavit filed on 18/7/17 the Applicant reiterated the grounds of the application. He added that the suit land has been substantially been developed by the deceased owner who has planted tea which is their source of livelihood.

4. He deposed that during the subdivision of the suit land, he learnt that the Defendants intend to reduce the acreage of the land by annexing 20ft X12 ft to the new expanded road. He opined that the current road access is sufficient to allow vehicular movement and people and there is no justification to expand it. By not carrying out public participation and consultation, the Applicant contends that he has been denied the opportunity to raise objections and grievances to the intended expansion, which interferes with the suit property.

5. Finally, the Applicant deposed that the Respondent has threatened to carry out the road expansion notwithstanding the breach of procedure and rights of the Applicant and its beneficiaries. That such an action will be prejudicial to the applicant as will cause them to suffer loss and damage irreparable.

6. In support of his application the Applicant has annexed, *inter-alia*, the following documents;

- a. Grant of letters of administration intestate dated 2/3/2009.
- b. Certificate of confirmation of grant dated 18/1/2017.
- c. Certificate of official search dated 5/4/17.
- d. Cadastral map for Loc.19/Nyakianga unit.
- e. Several pictures showing the intended road.

7. The Respondent opposed the application by filing grounds of opposition on 21/5/18 on the following, *inter-alia*;

- a. The application is incurably defective, brought under the wrong provisions of the law and an abuse of Court Process.
- b. The application is seeking to restrain the government from enforcing its mandatory provisions as empowered by the law.
- c. The status quo is the illegal position.
- d. Delineation survey and registration is not a devolved function and rests with the National Government rendering the application and whole suit misguided, ill advised and incompetent.
- e. The changes to the land are solely the prerogative of the National Government and the Defendant only assists in execution.
 - i. It is the National Government, which draws the cadastral map.
 - ii. It is the National Government, which has the formulae to decide where the road shall be.
 - iii. It is the National Government, which undertakes the survey thereto of roads.
 - iv. The Defendants are only consulted with reference to approved plans which Plaintiff refused to submit for approval.
- f. The Defendant is aware that actions by the National Government in relation to land are made contentiously as evidenced by the Plaintiff documents.

8. On the 24/5/18, the parties through their Counsels on record elected to file written submission, which I have read and considered.

9. It is trite law that interlocutory injunctions are governed by the principles enunciated in the case of ***Giella vs Cassman Brown and Co. Ltd (1973) EA 358*** which are: that firstly, 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, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience”.

10. What is a prima facie case? ***Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eK.L.R)*** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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. As regards whether the Applicant has established a prima facie case with a probability of success, the Applicant has demonstrated that he is the registered owner (an administratrix of the estate of estate of Nuhu Njogo Gathambiri) of the suit land on 19/1/17 vide RL 19. He has stated that the land is extensively developed and are apprehensive that the Defendant’s intention to expand the road will interfere with the suit land by reducing the acreage without compensation. It is their case that the act of excising 12ft & 20ft of their land amounts to an arbitrary action and is in contravention of Article 40 of the Constitution in specific, a violation to their right to own property.

12. The Defendant on the other hand has raised an objection that the application is incurably defective because it seeks a permanent injunction without presenting special reasons to warrant a permanent injunction. I have perused the orders of the Applicant and it is clear that he is seeking an injunction pending the hearing and determination of the suit. That cannot be called a permanent injunction. The argument of the Respondents is therefore unfounded.

13. Will the Applicant suffer irreparable damage if the injunction is not granted? Article 40 of the Constitution guarantees the right to property. Section 26 of the Land Registration Act protects the right of ownership of property except that any challenge to the title shall be permitted through fraud or misrepresentation for which the party is proven party to. In this case, the Applicant has demonstrated that the suit land is an inheritance from their deceased father. Taking it away without prompt and full compensation will be prejudicial to the Applicants. I hold that this limb of the requirements of injunction is present.

14. Having assessed the application the balance of convenience tilts in the Court granting a status quo, which should last for 6 (six) months within which time the parties must have taken steps to have the matter heard and determined. In default, the status quo shall lapse.

15. I have noted that the 1st Defendant described as County Council of Muranga ceased to exist on the 4/3/13 under the new Constitution. The suit was filed on the 18/7/17 against a non-existent person under the law. The application against this 1st Defendant is strike out. Consequently, the suit as against the 1st Defendant is strike out for the same reason.

16. Consequently, the application succeeds against the 2nd Defendant in the following terms

a. The 2nd Defendant is restrained by himself, his servants agents and or whomsoever in any means from damaging destroying demolishing pulling down and or in any way interfering with the boundary to the title Loc 19/Nyakianga/461 for a period of 180 days from today.

17. The costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF OCTOBER 2018

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Githinji HB for Waiganjo for the Plaintiff

Njau HB for Kimwere for the 1st and 2nd Defendants

Irene and Njeri, Court Assistants