



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.543 OF 2017

MICHAEL NJIIRI KARIUKI.....PLAINTIFF/APPLICANT

-VERSUS-

FERDINARD NDUNGU WAITITU BABAYAO...1ST DEFENDANT/RESPONDENT

HON. ALICE NGANGA.....2ND DEFENDANT/RESPONDENT

DAVID KARIUKI NGARI *alias* GAKUYO.....3RD DEFENDANT/RESPONDENT

GAKUYO REAL ESTATE LTD.....4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff herein filed a *Plaint* dated **19th May 2017**, against the Defendants and sought for various orders among them being:-

a) A permanent injunction restraining the Defendants, their agents, servants, employees, assigns or any other person, body or authority from entering, causing to enter any machinery for construction, constructing, passing through or in any other way trespassing upon the Plaintiff's property comprised in LR.No.12646/4.

b) An order that the Defendants do remove all structures that they put on LR.No.12646/4 and restore at their own cost the Plaintiff's land to its original state as farmland.

The Plaintiff had claimed that he is the registered proprietor of all the leasehold interest in the parcel of land known as **LR.No.12646/4**, located in **Thika Municipality** measuring approximately **0.7688 Hectares**. However on or about **9th May 2017**, the Defendants and their agents unlawfully and willfully entered and caused road construction equipment to be entered into **LR.No.12646/4** and the said equipment destroyed the fence to **LR.No.12646/4** and damaged crops thereon. The Defendants further caused levelling and fence establishment of a road with Murrum on **LR.No.12646/4** without the Plaintiff's authority.

Simultaneously, the Plaintiff filed a *Notice of Motion* application dated **19th May 2017**, wherein the Plaintiff/Applicant sought for the following orders:-

a) A temporary injunction restraining the Defendants/Respondents, their agents, servants, employees, assigns or any other person, body or authority from entering, building on, passing through, remaining on or any other way trespassing upon the Plaintiff's property comprised in the LR.No.12646/4 pending the hearing and determination of this suit.

b) A mandatory injunction directing the Defendants/Respondents, their agents, servants, employees or any other concerned person to demolish and remove all structures and materials erected or placed by themselves or upon their instructions on the suit property comprised in LR.No.12646/4 forthwith and in default the Plaintiff to be at liberty to demolish or remove the same at the Defendants/Respondents cost.

c) That the road erected on LR.No.12646/4 by the Defendants/ Respondents be closed forthwith.

d) That the Defendants/Respondents do restore the Plaintiff/ Applicant's land to its former state forthwith.

e) *That the Officer in charge, Thika Police Division do ensure compliance with the court orders and provide security for the Plaintiff.*

f) *Costs of the application be borne by the Respondents.*

The said application was supported by the following grounds:-

1) *That the Applicant is the registered proprietor as lessee for the unexpired term of 99 years from 15th September 1993 of all that land known as LR.No.12646/4.*

2) *That the Respondents have without any colour of right come onto the Applicant's land and commissioned levelling a road thereon.*

3) *That the Respondents' actions are callous, arbitrary, unlawful and intended to defeat the Applicant's proprietary rights over his land.*

4) *That the Applicant stands to suffer irreparable harm, loss and damage if this Honourable Court does not grant the orders sought in this application.*

5) *That the Applicant has a prima-facie case with a high likelihood of success.*

6) *The balance of convenience tilts in favour of granting the orders sought by the Applicant.*

The said application is supported by the *Affidavit of Michael Njiiru Kariuki*, the Applicant herein who reiterated that he is the registered owner of *LR.No.12646/4* as is evident from *annexture MNK-1* which is a copy of *Certificate of Title LR.No.12646/4, Survey Map and Deed Plan*. He explained that he acquired the same through transmission as a beneficiary of the Estate of *Jane Wangari Kariuki Njiiri* as a sole proprietor as per *annexture MNK-2*. He also explained how the Defendants invaded the said land and established an access road without his consent. He attached several photographs showing the 1st – 3rd Defendants supervising the levelling of the said land to create an access road.

The application is vehemently opposed by the Defendants who swore a *Replying Affidavit* through the 1st Defendant *Hon. Ferdinard Ndungu Waititu*. He denied that the established road encroaches on the land parcel *LR.No.12646/4*, or at all that owned is by the Plaintiff. He contended that the said construction was undertaken on a road reserve and on a riparian area of *Chania River* that runs adjacent to the said passage. Further, that he has been advised by the *Government Surveyors* that it is the Plaintiff as a proprietor whose subject parcel of land has extended his boundaries and therefore encroached on the riparian section of the river and the road reserve.

Further, that even if there is any encroachment, it is a small portion which the *National Land Commission* is in the process of determining ownership of the subject parcel and then compulsory acquire the same. Further that once the competing interests are reconciled or established, the Government through the *National Land Commission* will make good for any encroachment if any so that the proprietor can be fully compensated.

The 1st Respondent filed a further affidavit and averred that the *National Land Commission* is in the process of completing acquisition of *LR.No.12646/4*, owned by the Plaintiff for the purposes of improving the *Nairobi-Thika Highway* pursuant to *Section 112* and *162(2)* of the *Land Act 2012*. He annexed *annexture FNWB*, a copy of the said *Kenya Gazette*. Further that the proposed acquisition is for the *public* good and that the Plaintiff/Applicant will be compensated *fully* for his property in accordance with the law.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto and the relevant provisions of law and the Court renders itself as follows:-

In the instant *Notice of Motion* application, the Applicant has sought for injunctive relief which is equitable in nature and is 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”.

Further, in determining an application for injunction, the court is not called upon to decide the disputed facts with finality. See the case of *Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003*, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The Court is only supposed to decide whether the Applicant is deserving of the orders sought in line with the principles set out in the case of *Giella...Vs...Cassman Brown & Co. Ltd (1973) EA 358*. These principles 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.*

The Applicant has also sought for **mandatory injunction** which is a final order and which is granted in very special circumstances. See the case of *Kenya Breweries Ltd & Ano..Vs..Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109*, where the Court held 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 a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See *Volume 24 Halsbury Laws of England 4th Edition Paragraph 948*

Taking into account the available evidence and the principles for grant of orders sought, has the Applicant herein been able to establish the same?

There is no doubt that the Plaintiff/Applicant is the registered owner of *LR.No.12646/4* as a sole proprietor. He has a Certificate of Title to that effect. He has alleged that the Defendants have encroached on his land and have levelled it thus creating an access Murram Road without his authority or compensating him. However, the Defendants/Respondents have admitted having created the said access road connecting to Nairobi-Thika Highway but they contended that indeed it was the Plaintiff/Applicant who had encroached on the riparian area and road reserve and does not deserve the orders sought.

The issue of whether the Plaintiff/Applicant has encroached on the riparian area or road reserve is disputed by the Plaintiff/Applicant. Therefore that is a disputed issue which can only be resolved in the main trial by calling the **Government Surveyor** to adduce evidence on the acreage and extend of the Plaintiff's parcel of land. Therefore at this juncture, the court cannot find with certainty that the created access road falls on the Plaintiff's/Applicant's land or on the riparian area and/or road reserve. That is a determination to be made by calling of evidence at the main trial but not through affidavits evidence.

Having found that there is uncertainty on whether the access road passed through the Plaintiff's land or riparian area, the Court finds that the Plaintiff/Applicant though holding a title deed for *LR.No.12646/4* has not established that he has a *prima-facie* case with probability of success at the trial.

Having found that the Plaintiff has not established a *prima-facie* case, this Court finds no reasons to deal with the other limbs of *Giella...Vs...Cassman Brown Case (supra)* since the said principles are sequential. See the case of *Kenya Commercial Finance Co. Limited..Vs.. Afraha Education Society (2001) 1EA 87*, where the court held that”-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

On the mandatory injunction, the Applicant has sought for demolition and/or removal of all structures or materials erected by the Defendants on the suit property *LR.No.12646/4*. However, as the Court held earlier, it is not very certain whether the said access road was levelled or created on the riparian area(section) and that the Plaintiff/Applicant is the one who had encroached on the said riparian section. That would have to await ascertainment at the main trial.

On prayers No.(f) and (g) for closure of the said road and restoration of the land to its former state, those are the same orders sought in the Plaint. Granting the said order at this juncture would mean granting final orders without the benefit of having heard the evidence of the parties. By granting the final orders it would mean a portion of the claim has been determined at the interlocutory stage. However, this Court finds that it would be proper and just to await the adducing of the evidence, testing of the same through cross-examination before determining whether to issue orders of closure of the said access road or not. See the case of *Trinity Prime Investments Ltd..Vs..Savings & Loans & Another, Civil Appeal No.90 of 1998*, where the Court held that:-

“Where the court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect would be to bring the litigation to an end at this stage”.

Further, the Respondents averred that the creating of the access road was for the public good and the Plaintiff/Applicant would adequately be compensated as and when the process of compulsory acquisition which has been started by the National Land Commission is completed. The Court finds that the option that would present less risk or prejudice is the option of disallowing grant of mandatory orders sought. See the case of *Films Rovern International...Vs...Canon Films Notes 1986 (3All ER 772 page 780):-*

“A fundamental principle is that the Court should take which cause appears to carry the lower risk of injustice if it should turn out to have been wrong...”

Having carefully considered the available evidence, the Court finds that the issues raised by the Plaintiff/Applicant and the responses by the Respondents/(Defendants) would only best be resolved at the main trial once evidence has been adduced and tested as per the required

standard.

Consequently, the Court finds that the Plaintiff/Applicant's **Notice of Motion** application dated **19th May 2017, is not merited and the same is hereby dismissed entirely with costs being in the cause.** For avoidance

of doubt, the interim orders in force are hereby discharged and/or vacated. Parties should prepare the main suit for hearing expeditiously.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

Mr. Maina holding brief for Jesse Kariuki for 1st & 2nd Defendant/

Respondent

No appearance for 3rd Defendant/Respondent

No appearance for 4th Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of Mr. Maina holding brief for Mr. Kariuki for the 1st and 2nd Defendant/Respondent

L. GACHERU

JUDGE

19/10/2018