



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.7 OF 2018

KITAMAIYU LIMITED..... PLAINTIFF/APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT, KIAMBU..1ST DEFENDANT/RESPONDENT

SIMON KAMAU KIMANI.....2ND DEFENDANT/RESPONDENT

RULING

There are two *Notices of Motion* applications filed by the Plaintiff/Applicant here.

The first *Notice of Motion* application is dated **14th January 2018** wherein the Applicant has sought for the following orders against the Defendants/Respondents.

1) That pending the hearing and determination of the suit the Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves or their agents, servants, employees, or any other person claiming under them from trespassing onto, entering, demolishing structures on, occupying and/or in any other manner interfering with the quiet possession and/or dealing in any way with the suit premises comprised in LR.No.243/3, 244, 4068 and 4698.

2) That the Honourable court direct the Inspector General of Police through OCPD, Ruiru Police Station to enforce the said orders.

3) That costs of this application be provided for.

This application is based on the following grounds:-

a) That the suit premises, to wit, LR.No.243/3,244, 4068 and 4698 are lawfully and rightfully owned by the Applicant.

b) That the Respondents have without legal justification or possessory right unlawfully trespassed onto the suit premises and are illegally uprooting coffee bushes, felling trees, destroying the topography and wasting the suit premises.

c) That the Respondents have no legal claim to the suit premises.

d) That unless the injunction sought is granted, the Respondents illegal actions will cause permanent damage to the suit premises and irreparable loss to the Applicant.

e) That it is in the interests of justice and fairness that the application herein be allowed.

Further the application is supported by the *Affidavit* of **Hon. Maina Wanjigi**, who averred that he is a Director of the Applicant herein and that the Applicant is the registered and lawful owner of **LR.No.243/2, 244, 4068 and 4698** and has had a quiet and peaceful possession of the same for **29 years now**. He annexed **MW-1(a) and (b)** to support that averment. He further averred that the Respondent have no legal title or claim to the suit premises. However the Respondents have illegally trespassed onto the suit premises, uprooted coffee trees, fallen trees and cut a road through the suit premises occasioning massive damage to the topography of the suit premises. He annexed **MW-2** which are photographs evidencing the trespass and damage to the suit premises by the Respondents. He further alleged that the Respondents have insisted and persisted in trespassing on the suit premises without any colour of right thereto. He also contended that the Respondent by reason of their unlawful actions are causing substantive damage to and wasting the suit premises. He therefore contended that unless stopped by injunction the Respondents shall continue to unlawfully trespass and/or intermeddle with the suit premises and thereby waste it and therefore the Applicant shall suffer and continue to suffer loss and will damage.

The application is contested and **Zaverio Kinyua HSC**, the **Director Lands, Survey and Geo Informatics** in the **County Government of Kiambu**, 1st Defendant/Respondent herein swore a **Replying Affidavit** on **24th January 2018**, and averred that the allegations that the 1st Defendant/Respondent trespassed onto and demolished structures on the suit parcels are untrue. He contended that it is the Plaintiff/Applicant who has negligently allowed trees to be planted on the periphery that borders the Public Access Road as is evident from **KM-2**. Further that the site visit conducted on **24th January 2018** did not show any destruction of any coffee plantation belonging to the Plaintiff/Applicant. Further, there were no coffee bushes planted on the Public Access Road. He alleged that the suit herein was as a result of the Plaintiff's unlawful actions of blocking the Public Access Road forcing other road users to use alternative routes which caused them to walk more than 10km longer to access their homes. He also averred that owing to public outcry, the 1st Defendant/Respondent identified the extent of the right of way and cleared the access road for **vehicles, bodaboda operators** and **members of the public** plying the route as was evident from **KM-2**. He further contended that from the land available, the suit parcel **LR.No.244** measuring approximately **617 acres** has a road reserve cutting across the said parcel of land for access to and from the native reserves as evidenced in the **Road Plan** dated **29th September 1913** marked **KM-3**. Further that from the **Survey of Kenya** records, the suit parcel **LR.No.4068** which measures **6.35 acres** has a motorable road cutting across the said parcel of land as is evidenced by dotted line marked as track which is outlined in the **Survey Plan 16/250** dated **24th August 2921** **KM-4**. He also contended that at the time the Plaintiff acquired the parcel of land, the road was in use as a section of that road is tarmacked. Further that according to the records retrieved from the Lands Office, the suit parcel **LR.No.4698** measuring **14.45 acres** has a road of access cutting across the said parcel of land as is evident from **Deed Plan No.16703** dated **5th January 1923** **KM-5**.

It was his contention that if the prayers sought are granted, they will be in vain because there is no trespass onto the Plaintiff's/

Applicant's parcels of land and the public access road is in use. He urged the Court to dismiss the instant applications.

The 2nd Defendant/Respondent, **Simon Kamau Kimani** too filed a **Replying Affidavit** on **25th January 2018** and averred that he is a **Member of County Assembly** of **Komothai Ward** within the 1st Defendant's/Respondent's County. Further that his duties as a **Member of County Assembly** for **Kimothai Ward** are basically representation and legislation. He stated that he is not involved in the Executive arm of the County in any manner. He further admitted that he was aware that the 1st Defendant was opening up a public road that had been blocked by the Plaintiff/Applicant and as a **Ward Representative**, he visited the area in such capacity and had no authority over the employees of the County and the machinery in the area were not within his control. He further contended that he has been wrongly enjoined in the suit as he has no personal interest in the Plaintiff's/Applicant's suit properties nor did he have any personal grudge with it. He urged the court to dismiss the application and strike out the pleadings against him as he has been dragged in the matter unnecessarily.

Further, **Hon. Maina Wanjigi** filed a **Supplementary Affidavit** on **6th February 2018**, and denied that the Applicant had blocked any public access road as alleged. He contended that the 1st Respondent is illegal and in flagrant breach of the law by attempting to create a right of way within the Applicant's suit premises. Further that the power to create right of way for the benefit of the public is vested in the **National Land Commission** and not the 1st Respondent and therefore the 1st Respondent has usurped the power of **National Land Commission**. He further contended that the motorable road cutting across the Applicant's parcels of land are private road and not public roads as defined by **Section 2** of the **Public Roads and Roads of Access Act Cap 399 Laws of Kenya**. It was his further contention that these access roads have been privately maintained by the Applicant and neither the 1st Defendant nor **Kenya Rural Road Authority(KURRA)** have contributed to the maintenance of the said roads or tracks since they are private. He reiterated that the Respondents are trespassing on the Applicant's parcels of land and urged the Court to allow the instant application.

The second **Notice of Motion** is dated **16th February 2018** wherein the Plaintiff/Applicant has sought for the following orders:-

1) That pending the hearing and determination of the Applicant's Notice of Motion application dated 14th January 2018, the Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves or their agents, servants, employees, or any other person claiming under them from trespassing onto, entering, levelling the ground, demolishing structures on, occupying and/or in any other manner interfering with the quiet possession and/or dealing in any way with the suit premises comprised in LR.Nos.243/3, 244, 4068 and 4698.

2) That the Honourable Court do direct the Inspector General of Police through the Officer in Charge of Mugutha Police Post to forthwith enforce the said orders.

3) That cost of this application be provided for.

It is supported by the grounds stated on the face of the application and the **Supporting Affidavit** of **Hon. Maina Wanjigi** sworn on the same date wherein the averred that though on **25th January 2018**, the Court issued limited restraining orders to the effect that the Respondents were restrained from cutting down trees or uprooting coffee bushes, the Respondents have taken advantage of the limited restraining orders and on **8th February 2018**, they trespassed onto the suit premises to level the ground and establish an illegal road access on the Applicant's private properties, as per **MW-1** which are **photographs** of the equipment and machines on the suit properties brought by the 1st Respondent. Further that the illegal actions of the Respondents are adverse to the interest of the Applicant on the suit property and the Applicant is apprehensive that should the suit be determined in its favour, the subject matter will be eroded and irreparably damaged. Further that the issue of the existence of public access road on the Applicant's suit premises is an issue pending determination in the **Notice of Motion** dated **14th January 2018** and therefore the application has a genuine and arguable case showing that its right to property has been and continue to be infringed by the Respondent. Further, that damages would not be adequate compensation for the Applicant for the infringement of such fundamental right.

The Court directed the two **Notices of Motion** applications be canvassed together by way of written submissions.

In response to the said directions, the Applicant filed its written submission on **25th March 2018** and urged the Court to allow the said applications.

On its part, the 1st Respondent filed its application on **25th May 2018** and submitted that Applicant has not established the grounds for grant of injunctive orders and urged the Court to dismiss the said application.

However, the 2nd Defendant/Respondent did not file any written submissions and the Court will only rely on his **Replying Affidavit**.

The Court has carefully considered the pleadings herein in general and the written submissions. The Court too has considered the relevant provisions of law and the cited authorities and it makes the following findings:-

There is no doubt that the Plaintiff/Applicant herein is the registered owner of the suit properties referred to **LR.No.243/3, 244, 4068 and 4698**. The Applicant has attached the grant for the suit premises and the conveyance for **LR.No.743/3, 244, 4068 and 4698** in its favour.

The 1st Respondent has also admitted that indeed the Plaintiff/Applicant is the registered owner of the above stated parcels of land. However, the Applicant has alleged that the Respondents herein have encroached on its parcels of land and have fallen its trees, cut down coffee bushes, levelled the ground and created public access road without the consent and/or authority of the Applicant.

On their part, the Respondents have denied the said allegations and 1st Respondent averred that it was only clearing public access roads which the Plaintiff/Applicant had encroached for so long thus denying the public such access. The existence of such access roads is denied by the Applicants and thus the filing of this suit.

The application herein is seeking injunctive orders which are equitable reliefs which are 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 as the Court embarks on the determination of the instant **Notice of Motion** application, it will be cautious not to determine the contested issues with finality at this juncture especially given that the available evidence is only affidavits evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

This Court will be guided by the principles set out in the case of **Giella....Vs...Cassman Brown & Co. Ltd 1973 E.A 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.***

Has the Applicant herein established that it has a prima-facie case with probability of success?

As was stated in **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR 123**, prima-facie means, more than an arguable case. It states:-

‘A prima-facie case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial’.

It is not in doubt that the Plaintiff/Applicant herein is the registered owner of the suit properties. As a registered owner, the Applicant is deemed to be an absolute and indefeasible proprietor whose proprietorship can only be challenged as provided by the law. See **Section 26(1) (a)&(b)** of the **Land Registration Act**. The Section provides:-

“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.”

Further, as the registered proprietor, it has its rights protected by Section 24(a) and 25(1) of the *Land Registration Act* which provide:-

24(a) Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

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...”

Such rights include right to peaceful enjoyment of its parcels of land without any interference from third parties and if there is deprivation of such right or ownership then the same should be done as per the law or as provided by Article 40(3) of *The Constitution* which provides:

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) 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 Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Applicant has alleged that the 1st Respondent with the assistance of the 2nd Respondent have invaded its stated parcels of land and have destroyed the crops and plants that were thereon without any colour of right and without consent of the Applicant.

However, the Respondents have alleged that the cleared areas are public access roads which the Applicants had encroached on. The said allegation has been vehemently denied by the Applicant herein. The conveyance annexed to the Application is dated **23rd November 1989**. The Applicant has used the said land for the last **29 years** without any claim by the 1st Respondent that there are public access roads on the said parcels of land.

The issue of whether the opened access roads are public road or

private ones is a disputed issue which cannot be determined at this juncture without calling of evidence. However, even if the said access roads were public roads, and which had not been opened up **since 1989**, and which roads pass on the applicant’s parcels of land, then if the 1st Respondent needed to clear and open them up, it ought to have given the Applicant **Notice** for its intention to do so.

It is clear that by levelling the ground in a bid to clear the alleged public access roads, the Respondents have fallen some trees and destroyed coffee bushes which belong to the Applicant. It is apparent that the 1st Respondent did not use proper means in clearing the alleged access roads. Before the issue of whether there are public access roads on the suit properties is determined at the main suit, the Applicant’s suit properties need to be preserved and the Respondents should be restrained from further carrying on with the alleged intended clearing of the alleged access roads, since the purpose of injunction is to preserve the *status quo*. See the case of **Noormohammed Janmohammed... Vs... Kassam Ali Virji Madham (1953) 20 LRK 8**, where it was held that:-

“the purpose of temporary injunction is to preserve the status quo”.

For the above reasons, the Court finds that the Applicant has a *prima-facie* case with probability of success at the trial.

On the second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is apparent that the 1st Respondent has not denied clearing up the said areas on the Applicant’s parcels of land on allegations that the said areas are public access roads. However, that is an issue to be determined at the main trial. However, it is clear that in a bid to clear up the area, the 1st Respondent had taken machinery on the ground, has levelled the grounds, and cut down some trees and other crops. Though the said damages can be assessed and quantified, the Applicant feels that the said encroachment is an infringement of its right to peaceful enjoyment of its property which infringement is a violation of the Applicant’s constitution right to own property and is against the provisions of the laws

of this County.

It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of **Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Equally in this case the Court finds that if the Applicant’s rights are infringed, no amount of money can compensate such infringement. Therefore the Court finds that the Applicant has established that it is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the status quo and the *status quo* herein is directing the Respondents to desist from carrying out any act of clearing the alleged public roads until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful actions. See the case of **Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 o 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence, the Court finds that the Plaintiff’s/Applicant’s ***Notice of Motion*** applications dated ***14th January 2018*** and ***16th February 2018*** are merited. The Court allows the said applications entirely in terms of ***prayer No.3*** of the ***Notice of Motion*** dated ***14th January 2018*** and ***prayer No.3*** of the ***Notice of Motion*** dated ***16th February 2018***. The Applicant is also entitled to costs of the two applications.

Further, the parties are directed to comply with Order 11 within a period of 60 days from the date hereof and thereafter fix the matter for Pre-trial before the Deputy Registrar of this court.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of November 2018.

L. GACHERU

JUDGE

23/11/2018

In the presence of

M/S Wambui holding brief for M/S Njoki Gachingi for the Plaintiff/

Applicant

M/S Cheserek holding brief for M/S Mbugua for the 1st Defendant/

Respondent

Mr. Maina holding brief for Mr. Gachomo for the 2nd Defendant/

Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

23/11/2018