



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.1087 OF 2016

- 1. SAMUEL NJOROGE GITUKUI**
- 2. DOMINIC MBUGUA WAINAINA**
- 3. MARY ANNE KIGATHI**
- 4. VERONICA MBUTU NJUNGE**
- 5. GEORGE KAMAU MWAURA**
- 6. JULIUS KIIRU MWAURA**
- 7. MWAURA GITUKUI.....PLAINTIFFS**

VERSUS

- 1. KENYA RURAL ROADS AUTHORITY**
- 2. NATIONAL LAND COMMISSION**
- 3. CHINA ROAD AND BRIDGE CORPORATION CO.LTD**
- 4. THE HON. ATTORNEY GENERAL**
- 5. LINK ROAD ASSOCIATION**
- 6. COUNTY GOVERNMENT OF KIAMBU..... DEFENDANTS**

RULING

1. The plaintiffs are the registered proprietors of all those parcels of land known as Land Reference Numbers **Muguga/ Gitaru/ 1745/ 143/ 2263/ 2268/ 2273/ 2108/ 1379 /2183 and 2533** (hereinafter referred to as **“the suit properties”**). The suit properties are situated within Kiambu County.

2. The plaintiffs brought this suit against the defendants on 12th October 2016 through amended plaint of the same date seeking; a permanent injunction restraining the defendants, their agents or servants from entering or encroaching on the suit properties in any manner while constructing Road E1507(hereinafter referred to as **“the disputed road”**) until the plaintiffs have been compensated, a declaration that the plaintiffs have not encroached on the disputed road and a declaration that the measurements for the disputed road as given in Map Sheets No. 3 and 6 are the correct and valid measurements for the said

road.

3. In their amended plaint, the plaintiffs averred that the suit properties are situated adjacent to the disputed road and that the plaintiffs have occupied the suit properties from the time the same were adjudicated and demarcated and have over the years restricted their activities on the suit properties within the boundaries of the said parcels of land which were set during the land adjudication in 1958. The plaintiffs averred that the boundaries of the suit properties and the disputed road are clearly marked on the said Map Sheet No. 3 and Map Sheet No. 6 and that the plaintiffs have at no time encroached on the disputed road which according to the plaintiffs measures 10 meters. The plaintiffs averred that on 4th August 2016, the 2nd defendant unilaterally and without having regard to the said Map Sheets declared that the plaintiffs had encroached on the disputed road and should remove their developments which are situated on the said road. The plaintiffs averred that following that decision by the 2nd defendant, the 3rd defendant moved to the site ready to forcefully remove the plaintiffs' developments which are alleged to be standing on the disputed road. The plaintiffs have averred that they are entitled to be compensated for the developments which they have carried out on the portions of the suit properties which are alleged to be falling within the disputed road which the defendants intend to acquire forcefully.

4. Together with the amended plaint, the plaintiffs filed an application by way of Amended Notice of Motion dated 12th October 2016 under certificate of urgency seeking a temporary injunction to restrain the defendants by themselves or through their agents, servants and/or anyone acting on their behalf from entering upon, encroaching or demolishing any structures within the suit properties pending the hearing and determination of this suit. The plaintiffs' application was brought on the grounds set out in the body thereof and in the affidavit of the 1st plaintiff sworn on 12th October 2016. The application was brought on the grounds that the plaintiffs are the owners and beneficiaries of the suit properties which borders the disputed road and that the plaintiffs had been ordered to remove the developments allegedly standing on the disputed road failure to which the 3rd defendant would forcefully remove the same. The plaintiffs averred that unless restrained by the court, the defendants would proceed with the forceful removal of the plaintiff's developments aforesaid.

5. In his affidavit in support of the application, the 1st plaintiff reiterated the contents of the plaint which I have highlighted herein above and annexed to his affidavit among others, copies of the title deeds which the plaintiffs hold in respect of the suit properties, a copy of the determination by the 2nd respondent with regard to a review that it undertook on the titles held by the plaintiffs on a complaint by the 1st defendant and a copy of a letter from the Deputy County Commissioner, Kikuyu Sub-County asking the plaintiffs to move their fences and buildings from the disputed road to allow construction of the same by the 3rd defendant.

6. The plaintiffs' application was opposed by the 1st, 2nd, 4th and 6th defendants. The 1st and 4th defendants filed grounds of opposition on 23rd September 2016. The 1st and 4th defendants contended that the issues which have been raised in this suit had been determined by the 2nd defendant which had made a finding that the plaintiffs had encroached on the disputed road. The 1st and 4th defendants contended that the plaintiffs had not satisfied the conditions for grant of the orders sought and that, their application is frivolous, vexatious and amounts to an abuse of the process of the court. The 6th defendant also filed grounds of opposition on 21st November 2016 in which it contended that the plaintiffs' suit is res judicata the issues raised therein having been determined by the 2nd defendant. The 6th defendant contended that the decision of the 2nd Respondent on the issues raised by the plaintiffs has not been reviewed or set aside and as such is binding upon the plaintiffs.

7. The 2nd defendant opposed the application through a replying affidavit sworn by Brian Ikol. In its affidavit, the 2nd defendant averred that it has constitutional and statutory power to review grants and dispositions of public land to establish propriety and legality thereof and that such review is carried out on a compliant or on the 2nd defendant's own motion. The 2nd defendant averred that it received a complaint that some land owners in Muguga had encroached on the disputed road following which complaint the

2nd defendant notified the land owners concerned of its intention to review the titles held by them.

8. The 2nd defendant averred that in the course of its investigations, it found that the disputed road was planned in the year 1935 and that a deed plan had been issued in respect thereof the existence of which was not denied by the land owners concerned. The 2nd defendant averred that in its determination, it found that the owners of land adjacent to the disputed road had encroached on the road and directed them to move the fences and other developments they had put up on the said road to allow for the expansion of the road. The 2nd defendant termed the present application an abuse of the process of the court.

9. The plaintiffs' application was argued by way of written submissions. The plaintiffs filed their submissions on 14th December 2016. The 6th defendant filed its submissions on 16th December 2016. The 1st and 4th defendants filed their submissions on 19th December 2016 while the 2nd defendant filed its submissions on 20th December 2016. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the defendants' grounds of opposition and replying affidavit filed in opposition to the application. Finally, I have considered the written submissions which were filed by parties' respective advocates. As was held in the case of Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A. 358, an applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent. He must also demonstrate that unless the injunction is granted, he will suffer irreparable injury which cannot be compensated in damages. If the court is in doubt as to the fulfillment of the two conditions, the court would determine the application on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and went further to state as follows:- "*The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ... All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.*"

10. What I need to determine in the application before me is whether the plaintiffs have shown that they have a prima facie case against the defendants and that unless the orders sought are granted, they will suffer irreparable loss or injury. The plaintiffs' case is that they are the registered proprietors of the suit properties which are situated adjacent to Road E 1507 ("the disputed road"). The disputed road is under construction by the 3rd defendant which has been contracted to carry out the said construction by the 1st defendant. The plaintiffs have contended that in the course of making preparations for the construction of the said road, the 1st defendant claimed that the plaintiffs had encroached on portions of the said road and should remove the offending structures standing thereon. The plaintiffs have contended that they have not encroached on the disputed road and that their structures and developments said to be on the portion of the said road are within the boundaries of the suit properties which boundaries are in accord with the Map Sheets 3 and 6 Muguga/Gitaru Registration Section. The plaintiffs have contended that without taking into consideration the said Map Sheets 3 and 6, the 2nd defendant unilaterally made a determination that the plaintiffs have encroached on the disputed road and should clear the encroached areas to allow the construction works to proceed.

11. The plaintiffs have contended that the developments that are alleged to be on the disputed road are within the suit properties and in the event that the defendants wish to acquire the same for the expansion of the disputed road, they are entitled to be compensated therefor.

12. The defendants' position is that the plaintiffs have encroached on the disputed road a fact which has been established by the 2nd defendant following investigations in which the plaintiffs were involved. The

defendants have contended that the plaintiffs having failed to seek a review of the decision of the 2nd defendant, they are bound by its findings and cannot reopen the same issues before this court for fresh determination.

13. In my view, the dispute before this court concerns the boundaries between the suit properties and the disputed road. From the material before me, the plaintiffs have contended that the said road measures 10 meters while the defendants have on the other hand contended that the road measures 18 meters but has been reduced to 10 meters and less through encroachment by the plaintiffs and other owners of land adjacent to the said road.

14. On the material before me, I am unable to determine whether the disputed road measures 10 meters or 18 meters. It is upon determination of this issue that the court can conclude whether the plaintiffs have encroached on the said road or not. I have perused copies of the title deeds annexed to the plaintiffs' affidavit in support of the application herein. There is no indication that the boundaries of the suit properties have been fixed. The plaintiffs have placed reliance on the Map Sheets 3 and 6 aforesaid in support of their contention that the boundaries of the suit properties are off the disputed road. The defendants on the other hand have relied on Deed Plan No. 33992 which was prepared in 1935 in support of their contention that the disputed road measures 18 meters and that the plaintiffs have encroached on the same. Section 18(1) of the Land Registration Act 2012 provides that unless it is noted in the register that the boundaries of a particular parcel of land have been fixed, any cadastral map or plan which may be filed in relation to such parcel of land are deemed to indicate only approximate boundaries. The Map Sheets relied on by the plaintiffs are in the circumstances not conclusive proof of the boundaries of the suit properties. Section 18(2) of the Land Registration Act 2012 bars this court from entertaining any proceedings relating to a dispute over a boundary which has not been fixed. Without deciding the issue with finality, I must say that this court has no jurisdiction to determine the dispute brought before it by the plaintiffs. See, the case of, Wamutu vs. Kiarie [1982]KLR 480. I am of the view that the dispute should have been taken before the land Registrar in the first instance under section 19 of the Land Registration Act 2012.

15. The onus was upon the plaintiffs to establish a prima facie case against the defendants. In view of what I have stated above, I am not persuaded that the plaintiffs have a prima facie case with a probability of success against the defendants. That being my view on the matter, it is not necessary for me to consider whether or not the plaintiffs stand to suffer irreparable harm unless the orders sought are granted. However, if I was to determine the issue, I would have ruled against the plaintiffs. There is no doubt from my reading of paragraphs 10, 11 and 12 of the amended plaint and prayer (a) thereof that the plaintiffs' claim against the defendants is for compensation. The plaintiffs' likely loss if the defendants continue with road construction across the disputed portions of the suit properties can therefore be compensated by an award of damages. The plaintiffs have not claimed that the defendants are incapable of paying damages that would accrue to them if they succeed in this suit.

16. In conclusion, it is my finding that the plaintiffs have failed to satisfy the conditions for granting interlocutory injunction. The plaintiffs' application dated 12th October 2016 is accordingly dismissed with costs to be in the cause. The interim injunction which was granted herein on 27th September 2016 stands discharged.

Delivered and Signed at Nairobi this 24th day of January, 2017.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Kinyanjui for the plaintiffs

Mr. Githinji for the 1st and 4th defendants

N/A for the 2nd defendant

N/A for the 5th defendant

Mr. Ranja for the 6th defendant

Kajuju Court Assistant