



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 1495 OF 2013**

**KAMUNYO KARECHIO TRUST.....PLAINTIFF**

**=VERSUS=**

**1. SAMUEL CHEGE GICHUHI**

**2. NAIROBI COUNTY.....DEFENDANTS**

**RULING**

**Introduction:**

1. The Plaintiff is a trust established under a Trust Deed dated 10/8/2004 and registered in the Registry of Documents at Nairobi under Volume D1 Folio 89/652 File DXXX1. Its trustees are Samson Gitau Karechio Vasliah Wanjiru Gitau and Andrew Muthee Gitau. The Trustees are the registered proprietors of Land Reference Number 13330/625 situated at the junction of Thika Super Highway and Garden Estate Road within the Nairobi City County. Fronting the said piece of land is a road reserve forming part of the junction of the two roads. That road reserve is the subject of the dispute in this suit. For purpose of this Ruling, I will refer to the said road reserve as **“the suit property”**.

2. The Plaintiff contends that in June 2012, he applied for a licence and the predecessor to the 2nd Defendant, the City Council of Nairobi, granted him a licence to undertake comprehensive landscaping, environmental conservation and beautification exercise on the road reserve on the frontage of its piece of land L R NO. 13330/625. The Plaintiff further contends that he obtained further approval from the Kenya National Highways Authority (hereinafter referred to as **“Kenha”**). The Plaintiff further contends that in December 2013, the 2nd Defendant, without any colour of right, and in breach of its earlier licence, gave authority to the 1st Defendant to convert the suit property to a commercial parking plot thereby interfering with the Plaintiff’s landscaping and beautification works. It contends that the 2nd Defendant acted in contravention of the law and public policy as the said space is a road reserve not available for allocation for commercial purposes. It is the 2nd Defendant’s decision to allocate the road reserve to the 1st Defendant that triggered this suit

3. Through a Plaint dated 6/12/2013, the Plaintiff brought this suit seeking among other prayers, a permanent injunction restraining the Defendants against interfering with, or hampering the landscaping, beautification and environmental conservation works undertaken by the Plaintiff on the suit property. Together with the Plaint, the Plaintiff lodged a Chamber Summons Application dated 6/12/2013 seeking among other orders, an interim injunction restraining the Defendants against “gaining access to, interfering, tampering and/or in any way hampering the landscaping, beautification and environmental conservation exercise undertaken by the Plaintiff” on the suit property.

4. On 14/1/2014 Parties’ Advocates appeared before Justice Mutungi on the hearing of the Plaintiff’s

Application dated 6/12/2013. At the request of the 2<sup>nd</sup> Defendant, hearing of the Application was rescheduled to 27/2/2014 and the Judge granted an interim status quo order in the following verbatim terms:

**“The Respondents are granted leave of 21 days from today to file a response to the Plaintiffs application and the Plaintiffs will have corresponding leave of 14 days to file a further affidavit or supplementary affidavit. The application fixed for interpartes hearing on 27/2/2014 and in the meantime the court grants an order that the parties observe the obtaining status quo in terms of prayer 2 of the plaintiffs chamber summons pending the hearing of the application.”**

5. On 22/1/2014 the 1st Defendant filed a Notice of Motion dated 21/1/14 seeking a review of the status quo order given by Justice Mutungi. In the alternative, the 1st Defendant sought to be given access/or right to use the suit property in the interim.

6. On 5/4/2017 the court directed that the two Applications be considered and determined together. This Ruling therefore relates to the Two Applications, that is, the Plaintiff’s Application dated 6/12/2013 and the Defendant’s Application dated 21/1/2014.

7. I have carefully considered the Affidavits and rival written submissions presented before this court. I have also applied my mind to the legal framework and guiding jurisprudential principles applicable to the two Applications.

8. I have noted from the pleadings on record that the 1st Defendant filed a Statement of Defence dated 23/1/2014. He did not make a counterclaim in respect of the suit property.

#### **The 1st Defendant’s Application dated 21/1/2014**

9. The first limb of the 1st Defendant’s Application dated 21/1/2014 [prayer 2] seeks a review of the status quo order given by Mutungi J on 14/1/2014. The status quo order was made pending the hearing and determination of the Plaintiff’s Application dated 6/12/13. In my view, a determination of the Plaintiff’s Application dated 6/12/13 will automatically discharge the status quo order and replace it with the order contained in that determination. A determination of the Plaintiff’s Application dated 6/12/2013 will therefore render the first limb of the 1st Defendant’s Application dated 21/1/2014 spent.

10. The second limb of the 1st Defendant’s Application [that is, prayer 3] is effectively a prayer for an injunctive order granting the 1st Defendant access and rights to the suit property. Ordinarily, an injunction is predicated upon a substantive claim contained in a statement of claim containing final prayers. The statement of claim takes many forms, depending on the prescribed procedural framework. These would include a plaint, counterclaim, petition, originating summons etc. The Defendant has not pleaded any claim against the Plaintiff. He nonetheless seeks an injunction against the Plaintiff. In **Thuri Burton Kamau Vs Thomas Ngugi t/a Miiri Bookshop (2005) eKLR**, Ojwang J (as he then was) addressed the question as to whether a party who has not pleaded a substantive claim can be granted an injunctive relief. He examined the legal framework in Order XXXIX of the then applicable Civil Procedure Rules. Order XXXIX has been replicated in Order 40 of our current Civil Procedure Rules. He held that, in certain circumstances, a defendant who has not pleaded a counterclaim can indeed be granted an injunctive relief within the framework of Order XXXIX. For avoidance of doubt Order 40 Rule I provides as follows:

**“1. Where in any suit it is proved by affidavit or otherwise-**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or**

**delayed in the execution of any decree that may be passed against the defendant in the suit,**

**the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

11. Having carefully examined the wording of Order 40 of the Civil Procedure Rules, I would agree with Ojwang J and hold that, where the suit property is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, a party who has not pleaded any substantive claim in the same suit may legitimately apply for an injunctive relief in form of a preservative order preserving the suit property pending the hearing and final determination of the suit. However, the Defendant’s Application dated 21/1/2014 does not in any way seek an interim preservative relief. It seeks a mandatory injunction granting him access and rights to use the suit property as a parking bay. That in my view is untenable in the absence of a counterclaim. Consequently, I would reject the second limb of the 1st Defendant’s Application on the ground that the same is untenable in the absence of substantive counterclaim. I now turn to the Plaintiff’s Application dated 6/12/2013, through which the Plaintiff seeks an injunctive relief against the Defendant.

### **The Plaintiff’s Application dated 6/12/2013**

12. The issue for determination in the Plaintiff’s Application dated 6/12/2013 is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.

13. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) eKLR** as:

**“ a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”**

14. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court adopted the above definition and outlined the key ingredients of a prima facie case 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide 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.”**

15. The Plaintiff has exhibited letters dated 21/11/2013 from Kenha and 22/11/13. Both letters authorize the Plaintiff to landscape the road reserve fronting Plot LR No.13330/625 along Thika road. The Plaintiff has also exhibited a letter dated 20/6/2012 from the predecessor to the Nairobi City County Government, the City Council of Nairobi, authorizing the Plaintiff to landscape the suit property. Also exhibited by the Plaintiff is a letter dated 8/10/2013 from the Plaintiff to Kenha, in which the Plaintiff states that it unknowingly applied for and obtained similar approval from the City Council of Nairobi in 2012 but later realized that Kenha is the custodian of national highway road reserves.

16. On his part, the 1st Defendant in his Replying Affidavit sworn on 4/4/2014 contends that the Plaintiff was a licensee and his licence was “annulled, revoked and or cancelled on 5/2/2013” by the City Council of Nairobi. The 1st Defendant did not exhibit the subsequent licence issued to him by the 2nd Defendant.

17. The 2nd Defendant responded to the Plaintiff’s Application through an Affidavit sworn by Eng. S. M. Muthama on 21/1/2015 in which he deposed that on 20/6/2013 the 2nd Respondent approved the 1st Defendant’s request to utilize the suit property as a parking bay. He stated that at the time of approving the request there was **“no evidence of authority given to the owners of Plot Ref No.13330/625 for landscaping works by the Plaintiff”**.

18. Having examined the respective cases of parties to this suit, two questions emerge requiring answers in disposing the material Application; 1) Who has the legal mandate to authorize the temporary utilization of a road reserve? and 2) Does the Plaintiff have any legitimate authority to utilize the road reserve and undertake the works he purports to have undertaken? At this point, I must caution myself against holding a mini trial by delving deep into the merits of the parties’ respective cases at this interlocutory stage. What I am required to do at this stage is merely to evaluate the material presented before me and establish if the Plaintiff has placed before this court sufficient evidence to establish a prima facie case with a probability of success.

19. In August 2010, Kenyans promulgated a new Constitution, the Constitution of Kenya 2010, which ushered in a devolved system of governance. Article 186 as read together with the Fourth Schedule to the Constitution of Kenya 2010 outlines the various functions and mandates of the two levels of government. Section 18 of the Fourth Schedule places road traffic and the construction and operation of national trunk roads under the National Government.

20. Besides the Constitution, the Kenya Roads Act provides a legal framework on the classification of roads and specifies the national agencies responsible for each category of roads. These agencies are:- 1) the Kenya National Highways Authority (KENHA); 2) the Kenya Urban Roads Authority (KURA); and 3) the Kenya Rural Roads Authority (KERRA). The general powers of each of these Agencies are set out in Section 22 of the Act and include, among other functions, **“to maintain, operate and manage the roads under its jurisdiction”**. Section 49(1) of the Act provides a legal framework on authorization of structures and other works on, over and below roads. It provides as follows:-

**“49 (1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authorities’ written permission or contrary to such permission:-**

**(a) erect, construct or lay or establish any structure or other thing on or over or below the surface of a road reserve or land in a building restricted area;**

**(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or**

**(c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other things so situated.**

**2. An authority may, in its discretion, give or refuse to give permission under this section.**

**3. When giving permission the Authority may prescribe:-**

**(a) the specifications with which the structure, other things, alteration or addition for which permission is requested must comply;**

**(b) the manner and circumstances in which, the place where, the conditions on which the structure, other thing, alteration or addition may be erected, constructed, laid, established or made; and**

**(c) the obligations to be fulfilled by the owner in respect of the land on which the structure or addition is to be erected, constructed, laid established or made.”**

21. I have not come across a similar legal framework conferring upon the County Government of Nairobi parallel mandate to maintain, operate and manage national highways. The subject road reserve is situated at the Junction of Thika Highway and Garden Estate Road. The management of Thika Super Highway falls within the mandate of Kenha.

22. It appears from the above legal framework on the management and operation of roads that the road reserve subject of this dispute is not under the mandate of the Nairobi City County. Kenha would have a legitimate mandate over the road reserve by dint of the fact that it is at the junction of Thika Super Highway and Garden Estate Road. Secondly, the Plaintiff's landscaping works on the road reserve appear to have received a belated authorization from Kenha in November 2013. No similar evidence of authorization by the responsible agency has been exhibited by the 1st Defendant.

23. Taking into account the totality of the material placed before the court, the existing legal framework on the maintenance, operation and management of roads and road reserves, and further taking into account the prevailing jurisprudence on interlocutory injunctions, I am satisfied the Plaintiff has established a reasonable legal and evidential basis that would constitute a *prima facie* case. I am also satisfied that damages would not be an adequate remedy in the circumstances of the dispute before court and the nature of the environmental works which the Applicant seeks to preserve.

24. I must however mention that the Plaintiff moved the court by way of a chamber summons instead of a notice of motion. I have reflected on the letter and spirit of Article 159 of the Constitution and I am persuaded that this particular procedural error does not prejudice the Defendants and would not be a sufficient reason for rejection of the Plaintiff's Application.

### **Disposal**

25. Consequently, I make the following orders in disposing the Plaintiff's Application dated 6/12/2013 and the 1st Defendant's Notice of Motion Application dated 21/1/2014.

**(a) The 1st Defendant's Notice of Motion Application dated 21/1/2014 is dismissed for lack of merit.**

**(b) The Plaintiff's Application dated 6/12/2013 is allowed to the extent that, pending the hearing and final determination of this suit, the Defendants, their agents, employees and servants are restrained against entering into, interfering with or tampering with the suit property or hampering the landscaping, beautification and environmental conservation undertaken by the Plaintiff on the suit property, that is, the road reserve fronting the Plaintiff's Plot LR No.13330/625, situated at the Junction of Thika Super Highway and Garden Estate Road within Nairobi City County.**

**(c) The Plaintiff shall have costs of the two Applications.**

**Dated, signed and delivered at Nairobi on this 25th day of April 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court clerk