



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 230 OF 2016

MOSES NJOROGE MUNGAI.....PLAINTIFF

VERSUS

PETER MUCHOKI1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....2ND DEFENDANT

RULING

(Plaintiff claiming ownership of land said to be adjacent to a highway; 1st defendant being in occupation of the road reserve having a licence to operate a tree and flower nursery; plaintiff claiming that this impedes his access to his land and wishing to have an order that 1st defendant do vacate; question of extent to which county government may allow use of road reserves which is best determined at the hearing of the suit; order that status quo be maintained)

1. This suit was commenced by way of a plaint that was filed on 29 June 2016. The plaintiff has averred that he is the registered proprietor of the land parcel Gilgil/Gilgil Block 1/4185 (Kekopey) situated along the Nakuru-Nairobi highway. He has stated that he has conceived the idea of starting a nature and recreation services motel and incorporated a business for that purpose. His quarrel is based on the allegation that the 2nd defendant has granted a licence to the 1st defendant to start a tree nursery right at the frontage of the plaintiff's land. He has averred that effectively he has no access to his land from the highway. He has contended that the issuance of a licence to the frontage of his land is illegal and an infraction over his right of access to his property and therefore his right to enjoy the property. He has stated that he acquired the property on the basis of representations made in the maps from the 2nd defendant and has continuously been paying land rates and rents. He has asserted that he has a legitimate expectation that he would continuously enjoy the right to his property as well as free and unlimited access to it. In the suit, the plaintiff has sought for the following orders :-

(a) A declaration that the issuance of a licence by the 2nd defendant to the 1st defendant in respect of the frontage to the parcel of land known as Gilgil/Gilgil Block 1/4185 (Kekopey) is malicious, unconstitutional, illegal and a breach of the plaintiff's legitimate expectation.

(b) An order directing the 2nd defendant to revoke the licence issued to the 1st defendant and in respect of the frontage to the parcel of land known as Gilgil/Gilgil Block 1/4185 (Kekopey).

(c) Costs of the suit.

2. Together with the plaint, the plaintiff filed an application under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, seeking the following principal orders which are prayers 3 and 4 of the application, being :-

(i) That pending the hearing and determination of this suit, the respondents whether acting in person, through their agents, employees, servant or any other person acting at their behest be restrained by way of an injunction from blocking, continuing to block or in any other way from interfering with the applicant's access to all that parcel of land known as Gilgil/Gilgil Block 1/4185 (Kekopey).

(ii) That any licence that may have been issued by the 2nd defendant to the 1st defendant allowing the blockage of the plaintiff's access to the parcel of land known as Gilgil/Gilgil Block 1/4185 (Kekopey) be revoked.

3. To his supporting affidavit, the plaintiff has annexed a copy of his title deed and map. He has averred that his property has direct access to the Nakuru-Nairobi Highway a fact which weighed heavily in his decision to take up the land. He has stated that as the absolute owner, he has a right to enjoy the property and has a legitimate expectation that the 2nd respondent will not interfere with his enjoyment or access to his property. He has deposed that in pursuance of his right to enjoy his property he has established a nature and recreational facility. He has stated that his advertisements have been based on the fact that his facility has access to the highway. He is of the view that it is in breach of his legitimate expectation for the 2nd respondent to licence the 1st respondent to establish a tree nursery right in front of the entrance to his premises. He has stated that the effect is to block the entrance of his premises completely.

4. The 1st defendant has opposed the application by filing a replying affidavit. He has deposed inter alia that he is wrongly enjoined in the suit as the section of the land which is subject of this case is occupied by a larger group of persons and a registered group consisting of more than 40 people and he is only a coordinator of the members. Nonetheless, he has stated that neither he, nor members of his group, have ever interfered with the plaintiff's use of the suit land and he has denied that they have blocked the plaintiff's access to the said land. He has averred that their activities are not illegal as they obtained a trade licence and the requisite permits from the County Government of Nakuru before being allotted the road reserve for purposes of operating a nursery bed. He has annexed the trade permits. He has contended that the true position is that there are two road reserve areas and a government road between their temporary occupied nursery area and the suit land. He has stated that they were allocated this on a temporary basis way before the rehabilitation of the old Nakuru highway project. He has averred that the plaintiff's suit is based on the wrong advice that he can annex and claim ownership over the reserve area or that he can grab this public utility land. He has claimed that if the plaintiff puts a fence on his land, the place where their nursery project stands will be more than 60 feet from his land. He is of the view that the plaintiff wants to maliciously take away the right of their group members who earn their livelihood through conservation efforts. He has denied that the plaintiff's parcel of land is entirely blocked as their project has only taken 20% of the road reserve. He has alleged that his group has suffered great loss by the plaintiff maliciously damaging the trees and flower nurseries and they stand to suffer irreparably. He wishes to have the status quo maintained until this case is heard and determined.

5. The 2nd defendant on its part filed Grounds of Opposition which inter alia state that the licence issued to the 1st defendant is temporary and the 1st defendant has a right to revoke it.

6. I have considered the application alongside the submissions of counsel for the plaintiff and 2nd defendant. 7. The 1st defendant did not appear at the hearing of the application and did not make any submissions.

8. To succeed in an application of this nature, one needs to demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss unless the injunction is granted. If in doubt, the court will determine the application on a balance of convenience.

9. In this suit, the plaintiff essentially claims that the use of a road reserve adjacent to his plot of land is

illegal. He is of opinion that it interferes with his enjoyment of his land. He has also claimed that he cannot gain access to his land. The 1st defendant claims that he and his group have a licence to operate a tree and flower nursery at the site and has denied that this interferes with the plaintiff's enjoyment of his land.

10. It will be observed that in his application, the plaintiff wants the 1st defendant to be restrained from interfering with access to the suit land and to have the licence issued by the 2nd defendant revoked.

11. Apart from the claim that the plaintiff cannot access his land, I have not seen any tangible supporting evidence of this, either by way of photographs or otherwise. In his submissions, Mr. Githui submitted that the plaintiff has done extensive developments but I wonder how he managed to undertake these developments without having access to his land. This leads to a doubt as to whether the plaintiff has actually been denied access. I suppose a full assessment of this will need to be made but it can only be done after taking evidence at a hearing and maybe after a visit to the site.

12. There is the prayer to cancel the licence issued. This to me is a final order which in the circumstances of this case, I feel it may not be wise to consider at this stage of the proceedings.

13. That said, this suit raises a critical question of the extent to which the County or National Government may be allowed to permit the use of road or other reserves. I ask myself whether the land owner adjacent to the road reserve ought to be consulted and his consent given before any licence is given to a person to use such road reserve. There is of course a danger that the use of road reserves may impede the enjoyment of persons who hold the adjacent property. It is an important question which needs to be answered. I think it is only prudent that I allow all parties to present their case in full on this important point before I proceed to make orders for or against a party.

14. From my above assessment of the application, it is my considered impression that it is best that the current status quo be maintained until this suit is heard and determined. Thus my final order on the application is that the current status quo be maintained pending hearing and determination of this suit. The costs of this application shall be costs in the cause.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 17th day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

The plaintiff and 1st defendant

Counsels : absent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU