



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 575 OF 2015

MUTARATARA ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY..... DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a notice of motion dated 23rd June 2015 in which it sought the following reliefs:-

1. Spent

2. That this Honourable Court be pleased to dispense with the provisions of Section 34 of the Kenya Airports Authority Act requiring 30 days' notice of intention to sue to be issued to the defendant(if the same is so required in the circumstances of this case) in view of the urgency herein.

3. Spent

4. Spent

5. That an order of injunction do issue restraining the defendant whether acting by itself, its agents, employees, servants, security guards, officials or whosoever from putting up a fence, blocking, barricading the 18 metre public access road and/or denying the plaintiff access through the said road and/or otherwise arbitrarily interfering with the Plaintiff's and/or its officers' visitors' employees' access, and or quiet enjoyment of its parcel of land known as LR No. 24089 Nairobi pending the hearing and determination of this suit.

6. That a mandatory injunction do issue to compel the defendant, its agents, officers, employees, servants, security guards, officials or whosoever to remove the fence or any kind of structures that had been put up and/or along the 18 metre public access road to barricade, block and/or restrain the Plaintiff from accessing its parcel of land known as LR No. 24089, Nairobi pending the hearing and determination of this suit.

7. That the costs of this application be provided for.

2. The applicant contends that it is the registered owner of LR No. 24089. The respondent owns land opposite the applicant's land. In between the applicant's land and that of the respondent, there is an 18

meter public access road which separates the two parcels of land. On 13th June 2015 the guards manning the applicant's property called the applicant's chief executive and informed him that there were persons barricading the public road of access.

3. The chief executive officer of the applicant was informed that those barricading the road were officers from the respondent who were doing so on instructions of the respondent. The applicant's chief executive tried to engage the respondent over the barricaded road but the respondent was adamant. The applicant was forced to come to court for redress.

4. The respondent in a replying affidavit sworn on 10th August 2015 by its company secretary denied the applicant's claims arguing that there was no public access road as alleged. The respondent called for a site visit by a Government Surveyor to determine whether there was a public access road as alleged by the applicant.

5. The respondent contended that what existed on the ground was a road which it used to patrol the area for the sake of security of the Airport and that security agencies had recommended that the road be blocked as it was bushy and posed threat to security of the Airport.

6. Owing to the rival contentions by the applicant and the respondent, the court directed that a Government Surveyor goes to the ground to ascertain if there exists a public road of access. A Government Surveyor visited the ground on 25th August 2015 and prepared a report which was filed in court on the same day confirming that there was a public access road which had been blocked. It would appear that the respondent was not satisfied with the report. The parties came to court and obtained another order directing that the Government Surveyor goes to the ground in the company of independent surveyors from both sides to the dispute and file report.

7. The second visit was done on 5th and 6th November 2015 and a report dated 23rd November 2015 prepared and forwarded to court on 18th January 2016. It is after the second report that the respondent tried to sort out the dispute out of court by agreeing to open up the road on certain conditions which the applicant was not willing to comply with.

8. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by both sides. This is an application which seeks both temporary and mandatory injunction. The principles for grant of temporary injunctions are well set out in the case of **Giella Vs. Cassman Brown & Co. Ltd [1973] EA 358**. The principles for grant of mandatory injunctions have been set out in a number of decisions like in the case of **Sharrif Abdi Hassan – Vs- Nadhif Jama Adan (Civil Appeal No. 121 of 2006) eKLR** where the Court of Appeal stated as follows:-

“The courts have been reluctant to grant mandatory injunction at interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

9. In the instant case the applicant is complaining that the respondent has blocked a public access road which it uses to access its property. The respondent has admitted that indeed there exists a public access road and that it has blocked it. The respondent had initially denied that there was a public access road. The respondent only conceded after two reports from surveyors indicated that there was a public access road.

10. The respondent agreed to open up the road on certain conditions namely:-

(i) The applicant erects a security gate at its cost which should be manned by security patrols.

(ii) The respondent erects a patrol truck within the flight path for regular security patrols.

(iii) The applicant withdraws the matter.

(iv) That each party bears its own costs.

11. The applicant found these conditions unacceptable. It is clear that there is a public access road which has been blocked by the respondent. This is the main complaint by the applicant that it is entitled to use the road. Without going into further details, the applicant has demonstrated that it has a prima facie case with probability of success. The applicant has a right to use the public access road and the respondent has no right to unilaterally close the same and then ask the applicant to meet certain stringent conditions for its opening.

12. There is no point of waiting until this case is heard for a mandatory injunction to issue. This is a matter which can be remedied at once by a mandatory order of injunction being issued. The respondent is raising issues of security. They may have legitimate concerns about the security of their installations but there is a proper way in which this can be addressed. The respondent can apply to the relevant authorities to erect barriers manned by its personnel and at their cost without completely blocking the applicant. Provision of security to the Airport is part of the mandate of the respondent and it cannot push its duties to the applicant by asking it to erect a security gate at its cost.

13. This case was filed under certificate of urgency and owing to the urgency, the applicant was at liberty to ask the court to dispense, with the requirement of giving a 30 days' notice of intention to sue. Section 34 of the Kenya Airports Authority Act provides as follows:

34 Limitation “where any action or other legal proceedings is commenced against the Authority for any act done in Pursuance or execution, or intended execution of this Act or any Public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect –

(b) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the Plaintiff or his agent”

14. I therefore find that in the circumstances of this case, the applicant had no time to give a 30 days' notice of its intention to sue. As the applicant has satisfied the conditions for grant of both temporary and mandatory injunction, I allow its notice of motion dated 23rd June 2015 in terms of prayers two(2), five(5), six (6) and seven(7).

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of June, 2017

E.O. OBAGA

JUDGE

In the presence of:-

Mr. Nyawara for Mr. Gakuru for Plaintiff/Applicant

Court Assistant – Hilda