



**REPUBLIC OF KENYA**

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

**ELC.NO.337 OF 2017**

**JULIUS KURIA NGANGA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**WAMBUI KIGAMBA.....DEFENDANT/RESPONDENT**

**R U L I N G**

The matter for determination is the Plaintiff/Applicant's **Notice of Motion** application dated **4<sup>th</sup> November 2016** brought under Order 51 Rule 1, Order 40 of the Civil Procedure Rules and Sections 3, 3A and Section 63(e) of the Civil Procedure Act (2010) and all the enabling provisions of the law.

The applicant has sought for the following orders:

- 1) THAT an order of temporary injunction be issued restraining the Defendant/Respondent her servants, agents and/or employees from trespassing, encroaching and blocking the access road to the Plaintiff's/Applicant's parcels of land numbers KIAMBAA/RUAKA/5113 and KIAMBAA/RUAKA 5114 on the suit premises until the final determination of the main suit.**
- 2) THAT the Defendant/Respondent be ordered to remove any illegal structures blocking the access to the Plaintiff's/Applicant's parcels of land.**
- 3) THAT the OCS Kiambu Police Station to oversee compliance of this Honourable Court orders.**
- 4) THAT costs of this application be provided for.**

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of **Julius Kuria Nganga**. The grounds in support of application are;

- a) THAT the Plaintiff is the registered owner of all that parcels of land known and described as KIAMBAA/RUAKA/5113 and KIAMBAA/RUAKA 5114 which are adjacent to land parcel number KIAMBAA/RUAKA/4310 registered in the name of the Defendant's husband GEOFFREY M. KIGAMBA (now deceased)**
- b) THAT of late the Defendant/Respondent, her servants and/or agents has unlawfully and illegally encroached, trespassed on the Plaintiff's aforesaid parcels of land thereby blocking the access road to the Plaintiff's parcel of lands by erecting illegal structures.**
- c) THAT as a result of the Defendant's unlawful and illegal acts the Plaintiff has been put into unnecessary sufferings and mental torture and has suffered loss and damage.**

**d) THAT the Defendant is not the administrator of his deceased husband estate as she has never applied for Letters of Administration and therefore she is still intermeddling with deceased's estate.**

**e) THAT it is in the interest of justice that the orders sought for herein be granted.**

**f) THAT if the orders sought are not granted this application shall be rendered nugatory.**

In his supporting affidavit, the Applicant *Julius Kuria Nganga* reiterated the contents of the grounds in support of the application.

The application is opposed and the Defendant/Respondent *Wambui Kigamba* swore a Replying Affidavit on **14<sup>th</sup> December 2016** and averred that she is the *Widow* of the *late Geoffrey N. Kigamba* the registered owner of **LR.NO.KIAMBAA/RUAKA/4310** as evident from annexure **WK1**. Further that no Letters of Administration have been taken out in regard to the Estate of Geoffrey N. Kigamba. It was her contention that on **19<sup>th</sup> October 2016**, she was issued with a Notice by Sub-County Surveyor of Roads one **G. K. Rono** marked **WK3**. Further that after writing and engaging the Sub-County Surveyor, and providing the relevant Mutation Forms, the demolition Notice was suspended pending the resolution of the said issue by the Ministry of Lands. It was her contention that at no time has the Applicant been granted the use of the private road leading to **Kiambaa/Ruaka/4311**. She also contended that the Applicant can hive off a road from his parcels of land and not interfere whatsoever with her quiet possession and enjoyment of the property where she resides.

The Respondent further averred that her husband *Geoffrey N. Kigamba* passed away in the year **2015** and if the Applicant had any dispute regarding the said road, he would have raised the issue with her late husband. Further that the Applicant is trying to get orders involving property owned by a deceased person contrary to the laid down provisions of the Law.

The Respondent also filed a Notice of **Preliminary Objection** dated **14<sup>th</sup> December 2016** and stated as follows:

- 1. That the application dated 4<sup>th</sup> November 2016 is bad in law, fatally defective and incurable by amendment.**
- 2. The matter involves property Kiambaa/Ruaka/4310 which is registered in the name of a deceased party.**
- 3) No Letter of Administration have been applied for the estate of Geoffrey M. Kigamba (now deceased).**

The application was canvassed by way of Written Submissions which this Court has considered. The court has also considered the Pleadings in general and the annexures thereto.

The court will first deal with the issue of Preliminary Objection. In the case of **Oraro vs Mbaja(2005)/KLR 141**, the court held that:

**“A Preliminary Objection consists of a point of law which has been pleaded and on which arise by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”**

The Defendant has alleged that the suit is bad in law, fatally defective and incurable by amendments as the Plaintiff has sued the Defendant who is not the registered owner of the suit property. The Plaintiff has indeed admitted that the suit property is in the name of *Geoffrey M. Kigamba* but in the Plaintiff, he has not sued the Defendant as legal representative of the Estate of the deceased. If the owner of the suit property referred to by the Plaintiff is deceased, then the Plaintiff ought to have sued the legal representative of the

estate of the deceased but to sue the widow who is the Defendant in her personal capacity but not as a legal representative. The omission by the Plaintiff is a legal issue which stems from the Pleadings. The issue raised by the Defendant qualifies to be a Preliminary Objection. However, the court finds that such a technical omission can be cured by an amendment of the Pleadings.

The court therefore finds that though the Plaintiff/Applicant has wrongly sued the Defendant herein, then such an omission can be cured through the amendments of the Pleadings.

On the issue of injunction, the court will be guided by the principles set out in the case of *Giella vs Cassman Brown co. Ltd 1973 EA 358*, which threshold principles are:

***“First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”***

Further, the court will also take into account that at this stage the court is not called upon to determine the very issues with finality but only to find out if the Applicant has established that he deserved the orders sought basing it on the laid down criteria. See the case of *Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd Nairobi (Milimani) High Court, Civil Case No.1118 of 2002*, where the court held that:

***“in an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled to at that stage is whether the Applicant is entitled to an injunction sought on the usual criteria”.***

The Plaintiff alleged that of late, the Defendant and her servants and/or agents have unlawfully and illegally encroached, trespassed on the Plaintiff's parcel of land and also blocked the access road to the Plaintiff's parcel of lands. However, the Defendant has alleged that the referred access road is a Private Road and the Plaintiff never brought out the issue he is bringing during the lifetime of her deceased husband, ***Geoffrey N. Kigamba*** who is the registered owner of ***Kiambaa/Ruaka/4310***. The Plaintiff alleged that the Sub-County Surveyor had even issued a Notice to the Defendant to unblock the public access road.

The issue herein for determination is whether there is a public access road as alleged by the Plaintiff and denied by the Defendant. The said issue cannot be decided at this stage through affidavit evidence. The issue of existence of such road and the Notice issued by the County Government of Kiambu requires calling of evidence at the full trial. The court therefore finds that the Plaintiff has not established that he has a *prima-facie* case with probability of success.

Having found that the Plaintiff had failed to establish a *prima-facie* case with probability of success, at this stage, the court finds no reason to deal with the other threshold principle as laid down in the *Giella..vs.. Cassman Brown Case(Suppla)*. This is because these threshold are sequential and was stated in the case of the *Attorney General ..vs.. Kenya Commercial Bank Ltd, Agraha Education Development co. Ltd & others, Nakuru HCCC Case No.260 of 2004*, where the Court held that:

***“The judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title's dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available”***

Having now carefully considered the instant Notice of Motion and the Written Submissions therein, the court finds it not merited. Accordingly the court dismisses the Notice of Motion dated **4<sup>th</sup> November 2016** entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, signed and delivered this 14<sup>th</sup> June 2017.

**L. GACHERU**

**JUDGE**

In the presence of

L. Gacheru Judge.

Court Clerk – Rachael

Plaintiff/Applicant – present in person

Defendant/Respondent – present in person

**L. GACHERU**

**JUDGE**

**14/6/2017**

In the presence of Hon. Gacheru

Court clerk –Rachael

Plaintiff/Applicant in person – present

Defendant/Respondent in person –Present

Court – Ruling read in open court in the presence of the above parties

**L. GACHERU**

**JUDGE**

**14/6/2017**