



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 351 OF 2017**

**KAMAU KUNG'U - 1ST PLAINTIFF/APPLICANT**

**PETER KUNG'U KAMAU - 2ND PLAINTIFF/APPLICANT**

**VS**

**FRANCIS KUNG'U NJOROGE - 1ST DEFENDANT/RESPONDENT**

**MUNGAI NJOROGE - 2ND DEFENDANT/RESPONDENT**

**RULING**

1. This is an application brought by way of Notice of motion dated the 11/4/2017, by the Plaintiff/Applicant against the 1st and 2nd defendant seeking to stop 1st and 2nd defendant from trespassing on the Applicant's property title No. LOC 18/GITHIMA/1823.
2. The application was brought by way of certificate of urgency heard *ex parte* on the same day it was filed and interim orders were given for a temporary injunction against the Defendants and orders given for inter-parties hearing on 10/5/2017.
3. The Applicants claim is for an injunction against the Defendants jointly and severally barring them from trespassing on the above said parcel of land pending the hearing of this application on grounds that;
  - a. The 1st Plaintiff is the registered owner of the parcel of land title No. LOC 18/GITHIMA/1823.
  - b. The 2nd plaintiff is a son of the 1<sup>st</sup> Plaintiff who has a permanent home on the 1st Plaintiff's land.
  - c. The defendants are neighbors of the plaintiffs and have trespassed on the land of the Plaintiffs as they are digging up a road on the Plaintiffs land and the permanent house of the 2nd plaintiff risks being demolished.
  - d. The Plaintiffs are now living in fear and apprehension.
  - e. No Court order was issued to dig up the road.
  - f. The situation has become volatile.
  - g. There is need for urgent intervention by the Court.

4. The Learned Counsel for the 1st respondent entered appearance and filed their replying affidavit on the 10/5/2017. Both Counsels for both the parties choose to canvas the application by way of written submissions.

5. The Applicants submitted that their claim was substantively in terms of prayer 2. That the Defendants trespassed on their land and started digging up a road on the land. That in so doing they destroyed the Plaintiff's properties to wit; banana trees, nappier grass and other crops. They contend that survey map produced as KK2 does not show the existence of a public access road running across the suit property. That the access road ought to have been created by the Murang'a County Government and not the respondents. That the Plaintiffs have established a prima facie case and stand to suffer irreparable loss, further that the balance of convenience was in their favor. The Learned Counsel prayed that the court restrains the defendants from further destruction.

6. The Respondents submitted that the application is improper before the court as it fails to comply with order 40 and that the prayers sought in prayer 2 of the application are final in nature hence irregular. According to them the applicant has not filed a plaint. That the exhibit marked FKN-1 shows there is an access road traversing through the plaintiffs parcels of land and that the exhibit produced by the Plaintiffs as KK2 indicating otherwise is suspect. They aver that L.R Nos. 1823, 1824 and 1825 originated from L.R No. LOC.18/GITHIMA/ 206 which had a public road traversing across it, which road remained after the subdivisions. They contend that they have always restricted their activities to the public road and at no time have they trespassed onto the Applicants L.R No. LOC.18/GITHIMA/ 1825. That the exhibits of photographs produced by the Applicants do not show the defendants committing the alleged acts and do not show they were taking place at the suit property. That the defendants never engaged in any destructive conduct therefore should not be restrained and restraining orders should not be issued in vain. Further that the Applicants have not come to court with clean hands. They have urged the court to dismiss the said application with costs.

7. The principles on which the Courts will grant an injunction are well known. This Court restated those principles in **Giella v. Cassman Brown and Co. Ltd (1973) EA 358**, together with the mode of their application as follows:

“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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience”.

8. “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- a. establish a prima facie case,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. show that the balance of convenience is in his favour”.

9. It is not in dispute that the 1<sup>st</sup> Plaintiff is the registered owner of LR No. LOC.18/GITHIMA/1824. I have seen the copy of title marked KKI issued on 17/2/86. It is also not in dispute that the Defendants are neighbours and occupiers of the adjacent plot LR No. LOC.18/GITHIMA/ 1823. I note that the Notice of Motion states that LR No. LOC.18/GITHIMA/1823 belong to the Plaintiff but as stated above in the Supporting Affidavit, Plaint and the Copy of title above, the 1<sup>st</sup> Plaintiff is owner of LR No. LOC.18/GITHIMA/1824. I shall read it as such as in the whole ruling.

10. There appears to be a contest between the Applicant and the Respondents on the position of the road if any on the ground with each strongly contending their separate positions. I have examined the plan attached to the Supporting Affidavit of the 1<sup>st</sup> Applicant marked KK 2. This plan is said to be suspect by the Respondent. The Respondent has attached a plan for Loc 18 Githima Part of sheet No. 17 & 18 and marked FKN 2 which shows a road from L.R No 1476 through L.R No. LOC.18/GITHIMA/1823 and

No. LOC.18/GITHIMA/1824. The issues relating to whether or not there is a public road between the two plots and the positioning of the said road is a matter for the trial Court. It cannot be canvassed at the interlocutory stage. In their submissions, the Respondent has denied that it has encroached on the suit premises and contends that the Photographs attached by the Applicant as KK3 do not belong to the site the title 1824 is situated. This is also left for the trial Court to determine.

11. Notwithstanding I note that the Plaintiffs application is inconsistent with the plan marked KK2 attached in that the road passes on plot LR No LOC.18/GITHIMA/ 1823 and not LR No LOC.18/GITHIMA/1824. The claim of trespass on to his property 1824 is not tenable. I hold and find that a prima facie case has not been established. Contrary to the Respondents assertion that the Applicants have not filed a plaint, I note that a Plaint dated 11/4/2017 and filed on 24/5/2017 is on record. The application is therefore procedurally and properly on record.

12. It is on record that the Applicant has quantified the damages alleged or expected to be suffered and therefore the 2<sup>nd</sup> limb of the test is not met.

13. Noting that I am not in doubt, I find and hold that the application dated 11/4/17 is unmeritorious and is hereby dismissed with costs payable by the Applicant.

14. Parties to take steps to conclude pretrial within 30 days from today and in default either party be at liberty to set the suit down for hearing.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**J. G. KEMEI**

**JUDGE**