



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 774 OF 2015

MR.JOHN MURIITHI

BRIG.(RTD)BERNARD KILLU

MRS.ROSE MURIITHI

MRS. BRIDGET KILLU

CAPT.JOE GATHECHA

MRS SOPHIA GATHECHA

MR.STEVE KABII

ENG. ALBERT MUGO

REV.PHOEBE MUGO

HON.KIPRUTO ARAP KIRWA

DR.CHARLES CHUNGE

MRS.RUTH CHUNGE

DR.WARUGONGO KIONI

MRS.ALICE WARUGONGO

MR.MOSES KANENE

MR.SAMUEL ABANGA

MRS.MICHELLE ABANGA

MR. PETER MAINGI

REGISTERED AS OLESHUA

COMMUNITY ORGANISATION.....PLAINTIFFS/APPLICANTS

= VERSUS =

HON.GEORGE NYANJA.....DEFENDANT/RESPONDENT

RULING

1. The applicants are all members of Oleshua Community Organization which is duly registered. The members have their individual homes within Karen in Nairobi City County. The applicants' homes are accessed through Ololua Close which starts at Ngong Road. The applicants' homes are comprised on LR Nos.3994/9 and 10. The Respondent owns LR No. 7583/1 which neighbours the applicants' properties.

2. The applicants brought a Notice of Motion dated 6th August 2015, in which they sought the following reliefs:-

a. Spent

b. Spent

c. This honourable court be pleased to order that pending hearing and final determination of the instant suit the Defendant/ Respondent by himself, servants and/or agents be restrained by temporary injunction from continuing with pulling down the perimeter fence, cutting down trees, uprooting tree stumps, levelling and creating an illegal road of access at the end of Ololua Close Karen in between the Plaintiff/Applicants' properties known as LR No. 3994/9 and LR No.3994/10.

d. This Honourable Court be pleased to order that pending hearing and final determination of the instant application interpartes and also pending hearing and final determination of the instant suit the Plaintiff/Applicants be allowed to restore the fence pulled down by the Defendant/Respondent at Ololua Close in order to maintain their security.

e. This Honourable Court be pleased to order that the orders granted herein in this application be supervised by the OCPD Karen Police Division to ensure compliance.

f. Such other or further relief that the honourable court may deem to grant.

g. Costs of the application be provided for.

3. The Applicants contend that the opening up of Ololua Close will pose security challenges to them in that there will be uncontrolled movement of vehicular and persons through the said road. That the road which the Respondent intends to open up is too narrow to accommodate 40 ton trucks which are likely to pass through the road because the Respondent deals in business of supplying poles.

4. The applicant further contends that they have tried to reason with the Respondent on the implications of opening up the Ololua Close but the Respondent is adamant and is bent on opening the same with impunity. That the Respondent has already pulled down a fence on the Ololua Close and has cut down trees on the same and carried them away.

5. The Respondent has opposed the Applicants affidavit through a replying affidavit sworn on 11th September 2015 and filed in Court on 14th September 2015. The Respondent contends that Ololua Close is a public access road which starts at Ngong Road, passes through the applicants properties and terminates at his plot No. LR 7583/1. That he is entitled to use the Road which has been illegally blocked by the Applicants. That the fence which he pulled down was put up by the owner of the property which was sold to him.

6. The Respondent further contends that his property is landlocked and that Mwituu Road which he has been using is being claimed by Mwituu Estate Water Company Limited. Mwituu Estate Water Company

Limited sued him in Court and the Court held that he was not entitled to use the said road and that if he wanted to use it he should pay for it. That he has been paying for the use of the said road and that his visitors are always harassed whenever they visit him as they are asked to pay before passing through. He therefore contends that he has the right to use Ololua Close to access his property and that the road will not be a throughfare as it will terminate on his property on which he will erect a gate and as such, the issue of insecurity should not arise.

7. I have carefully considered the applicants' application as well as the opposition to the same by the Respondent. There is no doubt that the Applicants' properties neighbour the Respondent's property. The Applicants are seeking to injunct the Respondent from opening up Ololua Close. This being an application for injunction, the applicant have to meet the threshold for the grant of such orders. The principles for grant of temporary injunctions have been settled through the celebrated case of **Giella Vs.Cassman Brown & Co.Ltd (1973) EA 358.**

8. One of the principles of the Giella Case (Supra) is that an applicant must demonstrate that he has a prima facie case with probability of success. The question which then arises for determination is whether the applicants have demonstrated a prima facie case to warrant issuance of injunctive orders. A close reading of the Applicants Supporting affidavit shows that as a matter of fact, they concede that Ololua Close goes beyond where they have erected a fence to block the road. The Applicants only fear is that if the road is opened, it will lead to insecurity in that vehicles will pass and pedestrians will also pass through the road. The other fear of the Applicants is that the road is too narrow and will not accommodate the 40 ton trucks which are likely to pass through it as the Respondent is in the business of supplying poles.

9. The Respondent has provided evidence that Ololua Close starts at Ngong Road and ends at his property. This is as per letter from Nairobi City County. This being the case, the Respondent is free to access his property through the Ololua Close. The Respondent has allayed the Applicants fears of insecurity by stating that he will erect a gate at the area where the road in contention touches his plot. The road will not be a throughfare. I therefore do not see what case the applicants have to warrant grant of injunction.

10. The Applicant contends that the Respondent has an alternative road to access his property and that is Mwituroad. The Respondent was sued in Nairobi HCCC No. 1031 of 1991 over the use of Mwituroad and Mwituroad Drive. The Court held that the Road as well as the Drive were private roads and that the Respondent was not entitled to use the same unless he paid for the usage. The Respondent has been paying for the usage of the said Road since then and as per the receipt issued on 30th June 2015, annexed to his supporting affidavit in reply to the applicants' application. The Judge in the judgement observed that the Respondent indeed appeared to be landlocked.

11. From the above analysis, it is clear that the Applicants have failed to show that they have a prima facie case against the Respondent. The Applicants application therefore lacks merit. The same is hereby dismissed with costs to the Respondent. The injunctive orders which were first given on 14th August 2015 and extended subsequently are hereby discharged.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **20th** day of **September, 2017.**

E.O.OBAGA

JUDGE

In the absence of parties who were aware of the date and time for delivery of Ruling.

Court Assistant: Hilda

E.O.OBAGA

JUDGE