



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 144 OF 2013 (O.S)

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF TITLE NUMBER OTHAYA/KIHUGIRU/863

BETWEEN

MUTAHİ MUTİTÜPLAINTIFF/APPLICANT

-VERSUS-

FRASHIA WANGUI GICHERU as the personal representative of

**GEOFFREY GICHERU KAGIRI
(deceased).....DEFENDANT/RESPONDENT**

RULING

1. The applicant herein, Mutahi Mutitu, took up the summons dated **11th September, 2017** for determination of the questions listed therein.
2. Simultaneously with the summons, the applicant filed the motion of even date seeking the following orders:-
 - (i) **Certification of the application as urgent and deserving to be heard ex parte in the first instance;**
 - (ii) **An order restraining the respondent from excavating and building on the road measuring 30 by 100 feet on LR No. Othaya/Kihugiru/863 (the suit property) pending the hearing and determination of the suit;**
 - (iii) **Maintainance of the status quo on the suit property pending the hearing and determination of the suit.**
 - (iv) **The orders if granted be enforced by the OCS Othaya police station**

(v) Costs of the application be in cause.

3. The application is premised on the grounds on its face and the affidavit of the applicant filed in support of the application.
4. As can be discerned from the grounds on the face of the application and the affidavit sworn in support thereof, the application is premised on the ground that the respondent has began works on the road on the suit property which have affected the foundation of his works on LR NO.Othaya/Kihugiru/860, damaged the road parking space which has been used by the applicant, the respondent and their customers for over 21 years, destroyed water pipes, electricity wires and sewerage system serving the applicant and the neighbourhood.
5. The applicant contends that unless the excavation is stopped by this court his building worthy over 40 million Kenya shillings risks being damaged.
6. According to the applicant, he has used the suit property which is registered in the name of the respondent's husband, Geoffrey Gicheru Kagiri (deceased) as a road of access and parking since 1996.
7. In reply and opposition to the application, the respondent filed the replying affidavit she swore on **18th September, 2017**. Vide that affidavit the respondent denies the allegations that the developments she is effecting in the suit property have affected the applicant's development.
8. The respondent explains that the developments she has effected on the suit property have been sanctioned by the relevant Government authorities and has obtained all relevant approvals, licenses and consents to carry the impugned developments.
9. The applicant further explains that the construction shall maintain the access road to silent lodge and that removal of the pipelines was ordered by the County Government of Nyeri as they were on her private land.
10. Pointing out that she is carrying out the development on her own parcel of land and with approval of the relevant Government departments, the respondent deposes that the applicant is merely jealous and envious of her developments.
11. The respondent further denies having damaged the sewerage system, electric wires or water pipes.
12. Maintaining that as the owner of the suit property she is entitled to all rights of a proprietor of land, the respondent contends that the application was brought in bad faith and as such is vexatious and an abuse of the court process.
13. When the matter came up for hearing, counsel for the applicant informed the court that the respondent is constructing on a plot that has been an access road for use by members of the public for over 21 years.
14. Counsel for the applicant further informed the court that members of the public have petitioned the lands officer (annexture 8) to stop the construction.
15. Making reliance on the grounds on the face of the application, the supporting affidavit and the annexures, counsel for the applicant urged the court to order for maintenance of *status quo*. He also urged the court to visit the site.
16. Counsel for the applicant submitted that the respondent has not denied the use of the plot as a road of access for over 21 years.
17. Counsel for the respondent **Mr. Gathega** in opposition to the application, relied on the grounds of opposition dated **18th September, 2017** and the replying affidavit of even date.

18. Contrary to **Mr. Muguku's** contention that the respondent has not denied that the suit property has been used as a road of access for 21 years, he stated that the suit property has never been a road reserve.
19. He further explained that all owners of plots in the area have access to their respective plots.
20. Concerning the pleadings filed in this matter (O.S), he pointed out that the applicant seeks that he be declared a joint-owner of the suit property with the respondent and submitted that the applicant is trying to grab the suit property.
21. Pointing out that the respondent has obtained the necessary approvals from all relevant authorities and that she has engaged professionals to carry out the developments sought to be restrained, counsel for the applicant submitted that it cannot be said that the developments will weaken the applicant's development.
22. Since the parties to this dispute are effecting developments on their respective parcels of land, it is submitted that the applicant has not made up a prima facie case with probability of success.
23. Because the respondent is building on her husband's plot, it is submitted that the applicant is unlikely to suffer damages incapable of being compensated by way of damages. The respondent is said to be capable of paying such damages as may be awarded against her in case the applicant succeeds in his case against her.
24. On balance of convenience, it is submitted that the balance of convenience tilts in favour of the respondent who has incurred alot of expense to put up the impugned structures and who will suffer great loss if the orders sought are granted.
25. Concerning the allegation that the respondent is blocking the applicant's access to his premises, he pointed out that the respondent was building within the beacons of her own plot.
26. On the contention that the suit property is an access road, it was submitted that no document was produced capable of proving that the suit property is an access road.
27. Because no excavation is going on and construction on the suit property has commenced, the application herein is said to have been overtaken by events.
28. In a rejoinder, counsel for the applicant informed the court that the applicant has attached a 1997 approval (exhibit 2) showing that the plot belongs to the respondent's husband and took issue with the fact that the respondent has no letters of administration.

Analysis and determination

29. I have carefully read and considered the pleadings filed in this matter, the affidavit evidence relied on by the parties to this dispute and the submissions made for and against the application.
30. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought.
31. In answering that question, I start by pointing out that it is not dispute that the developments which the applicant seeks orders to restrain their further development are being effected on a plot which belongs to the respondent's husband.
32. It is also not in dispute that the respondent has obtained the relevant Government approvals to carry out the impugned developments on her husband's plot.
33. The applicant who merely basis his claim on the allegation that the suit property is a public access road, did not lead any evidence capable of proving that fact. In fact, that claim appears to contradict his own plea for being declared as the owner of the alleged access road and/or as having become entitled to

that parcel of land by adverse possession.

34. Having failed to demonstrate sufficient interest in the suit property and that unless the orders sought are granted he stands to suffer irreparable injury, I decline to grant him the orders sought.

35. Since the impugned developments are being carried out in a parcel of land in respect of which the respondent is the beneficial owner, I agree with the submissions by the counsel for the respondent that any loss that the respondent may suffer is compensable by way of damages.

36. Even if I was in doubt that damages may not be adequate compensation for the applicant, which I am not, in the circumstances of this case, the balance of convenience tilts in favour of the respondent who is effecting the impugned development on land in respect of which she is the beneficial owner and having obtained requisite approvals from the relevant Government authorities.

37. The applicant who has equally effected developments on his parcel of land cannot be heard to say that he had legitimate expectation that the respondent would surrender her parcel of land for his use and enjoyment, without any legal basis of making that assertion.

38. For the foregoing reasons I find the application to be lacking in merit and dismiss it with costs to the respondent.

Dated, signed and delivered at Nyeri this 24th day of October, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiminda h/b for Mr. Muguku for the applicant

Mr. Gathega Mwangi for the respondent

Court assistant - Esther