



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT CHUKA

CHUKA ELC CASE NO 291 OF 2017

JOHN KAMAKIA NTHATU.....PLAINTIFF

VERSUS

FESTUS KITHINJI NJAGI.....DEFENDANT

RULING

1. This application concerns an application dated 28th September, 2017 and seeks orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance.

2. That pending the hearing of this application inter-partes, this honourable court be pleased to issue temporary orders of injunction restraining the defendant, his agents, servants, employees and whomsoever acting on his behalf or instructions from entering, constructing, cultivating, erecting any structures, trespassing, using, selling or in any matter whatsoever from dealing with land parcel No. THARAKA NITHI/GATUNGA/2271.

3. That pending the hearing and determination of this suit, this honourable court be pleased to issue temporary orders of injunction restraining the defendant, his agents, servants, employees and whomsoever acting on his behalf or instructions from entering, constructing, cultivating, erecting any structures, trespassing, using, selling or in any manner whatsoever from dealing with land parcel No. THARAKA NITHI/GATUNGA/2271.

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

2. The application is supported by the affidavit of the applicant, John Kamakia Nthatu and has the following grounds:

a. That the plaintiff/applicant is the registered proprietor of Land Parcel No. THARAKA NITHI/GATUNGA/2271.

b. That the plaintiff has been in occupation and use of the said land from his childhood to date on which he has built a home and has been cultivating crops, green grams, millet, sorghum, rearing livestock and planted trees thereon.

c. That on or about 19th August, 2017 the defendant without the permission and authority from the plaintiff commenced construction on the plaintiff's land parcel No. THARAKA NITHI/GATUNGA/2271 and created unauthorized access road without the plaintiff's authority, permission and / or consent.

d. That the defendant has destroyed the plaintiff's fence, destroyed his crops and trees on the said parcel of land. The defendant further interfered with the plaintiff's boundaries on the suit land.

e. That the applicant stands to suffer irreparable loss and damage.

3. The application is supported by the affidavit of JOHN KAMAKIA NTHATU of P. O. Box 46, Marimanti Tharaka Nithi County sworn on 28th September, 2017 which states as follows:

1. That I am an adult male of sound mind, working for gain and residing within Tharaka North in Tharaka Nithi County in the Republic of Kenya and the plaintiff/applicant herein and therefore competent to swear this affidavit.

2. That I am the registered owner of Land parcel No. THARAKA NITHI/GATUNGA/2271. (Annexed herein and marked "JKN1" is a copy of the title deed).

3. That I have been in occupation and use of the said land from his (sic) childhood to date on which he has built a home and has been cultivating crops, green grams, millet, sorghum, rearing livestock and planted trees thereon.

4. That on or about 19th August, 2017 the defendant without my permission and authority commenced construction on my land parcel No. THARAKA NITHI/GATUNGA/2271 and created unauthorized access road without my authority, permission and/or consent.

5. That the defendant has destroyed the my fence, destroyed crops and trees on the said parcel of land and interfered with my land boundaries on the suit land.

6. That the said unlawful acts have been reported to Gatunga Police Station vide OB 15/17/06/2015 but no criminal action has been taken against the defendant.

7. That the defendant has conspired and colluded to fraudulently transfer the plaintiff's parcel of land to himself to the detriment of the plaintiff.

8. That the defendant/respondent is colluding and conspiring with third parties to have land parcel No. THARAKA NITHI/GAtunga/2271.

9. That I have suffered immense loss and damage as a result of the defendant's actions.

10. That unless a temporary injunction is granted I stand to suffer irreparable loss and damage.

11. That the contents of this affidavit are true to the best of my knowledge, information and belief.

4. The defendant has replied to the application through his replying affidavit sworn on 17th October, 2017 which states:

I, FESTUS KITHINJI NJAGI of ID NO. 7410212 and P. O. Box 386-60400 CHUKA do hereby make oath and state as follows:

1. That I am an adult male person of sound mind and the respondent herein well versed with facts of this suit hence competent to swear this affidavit.

2. That the applicant herein is my neighbor in that his land parcel No. THARAKA NITHI/GATUNGA/2271 borders my land parcel NO. THARAKA NITHI/GTUNGA/2672.

3. That there is no access road between my land parcel number THARAKA NITHI/GATUNGA/2672 and the respondent land parcel NO. THARAKA

NITHI/GATUNGA/2672 as alleged by the applicant. (Attached herein and marked FKN1 is a copy of index map).

4. That at no particular time have I or my agents, servants or workers trespassed, entered, constructed and or created any easements, path or way on the applicant's land parcel number THARAKA NITHI/GATUNGA/2271 as indicated.

5. That the only existing road is a public access road that feeds the applicant (sic) parcel of land and my parcel of land that all members of public and residence of Karii Ka Mburi village use for their daily routine.

6. That I am not constructing on my parcel of land as alleged in the application as at now leave alone attempting to construct. Although there exists structures on my parcel of land THARAKA NITHI/GATUNGA/2672 that were put up sometime in the year 2012.

7. That the boundaries between land parcel number THARAKA NITHI/GATUNGA/2672 and land parcel No.THARAKA NITHI/GATUNGA/2271 are intact and have been existing un removed since time immemorial.

8. That the applicant obtained exparte orders though misrepresenting facts and or hiding material facts to the court.

9. That as such I pray that the orders of injunction obtained through falsehoods be vacated by this honourable court.

10. That what is deponed to herein is true and best of my knowledge and understanding.

5. When the application was heard interpartes on 18.10.2017, the applicant disowned the contents of paragraphs 4 and 7 of his supporting affidavit sworn on 28.9.2017.

6. I opine that an application predicated upon false evidence establishes no basis for grant of interim orders. In the circumstances, I find that the application veritably invites dismissal. Existing interim orders are vacated.

7. This application is dismissed.

8. As the parties in their pleadings have filed diametrically opposed assertions, I find it necessary to have this suit heard expeditiously.

9. The plaintiff is hereby ordered to fully comply with Order 11, CPR within 14 days of today.

10. The defendant is hereby ordered to fully comply with order 11, CPR within 14 days after receipt of the plaintiff's compliance documents.

11. Parties are directed to come back to court for directions on **21.11.2017**.

12. Costs shall be in the cause.

13. It is so ordered.

Delivered in open court at Chuka this **18th day of October, 2017** in the presence of:

CA: Ndegwa

John Kamakia Nthatu – Plaintiff/Applicant

Kijaru for Defendant/Respondent

P. M. NJOROGE

JUDGE