



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.620 OF 2017

PATRICK J. N. WAMAE..... 1ST PLAINTIFF/APPLICANT

VERONICA NYAMBURA WAMAE..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

SERAH WANJIKU KARIUKI..... DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs/Applicants' *Notice of Motion* application dated 22nd June 2017, which seeks for the orders:-

1) *Spent.*

2) *Spent.*

3) *That this Honourable Court be pleased to issue an order of mandatory injunction compelling the Defendant/Respondent to remove any obstruction to the Plaintiff's right of way to their properties known as LR.No.Limuru/Ngecha/1450, LR.No.Limuru/Ngecha/1451 and LR.No.Limuru/Ngecha/1453 pending hearing and determination of this application and the suit herein.*

4) *That the costs of the application be borne by the Respondent.*

The application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of *Patrick J. N. Wamae*. These grounds are:-

a) *That the Plaintiff/Applicant is registered owner of all that parcel of land known as LR.No.Limuru/Ngecha/1451.*

b) *That the 2nd Plaintiff/Applicant is the registered owner of all that parcel of land known as LR.No.Limuru/Ngecha/1450 and LR.No.Limuru/Ngecha/1453.*

c) *That the Defendant/Respondent is the owner of all that parcel of land known as LR.No.Limuru/Ngecha/1449.*

d) *That since 1960s, the Plaintiffs have had unfettered access to their properties known as*

LR.No.Limuru/Ngecha/1450, LR. No. Limuru/Ngecha/1451 and LR.No.Limuru/Ngecha/1453 through a nine (9) meters access road beginning on the right side of the Defendant's property (LR.No.Limuru/Ngecha/1449).

e) That the foregoing has been the case until 16th February 2017, when the Defendant maliciously and via a letter dated the same date, blocked access to the Plaintiff's properties for no reason whatsoever.

f) That the Defendant/Respondent stands to suffer no prejudice if the orders sought are granted whereas the Plaintiffs/Applicants stand to suffer substantial loss if the order sought are not granted.

g) That it is in the interest of justice that the orders sought are granted.

In his ***Supporting Affidavit***, the deponent ***Patrick J. N. Wamae*** reiterated the contents of the grounds in support of the application and averred that their resultant parcels of land are from subdivision of ***Limuru/Ngecha/1249***, which was owned by ***Esther Njoki Wamae***, the mother to the Plaintiffs and mother-in-law to the Defendant. He further averred that since the subdivision in ***1993*** and even before (***since 1960***)

there has always been unrestricted access to their property through a nine (9) meters access road beginning on the right side of the Defendant's property ***LR.No.Limuru/Ngecha/1449***. It was his allegation that the foregoing was the case until ***16th February 2017***, when the Defendant blocked access to their properties through the aforesaid access road and sought to change access to their properties through the left side of ***LR.No.Limuru/Ngecha/1449***, which is untenable. That due to the said blockage of the access road, the Plaintiffs have resorted to using unorthodox means to access their property or even rely on the good will of their neighbours in ***Limuru/Ngecha/2573*** and ***2574***. Therefore the Plaintiffs stand to suffer loss and damage if the blockage is allowed to persist. However, the Defendant would suffer no prejudice if the orders sought are allowed. He urged the court to allow the application.

The application is contested and ***Serah Wanjiru Kariuki*** filed her Replying Affidavit and averred that indeed their parcels of their land are as a result of subdivision of ***Limuru/Ngecha/1249***, which was initially owned by their late Mother and mother-in-law ***Esther Njoki Wamae***. She averred that the Plaintiffs parcels of land had an access road which they do not use. It was her contention that in the ***year 1998***, the 1st Applicant requested her to allow him to access his parcel of land through her property, for purposes of passing building materials instead of using the former access road. She contended that she accepted the said request but the 1st and 2nd Applicants made a habit of using the later route and they started to claim access road through her parcel of land which is a private property. It was her contention that on ***5th January 2017***, the Applicants through the County Commissioner illegally ordered her to open the access road created through her property. Further that on ***10th January 2017***, the County Commissioner and Surveyor went to the ground and illegally supervised the creation of the said access road on her property. She also contended that she has fully developed her land parcel and her son who has also developed on the said area will suffer irreparably as he will be forced to demolish his house. She urged the Court to disallow the instant application.

In his further affidavit, the Applicant averred that they have always accessed their properties through the 9 meters access road and that the subdivisions took place in 1993 having been initiated by their mother and that has been the case all through. That the ***'access road'*** referred to by the Respondent is actually a private road owned by the proprietors of ***LR.No.Limuru/Ngecha/614*** and ***615***, which access road was excised from their properties. He further reiterated that they have never used the said private road to access their properties and that the said allegation by the Respondent is a blatant falsehood.

This application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general, the annexures thereto and the relevant provisions of law and it will render itself as follows:-

The applicant herein has sought for injunctive order which is an equitable relief granted at the discretion of the court. This discretion however must be exercised judicially. See the case of Agip (K) Ltd...Vs...

Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999, where the Court held that:-

“grant of injunction being discretionary, the appellate court only interferes in exceptional circumstances.....”

Further the Court takes into account that at this juncture, the Court is not called upon to decide the matter with a finality or definitively based on the affidavits evidence. The Court is only called to decide whether the Applicant is deserving of the injunctive orders based on the usual criteria. See the case of Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC 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 at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria to be considered in determining this matter is the one set out in the case of Giella...Vs... Cassman Brown & Co. Ltd 1973, EA 358. These criterias are:

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

First, the Applicants needed to establish that they have a *prima-facie* case with probability of success. *Prima-facie* case was described in the case of Mrao...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Further, it is clear that from the description of *prima-facie* case, it means more than arguable case. The Applicant must establish infringement of his/her rights and probability of success of his/her case at the main trial.

There is no doubt that in this case, the dispute is over an access road. There is also no doubt that the Plaintiffs and the Defendants are proprietors of their respective parcels of land being Limuru/Ngecha/1450,1453 and 1449, which are resultant subdivisions of the mother title Limuru/Ngecha/

1249, which was owned by Esther Njoki Wamae who was the biological mother to the Plaintiffs/Applicants and mother-in-law to the Defendant/Respondent. There is also no doubt that the subdivisions were

effected in 1993. Further there is no evidence that after the subdivisions, there was any dispute of access to each of the resultant subdivision. The dispute herein arose in January 2017.

The Plaintiffs/Applicants have alleged that since 1960s and also since the subdivision of Limuru/Ngecha/1249 in 1993, there has been in existence a 9 meters access road which begins at the right side of the Defendant’s parcel of land No.Limuru/Ngecha/1449. The Applicants alleged that they have used the said access road all along until January 2017, when the Respondent blocked the said

access road.

However, the Defendant alleged that indeed there was an access road provided for all the resultant subdivisions of ***Limuru/Ngecha/1249***, which was accessed through the left side of her parcel of land. However in 1998, the 1st Defendant requested her to allow him use her parcel of land to access his parcel of land for purpose of delivering building materials. It was her contention that the Plaintiff now want to permanently convert this access road to be their access road thus encroaching on her private property. However, this Court has seen a letter dated ***18th January 2017***, from the Sub-County Surveyor which states that there is a 9 meters access road serving plots ***Nos.1450, 1451,1452 and 1453*** as per the Registry Index Map Sheet. The surveyors report gave credence to the Plaintiffs/Applicants allegations of existence of a 9 meters access road to serve their parcels of land which has been in existence since 1960s.

The existence of this 9 metre access road is in dispute. That is not an issue that can be decided at this stage based on affidavits evidence. That is an issue that requires calling of evidence. However, it is evident that the Plaintiffs/Applicants access to their parcels of land which they have allegedly done since ***1998*** has now been blocked by the Defendant. The blocking of their access road is an infringement of a right to access their property. Further on whether the Plaintiffs have been using the access road on the left side is an issue to be determined after calling of evidence at the main trial. For now the Court finds that it is evident that the Plaintiffs right to access their parcels of land using the access road that was allegedly granted to the 1st Plaintiff by Defendants in ***1998***, has been infringed. For the above reasons, the Court finds that the Plaintiffs/Applicants have established that they have a *prima-facie* case with probability of success. See the case of ***Equator Inn Ltd t/a Tsavo Inn Hotel...Vs...National Oil Corporation of Kenya (2017)eKLR***, where the Court held that:-

“From the material placed before court, it is not disputed that the Plaintiff has been enjoying the right of way through the Defendant’s piece of land. It is also not in dispute that what triggered this suit and application is the Defendant’s decision to erect a boundary wall to block the entrance to the Plaintiff’s Hotel. Whether the right of way enjoyed by the Plaintiff has crystallized into an absolute and indefeasible easement within the framework of Section 28 of the Land Registration Act and Section 32 of the Limitation of Actions Act is a question to be answered at the substantive hearing of this case”.

Having now carefully considered the available evidence, the Court finds that the Applicants have established that they have a prima-facie case with probability of success at the trial.

On the ***2nd limb***, the court finds that the Applicants have alleged that they have been using this access road since the year ***1993*** and before. Now with the blockage of the same, they have been forced to look for other alternatives including relying on goodwill of their neighbours. That alone has caused them anxiety and anguish and whatever loss they are incurring through that anxiety cannot be quantified or compensated through an award of damages. Therefore, ***the Plaintiffs/Applicants have established that they stand to suffer irreparable loss which cannot be compensated by an award of damages.***

On the ***3rd limb***, the Court is not in doubt and so it will not decide on the balance of convenience. However, even if the court was to decide on the balance of convenience, this would tilt in favour of ***maintaining the status quo. The status quo herein would mean allowing the Plaintiffs/Applicants to use the said access road until the suit is heard and determined.*** See the case of ***Virginia Edith Wambui... Vs....***

Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Having now carefully considered the available evidence, the ***Court finds that the Applicants instant***

Notice of Motion application dated 22nd June 2017 is merited. The same is allowed entirely in terms of prayer no.3 with costs to the Plaintiff/Applicants.

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of **November 2017**.

L. GACHERU

JUDGE

In the presence of

M/S Kithinji holding brief for Mr. Musyoka for Plaintiffs/Applicants

Mr. Mugambi holding brief for Mr. Muraguri for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

17/11/2017