



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 40 OF 2017

DAVID MWIYEIAPPLICANT

VERSUS

JULIUS MUSYOKA KILYA.....RESPONDENT

RULING

By a Notice of Motion dated 15th September, 2017 the applicant is seeking the following orders.

1. (Spent)
2. THAT this honourable court do issue mandatory injunction directed at the respondent to demolition of an extended wall on land parcel No. Mwingi /Kanzanzu/339 to enable the applicant access parcel No. Mwingi/Kanzanzu/4114.
3. THAT a mandatory injunction do issue directed at the respondent to give the applicant unlimited access to his premises on parcel No. Mwingi/Kanzanzu/4114 pending hearing and determination of this suit or until further orders of this court.
4. THAT the Officer Commanding Mwingi Police Station together with the county surveyor Mwingi sub-county and the chief Mwingi location do enforce the order herein.
5. Any other relief in favour of the applicant.
6. THAT costs of this application be provided for.

The application is brought under Order 40 Rules 1 and 2 CPR and supported by grounds on the face of the application and the affidavit of the applicant sworn on 15th September, 2015. The supporting affidavit is further supported by numerous documents marked 'A', 'B', 'C' and 'D'. On 17th October 2017 the respondent filed a replying affidavit and grounds of opposition in opposition to the applicant's application.

APPLICANT'S CASE

The applicant contents that he is the owner of parcel No. Mwingi/Kanzanzu/4114 and that he has leased the land to a third party who has erected a base transmission station but could not commission it for lack of access road since 2015.

He avers that he reported the respondent's actions to the administration, Mwingi town who gave him a statutory notice on 12th February, 2016 but to date the respondent has not complied. He further stated that he also reported the respondent's actions to the area chief who wrote a letter to the Land Registrar Mwingi District.

Following that letter, the Land Registrar and Land Surveyors visited the land and established the respondent's actions were illegal and ordered him to open the access road but failed to do so. The applicant has therefore approached this court for an equitable relief to issue a mandatory order of injunction directing the demolition of some development to give access to the applicant plot No. Mwingi/Kanzanzu/4114.

RESPONDENT'S CASE

The respondent filed grounds of opposition and a replying affidavit opposing the application. In his argument, the respondent contends that granting the orders would be tantamount to granting final orders at an interlocutory stage. The respondent also states that he is the owner of Land Parcel No. Mwingi/Kanzanzu/1339 and that he has done substantive development on his land and that he has a right to be heard before demolition is done. He says that he has not blocked any access road and that all developments are confined within his plot.

ISSUES FOR DETERMINATION

1. Whether the applicant has established the principles for the grant of an interlocutory injunction?
2. Whether mandatory orders can issue at interlocutory stage?
3. Who shall bear the costs of this application?

ANALYSIS AND DETERMINATION

The issue for determination in this application is whether a mandatory injunction can issue at interlocutory stage. The plaintiff/applicant in his plaint filed on 18th May, 2016 seek orders of inter alia permanent injunction, and a declaration that the defendant/respondent is not entitled to block him from accessing his land and that any developments or blockage be demolished. From the documents annexed to the supporting affidavit there is no part development plan form Kitui County showing that the respondent has blocked an access road leading to the applicant's land. The letters attached to the supporting affidavit marked 'A', 'B' and 'C' are not supported by any part development plan showing the access road.

I also take note that the orders of mandatory injunction are final in nature and can only be granted in clear and special circumstances.

That was the position in the case of **MAGNATE VENTURES LIMITED -VS- ENG. KENYA LIMITED (2009) KLR** at page 538 where it was held as follows:

"A mandatory injunction need not be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was;

- (a) Clear and one which the court thought it ought to be decided at once or
- (b) If the act done was a simple and summary one which could be easily remedied.
- (c) Or if the defendant attempted to steal a march on the plaintiff.

..... the decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on

the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances.

In my mind, there are no peculiar facts and circumstance to warrant the grant of the orders sought. In the upshot, the application dated 15th September, 2017 lack merit and the same is hereby dismissed with costs to abide the event.

Read and signed in the open court this 2nd day of November, 2017.

E. C Cherono (Mr.)

ELC Judge

In the presence of

1. Ijabo – Court clerk
2. Mr. Nzili for plaintiff

MR. NZILI: I wish to apply for a mention for pre-trial conference. I will serve my colleague.

COURT: Mention on 30/11/2017

E. C Cherono (Mr.)

ELC Judge