



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.236 OF 2016

BONNY MWANGI NJUGUNA.....PLAINTIFF

VERSUS

DOMINIC MAITHA.....1STDEFENDANT

GEORGE MASINDE.....2NDDEFENDANT

MWANDUKO MUSALO.....3RD DEFENDANT

BETH WAINAINA.....4THDEFENDANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF MACHAKOS.....1ST INTERESTED PARTY

RULING

What is before me for determination is the plaintiff’s Notice of Motion application dated 2nd March, 2016 brought under section 3,3A,11,13,20 and 21 of the Civil Procedure Act, Order 1 Rule 3, Order 40 Rule1 and 2, Order 51 Rules 1,2,3,4,10(2)12,13 of the Civil Procedure Rules and Articles 48,60 (1) (a), 62 (1) (h) and 165(3) of the Constitution seeking orders that;

- a) The honourable court be pleased to restrain or stop the defendants/respondents from issuing or making any further statements in connection with construction of structures by their constituents on the frontage of the plaintiff’s premises.
- b) That this honourable court do restrain the defendants, their agents, servants, constituents or any person under their directive from constructing or putting up business structures on the frontage of the plaintiff’s premises and road reserve.
- c) That the honourable court be pleased to direct the defendants,their servants, agents, employees or constituents to remove the structures that they have put up on the frontage of the plaintiff’s property so as to allow access and entry pending the hearing and determination of this suit.
- d) That cost of the application to be borne by the defendants /respondents

The plaintiff/applicant's case:

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 2nd March, 2016. The plaintiff has contended that he is the legal owner of all that parcel of land known as L.R No. MAVOKO TOWN BLOCK 20/121 (hereinafter referred to as "the suit property") on which he has constructed buildings which are used both for business and as residence. The plaintiff has contended that the suit property is situated at a place known as Joska next to Kangudo road and that, between the suit property and the mainroad is a road reserve through which owners of the premises in the area access the main road. The plaintiff has averred that from the time he acquired the suit property and developed the same there has never been structures put up on the road reserve in front of the said property which his tenants and heuses to access the premises on the suit property. The plaintiff has averred that the defendants came to a market next to the suit property and asked the local residents to construct structures on the said road reserve in front of the suit property without any authority from the interested parties. The plaintiff has averred that following that call by the defendants, the residents of Joska begun erecting business structures in front of the suit property. The plaintiff has averred that in protest against the invasion of the said road reserve, he reported the same to the interested parties so that they may take the necessary action to remedy the situation. The plaintiff has averred that although the interested parties found that the said structures were illegal, the same having been put up without the necessary approvals, the interested parties failed to demolish the same without giving any reason. The plaintiff has averred that his request to those who had put up structures on the said road reserve to remove the same was not heeded as they claimed that the same had been put up with the permission of the 1st defendant who was the area Member of the County Assembly.

The plaintiff has averred that he is aggrieved by the defendants' actions of directing people to put up structures for business on the frontage of a private property and a road reserve without proper consultations with the private owners and the interested parties. The plaintiff has contended that the said structures have blocked vehicles from accessing the suit property. The plaintiff has averred that it is unfair for people to be allowed to build structures on the frontage of private properties without consultation and relevant approval from the interested parties. The plaintiff has contended that the said structures have been put up illegally and as such the owners thereof should be compelled to bring down the same.

The defendants never entered appearance. They did not therefore respond to the application. The interested parties responded to the application although no orders had been sought against them.

The 1st interested party's case:

The 1st interested party responded to the application through a replying affidavit sworn on 2nd December, 2016 by Thomas Gacoki. The 1st interested party contended that it has a mandate under section 4 of the Kenya Roads Act Chapter 408 Laws of Kenya to construct, upgrade, rehabilitate and maintain roads under its control; to plan the development and maintenance of national roads and to control national roads and road reserves. The 1st interested party has averred that its mandate extends to the management and protection of road reserves which accommodate utility service facilities such as electric cables, gas, water, and sewage pipes and also provide room for road alignment and expansion. The 1st interested party has averred that the suit property is located at Joska trading center along kamulu-kangundo road (C98) section and abuts the road reserve. The interested party has averred that the road reserve between the said property and the main road is under its control. The 1st interested party has admitted that there were structures encroaching on the said road reserve section of Kamulu-kangundo (C98) road and that the 1st interested party did not authorize the construction of the same.

The 1st interested party has averred that section 49 of the Kenya Roads Act outlines acts that cannot be done without the permission of the 1st interested party and these include putting up structures on a road reserve. The 1st interested party has averred that it has power to issue a notice for the removal of unauthorized structures and also to remove the same at the expense of those who have put them up. The 1st interested party has contended that its protection team was reviewing the encroachments on road

reserves under its mandate in the lower eastern region including along the road reserve section of Kamulu-kangundo road (C98) with a view to identifying the trespassers before taking appropriate action.

The 2nd interested party's case:

The 2nd interested party responded to the application through a replying affidavitsworn on 18th May, 2016 by its Chief Legal Officer, James M.Kathili. The 2nd interested party has contended that it has no mandate to authorize, deny or preventerection of structures on road reserves. The applicant has contended that Kenya Roads Act, Chapter 408 Laws of Kenya has established 3 entities that deal with roads and road reserves namely; Kenya National Highways Authority, Kenya Rural RoadsAuthority and Kenya Urban Roads Authority and that the mandate to control roadside developments rest with the relevantentity depending on the road classification. The 2nd interested party has averred that Kangudo road to Tala is classified as C99 meaning that it is a national road in accordance with the classification of roads in the 1st schedule to the Roads Act. The 2nd interested party has stated that section 49 of the Kenya Roads Act provides for acts that can only be done with the permission of the relevant authority. The 2nd interested party has averred that it is the duty of Kenya National Highways Authority, the 1st interested party herein to approve developments on road reserves. The 2nd interested party has contended that it is not its function to permit or prevent erection of structures on road reserves. The 2nd interested party has contended that it was wrongly joined in this suit as it has no interest in the subject matter of the suit given the fact that the road reserve in question falls within the mandate of the 1stinterested party as aforesaid. The 2nd interested party has urgedthe court to strike out its name from the suit.

Analysis of the parties respective cases:

The application was argued by way of written submissions. The plaintiff filed his written submissions on 1st February, 2017. The 1st interested party filed its submissions on 13th June, 2017 while the 2nd interested party filed its submissions on 13th February, 2017. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the interested parties in response to the application. Finally, I have considered the written submissions and the authorities cited in support thereof.

The plaintiff has sought both prohibitory and mandatory injunction. The principles applied by the court in applications of this nature are now well settled. As was stated in the case of Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case.

An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The principlesapplied by the court in applications for interlocutory mandatory injunction were stated in the case of Locabail International Finance Limited vs. Agro-Export (1988) 1 All ER 901,as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibition injunction.”

In the case of Shepherd Homes Ltd. vs. Sandham [1971] 1 ch.304,Meggary J. had this to say on

interlocutory mandatory injunctions;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiff has satisfied this court that he has unusually strong and clear case against the defendants that warrants the issuance of the prohibitory and mandatory injunctions sought. As I have stated earlier in this ruling, the defendants did not oppose the application. No material or evidence was placed before the court to controvert the averments made by the plaintiff against the defendants in the plaint and the present application. The plaintiff's contention that the defendants incited the residents of Joska trading center (Joska) to put up structures on the road reserve in front of the suit property thereby interfering with access to and other activities on the premises situated on the suit property have not been denied. The plaintiff's contention that the said structures are illegal has also not been controverted. I am in agreement with the plaintiff that the defendants' acts of inciting and encouraging the residents of Joska to put up illegal structures in front of the suit property thereby interfering with the plaintiff's business and access to the property were wrongful. I am also satisfied that the defendants have no right either by themselves or through their servants or agents to put up the said structures. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants in relation to their acts of inciting the residents of Joska to put up the offending structures in front of the suit property. I am also satisfied that the plaintiff would suffer irreparable injury which cannot be adequately compensated in damages if the orders sought are not granted. The plaintiff has in the circumstances made out a case for a grant of a temporary prohibitory injunction against the defendants.

As I have mentioned earlier, in addition to the prohibitory injunction, the plaintiff has also sought an order compelling the defendants to remove the structures which have been put on the road reserve in front of the suit property. This is the limb of the plaintiff's application that seeks a mandatory injunction. The plaintiff's case against the defendants is that they incited the residents of Joska to put up the structures in question. The defendants have not been accused of putting up the said structures. This means that the said structures have been put up by third parties who are not before the court. I am of the view that this court cannot compel the defendants to remove from the road reserve in contention, structures that were not put up by them. Furthermore, natural justice demands that the owners of the said structures be given a hearing before their structures are brought down. It is not clear to me why the plaintiff did not join in this suit as defendants the people who had put up the structures the subject of his complaint.

It is admitted that the 1st interested party has the mandate to manage developments on road reserves. The court cannot however order the 1st interested party to demolish structures which have been put up on a road reserve by people who are not before the court. In any event, the plaintiff has not sought such order as against the 1st interested party. As the 1st interested party has explained in its replying affidavit, for it to demolish illegal structures on a road reserve, it has to follow the due process which entail identifying the offending structures and sending out notices to the owners informing them that the structures are illegal and would be demolished unless the owners remove the same. The plaintiff did not come out clearly in his submissions why it was necessary to join the two interested parties to this suit as no relief has been sought against them.

For the foregoing reasons, I am not satisfied that the plaintiff has made out a case for a temporary mandatory injunction against the defendants.

The conclusion:

The upshot of the foregoing is that the plaintiff's application dated 2nd March, 2016 succeeds in part. The application is allowed in terms of prayer 2 thereof. Prayer 3 is also granted but limited only to the

defendants, their agents, employees or servants. It shall not extend to the persons the plaintiff has referred to as the defendant's "constituents". The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 19th day of December 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th defendant

Mr. Obok for the 1st interested party

N/A for the 2nd interested party

Catherine Court Assistant