



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 422 OF 2017(OS)

**IN THE MATTER OF LAND PARCELS NOS. LOC.8/KAGANDA/1654, LOC.8/KAGANDA/1655,
LOC.8/KAGANDA/1656 & LOC.8/KAGANDA/1657**

AND

**IN THE MATTER OF THE ESTATE OF NGARACHU CHEGE (DECEASED) LAND PARCEL
NO LOC.8/KAGANDA/73**

AND

**IN THE MATTER OF SECTIONS 7, 17, 32 & 38 OF THE LIMITATION OF ACTIONS ACT
CAP 22, LAWS OF KENYA**

BETWEEN

ESTHER WANJIKU MWANGI.....1ST APPLICANT

JAMES NGARACHU CHEGE.....2ND APPLICANT

WILSON GITONGA NGARACHU.....3RD APPLICANT

JOHN KAMAU NGARACHU.....4TH APPLICANT

VS

WAMBUI NGARACHU (Sued as the Legal Representative of the estate of

NGARACHU CHEGE).....RESPONDENT

RULING

1. The Applicants who are the registered proprietors of Loc.8/Kaganda/1654, 1655, 1656 and 1657(Original Loc 8/Kaganda/77) filed an Originating Summons on 17/7/17 under Order 37 Rule 7 of the Civil Procedure Rules and Section 7, 17, 32(1) and 38(3) of Limitations of Actions Act and all other enabling provisions of the law, seeking a declaration that they are entitled to an easement measuring 58m long by 3m wide over land parcel No. Loc.8/Kaganda/73 which they together with their families have used as an access to and from Loc.8/Kaganda/1654, 1655, 1656 & 1657 respectively since 1963. That the deceased Ngarachu Chege held the property Loc.8/Kaganda/73 subject to the easement in trust for the Applicants and that the portion of 58m long by 3m wide in Loc.8/Kaganda/73 is now extinguished and the Applicants are entitled to be registered as the owners of the same.

2. Simultaneously to filing the Originating Summons the Applicants also filed a Notice of Motion on even date seeking Orders as follows;

a) Spent.

b) That pending the hearing and determination of this application, this Honourable Court be pleased to issue an interim mandatory injunction compelling the Respondent to open up the access road passing through land parcel No. Loc.8/KAGANDA/73 and in default, the Applicants be at liberty to open it.

c) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an interim mandatory injunction compelling the Respondent to open up the access road passing through land parcel No. LOC.3/KAGANDA/73 and in default, the Applicants be at liberty to open it.

d) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an interim mandatory injunction compelling the Respondent to restore the water pipes laid along the access road and in default, the Applicants be at liberty to restore it.

e) That costs be provided for.

3. The application is premised on interalia the following grounds;-

a) The access road appears on the relevant Registry Index Map.

b) Prior to the closure of the access road sometimes in the year 2014, the Applicants had openly and peacefully used it to and from their lands to wit Loc.8/Kaganda/1654, 1655, 1656 and 1657 since the year 1963, a period of over fifty-one (51) years.

c) The aforementioned land parcels resulted from subdivision of Loc.8/Kaganda/77 which shared a common boundary with Loc.8/Kaganda/73.

d) There is a water pipes laid along the access road which the Respondent diverted after closing the road thus denying the Applicant's access to water.

e) The closure of the access road has forced the Applicants to use an alternative but dangerous route in Order to access the main road thus causing them extreme hardship.

f) The Applicants have school going children who have been greatly prejudiced by the actions of the Respondent.

4. Further the application is supported by the affidavit of James Ngarachu Chege in which he deponed that the Applicants are registered owners of Loc.8/Kaganda/1654, 1655, 1656 and 1657 respectively which parcel resulted from the subdivision of land parcel No. Loc.8/Kaganda/77, the latter having been owned by their father. Certified copies of certificates of official searches for the parcels are enclosed.

5. He deponed that the parcels Loc.8/Kaganda/77 & 73 shared a common boundary. That in 1963 the late Ngarachu Chege granted the Applicant's father a portion of his land Loc.8/Kaganda/73 measuring 58M long by 3m wide as an access road and in return got a similar portion in measurement from land parcel No. Loc.8/Kaganda/77. That the Applicants have been using the land as access since 1963 without any interference, not even the deceased wife until 2014 when the Respondent blocked the access road and diverted water pipes laid along the access road to her home denying them access to water. Other services that have been affected include Medicare, Schools as they have to traverse a longer route through thickets, rough and steep terrain to access those services.

6. Further that they have unsuccessfully tried to resolve the matter through the local administration.

7. In response the Respondent opposed the application and termed the application unmeritorious and incompetent and good for dismissal. Whilst confirming that she is the legal administrator of the estate of Ngarachu Chege, she admitted that their Land Loc.8/Kaganda/73 and that of the Applicants father (Loc.8/Kaganda/77) shared a common boundary, which land was subdivided into Loc.8/Kaganda/1654, 1655, 1656 and 1657. She contended that the said parcels of land are accessible to the main road. That the original owners of Loc.8/Kaganda/73 & 77 being friends allowed each other to utilize a cross path through their respective land parcels, to fetch water and access to the road and vice versa. That the access path was equally accessible to the neighbours as well as the public.

8. She further deponed that it is the Applicants family that closed the path through their land and her family has to use the main road to go round and fetch water. She stated that overtime and enmity has developed between her family and the Applicants caused by the Applicants push to enforce an access through her land. The dispute has been before the local administration, clan members and in both instances it was decided that the access road be closed for harmony sake.

9. It is her position that her late husband did not transfer any portion of her land to the Applicants during his lifetime nor was any compensation paid for use of an access road through her land. She challenged the authenticity of the mutation forms adduced by the Applicants saying that they are not genuine. That the High Court issued an injunction against the Applicants & District Land Surveyor when they intended to enforce a fraudulent subdivision on the land or in any way trespassing or intermeddling with the parcel Loc.8/Kaganda/73.

10. She stated that the Applicants are misleading the Court by stating that they are suffering by using the main road which is also being used by the whole village and other members of the public. In Para 27, she however avers that the Applicants are not entitled to the said portion of land since the land belonged to her husband who had only allowed a footpath and not an access road as alleged.

11. Parties agreed to canvass the application by way of written submission. The Applicants submitted that the law governing grant of interlocutory injunction is found in section 63 (c) of the Civil Procedure Act Cap 21, Order 40 Rule 1 of the Civil Procedure Rules (2010). In both instances the Court is clothed with power to grant a temporary injunction to prevent the ends of justice from being defeated and in the second case to preserve the suit property where in the opinion of the Court the suit property is in danger of being wasted, damaged or alienated. That section 28 (c) of Land Registered Act No. 3 of 2012 provides that all registered land is subject to rights of way, water and profits subsisting on the title. Section 32(1) (b) & (c) of Limitations of Actions Act Cap 22 states that a way or a water course which has been enjoyed peacefully and openly as of right without interruption for 20 years is absolute and indefeasible. The Applicants placed reliance on the following cases to support their application; -

a) Giella vs Cassman Brown (1973) EA 358.

b) Mrao –vs- First American Bank of Kenya Limited & 2 Others (2003) KLR 125.

c) Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) EKLR.

d) Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd Civil Case No. 74 of 2000 (2005) KLR.

e) Kamau vs Kamau (1984) eKLR.

f) Equator Inn Limited t/a Tsavo Inn Hotel v National Oil Corporation of Kenya Limited (2017) eKLR.

12. The Respondent submitted that the Honourable Court does not have Jurisdiction to determine the dispute that is already before the High Court in Murang'a Succession Cause No. 184 of 2012 where the Court issued an Order of temporary injunction on 24/10/16 restraining the District Surveyor from entering, interfering, subdividing or in any way trespassing land No. Loc. 8/Kaganda/73. Quoting Section

45 of the Succession Act Cap 160, the Respondent submitted that, granting the Applicant's application will amount to intermeddling with the property of the deceased. In any event the Respondent's submitted, the Applicants should have filed a protest in the ongoing Succession Cause No. 184 of 2012. Further the Respondent averred that the Applicants have through fraud created a new map in respect to land Loc. 8 /Kaganda/73 while the earlier map that subsisted during the lifetime of the Respondent's husband does not show any access path.

Analysis & determination

13. I have considered the application herein, the rival affidavits and the submissions and the issues that commend themselves for determination are; whether the Court has jurisdiction to determine the application; whether in the circumstances the Applicant has established a *prima facie* case with a probability of success to warrant the grant of interim mandatory injunction.

14. Does the Court have jurisdiction to entertain this application? Jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the Court to pause and determine the issue before proceeding with the case. The Supreme Court of Kenya in the cases of In **Re the Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & A nother v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

15. Parliament in its wisdom under Article 162(2) (b) of the Constitution established the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The Article provided that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. Under the Environment and Land Act No.19 of 2011 the following provisions have been made;

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

It is plainly clear from the above provisions of the law that the Court enjoys wide powers to hear and determine cases relating to land use and occupation *inter alia*. In this case the claim is for entitlement to an easement provided by a dominant and a servient tenement based on trust. I find and hold that this Court has jurisdiction to hear and determine this matter.

16. It is the Applicant's case that the two properties Loc. 8/Kaganda/73 & Loc. 8/Kaganda/77 are both dormant and servient. It is on record that the owners of plot Loc. 8/Kaganda/77 are using plot no Loc.

8/Kaganda/73 to access the road. Clearly the two lands are adjoining to each and are owned by different people. The benefit obtained out of the use of the land of the servient tenement and the dormant tenement is access to road and water and vice versa. Section 32 of the Limitations of Actions Act state as follows;

“Where—

(a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or

(b) any way or watercourse, or the use of any water, has been enjoyed as an easement; or

(c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.”

Where the above requirements have been satisfied the right of a way is attached to land even if the land is sold to a third party. The encumbrance in form of a right of way subsist on the land and land would be sold subject to that right of way. This being a general right of way, the neighbour who uses it acquires the right over a period of time. There is no provision that the portion of the land on which the right is embedded or attached need be surveyed or excised out of the land. It remains attached to the land.

17. Does asserting a right of way mean intermeddling with the deceased land? On the face of it, it appears that the Applicants are claiming an interest that attaches to the land. In any case the temporary injunction issued in the High Court was against the District Surveyor restraining him from surveying the suit land. It would appear that the prayer in this application is for opening an access road, a right which is of a nature of an easement which carries the form of an overriding interest, if proved by the Applicants as such. I differ with the Respondent on the issue of intermeddling and I hesitate to say more on the same and leave it to the trial Court to make enquiries.

18. The Applicant’s main application is that of a mandatory injunction. There are no special circumstances that would lead this Court to grant an interim mandatory injunction. An interim mandatory injunction, carries a finality to it. The Applicants have rephrased the application and converted it to that of a temporary injunction in their submissions and have submitted extensively on the same. The Respondent have neither addressed/responded to either the mandatory injunction or temporary injunction and instead have raised issues of Jurisdiction of this Court to determine the matter at hand as well as the issue of intermeddling with the deceased’s property, which I have dealt with above.

19. The principles of granting a mandatory injunction are well settled and set out in the following cases;

In the case of **Nandan Pictures Ltd. Vs. Art Pictures Ltd & others, Air 1956, Cal 428**, Chakravartti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in Order that the Defendant cannot take advantage of his own act and defeat the suit by

saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

In **Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34**, Megarry, J. stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions 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 will be granted, even if it is sought in Order to enforce a contractual obligation

No reasons have been adduced in this case to warrant granting of a mandatory injunction.

20. As well the principles for granting a temporary injunction are set out in the case of **Giella vs Cassman Brown (1973) EA 358**. which are: that firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

21. I have taken the liberty to analyse the principles relating to both a temporary injunction and mandatory injunction because the Respondent's having had responsibility to respond to either did not do so notwithstanding filling their submissions. The Respondent submissions are totally different from their pleadings as contained in the affidavit.

22. Because of my findings that the matters raised in the originating summons are substantial matters and cannot be determined by way of an interim application. The issues raised in the originating summons would call for enquiries which should be by way of carrying out a trial. If the application is to be determined as filed. i.e. Mandatory injunction it would substantially determine the originating summons without the Court having heard the benefit of the necessary evidence on trial to support the allegations made. On the face of the suit the appropriate remedy at this stage would be the consideration of an interim injunction or such Orders pending hearing of the suit.

23. As to whether the Applicants have established a prima facie case the Court observes that the dormant and servient tenements have been established in as far as the two plots are adjoining and deriving benefits from each other. Secondly the Respondent has admitted of the existence of a mutual access between the owners of the two plots before their demise. It is also on record that there has been long usage of the path as an access road for the Applicants other members of the public. There is also an admission that indeed the Respondent has closed the road. She has also not denied that the said access was used by the Applicants, the neighbours and the public at large.

24. In respect to whether the Applicant will suffer irreparable harm, it is already established that the benefit accruing above is the access to the main road and the foreclosure of the right of the Respondent because of the 20(twenty) years rule, if proved. It is not necessary to look into the third limb of balance of convenience.

25. Empowered by section 3A and 63 of the Civil Procedure Act and to meet the ends of justice in this case I make Orders as follows;

a) That pending the hearing and determination of this suit, the Respondent is hereby directed to open up the access road passing through land parcel No. LOC.3/KAGANDA/73 and restore the

water pipes laid along the access road within the next 30 days from the date hereof.

b) In default, the Applicants be at liberty to open it and the O.C.S of the area shall ensure law and Order during the Plaintiff's opening of the said access road.

c) Parties be at liberty to set the matter down for pretrial and compliance to Order 11 of the Civil Procedure Rules at the earliest instance.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF DECEMBER 2018.

J G KEMEI

JUDGE