



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO.301 OF 2014

JUDE THADEUS RAGOT.....APPLICANT

VERSUS

CHINA OVERSEAS ENGINEERING GROUP CO LTD..... RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY2 RESPONDENT

RULING

1. **Jude Thadeus Ragot**, the Applicant by notice of motion dated 14th October 2014, prays for **China Overseas Engineering Group Co Ltd** and **Kenya National Highways Authority**, hereinafter referred to as the 1st and 2nd Respondents, to be restrained from demolishing the perimeter fence surrounding parcel **East Kisumu/Dago/1020** pending the hearing and determination of this suit. The application is based on the five grounds on the notice of motion and supported by the Applicant's affidavit sworn on the 14th October 2014. The Applicant deposes that the said land borders Kisumu – **Kakamega - Webuye – Kitale Highway** and that it is fenced with barbed wire, chain link and live hedge. That in July 2014 he noted some white markings had been put about 4 metres along the fence on the inside, and on making enquiries from the Respondents' office on 12th September 2014 and 11th October 2014 was notified that the 2nd Respondent intended to value that portion and offer compensation but due to the likely delay in the process, they would take the portion to make way for the ongoing road construction. That the fence does not fall within the road reserve and if demolished would expose him, his family and properties to insecurity and hence the application. The court granted temporary injunction *exparte* in terms of prayer 2 on 14th October 2014.
2. The application is opposed by the 2nd Respondent through the replying affidavit sworn by **Engineer J.O. Otiato** on 9th March 2015 in which he deposed that the fence in dispute is on the road reserve to the extent of 2.3 to 5 metres totaling 0.06 hectares. That the area of the road reserve incorporated into the Applicant's plot has increased its area from 0.23 hectares to 0.29 hectares. That the fence erected by the Applicant on the road reserve is hampering the progress of the construction of the road which is project with considerable public benefit.
3. The Applicant filed a supplementary affidavit sworn on 12th October 2015 to which he annexed a report from one **Patrick Opiyo Adero**. The application came up for hearing on 20th January 2016 when Mr Ragot and Mr Nthiga advocate for the Applicant and 2nd Respondent respectively made their rival submissions. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties and the submissions of both counsel and come to the following determinations:
 - a) That from the affidavit evidence and submissions by both parties counsel, the only dispute between the Applicant and the 2nd Respondent is whether the Applicant fence erected along the face of his

plot bordering the Kisumu - Kakamega – Webuye – Kitale highway has encroached into the road reserve or not. The position taken by the Applicant is that the fence is on the correct position while the 2nd Respondent takes the position that the fence has encroached onto

the road reserve by an area of about 0.06 hectares along a strip measuring 2.3 to 5 metres. These measurements are based on undated and unsigned report by one **Leo Wanyonyi Namukhasi** which is in the 2nd Respondent's list of documents. The court agree with the Applicant counsel's submissions that the court cannot place much value on the contents of the said report without the maker having appended his signature on it. That notwithstanding the office that deal with boundary disputes is the **Land Registrar** who has not been involved in this matter as required in accordance with **Section 18 of the Land Registered Act No.3 of 2012**. The provision **Section 2** requires the court not to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with that section.

b) That the 2nd Respondent has denied the Applicant's claim that its officers had informed the Applicant that the portion in dispute was not part of the road reserve or that they were intending to acquire it for road construction as it had always been part of the road reserve. The court has in (a) above found that the issue of boundary dispute can and should be handled by the Land Registrar, who normally works in conjunction with the Survey office, to determine whether the Applicant's plot has encroached onto the road reserve, and if so by what acreage.

c) That for the court to grant the prayer sought the Applicant must establish a *prima facie* case which is one of the three principles for granting of interlocutory injunction set out in the classic case of **Giella -V- Cassman Brown & Co Ltd** [1973] E.A 358. The Applicant herein has shown that the fence in dispute has been there for long and the Respondents had not interfered with it until during the current road expansion project. Unlike the position in the case of **Joseph Amana Okethe -V- Peter Ochar & 2 others** [2013] eKLR, it is only the Land Registrar who can confirm the correct position of the common boundary between the Applicant and the Kisumu –Kakamega – Wabuye – Kitale. Thereafter the court would be in a position to determine whether the Applicant has trespassed onto the road reserve or vice versa.

d) That the Kisumu – Kakamega – Webuye – Kitale highways is without doubt a project of great public importance, interest and benefit. The court has to therefore weight the interest of the Applicant and the whole public in determining whether or not to

grant the injunction sought. The road project is ongoing and the interim order issued **must** have had some drawback on the project at that area. If the court was to grant the prayer until the suit is heard and determined, and finally it be determined that there is no encroachment onto the road reserve by the Applicant, the 2nd Defendant will have to commence the process of acquiring that portion, if the road design already being implemented are to be followed. The alternative would be to change the design to accommodate the loss of that portion. The other extreme is that if the Applicant was to lose his claim, the public would have lost due to the

delay of completion of the road. While the Applicant's loss, if he succeeds in his claim, would easily be computed and appropriate orders issued on compensation, the loss to the public, if the Applicant lost in his claim would be difficult to compute and recover. The court therefore agrees that like in the findings in **Veronicah Waithira, Trustee of Inter-Christian Churches & 3 Others -V- Kenya National Highways Authority** [2014] eKLR, the wider and public good and interest would militate against injuncting the Respondents as the Applicant can adequately be compensated in damages.

e) That the Applicant can easily ensure the removal of the fence will not expose his compound to unnecessary exposure to insecurity by ensuring that the existing fence is removed and erected on the position marked by the Respondents.

4. That having come to the determination set out above the court find that the notice of motion dated 14th October 2014 is without merit and the following orders are issued:-

a) The notice of motion dated 14th October 2014 is dismissed with costs.

b) That the court on its own motion directs the parties to maintain the existing status quo for 30 days to enable the Applicant take measures to ensure the security of his compound is not compromised by the works being carried out by the Respondents.

c) The court on its own motion further directs that the County Land Registrar and Surveyor do visit land parcel **East Kisumu/Dago/1020** and confirm the acreage of the said parcel, the position of its boundary of the face bordering Kisumu – Kakamega – Webuye –Kitale highway, whether it has encroached onto the road reserve and if so by what acreage.

The Land Registrar is to file the report with the court within **60 (sixty) days**. That the parties herein be at liberty to engage Surveyor of their own choice to observe the exercise being carried out on their behalf.

d) That the Applicant do meet the County Land Registrar and Surveyor

costs for the exercise in (c) above and such expenses be taken as part of the costs to be recovered if successfully in the main claim.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 16th day of March 2016

In presence of;

Applicant Absent.

Respondents Absent

Counsel Mr Ragot for the Applicant

Mr Ted Omondi for the 2nd Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016

16/3/2016

S.M. Kibjuna J

Mr Oyugi court assistant

Mr Ted Omondi for Ntuinga for 2nd Defendant/Respondent.

Mr Ragot for the Plaintiff/Applicant

Court: Ruling delivered in open court in the presence of Mr Ragot for the Applicant and Mr Ted Omondi for Ntuinga for 2nd Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016