



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 743 OF 2015

MATHARE QUICK SERVICE LIMITED.....1ST PLAINTIFF

JOSEPH GITAU MUCHANE.....2ND PLAINTIFF

NJOROGE MBARUKI.....3RD PLAINTIFF

GACHORE GACHANJA NGARE.....4TH PLAINTIFF

ANNE NJERI.....5TH PLAINTIFF

MARY WANJA MUCHIRI.....6TH PLAINTIFF

FRANCIS G. IHURA.....7TH PLAINTIFF

P.C.E.A MATHARE WOMEN’S GUILD through.....8TH PLAINTIFF

HANNAH WANJIRU NJUGUNA – CHAIRPERSON

ANNIE WACHUKA – SECRETARY

TERESIA NDUTA KURIA – TREASURER

VERSUS

KENYA URBAN ROADS AUTHORITY.....DEFENDANT

RULING

The Plaintiffs filed an application dated **30th July 2015**, seeking an order that the Defendant be restrained from trespassing, or in any way interfering or demolishing structures on plot numbers 1, 15, 16, 17, 18, 19 and 20 in Mathare i.e. **L.R. No. 36/V/360, L.R. No. 36/V/333, L.R. No. 36/V/338** until the matter is heard and determined.

The application is premised on grounds that the land in question is owned by the 1st Plaintiff having acquired it through purchase and it is therefore private property. However, that the Defendant has encroached on the plots without due regard of the **Land Acquisition Act, Cap 295** and therefore in breach of **Article 40(3)** of the Constitution.

In the Supporting Affidavit sworn by the 2nd Plaintiff, the vice chairman of the 1st Plaintiff, he deposed that the plots are part of the original title **L.R. No. 36/V/16** purchased by the 1st Plaintiff from one **Esmail Adam** on **7th April 1986**. The purchase was a joint effort of the shareholders of the 1st Plaintiff who came together and contributed towards the acquisition of the property. It is deposed that during the current ongoing low income areas upgrade project, the Defendant contracted a road construction company which moved onto the property and embarked on demolishing structures thereon on the basis of constructing a road commonly known Mau Mau Road. The deponent maintained that there is already a provision for the said road and there is therefore no basis to displace the plot owners. The deponent urged the Court to grant the orders deposing that the plot owners stood to suffer irreparable loss notwithstanding the constitutional and legal protection on private property.

In support of the application, the deponent annexed copies of the purchase agreement between **Esmail Adam** and the 1st Plaintiff executed on **7th April 1986**; the deed plan showing the delineation of the various plots of the property and the road; and correspondence between the 1st Plaintiff and the Office of the Governor Nairobi County over the intended Government project and the looming eviction from the property.

Eng. Andrew Sirkoi Amai, the Regional Manager with the Defendant swore a Replying Affidavit on **24th August 2015**. He deposed that the Defendant is a State Corporation mandated with the development, management, rehabilitation, and maintenance of urban roads, road reserves and access to roadside developments under its control. It was his deposition that the road named Mau Mau Road on which the Defendant is undertaking improvement works is an existing road which has been in use by the general public and motorist. The said road starts from Mathare North Road and ends at Murstina Street, a stretch of about 3.2Kms and is within an existing road corridor clear of encroachments. The deponent maintained that works ongoing are improvement works on an already existing road serviced by major public utilities such as power, water and sewer lines and is clear of any settlements or developments and not construction of a new road as alleged. Further, that 60% of the work has been completed including surfacing with Asphalt concrete, drainage works among other works.

The deponent refuted the Plaintiff's allegation of demolitions deposing that the Defendant had not carried out any demolitions or issued any eviction notice. Further, that the Plaintiffs annexures –survey plan and deed plan - did not indicate any encroachment into their various plots but shows the clear outlines of the road serviced by electricity lines and street lighting. It was his deposition that the said road is not on private land and is therefore not subject to acquisition.

The application was canvassed by way of written submissions. On behalf of the Plaintiffs, Counsel submitted that for development carried out on private property, the **Kenya Roads Act**, which establishes the Defendant requires that it negotiates with the owner thereof, or through the Commissioner of Lands and subsequently acquire the land as specified in the **Land Acquisition Act**. Further, that the Constitution under **Article 40(3)** safeguards ownership of property as the state is barred from depriving a person of his property except in accordance with the law. It was submitted that the Plaintiffs had established ownership of the various plots and demonstrated the encroachment thereon by the Defendant in violation of the law. Consequently, that theirs was a prima facie case with chances of success to warrant the Court to grant injunction orders.

On behalf of the Defendant, counsel submitted that the Plaintiffs was underserving of the orders sought as they have failed to demonstrate any on-going demolition. Conversely, that the Defendant had annexed photographs to show that the construction works are a rehabilitation of an existing road and also that there is no encroachment on any property beyond the confines of the existing road. Consequently, that the Plaintiffs have failed to prove that they have a genuine and arguable case with the likelihood of success. It was also submitted that public interest does override private rights and therefore the residents of Mathare will stand to suffer in the event that the construction works are halted by an injunction.

At this stage, I am required to determine the application before me on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The

requirements are that the applicant must establish a *prima facie* case, and that they stand to suffer irreparable loss which may not be compensated by an award of damages. In the event that the Court finds that the two requirements are not satisfied, it may decide the application on the balance of convenience.

From the foregoing, ownership of the plots aforementioned is not disputed. It is also common that there is an upgrade of Mau Mau Road that runs along the Plaintiffs' plots. The dispute according to the Plaintiffs is that the Defendant in carrying out the road upgrading project is encroaching onto private property hence demolishing structures belonging to the Plaintiffs thereby occasioning loss. The Plaintiffs contend that the interference with their properties is without due regard to the **Land Acquisition Act** and therefore a violation of their proprietary rights safeguarded under **Article 40(3) of the Constitution**. The Defendant on its part maintains that the construction works is being carried out within the confines of an existing road and there is therefore no encroachment as alleged. Both parties availed photographs of the road works. One photograph produced by the Plaintiffs showed a building that has been marked for demolition and another showed a trench dug besides another building. The Defendants' photographs show road works on the road without any interference with the structures beside the road.

It is obviously that the evidence produced by the Plaintiffs as to encroachment is highly contested and contradicted by the evidence produced by the Defendant. This is an issue that can only be determined on trial upon further evidence. It would be prudent that a survey be undertaken to establish the extent of encroachment, if at all. On the foregoing, it is my finding that the Plaintiffs have not established a *prima facie* case and an injunction cannot issue. Even in the event that the Plaintiffs succeed to prove their claim of encroachment, an injunction in the circumstance would not be the viable remedy to give. I say so because, as the Defendant rightfully submitted, public interest overrides private rights. It is without doubt that the upgrade of Mau Mau Road will serve the greater public interest. See the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 others v Kenya National Highways Authority ELC Civil Suit No. 911 OF 2013 [2014] eKLR**. In safeguarding the right to ownership of property, **Article 40(3) (b) of the Constitution** envisages a situation where person may be deprived of its property where such deprivation is for public purpose or public interest, save that it must be carried out in accordance with the law. In the event that the Plaintiffs succeed in their claim, they can adequately be compensated in damages.

Having now carefully considered the Instant Notice of Motion and the written submissions, the Court makes the following findings:-

- 1. The instant Notice of Motion is not merited and the same is dismissed.***
- 2. Each party meets their own costs for the application.***
- 3. A Government Surveyor proceeds to the area and file a report within 60 days from the date hereof and the Plaintiffs be responsible to serve this order to the Director of Survey of Kenya.***

Dated, Signed and Delivered this 29th day of **April, 2016**

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiffs (though served)

Mr Kamau holding brief for Wambui Nganga the Defendant

Hilda : Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of Mr Kamau holding brief for M/s Wambui Nganga and absence of Mr Muya for the Plaintiffs though notified. The Defendant to serve today's directions to the Plaintiffs advocates.

Further mentions on 7th July, 2006 for government surveyors report. Mention Notice to be served.

L GACHERU

JUDGE

29/4/2016