



Loresho Gem Limited & another v Registered Officials of Loresho North Residents’ Association (Environment & Land Case E224 of 2023) [2024] KEELC 777 (KLR) (19 February 2024) (Ruling)

Neutral citation: [2024] KEELC 777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E224 OF 2023**

**JA MOGENI, J
FEBRUARY 19, 2024**

BETWEEN

LORESHO GEM LIMITED 1ST PLAINTIFF

JOHN EDWARDS 2ND PLAINTIFF

AND

THE REGISTERED OFFICIALS OF LORESHO NORTH RESIDENTS’ ASSOCIATION DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 20/12/2023 brought under order 40 Rules 1, of the Civil Procedure Rules Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders:
 1. Spent.
 2. That this Honorable Court be pleased to issue a mandatory injunction directing the Defendant/Respondent by itself, servant, agents, employees, proxies or any other person acting on its behalf to forthwith remove the wall erected in Loresho Close Road pending the hearing and determination of this Application.
 3. That this Honorable Court be pleased to issue a mandatory injunction direction the Defendant/Respondent by itself, servant, agents, employees, proxies or any other person acting on its behalf from erecting any walls or barriers intended to block and/or restrict the Plaintiffs/Applicants access to Loresho Close Road pending the hearing and determination of this Application.
 4. That this Honorable Court be pleased to issue a mandatory injunction direction the Defendant/Respondent by itself, servant, agents, employees, proxies or any other person



acting on its behalf to forthwith remove the wall erected in Loresho Close Road pending the hearing and determination of this suit.

5. That in the event the Defendant/Respondent are unwilling to remove the wall the plaintiff herein be and hereby permitted to remove the said wall.
 6. That this Honorable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by itself, servants, agents, employees, proxies and/or any other person acting on its behalf from erecting any walls or barrier intended to block and/or restrict the Plaintiffs/Applicants access to Loresho Close Road pending the hearing and determination of this suit.
 7. That the Officer Commanding Station, Spring Valley Police Station be ordered to facilitate the enforcement of the above orders and to keep the peace.
 8. That the cost of this application be provided for.
2. The grounds are on the face of the application and are set out in paragraphs 1 to 19.
 3. The application is supported by the affidavit of Shakeel Khan sworn on the 20/12/2023.
 4. When the parties appeared in court on 23/01/2024 for directions the Counsel for the defendant/respondent sought for about 7 days from the date of appearance in court to regularize their appearance in court and to file and Replying Affidavit.
 5. The leave was granted and the parties by consent agreed to canvass the application through written submissions.
 6. The defendant/respondent filed a replying affidavit sworn on 30th January 2024 confirming that there are construction works going on, on the aforementioned roads and their actions are well sanctioned by the National Government and Nairobi City County Policies and Development Plans.

The Plaintiffs'/Applicants' submissions

7. They are dated 14th April 2021. The defendants have commenced works on a neighbouring property calculated to block the Plaintiffs from accessing and using Railway Lane, Weruga Lane and Exchange Lane all being public access roads which service the Plaintiff's properties.
8. This court exercises its discretion upon principles that are well settled and were clearly discussed in the cases such as *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358; *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR; *Mrao Ltd v Frist American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
9. The Plaintiffs' are entitled to access and use of all access roads and lanes that serve their properties. These are public roads that have been blocked by the Defendants' actions.
10. A mandatory injunction will only be granted by the court in clearest of cases. They have put forward the case of *Shepherd Homes Ltd v Sandham* [1971] 1 CH 340; *Redland Bricks Ltd vs Morris* [1970] AC 652. The acts of trespass and an assault to the Plaintiffs' right to access and exit their properties have been detailed in the supplementary affidavit and the exhibits attached thereof.
11. The Plaintiffs have the legitimate expectation that the Respondents would at least notify them of the impending construction as the lawful owners of the suit properties.



12. The Plaintiffs being members of the public are entitled to use and enjoy public roads. There was a flagrant violation of the Plaintiffs' rights to the protection of their property under the law as granted by *the constitution*. They pray that the application be allowed.

The Defendant's/Respondent's submissions

13. They are dated 10th October 2021. The Plaintiffs' have not established a prima facies case. The entire area in which their properties sit was initially owned by the 1st Defendant. The allocations were in any event done irregularly and hived off the 1st Defendant/Property. The alleged wall being constructed by the 1st Defendant is within its own property and not on a public road as claimed. It has put forward the case of Mrao Ltd v First American Bank Ltd & 2 Others [2003] KLR 125.
14. On the prayer for a mandatory injunction, the Plaintiffs not having established a prima facie case are not entitled to the relief. They have put forward the case of Kenya Breweries Ltd & Another v Washington O. Okeyo 2002 [eKLR] where the Court of Appeal quoted with approval an English decision in the case of Labail International Finance Ltd vs Agro export and Others [1986] 1 All ER 901; Nation Media Group & 2 Others John Harun Mwau [2014] eKLR. They have prayed that the application be dismissed with costs.
15. I have considered the notice of motion, the supporting affidavit and the annexures. I have also considered the affidavits in response, the rival submissions and the authorities cited. The issues for determination are:-
- i. Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunction.
 - ii. Whether it has met the threshold for grant of mandatory injunction?
 - iii. Who should bear costs of this application?
16. The principles governing the grant of temporary injunction were set out in the case of Giella vs Cassman Brown & Co. ltd [1973] EA 358. In the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal stated what amounts to a prima facie case.
17. It is the Plaintiffs'/Applicants' case that the Defendant/Respondent on 30/10/2023 erected a wall on Loresho Close Restricting the Plaintiffs/Applicants access to their property. That the Director Planning and Compliance and Enforcement of the Nairobi City County issued an Enforcement Notice directing the plaintiffs to remove the wall immediately since it was being erected on a public access road but the plaintiffs could not comply since the wall was being erected by the Defendants/ Respondents.
18. Further that on 6/11/2023 the Director Planning and Compliance and Enforcement issued another notice requiring the wall to be removed within 7 days and the notice was never complied with.
19. That the 1st plaintiff is the registered proprietor of LR 7917/6 and the 2nd plaintiff is the proprietor of Land Reference number 7917/5 Loresho Nairobi and they have unrestricted vehicular access to Loresho close. That the access road was upon the subdivision of the of Land Reference Number 7917/1 into the ensuing subdivisions namely LR 7917/5, 7917/5 and 7917/1/3 the later being a condition of subdivision surrendered to the Government of Kenya as a road reserve to allow for vehicular access to the two subplots.
20. That LR Number 7917/1/3 is captured and recorded as a surrender on FR No. 462/99.



21. The Defendant/Respondent's case is that it is developing its own property and there is no encroachment on the Plaintiffs properties or on a public road.
22. The Application was canvassed by way of written submissions which the court has carefully read and considered.
23. The Court has also considered the pleadings in general and the annexures thereto. Further, the Court has also considered the cited authorities and the relevant provisions of law and makes the following rendition:
24. The Plaintiffs/ Applicants have sought for a mandatory order of injunction, seeking that the Defendants be directed to remove the wall erected on 30/10/2023 on Loresho Close Road which the Plaintiffs/ Applicants claim to have restricted their access to their property. However, this Court has noted that the bone of contention is whether or not the plaintiffs/applicants can use Loresho Close to access their property which they claim that the defendant's action of erecting a wall has interfered with. That all subplots neighbouring LR No. 7917/5 and LR 7917/6 Loresho Nairobi were allowed vehicular access following the surrender of subdivision LR 7917/1 which the plaintiffs claim allowed all vehicular access to all subplots from 18 m wide road. That since the subdivision the all the plaintiffs/ applicants have enjoyed access to their properties through Loresho Close Road which they allege to be a public road.
25. Further the Court has also noted that this is one of the prayers that has been sought by the Plaintiffs/ Applicants in their Plaint. Therefore, allowing the same will be tantamount to making a finding on the case without affording the Defendants/ Respondents a chance to be heard. It is this Court's considered view that the said prayer is not merited and cannot be allowed at this juncture.
26. The court in the case of *Locabail International Finance Ltd v Agro-export* [1986] 1 ALL E.R stated that;

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted on in a clear case”.
27. Further in the case of *Kenya Breweries Ltd v Washington O. Okeyo* [2002] eKLR the Court of Appeal quoted with approval the English decision in the case of *Locabail International Finance Ltd vs Agroexport and Others* [supra] where it was stated.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher 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 prohibitory injunction.”
28. I am guided by the above authority in finding that the plaintiffs/applicants have not demonstrated any special circumstances to warrant this court to issue orders to compel the Defendant/Respondent demolish the wall or for the plaintiffs/applicants to be allowed to demolish the wall themselves.



29. From my reading of the application I have also noted that the Applicants herein have sought for injunctive orders which are governed by Order 40 Rules 1(A) & (B) of the Civil Procedure Rules, which provides as follows: -

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

30. From the above provisions of law, it is very clear that the Court has discretion to grant temporary order of injunction in instances where the property in dispute is in danger of being wasted, damaged or alienated.

31. The suit property is a subdivision with a registration. On the other hand, the plaintiff's/applicants' properties are equally registered to their names.

32. The principles governing the grant of temporary injunction were set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal stated what amounts to a prima facie case.

33. It is the Plaintiffs'/Applicants' case that the Defendant/Respondent have commenced the construction of a wall which has completely blocked access to the Plaintiffs' property through Loresho Close a public road. The Defendant/Respondent's case is that Loresho Close Road is a road reserve of parcel LR 209/8336/246 and it hits a dead end with Loresho Crescent a horse-shoe shaped closed crescent.

34. Further that LR 7917/1/3 adjoins the end of Loresho Close Road Estate, and that there is no indication in the sub-division or anywhere else that the portion marked for surrender was earmarked as an access to the plaintiffs' parcels, LR 7917/5 and LR 7917/6 as alleged. That these two parcels already have access through northern boundary into Loresho Ridge road as captured in the subdivision plan FR 86/27 of 1988 and they therefore stated that LR 7917/1/3 cannot be an access road to Loresho close.

35. From the analysis hereabove I find that the Plaintiffs'/Applicants have failed to establish a prima facie case with a probability of success at the trial.

36. In the case of *Kenleb Cons Ltd v New Gatitu Services Station Ltd & Another* [1990] KLR 557 Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction”.



37. The Plaintiffs/Applicants have stated that the wall is being constructed on a public road which was surrendered through a subdivision. The defendants on their part have shown that the two parcels belonging to the plaintiffs are not served by the so called Loresho Close Road. The letter from the Director Surveys dated 22/03/2023 in response to the letter from the plaintiffs' lawyer dated 16/02/2023 state "from the records Loresho Close Road has not been captured as a private road". That statement does not provide information conclusively about the nature of the road and how or who should use it.
38. I therefore find that the balance of convenience tilts in favour of the Defendant/Respondent.
39. On the second limb if order not granted, the Applicants can adequately be compensated by an award of damages, this Court will echo the findings in the case of Olympic Sports House Ltd v School Equipment Centre Ltd [2012] eKLR, wherein the Court held that:-
- “ A party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.
40. Equally, the Applicants crystalized right herein cannot be adequately compensated by an order of injunction.
41. On the third limb, the Court acknowledges that the access road is in dispute and that is what will be determined in the main suit. However, it is clear that when the Court is in doubt, it should decide on balance of convenience. As the Court cannot at this juncture authoritatively state where the access road lies, whether public or private, it is its considered view that then the balance of convenience lies in maintaining the status quo. The status quo herein being that further construction of the wall or destruction of the wall ought to be stopped until the matter is determined.
42. In the case of Kenleb Cons Ltd v New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) held that:-
- “ to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction”.
43. The defendants have averred in their replying affidavit that for the last 48 years Loresho Close Road has always been utilized for the sole and exclusive use of Loresho Crescent Estate residents since the subdivision in 1975 under FR 129/71. The defendants produced copies of letters that they have written to the relevant authorities to complain about impugned access through Loresho close to the 1st plaintiff's property which was purportedly created without consultation of the residents.
44. Even if it is assumed, that the defendant was wrongfully putting up a wall on a public road as claimed by the plaintiffs, I am of the view that it not open to the plaintiffs to forcefully enter the suit property and demolish the said wall especially before the final determination of the main suit and also without a court order directing for demolition.
45. I therefore find that the balance of convenience tilts in favour of the defendant/respondents.
46. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2024.



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MOGENI J

JUDGE

In the virtual presence of:-

Mr. Charles Ojuok for the 1st and 2nd Applicants/Plaintiffs

Mr. Koech for the Defendant/Respondent

Ms. Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

