



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 878 OF 2014**

**FREDRICK MWATHI PERE.....PLAINTIFF**

**VERSUS**

**NELLEA LIMITED.....1<sup>ST</sup> DEFENDANT**

**NJOROGE MUGUKU.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO DISTRICT.....3<sup>RD</sup> DEFENDANT**

**RULING**

Following an application dated 2<sup>nd</sup> July 2014, this court granted injunction orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from entering the Plaintiff's property known as **Ngong/Ngong/12190** and **12189** and excavating, building, developing or in any other manner howsoever from interfering with the Plaintiff's occupation and possession thereof and demolishing houses erected by the Plaintiff thereon and in particular on the portions demarcated by the 3<sup>rd</sup> Defendants which have been in possession occupation of the Plaintiff. It is this order that the Plaintiff seeks to have confirmed pending the hearing and determination of the suit. The Plaintiff also seeks further orders as follows:

- i) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, whether acting by themselves, their agents, servants, employees, contractors and/or any other persons whatsoever, be restrained by an order of injunction from blocking access by the Plaintiff, Plaintiff's tenants and other persons authorized by the Plaintiff of the suit properties **Ngong/Ngong/12190** and **12189** through the access road adjoining property **Ngong/Ngong/3545**.
- ii) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants be compelled by an order of mandatory injunction to refill and restore to usable state and condition, the excavated portions forming part of properties **Ngong/Ngong/12190** and **12189** and in particular portions excavated in line with demarcation done by the 3<sup>rd</sup> Defendant on 27<sup>th</sup> June 2014, being the portions which have been in possession and occupation of the Plaintiff.
- iii) The Defendants do bear the costs of the application.

The application is premised on grounds outlined thereunder and supported by an affidavit sworn by

**Margaret Wanjiru Pere**, the Plaintiff's attorney pursuant to the Power of Attorney dated 1<sup>st</sup> June, 2014. She deposes that the Plaintiff is the registered owner of the **Ngong/Ngong/12190** and has beneficial interest in and **Ngong/Ngong/12189** registered in the name of **Margaret Wanjiru Pere** and that the Plaintiff has erected permanent buildings on the properties which have been let out for rent to tenants both for business and residential purposes. Further that the suit properties are adjacent to **Ngong/Ngong/3545** registered in the name of **Nelson Muguku** (now deceased). It is her disposition that the 3<sup>rd</sup> Defendant has unilaterally annexed portions of the Plaintiff's properties known as **Ngong/Ngong/12190** and **12189** (hereinafter the suit properties) contending that the annexed portion forms part of the adjoining property known as **Ngong/Ngong/3545**. Whereas that the 3<sup>rd</sup> Defendant's decision lacks basis in law pursuant to a ruling delivered by the then Land Registrar on 14/6/2006 that there was no boundary dispute between the suit properties and **Ngong/Ngong/3545**. The deponent stated that the Defendants did not appeal the findings of the Registrar but re-opened the matter in 2014, to which the Plaintiff opposed.

The deponent states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 28<sup>th</sup> June 2014, forcefully and unlawfully encroached on the suit properties, pulled down the fence demarcating the boundaries thereof undertook large portions of the suit properties to the substantial detriment of the Plaintiff and other persons residing thereon. It is also deposed that the excavation works undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the suit properties have completely blocked the Plaintiff's and his tenants' access through the access road provided and further exposed the tenants and especially their children to great risk of falling into trenches. Further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' intention is to construct on the disputed portion thereby permanently alienating the portions of the suit properties from the Plaintiff.

The application is contested and Daniel Muthanji, the Director of the 1<sup>st</sup> Defendant swore a Replying Affidavit on 31<sup>st</sup> July 2014 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants wherein he deposed that the permanent buildings referred to by the Plaintiff are not erected on the suit properties as alleged. He avied tht the plaintiff's buildings are on a designated public road thereby rendering members of pubic no alternative passage. Further that there is no order degazetting the public road in question where the Plaintiff has opted to carry out the construction which is clearly outside of their parcels. The deponent refuted the allegation that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had encroached on the Plaintiff's properties deposing that it is the Plaintiff who has continued to encroach on the public road and as a result, members of the public are forced to seek an alternative route through **Ngong/Ngong/3545** which is tantamount to them trespassing thereon.

Further on response to the Respondents' allegations, **Margaret Wanjiru Pere**, swore a Supplementary Affidavit on 25<sup>th</sup> August 2014, wherein she deposed that the Defendants had not furnished any evidence to suggest that the Plaintiff has encroached onto a public access road. It was her disposition that the boundary adjoining the suit properties and the public road was delineated in 1975 when the Plaintiff's father sold to one **Edward Miako Wanjau** a parcel of land measuring 4 ½ acres and thereafter planted an L shaped hedge boundary separating the road and the Plaintiff's properties which existed until 28<sup>th</sup> June 2014, when the same was uprooted by the Defendants whilst carrying out their excavations. It is further deposed that the property known as **Ngong/Ngong/3545** was excised from the said portion of 4 ½ acres and sold to **Nelson Muguku** (deceased) in 1977 by which time the fence was already in place.

The application was canvassed by way of written submissions. Lesinko Njoroge & Gathogo Advocates for the Plaintiff filed submissions dated 23<sup>rd</sup> September, 2014 wherein counsel submitted that the Plaintiff satisfied the requirements to warrant the grant of temporary orders of injunction. It was submitted that the Plaintiff had demonstrated that the buildings erected are his property and that there was nothing to show that they are on a road reserve. Further that there was suffering and hardship visited upon the Plaintiff as a result of the excavations undertaken and intended construction by the Defendants thereby inconveniencing the Plaintiff's tenants and thus damages would not be an adequate remedy. Counsel also submitted that the circumstances of the case are that the balance of convenience tilts in favour of the Plaintiff.

Counsel also submitted that the Plaintiff had demonstrated the existence of special circumstances to warrant the grant of mandatory order of injunction at the interlocutory stage. It was counsel's submission that the Plaintiffs had shown that the Defendants' impinged on the Plaintiff's proprietary rights and interests over the suit property and that the huge excavation is not only inconveniencing, but a grave danger to the Plaintiff and his tenants. Counsel urged the court to direct the Defendants to refill and restore to a usable state and condition, the portions excavated in order to maintain the status quo obtaining prior to the illegal actions of the Defendants.

Miller & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 25<sup>th</sup> September 2014, wherein counsel submitted that the dispute between the parties is that the Plaintiff has annexed a portion of the designated public road that runs between his properties and the 2<sup>nd</sup> Defendant property thereby greatly inconveniencing the members of the public who created an alternative bypass on the 2<sup>nd</sup> Defendant's property. Counsel referred to the finding of the Land Registrar on 14<sup>th</sup> November, 2006 which was to the effect that 2<sup>nd</sup> Defendant had suffered great prejudice as a result of the trespass on his property and was thus at liberty to recover the portion from the designated public road equivalent to the alternative bypass created through the 2<sup>nd</sup> Defendant's property. The court was further referred to the decision of the District Land Registrar of 27/6/2014 which directed the surveyor to amend the Registry Index Map effectively giving the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the right to proceed with the recovery.

It was submitted for the Defendants that injunction orders can be sought by a person who stands to incur loss due to the action of the other party and that the Plaintiff herein being guilty of unconscionable conduct, is underserving of the orders sought. Further that it is not in order for the Plaintiff to seek equitable remedy based on a claim to property that is tainted with illegality. Counsel submitted that the construction being undertaken by the Defendants is solely on their own property which the Plaintiff has no legal interest over. Counsel urged the court to disallow the application submitting that the Plaintiff had failed to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in anyway interfered with his properties nor has he shown that the Defendants' enjoyment of their property will impede on the use of his properties.

Having now considered the pleadings, annexures and the submissions it is evident from the summary of the pleadings that the dispute is an access road serving both parties, their tenants as well as owners of adjoining plots. According to the Plaintiff, the boundary dispute was solved in 2006 with the findings of the District Land Registrar pursuant to the authority given under Section 21 of the Registered Land Act (now repealed). The Plaintiff contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had a right of appeal which they did not exercise only to re-open the matter in 2014. I have perused the said decision and I do take note that it is Nelson Muguku (now deceased) who had moved the District Registrar's office to adjudicate over the matter but failed to attend the site visit which proceeding ex-parte. The finding of the Registrar (D.K. Nyantika) on 14<sup>th</sup> November, 2006 was that there was no boundary dispute.

It appears that the Defendants a second time moved the office of the Registrar sometime in 2014. The Plaintiff herein was served with an undated summons to attend which through his counsel in a letter dated 12<sup>th</sup> June, 2014 stated that he would not be in a position to attend owing to his being out of the country. The Plaintiff's counsel made reference to the District Land Registrar's decision of 14<sup>th</sup> November, 2006 stating that the same could not be overruled by another District Land Registrar but on appeal to the High Court. It follows therefore that the Plaintiff did not attend the said site visit nor send a representative. Similarly, the site visit proceeded and was determined ex-parte on the part of the Plaintiff. The District Land Registrar (R. K. Kalama) on 27<sup>th</sup> June, 2014 inter-alia directed the surveyor to amend the Registry Index Map to reflect what appear on the ground and fix the beacons.

In my view "what appears on the ground" is the dispute between the parties. The Defendants aver that the Plaintiff has encroached on a public access road and erected buildings thereon forcing members of the public to form an alternative access through their property thereby inconveniencing them. As a result, they approach the office of the District Land Registrar which ordered that they recover the portion used by the public as the access road from the designated public road. The Plaintiff disputes these averments stating that his buildings are constructed within his properties and not on the public road. Further that

there is no boundary dispute and that the Defendants are blatantly trespassing on his properties.

This dispute is one that the court cannot make a proper finding devoid of a trial. It is at the hearing that the court will be seized with all the information necessary to make a proper determination. It is thus best for the parties to maintain the status quo pending the hearing of the case. The challenge that presents itself now is which status quo should prevail. The Plaintiff contends that the status quo should be what was obtaining before the Defendant's action of trespassing and excavating portions of his property. Further that the Defendants' action is not only inconveniencing, but is a great danger to his tenants. Other than the status quo, the Plaintiff seeks a mandatory order of injunction directing the Defendants to refill and restore to a usable condition the excavated portion. The Defendants' on the other hand maintain that they were recovering the portion used by the public as an access road a situation caused by the Plaintiff.

As stated hereinabove, this is not a clear and straightforward case, one that can be determined at once. I therefore decline to issue the mandatory order of injunction. The court orders that pending the hearing and determination of the case or until further orders of the court:

- 1. An order of status quo is hereby entered to the effect that there shall be no further excavation, construction or demolition of existing structures to be undertaken on the disputed portion.**
- 2. For purposes of safety the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby ordered to barricade the excavated portion with iron sheet fence but to ensure that there is room for a foot path for residents to access their houses. This should be effected within 7 days from the date of this ruling.**
- 3. The parties to take steps to set the suit down for hearing without delay.**
- 4. Costs of the application be in the cause.**

Dated, Signed and Delivered this 11<sup>th</sup> day of December 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

.....For the 3<sup>rd</sup> Defendant

..... Court Clerk