



**Gichuhi (Suing on behalf of the Estate of Michael Gichuhi Muiru - Deceased)  
v Kenya National Highways Authority & another (Environment & Land  
Case E006 of 2023) [2024] KEELC 5837 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5837 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E006 OF 2023  
BM EBOSO, J  
AUGUST 12, 2024**

**BETWEEN**

**GODFREY KIHUHA GICHUHI (SUING ON BEHALF OF THE ESTATE OF  
MICHAEL GICHUHI MUIRU - DECEASED) ..... PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**CHINA ROAD AND BRIDGE CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff initiated this suit through a plaint dated 11/1/2023. He brought the suit on behalf of the estate of the late Michael Gichuhi Muiru [the deceased]. His case was that the deceased was the registered proprietor of land parcel number Kabete Karura/2083 [the suit land], located within Karura Town. The deceased developed a “huge hotel complex” on the land.
2. The plaintiff contended that the 1st defendant, through the National Land Commission, acquired part of the suit land for the construction of the Nairobi Western Bypass. He added that whereas the road construction works were nearing completion, the defendant had failed to make provisions to enable access to the hotel premises and or make provisions for parking. It was the case of the plaintiff that the defendants’ actions/ omissions had made the hotel complex totally inaccessible, rendering the estate’s investment valued at over Kshs 100,000 million useless and thereby exposing the estate to immense suffering and great loss of business.
3. The plaintiff sought the following reliefs against the defendant: (i) an order decreeing the defendant to immediately open up the road and make the hotel premises accessible from the Nairobi Western Bypass and Service Lane Roads; (ii) an order decreeing the defendants to redesign and reconstruct the portion of the Bypass next, touching and affecting the suit land to ensure there is easy access to the hotel



premises and ample parking and enhance the premises' commercial exploitation; (iii) general damages; and (iv) costs of the suit.

4. Together with the plaint, the plaintiff brought a notice of motion dated 11/1/2023, seeking an interlocutory order directing the defendants to immediately open up the road and make the hotel premises accessible from the Nairobi Western By-pass and Service lane roads. The said application is the subject of this ruling.
5. The application was supported by the plaintiff's affidavit sworn on 11/1/2023. It was canvassed through written submissions dated 4/9/2023 filed by M/s Kinyanjui, Kirimi & Company Advocates. The plaintiff reiterated the estate's case as summarized above. He added that the defendants had at all material times assured the estate that the road construction would not affect access to the hotel and its parking. The application was canvassed through written submissions dated 4/9/2023, filed by M/s Kinyanjui, Kirimi and Company Advocates.
6. The 1st defendant opposed the application through a replying affidavit sworn on 6/2/2023 by Eliud Munene, a Deputy Director in the 1st Defendant's Survey Department. He deposed that the application was rushed, misconceived, ill-advised and misplaced. He added that the suit land abutted the Nairobi Western Bypass at Karura Kanyungu and there was a two (2) storey building erected on it. He stated that a portion of the suit land was compulsorily acquired in 2020 for the construction of the Bypass, adding that the road was raised at the location of the suit land as per the approved drawings.
7. Mr Munene further deposed that the works on the Project were still ongoing and the contractor had been instructed to reinstate the access to the property. It was the position of the deponent that the contractor was waiting for the plaintiff to remove the fence on the suit property to enable them commence construction of the access road.
8. In addition, the 1st defendant filed written submissions dated 24/11/2023 through Ian Mudavadi Advocate. The 2nd defendant did not file a response to the application.
9. The court has considered the application; the 1st defendant's response; and the parties' submissions. The key question to be answered in this ruling is whether the application under consideration meets the criteria for grant of a mandatory interlocutory injunction.
10. The relevant criteria was outlined in the English case of *Locabail International Finance Limited vs Agro Export and others* [1986] All ER 906, the court held thus:

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff... .....a Mandatory injunction will be granted on an interlocutory application.'

11. The Court of Appeal in *Malier Unissa Karim vs Edward Oluoch Odumbe* (2015) eKLR outlined the criteria as follows:

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella –Versus - Cassman Brown case* which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd-Vs- Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory



Injunction was correctly stated in Vol. 24 *Halsbury Laws of England* 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

12. In the present application, the plaintiff seeks a mandatory interlocutory order compelling the defendant to restore the access to the suit property so that customers can access his hotel premises. In an affidavit sworn on 6/2/2024, more than six (6) months ago, the 1<sup>st</sup> defendant took the position that the application had been “rushed” adding that the work on the project was ongoing and that the contractor had been instructed to reinstate the access to the suit property. The 1<sup>st</sup> defendant added that the contractor was, at that time, “waiting for the plaintiff to remove the fence on the suit property to enable them commence construction of the access road. Given the above contextual background, the court granted the parties time to mutually resolve the matter. The parties were, regrettably, not able to reach a settlement on the application.
13. The plaintiff has presented evidence showing that the estate owns the suit land on which there exists a development that is intended to be operated as a hotel. The defendant states that there is a two (2) storey development on the suit land. Clearly, the estate has demonstrated a clear interest in the land. The estate has also demonstrated a need to protect the interest, pending the hearing and determination of the substantive suit. The applicant has also demonstrated that denying the suit property access will hurt the investments that are on the suit land. On its part, the 1<sup>st</sup> defendant has acknowledged that it has a duty to restore the access to the suit land.
14. Although not much relevant submissions were presented on the question of the adequacy of damages, it is clear that the balance of convenience favours grant of an interlocutory relief in terms of what the 1<sup>st</sup> defendant committed through the replying affidavit of Mr Eliud Munene themselves to do in February 2024. Secondly, the dispute in this suit revolves around the question of access to a public road. The question of access goes beyond monetary indemnification.
15. For the above reasons, the court is satisfied that the criteria for grant of a mandatory interlocutory injunction has been satisfied. Consequently, the following interlocutory order is issued:
  - a. Pending the hearing and determination of this suit, the defendants are ordered to reinstate the access to land parcel number Kabete/Karura/2083 within 60 days from today.
  - b. Costs of the Application dated 11/1/2023 shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF AUGUST 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Ms Swaka for the Plaintiff

Court Assistant: Elvis Hinga

