Kithoka Service Limited v Pari Pet Holdings Limited (Land Case E008 of 2024) [2024] KEELC 13835 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13835 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE E008 OF 2024

CK NZILI, J

DECEMBER 11, 2024

BETWEEN

KITHOKA SERVICE LIMITED ..... APPLICANT

AND

PARI PET HOLDINGS LIMITED ..... RESPONDENT

RULING

1. What is before the court is an application dated 30.7.2024, where the applicant is seeking for temporary injunction restraining the defendant, by itself, agents, servants, or anybody acting on its behalf from trespassing, constructing, excavating, or carrying out any activities into the applicant's frontages and access on Kanyuru Road, out of Plot No. Meru Municipality Block II/26 and Meru Municipality Block II/27, (the suit parcels).

2. The grounds on the face of the application are that the applicant is the registered proprietor of the suit parcels of land sharing a frontage on a public road known as Kanyuru Road. It is averred that the defendant has defiantly, unilaterally, unconscionably, and without any color of right blocked the applicant's access to the suit parcels of land by mounting, constructing, and erecting several developments on the access road. The applicant avers that the said developments have infringed on its constitutional right to use and utilize its properties and have occasioned them irreparable loss and damage.

3. The plaintiff avers that it has established a prima facie case with high chances of success and that the balance of convenience tilts in its favor, since the said developments by the respondent have not been approved by the relevant authorities.

4. In an affidavit sworn by Agnes N. Muriuki, a director of the applicant, she has attached certificates of lease to the suit parcels of land as AM-1. She avers that the respondent is the registered proprietor of

parcel Meru Municipality Block 11/100, where it has constructed a storey hotel christened La Beila Hotel bordering the suit parcels of land.

5. The applicant further avers that the respondent has mounted, constructed structures, placed a generator and several street lights on the frontage. In addition, the applicant avers that the respondent has embarked on the construction of new structures and excavations, as seen in the photographs marked as annexure AM-2. The applicant avers that it reported the matter to the police vide OB report marked as annexure AM-3.

6. In a further supporting affidavit dated 24.9.2024, the applicant avers that the office of the Director of Land and Physical Planning Meru County had intimated that the respondent had blocked the backyard through a letter dated 27.9.2023, marked as annexure AM-4. Similarly, the applicant avers that the County Government of Meru, through the Department of Physical Planning, had approved its plans for renovating the backyard. The applicant expresses doubts as to whether a private individual can be allowed to solely access and or develop public access and riparian land, at the expense of other land users. In this case, the applicant avers that the respondent has literally blocked it from accessing its backyard. Instead, the applicant avers that the respondent was exclusively utilizing the same as a parking lot. The applicant urges the court to find that there was a need for a site visit. She annexed the approved plans as AM-5.

7. The respondent opposes the application through a replying affidavit sworn on 12.9.2024 by its director, Lawrence Mwenda. It avers that there are no ongoing constructions as alleged or at all, as all the constructions were completed before the filing of this suit; the application is based on sheer lies; the court should not issue orders in vain; the suit parcels of land can be accessed from Moi Avenue and Meru – Nkubu highway, while the respondent's plot is only accessible through Kanyuru Road.

8. Again, the respondent avers that it sought and obtained from the County Government of Meru, the requisite approvals to stone–pitch, beautify both sides of the stream, construct a bridge, cabro-pave the road, curb insecurity, improve cleanliness, landscape and beautify, create accessibility to business ventures like the applicant, at a cost of Kshs.6,000,000/=. The letter is annexed as LMR "1".

9. Similarly, the respondent avers that Kanyuru Road, which is on the riparian part of the stream, was initially dilapidated, insecure, inaccessible, and slum-like before the improvement that it had undertaken. The respondent further avers that the said developments are not on the applicant's suit parcels of land. The respondent avers that public participation was conducted before the developments were undertaken, and no one raised any objections to the construction that took about eight months, including the applicant. As to the generator and the street lights the respondent averred that the same were along the power poles on the riparian part and not on the applicant's suit parcels of land.

10. Following an order of this court, the County Government of Meru, through the Lands, Physical Planning, Urban Development, Housing, and Public Works, visited the locus in quo and prepared a report dated 13.9.2024 by Jefferson Musyoka, Ag. Director of Physical and Land Use Planning, regarding the suit parcels of land and respondent's parcel of land. In the said report, it is indicated that the parties, the land registrar, the county surveyor, and his office visited the site on 5.9.2024 to determine the boundaries, extent of encroachment, and any interference with the access road. The report indicates that the methodology used was through field visits, literature reviews, observations, photography and interviews.

11. On ownership, the report confirmed that according to the Registry Index Map, the applicant is the registered owner of the suit parcels of land, while the respondent is the registered owner of parcel number Meru Municipality Block 11/1000. The report indicates that three plots are commercial; plot number Meru Municipality Block 11/26 is both industrial and commercial; the dispute is about a

conservation zone, which is a riparian reserve on the rear side that is public-purpose land and that the stream's water channel is lined with gabions to prevent erosion, as seen in annexure marked A.

12. Regarding the developments, the report confirmed that the three parcels of land are developed on the ground, as seen in annexure marked B, and have front access to Moi Avenue, which is 24m wide, and Meru – Nairobi highway, which is a 32m road reserve. The report states that the conservation zone is developed and improved with gabions, cabro paving, a bridge, lighting and trees, which improvements were done in partnership with the Municipality of Meru and the respondent. The report states that the Kenya Urban Support Program (KUSP) funded the gabion lining of the stream, whereas the Municipality of Meru and the respondent undertook the beautification and other improvements. The report affirms that the other facilities in the conservation zone are public utilities.

13. The report makes observations that the conservation zone was meant to protect the riparian area, which can be improved for public recreational purposes. The report states that there are no boundary encroachments on the three parcels of land as indicated by the survey maps, and neither have the developments thereon encroached into each other's land. Similarly, the report indicates that the boundaries of the three plots are intact on the ground as ascertained by the county surveyor, and none of the plots encroached into the conservation or riparian area. Again, the report indicates that neither the access roads to the suit parcels of land nor the access road to the respondent's parcel of land had been interfered with.

14. In another report dated 13.9.2024 made by the land registrar and the county surveyor, they state that they conducted a site visit together with the parties on 5.9.2024 and made the following findings: that the applicant's suit parcels of land are on Survey Plan Reference No. 87/35, with front access to a 24m road Harambee Avenue, and a 32m wide road on Meru- Embu highway, the parcels are developed and border the stream. Regarding the respondent's parcel, the same is on Reference No. 534/147, which is a resultant subdivision of Meru Municipality Block 2 /25. Parcel Number 1001 and has a 24m wide road on Harambee Street developed with La Beila hotel.

15. Further, the report indicates that the three parcels of land are well-defined, and there is no encroachment. The applicant's parcel is along the stream, improved with cabro pavement, beautification trees, power generator by Kenya Power poles. On the respondent's parcel, the report indicates that there is an access road, as indicated on RIM, which is improved with cabros, trees, street lights and metallic gates.

16. The report indicates that parcels Block 2/ 26, 27, and 1000 measure 0.0604 ha, 0.2034 ha and 0.0151 ha, respectively. The conclusion in the report is that despite the rear side being an access road on the RIM, it is a riparian or conservation zone, none of the parties can claim exclusive ownership and all improvements have to be sanctioned by relevant authorities. The report attached survey plan 534/147; 87/35; RIM, satellite imagery, and official searches for the suit parcels are attached as annexures.

17. The Water Resources Authority visited the locus in quo alongside the court and demonstrated the measurements of the width of the stream and the extent of the riparian land. Equally through a letter dated 15.11.2024, it forwarded the report by the licensing officer, Lucy K. Mbutura and Nancy Nzau, the records officer. The report indicates that a scene visit was conducted on 12.11.2024 in the presence of the court and the parties. The findings of the report are that both the applicant and the respondent are adjacent to each other on the left side of the stream; the respondent has put up a net fence made of steel posts within the riparian area, covering the applicant's access to the road reserve. The buildings by both the applicant and the respondent are not on the riparian or the road reserves, but the respondent's gate is partially within the 10m riparian zone of the stream.

18. After a scene visit was conducted on 12.11.2024, Mr. C.P Mbaabu, Counsel for the respondent in the open court, applied to have the further supporting affidavit by Agnes Muriuki expunged from the record under Order 51 Rule 14 (3) of the *Civil Procedure Rules*, since it was filed without the leave of court and it contains new facts at paragraphs 3-8.

19. Mr. Muriuki learned counsel for the applicant opposed the application and stated that the court, on 16.9.2024, allowed parties to file further affidavits. He, however, withdrew the said further affidavit. Learned counsel for the applicant submitted that the respondent is fully utilizing the access space and has blocked the applicant from accessing the road by putting up a gate. Learned counsel added that the applicant had suffered irreparable loss and damage; a prima facie case has been established and the balance of convenience tilts in favor of allowing the application. Similarly, learned counsel submitted that the approvals for the developments by the respondent were null since the land registrar and the surveyor had confirmed at the scene visit that they did not authorize the interference of an access road or riparian land by the respondent.

20. In a rejoinder, Mr. Mbaabu, learned counsel for the respondent, submitted that a temporary injunction is granted at the court's discretion, pursuant to the applicant's satisfaction of Order 40 of the *Civil Procedure Rules*, which the applicant has failed to do. Learned counsel submitted that the applicant is seeking to have the main suit determined at a preliminary stage since prayer (a) in the plaint is for an eviction order, whereas prayers (c) and (d) are for damages for the alleged trespass. Therefore, learned counsel submitted that the court lacks jurisdiction to determine the alleged encroachment, which ideally, in his view, was a boundary dispute that is ousted under Section 18, (7)(2) of the *Land Registration Act*.

21. Further, learned counsel submitted that the expert reports had not been challenged with counter reports; otherwise, an interim order would be premature and was likely to pre-empt the main suit. Learned counsel for the respondent insisted that the disputed portion was accessible and that there was no blockage as alleged by the applicant.

22. Equally, learned counsel submitted that the applicant has not met the provisions under Sections 108 -112 of the *Evidence Act* as it has not adduced any evidence of any loss or damage. That the same was not demonstrated under Order 2 Rule 6(1) of the *Civil Procedure Rules*, parties are bound by their pleadings and the applicant is guilty of laches since it did not move the court when the works were completed in 2021. Consequently, learned counsel submitted that the status quo should be maintained instead of granting the orders sought.

23. On jurisdiction, Mr. Muriuki learned counsel for the applicant submitted that the same was admitted in paragraph 9 of the defense; the expert reports are mere opinions; once the gate is locked, no one is able to access, and public participation was just done on paper but not on the ground.

24. What is before the court is an application for a temporary injunction. The plaintiff avers in his plaint that the defendant has blocked the access land serving its backyard, which borders Kanyuru stream, by putting cabro works on it and a steel gate such that its tenants cannot without impediment access the plots.

25. The defendant denies that it has blocked or encroached upon the access lane, which it terms as a road reserve. The defendant avers that it caused developments on the access lane after obtaining approvals from the County Government of Meru as part of the beautification of Kanyuru stream. The defendant denies any trespass to the plaintiff's plot, which, according to it, can still access its plot from the other lane save for the back lane.

26. A party seeking for an order of temporary injunction must establish a prima facie case with a probability of success; secondly, he has to show that he will suffer irreparable loss and damage, and thirdly, that the balance of convenience tilts in favor of granting the injunction.

27. A prima facie case is established if, looking at the material before the court, a right has been breached to call for rebuttal or an explanation from the opposite party. See *Mrao Ltd vs First American Bank Kenya* (2003) eKLR and *Nguruman Ltd vs Jan Bonde Nielsen & others* (2014) eKLR, irreparable damage refers to that damage which is not a quantifiable speculative injury will not do. There must be more than an unfounded fear or apprehension on the part of the applicant.

28. The injury must be actual, substantial and demonstratable such that monetary untrue of whatever amount will never be an adequate remedy. See *Nguruman vs Jan Bonde Nielsen* (*supra*) that he has a right, legal or equitable which requires protection by an injunction. See *Kenleb Construction Ltd vs New Gatitu Service Station Ltd & another* (1990) eKLR.

29. As regards mandatory injunction, all things being equal, it has more drastic effects than a prohibitory injunction, strong and precise before a mandatory injection can be granted even if it is sought in order to enforce a contractual obligation as held in *Shepherd Homes Ltd vs Sandahm* 1971 1 CH 34.

30. In *Nation Media Group & others vs John Harum Mwau* (2014) eKLR the court observed that for a mandatory injunction to be issued, the applicant must demonstrate the existence of special circumstances and a clear case or exceptional circumstances.

31. Section 143 of the *Land Act* creates public rights of way. A public right to way is created for the benefit of the national or county governments for the benefit of the public.

32. A balance of convenience refers to where if an injunction is not granted and the suit is ultimately decided in favor of the plaintiff, the inconvenience caused to the plaintiff would be greater than that caused to the defendant; if an injunction is not granted, the suit is ultimately dismissed. See *Chebii Kipkoech vs Barnabas Tuitoek Bargoria* (2019) eKLR.

33. It is upon the applicant to demonstrate the three elements sequentially and logically. A court does not conduct a mini-trial but looks at the materials presented before it without making definitive findings on facts. The purpose of an injunction is to improve the chances of the court doing justice to the party by preserving the property under dispute, which is in danger of being wasted, damaged, or alienated by any party to the suit.

34. To obtain an order of injunction, an applicant must make full and frank disclosures of all relevant facts.

35. As regards road reserves section 49 (1) of the *Kenya Roads Act* outlaws the erection of structures on road reserves without any written authority or permission by the Kenya Urban Road Authority. Section 91 (1) (a) and (c) of the *Traffic Act* outlaws without permission encroachment on the road or on road reserves by erecting structures, ditches, fences, or other obstacles by planting, sowing any tree or seed thereon.

36. In *Clarkson Onyango Bolo vs James Asaka & 2 others* (2021) eKLR, the court said that it did not matter whether the defendant structures had been approved or not so long as they encroached on a road reserve or into any of the neighboring titled properties.

37. The defendant has pleaded that it obtained the requisite approvals and permits to erect structures on the access lane or road reserve from the County Government of Meru. Both the land registrar and the land surveyor during the site visit by this court confirmed that the cabro, trees and a permanent gate erected on a road reserve. All of them said that they were not notified of the intended developments,

nor did they oppose them. As to the WARMA officers, they took measurements and prepared a report dated 14.11.2024 confirming that the development by the defendant was on riparian land. Equally, there was no report to show that the Water Resources Management Authority (WARMA) had approved the development on riparian land.

38. The defendant has not disputed that the developments were on both a road reserve and a riparian land, which under the *Traffic Act* falls under the jurisdiction of Kenya Urban Road Authority (KURA) and the WARMA. The defendant does not dispute that three-quarters of the development is in front of the plaintiff's plot(s), whose mandate to manage the development on a road reserve is the KURA. The same were equally erected without the consent of the plaintiff.

39. A mandatory injunction may be issued if the act done is a simple and summary one that can be easily remedied or where the defendant attempted to steal a match on the plaintiff. See *Kenya Breweries Ltd & another vs Washington Okeyo* (2002) eKLR, *Magnate Ventures Ltd vs Eng (K) Ltd* (2009) eKLR and *Silipet Properties Ltd & another vs Chege Mwaura & another* (2017) eKLR, the respondent had blocked or dwell with the access road hence denying the applications the use and enjoyment of the suit properties.

40. The defendant contended that the land was a road reserve and termed the claim as malicious. He denied restricting the plaintiff's access to their properties. The court cited *Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & others* NRB Civil Appeal No. 11 of 2002 that a mandatory injunction at an interlocutory stage merely serves to redress the status quo ante in deserving cases until the main suit is determined. The court said that it was common grounds that there was a 10 ft lane meant for the use of the owners of the properties in the area in their daily movements. The court said that the lane was held in trust as public land to aid free movement in the area and could not be allocated to the defendant without consulting the area residents.

41. The purpose for which it was being used was not what an access road is under Section 2 of the *Public Road and Road of Access Act*. The court found the acts of the defendant were wrongful and illegal. The court issued both a prohibitory and mandatory order at the interlocutory stage to remove the container forthwith.

42. In this application, the developments on the access lane, riparian land or road reserve are not only illegal but also impede on the access rights of the plaintiff. Moreover, Section 42 (1) of the *Environmental Management & Coordination Act* (EMCA) prohibits the carrying out of specified activities in relation to a river without the National Environment Management Authority (NEMA) approval. Equally, the *Environmental Management and Coordination of Wetlands, River Bank's Lake Shores and Sea Management, Regulation 2009* has not complied with Article 69 of the *Constitution* related to sustainable development.

43. A nullity is a nullity. The court cannot sanction illegality. The applicant has demonstrated exceptional circumstances for the issuance of appropriate orders to preserve the access lane/riparian land from illegal use by the defendant. An order is as a result of this issue that the defendant removes all the offensive structures and in particular the gate on the access lane/riparian land within forthwith and not later than 31 days from the date hereof to give the applicant and other members of the public unlimited use, access and occupation of the access lane or riparian land.

44. The WARMA officer is directed to supervise the exercise.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 11TH DECEMBER, 2024

In presence of

C.A Kananu

Plaintiff

Ken Muriuki for the plaintiff

Mbaabu for the defendant

HON. C K NZILI

JUDGE