



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 421 OF 2017

HARRISON CHEGE KARIUKI.....PLAINTIFF/APPLICANT

VERSUS

JEREMIAH KANYANJUA NJUGUNA.....1ST RESPONDENT

FRANCIS MUTUTHO NJUGUNA.....2ND RESPONDENT

PAUL NYOIKE NJUGUNA.....3RD RESPONDENT

CECEILIA WANJIKU NJUGUNA.....4TH RESPONDENT

HANNAH WANGARI NJUGUNA.....5TH RESPONDENT

RULING

1. Before me for determination is an application by way of the Notice of Motion dated 15th May 2017 pursuant to *Order 40 Rule 1 (a) 3, and 4 of the Civil Procedure Rules*, Section 1A and 1B of the Civil Procedure Act, *and all other enabling provisions of the law* where the Applicant seeks:

i. Spent

ii. That this Honorable court does(sic) grant an injunction restraining the Defendant (sic) jointly and severally trespassing into, damaging any fence or property therein and/or interfering with the quiet possession of his property namely Title number Nyandarua/ Ol Aragwai /6283 and Title Number Nyandarua/ Ol Aragwai /6282 pending the hearing and determination of this suit.

iii. spent

iv. That the OCS Kinangop Police station does (sic) assist in enforcing this order, if need be.

v. That costs of this application be provided for.

2. The said application was supported by the grounds on its face and an Affidavit, sworn by Harrison Chege Kariuki the Plaintiff/Applicant herein.

3. In the course of hearing the application, parties recorded a consent which was adopted by the court to the effect, among others, that the parties do dispose the application by way of written submissions.

4. In the meantime, the surveyor did visit the suit properties on the 15th May 2018 wherein he filed his report on the finding on the ground on the 24th May 2018.

5. The Respondents filed their respective submissions on the 5th December 2017 whereas the Applicant filed his submission on the 24th May 2018.

6. I have looked at both submissions. The Applicants submission is to the effect that the parcels of land herein were once registered in the

name of the Respondent's father, but after sub division, he had purchased Nyandarua/ Ol Aragwai /6282 from both the 3rd and 4th Respondents while parcel No. Nyandarua/ Ol Aragwai /6283, he had purchased from one Bernard Chege who was a brother to all the Respondents.

7. That it was when he had started fencing off his parcels of land that the Respondents herein had destroyed his fence and gate alleging that he had encroached on an access road. This was contrary to the registered mutation and Registry Index map that he had seen at the registry at the time he had conducted his due diligence.

8. The Applicant relied on the celebrated case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358**, to submit that he had established a prima facie case.

9. To this, the Applicant submitted that he had established a prima facie case by proving that he was an innocent purchaser of the suit lands by exhibiting copies of the title deeds marked as exhibit HCK1 in his name.

10. That due to the interference by the respondents, the Applicant had been unable to utilize the parcel of land which he had specifically purchased so as to utilize it for farming. That the Respondent have continued to deny him peaceful possession hence he has continue to suffer severe loss since the land now remains idle over the years wherein he would have planted various crops and kept livestock over the years.

11. That further the Respondent's interference has denied him his Constitutional right to own property and to have quiet enjoyment of the same thereafter. That further that interference has caused him to suffer depression and stress which harm and loss is irreparable.

12. The Applicant then submitted that the balance of inconvenience tilted in his favor since he had established that he had proprietary rights and/or interest over the suit land affording protection of this honorable court.

13. The Respondents response was to the fact that indeed the Applicant herein had purchased the suit parcels of land from the 3rd and the 4th Respondents. That the said parcels of land had been excised from the mother land being Nyandarua/ Ol Aragwai /1618 after subdivision of the same.

14. That as per the Copy of the Mutation map that was annexed to the Applicant's application and marked as HCK 2, the same is clear that there is an access road measuring 0.175 hectares cutting through the land parcels Nyandarua/ Ol Aragwai / 6267 all through to Nyandarua/ Ol Aragwai /6283. That Parcels Nyandarua/ Ol Aragwai /6267 to Nyandarua/ Ol Aragwai /6281 belong to the respondents and other land owners and the access road passes through the said lands too.

15. That the access road cutting through Nyandarua/ Ol Aragwai /6283 was mischievously excluded from the field sketch map thus being excluded from the Index registry Map wherein the Applicant took advantage of the same and fenced of this parcel of land denying the Respondents access to their respective land parcels when he himself uses the access road passing through Nyandarua/ Ol Aragwai /6262 to Nyandarua/ Ol Aragwai /6281, which belong to the Respondents, to access his land.

16. That further the signature and thumb print impression on the field sketch map and the Mutation form were a forgery to deny the Respondents access to the road passing through Nyandarua/ Ol Aragwai /6283. That they would call evidence at the hearing of the suit to demonstrate their allegation. That although the applicant bought 10 acres of land, yet on the ground the acreage is more than 10 acres thus proving that the excess was for provision of the access road. That it was just that the court ordered the surveyor to reroute the access road cutting through land parcel Nyandarua/ Ol Aragwai /6283 and the registry index map to be amended to reflect the same.

17. That further, it was not true that the Respondents herein had maliciously destroyed the Applicant's property known as Nyandarua/ Ol Aragwai /6282 and Nyandarua/ Ol Aragwai /6283. They had not been found guilty of any offence. They prayed for the application to be dismissed with costs.

18. I have considered the said application, the Affidavit in reply as well as the annexures thereto. I have also studied the submissions places before me by the learned Counsel for the parties herein.

19. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

20. I have carefully considered the said submissions by both parties. The issue for determination by this court is whether the plaintiff established a prima facie case to enable this court grant him the interlocutory injunction so sought.

21. The bone of contention herein is that whereas the Applicants claim is to the effect that there is no access road through his parcels of land No. Nyandarua/ Ol Aragwai /6282 and No. Nyandarua/ Ol Aragwai /6281, on the other hand the Respondents are categorical that indeed there is an access road therein, that was mischievously omitted from the index map, to which they use to access their own parcels of land.

22. I have taken time to study the map as well as the surveyors report dated the 18th May 2018. I find from the report that although the

surveyor confirmed that there was an access road, he did not state that the same run through the Applicant's land and further that the two parcels had been fenced all round with barbed wire which was found to be correct according to the survey records. On this point alone, I find that the Applicants have established a prima facie case with the probability of success.

23. On the second principle as to whether the Applicant would suffer irreparable harm if the injunction is not granted, I have considered what course would appear to carry a lower risk of injustice and I find that the Applicant stands to suffer irreparably if the application is not granted.

24. I find that the balance of convenience tilts in favour of granting the injunctive orders so sought. In this regard thereof the application succeeds with costs to the Applicant.

25. Parties to set down this matter for hearing expeditiously by complying with the provisions of Section 11 of the Civil Procedure Rules within the next 21 days upon delivery of this ruling.

Dated and delivered at Nyahururu this 31st day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE