



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 133 OF 2007

REGISTERED TRUSTEES OF NAIVASHA SPORTS CLUB.....PLAINTIFF

VERSUS

TOWN CLERK, NAIVASHA MUNICIPAL COUNCIL.....DEFENDANT

RULING

The Trustees of Naivasha Sports Club (*the plaintiff*) filed suit against the Naivasha Municipal Council seeking, *inter alia*, an order of permanent injunction to restrain the defendant, its servants or its employees from harassing, intimidating or in any other way whatsoever interfering with the plaintiff's ownership and occupation of Naivasha **L.R No.1144/334R** (*hereinafter referred to as the suit land*). Contemporaneous to filing the suit, the plaintiff filed an application of injunction under **Order XXXIX Rules 2(1), (2), (3) and 9** of the **Civil Procedure Rules** seeking to restrain the defendant by itself, its servants or employees from harassing, intimidating or in any other way interfering with the plaintiff's quiet enjoyment of the suit land pending the hearing and determination of the suit.

The grounds in support of the application are on the face of the application. The plaintiff states that it is the registered owner of the suit land. It had invested millions of shillings on the suit land by developing a nine hole golf course for use by its members. The plaintiff states that, without any justification, the defendant had threatened to construct a road through the said golf course which would be to the detriment of the plaintiff. The plaintiff states that it would suffer immense and irreparable loss which may not be compensated by any award of damages if the defendant is allowed to construct the said road. The application is supported by the annexed affidavit of Hans Rudolf Schubach. He further swore a supplementary affidavit in further support of the plaintiff's application. He deponed that the plaintiff had allowed the defendant to erect a sewerage plant on its parcel of land. The sewerage plant had blocked access of the road reserve which the defendant intends to open on the lake front. He deponed that there was an alternative road to the beaches of Lake Naivasha which the members of the public were using. He wondered why the defendant wanted to create a road in the middle of its golf course yet the plaintiff was willing to discuss with the defendant an alternative passage provided there was justification and an environmental impact assessment is carried out.

The application is opposed. The defendant filed grounds in opposition to the application. It stated that the application lacks merit, was vexatious and a travesty of justice. It further stated that the plaintiff had made a false claim on a road reserve which had been provided for in the plan of the area as a result of which access to the landing beaches of Lake Naivasha had been blocked. The defendant stated that it would suffer irreparable loss and damages if the plaintiff is allowed to grab a public road reserve. The Town Clerk of Naivasha Municipal Council swore a replying affidavit in opposition to the application. He deponed that the plaintiff's parcel of land was separated by a 35 metre wide road reserve which

accessed the beaches of Lake Naivasha from Naivasha Township. He deponed that the plaintiff had unlawfully amalgamated its two separate parcels of land and therefore encroached on the land set aside as a road reserve. He deponed that the defendant intended to grade the said road reserve so that members of the public could access the beaches of Lake Naivasha. He denied the suggestion by the plaintiff that it would suffer irreparable damage if the said road reserve is put to public use.

At the hearing of the application, I heard the submissions made by Mr. Ndubi on behalf of the plaintiff and by Mr. Rodi on behalf of the defendant. Mr. Rodi submitted that the plaintiff was the owner of the suit land and had developed a club house and a golf course on the same. He submitted that the defendant had threatened to construct a road traversing through the golf course. He explained that the plaintiff had unsuccessfully negotiated the issue with the defendant. He conceded that there was a road reserve between the two parcels of land owned by the plaintiff which were adjoining each other. He however submitted that the said road reserve had never been used. He explained that the plaintiff had offered to surrender a portion of its land so that the defendant could develop a road if it so wished. The defendant was however unwilling to consider the proposal made by the plaintiff. He submitted that if the proposed road were to be opened, it would serve no useful purpose because access to the lake on the said road reserve was blocked by the sewerage plant which has been constructed by the defendant. He submitted that no environmental impact assessment had been done to assess the suitability of opening the said road in view of the fragile ecosystem that exists along the said shores of Lake Naivasha. The plaintiff was of the view that the proposal made by the defendant to open up the said road was ill motivated. He maintained that the defendant had not considered that members of the public would be exposed to a risk of being hit by golf balls if a road was created within the said golf course. He urged the court to allow the application and maintain the status quo pending the hearing and determination of the suit.

Mr. Rodi for the defendant opposed the application. He reiterated the contents of the grounds in opposition and the replying affidavit. He submitted that there existed a road reserve separating the two parcels of land owned by the plaintiff. The said road connects Naivasha Township to the beaches of Lake Naivasha. He maintained that according to the area plan, the said road reserve ought to be opened and used by the members of the public. He submitted that the plaintiff had contravened **Section 29** of the **Physical Planning Act** by attempting to prevent the defendant from fulfilling its mandate of planning and developing an area within its jurisdiction. He maintained that the plaintiff would suffer no damage if the defendant developed the said road. He submitted that the interest of the members of the public outweighed the interest of the members of the plaintiff, which is an exclusive members club. He submitted that the suit filed by the plaintiff was fatally defective because the plaintiff had filed the suit without naming the registered trustees of the plaintiff. He urged the court to dismiss the application with costs.

I have heard the rival submission made by Mr. Ndubi on behalf of the plaintiff and by Mr. Rodi on behalf of the defendant. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant it the order of interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to grant an order of injunction are well settled. In **Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001]1 EA 86** at page 89, the Court of Appeal held that;

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretion will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly where the court is in doubt it will decide the application on a balance of convenience.”

The facts of this case are more or less not in dispute. It is not disputed that the plaintiff's parcels of land are in two portions separated by a road reserve. Although the said road reserve appears in the deed plan annexed to the title deed issued to the plaintiff, on the ground, the said road is not in existence. The defendant contends that the said road reserve should be used by members of the public. The Town Clerk of the defendant deponed that the defendant intends to develop the said road reserve so that members of the public can access the beaches of Lake Naivasha from Naivasha Township. The plaintiff, while conceding that indeed the said road reserve appears in the plan of the area, stated that the current position

on the ground is that the said road reserve is part of the golf course used by the members of the plaintiff. It is the plaintiff's case that it was willing to cede part of his said parcel of land so that members of the public could access the beaches of Lake Naivasha. The plaintiff argued that even if the defendant were to develop the road reserve, the same would not serve any useful purpose as it would not access the beaches of Lake Naivasha. It is the plaintiff's contention that the defendant had constructed a sewerage plant on the land adjoining the lake where the said road reserve terminates.

I have evaluated the facts of this case according to the affidavits filed in court. The defendant has a statutory mandate to plan and develop public utilities within the area of its jurisdiction as provided by the **Physical Planning Act**. In the present case, the plaintiff established that its golf course would be interfered with if the defendant goes ahead to develop the road reserve separating the two portions of land owned by the plaintiff. The plaintiff is willing to cede part of its parcel of land equivalent in area to the road reserve so that the defendant can still develop a road which can access the beaches of Lake Naivasha. I have looked at the plans of the area in dispute which were annexed in the affidavits sworn on behalf of the plaintiff and the defendant. It is clear that the members of the public have an alternative road of access to the beaches of Lake Naivasha.

It is the view of this court that the defendant is insensitive to the sensible request made by the plaintiff that it was willing to surrender a different portion of its parcel of land equivalent to the road of access that the defendant intends to develop. It is clear to this court that the defendant is in a hurry to develop the said road of access without adequate consultation. The defendant even forgot that the plaintiff donated a portion of its land where the defendant sited its sewerage plant. The defendant has not compensated the plaintiff for the use of its said parcel of land. It is apparent that the relationship between the plaintiff and the defendant has been amicable until the issue of the development of the road reserve which transverses the plaintiff's golf course arose. I think the plaintiff has shown good faith in its dealing with the defendant. It is the defendant which is unreasonable in the circumstances of this case.

I therefore hold that the plaintiff has established a prima facie case with a probability of success. The defendant should exhaust and explore all avenues, including conducting an environmental impact assessment, before developing the said road reserve. The defendant should further explore the possibility of accepting an alternative road of access offered by the plaintiff. The plaintiff would suffer irreparable damage which will not likely be compensated by an award of damages if the said road of access is developed in the manner proposed by the defendant. Its golf course would be damaged and most probably rendered useless. Members of the public would be exposed to danger of being hit by flying golf balls if the said road of access is developed in the manner proposed by the defendant. The plaintiff has established that it is entitled to an order of interlocutory injunction to preserve the status quo pending the hearing and determination of the suit.

The application is therefore allowed. The defendant by itself, its servants or agents are hereby restrained by means of an interlocutory injunction from harassing, intimidating or in any manner whatsoever interfering with the plaintiff or its agents or licensee's quiet possession and occupation of the suit land and the sports club within the said parcel of land pending the hearing and determination of the suit. The plaintiff shall have the costs of this application.

DATED at NAKURU this 21st day of December 2007

L. KIMARU

JUDGE