REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 26 OF 2020

JOSPHAT NGARE NDEGE....................................PLAINTIFF

VERSUS

FAITH WANJIRU MAKENDA..........................DEFENDANT

RULING

Introduction

By way of Chamber Summons dated 10th September 2020 brought under *Order 39 Rule 1 & 2 Civil Procedure Rules, Section 3A Civil Procedure Act* and all enabling provisions of the law, the Applicant is seeking the following orders:-

(1) That a temporary injunction do issue restraining the defendant/respondent, his agents, servants or anybody authorized by her from erecting a fence over the road of access leading to the plaintiff's plots Number INOI/KAITHERI/1145 and 827 respectively.

(2) Costs of this application be provided for.

The grounds upon which the application is grounded are as follows:-

(i) That the defendant has encroached upon the road of access leading to the plaintiff's plots by planting gravellia trees has commenced to erect a fence over the said road of access.

(ii) That this will greatly affect the plaintiff as he will not be able to properly access his land.

Applicant's Factual Statement

The applicant filed a supporting affidavit in which she deponed as follows:-

(a) That he is the owner of two plots adjacent each other in Kaitheri Village being plot Number INOI/KERUGOYA/1145 and INOI/KERUGOYA/827.

(b) That the defendant herein has encroached upon the road of access to the plots and other neighbouring plot by planting gravellia trees and has now commenced to fence over the said encroachment to his detriment and that of other neighbours.

(c) That the defendant is claiming to have gotten authority from the area Assistant Chief to do the said fencing.

(d) That if that is allowed to go on, the access road shall be reduced to mere path and their properties will greatly be reduced in value and accessibility.

The Respondent's Statement of Facts

The respondent filed a replying affidavit and deponed as follows:

(a) That the application is incompetent, bad in law and an abuse of the Court process.

(b) That the applicant has a pending matter relating to the same issue against him and the District Surveyor Kirinyaga which he has never bothered to prosecute which is SRM Misc. Appl. No. 12 of 2014.

(c) That the applicant has no propriety rights over roads of access and therefore lacks the capacity to institute the suit and the application herein.

(d) That he verily believes that he has not encroached on any road of access at all.

(e) That he has lawfully fenced his land and cannot be restrained from what he has already done as sought in the application before Court.

(f) That it is clear from the other suit filed by the applicant in 2014 that he filed his land long time ago and the applicant was then seeking to have him remove the same. He stated that the orders being sought are not available since the applicant cannot seek to restrain him from that has already been done.

(g) That his parcel of land is on the same side of the road as the applicant and their parcels are adjacent to each other.

(h) That the applicant has a stone wall adjacent to the road of access and that his barbed wire fence starts immediately next to the applicant's stone wall in a straight line. He deponed that he has not encroached on the road of access as the beacons erected by the surveyor are clearly visible and the road of access is also visible.

(i) That it is quite clear that the suit and the application herein are vexatious and frivolous.

(j) That after the applicant filed the suit in 2014, they discussed the issue with the local administration and the applicant was advised to get a Government Surveyor to visit the site and confirm the beacons erected but instead, the applicant filed the instant suit yet he has no surveyor's report to prove encroachment of the road access.

Legal Analysis

I have considered the affidavit evidence, both in support and in response to the Notice of Motion dated 10th September 2020. I have also considered the applicable law. The principles for the grant of an interlocutory injunction under ***Order 40 Rule 1*** is premised on the celebrated case of ***Giella Vs Cassman Brown Co. Ltd (1973) E.A. at page 358*** where the following three principles were set out:-

(1) An applicant must establish a prima facie case with a probability of success.

(2) He must show that he will suffer irreparable loss which cannot be compensated by an award of damages unless the orders sought are granted and

(3) Where the Court is in doubt, the application may be decided on a balance of convenience.

The applicant is seeking an order restraining the respondent from erecting a fence over the road of access leading to his plots. In his supporting affidavit, the applicant stated that the respondent has already encroached upon the alleged road access by planting Gravellia trees and even commenced fencing the access road. The applicant has annexed several documents to his supporting affidavit which include title deeds and copies of photographs and area registry map sheet. However, the issue of encroachment can only be verified by a surveyor who can confirm the allegations by the applicant. Without a surveyor's report, it will be highly impossible to establish whether the allegations by the applicant are true or not. A surveyor's report is a prima facie evidence of the allegations by the applicant. The applicant has miserably failed to prove the first principle for the grant of the interlocutory injunction order sought.

The applicant has not also established what irreparable loss, if any, he will suffer if the order sought are not granted. The principle was well defined in the case of ***Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) e K.L.R*** as follows:-

"The meaning of convenience in favour of the plaintiff if that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting".

The applicant has not demonstrated any inconvenience he is likely to suffer if the injunction order sought is not granted.

The third and last principle for the grant of an injunction is whether the balance of convenience lies with the grant of the orders and my answer is in the negative. Infact the respondent in her replying affidavit has annexed a copy of another application before the Senior Principal Magistrate's Court being Miscellaneous Application No. 12 of 2014 between the applicant and the respondent jointly with the District Surveyor. The said suit is said to be pending determination before the subordinate Court. The applicant has not filed a supplementary affidavit denying the existence of another suit touching the same subject matter. If indeed there is a pending suit seeking similar orders before the Magistrate's Court which is pending hearing and determination, then the applicant is not deserving the orders sought since forum shopping cannot be entertained.

The upshot of my analysis is that the applicant's application dated 10th September 2020 is lacking merit and is dismissed with costs to the respondent. It is so ordered.

***Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this* 20th day of November, 2020.**

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Plaintiff – present*

2. *Defendant – present*

3. *Mbogo, Court clerk – present*

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