



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CIVIL CASE NO. E331 OF 2021**

**JAMAL HOLDINGS LIMITED.....1<sup>ST</sup> APPLICANT/PLAINTIFF**

**SOPHIA CHEMENGEN TOO.....2<sup>ND</sup> APPLICANT/PLAINTIFF**

**VERSUS**

**ASHWIN GIDOOMAL.....RESPONDENT**

**RULING**

1. I have before me the Notice of motion of the Applicant dated 13/09/2021 brought under Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act. In this matter the Plaintiff has sought to have the defendant to be restrained from interfering with the suit property or trespassing thereunto.

2. The 1<sup>st</sup> Applicant/Plaintiff, it is not contested is the registered proprietor of Land Reference Number 214/702. Neither is it contested that the registered proprietor of Land Reference No. L.R NO. 214/703 is the Respondent and the two parcels of land are adjacent to each other.

3. Each parcel has a permissible access long the Muthaiga Road as delineated on the Land Survey plan number 137808 which is annexed to the 2<sup>nd</sup> Applicant/Plaintiff's Affidavit.

4. The property is currently housing the family home of the 2<sup>nd</sup> Applicant/Plaintiff who is the director of the 1<sup>st</sup> Applicant/Plaintiff who have co-existed with the Respondent/Defendant peacefully.

5. As a gesture of good neighborliness, over the years, the 2<sup>nd</sup> Applicant /Plaintiff has granted the Respondent/Defendant the right of access to the suit property for ease of accessing his home using the suit property which is curved out as a long stretch "neck" extending to Muthaiga road and which ideally is the path leading to the gate of the 2<sup>nd</sup> Applicant/Plaintiff.

6. With such registration as to ownership intact the 2<sup>nd</sup> Plaintiff/Applicant contend that they are entitled to enjoy the benefits, privileges and rights appurtenant to such registration without interruptions

7. The 2<sup>nd</sup> Applicant/Plaintiff avers that it recently initiated renovations to the suit property and wrote a letter dated 9/08/2021 to the Respondent/Defendant asking to make provisions for his own access to his property as the suit property is under facelift. It avers that the Respondent/Defendant was given reasonable time of 6 months to make the changes but on 11/08/21 the Respondent/Defendant responded to the letter of 2<sup>nd</sup> Applicant/Plaintiff and stated that he was not going to relocate his sewer since

he is entitled to use the access road.

8. The 2<sup>nd</sup> Applicant/Plaintiff avers that the Respondent/Defendant has become a nuisance through numerous unreasonable and unwarranted complaints about blockage of his perceived access road by trucks and building materials.

9. The Plaintiff avers that they wrote a letter which they have annexed to the Affidavit seeking clarification on 10/08/2021 to Director of Survey who responded vide the letter dated 1/09/2021 clarifying that the neck of LR 214/702 is part of the total acreage of the land as indicated in survey plan and it is not an access road.

10. The plaintiff contends that their right to property as provided in the Land Registration Act is interfered with. The Respondent/Defendant according to the 2<sup>nd</sup> Applicant/Plaintiff are trespassers with no right over the property whatsoever.

11. Further the plaintiff avers that the Respondent however are not letting the Plaintiff enjoy the rights accruing from being the registered owner of the suit property and have unjustifiably intruded.

12. The Respondent/Defendant on the other hand contends through a Replying Affidavit filed on 24/09/2021 and states that they never interfered with the 2<sup>nd</sup> Applicant/Plaintiff's access to the suit land nor the easement. This is evident from the monthly payment of joint security.

13. The Respondent/Defendant avers the two properties were a result of a subdivision of the property known as LR No.214/178 and that an easement for the benefit of the defendant's property was created at the time of the subdivision as recorded in a conveyance dated 31/10/93 and registered as the Land Titles Registry in Volume N59 Folio 212/1 file 18913.

14. This application was argued by way of written submissions. The Applicant/plaintiff filed its submission on 8/10/2021. The Respondent/Defendant 29/09/2021. I have considered the submissions and filed authorities cited in support of the Applicant/Plaintiff and the submissions and filed authorities of the Respondent/Defendant together with the supporting affidavits. I have considered carefully the replying affidavit and further affidavit of the Respondent. I have also considered the Applicant's Further Affidavit.

15. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. An applicant for a temporary injunction must establish that they have a prima facie case against the respondent and they stand to suffer irreparable harm which cannot be compensated in damages if the order is not granted.

16. If the court is in doubt as to the above, the application would be considered on a balance of convenience. See, the case of *Giella v Cassman Brown & Co. Ltd.* (1973) E.A 358

17. I am satisfied that the Applicant/Plaintiff has established a prima facie case against the defendant with a probability of success. The 2<sup>nd</sup> Applicant/Plaintiff has demonstrated that the suit property is part of their property.

18. Although the 2<sup>nd</sup> Respondent/Defendant claims that there is an easement that moves with the land they placed no evidence before the court showing how and when the easement was factored on the suit property.

19. For the foregoing reasons I come to the sudden yet justifiable conclusion that the Respondent/Defendant has no legal claim in the suit property. Instead the Applicant/Plaintiff has and is the holder of the legal interest. Effectively, the Plaintiff has established a prima facie case with chances of success and as such the Respondent/Defendant ought to be restrained.

20. As for the principle that if the court is in doubt, it will decide an application on the balance of convenience, I am of the view that the same must at all times tilt towards safeguarding the property rights of a legally registered owner. Whereas there is a dispute on the access road which is the suit property, the balance of convenience tilts in favour of the Applicant/Plaintiff

21. For the foregoing reasons I will allow the Applicant's/plaintiff's Notice of Motion dated 13/09/2021 and give the following orders:

a) Pending the hearing and determination of this suit or further orders by the Court, the Respondent/Defendant either by himself, his relatives, servants, employees, agents, assignees or anybody claiming under or in his name are *restrained* from entering and/or accessing, trespassing, encroaching or in any way whatsoever interfering with the Applicants/Plaintiffs' quiet occupation, use and possession of all that parcel of land known as LR No. 214/702 delineated on Land Survey Plan Number 137808 situated in the Muthaiga area of Nairobi City County.

b) Costs of the application shall abide the outcome of the main suit.

24. This is a matter that would benefit from negotiation and mediation if the parties are willing to engage

Order accordingly.

**SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF NOVEMBER 2021.**

.....

**MOGENI J.**

**JUDGE**

NA.....Applicant/Plaintiff

Mr Deya.....Defendant/Respondent

Mr Vincent Owuor.....Court Assistant



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)