



**REPUBLIC OF KENYA**

**High Court at Meru**

**Petition 4 of 2011**

**TABITHA KAGWIRIA MURIUKI.....PETITIONER/APPLICANT**

**V E R S U S**

**STEPHEN MAINGI M'ICHORO & 4 OTHERS.....RESPONDENT**

**R U L I N G**

The Petitioner/Applicant has brought a Chamber Summons application under Articles 22 and 23(3) of the Constitution, rules 20 and 21 of the Constitution Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual High Court Practice and Procedure Rules 2006) it is the application dated 18<sup>th</sup> May, 2011. It seeks Order 3 and 4 as follows:

1. ...

2. ...

**3. Issue an interlocutory injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and their agents, servants, employees and/or anyone else acting or claiming for, on behalf of or through them or any of them from demolishing any part of the Petitioner's/Applicant's permanent and semi-permanent commercial and dwelling premises built on the petitioner's applicants L.R. No. Ntima/Igoki/6726, situate in Gakoromone area within Meru Township or whatsoever pending inter-partes hearing of the application pending hearing and determination of petition or until further orders of the court.**

**4.Award costs of the application to the Petitioner/Applicant.**

The application is premised on grounds on the face of the applications as follows:

**1.That the applicant bought the suit land on 18<sup>th</sup> December, 1985 and has established both permanent and semi-permanent commercial and dwelling houses thereon.**

**2.That the said premises are not on any access road.**

**3. That the applicant is in actual possession of the suit land and her aforesaid premises.**

**4. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent have threatened to demolish parts of the said premises ten days after 12.5.2011 alleging that parts of the same are an access road to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's plots, if the applicant does not do so on her own within those ten days.**

**5. That the applicant risks suffering profound loss, harm and damage.**

**6. That the 3<sup>rd</sup> and 4<sup>th</sup> respondents have refused to listen to the applicant.**

The application is supported by the petitioner's affidavit of even date and a supplementary affidavit dated 9<sup>th</sup> November 2012.

The gist of the Petitioner's affidavit are that she has been in actual possession of the suit land in 1985 and that she has extensively developed the said parcel of land. She avers that the buildings on the suit land were her only source of income and that currently she has 10 tenants on the said premises. She avers that problems started on 11<sup>th</sup> May, 2011 when the 3<sup>rd</sup> Respondent caused her to be served with a boundary dispute summons of a dispute between the petitioner and the 1<sup>st</sup> Respondent. She avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents flanked by Police officers visited her premises on 12<sup>th</sup> May, 2011. That she learnt then that it was being alleged that her buildings were an access road, a fact she vehemently denies. The Applicant contends that she was apprehensive that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have always freely and easily accessed their plots through an existing access path. That it is the reason why they did not complain in the past and that if indeed she had constructed an access road, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should have raised issues at the time she dug the foundation.

The application is opposed. The 1<sup>st</sup> Respondent has sworn an affidavit on his behalf and the 2<sup>nd</sup> respondent's on behalf. It is dated 3<sup>rd</sup> June, 2011. The gist of the affidavit is that the applicant purchased the suit property from the 1<sup>st</sup> Respondent's father who is also the 2<sup>nd</sup> Respondent's grandfather. The 1<sup>st</sup> Respondent contends that his father died before he could transfer the plot to the Applicant but to their surprise the transfer was effected 23 days after the deceased death. The Respondent's contend that the Applicant built permanent structures on the access road blocking it in 2010. The respondents deny that they have any intention of interfering with the Applicant's parcel of land.

The 3<sup>rd</sup> Respondent, the District Land Registrar Meru has filed a replying affidavit dated 22<sup>nd</sup> July, 2011. The gist of the affidavit is that the access road to and from the tarmac road to the complainant's parcel **No. NTIMA/IGOKI/6727** is closed and a business premises erected which has covered the whole width of the road. He avers that the road of access was intended to give access to the main road to plot **Nos. NTIMA/IGOKI/6723, 6724, 6725, 6726 and 6727**. He also avers that the blocked access road is a public road.

I have considered the petitioner's application, the affidavits sworn by the Petitioner and the respondent. I have also considered the submissions made by Mr. Mbaabu for the Petitioner, Ms Mutinda for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and Mr. Menge Principal Litigation Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

The Petitioner has invoked provisions of the Constitution 2010, Articles 22 and 23(3), to seek for injunctive reliefs against the Respondents among other prayers. Article 22 and 23(3) provides

**22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has**

**been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group or class of persons;**

**(c) a person acting in the public interest; or**

**(d) an association acting in the interest of one or more of its members.**

**(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria**

**that—**

**(a) the rights of standing provided for in clause (2) are fully facilitated;**

**(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;**

**(c) no fee may be charged for commencing the proceedings;**

**(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;**

**and**

**(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.**

**(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.**

**23. (1) .....**

**(2) .....**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including–**

**(a) a declaration of rights;**

**(b) an injunction;**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.**

Mr. Mbaabu for the Petitioner urges that in considering this application, the court should be guided by the case of **GIELLA VS. CASSMAN BROWN & CO LTD (1993) EA 358**. This case sets out the principles which apply in determining whether a case has been made for an order of injunction. It was held in that case where relevant thus:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa.**

**First an applicant must show a prima facie case with a probability of success.**

**Secondly, an interlocutory injunction will not normally be granted unless the applicant 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.”**

Mr. Mbaabu urges that the petition has an overwhelming chances of success. Counsel has urged that the Petitioner has demonstrated through her, affidavits and annexures thereto that the land and the buildings on it belongs to her and that her title has not been challenged. Counsel urged that the Respondent had no intentions of resolving an alleged boundary dispute. That they were bent on demolishing the Petitioner’s buildings. Counsel urged that such an act violates petitioner’s rights as enshrined under Art 40(2) of the constitution. Counsel relied on the case of **MARY KABURU M’NJUKI VS M’CHABARI M’ITARU MERU HCCC NO. 62 OF 2010** where Hon Kasango J. held:

Article 40(2) (a) of the Constitution provides as follows:

**“Parliament shall not enact a law that permits the state or person-**

**(a) to arbitrarily deprive a person of property of any description or of any interest, or right over, any property of any description.”**

Ms Mutinda for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent urged that the Petitioner did not have any case as it has been proved through affidavit evidence that she had encroached on the access road. Counsel urged that the demolition called for the removal of only the parts of the premises protruding and blocking the public access road. Ms Mutinda urged that Article 40(2)(a) of the Constitution did not offer blanket protection of the right to own property, and that it does not aid the Petitioner. Counsel relied on Mombasa **HCCC NO. 103 OF 2010 MALACHI ORONDO AND 6 OTHERS VS MOMBASA WATER PRODUCTS LTD ON CITY COUNCIL OF MOMBASA**. That case does not apply since the land in issue in the cited case was unregistered land.

The Principal Litigation counsel Mr. Menge, in his submissions urged that the petitioner had not established any prima facie case with any chances of success. Counsel urged that Article 40(2) (a) of the constitution quoted by the Petitioner was being misinterpreted as it does not protect a person who unlawfully takes land that does not belong to her.

Injunctive relief is an equitable relief. The court has the powers to exercise its discretion and determine whether or not to grant an injunction. That exercise of discretion must however be judiciary exercised.

The principles set out in Geilla's case, supra, apply to this case. I have considered what the counsels to the parties have submitted in regard to a prima facie case. The burden lies upon the petitioner to establish that she has a prima facie case with a probability of success. The petitioner claims that the structures/buildings on the suit property were hers and that she has not encroached on any access road. The 3<sup>rd</sup> Respondent has sworn an affidavit, and has annexed a report and Map to show that the Petitioner has encroached on an access road and has constructed on the entire width of the access road. Further the report shows that the Petitioner has completely blocked access to the main road to several plot owners. The 3<sup>rd</sup> Respondent is the Land Registrar Meru. His evidence that the Petitioner has encroached on a public road is backed by Government records.

It has been shown that the petitioner has delineated public road and made it part of her plot. The public road was meant as an access for the use of the public including the petitioner herself. It was not meant for exclusive use of an individual. The petitioner has not controverted that fact on a balance of probabilities. I am satisfied that the Petitioner has encroached on public land. Article 40, 22 and 23(3) of the Constitution cannot come to the Petitioners aid in view of the fact Petitioners constructed on a public road.

It is a diction of Equity that Equity does not aid or protect wrong doers neither can it be used to legalize that which is illegal. In the circumstances the Petitioner has not satisfied the first test of establishing a prima facie case with a probability of success.

In case I may be wrong I will consider the other tests.

Mr. Mbaabu has urged that because the Applicant has filed constitutional suit and not a civil suit her application should be granted even against the government. Mr. Mbaabu urged that unless the injunction sought is granted the petitioner will suffer irreparable damage. If her rental premises were demolished. Further the petitioner would suffer irreparable loss since she had taken an AFC loan to develop the plot and that she was still servicing it.

In regard to balance of convenience Mr. Mbaabu urged that the balance of convenience tilts in favour of the Petitioner He urges that the Petitioner has shown plot is hers and that she had obtained approval for the plan before construction. He urged that TKM3 annexed to the supplementary affidavit reflected a spacious access road through which the 1<sup>st</sup> and 2<sup>nd</sup> respondents had been accessing their plots.

Mr. Menge for the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents urged that since there were other remedies available to the Petitioner, she ought not to have filed a petition. That point is however premature as bi iooisutuib was filed. It ought to be argued substantively in order to give all parties a chance to respond to it.

Mr. Menge urged that the prayer for irreparable damage cannot be made available in this suit for the simple reason any damage would be compensated by an award of damages.

Mr. Mutinda equally urged that the petition cannot suffer irreparable damage as he can always be compensated by an award of damages. She urged that landowners should not be allowed to block or interfere with proper use of adjacent land. In regard to principle of balance of convenience Ms Mutinda urged that on a proper application of the law and facts the balance of convenience should be found to be in favour of the Respondents.

The respondents have been able to establish that there was a well founded and proper demonstration that the petitioner had encroached onto public land and that the part of her structure which had encroached was a semi permanent building. Whether permanent or temporary the court is satisfied that the damage which may result if this application is not granted can easily be computed and compensated in an award of damages.

On the issue of balance of convenience I have no difficulty in finding that a party cannot be allowed to affect or interfere in the use of adjacent land, much worse if that adjacent land happens to be a public road giving access to the main road to many plot owner. The balance of convenience should tilt in favour of those whose rights have been infringed. The ones whose rights have been infringed are road users of the blocked access road. The petitioner put up structures on public road, deliberately and in a calculated manner. The court cannot grant this application as that would be sanctioning an illegality, protecting and aiding a wrong doer and giving relief to a person who has come with unclean hands.

The conclusion is that the application dated 18<sup>th</sup> May, 2011 fails and is dismissed with costs.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER 2012**

**LESIT, J.**

**JUDGE.**



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