



Maranga (Suing as the Legal Administrator of the Estate of Stephen Maranga Obegi) & 3 others v Saul & 5 others (Environment & Land Case E023 of 2022) [2023] KEELC 16184 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE E023 OF 2022**

**M SILA, J
MARCH 15, 2023**

BETWEEN

**WILFRED OBEGI MARANGA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF STEPHEN MARANGA OBEGI) 1ST PLAINTIFF
DOUGLAS GICHABA GICHANA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JUSTUS GICHANA OBEGI) 2ND PLAINTIFF
JOSEPH OCHWERI OBEGI 3RD PLAINTIFF
HUDSON OCHWERI MARANGA OBEGI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF PERIS NYAMAINA OBEGI) 4TH PLAINTIFF**

AND

**STANLEY OBINO SAUL 1ST DEFENDANT
ALFRED OMWENGA SAUL 2ND DEFENDANT
THE KISII COUNTY SURVEYOR 3RD DEFENDANT
THE COUNTY LAND REGISTRAR 4TH DEFENDANT
THE DIRECTOR OF SURVEY 5TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. The application before me is that dated December 20, 2022 filed by the 1st and 2nd defendants in the main suit who also have a counterclaim. The application seeks orders (paraphrased for brevity):-



- a. Certification of urgency.
 - b. That pending hearing and determination of this application, an order of mandatory injunction be issued compelling the plaintiffs and/or their agents to remove the fence erected across the suit public road.
 - c. That pending hearing and determination of the suit, the plaintiffs and their agents be restrained from closing and/or blocking the public road or prevent the applicants from using it or passing through it.
 - d. The OCS Ramasha police to oversee compliance of this order.
2. The application is based on grounds that on December 4, 2022, the plaintiffs in the main suit (respondents herein) blocked the disputed road by erecting fences across it. It is averred that this road exists on the ground, is murramed, and motorists even use it. It is contended that the road was created during the adjudication process and has existed since then to date and serves not only the applicants but also the community. The supporting affidavit is sworn by Stanley Obino Saul the 1st applicant. He has annexed the Registry Index Map and has added that his late mother, Gesare Okioma, had filed suit against Stephen Maranga Obegi, Yunes Mogotu Gichana, Gichana Sefania Ondara Obegi, and Andrew Ombaba Saul, being the suit Kisii CMCC No 798 of 2006, and she obtained mandatory orders for opening the same road. A copy of the order and decree are annexed. He deposes that the Kisii District Land Registrar and Surveyor came to site, opened the road and fixed its boundaries. He adds that in the year 2007, the Member of Parliament officially opened the road and the same was subsequently murramed. He states that they have been using the road but on the morning of 4 December 2022 the respondents fenced across it using poles and rafters. He reported at Ramasha Police station and the OCS went to site but they could not arrest the culprits or remove the fence on ground that there is a pending case. He avers that because of the road they are prevented from accessing the main road and river.
3. The application is opposed through the replying affidavit of Joseph Ochweri Obegi, the 3rd plaintiff/respondent. He contends that after the summons herein were served, the applicants assembled heavy machinery and enlisted the help of the area chief to create the disputed access road so as to short-circuit this suit. He avers that on 13 December 2022, the applicants brought a tractor to create the road but they were stopped when they raised alarm and neighbours intervened. He contends that the applicants have been using the provincial administration to frustrate them and collude with the Lands and Survey offices to irregularly amend the maps and superimpose a road of access on their land without involving them. He contends that the original map reflects that there was never any easement or road of access existing on their land and so too the green card. He deposes that when they got wind that the applicants intended to invade their homes to create a road, they informed their counsel who wrote a letter dated 9 December 2022 to the County Commissioner for his intervention. The Assistant Chief and Assistant County Commissioner thus retreated but the applicants enlisted the help of goons armed with crude weapons who have been visiting their homes and threatening them. On 7 January 2023, he deposes that their homes were invaded by the said goons, who destroyed their fence and terrorized them for hours, and over 30 of their chickens were stolen. He avers that out of this violence, he suffered serious injuries. He adds that the 1st and 3rd defendants have been frequenting their homes so as to intimidate them to withdraw the suit. He contends that it is wrong for the applicants to engage in acts of violence and also run to court to help them perpetuate their illegality. He asserts that the alleged road has never existed on the ground since, and that for the road to exist, it will involve tearing down their homes. He states that attempts to create the road through ex parte orders has not materialized as the orders were set aside. He has referred to the pictures annexed by the applicants and states that this is part of



their perimeter fence which had been demolished and restored. He adds that he who seeks equity must come with clean hands and that the applicants have concealed their criminal acts.

4. The suit itself was commenced by the respondents who, in their plaint filed on November 11, 2022, pleaded to be the registered owners of the land parcel Kisii/Nyaribari Masaba/Bokimotwe 1/1576, 1577, 1578, 392 (the suit lands). It was pleaded that the parcels No 1576, 11577 and 1578 were subdivisions of the parcel No 391 which shared a common boundary with the parcel No 392. It was averred that the parcel No 391 was adjudicated to Jelja Kerubo Obegi and the parcel No 392 was adjudicated to the 4th plaintiff. It is pleaded that in November 2021, the applicants came up with a claim that there is a road of access which ought to exist on the ground through the suit lands but they were repulsed. It is added that on September 20, 2022, they came to the land and destroyed a grave where Mzee Reuben Obegi was interred. It is pleaded that in the year 1970, the adjudication officer sought to create a road of access through the plaintiffs' parcels of land No 391 and 392 by preferring criminal charges, in Criminal Case No 710 of 1970, against the original owners, so as to have them fence off a path of access within their land but this attempt flopped and the criminal charges dismissed. It is pleaded that the family continued to use their land peacefully until the year 2006 when one Gesare Okioma approached the Land Registrar to open up the road. The Land Registrar issued summons but the road was not created since the path of the intended road was densely developed with permanent homes and buildings belonging to the plaintiffs and family members. The said Gesare Okioma then filed the suit Kisii CMCC No 798 of 2006 to have the road opened to serve her parcel No 386, which suit culminated in an ex parte judgment but which was set aside by the High Court vide Kisii HCCA No 202 of 2008. The case Kisii CMCC No 798 of 2006 was to be heard de novo but it abated upon the death of Gesare Okioma. It is pleaded that after the death of the said Gesare, the plaintiffs continued using their parcels of land with no access road. The plaintiffs aver that they have established that through documents filed in Kisii CMCC No 798 of 2006, a map had been prepared by the survey department, to reflect a road of access through the suit lands, which the plaintiffs contend was made secretly and without notice or involvement of the plaintiffs or predecessors in title. Based on the ex parte proceedings, the Land Registrar and Surveyor generated two reports dated 10 August 2006 and 23 August 2007 but which reports were invalidated after the ex parte judgment was set aside. It is alleged that in November 2021, the defendants came to the land with a claim that there is a road of access which ought to exist on the ground and brought a tractor. They contend that the defendants and members of the public have alternatives and the decision of the 3rd – 5th defendants of creating a road in the map without involving the plaintiffs constitutes trespass, a forcible acquisition and conversion. They assert that they have been using their parcels of land without existence of a road. In the suit, they ask for the following orders (paraphrased for brevity) :-
 - a. A declaration that the amendment of the index map and imposition of a road of access is illegal.
 - b. An order directing the Director of Survey to delete the said road imposed on the suit lands.
 - c. A permanent injunction to restrain the defendants from trespassing or interfering with the suit lands.
 - d. In the alternative an order that any accrued rights of the defendants are extinguished by operation of law and/or non-user.
 - e. Costs and interest.
 - f. Any further relief the court may deem fit.
5. The applicants, as 1st and 2nd defendants, filed defence and counterclaim. They denied the claims of the plaintiffs. They pleaded that the road was opened sometimes in the year 2007 and has been in use



until December 2022 when the plaintiffs erected a fence across it. They contended that the decree in Kisii CMCC No 798 of 2006 was fully implemented. They asserted that the road exists on both the Registry Index Map (RIM) and on the ground and that they have a right to use it. In the counterclaim, they plead that the plaintiffs illegally closed the road on December 4, 2022 and seek orders compelling them to remove their fence, and a permanent injunction to stop them from interfering or blocking the said road. They also seek general damages for the inconvenience caused and costs.

6. I have considered the pleadings, the material placed before me, and the submissions of counsel.
7. This is an application for a mandatory interlocutory injunction to have the respondents remove what the applicants contend is a fence that the respondents erected on December 4, 2022 which fence blocked the access road in dispute. The applicants aver that they have all along been using this road prior to its closure. On the other hand, the respondents assert that there has been no such road in use. They claim that on December 13, 2022, the applicants came with machinery to create the road which attempt was not successful. They add that on January 7, 2023, the applicants descended on their land with goons. It follows that I have disparate positions on what the true facts are. I will have to chart my own path upon sifting through the material presented.
8. I have particularly looked at the photographs presented by the applicants. They do show some sort of treaded path and a fence, which in my view, based on the material before me, appears newly erected. In paragraph 26 of the replying affidavit, it is deposed that the images depicted in the photographs show part of the fence which was demolished and restored. The deponent does not give a precise date when this was done. It certainly cannot have been after 7 January 2023 when the respondents allege that the applicants came with goons and destroyed their perimeter fence, for by then, this application had already been filed and the photographs were already in the application. Weighing the two depositions, it is, in my view, more probable that the fencing was done as claimed by the applicants. To my discernment, it is this fence that they want removed. I am persuaded to grant the order to remove this fence, as I am persuaded that the same was recently erected.
9. By making this order, I am not, in any way, saying that the applicants have convinced me that there should be such a road in the map. What I am saying is that I have been persuaded, based on the limited material before me, that there was some sort of path in use before this case was filed. It is a holding restricted only for purposes of making a decision on this application and it is one that could very well be overturned once I hear the parties on merits. It should not therefore be deemed that the final holding of this court is that the applicants have succeeded in convincing this court that there is a road of access in the maps which needs to be created. That, I am alive, is the substance of the case and I would not wish to make any pronouncement on the same at this stage of the proceedings. I am also alive to the fact that the plaintiffs' position is that there should be no road and that none exists in the correct maps and the defendants' position is that the road exists on both ground and map. It is only that I must pronounce myself on a certain status to be maintained pending the hearing of the suit.
10. For the reasons above, I do order the respondents to remove the impugned fence blocking the path in issue within the next 48 hours. If they do not so remove it, the applicants to proceed and remove it under supervision of the Assistant County Commissioner of the area and the OCS of Ramasha Police Station to provide the necessary security.
11. For the avoidance of doubt, all I have ordered is removal of this fence traversing the path and nothing else. Nobody should proceed with machinery or tools to cut the ground claiming to be creating or improving the road. No trees should be cut or building pulled down on the basis that there is a road being established. Upon removal of the fence nothing should be erected on or across this path until



the conclusion of this case and the disputed area should be used as it was being used before this suit was filed.

12. The costs of this application will be costs in the cause.

13. Orders accordingly.

DATED AND DELIVERED THIS 15 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

Delivered in presence of: -

Mr. O.M Otieno for the plaintiffs/respondents

No Appearance on part of Mr. Momanyi Aunga for the applicants

