



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO. 130 OF 2016

COL (RTD) LAWRENCE NTEERE PLAINTIFF/APPLICANT

-VERSUS-

KONGONI CAMP LIMITED..... DEFENDANT/RESPONDENT

RULING

1. By a plaint dated **20th June, 2016** and filed on the same day, Col (Rtd) Lawrence Nteere, hereinafter referred to as “the applicant”, filed the suit herein seeking the following reliefs against Kongoni Camp Limited, the defendant herein:

- i. A declaration that the road situated at the tail end of LR. 12272 is a public road and an easement meant to be enjoyed by the members of Samat Estate and its neighbourhood;
- ii. A mandatory injunction compelling the defendant by itself, servants, agents, employees, proxies or any other person acting on its behalf to forthwith open the public access road at the tail end of LR No.12272 belonging to the defendant; and
- iii. A permanent injunction restraining the defendant by itself, its servants, agents, employees, proxies or any other person acting on its behalf from blocking the public access road at the tail end of LR No.12272 belonging to the defendant.

2. Simultaneously with the plaint, the applicant filed the notice of motion of an even date seeking the following orders:

- i. Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;
- ii. A temporary mandatory injunction to restrain the defendant by itself, servants, agents, employees, proxies or any other person acting on its behalf from blocking the public access road passing at the tail end of LR No.12272 and erecting barbed wires and fencing posts thereon pending the inter partes hearing of application;
- iii. A temporary mandatory injunction directing the defendant by itself, servants, agents, employees, proxies or any other person acting on its behalf to forthwith open the public access road passing at the tail end of LR No.12272 and remove the barbed wires and fencing posts erected thereon pending the inter partes hearing of application;
- iv. A temporary mandatory injunction to restrain the defendant by itself, servants, agents, employees, proxies or any other person acting on its behalf from blocking the public access road

passing at the tail end of LR No.12272 and erecting barbed wires and fencing posts thereon pending the hearing and determination of the suit;

v. A temporary mandatory injunction directing the defendant by itself, servants, agents, employees, proxies or any other person acting on its behalf to forthwith open the public access road passing at the tail end of LR No.12272 and remove the barbed wires and fencing posts erected thereon pending the hearing and determination of the suit.

vi. The officer in charge of Nanyuki Police Station to facilitate the enforcement of the orders;

vii. Costs of the application.

3. The application is premised on 12 grounds that can be summarised as follows:

(a) That there exists a public access road at the tail end of the parcel of land known as L.R No. 12272 owned by the defendant;

b. That the road has existed for a long period of time, since 1936;

c. That the road has been used and enjoyed by the plaintiff and the members of Samat Estate since that time (1936);

d. That the defendant who bought L.R No.12272 on which the road is found in 2008, has blocked the road rendering the plaintiff and the other residents of Samat estate landlocked and marooned;

4. Explaining that there is no other road the resident of Samat estate and he can use to access their public utilities like schools, hospitals and markets; the plaintiff contends that the conduct of the defendant of blocking the road is unlawful, arbitrary, oppressive, barbaric and untimely.

5. According to the applicant, the respondent who acquiesced to the use of the road by members of the public should not be allowed to deny them use of the road.

6. It is pointed out that on 9th June, 2016 the respondent put up a notice to the effect that he would close the road after seven (7) days.

7. Whilst the notice was to expire on 16th June 2016, the defendant is accused of having closed the road way before the end of the notified time and without involving the relevant Government agencies like the National Land Commission (The defendant is said to have closed the road on 13th June, 2016).

8. It is contended that the road exists in survey maps of 1941 to date.

9. Maintaining that the closure of the road is detrimental to them, the plaintiff explains that their attempts to have the dispute resolved amicably, have been in vain.

10. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated. Besides reiterating the grounds on the face of the application, the applicant has annexed the following documents in support of the averments contained in the supporting affidavit:

a. List of members of Samat estate showing that they are against closure of the road, marked **LN-1**;

b. Bundle of maps allegedly showing that there is no other access road apart from one which forms the subject matter of this suit, marked **LN-2**;

c. A bundle of letters exchanged between the parties to this dispute, marked **LN-3**;

d. The notice put up by the defendant, marked **LN-4**;

e. Photograph showing that the road was closed before expiry of the notice, marked **LN-5**.

11. The application is opposed through the replying affidavit of Edwin Anderson, one of the directors of the defendant.

12. Through that affidavit, the defendant contends that the suit property is not encumbered by any easements known in law; that there exists an official road of access to Samat estate which has been unused all through.

13. Terming the applicants trespassers to its land, the defendant explains that Samat estate, which used to be one property, was sub-divided leading to blockage of road through which residents of the estate accessed the official road by the current owners of the sub-divisions.

14. According to the defendant, the members of Samat estate were using an unofficial access road on LR. NO. 122271 owned by Hellen Kirutu before the said Hellen apportioned that property and sold it.

15. According to the defendant, the apportioning and sale of LR No.122271 by Hellen led to blockage of the un-official access road and to shifting of the un-official access road to its property, that is to say to LR No.122172.

16. Although the defendant was opposed to the diversion of the un-official access road to its property, in the spirit of good neighbourhood, it indulged the plaintiffs on understanding that they would move to the official access road upon its rehabilitation.

17. In due course of time, the defendant realised that the plaintiffs had no intention of stopping the use of the un-official access road and issued them with the notice referred to herein above.

18. The defendant acknowledges having closed the access road before the time provided in the notice lapsed but explains that he did so because the applicants moved into the suit property and attempted to grade the road using graders from the County Government of Meru.

19. Explaining that there were attempts to resolve the dispute amicably, the defendant laments that no settlement was reached because the applicants refused the proposal to have them relocate to the official road which they consider remote and far from their properties.

20. It is pointed out that the fence the defendant erected was destroyed by hired goons but restored after the police advised them to do so.

21. According to the defendant, the current suit was meant to pre-empt the possible prosecution of the persons who destroyed the fence it erected.

22. The defendant explains that before it leased the suit property, it engaged a surveyor who prepared a report dubbed, ascertaining of boundary beacons for LR. No.12272 (Kongoni camp).

23. Arguing that the application is aimed at justifying crime and civil wrongs, the defendant contends that the applicants are not entitled to the reliefs sought because they have approached the court with dirty hands.

24. In a rejoinder the applicant filed the affidavit (supplementary affidavit) he swore on **7th November, 2016** in which he *inter alia* reiterates the contents of the affidavit he swore on 20th June, 2016 (the affidavit he swore in support of the application).

25. Terming the affidavit filed in reply of the application defective for having been filed before it was commissioned; the applicant urges the court to expunge it from the record of the court.

26. The applicant denies the contention that they have trespassed onto the defendant's property and maintains that they have always used it to access properties and homes.
27. The applicant further contends that the title held by the defendant is subject to easements, which are overriding interests under **Section 28** of the Land Registration Act, 2012, not requiring to be noted in the title.
28. The applicant maintains that there is no other access road to the estate, a fact he says is confirmed by the goggle map presented by the defendant.
29. That the access road in dispute has never been blocked by any other person except the defendant.
30. That contrary to the defendant's allegations, they moved to court after the defendant blocked the suit property leaving them marooned and without access to Nanyuki-Meru High way.
31. The applicant denies having moved to court with unclean hands.
32. It is contended that there is no evidence to show that the road in dispute is not a public road or that there is an alternative access road through which the residents of Samat estate can access the main road, Nanyuki-Meru High Way.
33. The goggle map provided by the defendant and marked as **EA-2** is said to confirm that the road in dispute emanates from the High Way to Samat estate.
34. Samat estate being a gated community is said to be incapable of having a public road through it.
35. The applicants' case is further supported by the affidavits of the applicant Tony Mwithe, Major (Rtd) Samwel Waweru Njoroge and Hellen W. Kurutu annexed to the supplementary affidavit sworn by the applicant.
36. The application was disposed of by way of written submissions.

Submissions

37. On behalf of the applicant an overview of the applicants' case is given and based on the principles espoused in the cases of **Giella v. Cassman Brown & Co. Ltd 1973 E.A 358; American Cyanamid Co. vs. Ethicon Ltd (1975) ALL E.R 504** and in **Halbury's Laws of England, Vol. 11 (2009), 5th Edition, Para. 385** and submitted that the applicant has made up a case for being granted the orders sought.
38. Pointing out that the applicants have used the road in question for a long period of time, reference is made to **Section 138** of the Land Act, 2012 which describes an easement and submitted that the prolonged use of the road in dispute by the applicant' should be treated as an easement.
39. Further reference is made to the cases of **Simiyu Mukholosi v. John Khaemba (2013) eKLR** and **Esther Mutenyo Egesa v. Daniel Nyagah & Patrick Mabuka Wanjala (2015) eKLR** where the courts found in favour of the applicants whose road of access had been blocked by the respondents.
40. Further reference is also made to the case of **Parmuat Oloishorua Kore v. Phillip Santamo Wautai & 7 Others (2015) eKLR** where the court emphasised the importance of maintaining the status quo pending the hearing and determination of dispute presented before court for determination.
41. The applicants have also relied on **Section 143(5)** of the Land Act, 2012 which recognises communal right of way.
42. Based on the provisions of **Section 140(4)** of the Land Act, 2012 which gives the factors which the court shall consider in determining whether to give a right to easement it is submitted that if this court

fails to grant the orders sought pending the hearing and determination of the suit herein, great harm and prejudice will be occasioned on the applicants.

43. Maintaining that the replying affidavit filed in court is incompetent for being sworn way after it was filed, the court is urged to strike it out.

44. On behalf of the defendant, an overview of the plaintiff's case is given and submitted that though presented as a representative suit, the suit does not qualify as a representative suit because no authority was filed with the initial pleadings. The authority introduced through the supplementary affidavit is said to be incapable of curing the defect in the initial pleadings.

45. Terming the suit defective for want of the authority referred to herein above at the time the suit was filed, it is submitted that the application herein should fail for lack of substratum.

46. Pointing out that the title held by the defendant is not encumbered, it is submitted that if the title was subject to any easement in favour of the applicants, the easement would have been noted in the register; the memorandum section.

47. Arguing that it's not the duty of the defendant to provide access to the applicant, the defendant submits that it cannot be blamed for the situation the applicants are in.

48. Maintaining that there is not and there has never been a public access road on its parcel of land, the defendant maintains that the road in dispute is an informal path which initially passed through LR. 122171 before it was subdivided and the road blocked.

49. Concerning the authorities cited by the applicants, it is submitted that they have no bearing to the dispute herein because it relates to public access roads for which the applicant should avail documents to show that it exists.

50. According to the defendant, in the absence of any record showing that the road in question is a public access road, granting the orders sought would be tantamount to sanctioning an illegality.

Analysis and determination

51. I have considered the cases urged for and against the respective parties to this dispute.

52. It is not in dispute that the applicant either with express or implied permission of the respondent, had been using the road in question to access their premises.

53. Whilst the applicant claims that they had been using the road in question from time immemorial, the respondent explains that the applicants began using the access road in question after one of the owners of the plots in Samat estate apportioned her plot and sold it leading to closure of the access road then in use, an assertion which is vehemently denied by the applicants.

54. Although it is not in dispute that the subject matter of this dispute is found in land belonging to the respondent on the strength of evidence showing that the applicants had been using the road for a long period of time before the respondent decided to block it, I am satisfied that the applicants have made up a *prima facie* case with a probability of success at trial.

55. Being of the view that no amount of damages can compensate the applicants if the blockage of access to their plots is ultimately found to have being illegal or unlawful and that the balance of convenience tilts in favour of the applicants who for a long period of time have been using the access road in question, I find the applicants have made a case to warrant issuance of orders. However, considering that the orders sought in the application are mandatory in nature which cannot be granted at this interlocutory stage, I find and hold that confirming the order of *status quo* granted on 27th June, 2016 to be the most appropriate in the circumstances which I hereby confirm pending the hearing and determination of the

suit.

56. Costs will be in the cause.

Orders accordingly.

Dated, signed and delivered at Nyeri this 23rd day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms Mwikali h/b for Mr. Wanjohi for defendant/respondent

N/A for the plaintiff

Court assistant - Esther