



demolish and remove the gates/barriers to their property known as L.R. No. 24880 (Original Numbers 8724/5, 7334/4 and 5025/96) comprised in the Title No. C.R. 41234 which is alleged to be on an alleged road designated D556;

(2) further, or in the alternative, an order of certiorari to remove into this Honourable court, for the purposes of being quashed, the decision of the Respondents expressed in the said letter dated 29<sup>th</sup> November, 2010 to the effect that the Ex-parte Applicants' proposal of re-alignment of the alleged road (without admitting it exists) can only be considered if the gadgets/barriers to the Applicants' property are removed and/or demolished;

(3) an order of mandamus requiring the Respondents to act lawfully, reasonably and consider the Ex-parte Applicants' re-alignment proposal in accordance with the law and/or rules of natural justice;

(4) an order of prohibition to prohibit the Respondents from unlawfully and illegally declaring, insisting, imposing and/or persisting in that the alleged Road D556 is a classified road (Mitangoni-Mtwapa) and that it cuts over the Ex-parte Applicants' property known as L.R. No. 24880 (Original Numbers 8724/5, 7334/4 and 5025/96) comprised in Title No. C. R.41234 or that the Ex-parte Applicants have encroached onto the alleged road by erecting barriers/gates which form the entrance and provide security to their aforesaid property and/or in any manner whatsoever breaching and/or contravening the Ex-parte Applicants' proprietorship rights as guaranteed by the Constitution of Kenya;

(5) the costs of an occasioned by this motion be taxed and paid by the Respondent to the Applicant.

2. The Notice of Motion was based upon the grounds on the face thereof, and the Statutory Statement attached to the Chamber Summons for leave to commence judicial review proceedings, the Affidavit of Robert Ward Verifying the Facts sworn on 31<sup>st</sup> March, 2011 and the annexures thereto, the Affidavit of Phillippe Zimmerlin sworn on 31<sup>st</sup> March, 2011 and filed on 13<sup>th</sup> April, 2011, the Further Affidavit of Robert Ward sworn and filed on 2<sup>nd</sup> July, 2012 and the Further Affidavit of Robert Clarke, the General Manager of the First Applicant sworn and filed on 2<sup>nd</sup> May, 2011.

### **THE APPLICANTS' CASE**

3. The Applicants' bone of contention with the Respondents is whether an access road known as Road D556 ever existed and traversed the Applicants lands more particularly described in the Application and the said Affidavits. Whereas the Applicants contend that what existed were grids for fire breaks and farm tracks clearly evident on the topographical map appearing at page 47 of the Affidavit of Robert Ward sworn on 31<sup>st</sup> March, 2011, the Respondents however contend per the Replying Affidavit of S. O. Obara, the Regional Manager of Kenya Rural Roads Authority, the second Respondent herein, that the Road D556 was a re-classification of Roads E923 and E924.

4. Because of these conflicting claims, the Applicants filed on 13<sup>th</sup> March, 2013, a Notice of Motion dated 12<sup>th</sup> March, 2013 and sought orders that Engineer S. O. Obara, the Second Respondent's Regional Manager do produce original map annexed to his Affidavit as exhibit "SOO1" for inspection by the ex-parte Applicants and the court, and that the said Engineer S. O. Obara do attend court upon the hearing of the Applicants' Notice of Motion dated 3<sup>rd</sup> May, 2011 (the subject of this Ruling) for the purposes of being cross-examined on the contents of his affidavit sworn on 7<sup>th</sup> December, 2011 and file don 15<sup>th</sup> December, 2011.

5. In a Ruling delivered on 30<sup>th</sup> March, 2015 the court ordered among others, that exhibit "SOO1" attached to the Affidavit of Engineer S. O. Obara sworn on 7<sup>th</sup> December, 2011 be expunged from the record, and the court shall not use it, and further ordered that Engineer S. O. Obara do attend court on a

date to be fixed for purposes of cross-examination on the question of existence of Road No. D556, the subject of this Ruling, and that the Respondents' counsel would also be at liberty to cross-examine the deponents of affidavits filed in support of the ex-parte Applicants' case.

### **CROSS-EXAMINATION OF ENGINEER S. O. OBARA**

6. Engineer S. O. Obara was led in evidence by Mr. Wafula, counsel for the Second Respondent. It was Engineer Obara's evidence that Road D556 existed from 1938 as Road No. E923 and E924, and was re-classified into D556 because of increase of traffic. He testified that the road stretched from Mtangoni to Mitopeni in Mtwapa in Kilifi County. Engineer S. O. Obara testified that Class D is a minor road which joins market centres, while Class A Roads are international trunk ways like Mombasa-Malaba joining borders of different countries. He explained that from a foot track from 1938 to 1970, when it was classified as E923 and E924 and was re-classified between 1970 and 1983 to Class D 556. It was the road, he testified, which was fenced off within the Applicants' developments. Engineer Obara also testified that following demonstrations from the community of Mtwapa, the Applicants had now agreed to the realignment of the road outside the First Applicant's development, and that the realignment involved many other stakeholders.

7. When cross-examined by Mr. Khagram, he testified that Exhibit "SOO6" is a classification index drawn in 1971 but was not the latest as the classifications keep changing following improvement of the road, and Road D556 came into force in 1983, being former Road E923 and E924. The Engineer however testified that he had no knowledge that these roads (E923 and E924 now D556) cut through the First Applicant's development. *"I do not know and that there is no evidence to show that the roads cut through Vipingo Ridge Development."* Engineer Obara however denied the suggestion by counsel for the Applicants that the Respondents' surveyors went to the site during the pendency of the suit herein.

8. Following the evidence of Engineer Obara, I directed respective counsel to file their written submissions. The Applicants' counsel's submissions dated 5<sup>th</sup> May, 2016 were filed on 6<sup>th</sup> May, 2016. The Second Respondent's counsel's written submissions dated 22<sup>nd</sup> March, 2016 were filed on the same date.

9. The Attorney-General Counsel for the First Respondent took a limited role in these proceedings. Grounds of Opposition dated 21<sup>st</sup> March, 2016 were filed on 28<sup>th</sup> March, 2016 on behalf of the First Respondent to the effect that –

- (1) the application is misconceived, frivolous, vexatious and an abuse of the process of the court;
- (2) the orders sought are untenable and a nullity;
- (3) the application is res judicata;
- (4) the applicant is guilty of laches;
- (5) the applicant was the author of its own misfortunes.

10. No submissions were however filed on behalf of the First Respondent. The Second Respondent's submissions dated 22<sup>nd</sup> March, 2016 were filed on the same day. The Applicants' counsel's written submissions dated 5<sup>th</sup> May, 2016 were filed on 6<sup>th</sup> May, 2016. I will now consider the submissions by the respective parties, commencing with the Applicants submissions.

### **THE APPLICANTS' CASE**

11. The Applicants' case is summarized in paragraphs 7, 8 and 9 of the Further Affidavit of Robert Clarke sworn and filed on 2<sup>nd</sup> July, 2012, and reiterated in paragraph 6 of the Further Affidavit of the

Robert Ward also sworn and filed on 2<sup>nd</sup> July, 2012. The deponent avers in the said paragraphs as follows –

7. **That I do not accept as true the contents by the Kenya Roads Authority to the effect that there is a road that actually traverses through REA Vipingo Plantations, VRL and STCL's property and which is part of Road D556 as is now alleged and sought to be made out.**

8. **That what is now being referred to as Road D556 and particularly that part which is alleged to traverse across VRL and STCL's property has since I can remember been used as farm tracks and a fire break to provide passage to the staff of Rea Vipingo Estates Limited for the purposes of maintaining and cultivating the sisal plantations;**

9. **That at no time has any public road been built or maintained or for that matter traversed through the sisal plantations and the land on which the cultivation has taken place has always been privately owned land. Neither was this accessible to motorized traffic save for the farm tractors.**

12. To prove the above averments, the deponent attached as Exhibit "RC1", true photocopies of Google Earth Satellite images of the property currently owned by VRL and STCL spanning over a period 2003 and 2011 which clearly show systematic grids in white, the said farm tracks and firebreaks.

13. The general principle of the law of evidence (Section 107 of the Evidence Act, Cap 80, Laws of Kenya), is that he who alleges the existence of fact, must prove that fact. Put differently, the onus or burden of proof is upon the person who asserts or alleges. In his introduction, **MURPHY ON EVIDENCE, 11<sup>th</sup> Edition**, Judge Peter Murphy cites the case of *In Re B(Children)* (Case Proceedings Standard of Proof), *CARCASS Intervening* [2009]1AC 11(2) where Lord Holman said –

**"If a legal rule requires a fact to be proved, (a fact in issue)" a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."**

14. In his evidence, Engineer S. O. Obara insisted that Road D556 was formerly Road Nos. E923 and E924 and had been re-classified from years 1971 to 1983. And according to Exhibit "SOO1" entitled "*Road D556*" the road runs south from Mitangoni market as D566 (E923) to Pingilikani as E924 and continues from Pingilikani as D556, through LR No. 7334/4 and LR No. 5025/6 to Vipingo School down southwards Gongoni market where it branches eastwards as E926, but continues southwards as E924 to Bomani about where it meets E927 which runs east, but runs from Bomani to Mtopeni, down towards Mtwapa Coast Farmers Training Centre, and turns east and appears to end at the Chief's Office.

15. Though Engineer Obara insisted upon the re-classification of Roads E923 and E924 into Road D556, his own evidence, and the original maps, sheet 198/2 and sheet No. 198/4 (Vipingo) road E923 runs from **Mitangoni** (S87) through Pingilikani as E924 down south towards **Gongoni**, and out of that map (198/2) to Bomani (map 198/4). West of **Pingilikani** (map 198/4), runs road E925. Though roads E923 and E924 are shown in Exhibit "SOO6" to the Replying Affidavit of Engineer Obara, there is no indication of classification of those roads into Road D556.

16. It is a little strange that Engineer Obara depones in paragraph 21 of his Replying Affidavit that roads E923 and E924 were re-classified before amalgamation of the Applicants' properties. It is strange because Exhibit RW8 lists Road D556, but it does not, unlike other roads listed in that Exhibit indicate what road was re-classified to road D556.

17. Much more telling is Exhibit RW11, an extract taken from the Kenya Roads Authority Board Website and attached to the Supporting Affidavit of Robert Ward to the Applicants' Notice of Motion dated and filed on 12<sup>th</sup> March, 2013, seeking orders for the production of the original map to Exhibit "SOO1", and for leave to cross-examine Engineer Obara. The website road maps shows a completely different network of roads when compared to Engineer Obara's Exhibits "SOO1" to "SOO4". This lack of consistency led to orders in the court's Ruling of 30<sup>th</sup> March, 2015 expunging exhibit SOO1 from the record of proceedings and for the cross-examination of Engineer Obara.

18. Whether or not road E923 and E924 was re-classified into Road D556 is neither here or there. What really is critical is whether roads E923 and E924 transverse any of the ex-Applicants' parcels as claimed either before or after amalgamation of those parcels into a development known as Vipingo Ridge as claimed by Engineer Mwangi Maingi in his letter of 29<sup>th</sup> November, 2010 on behalf of the Kenya Rural Roads Authority, and the Bahari Constituency Roads Committee as claimed in minutes of the Kenya Rural Roads Authority held on 3<sup>rd</sup> February, 2010. The said meeting was attended by among others Hon. Ben Gundo then MP for Bahari Constituency.

19. I have scoured the map sheets No. 198/2 and 198/4 (Exhibits "SOO3" and "SOO4") and it is quite clear to me that neither Road E923 nor E924 traversed the Applicants' parcel of land known as LR No. 24880, and Road D556 being re-classification of Roads E923 and E924, cannot be said to traverse the Applicants' said property. Indeed Map Sheep 198/4 has this caution –

- (1) Passage by motor transport along some of the roads and tracks shown on this map may not always be possible or permitted; (underlining added)**
- (2) The representation on this map of a Road, Track or Footpath is no evidence of the existence of a right of way;**
- (3) This map is NOT an authority on the delimitation of boundaries;**
- (4) New authority Numbers are in accordance with M.O.W. Road Reclassification dated July, 1970;**
- (5) Distinct Vegetation Boundaries are shown as a dotted line.**

20. Whereas a landowner such as the Applicants may have roads or tracks motorable or otherwise, running and crisscrossing their property, for ingress and egress of their workers or other lawful visitors or guests, it does not translate those tracks into public highways, or confer the right way to the public.

21. The law governing public roads and roads of access, is the Public Roads and Roads of Access Act (Cap 399, Laws of Kenya). Under Section 2 of the Act a **public road** means –

- (a) any road which the public and had right to use immediately before the commencement of this Act;**
- (b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East African Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap 280), at any time before the commencement of this Act;**
- (c) all roads and thorough fares hereafter reserved for public use.**

22. The Public Roads and Roads of Access Act also prescribes the method or procedure for dedication of a line of public travel. Section 8(1) and (4) of the Act provide as follows –

**“8(1) Whenever it is made to appear to the Minister that requirements exist for**

**the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.**

(2)

(3)

(4) **Before making and publishing any order under this Section dedicating a line of public travel or conversion of a road of access into a line of public travel, the Minister may where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.”**

23. Neither the Replying Affidavit of Engineer Obara nor the correspondence to and from the Engineer shows any report made to the Minister as required under Section 8(1), nor any decision of a roads board as required under Section 8(4) of the Act that Roads E923 and E924, classified into road D556, be declared roads of access or public roads travel. That is the first ground of illegality of the correspondence condemning the Applicants’ land to a road of access or public “created” without reference to the requirements of the Public Roads and Roads of Access Act. Indeed the Respondent’s submissions dated and filed on 22<sup>nd</sup> March, 2016 confirm this principle (of illegality).

24. In **STANDARD CHARTERED BANK LIMITED VS. INTERCOM SERVICES LIMITED & 4 OTHERS** (Civil Appeal No. 37 of 2003), unreported, the Court of Appeal referred to the English case of **HOLMAN VS. JOHNSON (1775-1802) ALL ER 98** at page 99, where Lord Mansfield C.J. said –

**“The principle of public policy is this, Ex dolo malo, non oritur actio. No court will lend its aid to a man who found his cause of action on immoral or on illegal act. If from the Plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such Plaintiff.”**

25. The principle was further expressed in similar terms in **SCOTT VS. BROWN, DENNING & MCNAB COMPANY (3) [1892] 2QB 724** at page 728 where Lindley LJ said –

**“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has paraded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”**

26. Similar holding is to be found in the case of **HARTULA VS. NOORMOHAMED [1984] KLR**.

27. It is the ex parte Applicants’ case that the Respondents’ insistence of roads E923 and E924 or re-classified into road D556, is illegal and contrary to the clear provisions of the Public Roads and Roads of Access Act.

28. Perhaps the clearest evidence that the said roads never traversed any of the ex parte Applicants’ land is to be found in the requirements of **Part VI, Preservation of Survey Marks**, Sections 24, 27(1) and 28 of the Survey Act (Cap 299, Laws of Kenya) which say –

**“24. Every trigonometrical station, fundamental benchmark and boundary beacon erected or placed for the purpose of defining the boundaries of any holding or land shall be shown on the place (if any) attached to, or referred to in, any document or instrument purporting to contest, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title, or interest, whether vested or contingent to, or in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law for the time being in force relating to the registration of transactions in or of title to land.”**

and Section 27(1) says

**“27. It shall be the duty of every grantee to ascertain within sixty days after he has received his grant, that the survey marks shown on any plan attached to his grant or referred to therein are in place as shown on the plan.”**

29. And Section 28, places the onus for protection of the marks upon the owner –

**“28. Every owner or occupier of land shall take all reasonable measures to protect every survey mark erected or placed on the land owned or occupied by him.”**

30. It is clear from the supporting Affidavit of Phillippe A. Zimmerline, (the surveyor) paragraph 4, 5, 6 and 7 thereof, that no mention of Road D556 was ever made by the approving authorities being the Kilifi County Council, the District Physical Planning Officer, the District Surveyor or the District Agricultural Officer, when the parcels of land were being surveyed for purposes of consolidation into one plot, LR 24880 (from CR 34868, CR34867 and CR 34865). In addition the Further Affidavit of Robert Clark, paragraphs 7-9, also contend that no such road traverses the ex parte Applicants’ parcel of land. And so does the Further Affidavit of Robert Ward sworn and filed on 22<sup>nd</sup> July, 2012, at paragraph 9 that alleged roads are grids of fire breaks.

31. It is noteworthy that Engineer Obara has never attempted to reply to the averments in any of these Further Affidavits. In other words the averments that roads E923 and E924, re-classified as Road D556, never traversed the ex parte Applicants’ parcels of land.

32. I notice from the letter of Alistair Cavenagh a Director/CEO of the First Applicant that dated 20<sup>th</sup> March, 2009 that the ex parte Applicants were already putting in place

**“... an all-weather road running along our boundary wall from Shariani towards Chodari/Kapecha and Pingilikani areas and we are at an advanced planning stage in putting up a pedestrian (cycle motorcycle route directly from Chodari Village, across the, main town by bridge and directly limiting to the main Mombasa/Malindi Highway along the line of E925. We had already undertaken to do this work in order to improve access to the public.”**

33. This spirit is both commendable and is encouraged as this litigation concerns both the rights of the ex parte Applicants or well as public good or welfare, I direct that each party does carry over costs of litigation.

34. In the ultimate however, the inevitable conclusion from both the factual and legal stand point must be that it is neither legal, nor rational nor procedurally proper for the Respondents to lay claim to fact which they cannot prove, **“if the party who bears the burden of proof fails to discharge it, a value of zero is returned, and the fact is treated as not having happened.”** The ex parte Applicants succeed in their notice of motion in terms of paragraph I that there shall be removed into this court, and quashed by order of certiorari, the Respondents letter dated 29<sup>th</sup> November, 2010 requiring the ex parte Applicants to demolish, remove and demolish the gates/barriers to their property known as LR No. 24880 (original Numbers 8724/5, 7334/4 and 5025/96), comprised on the Zith No. CR 41234, alleged to be on alleged road designated D556.

35. In light of the order of certiorari, granted, I decline to grant the order of prohibition, as it will serve no purpose. I also decline to grant any order of mandamus.

36. Having granted the order of certiorari, the Respondents can only act lawfully if a road of access were sought through the ex parte Applicants lands.

37 There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 30<sup>th</sup> day of June, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Khagram for Applicants

Miss Lutta for Respondents

Mr. Wafula for 2<sup>nd</sup> Respondent

Mr. Silas Kaunda Court Assistant