



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO. E009 OF 2021

CHRISTINE NYOKABI GITONGA

(suing in her capacity as personal representative of the estate of

LAINGISA MUNGE PUSI (deceased).....APPLICANT

VERSUS

PHILIP W. KURIA.....1ST RESPONDENT

MAXWELL KAISE.....2ND RESPONDENT

JAMES MATUNGE.....3RD RESPONDENT

PETER ARAP NG'ENG.....4TH RESPONDENT

RULING

1. By an originating summons dated 1st September, 2021 based upon **Order 37 of the Civil Procedure Rules, 2010 (the Rules) and Articles 65 of the Constitution of Kenya, 2010, Sections 25, 26 and 30 of the Land Registration Act, 2012 and all enabling provisions of the law**, the Applicant sought the following reliefs:

(a) This honourable court do issue a permanent injunction restraining the Respondents either by themselves, their agents, servants and/or personal representatives from further constructing a road through, trespassing through and/or in any other manner whatsoever interfering with Title No. Laikipia/Mumonyot 1/1 pending the hearing and determination of this suit.

(b) This honourable court be pleased to issue an order of injunction restraining the Respondents either by themselves, their agents, servants and/or personal representatives from further constructing a road through, trespassing through and/or in any other manner whatsoever interfering with Title No. Laikipia/Mumonyot 1/1.

(c) That the Applicant and other beneficiaries of the state of the deceased receive compensation for trees that were destroyed during construction of a road through their parcel of land.

(d) The Officer Commanding Station in charge of Doldol Police Station be directed to ensure enforcement of the orders granted by this honourable court.

(e) The honourable court be pleased to grant any such further orders or relief as may be just and fit.

(f) The costs of this application be provided for.

2. The gist of the Applicant's case was that the Respondents had on or about 16th August, 2021 trespassed upon the suit property and illegally constructed a road through it without the consent of the owner and without following due process. It was further contended that the 2nd, 3rd and 4th Respondents were using the said road for the purpose of exploiting sand deposits from a site adjacent to the suit property for private gain.

3. Simultaneously with the filing of the suit, the Applicant filed a notice of motion of even date seeking various interim orders against the

Respondents pending the hearing and determination of the suit.

4. During the pendency of the said suit and application for interim orders, the Respondents filed a notice of motion dated 8th October, 2021 under **Order 1 Rule 3, Order 1 Rule 11, Order 2 Rule 15, Order 51 Rule 1 of the Rules, Sections 1, 1B, 3 and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** seeking that their names be struck out of the originating summons.

5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 3rd Respondent on 8th October, 2021 on his own behalf and on behalf of his Co-respondents. The gist of the application was that at all material times the Respondents were acting in their official capacities as Government officers hence they ought not to have been sued in their personal capacities. They contended that if the Applicant was aggrieved by their actions, she ought to have sued the Attorney General as stipulated under the **Government Proceedings Act (Cap. 40)**.

6. The Respondents further contended that they did not create a new or illegal road upon the suit property but they were merely re-establishing and re-beaconing an already existing road and that the process was undertaken upon consultation with all concerned stakeholders and the Applicant.

7. The record shows that on 31st January 2022, the court directed that the Respondents' application for striking out be heard first. The parties were granted timelines within which to file and exchange their submissions. The record shows that the Respondents filed their submissions on 13th January, 2022 whereas the Applicant filed hers on 31st January, 2022.

8. The Respondents submitted that under **Sections 4 and 12 of the Government Proceedings Act** any wrongful actions by Government servants or agents in the course of their official duties do not attract personal liability. It was consequently submitted that the Applicant's suit did not disclose a reasonable cause of action. The Respondents submitted that they could only be held liable if they were on a frolic of their own and cited the cases of **Kimunai ole Kimeywa & 5 Others v Joseph Motari Mosigisi (District Commissioner, Rongai District) and 3 others [2020] eKLR** and **Kipsigis Traders Limited v Mwangi Muheria [2015] eKLR** in support of the application. They consequently urged the court to allow the application.

9. The Applicant, on other hand, submitted that none of the Respondents' actions fell within the scope of their duties of employment in so far as establishment, development or rehabilitation of rural roads was concerned. It was submitted that such mandate was vested in the **Kenya Rural Roads Authority (KERRA)** hence the Respondents were acting on a frolic of their own. It was further submitted that neither the Respondents nor **KERRA** had any authority to establish or construct roads on private property without following due process. It was submitted that the Respondents' actions were patently unlawful and unconstitutional hence they should be held personally liable. They cited the case of **Republic v Communications Authority of Kenya Ex-parte Information Communication Technology Association of Kenya (ICTAK) [2021] eKLR** and **Kimunai Ole Kimeywa & 5 Others (supra)** in support of their submissions. They consequently urged the court to dismiss the application.

10. The court has considered the Respondents' application, the material on record and the submissions of the parties. Whereas the Respondents consider that they were wrongfully sued for official actions committed in the course of their employment, the Applicant considers that the Respondents' actions were patently unlawful and unconstitutional and that they were actuated by improper motives hence they should be held personally liable. It has been held that a court should be slow in summarily striking out actions before all the material evidence has been tendered and tested. See **D.T. Dobie & Co (Kenya) Limited v Joseph Muchina [1980] KLR 1**

11. At this interlocutory stage, it may not be possible for the court to determine in a summary manner and without the benefit of a trial whether or not the Respondents were on a frolic of their own. It may not be possible for the court to determine without the benefit of a trial whether or not the Respondents were creating a new road or merely opening up an existing road. It is not possible to determine from the scanty material on record whether or not the Respondents, or some of them, were conflicted in their actions and whether or not they created a road on private property for the predominant purpose of exploiting sand from some land adjoining the suit property.

12. The court is thus far from satisfied that this is a case suitable for summary determination. Removal of all the Respondents from the suit would inevitably lead to a summary termination of the proceedings since the suit cannot subsist without Respondents. The court is, however, inclined to order a joinder of the Hon. Attorney General as a party to the proceedings under **Order 1 rule 10 (2) of the Rules** to enable the court to completely adjudicate upon the issues in controversy with finality should it be ultimately found that the Respondents were acting in good faith and within the scope of their authority.

13. The upshot of the foregoing is that the court finds no merit in the Respondents' notice of motion dated 8th October, 2021. The court consequently makes the following orders for disposal thereof:

(a) **The Respondents' notice of motion dated 8th October, 2021 is hereby dismissed.**

(b) **The Hon. Attorney General is hereby joined as a 5th Respondent under Order 1 Rule 10 (2) of the Rules in view of the provisions of the Government Proceedings Act (Cap. 40)**

(c) **The Applicant shall amend the originating summons dated 1st September, 2021 within 14 days to incorporate the Hon. Attorney General and serve a copy thereof.**

(d) **Costs of the application shall be in the cause.**

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 17TH DAY OF MARCH, 2022 AND DELIVERED

VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

CA - Carol

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Y. M. ANGIMA

JUDGE