



**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 106 OF 2014**

ISAAC NUNDA NYABAYO ..... 1<sup>ST</sup> PLAINTIFF

ANNAH BOSIBORI ISAAC ..... 2<sup>ND</sup> PLAINTIFF

CLEMENCIA NYABOKE ONYANCHA ..... 3<sup>RD</sup> PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KISII ..... 1<sup>ST</sup> DEFENDANT

HON. JAMES ONGWAE ..... 2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiffs are the registered proprietors of all those parcels of land known as LR Nos. Central Kitutu/Daraja Mbili/599, 911, 910 and 1575 together with the developments standing thereon. The 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff are the registered proprietors of LR Nos. Central Kitutu/Daraja Mbili/599 and 911 respectively while the 3<sup>rd</sup> plaintiff is the registered proprietor of LR Nos. Central Kitutu/Daraja Mbili/910 and 1575. The four (4) parcels of land are hereinafter referred to as “**the suit properties**”. The plaintiffs brought this suit against the defendants on 17<sup>th</sup> March 2014 seeking; a permanent injunction to restrain the defendants by themselves or through their employees, servants and/or agents from interfering with the suit properties in any manner and more particularly from converting a 6 metre private access road to the suit properties into a public road or undertaking any construction and/or upgrade of the said road. In the plaint dated 14<sup>th</sup> March 2014 the plaintiffs averred that they have developed the suit properties with permanent structures some of which serve as their residences.
2. The plaintiffs averred that the plaintiffs and their neighbours created a 6 metre road running through the said neighbours properties and the suit properties to ease access to the said properties which road has been used and maintained exclusively by the plaintiffs and their said neighbours. The plaintiffs averred that the said road has not been acquired either by the National or County Government. The plaintiffs averred that sometimes in the month of March 2014 the defendants through their employees, servants or agents purported to take over and upgrade the said private road for use by the general public without the consent of the plaintiffs. The plaintiffs averred that in the process of carrying out the said upgrade the defendants have demolished and destroyed permanent and temporary structures, trees and other developments on the suit properties and the destruction is continuing to the great prejudice of the plaintiffs. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 14<sup>th</sup> March 2014 seeking a temporary injunction to restrain the defendants by themselves or through their employees, agents and/or servants from interfering with the suit properties in any manner whatsoever and in particular from converting the plaintiffs 6 metre access road into a public road or undertaking any construction and/or upgrade of the said road pending the hearing and determination of this suit.

The plaintiffs' application was brought on the grounds set out in the body thereof and in the affidavit of the 1<sup>st</sup> plaintiff sworn on 14<sup>th</sup> March, 2014.

3. In his affidavit in support of the application, the 1<sup>st</sup> plaintiff reiterated the contents of the plaint that I have highlighted herein above. The 1<sup>st</sup> plaintiff stated that unless the defendants are stopped by way of an injunction from continuing with their illegal activities mentioned hereinabove, the said activities will continue to the great detriment and prejudice to the plaintiffs. The 1<sup>st</sup> plaintiff annexed to his affidavit as exhibits; copies of title deeds for the suit properties as evidence of the plaintiffs ownership of the said properties and copies of photographs showing the road construction works and/or upgrade complained of. The plaintiffs' application was opposed by the defendants. The defendants file a notice of preliminary objection dated 28<sup>th</sup> March 2014 and a replying affidavit sworn by one, Josephat Simba, the 1<sup>st</sup> defendant's road engineer on 10<sup>th</sup> April 2014 in opposition to the application.
4. In their notice of preliminary objection, the defendants contended that, the 2<sup>nd</sup> defendant has been wrongly sued in his personal capacity and that the plaintiffs' entire suit is bad in law, fatally defective and amounts to an abuse of the process of the court. In the replying affidavit, the defendants contended that the construction works complained of by the plaintiffs are not being undertaken by the defendants. The defendants contended that the said road is being constructed by a third party by the name Romaca Enterprises Ltd. who won a tender that was put up by the 1<sup>st</sup> defendant for the construction of the said road. The defendants contended that the said road construction is a community project and that before the construction commenced, there was wider consultation and public participation in the decision making. The defendants contended that due notice was given to the area residents to remove all offensive structures that were standing on the said road.
5. The defendants contended that the structures belonging to the defendants which were demolished in the process of the said road construction were on the road and the defendants had been notified to remove the same failure to which the same would be demolished. The defendants contended that the road in contention is a public road and that the same has been used as such for many years. The defendants contended further that the road construction complained of is being carried out in good faith and with very minimal damage to the properties in the area. The defendants admitted that the plaintiffs' walls were demolished. They denied however that there was any other damage to the plaintiffs' properties.
6. The plaintiffs application came up for hearing on 15<sup>th</sup> may 2014 when Mr. Kamau advocate appeared for the plaintiffs while Mr. Onsembe advocate appeared for the defendants. In his submission, Mr. Kamau reiterated the contents of the 1<sup>st</sup> plaintiff's affidavit which I have highlighted hereinabove in detail and need not rehearse here. Mr. Kamau submitted that the defendants have in the process of upgrading and/or constructing the road in dispute caused massive damage to the plaintiffs' developments on the suit properties. Mr. Kamau submitted that the walls have been brought down and that in some instances even the septic tanks have been damaged. Counsel refuted the claim that the plaintiffs had approved the construction being undertaken by the defendants on the said road arguing that there was no way the plaintiffs could have approved the destruction of their properties. Counsel submitted that the damage that has been carried out in the process of constructing the said road has not been denied and that the defendants did not follow the due process before commencing works on the said road which is a private and not a public road.
7. Counsel submitted that if the defendants wanted to convert the road into a public road, they should have compulsorily acquired the land where the said road is situated first before they commenced the upgrading. In support of this submission, counsel referred to section 107 of the Land Act, 2012. Counsel submitted that the defendants' preliminary objection has no basis on account of the fact that the defendants have not filed a defence to the plaintiffs' claim on which they can base any preliminary objection. Counsel submitted that the plaintiffs have established a prima facie case with a probability of success and have also demonstrated that they would suffer irreparable loss unless the orders sought are granted. In support of his submissions Mr. Kamau cited the cases of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** and **Shalein Masood Mughal –vs- Attorney General & 5 Others [2014] eKLR**.
8. In reply to the submissions by the plaintiffs advocate, Mr. Onsembe submitted that the plaintiffs'

- advocates did not serve the defendants with summons to enter appearance and as such the defendants could neither enter appearance nor file a defence. Counsel submitted that on account of that, the defendants cannot be accused of neglecting to file their statement of defence. On the defendants' preliminary objection, Mr. Onsembe submitted that the plaintiffs' suit is fatally defective. Counsel submitted that the plaint that was served upon the defendants was not dated. He submitted further that the verifying affidavit which was also commissioned but not dated. Further on the verifying affidavit, counsel submitted that without a date the same is not valid. Counsel submitted further that the witness statements that were served together with the plaint upon the defendants were neither dated nor signed. Turning to the affidavit in support of the present application for injunction, counsel submitted that although the affidavit is indicated to have been signed in Nairobi, the commissioner's stamp on it bears Suna Migori address which raises doubts on its authenticity.
9. Counsel submitted that on account of those procedural flaws, the plaintiffs' suit has no leg to stand on and ought to be dismissed. On the merit of the application, Mr. Onsembe reiterated the contents of the replying affidavit of Josephat Simba and submitted that the defendants are not carrying out any activity on the ground and as such if any damage has been caused, the defendants cannot be held responsible. Counsel submitted that the person on the ground is the 1<sup>st</sup> defendant's contractor, Romaca Enterprises Ltd. who has not been joined in these proceedings as a party. Counsel submitted that the said contractor was engaged to construct a road and not to destroy third parties properties. Counsel submitted that the defendants cannot be held liable for any such destruction if any. Counsel submitted that non joinder of Romaca Enterprises Ltd. in this suit is fatal to the plaintiffs claim. Mr. Onsembe submitted further that the 2<sup>nd</sup> defendant should not have been sued in his personal capacity.
  10. Counsel submitted that whatever undertakings the 2<sup>nd</sup> defendant is engaged in while at the 1<sup>st</sup> defendant are official in nature. The 2<sup>nd</sup> defendant ought therefore to have been sued in his official capacity and not otherwise. Counsel submitted that the 2<sup>nd</sup> defendant has no personal interest in the matters at hand and as such should not have been sued in his personal name. Counsel submitted that the plaintiffs have not established a prima facie case against the defendants. Counsel submitted that the plaintiffs did not raise any objection when the road construction commenced. Counsel termed the plaintiffs' suit herein as an afterthought. Counsel submitted that the balance of convenience would tilt in favour of the public interest that would be served if the road construction continues. Counsel urged the court to disallow the application and order the name of the 2<sup>nd</sup> defendant to be struck off this suit.
  11. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the defendants' notice of preliminary objection and replying affidavit filed in opposition to the application. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that an applicant for interlocutory injunction must establish a prima facie case against the respondent with a probability of success and must also demonstrate that unless the injunction is granted, he stands to suffer irreparable loss. It was held further that if the court is in doubt as to the above, the court would determine the application on a balance of convenience. What I need to determine here therefore is whether the plaintiffs have shown that they have a prima facie case against the defendants and also that unless the orders sought are granted, the plaintiffs will suffer irreparable loss. The plaintiffs' case is that the road in dispute is a private road which serves the suit properties and that this road was created by the plaintiffs and their neighbours for their private use and not for the use of the general public.
  12. The plaintiffs have contended that without their consent, the defendants commenced the process of upgrading and or constructing this road for use by the general public. During the said upgrade which involved expanding the said road which was a 6 metre road, the defendants have destroyed and demolished several permanent structures which the plaintiffs had put up on the suit properties. The defendants are said have knocked down walls thereby exposing homes, cut down trees, uncovered and damaged septic tanks among others. The plaintiffs' contention is that the said activities are unlawful because the defendants have no right to invade private property and cause such damage. The plaintiffs have contended that the defendants should have followed the process of compulsory acquisition of land as provided in the Constitution and the Land Act, 2012 before commencing upgrade and construction of the said road. In their response, the defendants have

- contended that the road in dispute is a public road which has been in use as such for several years. The defendants have contended that the said road is being constructed for the benefit of the community in the area where it is situated and that the area residents including the plaintiffs were consulted and notified of the said construction works before it commenced.
13. The defendants have contended that the structures which were demolished and trees that were brought down were standing on the road and that the owners thereof the plaintiffs included had been asked to remove the same before the construction works commenced but they declined or neglected to comply thereby making the destruction of the same necessary. The defendants have contended that if any damage has been caused by the said road construction works, the defendants are not liable for the same because the said works are being carried out by an independent contractor who had won a tender to carry out the works. The defendants have contended that they have been wrongly sued and that the plaintiffs should have directed their complaints to the said contractor who has not been joined in this suit as a party. The onus was upon the plaintiffs to prove that the road in dispute is a private road and that the parcel of land on which it stands belongs to the plaintiffs and their neighbours who are said to be the owners of the said road.
  14. The plaintiffs placed no evidence before the court to prove that the road in dispute belongs to and is owned by the plaintiffs. The plaintiffs have not placed as evidence before the court, any survey maps or diagrams to show how the land on which the said road lies was surrendered by the plaintiffs and their said neighbours for the purpose of the said road. I have nothing before me which points to the plaintiffs' ownership of the said road. I have seen in the plaintiffs' bundle of documents a copy of a survey map for the area where the said road is situated. The plaintiffs did not refer to this map in their submissions before me. I believe this is because the map was not attached to the 1<sup>st</sup> plaintiff's affidavit in support of the present application. In this map, the road in dispute is indicated to be serving several parcels of land and it is connected to several roads in the area. The road as indicated in this map is not serving only the suit properties. It serves over twenty (20) parcels of land.
  15. There is no indication in this map that this road is a private road. If it is, there is no indication as to what point it assumes private status. The situation has not been helped by the defendants. The 1<sup>st</sup> defendant is the custodian of all information and documents concerning public roads in Kisii County. The defendants have also not placed any material before the court to show that the road in dispute is a public road. This is not to say that I am shifting the burden of proof to the defendants. The court is supposed to be assisted to arrive at a just determination of the dispute before it. The court would have been well served in this regard if the defendants had produced information which is readily available to them on the status of this road. As things stand, the much I can say is that I have no information before me on which I can determine whether the road in dispute is a private road or a public road. The issue will have to be determined at the trial.
  16. Due to the foregoing, I am not satisfied that the plaintiffs have established a prima facie case against the defendants with a probability of success. The plaintiffs have proved that massive damage has been caused to the developments on the suit properties. They have however failed to demonstrate that the damage was occasioned wrongfully. Having come to this conclusion, I am not obliged to consider whether or not the plaintiffs will suffer irreparable harm unless the orders sought are granted. If I was to determine this issue however, I would have held against the plaintiffs. I have noted that the plaintiffs came to court after so much damage had already been caused to their developments on the suit properties as can be seen on the photographs attached to the plaintiffs' bundle of documents. If any loss was to be suffered by the plaintiffs then the same has already been incurred and whether the injunction is granted or not will not change the situation.
  17. The upshot of the foregoing is that I find no merit in the plaintiffs' application dated 14<sup>th</sup> March 2014. The application is dismissed with costs to the defendants. I would however in exercise of the powers conferred upon this court under section 13 (7) of the Environment and Land Act, 2011, order that in the course of constructing the road in dispute the defendants shall not interfere with or cause any other or further destruction or damage to the developments and/or structures on the suit properties pending the hearing and determination of this suit.

**Delivered, signed and dated at KISII this 18<sup>th</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiffs

Mr. Onsembe for the defendants

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**