REPUBLIC OF KENYA

High Court at Kitale

Miscellaneous Application 62 of 2012

EZEKIEL LUYALI KIBICHI ..... APPLICANT

V

ELIJAH OMINDE MASIEBA .....}

BILIAH KANALI ANUSU ….....} RESPONDENTS

R U L I N G

This is a ruling in respect of a Notice of Motion dated 21/11/2012. The Applicant seeks an access order in respect of Land Reference No. Sinyerere/Kipsaina Block 2/Kesogon 330. The Applicant contends that his land is landlocked by two adjoining parcels Nos 329 and 331 which are owned by the 1st and 2nd Respondents respectively. The Applicant contends that he bought his land in 1986 and that at that time, he had no problem in accessing his land. That in 2005 the 1st Respondent blocked his access road and started using it as part of his agricultural land. That he has made several attempts to have the access road opened to no avail.

The 1st Respondent opposed the application based on his Replying Affidavit sworn on 18th January, 2013. He contends that in 2007 the 2nd Respondent trespassed into his land and forced creation of an access road on the same. This prompted him to file a complaint with Kaplamai Land Disputes Tribunal whose findings were adopted as judgment of the Court vide Kitale Chief Magistrate's Land Case No. 114 of 2007. In the said judgment, it was decreed that the 2nd Respondent should seek an access road from the person who sold her the land. The 1st Respondent executed the decree and the access road which had been created was stopped. The 2nd Respondent filed a suit in Kitale being Kitale Chief Magistrate Civil Suit no. 186 of 2008 seeking orders similar to the current ones. The suit was eventually struck out on the ground that it was *res judicita.* In 2011, the Applicant herein filed a claim before Kaplamai Land Disputes Tribunal seeking orders similar as the ones sought by the 2nd Respondent. The tribunal made an award which was subsequently adopted as judgment of the Court vide Kitale Land Case No. 41 of 2011. The decision of the Kaplamai Land Disputes Tribunal was challenged by the 1st Respondent via a Judicial Review Application. In a ruling delivered on 19/07/2012, the High Court quashed the said decision on grounds that the Tribunal had no jurisdiction to entertain the application as it had dealt with a previous issue touching on the same subject. The 1st Respondent therefore contends that the matter is *res judicata* as it has been dealt with previously by Courts of competent jurisdiction.

The parties herein agreed to put in their submissions and let the Court decide the application. The 2nd Respondent who neither filed grounds of opposition nor filed a Replying Affidavit, filed her submissions in support of the Applicants application. The 2nd Respondent in his submissions urged the Court to dismiss the application on ground that the same is *res judicata.*

I have carefully gone through the application herein, the affidavit in support of the same, the Replying

Affidavit as well as the submissions by the parties herein. The Applicant is seeking an access order affecting Land Parcel No. 329 and 331. This access order which the Applicant seeks has been subject of previous proceedings which have finally and conclusively determined on the same. The position on the previous proceedings which have been determined have the net effect of holding that the Applicant and or the 2nd Respondent are not entitled to an access road from the 1st Respondent. It does not matter what means the parties herein are using to achieve their intended aim. Whether they come through civil suits, tribunals or applications, the fact remains that the subject matter is an access road. It has been determined that the Applicant is not entitled to an access road from the 1st Respondent. It therefore follows that this application by the Applicant is *res judicata* and amounts to an abuse of the process of Court.

Even if the Court were not to find that this application is *res judicata,* the same would not have succeeded as against the 1st Respondent. This is because the provisions under which the application was brought particularly section 140 of the Land Act provides for what the Court should consider in deciding whether to grant an access order. Section 140(4) lists the considerations as follows:-

(a) ***the nature and quality of the access, if any, to the landlocked land when the Applicant first occupied the land;***

(b) ***the circumstances in which the land became landlocked;***

(c) ***the nature and conduct of the negotiations if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land;***

(d) ***the hardship that may be caused to the Applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making in the of the order;***

(e) ***the purpose for which access is or may be required and;***

(f) ***any other matter that appears to the Court to be relevant.***

In the present case, there is evidence that the Applicant bought his portion of land which is now landlocked in 1986. There is also evidence that Land Reference No. Sinyerere/Kipsaina Block 2/Kesogon/321, 329 and 330 were comprised in one title which had access to the roads of access provided during the initial sub division. The land was blocked after the title was subdivided into three portions and sold to three different persons. There is no evidence to show whether at the sub division which resulted into title nos 321, 329 and 330, there was provision of access road serving the owners of Plot nos 329 and 330. It is therefore clear that if there was to be an access road for the benefit of the Applicant, then the same would not come from the 1st Respondent who had nothing to do with the sub divisions which created the blockage the Applicant finds himself in. The map which is annexed to the supporting affidavit of the Applicant supports the contention by the 1st Respondent which came out during his testimony at Kaplamai Land Disputes Tribunal. The proceedings led to the decision that his co-respondent in this application had no right to impose an access road on his land. The decision arising from the tribunal still stands and has never been appealed against.

It is clear from the map of the area that an access road can properly be created affecting land Parcel No. 329 and 321 without affecting the land of the 1st Respondent. If an access order was to be made affecting the 1st Respondent, it will amount to punishing him for the omissions of the person who sold land to the Applicant and the 2nd Respondent as well as the owner of Plot No. 321 who is not a party to these proceedings. There is no evidence at all to show that when the original owner of the land which became known as Plot Nos 321, 329 and 330 sub divided his land, he made provision for a road of access. If there was evidence that there was a road of access which was blocked by the 1st Respondent, then the issue would have been a different one altogether. This is not the position herein as the Applicant is seeking an order of access which is different from an order for re-opening a blocked road. The Applicant is seeking an easement which is a burden on another's land. For the foregoing reasons, the application herein has no merits. The same is hereby dismissed with costs to the 1st Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 23rd day of April, 2013.

E. OBAGA

JUDGE

In the presence of Mrs. Wanyama for the 1st Respondent and M/S Nyakibia for Mr. Samba for Applicant. Cc: Joan.

E. OBAGA

JUDGE

23/04/2013