



**REUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 68 OF 2013**

**JAYENDRA RAICHAND SHAH ..... PLAINTIFF**

**V E R S U S**

**CLARA ESHA BEBORA ..... DEFENDANT**

**RULING**

1. The Plaintiff is the registered owner of the Plot **Mgumo Patsa/Mazeras/185**.
2. The Defendant is the registered owner of the Plot **Mgumo Patsa/Mazeras/193**.
3. Both parties accept that there is an access road which begins from Mombasa/Nairobi Highway and which gives access to the Plaintiff's and Defendant's plots amongst others. What is in dispute is whether the Defendant's wall built on her land blocks that access road.
4. By this claim the Plaintiff prays for an order requiring the Defendant to demolish the wall obstructing the access road to enable the Plaintiff free access to his plot. The Plaintiff also prays for damages for loss of rental income from his plot. The Plaintiff has filed an interlocutory application by way of Notice of Motion dated 5th June 2013. By that application the Plaintiff seeks mandatory injunction to issue requiring the Defendant to demolish the wall constructed around Plot No. 193.
5. The Plaintiff in his supporting affidavit stated that the public access to his property had always been through Mombasa/Nairobi highway and through the access road bordering the Defendant's plot. Further, he deponed as follows –

***“ 5. On or about 21<sup>st</sup> March 2012, all interested parties were called to a meeting at the Area Chief's Office, where it was confirmed that the road around the boundary of Plot Mgumo Patsa/Mazeras/193 was indeed a public access way. The Defendant was also present at this meeting.***

***6. It was after this meeting at the Chief's Office that the Defendant erected a wall thereby blocking all public access to the other plots at the back of her property. Attached and marked as exhibit 'JS3' are photographs of the site.”***

6. He further stated that although the District Land Registrar Kilifi wrote a letter to all affected parties who included the Plaintiff and the Defendant, where he stated that he intended to open the access road on 4th December 2012 that did not however take place. That since the wall was erected by the Defendant the Plaintiff had completely been blocked from accessing his land and

consequently he was unable to rent out his land.

7. The Defendant by her replying affidavit dated 19th June 2013 with one breath stated that there is an access road running at the boarder of her plot and with another breath stated “***the access road as provided for on the map and on the ground is merely a finder road not destined for commercial trucks as the Plaintiff is keen to insinuate and employ.***” The Defendant annexed the survey map which shows the access road running along the boarder of her land.
8. Because the Plaintiff sought very drastic order the Court acceded to the parties request to visit locus in quo. On 27th August 2013 I visited the scene. At the scene I found the area Chief of Rabai namely Stephen Muta. I walked along the access road running from Mombasa/Nairobi Highway and going into the interior. When I reached the Defendant's property I found the road blocked by a wall. The wall is built and extends from the Defendants land right across the access road. In this regard, I refer to the Plaintiff's exhibit JS3 attached to the Plaintiff's supporting affidavit. The two bottom photographs in that exhibit are a true reflection of what I saw. As it is seen in those photographs the road can be seen running from one side of the Defendant's wall and it continues to the other side of the wall after the blockage. It is clear to see that the road has previously been used and the wear of such use is clear from one side of the Defendant's wall then comes the blockage across that wear and continues to the other side of the wall.
9. Mandatory injunction is ordinarily more drastic in its effect than prohibitory injunction. See the case **Shepherd Homes Ltd -Vs- Sandahm [1971]1 CH. 34.** In that case Judge Megarry stated as follows-

***“... On motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”***

10. The Defendant's wall has blocked the access road bordering her land.

The only reason she attributes to her right to so block the road is because the Plaintiff intends to use his land by hiring it out for parking of commercial vehicles which would lead to those commercial vehicles using that road . My response to that is that the Defendant is not entitled to take the law into her own hands. She ought to have moved the appropriate authorities in challenging the Plaintiff's intent.

11. I am satisfied having considered the application before me the parties

affidavits, the submissions and the visit on locus quo that the justice of this case require at this interlocutory stage a mandatory injunction to be issued. This will enable the Plaintiff and other plot owners or users whose plots are beyond the Defendants plot to have access.

12. I grant the following orders-

- a. **A mandatory injunction is hereby issued for the demolition of the wall and structures around Mgumo Patsa/Mazeras/193 which are blocking the access road.**
- b. **Such demolition should only take place in the presence of District Land Registrar who shall confirm the extent of that access road.**
- c. **The Officer in Charge Kaloleni Police Station shall give security when that Demolition takes place.**
- d. **Demolition shall only take place after the Plaintiff has filed before this Court an undertaking to pay damages.**

e. **The costs of the Notice of Motion dated 5th June 2013 are awarded to the Plaintiff.**

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2013.**

**MARY KASANGO**

**JUDGE**