



PATRICIA LOIS

MUCHIRI.....1ST
PLAINTIFF/APPLICANT

JULIA WACERA

MAGONDU.....2ND
PLAINTIFF/APPLICANT

MARGARET WANGUI

MWAURA.....3RD
PLAINTIFF/APPLICANT

LYDIA GATHONI

WAMBUGU.....4TH
PLAINTIFF/APPLICANT

DAVID KAMAU

WAMATHU.....5TH
PLAINTIFF/APPLICANT

DANIEL KARIUKI

WABANDE.....6TH
PLAINTIFF/APPLICANT

VERSUS

**THE BOARD OF GOVERNORS, BURUBURU GIRLS SECONDARY
SCHOOL.....DEFENDANT/RESPONDENT**

AND

**THE PRINCIPAL/SECRETARY BOARD OF GOVERNERS BURUBURU GIRLS SECONDARY
SCHOOL.....1ST INTERESTED PARTY**

**THE CHAIRMAN, BOARD OF GOVERNORS, BURUBURU GIRLS SECONDARY
SCHOOL.....2ND INTERESTED PARTY**

RULING

The plaintiffs/applicants herein after referred to as the applicants have filed a Notice of Motion dated 18/2/11 under Order 40 Rule 3(1), (2) and (3) of the Civil Procedure Rules, section 3 A of the civil procedure Act, Chapter 21 of the laws of Kenya seeking the following orders:-

0. That the 1st and 2nd interested party be committed to jail for six months or for such period as the Court may deem fit for contravening the order of the Court issued on 4th February 2011.
1. That the costs of and incidental to this application be borne by the defendant/respondent.

The application is premised on the following grounds:-

- i. That the Court issued an order on 4th February 2011 requiring the parties to this suit or their agents, servants/or employees to maintain the status quo pending the delivery of the ruling on the plaintiffs/applicants application for injunction dated 27th October 2010.
- ii. That on 17th February 2011, the defendant, acting through the 1st and 2nd interested parties, has blocked the joint access utilized by the plaintiffs/applicants and the defendant/respondents by erecting a barrier on the point of entry on the access.
- iii. That the interested parties were served with the Court order and a penal notice that contempt of Court proceedings would be instituted if they failed, refused or neglected to comply with the terms of the order forthwith.
- iv. That the actions of the interested parties, on behalf of the defendant/respondent are in violation of the terms of the order of the court and are intended to undermine the authority of the Court in administration of justice.
- v. That it is in the interest of justice that the aforesaid orders be granted as prayed.
- vi. That the plaintiffs/Applicants stand to suffer grave and irreparable damage if the orders sought are not granted.

The application is supported by the affidavit of Patricia Lois Muchiri dated 18/2/2011. She deposes as follows :- That on 4th February 2011, the Court granted an order providing, inter alia, that “*Status quo shall be maintained until the ruling is delivered*”. That on 8th February 2011, the 1st and 2nd interested parties were served with the Court Orders on behalf of the defendant/respondent. That thereafter, the 2nd interested party wrote to their advocates confirming and acknowledging receipt of the order and the penal notice but stating that the defendant/respondent was reluctant to heed and obey the orders of the Court. That the status quo at the time the order was issued and served was that the plaintiffs/applicants and the defendant/respondent were jointly utilizing the access to reach their respective premises. That on 17th February 2011, while the orders were in force, the defendant, through the 1st and 2nd interested parties, blocked the joint access by erecting a barrier, thereby denying the plaintiffs/applicants access to their premises. That the actions of the defendant/respondent, acting through the 1st and 2nd interested parties, are a blatant breach of the orders of the Court issued on 4th February 2011 and are actions that demonstrate clear contempt of Court orders by the defendant/respondent and the interested parties. That the advocate for the defendant, Mr. A Ombwayo, was present in Court on 16th February 2011, when the Court Orders were given. That the defendant and the interested parties were therefore well aware of the existence of the orders and the need to obey the orders. Further the City Council of Nairobi wrote to the defendant/respondent indicating that the disputed portion of land was an access available to the public. That the joint access is the only route to the plaintiffs/applicants premises and the actions of the defendant/respondent and the interested parties are effectively denying them the right to use their property.

In response, the respondents filed a Replying affidavit dated 3/3/11 of Eng. Austin Salmon Kitolo where he deposes:- That the bone of contention and general substratum giving rise to these proceedings is an access road that's the main and only entrance to the defendant's school. That the plaintiffs comprise shareholders, owners and tenants of a housing estate that abuts the defendant's school. That upon disagreement arising on whether indeed the school has exclusive use of the said access road the previous owner and/or developer of the said adjacent property to the defendant school, Metropolitan Health Service Ltd referred

the matter to the High Court vide HCCC 251 of 2010 pitying themselves and the defendant herein. That in an unsuccessful interlocutory bid to secure use of the access road alongside the school the plaintiff in the aforesaid case (ie HCCC 251 of 2010) had moved the court through a Motion seeking an injunction. While declining to issue the injunction sought, the High Court (Muchelule J) ordered that the status quo subsists and defined the said status quo to be that said road access was to be used exclusively by the school pending hearing and determination of the matter. That the status quo was discussed and adopted by all the relevant government ministries and departments at the ministry of education's Board Room on 25.01.11 and it has never been varied, altered or reversed. That despite the fact that order of status quo above allows for exclusive use of the access road by the school only, the defendant's school have continued to allow the plaintiffs access through the said road unhindered or without let up and that a drop bar barrier erected thereon merely acts as a control for security reasons to weed out and keep strangers at bay seeing as it is that defendant school is a public Girls Boarding school. That the alleged co-contemnor nor himself have disobeyed any Court order and any such allegation as contained in the present motion is false, erroneous, misconceived and without merit.

The respondents also filed a Replying affidavit by Mrs. Consolata Kimuya the principal and secretary of the Board of Governors of Buruburu Secondary school and the 1st interested party dated 8/3/2011. She depones as follows in brief:- That the subject matter in this suit is a driveway into the defendant's premises and the same is owned by the defendant. That the developer Metropolitan Health Services Limited who allegedly sold the property known as land parcel Number Nairobi/Block No. 76/895 situate in Buruburu to the plaintiffs herein instituted the High Court ELC No. 251/2010 against the defendant herein together with a chamber summons application dated 25th May, 2010. That the said application was canvassed before the Hon. Justice Muchelule who delivered his ruling dismissing the chamber summons application on 13th October, 2010. That when the defendant extracted the order the Metropolitan Health Services Limited (the developer) contested the wording of the same necessitating the matter to be placed before hon. Justice Muchelule for clarification. That in a short ruling dated 16th December, 2010 Hon. Justice Muchelule dismissed the developers' complaint. That the aforesaid ruling has not been appealed against reviewed and/or varied and remains in force. That despite the orders of this Court which gave the defendant exclusive usage of the access road, neither the 2nd interested party nor herself have denied the plaintiffs access of the subject access road. That the barrier erected by the defendant has not disturbed and/or interfered with the status quo in any way whatsoever and cannot form basis of the application before the Court. That the 2nd interested party and herself are law abiding and will not violate the orders of this court.

In a further affidavit dated 4/3/12, Patricia Lois Muchiri depones:- That the suit filed by Metropolitan Health Services limited against the defendant (Nairobi HCCC number 251 of 2010) is a separate suit and clearly distinguishable on the grounds that, the parties to the two suits are different entities claiming different remedies, the issues for determination are different, the claim in Nairobi HCCC Number 251 of 2010 is a public road of access while in the present suit the claim is for a right of way as an implied easement on a portion of the unsurveyed and unalienated government land known as Nairobi Block 76/581. That the plaintiffs are not claiming through Metropolitan Health Services Limited. Since the plaintiffs have paid the full purchase price for their premises, they have full legal, beneficial and separate title to, and have exclusive rights of possession and use of, their respective premises. The process of registration of the respective leases by the commissioner of lands is underway. The ownership of the plaintiffs is distinguishable from the interests of Metropolitan Health Services Limited. That sections 6 and 7 of the Civil Procedure Act does not apply as Nairobi HCCC number 251 of 2010 has not been determined finally on its merits and that only an interlocutory application has been determined. That the letter of allotment attached to the supplementary affidavit filed by the defendant is not issued to the defendant but to permanent secretary to the treasury, who is a separate legal entity from the defendant. In the circumstances, the defendant has no discernible legal interest in the suit premises and has no legal right to stop the plaintiffs or any other person from that portion of the unsurveyed and unalienated government land to access their premises. That the issuance of the letter of allotment by the commissioner of lands while the present suit and application was pending before the Honourable Court intended to undermine the cause of justice and defeat the rights of the plaintiffs and is illegal, null and void and in contravention of the doctrine of lis pendens. That the city council of Nairobi has put the defendant on

notice that that portion of the portion of the unsurveyed and unalienated government land is available for public use, including utilization by the plaintiffs to access their premises. That the defendant is equally obliged to obey the law even acting in public interest. That the so called large frontage on Rabai Road does not belong to the plaintiffs or any of them. That the plaintiffs do not have any alternative vehicular access that directly connects their premises to Rabai Road except the disputed portion of the unsurveyed and unalienated government land. That the City Council of Nairobi has noted that a planning process taking the interests of all parties should be carried out on the unsurveyed and unalienated government land leading to an amicable solution for acceptable to all the parties to this suit.

In a further Supplementary affidavit, she deposes that the suit before Hon. Justice Muchelule, namely Nairobi HCCC number 251 of 2010 was between the defendant and Metropolitan Health Services Limited, who is not a party to the present suit. The plaintiffs have sued in their own right and not on behalf of Metropolitan Health Services Limited. That orders issued by the Court in Nairobi HCCC number 251 of 2010 cannot bind persons who were not parties to the suit and who were not served with the said order. That the status quo obtaining at the time the court order was made was that both the defendant and the plaintiff were jointly and peaceably utilizing the access to their respective premises. There was no road barrier at all erected by the defendant or any other party. That the defendant, under the direction and control of the interested parties/contemnors, erected a barrier and obstructed the plaintiffs after service of the order of the court which constitutes contempt of court. That the erection of a barrier by the defendant after the issuance and service of the court order and penal notice was in clear violation of the court order. The order of hon. Mr. Justice Muchelule given in HCCC No. 251 of 2010 did not direct or authorize the defendant and/or its officers to block the access or erect a barrier thereon or to obstruct the plaintiffs in any manner whatsoever from accessing their homes. That the defendant further blocked the plaintiffs from accessing their houses by pouring several truck loads of stones at the junction of their joint access thus obstructing the plaintiffs but leaving the access to the defendant open. That the plaintiffs cleared the stones obstructing the access at their own cost and the barrier erected by the defendant has remained in situ, contrary to the order given by the court directing the parties to maintain the situation prevailing at the time the order of status quo was given.

The plaintiff/Applicant filed skeleton submissions, the 1st interested party filed skeleton submission and the defendant filed submissions too. Parties highlighted the said submission in court, I have carefully considered the said submissions together with the authorities cited. The affidavits filed by the parties which I have extensively quoted in this ruling give a clear background to the application before me. The issue before interested me is whether the 1st and 2nd Interested parties should be committed to civil jail for six months or such period as the court may deem fit for contravening the court orders issued on the 4th of February 2012.

The court orders that were issued on the 3rd of February 2011 were that the status quo be maintained until the ruling is delivered. The Plaintiffs in this matter filed suit and simultaneously filed a chamber summons application dated 27th of October 2011 which has not been determined. At the time Justice Mbogholi gave this order, the application had not been determined. The judge order which was issued on the 3rd of February 2011 as per the court's record was that the status quo be maintained until the ruling is delivered. The judge did not record the status on the ground as it was on the 3rd of February 2011. For a party to be in contempt, the applicant must demonstrate that the order was served. This they have done and the 1st and 2nd respondents have acknowledged service. The applicants argue that the respondents are in contempt because having been served with the court order, they have constructed a barrier. To help me determine the issue of contempt, I have carefully perused HCCC No. 251 of 2010 which the applicants argue is not related to this suit. Having perused this file, I note that before the applicants filed this suit, the company that developed their premises filed suit against the defendant herein over an access road which according to me is the same road the applicants are referring to in their plaint. HCCC No. 251 of 2010 has not been determined. An Order was given by Justice Muchelule on the 18th day of October 2011 that the defendants have an exclusive right to the area in dispute. This order was not appealed against. The order of 3rd February 2011 is that the status quo be maintained. Counsel for the defendant has given an elaborate definition of what status quo is. In my view, status quo can be the situation as it is on the ground

or in a case where a court order has been given as specified in that order. From the history of the 2 cases which I find are interrelated, the status quo is the status as per the order given by justice Muchelule which was that the defendant has an exclusive right over the access road which is described by the applicant by way of a title in the present suit, pending the hearing and determination of HCCC No. 251 of 2010. In my view, the two suits should be consolidated as they arise from the same subject matter. The applicants have access as deponed by the respondents. I decline to go into the other issues raised as they are to be determined in the main suit. I do not find the respondents to be in contempt as alleged and I dismiss the application dated 18th of February 2011 with costs to the respondents.

Dated, signed and delivered this 10th day of August 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the plaintiffs
..... For the defendants

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