



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 4 of 2010

MAGATI KODECK PLAINTIFF

-VERSUS-

JAMES OBEGI DEFENDANT

RULING

By plaint dated 13th January, 2010 and filed in court the same day, the plaintiff sued the defendant seeking a permanent injunction to restrain the defendant whether by himself, his servants, employees and/or agents from closing, fencing, interfering and/or doing anything of whatsoever nature so as to obstruct and/or interfere with the plaintiff's access and/or entry into his land title Nos. **Nyaribari chache/B/B/Boburia/7726** and **8066**. Along with the plaint the plaintiff filed an application seeking temporary orders pending the hearing and determination of the suit.

The suit is defended and has been in court since January 2010. Multiple applications have been filed and orders obtained by the parties in the course of time. Notable amongst the orders obtained by parties is a consent order recorded before this court (as differently constituted by **Makhandia J.**) that:-

"...By consent the District Land Registrar, Kisii in company of the District Surveyour, Kisii do visit the land parcel Nos. Nyaribari Chache/B/B/Boburia/7626 and 8066 and ascertain the access road from Kisii-Kilgoris road. Their respective report(s) to be filed in court on or before 23rd April, 2010 when the matter shall be mentioned. The plaintiff shall meet all the expenses for the exercise..."

Another notable order is one for contempt of court obtained by the plaintiff against the defendant vide this court's ruling (**Musinga J.**) on 28th July, 2010. Yet a similar order was obtained against the defendant vide this court's ruling (**Sitati J.**) dated 7th July, 2011.

Before me now is a preliminary objection filed by the defendant dated 12th April, 2012 brought under Order 2 Rule 9 of the **Civil Procedure Rules**, 2010. The preliminary objection is on the court's jurisdiction to hear and determine this matter. The defendant contends that the matter complained of ought to first have been referred to the District Land Registrar for determination in terms of section 21 of the **Registered Land Act**, Cap 300, Laws of Kenya. The defendant's preliminary objection is silent on the consent order on the same referred to above.

Counsel for the defendant relied on the following authorities:-

Kimani Wanyoike –vs- Electoral Commission and another, Civil Appeal No. 213 of 1995, Republic

-vs- The Land Registrar Kajiado and another, Exparte Kiserek Investment Limited (2004) eKLR and Narok County Council –vs- Transmara County Council (2000) 1EA 161.

In opposing the preliminary objection, the plaintiff has filed grounds of opposition dated 8th May, 2012. In paragraph 2, the plaintiff contends:-

“That the defendant has misapprehend the plaintiff’s suit which he merely imagines to be the wishes to treat as a merely boundary dispute whereas the matter for determination before court is on the existing road of access which he closed as pleaded”.

At paragraph 3 of the amended statement of defence dated 22nd November 2011, the defendant denies paragraphs 5 and 6 of the plaint and further states that:-

“There has been no existence of road access leading to the plaintiff’s parcel of land”.

From the pleadings it appears to me that the plaintiff’s claim is one relating to an access road leading to the plaintiff’s land titles no. **Nyaribari Chache/B/B /Boburia/7726** and **8066**. Without predetermining the issues in contention, it seems to me there is no clear evidence that in fact the dispute is one relating to a boundary *per se*. Secondly, as I have observed above, there appears from the record to have been a reference to the land registrar. What the plaintiff should be telling the court is what happened to the report of the land registrar.

In the event, owing to the history of this suit, I am of the view that the preliminary objection is not only unsustainable but mischievous and intended to delay the determination of the suit. There is nothing that will stop the court if it becomes desirable in the course of the trial and in the interests of justice to refer the matter to the land registrar and/or surveyor. The objection is dismissed. I order that the suit be set down for hearing.

Ruling dated, signed and delivered at Kisii this 20th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE