



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Civil Suit 41 of 2004**

**MOSES WATAYI KITERESI .....PLAINTIFF.**

**VERSUS**

**DANIEL WANYONYI**

**ROSINA MUSAMUA**

**THE DIRECTOR OF SURVEYS.....DEFENDANTS**

**RULING.**

By a Notice of Motion dated 26<sup>th</sup> April, 2010, pursuant to the provisions of order XXXIX Rule 4, Order XLIV Rule 1, Order L Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the applicant seeks orders that

1. **THE** application be certified urgent and the same be heard forthwith.
2. **THAT**, the ruling of the Hon. Justice W. Karanja made on 9/5/2006 confirming interim orders of injunction closing an access road be reviewed varied and or set aside.
3. **THIS** honourable court be pleased to order that the applicants and their respective families or affected persons on the suit land be allowed to utilize the access road until final determination of the proceedings herein.
4. Costs be provided for.

The application is based on the grounds:-

- (i) **THAT**, on 9/6/2006 the Hon. Justice W. Karanja granted orders leading to the closure of an access road between parcel No. 5389/7 and 5389/8.
- (ii) **THAT**, the closure of the said road was made without according to both parties an opportunity to testify and/or be heard.
- (iii) **AS** a result of the closure the defendant's members of Shangalamwe farm and their respective families have no access to other places.
- (iv) **THE** said closure which amounts to summary trial has caused untold hardship to the defendants.
- (v) **THE** order of injunction was made without any presentation from the Director of Surveyors or his representative.
- (vi) **UPON** obtaining the order the plaintiff has never bothered to move the court for any further orders.

The application is predicated upon the annexed affidavit of Daniel Wanyonyi sworn on 26<sup>th</sup> April, 2010.

On behalf of the applicant, it was argued that on 24<sup>th</sup> March, 2004, the plaintiff filed an application seeking orders of temporary injunction restraining the defendant/applicant, their servants, and/or agents from trespassing onto land parcel No. 5389/8 or using the purported access road created by the 3<sup>rd</sup> defendant pending the hearing. The ruling in respect of the said application is exhibited herein as "DW2".

The matter was heard ex-parte save for the Director of Survey who was not summoned to explain how the said road came into existence. Instead the court only summoned a private surveyor. After the hearing a ruling was delivered on 9<sup>th</sup> May, 2006 thus making a final determination without confirming whether the Director of Survey was duly served with a notice to appear in court. By failing to summon the Director of Survey, the Government, so to speak, was enjoined without being given a hearing.

In support of his case the applicant annexed a copy of a letter exhibited as "DW2" from Geomatics Services, a licensed surveyor, showing that there exists an access road between the two parcels aforesaid. The applicant equally annexed a Deed plan, Area map and a letter from the District Surveyor in support of the position that there exists a Deed Plan, Area Map and a letter from the District Surveyor depicting

an access road exhibited as DW3 (a) “b” and “c” respectively.

The application was served on the firm of Risper Arunga & Co. Advocates who failed to attend court. On application, I granted the applicant leave to proceed ex-parte.

I have carefully analysed the application and all the exhibits annexed. Having done so, I am of the view that an order was given by the court effectively injunctioning all the three (3) defendants including the 3<sup>rd</sup> defendant, the Director of Survey who is head of a Government Department which is in violation of order 1 XA Rule 7 of the Civil Procedure Rules. Accordingly, there has been established a prima facie case with a probability of success.

By reason of the foregoing, there shall be an injunction in terms of prayer 3 of the application. Costs shall be in the cause.

Dated and delivered at Kitale this 29<sup>th</sup> day of June, 2010.

**N.R.O. OMBIJA.**

**JUDGE.**

N/A for Plaintiff.

Daniel Wanyonyi – 1<sup>st</sup> Defendant present in person.