



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

JOHN MWAURA NDIHO.....1ST PLAINTIFF
ALEX MWANGI MUURI.....2ND PLAINTIFF
CYRUS GICHORA.....3RD PLAINTIFF
NICHOLAS NYAGA.....4TH PLAINTIFF

(Suing on their behalf and as
Officials of the Runda Kigwaru Plot Owners
And Residents Association)

VERSUS

LAWRENCE YEGO.....1ST DEFENDANT
SAMUEL ODOURI.....2ND DEFENDANT
BEN CHUMO.....3RD DEFENDANT
LAURENCIA NJAGI.....4TH DEFENDANT

(Sued as the Registered Trustees of the Kenya
Power and Lighting Pension Scheme)

RULING

The plaintiffs are owners of some parcels of land set out in the plaint that adjoin a parcel of land said to be owned by the registered trustees of the Kenya Power and Lighting Pension Scheme.

They brought this suit against the defendants alleging that the defendants have closed an access road hitherto existing

through the defendants land and thereby denying them a right of way to another public road.

It is their case that for the last 25 years and above they have been using the said access road and as a result of the action by the defendants, they have been denied their rights.

It is also their case that the said road was provided for and clearly demarcated on the area map authenticated on 21st September, 1993 by the Director of Surveys. They now seek an order that there be a declaration that there is an easement over the defendants' parcel of land in the form of an access road and a right of way leading to Limuru Road. They also seek a permanent injunction to restrain the defendants from erecting structures, or making any development on their parcel of land and specifically on the access road through the said parcel of land leading to Limuru Road.

They are also asking for a mandatory injunction to compel the defendants to remove any obstruction or structures that have been erected on the access road aforesaid.

The defendants have filed a defence wherein the allegations of the plaintiffs have been denied, but specifically stating that this court has no jurisdiction to entertain this suit.

Following the issues raised in the defence of the defendants and in particular the names of the trustees and the title number of the defendants property being incorrect, the plaintiffs filed an application by way of Chamber Summons under Order VIA Rules 3 and 10 of the Civil Procedure Rules, seeking an order that they be granted leave to amend the plaint in line with the draft annexed to the application.

In the said application the plaintiff sought to correct the particulars of the suit premises and the names of the trustees of the defendant trust on the ground that, they were not as pleaded in the plaint. It is their position in the said application that, the proposed amendments are necessary for the conclusive determination of the issues arising in this suit and that they will not in any way prejudice the defendants.

Subsequent thereto, the defendants filed a notice of preliminary objection seeking orders that the plaintiffs' application aforesaid and the entire suit are incompetent, incurably defective and an abuse of the court process and should be dismissed with costs.

The grounds stated in the said notice are that;

- 1. The plaintiffs' claim is founded on the allegations that the defendants have denied the plaintiffs access through their property and that the defendants have unlawfully or wrongfully closed a public road or access. The jurisdiction to determine disputes relating to the creation and use of public road or access is vested in the District Roads Board, appointed under Section 3 of the Public Roads and Roads of Access Act Chapter 399 Laws of Kenya.**
- 2. This court does not at this stage have jurisdiction to entertain, hear or determine matters or disputes relating to the creation of and the use of public**

roads or access.

3. The suit herein is therefore frivolous and vexatious misconceived and abuse of court process and should be struck out with costs to the defendants.

Both learned counsel have filed submissions to address the notice of preliminary objection and cited several authorities.

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. ***See Mukhisa Biscuit Manufacturing Company Limited -vs - West End Distributors Limited (1969) E.A 696.***

I have had occasion to look at the Public Roads and Roads of Access Act Chapter 399 which has been cited by the learned counsel for the defendants in support of the position advanced. It is true that Section 3 of the said Act gives the Minister the power to appoint a board to address applications and or issues related to this Act.

With particular reference to the issues raised in the pleadings herein, a party may make an application to the board of the District in which such land is situate for leave to construct a road or roads over any lands lying between his land and such public roads or railway station. The Act provides for the procedures to be followed which include, notices to be served upon land owners affected and the process of addressing any grievances that may arise, including an appeal to a subordinate court by any person aggrieved, by the making of or the refusal to make an order by a board under any of the provisions of this Act.

My understanding of the plaintiffs' pleadings is that there has been an existing access road which the defendants have allegedly blocked by putting up and erecting a semi- permanent fence across it and effectively blocking and obstructing its use by the plaintiffs.

The particulars thereof have been set out from paragraphs 9, 10, 11, 12, 13 and 14 of the plaint. Indeed, paragraph 15 of the plaint sets out the plaintiffs' claim against the defendants, which is, to remove the said fence and or any obstruction erected or placed over the access road passing through the defendants' property.

My understanding is that, the plaintiffs do not seek to construct an access road over the defendants' property. On the contrary they, have alleged that there was in existence an access road prior to the defendants' actions which they have been using over the years but which has now been blocked by the defendants. Their plea to the court therefore is, to have the access road re-opened and this in my view does not amount to a construction of an access road as envisaged by Section 9 of the Public Roads and Roads of Access Act aforesaid.

With respect therefore, the preliminary objection cannot address the issues at hand and cannot, even when allowed, dispose of all the issues raised in the pleadings. Some of the submissions made by both learned counsel are not relevant at this stage before discovery, inspection of documents, agreed statement of issues and the case heard by adducing evidence.

I am of the view that the notice of preliminary objection is misplaced and misconceived in view of the pleadings on record and the same is hereby dismissed with costs to the plaintiffs.

Orders accordingly.

*Dated, signed and delivered at Nairobi this **19th** day of **July, 2010**.*

A. MBOGHOLI MSAGHA
JUDGE