



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 251 of 2010

**METROPOLITAN HEALTH
SERVICES LTD.....PLAINTIFF/APPLICANT**

V E R S S

**THE BOARD OF GOVERNERS.
BURUBURU GIRLS' SCHOOLDEFENDANT/RESPONDENT**

R U L I N G

The Plaintiff is the registered proprietor of land parcel Number Nairobi/Block 76/895 in Buruburu. It borders Rabai Road. On the land it developed a hospital known as The Metropolitan Hospital with an access to the said Road. In 2006 the Plaintiff sought to develop the portion of its land not in use into a residential estate, in a gated community, to be known as Metro Villas Estate. It took a loan of KShs. 140 million from Savings and Loan to develop the 34 maisonettes that comprised the Estate. The project was meant to be financed through the renting and/or sale of the maisonettes. The title above has secured the facility. The Estate, like the Hospital, adjoins Rabai Road.

The Defendant has developed a public school known as Buruburu Girls' School, Nairobi. It has a population of 800 girls and is boarding. It was established in 1986. It is the immediate neighbour of the Plaintiff's Estate and Hospital. It occupies parcel of land number Nairobi/Block 76/581 which is unsurveyed Government land.

The court visited these facilities at the request of the parties. When one is approaching from the City and using Rabai road, he gets to the Hospital first, then the Estate and lastly the school. The Estate has a wall around it, with its back adjoining the Road. Unlike the Hospital, the developer did not open a vehicular access to the Road. He chose to use the access the school was using for its community. It is this access that is the subject of this suit and application as the Plaintiff says this is a public road of access whereas the Defendant says this is a private road within its land, and therefore not open for use by the Plaintiff or its tenants.

There is no dispute that the Defendant has tarmacked this access road all the way from the school to Rabai Road. When one is coming from the School to Rabai Road while using this tarmac, the Estate's entrance is on the left and opens on the tarmac. This means that the residents of the Estate, while coming from Rabai Road and using this road that the School says it is private driveway, turn into the Estate while leaving the road to proceed to the School's gate. The Defendant put a barrier where the tarmac touches Rabai Road and that is what forced the Plaintiff to come to court complaining that its residents were being denied access to their maisonettes and yet they were using this public road of access. The Council of Nairobi, certainly at the instance of the Plaintiff, pulled down the barrier. They were agreeing with the Plaintiff that this was a public road of access, and not the School's driveway.

There is no dispute that the Hospital has similarly paved by tarmac its road of access to Rabai Road and put a barrier.

The Plaintiff sought a permanent injunction restraining the Defendant by itself, servants, employees, agents and all those acting under it from interfering with its right to use the road of access, running from Rabai Road and passing through the entrance to the Estate and terminating at the School's gate, erecting any gate or barrier thereon that would deter the use of the said road or alienate the said road. With the suit was filed an application by way of chamber summons under **Order 39 rules 1, 2 and 2A** of the **Civil Procedure Rules** and **section 3A and 63 (g)** of the **Civil Procedure Act** for a temporary injunction in similar terms.

The Defendant has filed response to the application, and also a defence denying that this is a public road of access. It states, instead, that this is a private easement on the school property being utilized as the Defendant's driveway. The Defendant

then counterclaimed for damages in the sum of KShs. 380,000/= being the value of damage when the barrier was destroyed and removed. It says that the damage followed the act of trespass on the part of the Plaintiff. The Plaintiff's response to the counterclaim was that it was officers of the City Council of Nairobi that destroyed the barrier and, therefore that, the acts cannot be blamed on it.

It is the chamber application that is subject of this Ruling. The application was prosecuted by Mr. Mari for the Plaintiff and the Defendant was represented by Mr. Ombwayo, Senior Principal Litigation Counsel from the Office of the Attorney General.

The conditions for granting of interlocutory injunction have been settled since the decision by the Court of Appeal for East Africa in the case of **Giella –Vs- Cassman Brown & Co. td [1973] E.A .358** in which Spry, V.P., said at page 360 – E as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First and applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. E.A. Industries –Vs- Trufoods [1972] E.A. 420”

The Plaintiff's case at trial is that it is being denied access to its Estate through a public road of access. The Defendant will be saying that this is its driveway which it has created on its title, a private easement on its property, to which the Plaintiff is not entitled. Through the affidavits and annexures, the parties had alot to say about the status of this access. The Plaintiff's supporting affidavit was sworn by Joab Kamau Njoroge who is its director. Its case was that in the Structure Plan of Buruburu area (“KK1”)a road of access measuring 25 metres to the Rabai Road was created by excision of part of the Plaintiff's land to serve both the Plaintiff's and the Defendant's parcels of land. Jacob Ogwari Oyato is a licenced surveyor working under Jooyato Surveys whom the Plaintiff used to verify information regarding the status of this access. He swore an affidavit on 20th July, 2010 and also wrote an opinion “KK8” at the request of the Plaintiff. He made reference to the Structure Plan which he says was a 1980 document and stated that it was the basis upon which the Part Development Plan (PDP) (“KK2”) for the Hospital was prepared in 2006. The said Plan and architectural Plans for the development of the Estate were approved by the City Council of Nairobi, Commissioner of Lands, Director of Survey, Director of Physical Planning and National Environmental Management Authority. “KK3” and “KK4” refer.

Engineer Austin Salmon Kitololo is the Chairman of the Defendant Board. He stated that the access was not excised from the Plaintiff's land but is a private road in the school's property as shown by the Area Map for Nairobi Block 76. This is “ASK1”. He stated that he was unaware of the Structure Plan “KK1” and that he had, in any case, sought the opinion of the Attorney General who had advised that the Plan is not registered and of no legal basis. Regarding this issue, Zachary Kanunu a Senior Assistant Director of Surveys in charge of Cadastal Division at the Department of Survey swore as follows:-

- a. THAT there exists a Registry Index Map for Buruburu Block 76 wherein the plaintiff's and defendant's parcels of land are described;
 - b. THAT the plaintiff's parcel of land is described as Nairobi/Buruburu Block 76/897 and 898;
 - c. THAT the defendant is occupying the land described as Nairobi/Block 76/581 which is unsurveyed GovernmentLand;
 - d. THAT there exists no road of access on the unsurveyed land No. Nairobi/Buruburu/76/581.
 - e. THAT the documents described by the plaintiff as structure plan for Buruburu area cannot override the Registry Index Map which is the authentic legal document;
 - f. THAT the Registry Index Map indicates that the Plaintiff's parcels Nos. Nairobi/Buru Buru/Block 76/897 and 898 are adjacent to the defendants land No. Nairobi/Buruburu/581;
3. THAT I have been shown an alleged road of access in dispute and do state that it does not exist in the Registry Index Map supplied by this office and annexed as Exhibit EASK2 in the Supplementary Affidavit of Engineer Austin Salomon Kitololo sworn on 11th June, 2010 and filed in the same suit;
 4. THAT Mr. Jacob Ogwari Oyato the deponent of the affidavit sworn on 20th July, 2010 and filed on 21st July, 2010 has never attempted to obtain a copy of the Registry Index Map as the same has been existing at all times in the department since 1979 to date;

.....”

It would appear that the Plaintiff's case is founded on the Structure Plan “KK1”. The Defendant is saying that this 1980 document was not registered, has no legal basis, and cannot be basis for saying that there is a road of access. The defence is saying that the dispute can be resolved by looking at the Registry Index Map “ASK1” which shows that what is being referred to as a road of access does not infact exist but that it is part of the Defendant's land. It is material that Jacob Ogwari Oyato made no reference to the Registry Index Map in his affidavit. He made no reference to it in his letter dated 26th March, 2010 (“KK8”) to the Plaintiff on the matter. It will be interesting what his view of the matter will be when the Map is shown to him, possibly during his testimony at trial.

It is equally clear that the position of the City Council of Nairobi as shown in the approvals to the Estate's development (“KK3”, “KK4” and “KK5”) is to support the case for the Plaintiff, that there is a road of access to which the Plaintiff is entitled. But there is a letter dated 13th November, 2009 produced both by the Plaintiff (as “KK6”) and the Defendant (as “ASK 2(b)”) regarding the dispute. It was addressed to the Plaintiff as follows:-

“RE: INTRUSION INTO THE SCHOOL ENTRY ROAD by THE NEW METRO VILLAS ESTATE NEXT TO THE SCHOOL”

This is in reference to a complaint letter sent to us by the Principal/Secretary B.O.G/PTA with regard to the above subject matter.

Kindly note that a team of our officers visited the ground to analyse the situation and concluded that you are to:-

- Provide an alternative access through Rabai road.
- Provide for a children's play area within your school.
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The letter is signed by P.T. Odongo for the Town Clerk. It would appear that a section of the City Council of Nairobi supports the case for the Defendant that there is no access road, and seeks that the Plaintiff develops its own access to Rabai Road.

Certainly, at this interlocutory stage of this case the court can only have a tentative view of the dispute. Matters will become clearer during the hearing of the case during which witnesses will testify and be cross-examined and all these competing documents be subjected to scrutiny. My view is that the Plaintiff has not demonstrated a *prima facie* case with a probability of success.

Did the Plaintiff show that if the injunction is not granted he will suffer such injury or loss that damages may not appropriately compensate? When the court visited the scene, it was clear that the Hospital, the Estate and the undeveloped land between the two, all border Rabai Road and all belong to the Plaintiff. One cannot say that the road in question is the only way that the Estate can be accessed. With a little expense, it is noted, the Plaintiff can develop for its residents a vehicular access through Rabai Road. This expense can be computed in monetary terms and would be compensable.

If the disputed access is in the Defendant's parcel of land it would be a private easement on the property to which the Plaintiff would not be entitled, and therefore not subject of interlocutory injunction. Further, the Defendant operates a public boarding school for girls. The road has been for the exclusive use of this school community until the Plaintiff developed the Estate. I find that the balance of convenience would tilt in favour of maintaining the *status quo* and retaining the access exclusively for the school.

In conclusion, the application for injunction has no merits and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 13TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**