

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE 78 OF 2009

NOAH CHEMWOR OGEYA PLAINTIFF

V E R S U S

JOHN K. AGEYA DEFENDANT

R U L I N G

By his application dated 22nd May, 2009, the applicant is seeking orders that the respondent do remove the fence blocking the access road to Plot No.**NANDI/KAPSENGERE/168** pending the hearing and determination of this suit. The application is supported by the applicant's affidavit sworn on 22nd May, 2009.

Miss Olel, counsel for the applicant submitted that the applicant is the registered owner of Plot No. **NANDI/KAPSENGERE/168**. The respondent erected a fence on a road which the applicant has been using for many years. The applicant uses the road to take his animals to the river and his children use it to go to school and to the shopping centre ahead. As a result of the respondent's action, the applicant is forced to go through other people's plots to access his plot.

Mr. Sagasi, counsel for the respondent opposed the application and relied on the replying affidavit of the respondent sworn on 18th June, 2009. Counsel submitted that there is no access road as alleged by the applicant. The applicant has an alternative route and will not suffer any damages. The neighbours have not complained as they know there is no access road. The respondent states in his affidavit that he is the owner of plots Nos. **NANDI/KAPSENGERE/164 and 167** having bought both plots. He has annexed a sketch plan which shows a road flowing through other plots leading to the applicant's plot No.**168**. He contends that the applicant raised the issue with the Nandi District Land Registrar and the matter is pending investigations by the Land Registrar.

The plaintiff and the defendant are brothers. It's unfortunate that they could not resolve their dispute amicably. The applicant has annexed map sheet No.5 for Terik Location prepared in December, 2000. From the map it shows that there are two access roads to Plot No.168. There is an access road between Plot No.**164** and **165**. That road is meant for Plots **167** owned by respondent and **168**. There is also another road that branches from the main Kakamega-Kisumu road between Plots Nos.169 and 170. It goes through plot numbers **172** and **187**. The road can also be utilized by plot Nos.**171, 172, 254** and **187**.

The respondent in his replying affidavit (par.9) avers that the applicant can access his plot through Plot Nos.**169, 170, 172, 187** and **254**. This is the second access road indicated in the registry map sheet No.5.

I do note from the proceedings that the dispute has been pending before the Nandi District Land Registrar. Summons were issued to the parties on 12th February, 2009 and 5th May, 2009.

From the map sheet Nos.5 for Kapsengere Registration Section, Terik Location, I am satisfied that there is an access road to Plot No.**168** between plot numbers **164** and **165** provided by the surveyors. The

applicant contends that he has been using the access road since birth and it has not been explained as to why he would make the claim now while knowing that no such road exist.

I am satisfied that the applicant has established a prima facie case with a probability of success. The presence of the second alternative access road should not bar the applicant from utilizing the other road that is provided for. The applicant contends that the access road that has been blocked is more convenient to him as his cattle and children use it daily. The respondent's action has caused him inconvenience.

The respondent is the owner of Plots Numbers **164** and **167** which are separated by the access road claimed by the applicant. The fact that neighbours have not complained does not imply that no such access road exists. The respondent can easily access his plot No.167 after blocking the access road at the end of plot No.164.

In the end the application dated 22nd May, 2009 is hereby granted. The respondent is hereby restrained from blocking the access road between plot numbers, **NANDI/KAPSENGERE/164** and **165** leading to plot No. **NANDI/KAPSENGERE/168**. Each party shall meet his own costs.

Delivered, Dated and Signed at Kakamega this 13th day of October, 2009

SAID J. CHITEMBWE

J U D G E