



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

Civil Case 80 of 2006

EVANS MWANGI NJOROGE (suing through TABITHA KIRERO).....PLAINTIFF

VERSUS

DICKSON MWAURA & JOHN MAINA.....DEFENDANTS

RULING

The applicant EVANS MWANGI NJOROGE an administrator to the Estate of the late TABAITHA KIRERO filed this application on 17th July,2006 seeking the following orders:-

1. That service of the application be dispensed with at the first instance.
2. That the Honourable court be pleased to issue an order of injunction restraining the defendants from interfering with the plaintiffs property .
3. Costs of this application be in the cause.

The main prayer is No.2 which seeks for an order of injunction. That prayer does not state the land in dispute. The four grounds in support of the application also do not mention the land number. However in the supporting affidavit the land is stated to be parcel **No. TIMBOROA/CHAGANA/SUBUKIA/48**.

It was deponed by the applicant and retaliated by his counsel in submissions that the land is registered in the name of the late **TABITHA KIRERO** who was the mother of the applicant. It measures 7.3 acres and boundaries were done in 1988. The deceased had said the directors of the bigger farm from which she got the land for creating an access road through her land. Case was determined in her favour. However the two respondents **DICKSON MWAURA and JOHN MAINA** have now created an access road through the said road which is an act of trespass. He reported the matter to police. They were arrested and charged but case is still pending.

The application was opposed and it was said applicant failed to disclose all material facts. It was deponed that the re-opening of the access road was done on 20th November,2003 under the supervision of the Land Registrar Uasin Gishu and other Government Officials. The access road also passes through other land parcels. the road has been in existence and is now a public utility.

I have considered the application, affidavits, annexures and submissions. The applicant seeks for an order restraining the defendants from interfering with his land. In his application and even in the affidavit he did not state when the road he is complaining of was created. The respondents in their replying affidavits have deponed that the access road was re-opened in the year 2003. That means it has been in existence for almost four years now. The applicant, though served with the affidavits, with those averments did not controvert the same. An injunction, except a mandatory one restrains a party from

doing some anticipated act. The access road has been in existence for several years and as such I find that this application was brought late in time. The road is already in existence and I concur with the respondents counsel to grant the prayer now sought would be like terminating the whole sit at this interlocutory stage.

The respondents deponed and submitted that the access road was reopened by the District Land Registrar on instructions he got from High Court Nakuru. Mr. Ngigi, though conceding there was such an order by Hon. Justice Lessit submitted that the Land Registrar is re-opening the access road did not follow and comply with all the requirements set out by Justice Lessit. I don't know what those requirements were but If I heard him right he was conceding that the access road was re-opened by the District land Registrar. This same fact was deponed by the respondent in their affidavit and it was never controverted. In that case then it means that the applicants complaint should be directed to the Land Registrar and the respondent. He is the one who re-opened the access road in 2003 and allegedly did not follow the laid down requirements. The respondents cannot be dragged into that dispute. Infact the court was not even told if the access road leads to their homes only or if it is used by other members of the public. I find the applicants case at this stage not to be clear but to the extent of saying a prima facie case has been established and the access road having been in existence for all those years I cannot say that the balance of convince tells in favour of the applicant.

In the circumstances I find no merit in the application and the same is dismissed with costs.

Dated and Delivered at Eldoret this 30th day of May,2007

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF:-

C/C - David

Mr. Okangi for Respondent

Applicant - Present