



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

Civil Case 33 of 2004

GITUKU KAMAITHA PLAINTIFF

VERSUS

MICHAEL KABUGI MUTEMBEI

JAMES W. N. KARIUKI & OTHERS..... DEFENDANTS

RULING

The Defendants/Applicants have moved this court by way of a notice of motion under section 3A of the Civil Procedure Act seeking orders:

- (1) That an order do issue that the road of access within Naru Moru Block 2 Muriru/1435 be opened for use by the 1st and 2nd Defendant to gain access to their properties.***
- (2) That the officer commanding Naru Moru Police Station do enforce this order.***
- (3) That the costs of the application be granted to the 1st and 2nd Defendants/applicants.***

It is the applicant's contention that despite the orders made by this court on the 2nd day of July 2004, granting the applicant's access to their properties through the suit land, the Respondent has blocked the access road and put guards to prevent the 1st and 2nd Defendant and other members of the community from using the access road.

The Respondent has filed a replying affidavit in which he maintains that he has complied with the orders of this court issued on the 18th September 2005 and 5th May 2005 and that the application is unwarranted except for the fact that the applicant's are agitating for the local community to use the Respondent's land as an access road while the court order was only for access to the applicants alone.

I have perused the court file and it is apparent that the parties are rather confused as to the purport of the orders made by this court. I need therefore to set the record straight. On the 2nd July 2004 this court delivered a ruling in which it confirmed the temporary orders issued on the 5th May 2004.

The orders issued on 5th May 2004 were in the following terms:

“An interim injunction to issue restraining the 1st and 2nd Defendants from committing acts of waste on the suit land. The Respondents will however have right to use the access road to their properties pending the inter-parte hearing.”

It is evident from the replying affidavit that the Plaintiff/Respondent interpreted that order to mean that only the Respondents can use the access road. That in effect is distorting the position. By right of access to their property, the Defendants are entitled to have access by themselves or by their servants, relatives, agent or visitor having a reason to access the Defendant’s property. That should remain the position until the plaintiff’s suit is heard and determined. I find that it is not necessary for this court to issue orders as requested by the Defendants in prayer (1) of their application as the order sought is already encapsulated in the orders issued on 5th May 2004 and 2nd July 2004. For this reason the application dated 25th September 2005 is dismissed as being superfluous. I make no orders as to costs.

Dated signed and delivered this 25th day of October 2006.

H. M. OKWENGU

JUDGE