



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO.605 OF 2001**

**M.A. BAYUSUF & SONS LTD. .... PLAINTIFF**

**VERSUS**

**AWALE TRANSPORTER CO. LTD. .... DEFENDANT**

**RULING**

The Application dated 4th December 2001 is brought under Order 29 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is seeking only one order and that is an order that an injunction do issue restraining the defendant whether by itself, its servants or agents or otherwise howsoever from entering or using the driveway wrongfully constructed on Plot No. L.R. MN/V/1692 pending the hearing and determination of this suit. It is also seeking costs of this application to be provided for.

The application is based on six grounds which are that the Plaintiff is the rightful owner of Plot No. L.R. MN/V/1692; that the road/driveway leading to the Defendants premises constructed on the Plaintiff's aforesaid property is wrongful in existence; that the defendant's action in putting up a boundary wall encroaching onto the Plaintiff's plot together with the driveway amounts to trespass on the land; that trespass to the land is a violation of the Plaintiff's right to enjoyment and use of private property which cannot be compensated by damages; that the injunction order shall prevent any ugly incident that may occur in the event the Plaintiff attempts to exercise its right to gain possession of this property without court assistance and that the Defendant is reluctant to peacefully surrender the land subject of the trespass and indeed has obstructed the surveyors and plaintiff from identifying and replacing beacons. The application is supported by an affidavit sworn by Managing Director of the Plaintiff company one Mr. Mohamed Ahmed Bayusuf and several annexures to the same affidavit. There is also a further affidavit by the same Mohamed Ahmed Bayusuf sworn on 4th April 2002 also in support of the same application.

The Respondent opposed the application and filed three Affidavits in opposing the application. First was sworn by Abdi J. Awale on 11th December 2001. The second one is sworn by the same Awale on 4th April 2002 and is a further affidavit. The third is sworn by Peter Kasyoka Mutua, the Estate Manager of the Kenya Railways who are the licensors of the Respondent's suit premises. There are several affidavits annexed to the same affidavits.

I have considered the application; the grounds for the same application; the supporting affidavits; the Replying Affidavits in opposition, and the annexures to them. Lastly I have considered the able submissions by the learned counsels.

Four reasons militate against the success of this application. First, the application is for injunction and yet it is brought under Order 29 Rules 1 and 2 of Civil Procedure Rules which is not the relevant order. The relevant rule is Order 39 Rules 1 and 2. That the application is brought under a wrong rule means in effect that the application is incompetent. A belated attempt was made to rectify this but as that was after the Respondent had replied to the application, the court could not consider such an attempt.

Secondly, it seems to me clear that the application is seeking to injunct the Respondent over what has been already done. Order 39 Rule 1 and 2 are in my humble opinion provisions for stopping a property in danger of being wasted from actions that would end up in wasting it. It is not a provision for reversing what is already done. If the Applicant wanted the Respondent to undo what is already done such as

pulling down the wall already built then it would have applied for mandatory injunction. I am fully aware that all that the Applicant is seeking is that the Defendant be restrained from entering or using the driveway wrongfully constructed on Plot No. L.R. MN/V/1692 but it is clear to me that if the driveway remains and the wall remains then it would be of no use stopping the use of the same driveway and wall so long as they remain there.

Thirdly, it seems to me that the dispute is not strictly between the Plaintiff and the Defendant in this suit. It is strictly between the Railways which is the alleged owners of the property being occupied by the Defendants and the Plaintiff which is the new owner of the property L.R. MN/V/1692. The Affidavit sworn by Peter Kasyoka Mutua, the Kenya Railways Estate Manager in-charge of real property belonging to the Kenya Railways states that the property in dispute part of which was given to the Respondent is Plot No.403/V/Mainland North and he says the same property is within Railway Reserve area whereas the Applicant refers to the property in dispute as L.R. MN/V/1692. Thus as between the Railways which gave licence to the Respondent to occupy their land and the Plaintiff, the Plot Numbers of the disputed plot are different. The problem is not made easy by the first annexure to the Respondent's further affidavit. That annexure A is a letter from the Surveyors hired by the Defendant. It is addressed to the Defendant and it is talking of Plot MN/V/1967. All this confusion would, in my humble opinion be sorted out only if the Kenya Railways was made a party to this suit. I say so because the dispute cannot ignore the question of the correct boundary between the Railway land and the land belonging to the Applicants. To solve that dispute, the present Respondents who were only given licence by the Kenya Railways would not be of any help to the court as they have no proprietary interests in the land. Thus the Kenya Railways must be made a party for they are the one who of necessity know what they gave to the Respondents and whether what they gave away to the Respondents was actually theirs or not.

The totality of all these is that I am not satisfied that as against the Respondents, a prima facie case with a probability of success has been demonstrated. The orders sought in the plaint cannot, in my humble opinion be granted without proof that Kenya Railways had no propriety or beneficiary interests in the subject property.

Finally, on the balance of convenience, I note that the Plaintiff acquired the suit land sometime in 2001 from the former owners M/s Marcago Ltd. The wall complained of and the driveway on access land was constructed in 1998 and the alleged access road was upgraded in March 2001 long before the Plaintiff acquired the suit land. The former owner and the Respondent had been at peace with each other. All this is in the Affidavit of Respondent and have not been challenged. The effect of that is that the balance of convenience favours status quo particularly as granting the orders prayed for would result in the Respondent being unable to pursue its business effectively as it would not have access to its business place.

Lastly I have not been satisfied as to the loss that the Plaintiff would suffer. The former owner did not complain about the situation and did not allege any suffering. The Applicant has not proved to my satisfaction that it would suffer irreparable loss if the injunction is not granted.

The sum total of all the above is that this application cannot succeed. It is dismissed with costs to the Respondent. I do however, direct the parties to have this matter set down for hearing as early as possible so as to have the matter sorted out once and for all. For that purpose, I do direct the Registry to give the parties a hearing date on priority basis.

**Dated and delivered at Mombasa this 28th Day of August 2002.**

**J.A. ONYANGO OTIENO**

**JUDGE**