



**Sheila Ashok Kumar Shah (Otieno Ouma Advocates) v Hwaock IM & 2 others
(Land Case E037 of 2024) [2024] KEELC 7372 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E037 OF 2024
LN MBUGUA, J
NOVEMBER 7, 2024**

BETWEEN

SHEILA ASHOK KUMAR SHAH (OTIENO OUMA ADVOCATES) .. PLAINTIFF

AND

HWAOCK IM 1ST RESPONDENT

EVANGELICAL MISSION FOR AFRICA NYAKU LIMITED . 2ND RESPONDENT

NYAKU LIMITED 3RD RESPONDENT

RULING

1. Vide a plaint dated 1.2.2024, the plaintiff filed this suit claiming that he bought his land parcel 209/8348 from the 2nd defendant way back on 2.12.1992, and by then the 2nd defendant had only constructed one access road serving both parcels 8348 and 8349. That as a condition for the purchase of parcel 8348, the plaintiff was granted the Deed of the Right of way to use the roadway on parcel 8349.
2. The plaintiff also filed an application contemporaneously with the suit claiming that the 1st defendant who now owns parcel 8349 has blocked the aforementioned access road. The plaintiff therefore seeks the following orders:
 - “i. . Pending the hearing and determination of this Application inter partes, the 1st Defendant whether by herself, servants, agents or employees be restrained from undertaking the proposed development of a perimeter wall and a gate on the Access Road on Land Reference Number 209/8349.
 - ii. Pending the hearing and determination of the main suit, the 1st Defendant whether by herself, servants, agents, or employees be restrained from undertaking the proposed development of a perimeter wall and a gate on the Access Road on Land Reference Number 209/8349.



- ii. Pending the herein and determination of the main suit, the 1st Defendant whether by herself, servants, agents, or employees be restrained from undertaking any actions that could deny, impair, or interfere with the Plaintiff's right of way, that is, to use the Access Road on Land Reference Number 209/8349 to access Land Reference Number 209/8348.
 - ii. The officer commanding Loresho Police Station or any other police station that is nearer to the Suit Properties do assist in compliance of the orders and ensure peace prevails.
 - ii. The costs of this application be borne by the Defendants.”
3. When the application was presented before me on 6.2.2024, the court gave directions on the prosecution of the said application with an order that status quo to be maintained.
 4. The applicant was back in court with an application dated 27.3.2024 seeking the following orders;
 - i. This Application be certified as urgent and heard ex parte in the first instance.
 - ii. This honourable court do issue summons to Hwaock Im, the 1st respondent herein and any other director or manager of the 2nd respondent to appear in person before this honourable court to show cause why they should not be held in contempt of this honourable court's order made on 6.2.2024.
 - iii. In default of 2 above or in failure to show cause Hwaock Im, the 1st respondent herein, and any other such director or manager of the 2nd respondent served be cited for contempt and committed to civil jail for six (6) months.
 - iv. Any structures and or developments made on Land Reference Number 209/8349 (the Disputed Land) in defiance of the order of this honourable court made on 6.2.2024 be demolished at the cost of the 1st and 2nd respondents.
 - v. The costs of this application be born jointly and severally by Hwaock Im, the 2nd respondent and any such other director or manager of the 2nd respondent served on full indemnity basis.
 5. The applicant avers that despite service of the orders of maintenance of status quo, the respondents have continued with the construction.
 6. In response to the 1st application, the 1st respondent filed a Notice of Preliminary Objection dated 11.3.2024 averring that;
 - i. This honourable court is bereft of jurisdiction to hear and determine this suit by virtue of the express provisions of Section 61 of the *Physical and Land Use Planning Act* No. 13 of 2019.
 - ii. This honourable court is deprived of jurisdiction to entertain this matter in view of the unequivocal provision of Sections 129 and 130 of the *Environmental Management and Co-ordination Act* No. 8 of 1999.
 - iii. The suit herein is a nullity, frivolous, vexatious and an abuse of court process and ought to be struck out with costs to the 1st defendant.
 7. The 1st defendant also filed a Replying Affidavit dated 11.3.2024 where he contends that he is the director of the Evangelical Mission for Africa, the registered owners of parcel 8349. He admits that indeed the Deed of the Right of Way comprising part of plaintiff's land parcel 8348 does exist,



permitting both property owners of parcels 8348 and 8349 to use the access road. He however contends that he has adhered to the said Deed of the Right of Way without interfering with plaintiff's access to her premises. The 1st respondent contends that what they obtained is a change of user from residential to education which necessitated renovation works, of which they got the requisite permits and approvals from the County Government.

8. In response to the application for contempt, the 1st respondent filed a Replying Affidavit dated 8.5.2024 where he avers that he is aware of the court orders given on 6.2.2024, but contends that the orders were confined to the disputed land and did not extend to the other parts of parcel 8349.
9. I have considered the rival arguments and submissions, I frame the issues for determination as follows; Whether this court has jurisdiction to hear the matter, whether orders restraining the defendants from constructing a perimeter wall and gate should be granted, and whether defendants are in contempt of the court orders of 6.2.2024.
10. On jurisdiction, I find that the common thread running between the protagonists relate to the nature and extent of use of the access road by the owners of parcels 8348 and 8349. To this end, the parties contend that there is a Deed of Right of Way allowing both owners of the two suit parcels to use the access road. Certainly that is an issue beyond the scope of the principles and norms envisaged under the *Physical and Land Use Planning Act*. Applying the Predominant Purpose Test, See *Suzanne Butler & 4 Others v. Redhill Investment & Another* (2017) eKLR, I find that this court has jurisdiction to determine the dispute herein. And in any event, courts should be able to deal with consequential matters; for instance the issues of approvals in the case at hand, See *Peter Mutisya Musembi & Another v National Bank of Kenya* [2015] eKLR. In the circumstances, I find that the Preliminary Objection is not merited.
11. On the question of use of the access road, I find that 1st defendant has admitted that there is a Deed of right of of Way permitting both owners of the two properties 8348 and 8349 to use the same access road. The 1st defendant contends that the perimeter wall and gate being constructed do not interfere with the said access road.
12. The court is not able to fully interpret the two maps availed by the plaintiff in her supporting affidavit to the 1st application. However, the photographs availed therein indicate that the cabro road has a line drawn right in the middle, a confirmation of interference with the access road. The court can only determine the extent of such interference when parties adduce evidence in a full trial.
13. In the case of *Cyanamid Co. vs Ethicon Ltd* (1975) 1 ALL ER 504; (1975) A.C 396 HL cited in *Tritex Industries Limited & 3 Others vs National Housing Corporations & Another* [2014] eKLR, it was held that;

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial”.
14. This far, it becomes clear that the extent to which the 1st respondent is building the perimeter wall and gate can only be dealt in the main trial. As at this stage, it is sufficient to note that the respondent is interfering with the access road hence the restraining orders are merited.
15. On contempt, the court has seen the photographs availed by the plaintiff in the initial application of 1.2.2024 which depicts some drawings on the road. By the time the plaintiff filed the contempt application dated 27.3.2024, the plaintiff availed photographs depicting a flurry of activities being



- undertaken on the cabro road including; the digging out of the road, pouring of construction materials, men at work with wheel barrows and other tools of trade in construction arena, and the road has a mark dividing it right in the middle. This is an indication that indeed there is ongoing construction.
16. The 1st respondent does not deny that there is ongoing construction. He however contends that the court order did not bar him from building on the other parts of his parcel. He has however not availed any evidence to demonstrate that the ongoing construction is not affecting the access road. He has availed about 6 photos where no construction can be discerned, but there is a green line right in the middle of the cabro road, a tell tale sign that the road has been interfered with.
 17. Section 5 of the Judicature Act provides for the punishment of contempt of court, See *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union* [2015] eKLR, cited in *Ramadhan Salim v Evans M. Maabi T/A Murhy Auctioneers & Another* [2016] eKLR. Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that which willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings, See *Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Others* [2015] eKLR.
 18. The orders given by this court on 6.2.2024 were for maintenance of the status quo, whereby no construction was to be undertaken on the disputed land. The interpretation being proffered by the 1st respondent that he is not building on the disputed land is hollow in view of the findings of this court that there is evidence of interference with the road. In the circumstances, the court finds that the 1st respondent is guilty of contempt of the court orders.
 19. In the end, I proceed to give final orders as follows:
 - i. The Preliminary Objection dated 11.3.2024 is hereby dismissed.
 - ii. The application dated 1.2.2024 is allowed with costs to the applicant. The orders given therein shall however remain in force for a period of one year.
 - iii. The 1st Respondent is hereby found guilty of contempt of court orders of 6.2.2024.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7th DAY OF NOVEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Nyatande H/B for Ouma for Plaintiff

Court Assistant: Venna

