



Adero & another v Kisumu County Director of Surveys & 3 others (Environment and Land Appeal E004 of 2023) [2023] KEELC 17152 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**E ASATI, J
MAY 4, 2023**

BETWEEN

RICHARD ONUNGA ADERO 1ST PLAINTIFF

SAMSON OKOTH ONUNGA 2ND PLAINTIFF

AND

KISUMU COUNTY DIRECTOR OF SURVEYS 1ST RESPONDENT

KISUMU COUNTY LAND REGISTRAR 2ND RESPONDENT

DAGO SUB-LOCATION ASS. CHIEF 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Together with plaint dated March 8, 2023, the Plaintiff filed a Notice of Motion application of even date seeking for orders of temporary injunction restraining the 1st, 2nd and 3rd Respondents by themselves, their agents or their officers or any person acting under their authority from purporting to peg out the alignments of the section of the access road that served the Plaintiff's land parcel number Kisumu/Dago/121, 122 And 120 (now Kisumu/Dago/5370) pending the hearing and determination of the suit.

The application was stated to be brought pursuant to the provisions of Order 40 Rules 1 and 4 and Order 51 of the Civil Procedure Rules 2010 and Articles 40 and 47(1) of the constitution of Kenya 2010.

2. The application was unopposed. Affidavit of Service sworn by George Omondi Ogonji, a process server, on 10th March 2023 shows that the Respondents were served with, among other documents, the application on 10th March 2023.



3. It was the applicant's case that the 2nd Respondent already opened the road of access on 24th November, 2020 after transparent and consultative process. That however, the Respondents have again issued notice of intention to unlawfully, procedurally and irregularly reopen the road. That if this happens, the Applicants property will be destroyed.

The application was supported by the contents of the Supporting Affidavit sworn by the 1st Applicant Richard Onunga Adero on 8th March, 2023 and a Further Affidavit sworn by the same deponent on 14th April, 2023.

4. The application was canvassed by way of written submissions. Written submissions dated 14th April, 2023 were filed on behalf of the Applicants by the firm of Row Advocates LLP. Counsel submitted that the Applicant had established a *prima facie* case with a probability of success. That the Applicants are the registered owners of the suit lands. That the road of access was opened on 24th November, 2020. That the Respondents have given notice to re-open the road. That the actions of the Respondents are unlawful, discriminatory and unreasonable.

Secondly, that unless the intended action is stopped, the Applicants' rights will be violated and that the balance of convenience tilts in favour of allowing the application.

5. I have considered the Notice of Motion, the Affidavits in Support and the submissions made. I have seen a copy of the notice dated 6th December, 2022 annexed to the Supporting Affidavit by one Steve Rogers Kobado County Director of Surveys and addressed to the area Assistant Chief Dago Sub-location informing the Assistant Chief that the Surveyors from the County survey office were to visit the site on Thursday 9th March 2023 to peg out the alignment of the road in question. The letter is copied to the proprietors of land parcel numbers Kisumu/Dago/118, 121, 122 and 5370 The subject matter of the letter is indicated to be opening of access road traversing through parcel numbers Kisumu/Dago/118, 121, 122 and 5370. I have also seen a copy a copy of a letter with similar contents annexed to the further Affidavit notifying the parties of a site visit on 21st April 2023 for same purpose.
6. I have also seen the ground report dated 27th January 2021 by one George Nyangweso District Land Registrar Kisumu annexed to the Supporting Affidavit. It is indicated in the said report that the road was opened on 24th November 2020 and that the road had been provided for. There is also annexed to the Supporting Affidavit a letter dated 8th July 2020 by one Joseph Nanzala, Regional Surveyor Nyanza region to the effect that the office had implemented the changes.
7. The Applicants' claim to be the registered owners of land parcel numbers Kisumu/Dago/5370, Kisumu/Dago/121 and Kisumu/Dago/122 which are the subject of the letters by the County Director of surveys in respect of which the re-opening of the road is to be done. To the Supporting Affidavit they have annexed copies of title deed and certificate of official search to demonstrate this. The re-opening of the rod is the subject matter of the suit as can be seen from the plaint and the substantive prayer sought is for permanent injunction restraining the Defendants from reopening the road.
8. The applicants as owners of the suit property are entitled to protection of their right to property under article 40 of the *constitution* of Kenya. I find that the applicants have demonstrated a *prima facie* case with a probability of success. I also find that if the orders sought are not granted, the threatened action will take place to the detriment of the applicants by denying them free enjoyment of their land. The balance of convenience tilts in favour of allowing the application pending interrogation of the issues in the suit at the full hearing. The application was unopposed and the facts contained in the affidavits uncontroverted.



9. The conditions in *Giella vs Cassman Brown* (1973) EA 358 for grant of interlocutory temporary injunctions have been satisfied. I allow the application and make the following orders: -
- i. An order of temporary injunction is hereby issued restraining the 1st, 2nd and 3rd Respondents by themselves, their agents or their officers or any person acting under their authority from purporting to peg out the alignments of the section of the access road that serves the Plaintiffs land parcel number Kisumu/Dago/121, 122 And 120 (now Kisumu/Dago/5370) pending the hearing and determination of the suit.
 - ii. Costs to the applicants.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 4TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Okello Advocate for the Plaintiffs/Applicants

No appearance for the Defendants/Respondents

