



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 913 OF 2017

KAVAI MUASYA.....1ST PLAINTIFF

BARNABAS MUTHUSI MUASYA.....2ND PLAINTIFF

VERSUS

AUGUSTINE MUTUA SAULI.....1ST DEFENDANT

WILLY MUTIE.....2ND DEFENDANT

SUSAN YEGO.....3RD DEFENDANT

CELESTINE JEPKOECH ROTICH.....4TH DEFENDANT

THE LAND REGISTRAR, KAJIADO

LANDS REGISTRY.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 29th July, 2019 brought pursuant to Section 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act, Order 40 Rule 1,2,4 and 10, Order 51 Rule 1 of the Civil Procedure Rules as well as Article 40 of the Constitution. The Applicants seek that the Court be pleased to Order the 1st, 2nd, 3rd and 4th Defendants to open the lawful public access road provided for in both title numbers Ngong/ Ngong/ 63413 and 63412 pending the outcome of this suit. The Application is premised on the grounds on the face of it and the affidavit of the 1st Plaintiff KAVAI MUASYA where he deposes that the Defendants have delayed in complying with the Pre Trial directions as ordered by the Court. He provides the history of the dispute herein and claims the 1st and 2nd Defendants changed parcel number Ngong/ Ngong/ 63412 to be registered as Ngong/ Ngong/ 90698 and purported to change the location of the access as well as created an illegal access road. He explains that the illegally created access road by the Defendants reaches a dead end at plot number Ngong/ Ngong/ 92262. He contends that the Defendants action of closing the lawfully created access road and purporting to sell part of that access road to the 3rd and 4th Defendants who have erected structures thereon to block the Plaintiffs' access has prompted the Plaintiffs to trespass on another plot. He insists that there is no point of convergence of the lawful access road and the unlawfully created access road by the Defendants. Further, the Plaintiffs together with persons who purchased from them have been forced to trespass on plot number Ngong/ Ngong/ 92262 whose owner has threatened to fence off his land to block trespassers. He reiterates that there is no justification for the continued encroachment on the public access road by the 3rd and 4th Defendants.

The 1st Defendant Augustine Mutua Sauli opposed the application by filing his replying affidavit where he deposes that their late father Sauli Mwavu Kioko owned two parcels of land numbers Ngong/ Ngong/ 3771 and 2159 together with Boniface Muasya Kalyuki who is the father of the Plaintiffs. He explains that the Applicants filed a Succession Cause in respect of their late father's estate but did not include the 1st Defendant, Michael Kavita Sauli and himself yet the property was held in common. He contends that the Applicants engaged a Mr. Mutemba to amalgamate land parcel number Ngong/ Ngong/ 3771 and 2159 without their participation at all. Further, the said Mr. Mutemba proceeded to subdivide Ngong/ Ngong/ 63411 into two without their participation and obtained Title Numbers Ngong/ Ngong/ 63412 and 63413 respectively. He claims together with the 1st Plaintiff they had agreed on the subdivision drawings but Mr. Mutemba has been a problem as he has curved himself a portion of the land, settled on it and insists the road needs to be changed.

The 3rd Defendant Susan Yego Suter in her replying affidavit in opposition to the instant application deposes that she purchased 1/8 acre of land for Kshs. 950,000/=, which was excised from Ngong/ Ngong/ 3771 belonging to the 1st Defendant vide a Sale Agreement dated the 11th

July, 2013. She contends that at the time of purchase, she adhered to all necessary legal procedures and carried out due diligence of the land in question as she was shown a draft copy of a field diagram including undertaking observation on site that appeared to be genuine having been signed as well as stamped upon by a licensed surveyor. She insists there was no illegality in proceeding with development on her plot. She claims the Applicants have engaged in intimidation and threats to demolish their houses yet this matter is not yet concluded in court. Further, that the Applicants recently brought a tractor and bulldozer to the contested site and established an access road contrary to what they have been using before exposing their property as well as the tenants therein. She avers that the Chief is supporting the Applicants and yet there is an access path provided for both parcels. Further, he has written letters to aid in their eviction. She denies participating in the subdivision as she purchased her plot from the beneficiaries of the estate. She prays that the 1st Defendant does allocate her a different plot in the event the court finds that access ought to be through her plot.

The 4th Defendant Cecilia Jepkoech Rotich opposed the application by filing a replying affidavit where she deposes that the orders being sought are trial orders which are in the main suit. She explains that she purchased her land parcel number Ngong/ Ngong/ 90698 from the 1st Defendant vide an Agreement dated the 14th September, 2015 and the property had been surveyed with a Survey Map shown to her. She claims as per the Survey Map, the road is not in the area currently claimed by the Plaintiffs. Further, that the current road is the one being used by all the parties. She contends that she has invested all her saving on her land which the Plaintiffs are seeking to demolish. She insists the Plaintiffs were present as neighbours when she was constructing the residential property in 2016 and never raised issues at all. She reiterates that the greater issues are between the Plaintiff and 1st Defendant who were supposed to share the property equally. Further, that the tenants on LR No. Ngong/ Ngong/ 63413 are the ones pressing through the Plaintiffs for change of the road and have already physically marked her residential house for demolition, damaged the fence as well as threatened her tenants.

The 5th and 6th Defendants did not oppose the instant application.

The Applicants and the 3rd Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 27th July, 2019 including the parties' respective affidavits, annexures and submissions, at this juncture the only issue for determination is whether the 1st, 2nd, 3rd and 4th Defendants should be directed to open the lawful public access road provided for both title numbers Ngong/ Ngong/ 63413 and 63412 pending the outcome of this suit.

The Applicants in their submissions have reiterated their claim above and insist they have made out a prima facie case for the opening of the road of access which fact is opposed by the 1st to 4th Defendants. They have relied on the following decisions: **in the matter of the estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR; Alloys Nyerere Omari V Ann Kerubo Ombachi & 5 Others (2013) eKLR; Azzuri Limited Vs Pink Properties Limited (2015) eKLR; and Kenya Anti Corruption Commission Vs Bhangra Limited & Another (2012) eKLR** to support their averments. The 3rd Defendant in her submissions averred that she regularly purchased her land, is a bona fide purchaser for value without notice and did not participate in any fraud / illegality as alleged by the Plaintiffs. She relied on the decisions of **Lawrence Mukiri V Attorney General & 4 others (2013) eKLR and Dennis Noel Mukhulo Ochwada & Another V Elizabeth Murungari Njoroge & Another (2018) eKLR** to support her averments.

From the Applicants and the 1st Defendant's averments, it is not in dispute that the mother titles to the suit parcels of land were jointly owned by their fathers. It is emerging that the dispute over road of access emanated when the 1st Defendant transferred parcels of land to the 3rd and 4th Defendants culminating in the closure of the said access to the Plaintiffs. The 3rd and 4th Defendants have confirmed that there is a road which was recently curved by a tractor that is affecting their respective parcels of land. From the annexures in the Applicants' affidavit, I note owner of parcel number Ngong/ Ngong/ 92262 actually issued a notice dated the 22nd July, 2019 on closing the illegal access road through his plot. Further, they have also presented a plan in respect to the shape of the plots and road of access. The 1st, 3rd and 4th Defendants in their affidavits have also included their map.

In the case of **Homescope Properties Ltd & another v David Gachuki & Pamela Odera Sued as Chairman & Secretary of Karen Ngong View Estate & another [2014] eKLR**, Justice Mutungi held as follows: **' Having regard to the provisions of the Public Roads and Roads of Access Act the court is persuaded there is a distinction between a public road and a road of access.Limitation as to use may be as to the nature or type of vehicles that may not use such a road. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt.'**

I note the Applicants are seeking orders of a permanent nature which are also contained in their Plaint that will culminate in the demolition of structures constructed by the 3rd and 4th Defendants. Insofar as the suit has not been set down for hearing, at this juncture, I note the Plaintiffs have no road to access their respective plots as had been designated in the map at the point of subdivision. I opine that it would be pertinent if the Court granted them an access to their respective properties pending the outcome of the suit. Even though the 1st, 3rd and 4th Defendants oppose the application, based on the facts as presented and in associating myself with the aforementioned decision, I note there is already a road which was recently curved out by the Plaintiffs, which they allege affects their respective properties.

In the circumstance, and insofar as the instant Application is merited, I direct that the obtaining status quo be maintained where the parties are directed to use the road of access that was recently curved out by the Plaintiffs pending the outcome of the suit.

I further direct that this matter be expeditiously set down for hearing within 60 days from the date hereof.

Costs will be in the cause.

Dated signed and delivered via email this 27th Day of May, 2020

CHRISTINE OCHIENG

JUDGE