



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO 228 OF 2014**

DIANI ROAD DEVELOPERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
AMBASSADOR PETER NYAMWEYA ..... 2<sup>ND</sup> PLAINTIFF  
OMARI PAUL MARAGIA NYAMWEYA ..... 3<sup>RD</sup> PLAINTIFF  
ONSERIO MARAGIA NYAMWEYA ..... 4<sup>TH</sup> PLAINTIFF  
NASSER NYAMBANE MARAGIA NYAMWEYA..... 5<sup>TH</sup>PLAINTIFF  
NOAH GEORGE OGENDI NYAMWEYA ..... 6<sup>TH</sup> PLAINTIFF  
STEPHEN RATEMO ..... 7<sup>TH</sup> PLAINTIFF  
BENJAMIN NYABERA NYAMWEYA ..... 8<sup>TH</sup>PLAINTIFF  
OLYMPIO NYABERA NYAMWEYA ..... 9<sup>TH</sup>PLAINTIFF  
PAUL MOGAKA NYAMWEYA ..... 10<sup>TH</sup>PLAINTIFF  
OMARI MOGAKA NYAMWEYA ..... 11<sup>TH</sup> PLAINTIFF

**VERSUS**

JERUSHA KERUBO NYAMWEYA ..... 1<sup>ST</sup> DEFENDANT  
PAUL OMARI NYAMWEYA ..... 2<sup>ND</sup> DEFENDANT  
JOHN NYAMBANE NYAMWEYA ..... 3<sup>RD</sup> DEFENDANT  
ROBERT NYAGWENCHA NYAMWEYA ..... 4<sup>TH</sup> DEFENDANT  
DAVID SIMBA NYAMWEYA ..... 5<sup>TH</sup> DEFENDANT

**RULING**

1. This dispute involves the family of the late **Pastor Paul Nyamweya**. Pastor Paul Nyamweya, deceased (hereinafter referred to only as “**the deceased**” where the context so permits) was registered as the proprietor of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/2535** (hereinafter referred to as “**Plot No. 2535**” where the context so admits). The deceased had five (5) sons namely, Samson Nyambati, Ambassador Peter Nyamweya, John Marube Nyamweya, deceased, Andrew Nyamweya deceased, and David Mogaka Nyamweya, deceased. Sometimes in the year 1972, the deceased sub-divided Plot No. 2535 into five (5) portions namely, LR Nos. Nyaribari Chache/B/B/Boburia/3217, 3218, 3219, 3220 and 3221 (hereinafter referred to as “Plot Nos. 3217, 3218, 3219, 3220 and 3221” where the context so admits). The deceased allocated to his five sons one (1) plot each. John Marube Nyamweya, deceased was allocated Plot No. 3221. David Nyamweya, deceased and Andrew Nyamweya, deceased were allocated Plot No. 3219 and Plot No. 3220 respectively. It is not clear from the record how the remaining two (2) Plots namely, Plot No. 3217 and Plot No. 3218 were allocated between Ambassador Peter Nyamweya and Samson Nyambati.

2. The 2<sup>nd</sup> plaintiff as I have stated above is the son of the deceased. The 3<sup>rd</sup> to 11<sup>th</sup> plaintiffs and the 2<sup>nd</sup> to 5<sup>th</sup> defendants are the grandsons of the deceased. The 1<sup>st</sup> defendant is the widow of John Marube Nyamweya and as such a daughter in law to the deceased. The 1<sup>st</sup> plaintiff is the registered proprietor of Plot No. 3218 which, the deceased had allocated to one of his sons. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs are directors and shareholders of the 1<sup>st</sup> defendant and have their permanent residences on Plot No. 3218 owned by the 1<sup>st</sup> defendant as aforesaid. The 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> plaintiffs are the sons of Andrew Nyamweya, deceased. They have their permanent residences on Plot No. 3220 which is said to be registered in the name of their deceased father aforesaid. The 7<sup>th</sup> and 11<sup>th</sup> plaintiffs are the sons of David Mogaka Nyamweya, deceased. They have their permanent residences on Plot No. 3219 which is also said to be registered in the name of their said deceased father. The 1<sup>st</sup> defendant is registered as the proprietor of Plot No. 3221 that was allocated by the deceased to his deceased husband, John Marube Nyamweya on which plot, she has her permanent residence. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are the 1<sup>st</sup> defendant’s children.

3. Sometimes in the year 2012, the 1<sup>st</sup> defendant decided to put up a three storey building comprising of eight commercial residential apartments on Plot No. 3221. The 1<sup>st</sup> defendant prepared plans for the said building which she presented to the defunct Municipal Council of Kisii for approval. The said plans were approved by the said council on 18<sup>th</sup> July 2012. The 1<sup>st</sup> defendant thereafter applied to the National Environment Management Authority (NEMA) for Environmental Impact Assessment Licence before commencing the construction of the said building. The 1<sup>st</sup> defendant was denied a licence for the said project by NEMA on 17<sup>th</sup> December 2012 on the following grounds:-

- (a) The project was not compatible with the surrounding area which is composed of predominantly single residential units.**
- (b) The project was to be undertaken near grave sites and was likely to interfere with the graves.**
- (c) The project was going to block access to one of the residences nearby.**
- (d) The project would interfere with the privacy of Nyamweya family who had strongly objected to the same.**

4. The 1<sup>st</sup> defendant was aggrieved by the decision of NEMA aforesaid and preferred an appeal against the same to the National Environment Tribunal (hereinafter referred to only as “**the tribunal**” where the context so admits) in Appeal No. NET/111/2013. The tribunal in its decision made on 31<sup>st</sup> December 2013 allowed the 1<sup>st</sup> defendant’s appeal, overturned NEMA’s decision and granted to the 1<sup>st</sup> defendant the Environmental Impact Assessment Licence for the project aforesaid. According to the ruling by the tribunal, the tribunal had visited the site of the 1<sup>st</sup> defendant’s project and made observations on a number

of issues such as the location of the project and its surroundings, the distance between the project site and the graves of the deceased members of Nyamweya family and the location of roads of access to nearby homes of the other members of Nyamweya family in relation to the site of the project. In its decision, the tribunal made a finding that the 1<sup>st</sup> defendant's project was not out of character with its surroundings and that the objection to the project on the grounds that it would interfere with graves and access roads had no factual basis. The tribunal on its visit to the site of the project observed that the home that was closest to the project was that of the 2<sup>nd</sup> plaintiff herein and that it had an access.

5. The 2<sup>nd</sup> plaintiff was not satisfied with the decision of the tribunal and lodged an application for judicial review before this court on 13<sup>th</sup> June 2014 seeking an order of certiorari to quash the same. The 2<sup>nd</sup> plaintiff's application for judicial review was filed following leave that was granted to the 2<sup>nd</sup> plaintiff for that purpose on 23<sup>rd</sup> May 2014. In his application for leave, the 2<sup>nd</sup> plaintiff had sought a further order that:

**“...the grant of such leave does operate as a stay of the ruling and consequential orders issued on 31<sup>st</sup> December 2013 by the 2<sup>nd</sup> respondent in Tribunal Appeal No. NET/111/2013 and also bar the interested party from further carrying out any excavation, construction works or development on Land Reference Number Nyaribari Chache/B/B/Boburia/3221 in Kisii Municipality within Kisii County pending the filing, hearing and final determination of the substantive application for orders of judicial review.”**

6. In this court's ruling on the 2<sup>nd</sup> plaintiff's said application for leave that was delivered on 23<sup>rd</sup> May, 2014, the court declined to grant the order that the leave that was granted to the 2<sup>nd</sup> plaintiff shall operate as a stay in the manner set out above. The court made a finding that the 2<sup>nd</sup> plaintiff had failed to demonstrate that he was likely to suffer serious prejudice and loss if the stay was not granted. On the 2<sup>nd</sup> plaintiff's contention in that application that the 1<sup>st</sup> defendant's project would block access to his premises, the court made an observation that the tribunal had made a finding of fact that the project was not likely to block any access. On the other issue that had been raised by the 2<sup>nd</sup> plaintiff that the project would interfere with the graves of the departed family members, the court observed once again that the tribunal had made a finding that the 1<sup>st</sup> defendant's project was situated some distance from the said graves. In conclusion, this court held that the 2<sup>nd</sup> plaintiff had not made out a case for granting a stay. The 2<sup>nd</sup> plaintiff did not appeal the said decisions by the tribunal and by this court.

7. The 2<sup>nd</sup> plaintiff has now joined the 1<sup>st</sup> and 3<sup>rd</sup> to 11<sup>th</sup> plaintiffs in this suit to challenge the 1<sup>st</sup> defendant's project aforesaid once again. It is not clear why the 2<sup>nd</sup> to 5<sup>th</sup> defendants have been joined in the suit. All the documents before me indicate that the 1<sup>st</sup> defendant is the proponent and executor of the project in dispute. In their plaint dated 16<sup>th</sup> June, 2014, the plaintiffs have averred that at all material times Plot Nos. 3218, 3219, 3220 and 3221 which are occupied by the 2<sup>nd</sup> to 11<sup>th</sup> plaintiffs as aforesaid were part of one parcel of land that was owned by Pastor Paul Nyamweya, deceased (“deceased”). The original parcel of land that gave rise to the said plots as I have stated at the beginning of this ruling was Plot No. 2535. The plaintiffs have averred that when the deceased effected the sub-division of Plot No. 2535 that gave rise to the four (4) plots aforesaid, he created or established an access road that traversed through the said plots for ease of access by his five sons to their respective homes. The plaintiffs have averred that the said access road at one point curved to form around about. The plaintiffs have averred that the said round about was being used by the deceased as a sacred ground for preaching, prayers and meditation and has always been held by his descendants as a consecrated ground. The plaintiffs have averred that they intend to maintain the said round about as a consecrated ground for posterity. The plaintiffs have averred that the said roundabout has been used by the plaintiffs and the defendants as a consecrated ground for about 37 years without any interruption. The plaintiffs averred that the access road aforesaid came into existence in the year 1977 before the marriage of the 1<sup>st</sup> defendant by John Marube Nyamweya. The plaintiffs have contended that even John Marube Nyamweya, deceased did not interfere with the said access road during his life time. The plaintiffs have averred further that their homesteads have been on prime land in a low density area and have been peaceful, quiet and private.

8. The plaintiffs have averred that without any regard to their rights and the rights of their family members, the defendants commenced the construction of the storey building that I have referred above in the middle of their homesteads for rental to the public. The plaintiffs have averred that the said building has encroached on the sacred roundabout and overlapped on the access road leading to the 2<sup>nd</sup> to 5<sup>th</sup> defendants' homesteads which are situated on Plot No. 3218. The plaintiffs have averred that the defendants have violated their rights to access their homes and their privacy. The plaintiffs have averred further that the defendants' acts complained of would expose their properties to environmental degradation, pollution, congestion and unnecessary nuisance. The plaintiffs have also contended that the defendants' project aforesaid is completely out of character with the surrounding area and is likely to devalue the plaintiffs properties thereby subjecting them to irreparable harm. The plaintiffs have averred that the defendants said project is a threat to their peaceful and quiet enjoyment of their properties.

9. The plaintiffs have sought in their plaint; a declaration that access road adjoining Plot Nos. 3218, 3219, 3220 and 3221 has been enjoyed by them as an easement for over 20 years and as such their right to the said access road is absolute and indefeasible, a declaration that their right to use the roundabout on the said access road which is a consecrated area is absolute and indefeasible, a permanent injunction to restrain the defendants from interfering with their peaceful and quiet ownership of Plot Nos. 3218, 3219 and 3220 and, an order for the demolition and complete removal of the structure that the defendants have put up on the said roundabout and access road and the removal of all debris and building materials which are interfering with access to their properties and privacy at the defendants costs.

10. Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 16<sup>th</sup> June 2014 seeking a temporary injunction to restrain the defendants or any of them from constructing a commercial building or any form of structure on the access road adjoining Plot Nos. 3218, 3219, 3220 and 3221 pending the hearing and determination of this suit. This is the application before me for determination. The plaintiffs' application was brought on the grounds which were set out on the face thereof and on the affidavit of the 5<sup>th</sup> defendant sworn on 16<sup>th</sup> June, 2014. In the said grounds and affidavit, the plaintiffs reiterated the contents of the plaint that I have highlighted hereinabove at length. The plaintiffs contended that in the circumstances of this case, it is necessary for the defendants to be restrained by this court by way of an injunction from interfering with the plaintiffs' peaceful and quiet ownership of their properties and existing easements pending the hearing and determination of this suit. The plaintiffs annexed to the said affidavit of the 5<sup>th</sup> defendant among others; a copy of the title deed for Plot No. 3218, a copy of sketch map of the location of the suit properties showing the disputed road of access and roundabout, copies of photographs showing how the defendants are said to have violated the plaintiffs rights and a copy of a sketch map showing the location where the building being put up by the defendants is situated.

11. The plaintiffs' application for injunction was opposed by the defendants through grounds of opposition dated 8<sup>th</sup> July 2014 and a replying affidavit of the 1<sup>st</sup> defendant sworn on 8<sup>th</sup> July 2014. In their grounds of opposition, the defendants contended that the plaintiffs' application is frivolous, vexatious and amounts to an abuse of the process of the court. The defendants contended further that the plaintiffs' application has been overtaken by events. The defendants contended that this suit is res judicata in that the issues raised in the same had been raised and determined in the National Environment Tribunal (NET) Appeal No. 111 of 2013. They contended further that this suit is sub-judice in that an application namely, Kisii HC.JR. No. 4 of 2014 in which the issues raised herein have also been raised is still pending hearing and determination before this court. The defendants termed the plaintiffs application as lacking in merit and the suit as a baseless, malicious and sadistic crusade by the 2<sup>nd</sup> plaintiff to obstruct the defendants from optimally utilizing their land.

12. In her affidavit in reply to the application, the 1<sup>st</sup> defendant stated that the building complained of by the plaintiffs has already been put up and is in its final stages of completion. She contended that the plaintiffs' application seeking to stop the construction of the said building has been overtaken by events. The 1<sup>st</sup> defendant stated further that the concerns that have been raised by the plaintiffs in this suit should have been raised at the stage when Pastor Paul Nyamweya, deceased ("deceased") was sub-dividing Plot No. 2535 and transferring portions thereof to his sons; an exercise that took place in the year 1974. The

1<sup>st</sup> defendant contended that the orders sought by the defendants are intended to restrict her rights over Plot No. 3221 on which the project complained of is being undertaken. She stated that when Plot No. 2535 was sub-divided, the resultant plots were all provided with roads of access. The 1<sup>st</sup> defendant denied that the building that she is putting up is out of character with the surrounding area. The 1<sup>st</sup> defendant contended that the project has received all necessary approvals and that the order sought if granted would negate the said approvals without giving the bodies that issued the same a hearing. The 1<sup>st</sup> defendant annexed to her affidavit; a copy of the mutation form through which Plot No. 2535 was sub-divided to give rise to Plot Nos. 3217, 3218, 3219, 3220 and 3221, a copy of the register for Plot No. 2535, a copy of the ruling by the tribunal dated 31<sup>st</sup> December 2013 and a copy of the ruling dated 23<sup>rd</sup> May 2014 by this court in Kisii HC.JR. Application No. 4 of 2014. The 5<sup>th</sup> defendant swore a further affidavit on 22<sup>nd</sup> July 2014 in which he denied the contents of the defendants' grounds of opposition and replying affidavit.

13. When the plaintiffs' application came up for hearing on 9<sup>th</sup> July 2014, I directed that the same be heard by way of written submissions. The parties filed their respective submissions and the same are on record. I have considered the plaintiffs' application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the written submissions by the parties' respective advocates together with the authorities cited in support thereof. As I have stated at the beginning of this ruling, the plaintiffs are seeking a temporary injunction to restrain the defendants from constructing a commercial building and/or any form of structure on access road pending the hearing and determination of this suit. In the case of **Aikman –vs- Muchoki [1984]KLR 353**, it was held that the conditions for granting interlocutory injunction are:

**(a) The probability of success of the applicant's claim.**

**(b) The likelihood of irreparable harm which would not be compensated for by damages.**

**(c) If in doubt the court should decide the matter on a balance of convenience.**

14. It is on these principles that the plaintiffs' application would be considered. The plaintiffs' main complaint against the defendants as I have set out at the beginning of this ruling is that the commercial building which the defendants are putting up on the 1<sup>st</sup> defendant's parcel of land known as Plot No. 3221 would block access road to the 1<sup>st</sup> to 5<sup>th</sup> defendants' homes situated on Plot No. 3218. The plaintiffs have contended that they have enjoyed the use of this road to access their homes for the last 37 years and as such have acquired a right of easement over the same. The plaintiffs have submitted that under section 32 of the Limitation of Actions Act, Cap 22 Laws of Kenya, their right to the said road of access is absolute and indefeasible. The plaintiffs have contended that the construction of the said building if allowed to continue would violate their right to enjoy and use the said road. In their submission in reply, the defendants have submitted that each of the plaintiffs' homes enjoy access through roads other than the access road complained about by the plaintiffs. The defendants have submitted that these other roads are clearly shown on the mutation form that gave rise to the plots on which the plaintiffs' residences are situated. The defendants have submitted that the access road claimed by the plaintiffs is not shown on the said mutation form. The defendants have submitted further that the easement claimed by the plaintiffs has not been registered in the title of Plot No. 3221 as an encumbrance and as such cannot burden the same. The defendants have contended further that the commercial building complained of by the plaintiffs has already been put up and as such there is no way it would block access road to the plaintiffs' premises.

15. On the material before me, there is no dispute that there was an access road adjoining the homesteads of the 2<sup>nd</sup> to 11<sup>th</sup> plaintiffs and the defendants. What is in dispute is whether the plaintiffs are entitled to use this access road as of right and whether the same has been blocked by the defendants' development on Plot No. 3221. It is not clear from the material before me as to when this access road was created or established. The plaintiffs have claimed that the access road was created by the pastor Paul Nyamweya, deceased ("the deceased") when he carried out the subdivision of Plot No. 2535 that gave rise to Plot Nos.

3217, 3218, 3219, 3220 and 3221 and that the same has been in existence since the year 1977 (see paragraphs 29 and 32 of the plaint). The plaintiffs have claimed that they have used this access road continuously, openly and peacefully from 1977 until the year 2012 when the defendants started constructing a commercial building on the same.

16. I am in agreement with the submission by the plaintiffs' advocates that, under section 32 of the Limitation of Actions Act, Cap 22 Laws of Kenya, where an access road or way has been used openly as of right and without interruption for 20 years, the right to such access becomes absolute and indefeasible. There is no dispute that the plaintiffs have been using the road in dispute to access their homes. The defendants have not denied that the use of this access road by the plaintiffs goes back to 1977 as contended by the plaintiffs. In the circumstances, I am satisfied on a prima facie basis that the plaintiffs have acquired an easement over the portion of Plot No. 3221 through which the said access road passes. Section 37 (b) of the Limitation of Actions Act, Cap 22 Laws of Kenya aforesaid provides that easement acquired under section 32 of the said Act does not come into existence until a copy of the judgment establishing the right to the easement has been registered against the title affected by the easement. Until then, the person whose title is affected by the easement holds the easement in trust for the person who has acquired it. In the circumstances, the 1<sup>st</sup> defendant is holding the access road through Plot No. 3221 in trust for the plaintiffs. Section 28 (h) of the Land Registration Act, 2012 provides that all registered land shall be subject to rights acquired or in the process of being acquired by virtue of any written law relating to Limitation of Actions or by prescription without such rights being noted in the register of such land. The plaintiffs' easement did not therefore require registration in the register of Plot No. 3221 as contended by the defendants' advocates.

17. Having come to the conclusion that the plaintiffs have acquired an easement over the access road that passes through Plot No. 3221, the next issue to consider is whether the defendants have interfered with that easement. As I have stated above, the plaintiffs have contended that the commercial building that the defendants are putting up on Plot No. 3221 has blocked the road of access leading to the homesteads of the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs. The defendants have denied this contention. I have no clear evidence before me that the access road to the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs' residences have been blocked. The sketch map that has been drawn by the plaintiffs (annexture "NNMN7" to the affidavit of the 5<sup>th</sup> defendant sworn on 16<sup>th</sup> June 2014) shows that the access road is partially blocked by the building being put up by the defendants. On the other hand, the defendants' contention that the access to the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs residences are not blocked finds support in the findings of the tribunal in their ruling dated 31<sup>st</sup> December 2013 referred to hereinabove. As I have stated at the beginning of this ruling, the members of the said tribunal visited the project site and noted that access to the homestead of the 2<sup>nd</sup> plaintiff who resides on the same parcel of land with the 3<sup>rd</sup> to 5<sup>th</sup> plaintiffs was not blocked. As I have stated above, that decision by the tribunal was not appealed to the High Court under section 130 of the Environmental Management and Co-ordination Act, 1999 within the prescribed time. I am not persuaded that the commercial building being put up by the defendants has blocked the road of access to the 2<sup>nd</sup> and 5<sup>th</sup> plaintiffs' homesteads.

18. In addition to the road of access, the plaintiffs have raised other issues in their plaint. As I have stated above, the plaintiffs have also contended that the building being put up by the defendants is out of character with the surrounding area and will infringe on their privacy. The plaintiffs have contended further that the said project would subject them to pollution and other environmental hazards. On the material before me, these claims have not been established on a prima facie basis. The tribunal which is a statutory body established under the Environmental Management and Co-ordination Act, 1999 (EMCA) with the expertise on environmental matters had given its approval to the project. The plaintiffs have not persuaded me at this stage that the tribunal was wrong in its findings.

19. The upshot of the foregoing is that the plaintiffs have not established a prima facie case with a probability of success against the defendants. In addition to establishing a prima facie case, the plaintiffs had also to demonstrate that they stand to suffer irreparable harm unless the orders sought are granted. According to the material before me, the building complained of by the plaintiffs has been constructed upto the lintel level at least as at the time the plaintiffs came to court. If the said building has been put up on access road as claimed by the plaintiffs, then, the said road has already been blocked and as such there

is nothing to restrain by an injunction. I am in agreement with the submission by the defendants' advocates that the plaintiffs' application has been overtaken by events. If the road has already been blocked by the building as claimed by the plaintiffs, it is only a mandatory injunction that can compel the defendants to open up the same. That is not the order that has been sought herein. In the circumstances, I am not convinced that the plaintiffs would suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted.

20. In conclusion, it is my finding that the plaintiffs have failed to satisfy the conditions for granting interlocutory injunction that I have set out earlier in this ruling. I therefore find no merit in the plaintiffs' application dated 16<sup>th</sup> June 2014. The same is accordingly dismissed with costs to the defendants.

**Delivered, Dated and Signed at Kisii this 8<sup>th</sup> day of May 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Miss Moguche h/b for Onyango      for the plaintiffs

Mr. Nyamwange h/b for Nyatundo      for the defendants

Mr. Bosire      Court Clerk

**S. OKONG'O**

**JUDGE**