



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 236 OF 2002

ABDALLA ALI ABDULRAHMANPLAINTIFF

VERSUS

ALIYA APARTMENTS LTD1ST DEFENDANT

MAHMOOD HAIDERALI KHIMJI2ND DEFENDANT

SUKAINA MAHMOOD KHIMJI3RD DEFENDANT

RULING

0. As part of the resolution of the dispute in this suit, which relates to public road access by the plaintiff land owner through the neighbouring defendants' land, the court while dismissing counter applications for injunctions by the plaintiff and the defendants on the 15th June 2012 directed the District Land Registrar, Mombasa to investigate the matter and report to the court in these terms:

“The Land Registrar Mombasa is hereby directed to ascertain the boundaries relating to the parcels of Land in this dispute – Mombasa/ Block XVII/108 and Mombasa/ Block XVII/107 and the existence or otherwise of an access road through the defendants' property Mombasa/ Block XVII/ 107 in accordance with section 21 of the Registered Land Act cap. 300 Laws of Kenya within the next 30 days and to report to the Court on his findings.”

0. By his report dated 15th June 2012 the Land Registrar made his findings and recommendations in the relevant parts as follows:

SURVEY WORK

Both the parties consented to the survey being carried out to confirm the status, acreage and position on the ground. In compliance with the order of Court.

- *MSA/BLOCK XVII/108 – the acreage confirmed as Nought decimal one two two one (0.1221) Acres or thereabout – A block of flats – Two (2) storeys.*

- MSA/BLOCK XVII/107 – the acreage confirmed as nought decimal two nine eight one nine (0.29819) Acres.
- Temporary Motor Vehicle spare Stores
- Burhani Nursery School

FINDINGS FROM SURVEY'S WORK

- Neither of the parcel (s) has an access road,
- The closest road to Plot NO. MSA/BLOCK XVII/107 is along Tom Mboya Avenue (Formerly Hobileys Road) – Across Plot No. MOMBASA/BLOCK XVII/106 – since one of the beacons (Rd7) is along the road.
- The closest road to Plot No. MOMBASA/BLOCK XVII/107/108 is the access road South East of the Plot and between Plots MOMBASA/BOLOCK XVII/1298 and MOMBASA/BLOCK XVII/1298 across Plot No. Mombasa/BLOCK XVII/1298 as this road is 2.5M from one of its beacons 108b.

OBSERVATIONS

- **It is true that both parcels of land – i.e. MOMBASA/BLOCK XVII/108 and MOMBASA/BLOCK XVII/107 have no road of access. According to the Registry Index Maps and the Deed Plans dated back to December 1923 issued by the Director of Survey.**
- The access road between Plot Nos. MOMBASA/BLOCK XVII/1298 and 1299 is 2.5M from the actual position and hence not better position to serve Plot No. MOMBASA/BLOCK XVII/108.
- The road which might have served Plot No. MOMBASA/BLOCK XVII/108 has been blocked due to uncontrolled construction and blockage by M/S HANTOOSH FILLING STATION, extension to the adjacent building covering “VIOSK/VIBANDS” namely:

- MWADORO SHOP
- HOMEBOZ &
- GIANT ELECTRICAL SERVICES

And which are recommended for demolition to create access to the other neighbourhood residential buildings.

RECOMMENDATION (S)

There are three (3) ways of solving this matter:

1. **Both the plaintiff and defendant to create a memorandum of understanding (MOU) and the status quo to be maintained. The memorandum of understanding be registered under the Registration of document Act Cap 285, Laws of Kenya to be enforced.**
2. **The access road from Hantoosh Filling Station be opened by the Municipal Council as per the Town Planning Act. The opening will involve demolition of all “KIOSKS” and part of the illegal constitutions i.e. building housing MWANDORO SHOP, HOMEBOYS AND GIANT ELCTRICAL SERVICES.**

Further, part of MOMBASA/BLOCK XVII/1298 has to be demolished to create access to Plot NO. MOMBASA/BLOCK XVII/108.

3. **The Honourable Court to issue Order for a creation of an easement to serve both Plot Nos. i.e. MOMBASA/BLOCK XVII/107 and 108.**

Dated this 15th day of June 2012.

HASHIM GOT SAT

LAND REGISTRAR

MOMBASA DISTRICT

0. Counsel for the parties – Mrs. Umara for the plaintiff and Mr. Asige for the defendants - made submissions on the Land Registrar’s Report as follows, and ruling was reserved:

Mrs. Umara

The Report of 15.6.2012 shows that the plaintiff and the defendant do not have any access to their property. The three recommendations of the Land Registrar. The court should order the Municipal Council in conjunction with the Land Registrar to create an access road for both parties. Section 149 of the Land Act confers power on the court to make such orders.

Mr. Asige

I have seen the report and I noted that the defendants are the registered proprietors of the property. There is no way for the plaintiff to force the creation of a road on the property of another. The court cannot make orders against or involving parties who are not parties to the suit. These are the Municipal Council and the Land Registrar. The court cannot create a road on somebody's property. It would amount to take over the property of the registered proprietor.

The Registered Report shows that there is a road of access which has been blocked. Becons E-F is the access road. The road should be created at that point. I refer to paragraph 2 of the Report. In reiterate the submissions by Mr. Mwakireti.

Mrs. Umara

I only seek the access for the parties and the court may follow any of the recommendations by the Land Registrar.

0. I have noted the findings of the Land Registrar to the effect that the two parcels of land Plot Nos. 107 and 108 owned respectively by the defendants and the plaintiff do not have access to any road and there is need, in resolving the dispute, to provide for access for both parcels as recommended by the Land Registrar.
0. However, the recommendation for a Memorandum of Understanding on the status quo to be maintained to be registered as a document under the Registration of Documents Act, cap.285 does not create a registered interest upon the land as this will not be registered against the title to the land, and it may leave open the parties and others who claim under them to litigation for enforcement of the right of way in the future.
0. The court cannot enforce the creation of a right of way or easement on unwilling parties in the manner suggested by the Land Registrar on recommendation No. 3. Section 98 of the Land Act 2012 contemplates voluntary grant of easement by the owner of land (or lessor) and expressly proscribes at subsection (7) thereof any presumption of grant of easement or right of way on account of long uninterrupted use.
0. Section 149 of the Land Act 2012 makes provision for courts to enforce public rights of way as follows:

149. Power of courts to enforce public rights of way

In determining any question or dispute concerning the existence or effect of a public right of way, a court may make an order on any condition, which it thinks fit on all or any of the following matters—

(a) the existence of a public right of way;

(b) the enforceability a public right of way by or against any person;

(c) the extent of the use of the easement, analogous right or public right of way and whether that use exceeds what is reasonable or is permitted under the terms of the grant of the easement or the terms of the order creating the analogous right or public right of way;

(d) the question whether any work is required to be done under the terms of an easement, analogous right or public right of way; and, if so, the nature and extent of the work required to be undertaken;

(e) the reasonable and proper cost of any such work as is required to be undertaken;

(f) the person or persons by whom the costs of any such work is to be borne and if the cost is to be shared between two or more persons, the shares to be borne by each such person;

(g) the date by which and the manner in which any such work is to be undertaken;

(h) the entry on to any land, whether or not it is land over which an easement, analogous right or public right of way has been created, or the purpose of doing the work and the use over or on that land of any vehicles, plant, machinery and installations for the purpose of carrying out that work; or

(i) any other matter arising in relation to question or dispute about an easement, analogous right or public right or way.

[Emphasis mine]

0. For the purposes of implementing the order for the creation of a road access, the Land Registrar and the County Government of Mombasa as the successor of the Municipal Council of Mombasa are necessary parties. These parties will therefore be joined pursuant to the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules so that they may effect the order of the court for the creation of a permanent road access for the parties. Order 1 rule 10 (2) of the Civil Procedure Rules provides for the joinder of parties who are necessary for the effectual and complete adjudication of the dispute as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

[Emphasis mine]

0. Accordingly, I consider that the matter should be determined by an order, which I hereby grant, pursuant to section 149 (a) and (b) of the Land Act 2012 for the creation by the County Government of Mombasa and the Land Registrar, Mombasa of a permanent road access to the parties parcels of land herein as recommended by the Land Registrar, Mombasa under the Recommendation No. (2) of his Report dated 15th June 2012 upon taking such necessary legal action or procedural steps to effect the road access.
0. For the avoidance of doubt, the court does not make any order for the creation of an easement or right of way in favour of the plaintiff's parcel of land *Mombasa/ Block XVII/108* on the defendant's parcel of land *Mombasa/ Block XVII/107* as proposed in Recommendation no. 3 of the

- Land Registrar's report dated the 15th June 2012.
0. The defendants who are aggrieved by the road access sought to be created through their parcel of land will serve the order of the court on the County Government of Mombasa and the Land Registrar, Mombasa and the matter shall be mentioned after sixty (60) days to confirm compliance with the order of the court herein and for final orders for the settlement of the dispute in the suit. There shall be liberty to apply.

Dated, signed and delivered this 14th day of May 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Plaintiff

Mr. Njenga for Mr. Asige for the Defendants

Miss Linda - Court Assistant