



NO. 10/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 299 OF 2009

**JOSEPH MBATHA NZAVI .....APPLICANT/RESPONDENT**

**VERSUS**

**AMBROSE MWIKYA NZAVI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**JANE KAVINDU KATHIKA..... 2<sup>ND</sup> RESPONDENT/APPLICANT**

**RHODA NDULU KATHUKA..... 3<sup>RD</sup> RESPONDENT/APPLICANT**

**BROWN NZAVI KATHUKA..... 4<sup>TH</sup> RESPONDENT/APPLICANT**

**R U L I N G**

1. Matter is for Motion dated 27<sup>th</sup> August 2014 which principally seeks an order of injunction against Applicant **Joseph Mbatha Nzavi**, his servants and/or agents from interfering with, altering, mutation and or subdividing land parcel No. **Kangundo/Isinga/784** pending hearing and determination of the suit herein.
2. The Application is based on the grounds on the face of the Motion and the Supporting Affidavit of **Jane Kavindu Kathuka** sworn on the 27<sup>th</sup> August 2014 and the annexures thereto.
3. The parties via their advocates on record agreed to have matter disposed by way of written submissions.
4. Along with the application is the Preliminary Objection by the Plaintiff/Respondent dated 12<sup>th</sup> September 2014.
5. The Applicant case is that the applicant has received twice notice of survey exercise of opening an access road on the contested portion of land thus got aggrieved by the notices because although the Respondent is the registered owner of the land he cannot oversee or participate in the exercise in view of this court ruling of 11<sup>th</sup> April 2013 which decreed that preservatory orders be issued pending hearing and determination of the suit herein.
6. The applicant opines that the aforesaid exercise will infringe her interest if it is undertaken and in any event the orders of preservation herein above mentioned barred such exercise.
7. The Applicant avers that the surveyors have been acting as Respondent's agents.
8. On the issue of the Preliminary Objection, the applicant contends that the same is misplaced as it is not based on pure point of law as it cannot be presented without reference to the facts.
9. Further the Applicant contends that the court can entertain the application under **Order 40 Rule 1** as it requires proof via Affidavit evidence where subject matter is in danger of being wasted, damaged and/or alienated.

10. The Applicant argues that the Supporting Affidavit contains such proof required to prove requirement of **Order 40 Rule (I) Civil Procedure Rules**

11. The Respondent's case is based on Replying Affidavit, Preliminary Objection and the written submissions as summarized below.

The Respondent states that the application is predicated on letter written by Machakos County Surveyor dated 11<sup>th</sup> March, 2014 and 9<sup>th</sup> June 2014 addressed to owners and occupants of parcels of land mentioned therein including parties herein. They are informing the addressees that the County Surveyor would visit the areas for the purposes of opening of road of access passing between the parcels of land mentioned therein including subject herein.

12. The Respondent claims that he has no connection with such letters nor did he request the surveyor to undertake the exercise complained of. He contends that he has no control whatsoever over the surveyor, either in the execution of his statutory duties or at all.

13. He argues that he has not contravened the preservatory orders nor is it demonstrated that the orders sought are deserved. He concludes by urging the application to be dismissed with costs as same cannot be granted.

14. On the Preliminary Objection, the Respondent submits that the application does not meet the threshold set by **Order 40 Rule 1 of Civil Procedure Rules** and thus should be denied.

15. After going through aforesaid contest, it becomes clear that, the issues are:

- i. Whether the Applicant has established the conditions for granting the temporary injunction as prayed in prayer No. 3 of the Motion dated 27<sup>th</sup> August 2014?
- ii. What are the orders as to costs?

16. Essentially the Applicant is seeking to stop the altering, mutation and or subdividing land parcel **Kangundo/Isinga /784** pending hearing of the suit.

17. In the grounds and Affidavits he states that the Respondent is unlawfully engaged in alterations, mutations and subdivisions of the suit property calculated at altering its material state to the detriment of the Applicant.

18. To support such allegations the Applicant attaches 2 copies of County Surveyor Machakos dated 11<sup>th</sup> March 2014 and 9<sup>th</sup> June 2014 which were notifying the owners of 8 parcels of land including subject herein of opening of access road passing between them.

19. The Applicant claims that the Respondent is influencing the exercise by the surveyor and that he invited surveyors to create an access road passing via subject parcel of land.

20. The Respondent denies the aforesaid accusation and contends that no evidence has been tendered in affidavit or otherwise to support the allegation.

21. The Court observes that the ruling by the court dated 11<sup>th</sup> April 2013 was to preserve the subject matter and status quo essentially to enable the court to determine the matter herein without prejudicing any party.

22. The surveyor's letters complained of are only talking of opening the road of access passing between the named parcels of land.

23. There is no evidence of the Respondent influencing the surveyor or inviting the surveyor to undertake the exercise of opening the road of access.

24. There is no evidence of the alleged alterations, mutations and subdivisions of suit property to alter its material state to the detriment of the Applicant.

25. The surveyor is not an agent of the Respondent or any of the parties or owners of the parcels mentioned in the letters.

26. The Applicant has not demonstrated the effect of the opening of the access road to the suit property nor has the applicant enjoined the surveyor as a party herein or even the other owners of the stated parcels of land who may be desirous of getting the access road opened.

27. The above analysis goes ahead to demonstrate an absence of prove of the conditions for granting temporary injunction sought herein. The preservatory orders issued herein will safeguard the integrity of the subject matter and in event the surveyor's exercise of opening access road by affecting the subject matter to the detriment of the Applicant, interests the Applicant can always apply against the surveyor to whip him back to the course of access road only and not to affect the

breadth and width of the subject herein.

28. In the premise the Preliminary objection dated 12<sup>th</sup> September 2014 succeeds, the application herein is denied with orders that:

- i. Preservatory orders issued herein on the 11<sup>th</sup> April 2013 to remain in force.
- ii. Costs to the Respondent.

**DATED, SIGNED and DELIVERED at MACHAKOS this 14<sup>TH</sup> day of NOVEMBER, 2014.**

**CHARLES KARIUKI**

**JUDGE**