



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 303 OF 2017 (O.S)

JOHNBOSCO MUINDE KAMALI.....1ST APPLICANT/RESPONDENT

PIUS KITHUKA MUIA.....2ND APPLICANT/RESPONDENT

HENRY MUTUKU MUTHEMBWA.....3RD APPLICANT/RESPONDENT

MANZA MUTHEMBWA.....4TH APPLICANT/RESPONDENT

PENINAH M. MUTHEMBWA.....5TH APPLICANT/RESPONDENT

HENRY MUTUKU MUTHEMBWA.....6TH APPLICANT/RESPONDENT

VERSUS

STEPHEN KALITI.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

AND

MUASYA M. MAKAI.....PROPOSED 1ST INTERESTED PARTY/APPLICANT

CATHERINE M. MUTHENGI..PROPOSED 2ND INTERESTED PARTY/APPLICANT

ANTHONY M. MWINI.....PROPOSED 3RD INTERESTED PARTY/ APPLICANT

ALLAN M. MUTHAMA.....PROPOSED 4TH INTERESTED PARTY/ APPLICANT

MILCAH M. MUTIA.....PROPOSED 5TH INTERESTED PARTY/APPLICANT

RUTH N. MALINDA.....PROPOSED 6TH INTERESTED PARTY/APPLICANT

JULIANA K. DAVID.....PROPOSED 7TH INTERESTED PARTY/APPLICANT

JOHN K. KIMATU.....PROPOSED 8TH INTERESTED PARTY/APPLICANT

LAZARUS K.NGUNGA.....PROPOSED 9TH INTERESTED PARTY/APPLICANT

EDWARD G. NDUNGU.....PROPOSED 10TH INTERESTED PARTY/APPLICANT

RULING

1. In the Chambers Summons Application dated 21st September, 2018, the Interested Parties/Applicants are seeking for the following orders:

a. That the proposed Interested Parties/Applicants be joined as Interested Parties forthwith, be supplied with copies of all the pleadings herein and be allowed to file their witness statements and documents herein before the hearing of the main suit.

b. That upon grant of prayer 4 above, this Honourable Court be pleased to order that the Government of Machakos County together with Charlotte Salome Mania Kaliti (co-owner of parcel of land No. Machakos/Kiima Kimwe/450 as per certified abstract of title) be joined as Respondents herein and the names of the 1st Respondent Stephen Kaliti be amended to read Stephen Mwanzia Maithya Kaliti.

c. That upon grant of prayer 4 above this Honourable Court be pleased to order that the Originating Summons herein be amended accordingly as prayed in prayer 1 and 2 above and also to include other particulars including the size of the easement sought and a certified copy of extract of title as per the draft amended Originating Summons and Supporting Affidavit thereto attached herewith and the same be effected and filed by the Applicants/Respondents.

d. That upon grant of prayer 4 of this Honourable Court be pleased to visit the site in the interest of justice and fairness to be able to fully appreciate the situation on the ground before the hearing and determination of the main suit herein.

e. That upon grant of prayer 4 above this Honourable Court be pleased to review its orders of 19th September, 2017 discharging interim orders of 13th July, 2017 and also review and/or vary consent orders of 19th February, 2018 between the Applicants/Respondents and the Respondents of status quo (which stated that the road in dispute remains unused by the Applicants/Respondents) in so far as the same affect the proposed Interested Parties/Applicants herein and/or reinstate the earlier orders of 13th July, 2017.

f. That upon grant of prayer 4 and 5 above this Honourable Court be pleased to restrain the 1st Respondent and co-owner Charlotte Salome Mwanzia Kaliti (proposed 3rd Respondent) from constructing and/or undertaking any developments whatsoever on the contested portion of land measuring approximately thirty eight meters squared (38m²) or thereabouts burdening their land and the Government of Machakos County (proposed 4th Respondent) be barred from approving any developments touching on the aforesaid contested portion pending the hearing and determination of the suit herein.

g. That costs of this Application be provided for.

2. Application is supported by the Affidavit of the 4th proposed Interested Party who has deponed that him, together with the other Applicants, are the owners and occupiers of the proposed dominant land parcels numbers Muputi/Kiima Kimwe/453 (now sub-divided into parcels of land numbers 2962, 2963, 457, 2999, 3000, 3001, 3020, 3021 and 3163).

3. According to the proposed Interested Parties, it is necessary to enjoin in this suit the proposed servient land; that the County Government of Machakos, being in charge of transport, including county roads, should be included in this suit; and that when the Interested Parties purchased their portions of land and mutations done, the District Land Registrar and the District Surveyors failed to do due diligence to update the map of the area accordingly.

4. The proposed Interested Parties have deponed that they have immensely suffered ever since the 1st Respondent and the co-owners of the proposed servient land blocked what they have used as their only access road to their homes. According to the proposed Interested Parties, neither the water tanks nor the schools can be accessed and that the easement sought only affects a portion of the servient land measuring 38m² (0.0038 Ha) burdening on parcel of land number Muputi/Kiima Kimwe/450 measuring 1100m².

5. The Interested Parties deponed that the alternative route to the proposed dominant parcels of land was long eroded with a river bed running through it making it completely impassible; that the community is unable to repair the alternative road and that no prejudice will be suffered by the Respondents if the orders are granted.

6. In response, the Respondents deponed that parcel of land Muvuti/Kiima Kimwe/450 is private land and has never been sub-divided or annexed and retains its original boundaries; that the mutations alluded to by the Applicants have no origins or relation to the suit land and that the suit land is at the centre of a coordinated vicious and malicious attack by the Applicants to deny its rightful owner peaceful enjoyment of his land.

7. The Applicants' advocate submitted that a party enjoys rights to property subject to rights of others; that those rights include way leaves and easements, among others and that the creation of an easement is anchored in law.

8. The Applicants' counsel finally submitted that Section 32 of the Limitation of Actions Act allows the creation of easements and that the amendments being sought will bring on board the provisions of Sections 140 and 145 of the Land Act.

9. The 1st Respondent's advocate submitted that the Applicants are seeking for orders that have already been sought by the Plaintiffs; that the Applicants cannot review the orders which were issued by the consent of the parties and that it is too late for the prayer being sought to be allowed.

10. This suit was commenced by way of an Originating Summons dated 13th July, 2017 by seven (7) Applicants. In the said Motion, the Applicants have sought for an order to issue "creating and registering a public right of way by way of an easement burdening the Respondents' Land parcel number Muvuti/Kiima Kimwe/450.

11. Simultaneously with the Originating Summons, the Applicants sought for an order of injunction prohibiting the Respondents from closing or restraining the use of public right of way passing across and bordering the Respondents' land parcel number 450.

12. However, the said Application was never heard. Instead, the Applicants and the 1st Respondent recorded a consent in the following terms:

“By consent, the status quo to be maintained, meaning that the disputed road to remain unused by the Applicants pending the hearing of the suit.”

13. Other than the issue of joinder, the proposed Interested Parties are seeking to set aside the above consent, and to have the injunction restraining the 1st Respondent from closing an access route passing through his land reinstated.

14. The proposed Interested Parties have pleaded that the occupiers and owners of the proposed dominant land, whose titles they have exhibited, own land neighbouring the 1st Respondent's land. To the extent that the proposed Interested Parties own land in the neighbourhood of parcel of land number Muputi/Kiima Kimwe/450, and in view of their claim, which is similar to the original Applicants' claim, I shall allow them to be enjoined in the suit.

15. As the institution in charge of County Transport, Planning and Development, which includes county roads, the prayer to join the County Government of Machakos in this proceedings shall also be allowed.

16. From the Abstract of Title for parcel of land number Muputi/Kiima Kimwe/450, the registered owners of the land are Stephen Mwanzia Maithya Kaliti and Charlotte Salome Mwanzia Kaliti. That being the case, the said Mrs. Charlotte is a necessary party to these proceedings.

17. Other than the prayer for joinder of the Interested Parties, the County Government of Machakos and Ms. Charlotte in these proceedings, which I have allowed, the Interested Parties are also seeking for an injunction restraining the 1st Respondent from developing parcel number Machakos/Kiima Kimwe/450 and to review and or discharge the interim orders of 13th July, 2017 and 19th February, 2018 between the Applicants and the 1st Respondent.

18. It is not in dispute that the 1st Respondent, together with Ms. Charlotte, are the owners of parcel of land known as Muputi/Kiima Kimwe/450 (*the suit land*).

19. According to the copy of Abstract of Title, parcel number 450 was registered on 25th August, 1977 and was transferred to the 1st Respondent on 13th August, 2015. On the other hand, the Interested Parties were registered as proprietors of the respective parcels of land between the year 1999-2017. The Interested Parties parcels of land are a sub-division of parcel number Muputi/Kiima Kimwe/453.

20. The Interested Parties, just like the Applicants, are seeking for an easement affecting a portion of the servient land (*the suit land*). According to the Interested Parties, the said easement is only in respect of 38m² (0.0038 Ha) of the suit land. The acquisition of the easement is based on the ground that they have used the access road passing through the suit land since time immemorial; that the only accessible road to their parcels of land is inaccessible and that the County Government of Machakos and the National Land Commission should easily compensate the 1st Respondent the acquired land.

21. The portions of land owned by the Interested Parties, which are a sub-division of Parcel No. 453, were created way after parcel number 450 had been created. Indeed, the Registered Index Map shows the existence of the said land. It is not therefore clear how the Interested Parties' parcels of land were created without a road or a convenient road. It is trite that any mutation in respect of a sub-division, must clearly provide how each proprietor is supposed to access his land.

22. The Interested Parties have admitted that they have an access road to their parcels of land. The only complaint is that the said road is impassable due to the deep gulleys that have been occasioned on the said road by storm waters. If that is so, the alternative is not to create a road on what is otherwise a private road, without due process. The Interested Parties recourse is against the County Government and the National Government to fix the otherwise impassable road.

23. If indeed the most convenient access road to their properties is parcel number 450, then the procedure for creating a public access road should be followed. That procedure is provided for under the Public Roads and Roads of Access Act or Section 98 of the Land Registration Act. Under Section 98 of the Land Registration Act, an owner of the land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the land to create an easement over his land.

24. If indeed the proposed Interested Parties are landlocked, which they have admitted they are not, then the court, under the provisions of Section 140 of the Land Act, can make an access order in respect of the suit land, subject to several conditions including reasonable compensation. However, nowhere in the Applicant's Affidavit have they agreed that they are ready and willing to pay the 1st Respondent for the easement.

25. The other ground that the Interested Parties can succeed in creating an easement over the suit land is if they prove that they have used the proposed "road" for a period of twenty (20) years. Section 32 of the Limitation of Actions Act provides as follows:

“(1) Where-

a) the access and use of light or air to and from any building have been enjoyed with the building as an easement; or

b) any way or watercourse, or the use of any water, has been enjoyed as an easement; or

c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.”

26. The evidence before me shows that the Interested Parties acquired their parcels of land between 1999 and 2017. The Interested Parties have not provided evidence, by way of Affidavits, of people who have used the proposed easement for over twenty (20) years. That being the case, the Interested Parties have not established a prima facie case with chances of success to warrant the grant of an injunction, whether mandatory or prohibitive.

27. The Applicants and the 1st Respondent’s counsel entered into a consent order on 19th February, 2019. The Interested Parties, having not been parties to the said consent, cannot have it varied or set aside. In any event, the grounds for setting aside a consent order have not been established. As was held in the case of *Hirani vs. Kasam (1952) 19 EACA 131 and Brooke Bond Liebig Ltd vs. Mellya (1975) EA 266*, a court cannot interfere with a consent Judgment except in such circumstances as would afford a good ground of varying or rescinding a contract between the parties.

28. For the reasons I have given above, the prayers by the Interested Parties for an order of injunction and setting aside the consent order of 19th February, 2018 cannot succeed. The Application dated 21st September, 2018 is therefore only allowed in terms of prayer Nos. 4, 5, and 6.

29. Each party will bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE