



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC (CIVIL APPLICATION) NO. 1015 OF 2016 (O.S)

BANQUE VILLA ESTATE MANAGEMENT LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

KENYA VETERINARY VACCINES

PRODUCTION INSTUTITE.....DEFENDANT/RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....INTERESTED PARTY

JUDGEMENT

1. The Plaintiff is a Management Company for an estate called Banque Villa Estate which is erected on L.R No 209/13294/1 and 2. The estate was developed by the Kenya Bankers Savings and Credit Co-operative Society Limited (Society) which then sold the houses to its members.

2. The Defendant is a State Corporation which owns L.R No 209/13409. The houses which had been put up by the society were sold to its members in the year 2010. As at the time the owners of the houses purchased them, the only access to their houses was a 200 metre road which traversed through the Defendant's property.

3. The Defendant was opposed to the Society's members using the road through its property to access their houses. There were attempts to have an alternative access road as it was said that the only access road to the estate had been grabbed by a private developer. The society pleaded with the Defendant to allow its members to use the road through its land for a while as they looked for an alternative. There were even attempts by the society to purchase the area covered by the road but the negotiations seems to have hit a dead end. In the meantime there were new developments in that the Makadara Constituency Development Fund upgraded the road to a tarmacked road which the society's members are using to date.

4. The Plaintiff moved to Court when the Defendant threatened to close the road. The Plaintiff filed this suit in which it sought the following orders:-

1. A declaration that the Applicant is entitled to an ACCESS ORDER granting access to L.R Nos. 209/13294/1 & 2 through the Respondent's land known as L.R No. 209/13409.

2. An order that the existing access road to L.R Nos. 209/13294/1 & 2 through part of the Respondent's land known as L.R No. 209/13409 do remain in place for use by the owners and occupiers of the Houses erected on L.R Nos. 209/13294/1 & 2 upon such reasonable terms as the Court will direct.

3. Such further or other order be granted as the Court will deem just and expedient in the circumstance of this application.

4. Costs of this application be provided for.

5. The Plaintiff contemporaneously filed an application for injunctive orders seeking to stop the Defendant from closing the road in issue. The orders were granted on 5th February, 2018 restraining the Defendant from closing the road until the suit is heard and determined.

6. The Plaintiff states that the estate comprises of a total of 140 maisonettes and Apartments complete with a school and shops and provides

residence in excess of 5000 people. The Plaintiff further states that when its members purchased their houses, the only access road was the road which passes through the Defendant's land. The Plaintiff contends that it became aware of a dispute between the society and the Defendant much later. The Plaintiff therefore contends that it is now clear that the estate is landlocked and pleads for an access order as provided for under Section 140 of the Land Act No. 6 of 2012.

7. The Defendant opposed the Plaintiff's suit through a Replying Affidavit sworn on 23rd September, 2016. The Defendant states that it is a State Corporation whose core mandate is production, research and distribution of veterinary vaccines not only in Kenya but to other countries in East African Region. Its laboratories and Headquarters are situated on the land through which the road is contention passes.

8. The Defendant contends that it was allocated 93.02 hectares in 1957. The land has since been grabbed and it now occupies a fraction the original land. In 2013, the Defendant noticed that there was encroachment on to its remaining land. A road had been constructed across the land. It wrote letters of complaint to Makadara CDF Fund, Kenya Rural & Urban Roads Authority and the Governor of Nairobi County. The Kenya Rural & Urban & Roads Authority wrote to the Defendant denying any knowledge of the road which had been constructed on the Defendant's land. The Makadara CDF Fund and the County Government did not respond to the complaint letters.

9. The society wrote a letter requesting the Defendant to allow its members to use the road for 90 days as they sought intervention of the Nairobi County to open up an official road which had been closed by a private developer. The Defendant argues that during the construction of the estate, the road in dispute was not there and that therefore there must have been another road which was being used. The Defendant therefore argues that the Plaintiff's estate is not landlocked.

10. The Defendant goes on to state that its land has been grabbed before and that it is subject of a Constitutional Petition in ELC Petition No. 939 of 2014 and that whenever the Defendant has sought to secure the land by putting up a perimeter fence, the same is opened by goons in the company of a Politician.

11. I have considered the Plaintiff's case as well that of the Defendant. I have also considered the submissions by the parties herein. The only issue for determination is whether an access order can be granted to the Plaintiff as prayed.

12. The Plaintiff has come to Court under the provisions of Section 140 of the Land Act which states as follows:

“140(1) An owner of landlocked land may apply in the prescribed form to a Court for an access order, granting reasonable access to that land.

(2) A copy of the application shall be served on-

- a) the owners of each piece of land adjoining the landlocked land;***
- b) any person claiming an interest in any such piece of land of whom the Applicant has actual notice;***
- c) the local authority having jurisdiction in the area where the landlocked land is located;***
- d) any other person occupying or having an interest in land which in the opinion of the Court may be affected by the granting of the application.***

(3) The Court, after hearing the Applicant and any person served with an application under subsection (2) may make access order in respect of any other piece of land, the owner of which was served with a copy of the application under subsection (2), for the benefit of the landlocked land.

(4) In considering whether to grant an access order, the Court shall consider-

- (a) the nature and quality of the access, if any, to the landlocked land when the Applicant first occupied the land;***
- (b) the circumstances in which the land became landlocked;***
- (c) the nature and conduct of the negotiations, if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land.***
- (d) the hardship that may be caused to the Applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making of the order;***
- (e) the purposes for which access is or may be required; and***
- (f) any other matter that appears to the Court to be relevant.***

5. An access order may be made subject to any conditions including-

- a) *the period for which the access order is to be made;*
- b) *the payment of reasonable compensation by the Applicant to any other person;*
- c) *the allocation of the costs of any work necessary to give effect to the order between the Applicant and any other person;*
- d) *the fencing of any land and the upkeep and maintenance of any such fence;*
- e) *the upkeep and maintenance of any land over which the access order has been granted;*
- f) *the execution of any instrument or the completion of any prescribed form or the doing of any other thing necessary to give effect to the order;*
- g) *any conditions set out in subsection (4) which in the opinion of the Court are applicable to an access order; and*
- h) *any other relevant matter.*

(6) An access order made under this section shall be deemed to have all the characteristics and incidents of an easement and the land over which it has been granted shall be deemed to be the servient land and landlocked land shall be deemed to be the dominant land in respect of that easement.

13. The Defendant has argued in its submissions that the Plaintiff is not an owner of the land which it alleges is landlocked and as such an access order cannot be granted. In support of this argument, the Defendant has cited the decision of **Justice Angote in ELC Misc 45 of 2017 – Harrican Kioko Ndeti Vs Joseph Musila Makau [2018]eKLR** where Justice Angote dismissed the Plaintiff’s application on grounds that the Applicant was seeking an access order to land which was not registered in his name and that he had not adhered to the provisions of Cap 399.

14. In the instant case, the Plaintiff has not moved the Court under the provisions of Cap 399. However that notwithstanding, I understand the Defendant’s contention to be that since the Plaintiff is not a registered owner of the suit property, it cannot bring an application for an access order under Section 140 of the Land Act. The Land Act does not define who an owner of land is Black’s Law Dictionary 10th Edition defines owner as follows: - owner **“someone who has the right to possess, use and convey something; a person in whom one or more interests are vested. An owner may have complete property in the thing or may have parted with some interests in it (as by granting an easement or making a lease).**

Ownership in the same dictionary is defined as follows:-

“The bundle of rights allowing one to use, manage, and enjoy property including the right to convey it to others. Ownership implies the right to possess a thing regardless of any actual or constructive control. Ownership rights are general, permanent and heritable.”

15. The Plaintiff is a Management Company for owners of the estate. The owners have therefore given management rights to the Plaintiff and as per the definition of owner and ownership above, the Plaintiff is an owner and can bring an application under Section 140 of the Land Act.

16. The factors to be considered in grant of an access order are clearly indicated in Section 140 (4) of the Land Act. Evidence on record is that the occupants of the estate purchased their houses in the year 2010. When the society was putting up the houses, the contractor was not using the access road for which they now want an access order. There was an official road of access which is said to have been blocked by a private developer. This is the road which was being used to access the area where the houses are put up.

17. The owners of the estate became landlocked after their only access was blocked by a private developer. The society pleaded with the Defendant to allow its members to use the road for 90 days as they sought the Nairobi County Government to unblock the official access road which had been taken by a private developer.

The society even wanted to purchase the two hundred metre stretch where the road passes. These negotiations seem not to have succeeded because of the past history of the land belonging to the Defendant which had been irregularly excised and given to private individuals.

18. There is no evidence to show that the society approached the private developer and that the private developer refused to open up the blocked road. The road passes through the Defendant’s land which hosts its headquarters. The business of the Defendant is to deal with research and production of vaccines for animals. The area is quarantined and should not be accessed by public who may interfere with the process of developing vaccines.

19. The Defendants’ land has been a subject of grabbing before. It will be unfair to let a person who obtained part of the Defendant’s land to keep what he/she took illegally in addition to blocking a public access road. This action is the height of impunity which should not be condoned. If the order of access was to be granted, it will be like rubbing salt on the wound of the Defendant which has already had a huge junk of its land go to grabbers. The Defendant should be given a break by denying the access order. I therefore find that the Plaintiff’s suit has no merits. The same is hereby dismissed with costs to the Defendant.

Dated, Signed and delivered at Nairobi on this 4th day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Mrs. Mbabu for Defendant.

E.O.OBAGA

JUDGE

4.4.2019