



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 4 OF 2007

SERGIO LIEMAN.....PLAINTIFF

=VERSUS=

1. TONICA INVESTMENTS LIMITED

2. NATIONAL MUSEUMS OF KENYA.....DEFENDANTS

RULING

1. For determination is the notice of motion dated 20th July 2017 brought under the provisions of sections 1A, 1B & 80 of the Civil Procedure Act and article 159 of the Constitution seeking the orders that:

- i) Spent
- ii) That the court order of 12. 06. 2015 be reviewed and set aside.
- iii) Alternatively the plaintiff be at liberty to re-open the access road.

2. The application is supported by the grounds on the face of it and the affidavits of Doctor Mzalendo Kibunja and Salim Hashim Rashid sworn on the 20th July 2017 and the documents annexed thereto. The reasons for seeking to have the orders reviewed includes inter alia:

- (a) The suit surveyed road has never been used before and is covered by natural bushes/forests.
- (b) Opening the access road entails destruction of natural bushes/forests or trees and the archaeological ruins situated thereon.
- (c) There are alternative surveyed roads that the plaintiff can use to access his land.
- (d) Alternatively due to financial constraints, the plaintiff can proceed to have the road opened if the court finds no merit in this application.

3. The application is opposed by the plaintiff via his replying affidavit dated 28th July. He deposed that he is advised that the consent order cannot be varied or discharged unless it is proved it was obtained by fraud or collusion or by agreement contrary to the policy of the court. That the 2nd defendant/Applicant has not brought evidence to show the illegality of the order entered. Further that there are no sufficient grounds shown to warrant the setting aside of the order. That the applicant is guilty of laches, having

brought this application after two years and only to avoid the expenses of re-opening the road. He therefore urged the court to dismiss the motion.

4. The order of 12. 6. 2015 sought to be set aside was given in the following terms:

“Following a site visit made by the court in the presence of all parties, it was agreed that the access road should be opened as it appears on the survey map (which all parties have copies of). Part of this road is filled with natural trees that are grown. To allow for clearance of the trees, the 2nd Defendant in collaboration with NEMA (as the agency in charge of all the natural resources) to immediately undertake an E.I.A on the trees/bushes to be cleared and decide what to do with the cut trees. The E.I.A report to be filed in court within 30 days from the date the order is served on them. The court to make further orders on opening of the road upon receipt of the report. The matter be mentioned on 30. 7. 2015.”

5. The 2nd defendant/Applicant argues that the implementation of this order will contravene the provisions of the National Museums Act Cap 6. Further that even relocating the road from the existing one according to the survey map will still affect the ruins and monuments. The applicant cited several case law which emphasized the grounds upon which this court can review its orders as set out in section 80 and order 45 of the Civil Procedure Act and Rules. I need not repeat them here having stated that this application is premised on the provisions of section 80 of Cap 21.

6. The question for determination is whether the order of 12th June 2015 if implemented will go against the provisions of legislation (Cap 6) and the Constitution. It is not in dispute that there exists a road which is identified in the registry index map for the area. This map was prepared by the Director of surveys under the powers bestowed upon him under Part II of the Registered Land Act (repealed) and the Survey Act Cap 299. The road besides enabling the plaintiff to access his plot can be used by any member of the public to access the Indian Ocean beach. It is therefore misleading for the Applicant to take a restricted approach that the road if opened will serve only the private interests of the plaintiff. In my opinion and I so had that it is a public road that is why it was deemed necessary to be included in the map by the experts who prepared the R.I.M for that area.

7. This court’s duty does not include surveying and mapping. Therefore if the survey department put an access road on the path of ruins and historical monuments that need to be preserved, it is incumbent upon the Applicant to approach that office to resurvey the area and reroute the road as soon as the discovery was made and or when the information was brought to their attention. As at the time the suit was filed in 2007 and the subsequent site visit by the court in 2015 (8 years later, the Applicant was already made aware of the demand by the plaintiff to have the access road opened. So far nothing has been shown to this court that the applicant has taken up the issue of the illegality of the location of the road as it is currently on the map with the relevant government agencies. The order of 12. 06. 2015 only directed the opening of the access road as per the existing R.I.M. I therefore find nothing wrong with its implementation.

8. The Applicant annexed letters and a gazette notice that identifies the ruins on the north bank of Mtwapa Creek as areas declared to be monuments under section 6 of Cap 215. The said documents are not specific that there are ruins/antiquities lying on the road path in issue. Part of the order of 12. 6. 2015 required that the Applicant was to liaise with the NEMA to carry out an environmental impact assessment and file a report in court within 30days of being served with the order. No E.I.A report has been filed todate. The allegations that if the road is opened will result in destruction of these monuments is therefore premature and is not backed by any expert report

9. For the reason that no submissions was made on which between the National Museums Act, the Registered Land Act (repealed) or the Land Registration Act and, the Survey Act is superior than the other and on the basis that no expert report has been provided to demonstrate that the implementation of the order will result in destruction of the ruins/monuments, I find no reason to review the orders of this court made on 12th June 2015. Consequently I dismiss pray (2) of the motion.

10. The Applicant made an alternative prayer that the plaintiff be liberty to re-open the access road because the Applicant is facing financial constraints. This is a substantial prayer that would require evidence to be led and the plaintiff getting a chance to cross-examine the witness to verify such contention. It was also not supported by nay documentary evidence. The same is premature and is not a ground for review and I hereby dismiss it.

11. The entire application fails and wholly dismissed. The Applicant to pay the plaintiff/Respondent costs of the application.

Dated and Delivered at Mombasa this 16th Day of January, 2018

A. OMOLLO

JUDGE