



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 394 OF 2017

KIMONGONY ARAP KEMEI.....1ST PLAINTIFF

JOB K. KEMBOI.....2ND PLAINTIFF

VERSUS

RUTH CHELAGAT KIRWA.....DEFENDANT

RULING

This ruling is in respect of application dated 11th December 2017 brought by way of a notice of motion by the plaintiff/applicants seeking for orders of injunction compelling the defendants and her agents to open a public road on the suit land pending the hearing and determination of the suit and in the alternative the County surveyors and the land Registrar be ordered to open the public road.

Counsel for the plaintiffs argued the application and relied on the grounds on the face of the record and the supporting affidavit together with the annexures. He submitted that the defendant has closed a public road which has been in use since 1960.

Mr. Tarus submitted that there has been animosity on the ground and that the parcel of land which measures 100 acres comprises a church and a water tank. It was further Counsel's submission that the replying affidavit admits there is a road but they call it a private road. He urged the court to allow the application as prayed.

The application was opposed by Counsel for the defendant/respondent who relied on the replying affidavit of the respondent filed herein. He submitted that there is no evidence adduced by the applicant that there is a public road and as such the prayers sought for injunction cannot suffice.

Counsel for the defendant submitted that the annexed map JKK 4 indicates that it is in respect of LR No.4797/4 and not LR No. 4797/5. He submitted that the application is a non – starter as the suit land has since been subdivided as per annexure JKK 7 which refers to plot No. 434 and LR No. 4797/4. Counsel further submitted that the applicants are not owners of the suit land.

It was Counsel's submission that it would be an exercise in futility to order a surveyor to visit land that does not exist. Counsel also submitted that the authority to act refers to the 2nd defendant and not the 2nd plaintiff and as such there is no valid authority to act. There is no 2nd defendant in this suit. He therefore prayed that the application be dismissed with costs.

Mr. Tarus in reply stated that the authority was a typo error as it was donated to the son who is the 2nd plaintiff. He reiterated his submissions and urged the court to allow the application as prayed.

Analysis and determination

This application seeks for two things which are mandatory in nature. One is to compel the defendant to open a public access road and the second one is to order the County surveyor and the Land Registrar to open the public road. In essence the court is being urged to grant a mandatory injunction to compel the defendant to open an access road.

The threshold in mandatory injunctions is much higher than in the case of prohibitory injunctions and the Court of Appeal in the case of **Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109** rendered itself on the principles to consider when dealing with the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 that:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

Likewise in the English case of Locabail International Finance Ltd vs Agro Export & Another (1986), ALI ER 901 which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

The catch phrase in the issuance of mandatory injunctions is “special circumstances” and only in clear cases either where the court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act. This must be in very clear cases whereby the evidence adduced including the supporting documentation leave the court with no doubt that it can do justice by granting the mandatory injunction.

In the current case the court has not been convinced that there are any special circumstances to warrant the issuance of a mandatory injunction. The annexures of the title documents are not clear cut as it refers to two different LR numbers. One refers to 4797/5 and another to 4797/4 as per the annexed map which purportedly shows the road in dispute. There also seems to be a subdivision which has changed the plot numbers. This is confirmed by the Chief’s letter marked as JKK 7a’. The letter refers to LR No 4797/4 and plot no 434. This leaves a lot of questions to be answered. Courts are not supposed to give orders in vain which cannot be enforced or implemented.

The other issue is that from the replying affidavit the defendant has deponed that the plaintiffs have access road and that there is no access road passing through her parcel of land. She further averred that the plaintiffs have been passing through her parcel of land by force and the fact that she has fenced off her land should not be construed to mean that she has blocked a public road as there is no road in the first place.

The application and the main suit seek for opening of the road and if the plaintiff had established the special circumstances to warrant the grant of the mandatory injunction then the court could have considered and finalized this matter but that is not the case herein.

I have considered the application, the supporting and replying affidavits together with the submissions by counsel and I have come to the conclusion that the plaintiff has not established any special circumstances that warrants the court to grant a mandatory injunction.

I therefore find that the application lacks merit and is dismissed with costs to the defendant.

Dated and delivered at Eldoret this 27th day of February, 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Tarus for the Plaintiff/Applicant and Mr. Wanyonyi holding brief for Mr. Chepkonga for the defendant.

Mr. Koech: Court Assistant.