



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 210 OF 2017**

**TABITHA MUEMA MUSYOKI .....PLAINTIFF**

**VERSUS**

**NDUNGWA MULINGE KAKENYI.....1<sup>ST</sup> DEFENDANT**

**MUMO MULINGE KAKENYI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before me is the Application by the Plaintiff dated 8<sup>th</sup> May, 2017 seeking for the following orders:

**a. That the Defendants themselves or their agents be restrained from trespassing and creating an illegal path/route on the Plaintiff's parcel No. Machakos/Kiandani/311 pending the hearing and determination of the main suit.**

**b. Costs do abide the Application.**

2. The Application is premised on the grounds that the Plaintiff is the owner of parcel of land known as Machakos/Kiandani/311; that the Defendants have created an illegal road on the said land and that the Defendants have blocked an access road between parcel number 311 and 315.

3. The Plaintiff has deponed that on 18<sup>th</sup> February, 2015, the County Surveyor visited the disputed area in the presence of both parties and established the said encroachment and that the orders being sought should be granted.

4. In response, the 1<sup>st</sup> Defendant deponed that the Defendants do not own parcel number 315; that being not owners of parcel number 315, they have not encroached on the said land and that he land belongs to Agnes Nzilani Kakenyi who is their mother and deceased.

5. According to the 1<sup>st</sup> Defendant, the access, at the gate of their mother's house, has been there for over thirty (30) years and that none of them was appointed the legal representative of the Estate of the late Agnes Nzilani and as such the proceedings are a nullity.

6. In the Further Affidavit, the Plaintiff deponed that the boundary dispute in respect to the two parcels of land was settled on 18<sup>th</sup> February, 2015; that he has no interest in the Estate of Agnes Kakenyi and that his interest is on the people currently trespassing on his land.

7. In his submissions, the Plaintiff's advocate submitted that the Defendants are fully aware of the dispute

and the report of the Surveyor; that the Defendants have created a non-existent entry on route number 311 and that an order of injunction should issue.

8. The Defendants' advocate on the other hand submitted that no letters of administration have been issued to the Defendants in respect to the Estate of the late Agnes Nzilani.

9. The Defendants' advocate submitted that issuing the order sought would not only expose the Estate of the deceased to waste but would also deny access to other parcels of land, namely plot numbers 316 and 317.

10. In the Plaintiff before me, the Plaintiff is seeking for a permanent injunction restraining the Defendants from trespassing on parcel number Mavoko/Kiandani/311 and also be restrained from blocking the access road. In the meantime, the Plaintiff are seeking for an order restraining the Defendants from creating an illegal path on plot number 311 pending the hearing of the suit.

11. The Plaintiff has annexed on his Affidavit a report of the Surveyor showing that the proprietor of parcel number 311 has encroached on the entire access road measuring 6M and also encroached on plot number 315 by 2 metres.

12. It would appear from the said report that an access road serving plot numbers 311, 316 and 317 runs through the Plaintiff's land.

13. However, the Defendants have contended that they are not the proprietors of parcel number 315 and that they do not leave on the said land. Further, it is the Defendants' case that the issue of where the access road should be located has not been dealt with finality and that the current access has been used for the past thirty (30) years.

14. The Plaintiff has not denied that the registered proprietor of parcel number 315 is one Agnes Nzilani Kakenyi who is now deceased. Indeed, from the copies of the Summons to the County Surveyor, it is the deceased who used to be summoned by the surveyor to attend to meetings in respect of the boundary dispute.

15. Considering that the boundary dispute was between the Plaintiff and the deceased, the Plaintiff should have sued the legal representatives of the late Agnes Nzilani and not the Defendants.

16. I say so because there has been no dispute as between the Plaintiff and the Defendants who do not reside on parcel number 315.

17. The Plaintiff has not denied that the current access road serves not only plot number 315, but also plot number 316 and 317, and that the road has been there for over thirty (30) years.

18. That being the case, the court cannot at this stage order for the closure of the said road before hearing the parties by way of oral evidence. The closure of the current access road would not only determine the matter at an interlocutory stage, but would also land lock the owners of plot numbers 316 and 317 before hearing them.

19. In the circumstances, and for the reasons I have given, I find that the Plaintiff has neither shown that he shall suffer irreparable damage that cannot be compensated by way of damages nor that the balance of convenience tilts in his favour.

20. I therefore dismiss the Application dated 8<sup>th</sup> May, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018.**

**O.A. ANGOTE**

**JUDGE**