



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 370 OF 2016

MOSE MOMANYI & 168 OTHERS

(All are residents of Nyanchwa/Erera village.....PLAINTIFFS

VERSUS

KISII SPORTS CLUB.....1ST DEFENDANT

COUNTY GOVERNMENT OF KISII.....2ND DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AGENCY.....3RD DEFENDANT

REGISTRAR OF LANDS.....4TH DEFENDANT

RULING

1. The plaintiffs are residents of Kisii County and are inhabitants of Nyanchwa/Erera Community village within Kisii Municipality. By a plaint dated 9th November 2016 filed in court on the same date but subsequently amended on 27th April 2017 the plaintiffs claim that they have as villages and community been using a footpath running through land parcels known as **Kisii Municipality/Block II/95 and 207** (“the suit properties”) both registered in the name of Kisii Sports Club to access the SDA Church and Kisii Central Business District. They claim they have used the pathway/passage since time immemorial and have therefore acquired a right of entitlement for its use as Nyanchwa/Erera village community. The plaintiffs aver that the defendants have unilaterally blocked the access and are constructing a perimeter wall which would totally obstruct the pathway and therefore deny the plaintiffs the right of use and enjoyment of the pathway to their detriment. Inter alia the plaintiffs seek orders for:-

1. A declaration that the plaintiffs are entitled to access, right of way of and/or through all that piece of land known as Kisii Municipality/Block II/95 and 207.

2. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise howsoever cannot restrain the access of the plaintiffs to the suit property.

3. An injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from restraining the plaintiffs access to the property for passage (right of way).

2. Simultaneously with the plaint the plaintiffs filed a Notice of Motion seeking the following substantive order:-

“That pending the hearing and determination of this suit the respondents whether by themselves or their servants or agents and/or otherwise howsoever be compelled to open the access road for passage for the residents of Nyanchwa/Erera village within the land known as Kisii Municipality/Block II/95 and 207.

3. The application is premised inter alia on the following grounds set out on the face of the application and on annexed supporting affidavit sworn by Mose Momanyi the 1st plaintiff herein:

(i) That the applicants had been using the road/access within the land known as Kisii Municipality/Block II/95 and 207 since

pre-colonial, colonial and upto early this year (2016).

(ii) That the applicants children do use the said access route/road within the land known as Kisii Municipality/Block II/95 and 207 to reach the nearby schools like Nyanchwa Primary School, Kisii Primary School and other learning institutions and the residents to access the town and the hospital.

(iii) That the applicants denial of the access route/road by the respondents, denies the residents and the public their fundamental rights to route/road access.

(iv) That, if the orders are not granted, the applicants shall continue suffering irreparable loss and damages.

4. In their supporting affidavit the plaintiffs acknowledge the 1st defendant is the registered owner of the suit properties and generally reiterate the grounds set out on the face of the application in support of the application. The plaintiffs' prayer for injunction is predicated on the long usage of foot path through the grounds of the land owned by the 1st defendant which grounds it is accepted and admitted by the plaintiffs are used by the 1st defendant's members to play the game of golf.

5. The 1st defendant's filed grounds of opposition dated 21st November 2016 on 22nd November 2016 where the 1st defendant stated it was indeed the registered owner of land parcel **Kisii Town/Block II/95** which is only 2 acres and only houses the club house and not the Golf Course must have prompted the plaintiffs to amend the plaint to include the 1st defendant's other land parcel **207** where the Golf Course is sited. The 1st defendant's position however was that the plaintiffs had no cause of action against the 1st defendant.

6. On behalf of the 1st defendant, Dr. John Kumenda, the Chairman has sworn an affidavit in response to the plaintiffs' application and deposes that the National Golf Regulator, the Kenya Golf Union demanded that the Golf Course be fenced off to enhance safety to the members of the public when members are playing golf. He deposed that the 1st defendant fenced off the golf course over two years ago and that the plaintiffs have alternative access roads to all the amenities that they have alluded to and that they are merely seeking a convenience at the 1st defendant's prejudice where its private property rights are compromised. The 1st defendant contends that the applicants have no cause of action against the 1st defendant and the instant suit ought to be struck out.

7. The plaintiffs have filed written submissions as directed by the court to argue the application dated 24th April 2017 as directed by the court. Mr. Masese advocate for the 1st defendant on 31st January 2018 informed the court that the 1st defendant would not file any submissions but would fully rely on the grounds of objection and the replying affidavit filed on behalf of the 1st defendant.

8. The plaintiffs application being one for injunction, the plaintiffs are required to satisfy the now well settled conditions for grant of injunction as established in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358** where the court held:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. The applicable conditions as outlined above are applied sequentially so that if the first condition, whether or not the applicant has a prima facie case with a probability of success is not satisfied, then an injunction cannot be granted. If a prima facie case is established the court will then consider whether the applicant stands to suffer irreparable injury if the injunction is not granted. If damages would be adequate compensation, the court will decline to grant an injunction. It is only where the court is in doubt as regards the first two conditions will it determine the application on consideration of the balance of convenience having regard to the attendant circumstances. In the present case, the plaintiffs claim they have been using a passage through the suit property where the 1st defendant has a Golf Course over a long period of time such that they have acquired a right of entitlement over the same. They seek a declaration that they are entitled to this access and/or right of way over the 1st defendant's property known as **Kisii Municipality/Block II/95 and 207**. There is no dispute that the 1st defendant is the registered owner of the suit property. There is also no dispute that there is no official road of access through the 1st defendant's said properties. Essentially therefore the plaintiffs are asking the court to declare the footpath/passage a public access and order the same to be opened for public use.

10. The law provides the procedure to be followed in order to create a public right of way under Section 143 of the Land Act No. 6 of 2012 which vests the power to do so on the National Land Commission. Section 143 (1) provides:-

143.(1) Subject to and in accordance with this Section and Section 146, the Commission may, create a right of way which shall be known as public right of way.

(2) A public right of way may be:-

(a)

(b) a right of way created for the benefit of the public, referred to in Section 145 of this Act as a communal right of way.

Section 145 provides thus:

145. A County Government, an association or any group of persons may make an application to the Commission for a communal right of way.

11. Section 146 provides the procedure the Commission is required to follow to make a determination on the application. After reviewing the application and on receipt of all information and considering any representations and objections made by any affected person the commission can under Section 146 1(b) recommend to the cabinet secretary whether to:-

(i) Appoint a public inquiry to give further consideration to the representations and objections; or

(ii) Refer the application to the County Government for its opinion on whether to approve the application; or

(iii) Initiate and facilitate negotiations between those persons who have made representations on the application and the applicant with a view to reaching a consensus on that application.

12. I have made extensive reference to the applicable law as relates to the creation of public right of way or communal right of way to illustrate that the court lacks the jurisdiction to make such an order as the plaintiffs are seeking in the instant suit. The plaintiffs as observed earlier in this ruling are seeking an order for a declaration of a public right of way through the 1st defendant's land. The power to determine such an issue is vested in the National Land Commission which is an independent institution established under the Constitution. The court will not usurp the power and mandate of an independent institution vested with authority to deal with the matter and will permit such institution to freely exercise its mandate.

13. From what I have observed it is clear the plaintiffs chose the wrong forum to ventilate their rights and/or concerns. As the court lacks the jurisdiction to deal with the matter it cannot be said the plaintiffs have demonstrated they have a prima facie case with any probability of success. The suit is misconceived and incompetent and constitutes abuse of the process of the court. The Notice of Motion dated 24th April 2016 is hereby declined. Having made a finding that the court lacks the jurisdiction to deal with the matter no purpose will be served by sustaining the suit. The court is obligated on finding it lacks the jurisdiction to deal with the matter, to promptly lay down its tools as proceeding further with the matter would be an exercise in futility. I accordingly order the suit struck out but as the suit was apparently instituted in public interest, I will make no order for costs. Each party will bear their own costs of the application and the struck out suit.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st to 169th plaintiffs

..... for the 1st defendant

..... for the 2nd, 3rd and 4th defendants

..... court assistant

J. M. MUTUNGI

JUDGE