



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CIVIL SUIT NO. 419 OF 2017**

**OMAR SAID KULLATEIN**

**FARIDA ABDALLAH MOHAMED.....PLAINTIFFS**

**-VERSUS-**

**ESHA ALI**

**COUNTY GOVERNMENT OF MOMBASA**

**LAND REGISTRAR MOMBASA.....DEFENDANTS**

**RULING**

1. The application for determination is the one dated 17.11.2017 brought under provisions of Order 40 rule 1 & 2. The plaintiffs seek the following orders to be granted:

**i) Spent**

**ii) Spent**

**iii) That an injunction be issued against the defendants, their servants, agents and or anyone acting under their authority from constructing, dumping building materials, excavating or digging on Plot No. MOMBASA/BLOCK XVII/1526 pending the hearing and determination of this suit.**

**iv) That the 1<sup>st</sup> and 3<sup>rd</sup> Defendant be ordered to produce the original survey plan and authorized survey for MOMBASA/BLOCK XVII/1526 to the Court and or documents showing process of survey, issuance of Part-Development Plan (P.D.P) and R.I.M.**

**v) That costs of this application be borne by the defendants.**

2. The application is supported by the grounds listed on the face of it and the affidavits of the 1<sup>st</sup> plaintiff sworn on 16<sup>th</sup> November 2017, 25<sup>th</sup> January 2018 and 16<sup>th</sup> March 2018 respectively. The applicants are the registered owners of parcels of land Nos. MSA/BLOCK/1639 and MSA/BLOCK XVII/1528. They both claim that the 1<sup>st</sup> Respondent's title MSA/BLOCK XVII/1526 is an access road hence he should not carry any development on it as access to their named plots as well as the neighbouring plots will be blocked. The applicants blame the 2<sup>nd</sup> defendant for granting approvals to the 1<sup>st</sup> defendant inspite of

having received numerous complaints from the residents of the area where plot 1526 is situated. The applicants place blame on the 3<sup>rd</sup> defendant for issuing title deed for the road reserve which action they state was fraudulent.

3. In the first affidavit, the applicants have annexed copies of exchanged correspondences between them and the 2<sup>nd</sup> defendant. They have also annexed photographs of the area where the proposed development was being commenced. In his affidavit of 16<sup>th</sup> March 2018, the 1<sup>st</sup> applicant denied the allegations put forth by the replying affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In the further affidavit sworn on 25<sup>th</sup> January 2018, the applicants deny that the 1<sup>st</sup> defendant followed all due procedures in obtaining the title deed and the development licences. That the 1<sup>st</sup> defendant's letters of 6<sup>th</sup> June 2016 and 6<sup>th</sup> March 2017 smacks of corruption & undue influence as the approval of the plan with variation was not given following an application made thus the same was not procedurally issued. The applicants also aver that the NEMA licence & NTSA approvals were all obtained through corruption and manipulation. That the construction is tainted with fraud, corruption and improper influence. They humbly asked the Court to stop it.

4. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 2<sup>nd</sup> defendant filed a brief affidavit sworn by Salim Khalil dated 12<sup>th</sup> March 2018. First Mr Salim clarified that the 2<sup>nd</sup> defendant is not undertaking any construction works on plot No. 1526 as alleged. That to his knowledge, this plot is not a road reserve and the only access road to the plaintiffs plots as alleged. In paragraph 7, the deponent states that a survey was carried out which established that plot No 1528 belonging to the 1<sup>st</sup> plaintiff has encroached and blocked the only access road. He confirmed that the 2<sup>nd</sup> defendant has issued development approvals to the 1<sup>st</sup> defendant. He deposed that the orders sought are not warranted and the application ought to be dismissed.

5. The 1<sup>st</sup> defendant on 15<sup>th</sup> January 2018 deposed that he is the registered owner of plot No MSA/XVII/1526 having purchased it. He denied that the plot was designated as a public utility area and he attached a survey map to show that neither is it a road. The 1<sup>st</sup> defendant avers that he applied for and obtained approval & development licences from the 2<sup>nd</sup> defendant & NEMA which he annexed copies thereof. That when he wanted to begin construction, the plaintiffs made frivolous complaints to 2<sup>nd</sup> defendant making the 2<sup>nd</sup> defendant to temporarily stay his licence. That after the officers from the 2<sup>nd</sup> defendant visited the suit plot and identified its beacons, his approval was reinstated. That it is the plaintiff owning plot No 1528 who has built outside his beacons. He deposes that the plaintiffs have not made a case against him and the current application ought to be dismissed. He annexed copies of his title deed and approved plans in support of his averments.

6. The parties' advocates offered oral submissions. Mr Ambwere advocate for the applicants submitted that the building being put up will deny his clients access especially in case of emergencies. That they're also building on top of a manhole which is used by neighbours. From the letter dated 28<sup>th</sup> November 2016 the applicants wonder why the 2<sup>nd</sup> defendant changed their mind on plot No 1526 not being a road reserve. That the plan submitted was not amended yet the 2<sup>nd</sup> defendant are now saying do not build on the ground floor. That the applicants have shown a prima facie case. They support their submission by relying on the decision of **Panari Enterprises Ltd vs Lijoodi & 2 others (2014) eKLR**.

7. Mr Kiarie appearing for the 1<sup>st</sup> defendant submitted that the effect of registration of title is provided under section 24 of the Land Registration Act. That the applicants have not demonstrated that their titles are superior to that of the applicant or that they have a right of way. Secondly that the 1<sup>st</sup> defendant has annexed a map showing the access road does not pass through the 1<sup>st</sup> defendant's parcel No 1526. That the constructions were previously stopped based on the complaints lodged by the plaintiffs. That the applicants only saw a vacant plot and assumed it was an access road. Lastly that if the applicants constructed manholes on 1<sup>st</sup> defendant's land, then they did so without authority and should not be given orders of injunction based on their wrongdoing. The 1<sup>st</sup> defendant submits that the plaintiffs have no

prima facie case against him and that the balance of convenience tilts in his favour.

8. Mr Sichenje for 2<sup>nd</sup> defendant adopted submissions made by the 1<sup>st</sup> defendant and added that the application is supported by an affidavit full of mere allegations. He referred to annex 'EA – 4' showing access road to both plots. The 2<sup>nd</sup> defendant wondered who designated the 1<sup>st</sup> defendant's plot as a public utility or sewer line or access road. That nothing was annexed to show any ongoing investigations on the corruption alleged on the officers of the 2<sup>nd</sup> defendant. That the letter dated 17<sup>th</sup> October 2017 lifted the previous cancellations of the 1<sup>st</sup> defendant's approvals. That the Court should not limit the enjoyment of the 1<sup>st</sup> defendant over his land.

9. In the Panari Enterprises Ltd case supra, Gitumbi J quoted the decisions of *Giella vs cassman Brown and Mrao vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125* which discussed what the Court should consider while determining an application for injunction. In the Mrao case, the Judge made reference to the following quote which I find as relevant here i.e.;

*“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

10. In this application, the applicants urge the Court to grant an order of injunction to stop the 1<sup>st</sup> defendant from undertaking development of the plot No MSA/XVII/1526 until this suit is determined. The applicants contend that the development on this plot will block the access of the nearby plots which includes their plots. They also argue this plot No 1526 was a public utility and the 3<sup>rd</sup> defendant issued title to the 1<sup>st</sup> defendant in a fraudulent way. The applicants have annexed several letters where they addressed the 2<sup>nd</sup> defendant objecting to the approvals of the development on this plot and the 2<sup>nd</sup> defendant's responses to their objection.

11. It is not in dispute that plot Nos. 1528 and 1526 are adjacent to each other going by the pleadings and the documents annexed in support thereof. The letter dated 28.11.2016 which the applicants relied on stated in part,

*“the development of land on plot No 1526 has been carried out without the grant of permission or following the conditions required on that behalf under paragraph v of the Physical Planning Act Cap 286. Secondly that it aggrieved the neighbours.”*

The letter asked the developer to stop building until the issue of complaints of building on a road reserve lodged by the neighbours was resolved. The 2<sup>nd</sup> defendant assumed to have resolved the dispute when it wrote the letter dated 6<sup>th</sup> March 2017 reinstating the 1<sup>st</sup> defendant's development earlier stayed.

12. The applicants however were not satisfied with the decision of the 2<sup>nd</sup> defendant hence their filing of this case, I note also that on 23<sup>rd</sup> March 2017 the CEM – Lands, Planning & Housing again requested that the proposed development be put on hold pending the resolution of the dispute. The applicants have annexed a map of the area in support of their application. The boundaries of the disputed plot have been highlighted in yellow. This map shows that two sides of the suit plot abuts a road. Plot 1528 is separated from plot 1526 by the said road on one side. Plot 1526 is also separated from 1525 by the same road. On the lower end, it is adjacent to plot No 1584. The applicants did not tell this Court the status of the road appearing on the map. Without delving into the merits of the applicants' case, the documents he has relied on do not show on their face that plot No 1526 was indeed reserved as a public utility or an access road. The letter of 28<sup>th</sup> November 2016 was informing the 1<sup>st</sup> defendant that he did not have the required development permission as well as acknowledging the complaints received from the applicants. The letter does not in my view make any conclusive remarks that this plot is a road reserve. Secondly the map annexed by the applicants clearly show a distinct road existing separate from plot No 1526. Besides these documents, the applicants annexed photographs which do not add any evidential value as regards

land ownership.

13. The 1<sup>st</sup> defendant has intimated that he has approval plans & development licences from the concerned authorities and he proceeded to annex copies thereof. His position is supported by the 2<sup>nd</sup> defendant who admits approving the plans presented by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant went further to claim that it is one of the applicants who had encroached on the access road. However the 2<sup>nd</sup> defendant did not annex the survey report to support this averment. Whether there is encroachment by plot No 1528 is not for determination before me now.

14. Going by the Applicants grounds for bringing this application which I have explained/analysed above, I am not satisfied that they have demonstrated a prima facie case as they failed to annex evidence showing that plot 1526 was previously reserved as a public utility or that it is an access road. The applicants also alleged that the 1<sup>st</sup> defendant obtained his title through fraud. Yet in the plaint they have not pleaded the particulars of fraud whether as against the 1<sup>st</sup> or 3<sup>rd</sup> defendants. The fraud can only be proved by evidence. This averment is also premature at this stage.

15. The balance of convenience in my view tilts in favour of the 1<sup>st</sup> defendant who has been unable to carry on with his approved developments due to constant complaints made by the plaintiffs. In conclusion, I find that the application is lacking in merit. I hereby dismiss it with costs to the 1<sup>st</sup> & 2<sup>nd</sup> defendants.

**Dated, signed & delivered at Mombasa this 22<sup>nd</sup> June 2018**

**A. OMOLLO**

**JUDGE**