



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 412 OF 2017

AMM (Unsound Mind) Suing through her guardian Ad litem/next

friend MMM.....PLAINTIFF/APPLICANT

VERSUS

DM.....DEFENDANT/RESPONDENT

RULING

1. The Application dated 3rd October, 2017 is seeking for the following orders:

a. That pending the hearing and determination of this suit a temporary injunction do issue restraining the Defendant from entering, remaining, trespassing, creating an access road, destroying the fence and or in any way interfering with the Plaintiff's occupation, ownership and possession of all that property Matungulu/Sengani/[particulars withheld] and that the Defendant reopen the Plaintiff's pit latrine.

b. That the Respondent do pay the costs of this Application.

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of land known as Matungulu/Sengani/[particulars withheld] (*the suit land*); that in July, 2017, the Defendant, who is a brother to the Plaintiff, destroyed the Plaintiff's life fence and that the Defendant created an illegal access road passing through the Plaintiff's land and homestead.

3. The Plaintiff deponed that the creation of an access road by the Defendant over the suit land is causing wanton destruction to the suit land and that the Defendant has gone further to close the only pit latrine that the Plaintiff has been using for her sanitation.

4. In response, the Defendant deponed that prior to the sub-division of the suit land; they were all living on parcel number [particulars withheld] as a family; that upon sub-division of the family land, his land became inaccessible and that the entire family agreed to donate to him an access road to enable him enter his land.

5. According to the Defendant, the road of access to the suit land was determined in Machakos Miscellaneous Cause No. 95 of 2007 and that the Plaintiff's pit latrine is intact.

6. In the Supplementary Affidavit, the Plaintiff deponed that the access road given to him by their mother to access the road is not the same road that is in dispute; that the access road that was given to the Defendant is from his land parcel number [particulars withheld], through parcel number [particulars withheld] onto their mother's land which is on parcel number [particulars withheld] and that when their mother died, parcel number [particulars withheld] was registered in the Plaintiff's name. According to the Plaintiff, the Defendant is seeking to access the main road through plot number [particulars withheld] which he has since fenced.

7. Both the Plaintiff's and the Defendant's advocate filed written submissions which I have considered.

8. It is not in dispute that the Plaintiff is the registered proprietor of parcel of land number Matungulu/Sengani/[particulars withheld] while the Defendant is the proprietor of parcel number [particulars withheld]. The two parcels of land formed part of the Estate of the Plaintiff's and Defendant's late father who owned parcel number [particulars withheld].

9. From the Affidavits, it would appear that the mother to both the Plaintiff and the Defendant occupied plot number [particulars withheld] which plot is separated from the Defendant's plot by parcel number [particulars withheld]. To access her mother's parcel of land and house, a road of access was created on parcel number [particulars withheld].

10. The Applicant filed a map showing the location of parcel numbers [particulars withheld]. From the said map, it is clear that the Defendant can only access plot number [particulars withheld] , where her mother resided, using either a longer official road or through plot number [particulars withheld] . Indeed, the temporary road of access that was accorded to the Plaintiff was with the consent of her mother before she passed on. That position was recorded in the Ruling of the court in Machakos CMCC No. 95 of 2007.

11. Considering that the road of access in dispute was opened up with the consent of the Plaintiff's mother, and in view of the fact that suit land (*parcel number* [particulars withheld]) seems to be on the opposite side of parcel number [particulars withheld], it would be unjust to close the road that the Defendant has been using since 2007 when the Ruling of the court in Machakos CMCC No. 95 of 2007 was made.

12. Indeed, if the Defendant is land locked as claimed, he will be entitled to claim for the opening up of the alleged road, with the participation of the Surveyor and the Land Registrar. Having been allowed to use a portion of parcel number [particulars withheld] to access the main road, the Plaintiff cannot unilaterally close the road just because the person who allowed the Defendant to use the road is dead.

13. In the circumstances, the prevailing status quo should be maintained pending the hearing of the suit. Consequently, the Application dated 3rd October, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE