



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 32 OF 2017

ANTHONY WANJALA MILIMO PLAINTIFF

VERSUS

TIMOTHY WAFULA WALUKANADEFENDANT

RULING

This is ruling in respect of a preliminary objection dated 3rd March 2016. It was lodged by the defendant. He states as follows.

- (i) That the plaintiff (sic) claim is for creation of public road (which relates to public nuisance can (sic) only be brought if it were merited by the Attorney General or have express (sic) authority from the Attorney General under the provisions of the Civil Procedure Act.
- (ii) That pursuant to Section 38(2) of Limitation of Action Act, an easement by way of prescription arises only upon registration (of the applicant) and not before as the plaintiff has not shown to have registered (sic) any easement against titles of the burdened land,
- (iii) That the plaintiff claim (sic) for an easement that is right of way over parcel Nos. 582 or 553 or 727 cannot be brought by way of plaint as envisage (sic) by order 37 Rule 8 of the Civil Procedure Rules 2010.

The background to this preliminary objection is that by a plaint dated 21/2/2017 the plaintiff claimed that on diverse dates the defendant has refused to give access to the road that leads to his residence. It is necessary to refer to the plaintiff's statement attached to the plaint for more details. The plaintiff avers that he bought land measuring 0.2 acres from the defendant in the year 1990 and paid the price in full. He avers that he was given a road by which he was able to access his home from the main road. Later on the defendant sold another piece of the same land to another person. This latter parcel that was sold bordered the plaintiffs parcel. It blocked the road the plaintiff was using to access his home from the main road.

Mr Wafula, at the hearing of the Preliminary Objection urged that the plaintiff's claim was for the creation of a public road. That is far from the truth. The plaintiff only wants the access road he has been having for many

years restored. This is the road that leads to his home. That cannot be said to be a public road since it came into existence by virtue of a contract for the sale of land between the plaintiff and the defendant. Besides, the plaint does not state that the claim is for a public right of way.

Therefore the consent of the Attorney General would not be necessary in the circumstances of this case. The first limb of the preliminary objection therefore fails.

The second limb of the preliminary objection refers to Section 38(2) of the Limitation of Actions Act. It states that an easement by way of prescription arises only upon registration against the burdened land.

This limb of the so called preliminary objection requires some evidence to be tabled before the court in order for it to succeed. That evidence would have to be by way of oral evidence or documents showing that an easement has been registered or not registered over the burdened land. This objection cannot be strictly called a preliminary objection. In the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] 696* the court stated as follows:-

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit.”

Later on in the same judgment, Sir Charles Newbold stated as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse the issue. The improper practice should stop.”

The second limb of the preliminary objection of the defendant calls for ascertainment of certain facts as to registration of otherwise of the so called easement. It therefore fails.

As I embark on the third limb of the preliminary objection the escapable fact is that it is based on the assumption that the plaintiff is claiming an easement. The gist of that limb of the Preliminary Objection is that the proceedings herein should not have been brought by way of plaint. The defendant cites Order 37 Rule 8 Order 37 Rule 8 states as follows:-

“8 An application under the Registered Land Act other than under Section 120, 128, 133, 143 and 150 thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in the suit”.

It is noteworthy that this suit was filed long after the Registered Land Act was repealed. It is inconceivable that a party can make an application for any purpose under the repealed statute.

Mr. Wafula for the defendant did not shed light on how it may be done. If the Act was still in force, that argument may be raised but the repeal makes it now not tenable. I would dismiss the Preliminary Objection on the above ground alone. However the conduct of the defendant in this matter leaves much to be desired. The defendant is on record as having informed the

court on 28/2/2017 that he agrees that a road of access be created and that he does not oppose the plaintiff's application dated 21/2/2017. It is on that basis that the court ordered that the County Land Surveyor do visit the suit premises for the purpose of establishing a road of access to serve the plaintiff's land. This was on 28/2/2017. On 8th March, 2017 the defendant was back in court with an application dated 7th March, 2017 seeking to stay the enforcement of the order issued on the 28/2/2017. Prior to this on the 3rd March, 2017 the defendant had lodged a Notice of Preliminary objection which we have just dealt with. Without going into the merits of the matter at this stage, I note that the plaintiff has attached a letter from Simiyu Wafula & Co. Advocates dated 18/7/2016. Part of the letter reads as follows:-

“That it is not in dispute that your client was/is obligated (sic) to allocate/apportioned (sic) an access road/path, in respect of plot No. 552 and 553 Sinyerere Settlement Scheme. It is the duty of the Land Registrar to come and settle the dispute. Indeed our client is very much willing and ready to do so. He has not in any manner reneged.”

There is no mention of this letter in the defendant's papers filed in court in this matter. Instead of complying with the Civil Procedure Rules on defence and discovery, the defendant chose to draw a red herring across the plaintiffs and the court's path by way of the Preliminary Objection dated 3/3/2017 and the application dated 7/3/2017. The latter application, though not yet formally determined, is manifestly reliant on the success of the Preliminary Objection for its survival.

It is quite clear that the defendant has been less than candid in this matter. I find no merit in the three limbs of the Preliminary Objection and I hereby dismiss the same with costs to the plaintiff.

Signed, dated and delivered at Kitale on this 7th day of April, 2017.

MWANGI NJOROGE

JUDGE

Ruling read in open court in the presence of:-

Mr. Wanyama for the plaintiff

N/A for the defendant.

Court Assistant – Isabellah.

MWANGI NJOROGE

JUDGE

7/4/2017