



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 182 OF 2016**

SARAH NYIVA HILLMAN.....1<sup>ST</sup> PLAINTIFF

PAULINE KAMBUA MAINGEY .....2<sup>ND</sup> PLAINTIFF

WILLIAM DAHER .....3<sup>RD</sup> PLAINTIFF

**VERSUS**

**MAVOKO WATER AND SEWARAGE**

**COMPANY LIMITED .....1<sup>ST</sup> DEFENDANT**

**TITUS MWIRIGI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Application dated 21<sup>st</sup> December, 2015, the Plaintiffs are seeking for the following orders:

*a. That pending the hearing and determination of this suit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves as their servants or agents or otherwise however be restrained from unlawful digging trenches or placing water pipes or otherwise interfering with quiet and peaceful enjoyment of Plaintiffs' properties known as L.R. No. 1338/91, 1338/92 and 1338/93 respectively and in all other manner whatsoever to the detriment of the Plaintiffs indefeasible proprietary corpus of rights.*

*b. That pending the hearing and determination to this Application the 1<sup>st</sup> Respondent be compelled by mandatory injunction to remove the water pipes placed in the trench and backfill the trench to forestall Plaintiffs' properties known as L.R. No. 1338/91, 1338/92 and 1338/93 respectively to their natural state.*

*c. That the OCPD Athi River Police Station in conjunction with Mavoko Sub-County Administrator be directed to enforce the court order herein.*

*d. That this Honourable Court does give such consequential, further or other order(s) as it may deem fit and just in the circumstances.*

*e. That the cost of this Application be provided for.*

2. In her Affidavit in support of the Application, the 1<sup>st</sup> Plaintiff deponed that on 23<sup>rd</sup> October, 2015, the

1<sup>st</sup> Defendant's employees dug trenches in the Plaintiffs' parcels of land being L.R. No. 1338/93, 1338/92 and 1338/91 without the Plaintiffs' permission.

3. It is the 1<sup>st</sup> Plaintiff's deposition that trenches were dug by the 1<sup>st</sup> Defendant's agents on their land so as to connect its pipelines to the 2<sup>nd</sup> Defendant's land; that there is no public access road through the Plaintiffs' three parcels of land and that the digging of the trenches on the Plaintiffs' parcels of land is an act of trespass.

4. The 1<sup>st</sup> Plaintiff deponed that the 2<sup>nd</sup> Defendant misled the 1<sup>st</sup> Defendant by presenting to it a court order in ELC. Civil Case No. 113 of 2015; that the 2<sup>nd</sup> Defendant further misled the 1<sup>st</sup> Defendant by furnishing it with the wrong title document and that the water supply permit that was obtained by the 2<sup>nd</sup> Defendant was obtained fraudulently.

5. In response to the Application, the 1<sup>st</sup> Defendant's Managing Director deponed that the 1<sup>st</sup> Defendant is a water service provider; that under the Water Act, the mandate of water and sewerage services is the responsibility of the water service provider and that the suit land is within its jurisdiction.

6. The 1<sup>st</sup> Defendant's Managing Director deponed that the 1<sup>st</sup> Defendant received an Application to connect water services in Jam city estate; that while connecting its pipes, it acted on the representations made to it by the 2<sup>nd</sup> Defendant that his land abutts a public road known as 39 Quarry Road and that from the survey maps of the area, there exists a public road known as 39 Quarry Road.

7. According to the 1<sup>st</sup> Defendant, in ELC No. 113 of 2015, this court restrained the Plaintiffs from interfering with the enjoyment of a road known as 39 Quarry Road.

8. That 1<sup>st</sup> Defendant's Managing Director finally deponed that the current Application is praying for orders that are directly in contradiction with the orders that were issued in ELC No. 113 of 2015.

9. The 2<sup>nd</sup> Defendant deponed that his company owns L.R. No. 1338/114; that the said property is accessed via 39 Quarry Road which traverses the Plaintiffs' properties and that the Plaintiffs' properties are a sub-division of a larger parcel of land known as 1338/4 owned by the Plaintiffs' father.

10. According to the 2<sup>nd</sup> Defendant, when he bought his land, he found the 39 Quarry Road in use; that the road appears on survey plan F/R 169/21 and that when the Deed Plans for the Plaintiffs' land were processed, the Director of Surveys omitted to indicate on the Deed Plans the existence of road 39 Quarry Road.

11. Due to the refusal by the Plaintiffs to surrender their Deed Plans for rectification, the 2<sup>nd</sup> Defendant deponed that they filed Machakos ELC. No. 113 of 2015 seeking for the rectification of the Deed Plans; that the court ordered for the opening up of 39 Quarry Road and that that is when he applied to the 1<sup>st</sup> Defendant to be connected and supplied with water.

12. The 2<sup>nd</sup> Defendant finally deponed that other than the order of the court in ELC No. 113 of 2015, the National Land Commission ordered that the status of the road should be maintained pending the decision of the court and that the Plaintiffs' remedy lies in damages.

13. The Plaintiffs' and the Defendants' advocates filed written submissions which I have considered. I have also considered the authorities that were filed by the said advocates.

14. The Plaintiffs are seeking for the orders of this court restraining the Defendants from laying water pipes over parcels of land known as L.R. No. 1338/91, 1338/92 and 1338/93, which pipes are supposed to supply water to the 2<sup>nd</sup> Defendant's land.

15. The Plaintiffs have not denied the fact that the 2<sup>nd</sup> Defendant, with other residents in the area, sued them in Machakos ELC. No. 113 of 2015.

16. In the Plaint that was filed in ELC. No. 113 of 2015, the Plaintiffs averred that in the approved subdivision scheme of L.R. No. 1338/4/R, a road, otherwise known as 39 Quarry Road was provided for; that when the Director of Surveys issued Deed Plans in respect to the Defendants' parcels of land (*the Plaintiffs herein*), he did not indicate on the said Deed Plans the said access road and that the error of the Director of Surveys should be corrected.

17. During the pendency of the suit, the Plaintiffs in ELC. No. 113 of 2015 sought for an order to allow them to continue accessing their plot using the said road notwithstanding the fact that the Defendants' (*the Plaintiffs herein*) Deed Plans did not provide for a road through their land.

18. In his order of 9<sup>th</sup> April, 2015, Kariuki J allowed the Plaintiffs' prayer and restrained the Defendants (*the Plaintiffs herein*) from "*interfering with the reasonable enjoyment of the said way by the Plaintiffs and all other proprietors of the adjacent properties.*"

19. On the basis of that order, the 2<sup>nd</sup> Defendant applied to the 1<sup>st</sup> Defendant for the connection of water.

20. According to the Affidavit of the 1<sup>st</sup> Defendant they laid their water pipes along a public road as per the existing survey plans and on the basis of the order of the court in ELC. No. 113 of 2015.

21. The Plaintiffs' advocate submitted that the Plaintiffs' properties do not have a road passing through them; that the ex-parte orders that were issued in ELC No. 113 of 2015 were issued by a court without jurisdiction and that those orders are a nullity.

22. Although the Plaintiffs' advocate submitted that the Court of Appeal pronounced that the court which issued the orders in ELC No. 113 of 2015 had no jurisdiction, I have not been referred to such a pronouncement.

23. Indeed, having read the Court of Appeal decision in the case of ***Karisa Chengo & others vs. R (2015) eKLR***, I have not come across any pronouncement by the court declaring the decision of Kariuki J dated 9<sup>th</sup> April, 2015 as null and void.

24. If the Plaintiffs' argument is that the decision of the court allowing the Defendants to use 39 Quarry Road was null and void, then the appropriate thing that they should have done was to move either the court itself to make such an order or appealed against the order.

25. As long as that decision has not been set aside, varied or discharged, it remains a valid order of the court.

26. In the circumstances, and based on the order of Kariuki J in ELC No. 113 of 2015, the Defendants were entitled to lay the water pipes across the Plaintiffs' parcels of land, otherwise known as 39 Quarry Road.

27. In any event, if the Plaintiffs succeed in their claim in this suit or in ELC No. 113 of 2015, then the impugned water pipes will be removed without causing the Plaintiffs any irreparable damages.

28. For those reasons, I dismiss the Plaintiffs' Application dated 21<sup>st</sup> December, 2015 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**O.A. ANGOTE**

**JUDGE**