



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 113 OF 2015

THOMAS MUMO MAINGEY

(Suing on his own behalf and on behalf of the

Franciscans of Our Lady of Good Counsel

Sisters Registered Trustees, David Masika,

Evergreen Crops Limited, Waridi Farm Limited

Daniel Mutisya Ndonye and

VALLEY BROOK CAPITAL LIMITED.....PLAINTIFF

VERSUS

SARAH NYIVA HILLMAN.....1ST DEFENDANT

PAULINE KAMBUA MAINGEY2ND DEFENDANT

WILLIAM DAHER.....3RD DEFENDANT

DIRECTOR OF SURVEYS.....4TH DEFENDANT

RULING

Introduction:

1. This Ruling is in respect of two Applications: the Plaintiff's Application dated 9th April, 2015 and the Defendants' Application dated 19th June, 2016.
2. In the Application dated 9th April, 2015, the Plaintiff is seeking for the following orders:

a. That pending the hearing and determination of this suit, the 1st to 3rd Defendants by themselves or their servants or agents or otherwise howsoever be restrained from placing or allowing to be placed on the road commonly known as 39 Quarry Road anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the said way of the Plaintiff and all other proprietors of the adjacent properties, their servants, employees, agents and licensees on foot, motor vehicles and other conveyances at all times and for all purposes and

from doing any act whereby the Plaintiff and all other proprietors of the adjacent properties may be hindered or obstructed in the free use of their properties.

b. That this Honourable Court does give such consequential, further or other orders (s) as it may deem just.

c. That the costs of this Application be provided for.

3. In the Application dated 19th June, 2016, the Defendants are seeking for the following reliefs:

a. The Complaint dated 9th April, 2015 be struck out.

b. Consequently, the Honourable Court be pleased to set aside, discharge and vacate the interim orders of injunction issued herein pursuant to the Respondent's Application dated 9th April, 2015 for non-disclosure and misrepresentation of material facts.

c. The Respondent and its servants and/or agents be permanently restrained by an order of this Honourable Court from interfering with the private road "39 Quarry Road" and the suit properties known as L.R. Nos. 1338/91, 1338/92 and 1338/93, Athi River since their actions amount to trespass leading to wastage and irreparable damage of the suit properties.

d. The OCPD Athi River Police Station in conjunction with Mavoko Sub-County Administrator be directed to assist the Applicants to enforce the court orders herein.

e. The costs of this Application and of the main suit be borne by the Plaintiff/Respondent.

The Plaintiff's Application:

4. In support of the Application dated 9th April, 2015, the Plaintiff deponed that his late father, Paul Maingey, acquired a parcel of land known as L.R. No. 1338/4 in 1970 with a road already in existence and traversing across the said land; that since 1970's, the owners of the adjacent parcels of land had a right of way across the said property using the existing road and that the said road later came to be known as 39 Quarry Road.

5. After being appointed as the executor of the Will of his late father, the Plaintiff deponed that he caused L.R. No. 1338/4/R to be sub-divided into several plots; that L.R. Nos. 1338/93, 1338/92 and 1338/91 were transferred to the 3rd Defendant, the 2nd Defendant and himself respectively and that 39 Quarry Road was shown in the sub-division plan with a continuous broken line and denoted as a road.

6. It is the Plaintiff's case that the then Mavoko County Council approved the proposed sub-division of L.R. No. 1338/4/R without any amendments but when the 4th Defendant issued to the 1st to 3rd Defendants Deed Plans for their respective portions of land, he did not indicate the said road of access.

7. The Plaintiff deponed that as a beneficiary of the sub-division of the original land, he enjoyed the right of way through the public road which ran across the 1st to the 3rd Defendant's property.

8. According to the Plaintiff, the road that he surrendered to the Machakos County Government measuring 15 metres is a continuation of the road that cuts across the Defendants' land and continues all the way to the adjacent property known as L.R. No. 14750/5 belonging to David Masika; that the said David Masika had also surrendered a road measuring 15 meters and that the errors in the 1st to the 3rd Defendant's Deed Plans should be corrected by the 4th Defendant.

9. It is the Plaintiff's case that all persons who acquired the plots that were sub-divided from L.R. No. 1338/90 have always and openly enjoyed access to their properties through 39 Quarry Road and that public resources were used by the former Mavoko Municipal Council to maintain the said road.

10. The Plaintiff finally deponed that in September, 2012, the 1st Defendant purported to close the impugned road and that the then Mavoko Sub-County wrongfully permitted the 1st Defendant to erect a barrier on the road.

11. If the road is closed, the Plaintiff deponed, it will negatively impact on the social cultural environment of Mavoko Sub-County and will restrict access to the hinterland because the road is one of the link roads to Kangundo Road from Nairobi-Mombasa Highway through Kamulu.

12. In response, the 1st Defendant deponed that she was swearing the Replying Affidavit on her own behalf and as the Attorney of the 2nd and 3rd Defendants and that when their father acquired the original land being land reference number 1338/4 in 1970, there was no public road traversing across the land.

13. According to the 1st Defendant, their father's Will never allowed the creation of a public road on the suit land and that at no time did the Applicant or other Executors of the Will of his father consult or raise the issue of creating a public road traversing through private properties.

14. It is the Defendants' case that the Plaintiff caused a sub-division of his own land known as L.R. No. 1338/90 and that his parcel of land has an access road from the "20 meters" stretch serving his interests and others; that the survey maps do not indicate the so called continuation of the alleged "39 Quarry Road" and that all the beneficiaries of the properties known as L.R. No. 1338/91-93 are well served with a common 20 meters public access situated along the North-Western Boundaries as per Survey Plan No. 371.

15. The 1st Defendant has deponed that the Director of Surveys confirmed vide his letter dated 18th March, 2015 that there is no public road passing through the three plots.

16. The 1st Defendant deponed that there were no errors at all in the issuance of the Deed Plans; that their neighbours have no right of way through their private properties; that a right of necessity does not obtain where the land locked parties have an alternative access road and that there is no surveyed road passing through the suit land.

17. In the Supplementary Affidavit, the Plaintiff deponed that when their father purchased L.R. No. 1338 and 1337 in 1970, there was a road which was used by the family and the neighbours; that the access on the North-Western Boundary was created by his sub-division in 2006 to provide additional access to five properties that were created from the Estate and that upon sub-division of his parcel of land (*L.R. No. 1338/90*), he duly surrendered the public access road being 39 Quarry Road.

The Defendants' Application:

18. The Defendants' Application dated 19th June, 2016 is premised on the grounds that the Defendants are the registered proprietors of L.R Nos. 1338/91, 92 and 93; that 39 Quarry Road is a private road; that the ex-parte injunctive orders were obtained through non-disclosure of material facts and that by way of a letter dated 5th May, 2016, the National Land Commission confirmed that there is no public road passing through the suit land.

19. In response to the Defendants' Application, the Plaintiff reiterated the contents of his earlier Affidavits by deponing that his father acquired L.R. No. 1338/4 in 1970 with a public road already traversing the said property; that the said Road appears on Survey Plan No. F/R 169/21 of 1983 and that upon the death of their father, they provided for the road in the sub-division plans.

20. According to the Plaintiff, the decision by the National Land Commission vide its letter dated 5th May, 2016 was done in an opaque manner, without basis and in error and that the Commission vide its letter dated 30th June, 2016 has withdrawn and revoked its earlier decision.

21. The 1st Defendant filed a Further Affidavit in which it annexed another letter dated 16th August, 2016 by the National Land Commission re-confirming that there is no public road on the suit property.

22. The Plaintiff's and the Defendants' advocates filed their respective submissions and authorities which I have considered.

Analysis and findings:

23. It is not in dispute that the late Paul Maingey, who is the father of the Plaintiff and the 1st Defendant, was the registered proprietor of a piece of land known as L.R. No. 1338/4 having acquired it in 1970.

24. According to the Plaintiff, by the time his father acquired the said parcel of land, there existed a public road which traversed across the said property, which came to be known as 39 Quarry Road.

25. It is the Plaintiff's cases that the owners of the properties adjacent to his late father's land used to access their respective properties from Nairobi-Mombasa Road using 39 Quarry Road.

26. The 1st to the 3rd Defendants have refuted this claim.

27. The evidence before me shows that Land Reference number 1338 measuring approximately 1,014.0 acres was registered in favour of Paul Maingey on 7th September, 1971.

28. After the acquisition of the land, the entries on the copy of the title shows that several people acquired interests in the said land on diverse dates.

29. Some of the people who acquired interests in the said land were: Galot Industries Limited (128.7Ha), Joseph Kamuya Maitha and Ndunge Maitha as joint tenants (48.56Ha), Sarah Samuel (8.117Ha), James Musyoki and William Mudachi (8.531Ha), George Ngure Kariuki & others (8.147Ha), Ruaraka Sabuni Development Co. Ltd (8.159Ha), Amirali (2.283Ha), Ashin Hussein & others (2.384 Ha), amongst many other people.

30. The copy of the certificate of title shows that when Paul Maingey died, a Grant of Probate was registered in the name of the Plaintiff, Mumo Maingey and Andrew Kitili Maingey. The grant of Probate was registered on 8th September, 2009.

31. By the time the said grant was registered, the suit land had been sub-divided into more than 30 portions.

32. Although the copy of the Deed Plan in respect of L.R. No. 1388 does not show the existence of any road running across it, the proposed sub-division of L.R. No. 1338/4/R shows the proposed roads that were to be created on the land that was to be distributed to the beneficiaries of the Estate of the late Mr. Maingey.

33. The proposed sub-division plan that has been exhibited by the Plaintiff shows the manner in which the remainder of the land was to be sub-divided and the portion of the parcels of land that had been sub-divided and transferred to third parties by the late Mr. Maingey.

34. Indeed, the proposed sub-division of L.R. No. 1338/4/R (*meaning the remainder of L.R. No. 1338*) shows some of the sub-divisions that had been done and approved by Mr. Maingey which ran up to L.R. No. 1338/30, and whose lines are not dotted but continuous.

35. The proposed plots that were to be sub-divided and distributed by the Executors of the Will of the late Mr. Maingey, including the roads that were to be created, are indicated by dotted lines.

36. In the proposed sub-division plan that was presented to the Commissioner of Lands for approval by

the executors of the Will of the Late Mr. Maingey, the said executors proposed to create what is now known as 39 Quarry Road, which was supposed to run through L.R. No. 1338/91, 1338/92, 1338/93 and 1338/94 so as to connect a road which had been created by the Late Mr. Maingey in the earlier sub-divisions.

37. I say the impugned road seem to have been created by the Executors of the Will because of the dotted lines, meaning that it was still a proposal, unlike the roads which had been created by the late Mr. Maingey which are donated by straight lines.

38. Although the Plaintiff had proposed the creation of a public access road to go through the four parcels of land, the survey plan that was approved by the Director of Surveys on 21st July, 2006 vide F/R No. 337/63 shows that the proposal was not accepted by the Director of Surveys. The Director of Surveys went ahead to issue Deed Plans in respect to L.R. No. 1338/91, 92, 93 and 94 without the road that had been proposed in the sub-division plan.

39. This position was confirmed by the Director of Surveys in the letter dated 18th March, 2015 in which he stated as follows:

“Records available indicate that there is no surveyed road passing through the three plots. They are accessed from a common road along their Northern-Western boundaries, which can be confirmed from Survey Map No. 371.”

40. In the letter dated 5th November, 2015, the Machakos County Surveyor agreed with the position taken by the Director of Surveys that there is no through road over L.R. Nos. 1338/91-93.

41. The above position was confirmed by the National Land Commission officials when they visited the land in issue. In the letter dated 5th May, 2016, the National Land Commission stated as follows:

“However, this road is neither surveyed nor documented as an easement as per survey map F/R No. 371.... We further note that there is a 30m wide public road running along the North-Western boundary giving accessing to the neighbouring parcels of land.”

42. Having gone through the copy of the initial Deed Plan for L.R. No. 1388, it would appear that the late Mr. Maingey used to create roads of access as and when he sub-divided the bigger piece of land. However, there is no evidence to show that before the said sub-divisions, there was a public road traversing the whole land.

43. If indeed there was a road traversing the larger parcel of land, then the same had not been surveyed and was therefore a private road.

44. If that is the case, then the Plaintiff could only have surrendered the road traversing the suit properties with the consent of the 1st to the 3rd Defendants and not otherwise.

45. Considering that Survey Plan No. 337/63 shows that none of the proprietors of the neighbouring parcels of land is landlocked, and in the absence of evidence to show that L.R. No. 1388 had a public road traversing it before it was acquired by Mr. Maingey in 1971, I find and hold that the Plaintiff has not shown that he has a *prima facie* case with chances of success.

46. In the circumstances, I shall, which I hereby do, dismiss the Plaintiff’s Application dated 9th April, 2015 and allow the Defendants’ Application dated 19th June, 2016 in the following terms:

a) The Plaintiff and his servants be restrained from interfering or using the road known as “39 Quarry Road” pending the hearing and determination of the suit.

b) The OCPD Athi River Police Station to enforce the order of this court.

c) The Plaintiff to pay for the costs of the Application.

d) The suit to be set down for pre-trial directions and hearing.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF JULY, 2017.

O.A. ANGOTE

JUDGE