



**REPUBLIC OF KENYA**

**LAND AND ENVIRONMENT DIVISION**

**AT MALINDI**

**ELC NO. 54 OF 2017**

**ABDALLA MOHAMED ABDISHEIKH.....APPLICANT**

**VERSUS**

**KISHAN CONSTRUCTION LTD.....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 13<sup>th</sup> March 2017. The Plaintiff Abdalla Mohamed Abdisheikh is praying for an Order: -

**1. THAT pending the hearing and determination of this suit, this Court be pleased to issue a temporary injunction restraining the Defendant from trespassing upon or entering or remaining or otherwise in any other manner putting up a road on the Plaintiff's parcel of land known as Ngomeni Squatter Settlement Scheme/1859. In addition, the Plaintiff is seeking that the injunctions orders issued be effected or enforced by the OCS, Marereni Police Station.**

2. The application is premised on the fact that the Plaintiff is the absolute proprietor of the subject parcel of land which is situated in a Settlement Scheme with prescribed or proposed roads. The Plaintiff contends that instead of using the said prescribed roads, the Defendant Kishan Construction Ltd has without his authority created a 9 metre access road through his parcel of land for accessing the Defendant's parcel of land which is No. 2099 for purposes of carrying out a construction thereon. It is the Plaintiff's case that the said encroachment and trespass is a deliberate more on the part of the Defendant to take over part of the Plaintiff's property and the Plaintiff is therefore bound to suffer irreparable damage.

3. In a Replying Affidavit sworn by one of its directors-Ranji Kalyan Patel on 10<sup>th</sup> April 2017, the Defendants deny trespassing onto the Plaintiff's land without his authority. It is the Defendant's case that the Plaintiff/Applicant did in fact verbally grant his authority to the Defendant to make an access road through his plot in order for the Defendant to have access to its Plot No. 2099 aforesaid.

4. I have considered the application and the affidavit in reply. It is not disputed that the Plaintiff is the registered owner of all that parcel of land known as Ngomeni Squatter Settlement Scheme/1859 measuring approximately 2.78 Hectares. The construction of an access road by the Defendant in the said parcel of land and the fact that the Defendant uses the road to access its parcel No. 2099 is equally admitted at Paragraphs 4 and 5 of the Defendant's Replying Affidavit.

5. The defendant however justifies its use of the road on the basis of an alleged verbal permission or authority granted by the Plaintiff. On his part, the Plaintiff plainly denies having granted such permission or authority.

6. From a reading of various correspondences annexed to the Plaintiff's Supporting Affidavit, it is clear to me that the parties were engaged in some sort of communication prior to the institution of this suit and it is possible that the Plaintiff had initially allowed some restricted use of the subject land by the Defendant to access its own Parcel. From a number of photographs annexed to the Plaintiff's affidavit, the existence

of the road and construction work going on in Parcel No. 2099 aforesaid is quite apparent.

7. In my considered view, even if the Plaintiff had initially allowed the Defendant to use his parcel of land for access, the Defendant cannot continue using the same once the Plaintiff withdraws such permission. I note that the Defendant does not state anywhere that it will henceforth stop using the Plaintiff's land. Thus given the apparent sense of entitlement demonstrated by the Defendant, I think the Plaintiff is entitled to an order to preserve the subject parcel of land.

8. Accordingly, I allow the Plaintiff's application in terms of Prayer No. 3 thereof. The Defendant shall pay the costs of this application.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of September, 2017.**

**J.O. OLOLA**

**JUDGE**