

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT KAKAMEGA

LAND CASE NO. 284 OF 2017

PATRICK CHIMELI MAINA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JULIUS MWALE ::::::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

The defendant raised a preliminary objection to the Notice of Motion dated 31st July, 2017 and listed for hearing on 3rd October, 2017 on the following grounds; the court lacks jurisdiction to give orders against a party who is not enjoined in the proceedings in the first instance. The entire suit is premature and an abuse of the process of the court. The affidavit in support of the Notice of Motion is bare and insufficient to establish a cause of action. A document "PCMI" is not annexed in the application and these being the primary document sought to establish the plaintiff's case the court has not been availed the benefit of the plaintiff's case in its entirety and cannot therefore arrive at a just decision. The defendant is listed as a witness to the plaintiff. The chief, Marama location, whose statement has been annexed is not named and besides the actual chief Marama has denied the statement and on plain sighting of the alleged signature of the chief on the foot of the statement, it resembles the signature of the plaintiff that appears in his witness statement, the plaint, the affidavit and the Notice of Motion raising the possibility that the signature is a forgery.

The respondent responded that he could not enjoin the Land Registrar and Surveyor in this case as they are custodians of all records concerning Land matters. They could not be enjoined as they are the ones to tell them whether the constructed road that was closed was legally on the map. The constructed road has raised a lot of questions even with the County Government of Kakamega as seen in the attached Public Notice gazetted on the 14th July, 2017 stating that all the construction is illegal and should be stopped immediately annexed is a copy of the Public Notice marked PCM 1. The court should dismiss the objection and grant the orders as sought.

This court has carefully considered the preliminary objection. The dispute seems to be one related to an access road and the applicant has annexed a document showing ownership of his parcel of land. The authenticity of any documents attached or otherwise can only be determined once this court hears the application. I find that failing to join the Land Registrar and Surveyor is not fatal to his application. I find that the preliminary objection has no merit and I overrule and/or dismiss the same.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF NOVEMBER 2017.

N. A. MATHEKA

JUDGE