



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 308 OF 2014**

**FESTUS KIAI & 26 OTHERS.....PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**HUSSEIN HASSAN NGOTHO**

**COUNTY GOVERNMENT OF MOMBASA.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The application before Court is dated 3<sup>rd</sup> December 2014 seeking for orders that:

**(i) Spent**

**(ii) Spent**

**(iii) That a temporary injunction be issued restraining the 1<sup>st</sup> Defendant/Respondent, his agents, servants, workmen and or any other person whomsoever, and whatsoever from constructing, sealing disposing off, charging or in any manner interfering with the plaintiff/Applicants' suit land traversing plot Numbers MN/II/172 and MN/II/173 and access road pending the hearing and determination of this suit.**

**(iv) That this Honourable Court do issue an order directing the 2<sup>nd</sup> Defendant/Respondent to cancel the approved building plan issued to the 1<sup>st</sup> Defendant/Respondent to constructing a building on a road reserve traversing on plot Number MN/II/172 and MN/II/173 and demolition of the structures erected thereon.**

**(v) Costs of this Application be provided for.**

2. The motion is supported by the grounds on the face of it inter alia that the applicants have been using an access road at MN/11/17 along the same area which is adjacent to plot No MN/II/173 for a long time. That the 1<sup>st</sup> Respondent has been constructing a building on this road reserve with the knowledge and approval of the 2<sup>nd</sup> Respondent thus denying the Applicants access to their houses which are adjacent to this road. The Applicants raised complaints with the 2<sup>nd</sup> Respondent but did not receive any assistance hence this suit.

3. The application is opposed by both Respondents. The 1<sup>st</sup> Respondent deposed that he is the legal

owner of the house without land (Swahili house) built on excised portion of plot 172. He deposed that he obtained the requisite approvals for his building. Further that plot No 172 has not been sub divided therefore there can be no road reserve as alleged by the applicants. He annexed a copy of the notification of approval given by the 2<sup>nd</sup> Respondent and a survey report of the plot. The surveyor stated that there is no official surveyed road because the plot has not been subdivided. He said the existing 4 meter lane can be adopted as a road of access. The 1<sup>st</sup> Respondent also deposed that the Applicants lack locus to bring this suit.

4. The Applicants swore a further affidavit in response to the replying affidavit of the 1<sup>st</sup> Respondent. Mr Matata deposed that the house constructed differs from the design that was approved and that it reduced the road of access to 3.6 meters instead of minimum 8 meters. Mr Matata also said the survey maps available show a road access through plot No MN/II/172. He annexed a copy of the map as **MK4**.

5. The parties filed written submissions which I have read and considered. Both parties have analysed the principles to be considered for granting temporary orders of injunction and I need not repeat them here as it is known to all and sundry. The question for me to determine is whether the Applicants have met the threshold. It is not in dispute that the 1<sup>st</sup> defendant is building on the land parcel No 172 under the house without land principle. The only dispute is whether there exists an access road that was being used by the applicants and which has been blocked thus causing them inconvenience.

6. The 1<sup>st</sup> defendant submitted that no road/access exists on the plot 172 because the same has not been subdivided corroborated by the part of the report of the surveyor. However I find this report conflicting itself because the sketch map annexed gives an indication of an existing road that appears to be on plot 172/II/MN. Page 2 of the report, Mr E.M J Kiguru states thus **“The plot number MN/II/172 has been sub-divided so there is no official surveyed road hence the existing 4 meter lane can be adopted as a road of access.”**

7. The applicants on their part annexed a portion of R.I.M map to the supplementary affidavit which shows a road passing through plot No 172 by virtue of the braces on this map (though the map is not very clear). It would therefore require evidence from the lands office to confirm whether the existing road is an official road passing the plot or not. The argument that there cannot be a road of access passing through the plot because there has been no subdivision is not a rule since this Court is alive to the fact that it is not strange or illegal for an official road to pass through a plot.

8. Therefore on the basis that it is shown and admitted there exist a road passing through this plot, the applicants have established a prima facie case with a probability of succeeding and at the same time proved that the balance of convenience tilts in the road remaining as it is pending the hearing and determination of the suit and or carrying out an official survey exercise to determine whether the road is in their records or not.

9. The 1<sup>st</sup> Respondent raised the issue of jurisdiction of this Court to determine this matter and quoted the provisions of the Physical Planning Act. First the liaison committee cannot grant an order of injunction hence the Applicants had all the rights to come for this remedy. Secondly before filing this case, they filed a complaint with the 2<sup>nd</sup> defendant in order to exhaust the available remedy but the 2<sup>nd</sup> defendant did not resolve the dispute to the applicants' satisfaction. Lastly the core issue in dispute is about road of access that does not fall under the jurisdiction of the Physical Planning Act. Therefore I find that the objection on jurisdiction is without any merit and I hereby disallow it.

10. Can the orders sought be granted? The plaintiffs were granted prayer 2 of the motion on 15.12.2014. The annexures **MK5 a – 5 c** in the applicants' supplementary affidavit of 15.4.2015 shows a complete building. The application therefore is allowed in terms of prayer 3 with a rider that if the house is on the road, the same shall not be demolished as the order of temporary injunction cannot be translated to an order of mandatory injunction. The same shall be treated to have been overtaken by events and the matter should therefore await determination of the suit on merits. Costs of the application awarded to the applicant.

**Dated, signed & delivered at Mombasa this 3<sup>rd</sup> November 2017.**

**A. OMOLLO**

**JDUGE**