



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO. 235 OF 2012**

**JOHN NGUGI GACHAU .....PLAINTIFF.**

**VERSUS**

**ALEXANDER NGOTHO NGUNYI .....1<sup>ST</sup> DEFENDANT**

**MARY WANJIKU NDUNGU.....2<sup>ND</sup> DEFENDANT**

**DANIEL MUCHEMI NGUNYI .....3<sup>RD</sup> DEFENDANT**

**ELIJAH NGUNYI WAGOI.....4<sup>TH</sup> DEFENDANT**

**AND**

**P.C MURAGE WANJOHI .....1<sup>ST</sup> RESPONDENT**

**P.C NJUGUNA.....2<sup>ND</sup> RESPONDENT**

**P.C MAINA .....3<sup>RD</sup> RESPONDENT**

**DISTRICT OFFICER, ALI MANDUK.....4<sup>TH</sup> RESPONDENT**

**RULING**

***(Application for contempt; allegation that respondent has closed a road of access despite an injunction issued in a judgment of the court; judgment deferred the issue of existence of road to the Land Registrar; injunction issued pending determination by the Land Registrar; Land Registrar having made a determination; cannot therefore be argued that the injunction continued to persist; injunction was only until the decision of the Land Registrar and the same has been rendered; no persuasion for a further order of injunction; application dismissed with costs)***

1. The application before me is that dated 18 December 2015 filed by the defendants. The application has been filed under the provisions of Section 1A, 3A, and 63(e) of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 9 Rules 9 and 10, Order 40 Rule 3(1), and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law. It is seeking the following orders :-

1. Spent

2. Spent

3. Pending inter partes hearing and determination of this application, an order do issue compelling the plaintiff, his agents and/or servants to restore the footpath in question and its usual facilities including the bridge over Gathuru River to the state that it was at the time of delivery of the judgment of the court.

4. Upon grant of prayer 3 and pending inter partes hearing and determination of this application and conclusion of the suit herein, a temporary injunction do issue restraining the plaintiff, his employees, agents and/or servants from interfering with the footpath in question and its usual facilities.

5. A declaration that the plaintiff and the 1<sup>st</sup> to 4<sup>th</sup> respondents (both inclusive) are in contempt of orders of this court existing as at 30 January 2015 and that the plaintiff does not have audience before the court.

6. The court do cite the plaintiff and the 1<sup>st</sup> to 4<sup>th</sup> respondents (both inclusive) for contempt aforesaid and determine the appropriate legal sanctions and/or consequences to be suffered by the plaintiff and the 1<sup>st</sup> -4<sup>th</sup> respondents for contempt of court.

7. The costs of the application be borne by the plaintiff.

8. Any other or further relief(s) as this Honourable Court may deem proper to grant.

2. The application is based on various grounds and is supported by the affidavit of one Alexander Ngotho Ngunyi. The same is opposed by the plaintiff.

3. Before I go to the gist of these, I think it is necessary that I set out some background leading to this application.

4. This suit was commenced by way of plaint on 31 August 2012. The plaintiff sued four persons in the suit. It was his case that he is the registered owner of the land parcels Nyandarua/Wanjohi/1274 (land parcel No. 1274) and Nyandarua/Wanjohi/1026 (land parcel No. 1026). He pleaded that he purchased the land parcel No.1274 from the father of the 1<sup>st</sup> and 3<sup>rd</sup> defendants one Ngunyi Rorwa Nyamu (now deceased) sometimes in the year 1985. It was pleaded that at the time of purchase, the land parcel No. 1274 was marshy, water logged and unmotorable. Due to difficulties to access this land, he was compelled to purchase the neighbouring land parcel No. 1026 from another person, one Githinji Thuo in October 1995. After purchasing this second land, he pleaded that he developed an access road at his own cost without any contribution from the defendants or any of the neighbours. Sometimes in the year 1996, it was pleaded that the family of the late Ngunyi Rorwa subdivided their father's land and created an access road in the middle of their farm with the sole intention of linking it with the plaintiff's access road. The plaintiff stated that on humanitarian grounds he accepted the request to link the two roads on condition that the road will only be used by the immediate family members of Mr. Ngunyi Rorwa and he (the plaintiff) be compensated for the same. The plaintiff pleaded that the defendants refused to compensate him and resorted to using the access road in the plaintiff's land and also opened it to the public which action resorted to destruction of the plaintiff's crops. In the suit, the plaintiff averred that the access road is not a public road but a private road owned by the plaintiff and is part of the land parcel No. 1026. He contended that the defendants have no colour of right over the land parcels No. 1026 and 1074.

5. In the suit, the plaintiff sought the following orders :-

(a) A declaration that the defendants' use of the access road that runs through land parcels No. 1074 and 1026 is illegal and amounts to trespass.

(b) A permanent injunction restraining the defendants by themselves, their agents, family

members or any other person from trespassing upon the land parcels No. 1074 and 1026.

(c) A permanent injunction restraining the defendants, the Clerk to the Council Nyandarua County Council from destroying the gate erected on parcel No. 1026.

(d) General damages.

(e) Costs of the suit.

6. The defendants filed defence and counterclaim through the law firm of M/s Ndungu Njuguna & Company Advocates. They pleaded inter alia that at the time the land parcel No. 1074 was purchased, there existed an access road since the 1950s and it was used by members of the public and the family of Mr. Ngunyi Rorwa (deceased). It was averred that the plaintiff was aware of this and the same was excluded from the purchase of the land parcel No. 1074 as the deceased did not intend to sell this portion and the plaintiff did not intend to purchase it. It was averred that the said land parcel No. 1074 was accessed by two roads one from the defendants' side and the other from the side of Githinji Thuo and that that was the position prior to the purchase. They denied creating another access road or requesting the plaintiff to allow them to use the access road as it was never private property. They pleaded that the plaintiff has no right to stop them or members of the public from using the access road. In the counterclaim, they asked for the following :-

(i) A declaration that the land comprising of the subject access road measuring about 6 metres that traverses through the plaintiff's land parcel No. 1274 was not sold to him by the late Ngunyi Rorwa.

(ii) A declaration that in the circumstances, the plaintiff herein does not have any legal rights over the said access road and or he holds the same in trust for the defendants herein, owners of the adjoining parcels land and or members of the public who uses that access road as of necessity or otherwise.

(iii) Further and or in the alternative to prayer (i) and (ii) above, a declaration that the access road measuring about 6 metres wide that traverses through the plaintiff's land parcel No. 1274 and/or 1026 is an overriding interest, right of way and or any other limitation/restriction as against the plaintiff's title to the said parcels of land jointly and or severally in favour of the defendants herein, owners of the adjoining parcels of land and or members of the public who use that access road as of necessity and/or otherwise.

(iv) An order of severance and or demarcation of the said access road from the above named plaintiff's parcel of land jointly and or severally and or registration of the same separately and or otherwise as a public road, right of way, an overriding interest and or in any other manner that this Honourable Court might deem fit in the circumstances of this case over the plaintiff's title No. 1274 and 1026.

(v) Any other remedy, order and or directions that this Honourable Court may deem fit to grant in the circumstances of this case.

(vi) Costs of the suit and the counterclaim.

7. The suit was heard and determined by my predecessor Honourable Justice L.N Waithaka who delivered a judgment on 30 January 2015. Inter alia, the learned Judge held that the defendants had not proved that an easement had been created over the plaintiff's land and had failed to prove on a balance of probabilities that there exists any overriding interest in relation to the access road in dispute. She also held that the maps do not indicate any road but she did not rule out the existence of an access road on the ground. The following bit of the judgment, appearing at the end of it is significant, and it is prudent that I lay it down in full as written. They are paragraphs 70, 71 and 72 of the judgment and they are as follows :

70. Despite my finding that the evidence on record is insufficient to prove existence of an easement in favour of the defendant on the plaintiff's parcels of land, I find as a fact that there exists a footpath measuring 4 feet wide which the defendants use, having obtained permission from the plaintiff to do so. The use of the said footpath by the defendants cannot be said to be unlawful or trespass to land. Consequently, I find the use of the said footpath, which the plaintiff puts at 4 feet wide to be incapable of constituting trespass to the plaintiff's land. I therefore decline to grant an injunction to restrain the defendants and/or members of the public from using the said 4 feet footpath until the dispute concerning the existence of the alleged access road is heard and determined by the Land Registrar in accordance with Sections 18 and 19 of the Land Registration Act, 2012.

71. By this judgment, the Land Registrar for the area in question is directed to visit the area in dispute for purposes of determining whether an access road exists on the ground, and if it does, for fixing its boundaries. The Land Registrar is further directed to file a report in court, concerning those issues, within 90 days from the date hereof.

72. Parties to bear their own costs of the suit.

8. Following the above judgment, the Land Registrar together with the District Surveyor, did visit the land in dispute and filed a report dated 18 September 2015. Part of the report reads as follows :-

*"The plaintiff John Ngigi Gachau is the registered owner of parcel No. Nyandarua/Wanjohi 1026 and 1274. Parcel No. 1074 is developed.*

*According to the Registry Index Map and the ground there is a road between parcel No. 1025 and 581. The said road ends at parcel No. 1026.*

*It is our finding that the existing 6ft footpath on parcel no. 1274 does not amount to an access road because f (sic) (probably meant "of") the following reasons :*

*(i) Registry Index Map does not show that there is an access road going through parcel No. 1274.*

*(ii) The said footpath has been shifting from time to time, thus, its boundaries could not be fixed nor be well ascertained.*

*(iii) There is no official document (development plan) showing the existence of the said access road.*

9. This report was presented to me on 21 September 2015. I considered the same, and directed parties to move the court appropriately depending on their instructions, since to me, the matter was finalized as there is a judgment on record. The plaintiff did on 16 October 2015 file an application for review of the judgement but before it could be heard, and shortly thereafter, the defendants filed this application for contempt. I directed that the latter application be heard first.

10. In the grounds in support and in the supporting affidavit, the applicants have argued that the Land Registrar's report has not yet been adopted or disapproved by the court and status quo persists. It is averred that in spite of the existence of lawful orders of the court maintaining the status quo, on 8 December 2015, the plaintiff, under the armed escort of the 1<sup>st</sup> – 4<sup>th</sup> respondent police officers, destroyed a communal bridge over Gathuru seasonal river forming part of the footpath and took away the resulting debris thereby completely blocking the defendants and other members of the public from conveniently accessing the Wanjohi Shopping Centre. It is averred that on 9 December 2015, the plaintiff blocked the entry and exit by erecting a barbed wire fence. It is the view of the applicants that the actions of the plaintiff are illegal, irregular and in contempt of court.

11. The plaintiff in his replying affidavit, has averred that it is clear from the Land Registrar's report that there has never been in existence an access road through the plaintiff's parcels of land. He has deposed

that upon adoption of the Land Registrar's report, he felt the decision of the defendants to continue using the footpath to be unlawful and amounted to trespass. He however denied destroying a communal bridge over Gathuru river as alleged. He deposed that it will be highly prejudicial to him if the defendants are allowed to continue using the non-existent footpath and that this court ought not to create one where none has ever existed. He deposed that he had to close the access road in the wake of wanton destruction of his crops by the defendants and members of the public.

12. I took in the submissions of both Mr. Kihiko (who took over the matter from M/s Ndungú Njuguna & Company Advocates after judgment) for the applicants and Mr. Kairu for the respondent. I have considered these submissions. In a nutshell, it is the view of the applicants that in proceeding to close the road of access, the plaintiff is in contempt of the judgment, particularly paragraph 70 thereof. It is further the view of the applicant that the plaintiff is proceeding to execute a non-existent decree. On his part, the plaintiff is of opinion that the Land Registrar has already determined that there does not exist a road of access and he has every justification in closing it.

13. Before I proceed any further, may I point out that the application was abandoned in so far as it relates to the four police officers, and the only respondent standing is the plaintiff.

14. I have considered the matter. The application before me is for contempt. The applicants believe that by closing the access road, the plaintiff is in contempt of the judgment delivered on 30 January 2015. It behoves upon this court to determine the import of the said judgment. I had earlier in this ruling reproduced the whole of paragraph 70, 71 and 72 of the judgment. It was argued by the applicants that the court declined to grant the injunction sought and I think it is necessary that I highlight that bit of paragraph 70 of the said judgment. It is as follows :-

*“I therefore decline to grant an injunction to restrain the defendants and/or members of the public from using the said 4 feet footpath **until the dispute concerning the existence of the alleged access road is heard and determined by the Land Registrar** (emphasis mine) in accordance with Sections 18 and 19 of the Land Registration Act, 2012.”*

The trial judge, in my view (at least at this stage of the proceedings) deferred the question of determining whether or not there is a road of access to the Land Registrar and did not make a conclusive finding on it.

15. I do not find myself in an easy position as I have to interpret a judgment which I myself did not write. The best I can do is to give the words of the learned Honourable Judge their plain and natural meaning. My opinion of the above bit of the judgment at paragraph 70 is that the injunction was declined until the dispute was determined by the Land Registrar. That is the plain text reading of the said bit of the judgment. The injunction was not to persist until the decision of the Land Registrar is *adopted* by court and a decree issued but until the *determination* by the Land Registrar.

16. There is already a determination by the Land Registrar, that which is contained in the report dated 18 September 2015. Once there was a determination, then it cannot be argued that the injunction continued to persist. True, no formal decree has been extracted, but I do not deem the act of the plaintiff as an act in execution of any decree. The plaintiff in my view is following the judgment which held that he is restrained until the determination by the Land Registrar. It is not alleged that he closed the road *before* the determination by the Land Registrar, and the injunction did not, in my view, extend to the period *after* the determination by the Land Registrar; it was only to persist, pending the said determination. As I said earlier, that is the plain and natural reading of the words in the said judgment.

17. Following the above, I find it difficult to hold that the plaintiff has been in contempt of the judgment of the court. In the same vein, I am unable to ask the plaintiff to restore the footpath in question and neither am I persuaded that it would be proper to issue another injunction to restrain him, any further than was ordered by the learned Honourable Judge in her judgment. I have already explained above, but I will emphasize for the avoidance of any doubt, that the injunction issued in the judgment, was to last only until the determination by the Land Registrar which has already been done.

18. I therefore find no merit in this application and it is hereby dismissed with costs.

19. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of March, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

Mr. Kibe Mungai holding brief for Mr. Kihiko for the defendants/applicants.

Ms. Nancy Njoroge for the plaintiff/respondent.

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**