



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 96 OF 2016

**JEREMIAH CHELANGA (suing as the Guardian Ad Litem of
JOHN CHELANGA CHEPKONGA.....PLAINTIFFT**

VERSUS

THE BOARD OF MANAGEMENT

KAMATONY PRIMARY SCHOOL.....1ST DEFENDANT

THE SUB COUNTY COMMISSIONER

TRANS-NZOIA EAST.....2ND DEFENDANT

THE CHIEF, SUWERWA LOCATION.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

1. The applicant Jeremiah Chelanga is the Guardian Ad Litem of John Chelanga Chepkonga who is the registered owner of **Trans-Nzoia/Suwerwa/152** (suitland). Kamatony Primary which is represented by its Board of Management is the first respondent. The school is established on **LR. No. Trans-Nzoia/Suwerwa/155**. On 30/6/2016 the school employed persons to cut down trees on the suitland with an intention of creating a road of access through the applicant's land. The school's actions were supervised by the second and third respondents prompting the applicant to come to court seeking to restrain the respondents from creating a road through the applicant's land.

2. The applicant contends that the first respondent with the assistance of the second and third respondents want to create a road of access through his father's land which road does not exist on the Registry Index Map. The applicant further contends that he had previously been summoned to the offices of the second respondent over the intended creation of a road across his father's land. He therefore contends that creation of this road across his father's land is illegal and should be stopped.

3. The applicant's application is opposed by the respondents through a replying affidavit sworn by **Flavia Okumu** the Assistant County Commissioner Cherangany Division. The respondents contend that Kamatony Primary School was informally started in the year 2010 but was officially opened on 15/8/2013 after it was registered. When the school started, the management committee of the school approached the

applicant's father who agreed to donate a 300 metres road connecting the school to a nearby public road. That the school has been using the access road since 2010 and even used it to ferry building materials to the school. That the applicant has since refused to let the school use the access road or receive any form of compensation. That the applicant closed the road in 2014 forcing pupils to pass through adjoining parcels.

4. I have gone through the application as well as the annexures thereto and the replying affidavit as well as grounds of opposition. This being an application for injunction the court must be satisfied that the principles for grant of temporary injunction have been met. One of the principles is that an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless the applicant might otherwise suffer loss which will not be compensated in damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. See *Giella -vs- Cessman Brown Co. Ltd [1973] E.A 358*.

5. In the instant case there is no contention that the applicant's father is the registered owner of the suitland. There is also no contention that the intended road does not exist on the map as required. The school is intent on creating a road through the plaintiff's land. The plaintiff has not consented to the creation of the road. The respondents are simply claiming that they can compensate the applicant later and that his application should fail.

6. If the school was properly set up on **LR. No. Trans-Nzoia Suwerwa/155** it ought to have been given a road of access. A school cannot be created and then authorities seek to create a road over ones land without his permission or compensation. There is an allegation that there was donation of a 300 metre road by the applicant's father. This has been denied by the applicant. The applicant contends that he was not party to the meeting. I have looked at the minutes marked "FA1". It is clear from the minutes that the school bought one acre from Paul Chepkirui. This is the person who should have provided an access road. The respondents cannot seek to force a road of access over someone's land.

7. There is a right of protection of property. One's land can be taken away through established legal machinery. If the school is claiming that it is landlocked, there are lawful ways of going about that. What the first respondent is seeking to do is illegal. The actions of the second and third respondents who are assisting the first respondent to carry out an illegal scheme cannot be protected and one cannot argue that an injunction cannot be issued in the circumstances.

8. The respondents argument that the applicant can be compensated in damages is untenable. A party cannot violate the rights of another simply because there can be compensation. The applicant has clearly demonstrated that he has a prima facie case with probability of success. I proceed to allow his application with the result that an injunction is hereby issued against the first, second and third respondents restraining them from creating a road of access on the suitland until hearing and determination of this suit. The respondents shall bear the costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this **28th** day of **July, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Litunya for Mr. Chebii for Applicant and Mr. Odongo for Respondents. Court Assistant - Isabellah.

E. OBAGA

JUDGE

28/7/2016