

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 102 OF 2013

DAVID KAYAJA WAFULA PLAINTIFF

VERSUS

JOSEPH KHALEA LUSINDALO DEFENDANT

RULING

1. The defendant/Applicant filed a notice of motion dated 28/3/2014 in which he seeks an injunction restraining the Plaintiff/Respondent either by himself or through his agents, servants, employees, assigns, representatives or any person claiming through him from encroaching, trespassing, entering, or interfering in any manner whatsoever with the defendant's quiet possession or occupation and use and from creating or using any road access created on parcel of land title No. Kiminini/Matunda Block 7 (Masaba)/159.
2. The Plaintiff/Respondent had bought two plots one measuring 50 x 100 and another 25 x 100 from the Defendant/Applicant. The applicant now contends that the respondent has trespassed onto his land and started creating a road of access without his permission or consent. It is on this basis that the applicant seeks an injunction restraining the respondent from creating an access road on his land.
3. The application is opposed by the respondent who contends that this application is brought in bad faith. The respondent further contends that the parties herein consented to sending a surveyor to create an access road. That the surveyor duly proceeded to the ground and created an access road as per the consent. The respondent denies that he is the one who created the road.
4. I have gone through the applicant's application as well as the opposition to the same by the respondent. The Advocates representing the parties herein agreed to dispose off this application by way of written submissions. I have gone through the submissions filed by the parties. I must say at the outset that this application is an abuse of the process of the court. On 2/12/2013, the parties herein entered a consent in which it was agreed that a surveyor do proceed to the ground and create an access road between parcel Nos. Kiminini/Matunda Block 7 (Masaba)/159 and 158. The surveyor proceeded to the ground and created a 6 metre road of access as required. This was done in the presence of both the applicant and the respondent. No one raised any objection.
5. After the access road was created, the applicant has come to court seeking to restrain the Plaintiff/Respondent from creating the access road. It is not the respondent who created the access road. It is the surveyor who created the road in accordance with the consent received by the parties herein. The applicant seems to be complaining that the surveyor created a 6 metre wide road on his plot but when he reached the respondent's plot he created a 4 metre wide road. This allegation is only contained in the submissions by the applicant. It was never mentioned in the supporting affidavit of the applicant.
6. The applicant having consented to creation of the access road cannot again turn round and oppose the same. I find that the applicant's application lacks merits. The same is hereby dismissed with costs to the Plaintiff/Respondent It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Ingosi for defendant and Mr Karani for M/S Arunga for plaintiff.
Court Clerk – Kassachoon.

E. OBAGA

JUDGE

28/07/2014