



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CIVIL NO. 1516 OF 2011

VINEYARD ESTATE (ROYSAMBU

RESIDENTS ASSOCIATION).....1ST PLAINTIFF

TRM HOLDINGS LIMITED.....2ND PLAINTIFF

JESUS WINENER MINISTRIES.....3RD PLAINTIFF

VERSUS

RAPHAEL ARC MICHAEL MUNGE.....DEFENDANT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

Synopsis

1. The controversy herein involves a dispute over an alleged public road which runs through the property that was originally Land Reference No. 8107. Neighboring residents want the alleged road now known as LR. No. 8107/1 to stretch a full 277.64 meters long.
2. The original owner of the now subdivided parcel being the Defendant contends the road is not a public road and does not run the said 277.64 meters long. He also contends that it is also not a through road but is a *cul-de-sac* with its terminal on boundary of LR No. 8107/11. The local residents alongside some two other select road users would want the court to restrain the Defendant from disposing of the Defendant's property known as LR No. 8107/11 until this suit is determined.

Pleadings & Facts

3. The Plaintiff filed herein on 1st December, 2014 reiterates in detail the fact that Defendant once owned LR No. 8107. The Defendant subdivided the same and sold to various third parties. The subdivision was in the year 1991. The Defendant retained ownership of two sub plots from the subdivision scheme. One of the two sub plots was LR. No. 8107/9. The Defendant also pursuant

to the provisions of the Physical Planning Act (Cap 286) Laws of Kenya also surrendered a portion of his plot. This was in consideration of the subdivision scheme being approved. The surrendered portion was known LR No. 8107/1. It was surrendered and designated as a road reserve. Nearly some twenty years later the Defendant sought to subdivide LR No. 8107/9. Somehow, a portion of LR No. 8107/1 ended up as part of LR No. 8107/9. As a result a *cul-de-sac* was created. The road ceased to be a through way. The road became shorter. The result was that the 1st Plaintiff's members were landlocked. The 2nd and 3rd Plaintiff however availed access to them through LR Nos. 12803/44 and LR. No. 12803/43.

4. The above facts are repeated on oath in the Supporting Affidavit of Peter Muiruri Njangi sworn with the authority of all the Plaintiffs.
5. In response, it is the Defendant's contention that at no time did he ever surrender a portion of his property LR No. 8107 to be utilized as a public road. The Defendant instead faults the owners and developers of LR. No. 12803 for demanding access through LR. 8107/1. The Defendant also faults the 2nd Plaintiff as well as other third parties including the United States International University (USIU) for not themselves surrendering portions of their respective parcels of land to create further or additional access roads.
6. The Defendant further contends that the annexation of a portion of LR No. 8107/1 in 2010 was fully approved by both the Planning authorities as well as the Commissioner of Lands. Likewise the Defendant contends that the Defendant only fenced off the road portion after due approval once again by the City's Planning Department.

Submissions

7. Both parties filed written submission on the application dated 1st December, 2014.
8. The said application seeks injunctive orders against the Defendant to restrain the Defendant his employees, servants and agents from selling, disposing off, transferring, alienating, fencing off and or dealing in any manner whatsoever with the property known as LR No. 8107/11. The said application also seeks orders compelling the defendant to surrender to the court the title documents for LR No. 8107/11 or alternatively that the Interested Party, being the National Land Commission be directed to register a caveat over the said parcel of land. Finally the application also seeks orders to compel the Defendants to grant and allow free access of traffic through the subject premises LR. No. 8107/11. Save for the second prayer, which was intended to last until determination of the application, the other orders sought are intended to last until determination of the suit.

Analysis

9. I have read both sets of submissions filed by the Parties. I have also read and considered the application together with the supporting affidavit as well as the replying affidavit.
10. At this stage of the proceedings, my consideration is limited to whether the Plaintiffs have established a *prima facie* case with a probability of success. The Plaintiffs also need satisfy me that in the absence of an injunction they stand to suffer irreparable harm. In the event of any doubts, I then will have to consider the balance of convenience and especially the hardship the granting or denial of an injunctive order will occasion to either party: see the case of **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358**.

11. With regard to the mandatory orders sought, I must satisfy myself that there are special circumstances warranting the order and that the orders if granted now would most likely be vindicated or confirmed at trial: see for example the cases of **Sharrif Abdi Hassan –v- Nadhif Juma [2006] eKLR** and the English case of **Locabail Intern Finance Ltd –v- Agro Export & another [1986] All ER 901**.
12. The Plaintiffs contend that they have demonstrated that they have a prima facie case with chances of success. That contention is pegged on the fact that LR No. 8107/1 measuring approximately 277.64 meters was reserved as a road way back in 1991. According to the Plaintiffs it then became a public road and part of Public land under Article 62 of the constitution. There is no controversy over this fact. Land Reference No. 8107/1 became a road reserve in 1991. However controversy emerges when the Defendant states that the original subdivision scheme was amended and the Defendant having been owner of the original LR no. 8107 then decided to acquire back a portion of LR No. 8107/1. On this controversy, I hold the view that the Plaintiffs have the edge. It is not clear from the evidence before me when the Defendant obtained approval from the planning authorities to keep or, may I state, to annex a portion of LR No. 8107/1 and amalgamate the portion with LR No. 8107/11.
13. It would however appear from the August, 2010 correspondence annexed to the Replying Affidavit that the amendment met with the approval of the Nairobi City's Planning Department in August, 2010. That was nearly twenty (20) years after the original subdivision plan had been approved and Land Reference Numbers as well as Deed plans issued. The subdivision plan for LR No. 8107 was approved on 1st November, 1991. From the contents of "RAMM-2", a letter dated 23rd August, 2010 it is apparent that it was not until 2010 that the Defendant, submitted amendments to the original subdivision for approval. The said letter, a copy of which is also annexed to the Replying Affidavit by the Defendant states in part as follows:

"The Developer has submitted minor amendments to the approved subdivision scheme. Since there are no planning objections, I recommend the same to you for approval subject to all the previous subdivision conditions being complied with".
14. The letter which is marked as annexure "PMN-8" suggests that the amendments were made in 2010. Secondly the letter also suggests that there were no planning objections to the amendments. Certainly, as at 23rd August, 2010, the approving authority had not only engaged the Defendant but also had received letters of complaint by residents; see for example the letters annexed to the supporting affidavits as annex "PMN-6" and "PMN-7". It is apparent that by June, 2010 the planning and approving authority had received representations from the Plaintiffs' representative. It would certainly be more appropriate for the court to engage in a further interrogative process on this aspect of the case, noting that there does not seem to have been any reply to the letter of 23rd August, 2010 by the Commissioner of Lands offices.
15. From a preliminary point, the Plaintiffs have shown that they have a prima facie case with chances of success that the subject matter in dispute was and is a public road where they have a public right to access and the Defendant even though was the original owner could not summarily lay claim to the same and regain private ownership of the same, when one reflects on the process of alienating public land. I am not convinced that the flip-flop manner the approving authority, being the Nairobi City Council, has acted helps the Defendant's cause. Rather it raises questions and lends credence to the Plaintiff's case. As a public authority the Nairobi City Council was always under a duty to give proper consideration on issues of planning touching on and impacting on the public.

16. I hasten to add that I have not sighted any Certificate of title or Certificate of lease issued by the Registrar of Titles for LR. No. 8107/11 with the consequent result that the provision of **Sections 24, 25 and 26** of the **Land Registration Act, 2012** would not come into play. For now, it would be sufficient to point out that the approved subdivision plan of 1991 led to the creation of LR No. 8107/1 as a 9 meter by 277.64 meter road as a public road which linked up with LR No. 12803/1. L.R. No. 8107/1 was dedicated by the Defendant as a public road in 1991 in consideration of approval of the subdivision scheme. Both would rank as road reserves and public land as defined and provided for under Article 62 of the Constitution.
17. Public interest dictates that it would be more appropriate if the same was so maintained as the court interrogates and investigates the apparent simplicity in again converting the same land LR No. 8107/1 to private land as claimed by the Defendant. It may be possible that the Defendant changed his intention to dedicate the piece or stretch of land to public use but such change of intention has to be effected through the laid down process. The trial court will have to interrogate this. The court will also have to confirm that the Defendant had complied with the provisions of the Public Roads and Roads Access Act (Cap 399) especially Sections 13 and 14 thereof. Compliance does not appear to have been met by the Defendant in the alleged conversion of the road to a private road.

Non suited

18. The Defendant has submitted that the Plaintiff is non-suited for failing to challenge and sue both the County government of Nairobi (the successor of the City Council of Nairobi) as well as the Commissioner of Lands. To this my brief answer would be that **Order 1 Rule 9** of the **Civil Procedure Rules** is relatively clear. No suit should be defeated by reason of any non-joinder or misjoinder of parties. The court is mandated to determine matters in dispute in so far as regards the rights and the interest of the parties actually before it.
19. I also note that the successor of the Commissioner of Lands being the National Land Commission is already a party to these proceedings albeit as an interested party. The latter will certainly assist in establishing the true position of the suit land by availing all the subdivision records and conditions imposed in 1991.

Of damages

20. The Plaintiffs contend that they stand to suffer irreparably. On this too, I have no doubt. The Plaintiff's seek access. I do not fathom how possibly damages can be appropriate or adequate recompense if there is a wrongful denial of the right of way to the public. The Plaintiffs have over a period of time used the disputed portion of land. They are accustomed to the same. It is time that will go to waste as the Plaintiffs go for alternatives.

Disposal

21. I find that the Plaintiffs have shown a prima facie case and further that damages in the circumstances of the case cannot certainly be adequate recompense for any time wasted.
22. The Plaintiffs are entitled to a mandatory injunction sought in terms of prayer No. 4 as I am also satisfied that the wider public interest would be better served if the access is allowed pending determination of the suit. The public have used the disputed portion for nearly twenty years. The Defendant has also stated at paragraph 17 that the Defendant is not undertaking any construction on the said parcel of land. There will be no hardship fetched on the Defendant. The

application is allowed in terms of prayer No. 4 to the effect that pending the hearing and determination of this suit, the Defendant his employees, agents, assigns, servants and/or any other persons acting under his directions or claiming through shall allow free flow of traffic and the general public through the subject premises namely LR No. 8107/1 and LR No. 8107/11 pending the final determination of this suit.

23. With regard to prayer number 3 I do not think the same is warranted. There is already in place an inhibiting order and that truly should serve the purpose. I do not see the purpose an order for delivery up of the original title will serve in the circumstances. The inhibition order shall subsist until determination of the suit.

Costs

24. Each party will bear their own costs of the application.

25. Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent



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