



**Stephen v M'Itonga (Environment & Land Case 46 of 2018)
[2023] KEELC 19012 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 46 OF 2018**

**CK NZILI, J
JULY 19, 2023**

BETWEEN

CEASER IKUNDA STEPHEN PLAINTIFF

AND

MISHECK MUTHAMIA M'ITONGA DEFENDANT

JUDGMENT

1. Through an originating summons dated November 22, 2018, the plaintiff sought to be;- a) declared entitled to LR No Abogeta/Lower Kithangari/1691, a resultant subdivision of the original LR No Abogeta/Lower Kithangari/1616 under adverse possession and, in the alternative, b) a declaration that the plaintiff has acquired easement rights over an access road crossing through the defendant's land parcel LR No Abogeta/Lower Kithangari/1691;c) a permanent injunction restraining the defendant, his agents, servants, or employees from blocking, fencing off, moving into or invading, trespassing, excavating constructions or in any way whatsoever interfering with the plaintiff's road of access possession and occupation of the portion bought together with the use of the access road as mentioned earlier.
2. The originating summons was accompanied by a supporting affidavit sworn by Ceaser Ikunda Stephen on November 22, 2018, with annexures of a sale agreement dated January 31, 2004 for a portion measuring 0.202 ha he had bought from the defendant for Kshs 280,000/=, payment slips, mutation forms, sketch maps, transfer land consent board consents, photos showing developments on the suit land and ground map all marked as annexures CIS "1", 2, 3 (a), (b) & (c) CIS 4 (a) (b) & (c), 5 (a) & (b) & CIS, 6(a) & (b)" respectively. The plaintiff also filed a list of witness statements and exhibits dated 22.11.2018, a case summary, and a list of issues for determination dated October 14, 2019.
3. The defendant opposed the originating summons through a replying affidavit sworn by Misheck Muthamia M'Itonga on January 8, 2019. He admitted selling 0.50 acres of land out of his LR No



- Abogeta/Lower Kithangari/1232, subdivided into two portions: LR No1691, in favor of the plaintiff, who paid the entire purchase price to him and took vacant possession.
4. The defendant averred that the parties attended the land control board meeting. Eventually, the plaintiff engaged a private surveyor to carry out the subdivisions who created an unnecessary access road on his land, yet there was already an access road to the main road on the other end of the land.
 5. When he discovered this, the defendant averred that he objected to the mutation form as drawn and refused to surrender the original title deed for registration of the intended changes. The defendant averred that the plaintiff forged his signature and registered a fake mutation form dated March 14, 2014, which created an access road on his land, a move which he protested.
 6. Eventually, the defendant averred that the plaintiff mobilized a gang of people who entered his land on May 26, 2017 and forcefully damaged his crops valued at Kshs 386,850/=, prompting him to make a formal police complaint. After that, the defendant averred that the plaintiff was arrested and charged in Nkubu PMC Court Case No 423 of 2017. He insisted the suit was an attempt to take away his land. A case summary accompanied the replying affidavit, a list of issues for determination, witnesses' statements, and documents dated May 14, 2019.
 7. In a further affidavit sworn on November 19, 2019, the plaintiff averred that he had used the suit land since January 2004, save for the blocked access road. He denied any alleged alternative access road to his land apart from the one unlawfully and illegally blocked by the defendant. Further, the plaintiff denied any alleged forgery to his supporting documents or complaint regarding the same, apart from the alleged criminal case of malicious damage, after he had re-opened the blocked access road.
 8. Following the interlocutory injunction and inhibition orders issued on March 15, 2019 and pre-trial directions made on November 28, 2019, the court directed a scene visit to be undertaken, and a land surveyor's report be filed before the court to establish;- who was in possession and user of LR No1961; if there was an official access road between LR No's 1962 and 1231 and lastly, whether the defendant had blocked the official access road.
 9. The district land surveyor eventually filed a report before the court dated 6.7.2021, confirming the existence of a 6-meter road of access for LR No1691 abutting LR No 1230, 1231, 1691 & 1692 since parcel LR No1691 was inaccessible from the existing 24-meter road. The report attached an amended registry index map confirming that the defendant's duly signed mutation form had been approved and registered for subdivision L.R No's 1691 and 1692.
 10. At the trial, the plaintiff testified as PW 1 and adopted his supporting and further affidavits to the originating summons and a witness statement dated November 22, 2018, as his evidence in chief. His evidence was that he bought land measuring $\frac{1}{2}$ an acre from the defendant's LR No Abogeta/Kithangari/1232 which was split into two portions and acquired LR No1691. He produced the sale agreement dated January 31, 2004 as P Exh No (1), a copy of a cheque and record of payments to the defendant as P Exh No (2), a copy of the mutation form and sketch map by the land surveyor as P Exh No (3), copies of green card for LR No Abogeta/Kithangari/1232 & 616 as P Exh No's (4) & (5) and copy of the area map as P Exh No (6). PW 1 testified that he took vacant possession of the suit land soon after he bought it and erected permanent buildings where he has lived for the last 12 years. He said that the suit land has a demarcated access road between LR No's 1231 & 1692 which the defendant has blocked and fenced off contrary to the directives of the land registrar and the land surveyor.
 11. PW 1 also told the court that the defendant had refused to surrender the original title deed so that a new title deed could be issued in line with the mutation form. His prayer before the court was that he



- be registered as the owner of LR No Abogeta/Lower Kithangari/1692, a title deed be issued, and the access road be re-opened.
12. Counsel present for the defendant did not cross-examine the witness following which the plaintiff closed his case, and a defense hearing date was taken by consent for April 24, 2023 when neither the defendant nor his advocates attended court. The court had no option but to mark the defense as closed and directed the parties to submit written submissions by May 25, 2023.
 13. The plaintiff submitted that despite paying for the land in 2004, obtaining the requisite transfer forms, land control board consent, mutation forms, making development on the land, and momentarily being allowed to use the access road, the defendant has refused to surrender the requisite completion documents.
 14. The plaintiff submitted that going by Sections 7 & 17 of the *Limitation of the Action Act*, he was entitled to the reliefs sought since he has satisfied the ingredients of adverse possession. Reliance was placed on *Muiruri Njuguna vs Charles Mwenga Mulwa* (2017) eKLR, *Titus Mutuku Kasuve vs Mwaani Investments Ltd & others* (2004) eKLR, *Mbui vs Maranya* (1993) eKLR.
 15. The issues calling for my determination are;
 - i. Whether the plaintiff has acquired the suit land by adverse possession.
 - ii. If the plaintiff is entitled to an access road.
 - iii. If the access road was envisaged in the sale agreement
 - iv. If the land surveyor created an unnecessary access road on the defendant's land.
 - v. If the plaintiff is entitled to the reliefs sought.
 16. In trite law, parties are bound by their pleadings, and issues flow from them. In this suit, both parties agree that there was a sale agreement between them, culminating into a mutation form as per form RL 29, which bore the defendant's names and signatures. In his replying affidavit, the defendant attached the mutation form as MM "1" and a letter as MM "3," which sought the registry index map to be amended to reflect sub-divisions LRNo's 1230, 1231, and 1232.P Exh No's (1), (2), (3), (4), (5), and (6) were not objected to by the defendant. The plaintiff's testimony indicates a permissive entry to the suit premises since 2004.
 17. In the case of *Titus Ong'ang'a Nyachieo vs Martin Okioma Nyauma and others* (2017) eKLR, cited with approval *Wambugu vs Njuguna* (1983) KLR 172 on the two key concepts in adverse possession, namely that the known owner must have lost his right to the land by either being dispossessed of it or by having discontinued his possession by acts which are inconsistent with his enjoyment of the soil for the purpose for which he had intended to use it. The court further cited with approval *Kimani Ruchire & another vs Swift Rutherford Co Ltd* (1976-80) 1KLR 1500, that possession takes different forms, such as fencing or cultivation of the land. The court observed that although the appellant's initial entry into the suit land was with the first respondent's consent and approval following the aborted sale due to the land control board's consent, the occupation had become adverse. The court cited with approval its earlier holding in *Samuel Miki Waweru vs Jane Njeri Richu* (2004) eKLR, that when a purchaser of land in a controlled transaction was permitted to possess the land by the vendor pending completion of the transaction, the intended sale became void, and the permission to occupy the land was terminated by operation of the law.
 18. In this suit, there is no dispute that the parties did all that was required of them to finalize the transactions but disagreed on the access road, which the defendant has termed an unnecessary burden



- on his land. The land surveyor's report alluded to above has clarified that the access road was necessary for the plaintiff and other road users.
19. In *Kiambi vs Miriti* (2022) KEELC 13299 (KLR) 5th October 2022) Judgement, the court cited with approval *Macharia Mwangi Maina & 811 others vs Davidson Mwangi Kagiri* (2014) eKLR, that purchasers of land put into possession of those portions were protected under the doctrine of a constructive trust. The court further cited with approval *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR on the constitutionality of adverse possession sanctioning acts of inaction or negligence by the true owner for a period of 12 years action by a trespasser.
 20. In this suit, the defendant has not disputed the occupation of the portion of land that he sold to the plaintiff more than 12 years ago. The plaintiff has demonstrated animus possidendi to own the land, which acts of use have not been interrupted by the defendant. The defendant knew that the plaintiff was on the land as a matter of right. He did not act in evicting him or stopping any development thereon. He has, however, vowed not to affect the transfers and complete the transaction.
 21. In *Alliaza vs Saul* Civil Appeal 134 of 2017 (2022) KECA 583 (KLR) 24th June (2022) (Judgment) the court held that equity and fairness being good principles under Article 10 of the *Constitution* require that the *Land Control Act* be read and interpreted in a manner that does not aid a wrongdoer but renders justice to a party in the position of the appellant who even though had not pleaded constructive trust, the court could still infer such trust going by *Odd Jobs vs Mubia* (1970) EA 476 and *Wanjobi vs Mukubi* (2021) eKLR. Therefore, my finding is that the plaintiff has proved entitlement of 0.202 ha out of the defendant's LR No 616, which became LR No1691 following the subdivisions.
 22. As to the access road, the plaintiff complained that an access road was a necessity which the defendant has blocked and continues to interfere with. In *Silipet Properties Ltd & another vs Chege Mwaura & another* (2017) eKLR, the court observed that interference with a lane that was supposed to aid free movement in the area was contrary to Section 2 of the *Public Road and Road Access Act* Cap 399 Laws of Kenya. The court found that the defendants had no right to block or close a public road without following due process.
 23. In this suit, the plaintiff seeks a declaration of easement rights and a permanent injunction restraining the defendant, his agents, servants, or employees from interfering with his right of way by blocking the access road. There is evidence that the land surveyor established a need for the access road in the area. The defendant has tendered no proof that he has objected to the access road's creation by complying with the *Land Act* and Sections 9 & 10 of the *Public Road and Road of Access Act* (Cap 399).
 24. In *Dellian Langata Ltd vs Symon Thuno Mubia & others* (2018) eKLR, the court observed that a road of access has a connotation of private usage and was characterized by a party has made an application to have an access road constructed to connect or link such party to utilities such as public road, railway station or a halt. In *John Bosco Muinde Kamali & 5 others vs Stephen Katili & another* (2019) eKLR the court observed that the procedure to follow in creating an access road was governed by Section 98 of the *Land Registration Act* and that the law did not allow a court to compel the owner of the land to create an easement but if a party was landlocked the court under Section 140 of the *Land Act* could make an access road subject to several conditions including reasonable compensation.
 25. In this suit, the sale agreement between the parties was not clear as to the access road. It was not envisaged by the parties at the time that they consented to transact on the land. The land surveyor has said the land covered by the access road was 6 meters. The length has not been indicated. The complaint by the defendant is in that the access road was unnecessary. In *Banque Villa Estate Management Ltd vs Kenya Veterinary Vaccines Production Institute* (2018) eKLR, the court granted an injunction



restraining the respondent from closing an access road. I find there would be a need for the issuance of an injunction for the plaintiff to access his land.

26. Consequently, I declare that the plaintiff is entitled to LR No 1691 by virtue of adverse possession. The defendant shall execute the subdivision and transfer forms in favour of the plaintiff within 2 months from the date hereof in default of which the Deputy Registrar of this court shall execute them.
27. An order shall also issue restraining the defendant from blocking the access road until the same is implemented by relevant land officers both on the ground and in the land records.
28. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JULY 2023

In presence of

Kitheka for plaintiff present

Parties

HON. CK NZILI

ELC JUDGE

