



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 11 OF 2015**

**JOHN KENNEDY MOTACHWA.....PLAINTIFF**

**VERSUS**

**WILBERT OGARI.....DEFENDANT**

**R U L I N G**

1. The plaintiff instituted the present suit vide a plaint dated 12<sup>th</sup> January 2015 filed in court on 19<sup>th</sup> January 2015. The plaintiff's claim was that he was the registered owner of land parcel known as **West Kitutu/Bomatara/4016** while the defendant was the registered proprietor of land parcel **West Kitutu/Bomatara/3691** which was adjacent to his said plot. The plaintiff's further claim was that the defendant had blocked the road of access to his land parcel **West Kitutu/Bomatara/4016** and the defendant had therefore denied the plaintiff access to his land parcel. The plaintiff prayed for judgment against the defendant for:-

- (a) An order of unlimited and unhindered access to the plaintiff to his parcel of land known as West Kitutu/Bomatara/4016 through the defendant's parcel of land known as West Kitutu/ Bomatara/3691.**
- (b) An order of a permanent injunction restraining the defendant from erecting a boundary, constructing and/or blocking the right of way of the plaintiff to his parcel of land West Kitutu/ Bomatara/4016.**
- (c) Any other order that this court may deem just and expedient to grant.**
- (d) Costs of this suit.**

2. The defendant filed a defence dated 25<sup>th</sup> March 2015 on the same date. The defendant denied the existence of a road of access running through his land parcel **West Kitutu/Bomatara/3691** as claimed by the plaintiff and further denied there was an easement over his parcel of land serving the plaintiff's parcel of land. The defendant averred that the plaintiff is the registered owner of land parcel **West Kitutu/Bomatara/2917** which adjoins land parcel **4016** and asserted that the plaintiff's land parcel **4016** is served by the access road serving land parcel **West Kitutu/Bomatara/2917**.

3. The parties were in agreement that the dispute between the parties was where the access to the plaintiff's plot land parcel **West Kitutu/Bomatara/4016** was located on the ground and whether the defendant had interfered with the same. The court was in agreement with the parties and on 3<sup>rd</sup> May 2016 made an order referring the dispute to the land registrar who the law mandates to establish and determine land parcel dimensions and boundaries on the following terms:

**“Quite evidently the issue in this matter is whether the plaintiff's land 4016 has access and if so whether the defendant has blocked the same. The land registrar has mandate to establish and open up roads of access under the Land Registration Act of 2012. The court directs the Land Registrar Kisii to visit land parcels West Kitutu/Bomatara/4016 and 3971 in the company of the County Surveyor and to open the access roads serving the two parcels. The land registrar to prepare and file a report within 90 days from today.”**

4. The surveyor filed a report together with a sketch plan and a copy of the Registry Index Map (RIM). The findings by the surveyor were that land parcel **West Kitutu/Bomatara 3691** was fully developed with a storey building and had a perimeter fence all around it while parcel **4016** had no buildings on it but was fenced with a stone fence on the lower side. The surveyor further found the road of access as provided in the survey map cannot practically serve land parcel **West Kitutu/Bomatara/4016** and the position where the plaintiff alleged the road of access to be was already built up and there was a septic tank and a pit latrine constructed by the defendant. It was the surveyor's observation that the ground position did not correspond with the position as reflected in the RIM. He concluded that the access road as provided in the survey map cannot serve land parcel **4016**. When the court summoned the surveyor to attend court to explain his report he repeated the contents of the report and explained that there was variance between what is on the ground and what the documents show. He was emphatic that the access road shown on the map cannot serve land parcel **4016**.

5. Arising from the report of the surveyor, it is clear that this is not a case of a blocked road of access as it is evident that no road of access exists through land parcel **3691** serving land parcel **4016**. It does appear that land parcel **West Kitutu/Bomatara/4016** is in fact land locked and the issue would be whether the plaintiff can prove that he is entitled to “**an easement**” and/or “**access**” over land parcel **West Kitutu/Bomatara/3691** under part X of the Land Act No. 6 of 2012 (Sections 136 – 142). In my view, that can only be determined by taking evidence at the trial. The plaintiff has pleaded that his land parcel **4016** enjoys an easement over land parcel 3691 belonging to the defendant which the defendant denies.

6. The report by the surveyor apart from confirming the access road provided cannot serve land parcel **4016** has made no mention of the existence of an easement that has burdened land parcel **3691** in favour of land parcel **4016**. It is my finding therefore that the surveyor’s report has not resolved the issue of whether or not an easement or access exists over land parcel **3691** in favour of land parcel **4016**. This issue should proceed to trial and the parties are accordingly directed to prepare the suit for trial by ensuring compliance with order 11 of the Civil Procedure Rules and to set down the suit for hearing expeditiously.

**RULING DATED, SIGNED AND DELIVERED AT KISII THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

Ms. Omigo for the plaintiff

Ms. Sagwa for the defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**