



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 8 OF 2017

WILFRED KELI NDOLO.....PLAINTIFF

VERSUS

JESCAH GATAKAA AMBOKA.....1ST DEFENDANT

JACKSON AMBOKA WANYUNGU.....2ND DEFENDANT

JUDGMENT

1. The plaintiff filed this suit vide a plaint dated 20/1/2017 which seeks the following orders against the defendants:-

(a) A declaration that the defendants have offensively obstructed a public road.

(b) A mandatory injunction order compelling the defendants to forthwith open the road of access and which serves all the plots subdivided from title No. Kitale Municipality Block 16/36 and 14.

(c) A permanent injunction to restrain the defendants from in future obstructing or otherwise interfering with the road of access, opening to the Kitale to Webuye highway.

(d) General and exemplary damages for the trespass.

(e) Costs of the suit.

(f) Interest

(g) Any other relief this court may deem fit to grant.

THE PARTIES PLEADINGS

The Plaintiff's Case

2. According to the plaint the plaintiff owned LR. No. Kitale Municipality Block 16/14 and Kitale Municipality Block 16/36 which he subdivided into various parcels and roads of access were provided to serve those subdivision. Those roads became public roads upon registration of the mutation. He sold Kitale Municipality Block 16/37 to the 1st defendant in 2013. The 1st and 2nd defendants occupied the said land. Kitale Municipality Block 16/37 abuts the access road that leads to Kitale Webuye road. The said access road also serves all the plots subdivided from Plot No. Kitale Municipality Block 16/36 and Kitale Municipality Block 16/14. In January, 2017 the defendants blocked the said access road by pouring stones and hardcore on the road service and thereby blocked the plaintiff and the owners of the surrounding plots from accessing their land. Those are the circumstances that led to the filing of this claim.

The Defendants' Defence

3. The defendants filed their statement of defence on 13/2/2017. Her defence is that Kitale Municipality Block 16/37 which she owns measures 0.2 hectares, is a corner plot and that the access road claimed by the plaintiff does not run through it. She also denies that the access road was meant to serve Kitale Municipality Block 16/36. She maintains that the road of access mentioned is a cul-de-sac ending at her gate and that plot No. Kitale Municipality Block 16/36 lies beyond its reach. She maintain that she was entitled to fence her plot, which according to her includes the area claimed to be a road of access. She denied that she acted illegally or blocked any road or caused any

inconvenience to the tenants of the portions subdivided from **Kitale Municipality Block 16/36**. She maintains that the plaintiff failed to provide for a road of access to the owners of plots subdivided from **Kitale Municipality Block 16/36** and she is not under any legal obligation to allow any part of her land that is, **Kitale Municipality Block 16/37** to be used by the plaintiff or other persons. She prays that the suit be dismissed with costs.

4. While dealing with an application for a temporary injunction and a mandatory injunction dated 23/1/2017 this court observed that the prayer sought in the notice of motion would determine prayer No. (b) of the plaint before a substantive hearing and determination of this suit on the merits and declined that application. The court emphasized that it had not had the advantage of examining any other documents used in the subdivision of **Kitale Municipality Block 16/14** and **Kitale Municipality Block 16/36**.

5. Hearing of this suit took place on **17/7/2019** on which date the plaintiff testified and closed his case. However the defendants failed to call their witnesses and the court ordered their case closed.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. The plaintiff adopted the contents of his statement filed in the record and produced the Registry Index Map (RIM) for the affected area as **PExh 1**. There was no objection raised regarding the production of that map. He also produced surveyor's report dated 29/7/2017 as **PExh 2** and a second report dated **18/3/2019** as **PExh 3**. The evidence in his statement reiterated the contents of his plaint. He agreed with the 1st defendant that her land that is, **Kitale Municipality Block 16/37** measures **0.20 hectares** but maintained that that plot did not include the area that he claims to be an access road. He stated that the access road serves all the plots subdivided from both **Kitale Municipality Block 16/14** and **Kitale Municipality Block 16/36**. He maintained that the defendant closed the road by dumping building stones and hardcore on its surface thereby illegally and unjustifiably blocking him and other plot owners from utilizing the said road, and thereby caused much inconvenience. He was cross-examined by Mr. Nakitare for the defendant. He maintained that the tenants of the subplots carved out of **Kitale Municipality Block 16/36** have resorted to passing through other peoples' land to access their properties.

7. Before the plaintiff testified **Mose Leonard** a Surveyor from Ministry of Land Trans-Nzoia County had testified on **24/10/2017**. He admitted to having prepared the surveyor's report dated **29/3/2017** pursuant to a court order made on **15/2/2017** in this case. He also visited the neighbouring parcels. He testified that he visited the affected site and conducted measurements and established that a road of access 6 metres wide existed and that it extended beyond parcel No. 37. According to the existing map the road therefore exists and the 1st defendant had blocked it and she should open it. The map used covers all the parcels in the Block. According to the surveyor no other plot owner has encroached on that road save the 1st defendant

The Defendants' Evidence

8. On 17/7/2019 when the suit came up for hearing the counsel for the defendant sought an adjournment. The court declined the adjournment on two grounds - the whereabouts of the witnesses were not given or explained and parties had notice of the hearing date. The court considered that no proper or reasonable explanation was given as to why the matter could proceed to its conclusion on that day. The court observed that the case was an old matter and the plaintiff had closed his case. The counsel for the defendants closed his clients' case and a date for judgment was issued.

Determination

Issues for determination

9. In my view the issues arising for determination in this suit are as follows:

(a) Whether the defendants have illegally and unjustifiably blocked the road subject matter of this suit from use by the plaintiff and owners plots located beyond Kitale Municipality Block 16/37.

(b) Whether the orders of mandatory and permanent injunctions sought by the plaintiff should issue.

(c) Whether the defendants should be condemned to general and exemplary damages.

(d) Who should bear the costs of the suit?

10. The issues are addressed as hereunder:

(a) Whether the defendants have illegally and unjustifiably blocked the road subject of this suit from use by the plaintiff and owners plots located beyond Kitale Municipality Block 16/37

11. I have considered the documentary evidence produced by the plaintiff and the surveyor and in particular the Registry Index Map (RIM) for **Kitale Municipality Block 16** which was produced as **P. Exhibit 1**. It shows that the road of access claimed by the plaintiff exists on the official map. On that official map, it is not affected by the 1st defendant's plot but runs continuously passed that land parcel. The legend at the bottom of the Registry Index Map reads as follows:

“Subdiv 36 to 282 - 348 MUT-TNZ/5129/6/15. Subdiv 14 to 36 to 70 MUT-TNZ/5122/3/98.”

12. What I gather from the above entry in the legend is that plot No. 14 was subdivided first in 1998 and plot No. 36 followed in 2015. The defendants required evidence to show that either the road was not provided for or it was subsequently closed.

13. The defendants never brought any evidence that **P. Exhibit 1** has ever been amended to effect closure of that road. Both **P. Exhibit 2** and **P. Exhibit 3** are reports from different officers from the County Surveyors Office and their competence has not been controverted.

14. I am therefore persuaded that the evidence of the plaintiff and the surveyors has established that the road of access exists in the map and that it serves both the 1st defendant’s plot and plots beyond it and that the 1st defendant has blocked the said road.

(b) Whether the orders of mandatory and permanent injunctions sought by the plaintiff should issue

15. Having found for the plaintiff on the first issue as above it necessarily follows orders of mandatory injunction and permanent injunction as sought by the plaintiff against the defendants must issue.

(c) Whether the defendants should be condemned to general and exemplary damages

16. I find that the plaintiff has established his claim and the defendants never called any evidence that could mitigate their conduct. They ought to have established the full extent of plot No. **Kitale Municipality Block 16/37** from the County Surveyor’s Office before blocking the road or fencing their plot. They made things worse by insisting in their defence in this suit that the road does not go beyond their gate and that it is a cul-de-sac ending at that gate. In my view the defendants’ conduct appears to be motivated by selfish interest to expand their territory beyond its proper boundaries to cover a public road of access. I find that conduct to be quite reckless, oppressive, inexcusable, illegal and unjustifiable. The plaintiff’s evidence is that he had subdivided plots and sold some to third parties who are not enjoined to this suit. I must therefore deal with the issue of damages awardable to the plaintiff.

17. The plaintiff never adduced evidence as to the extent of general damages he suffered. However that inability to access his land was occasioned by the defendants conduct. General damages must be proved by way of evidence. In the absence of evidence to establish the measure of damages this court awards a nominal sum of **Kshs.50,000/=**.

18. **Black’s Law Dictionary 10th Edition** terms exemplary damages as punitive damages and gives the definition thereof as follows:-

“Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit,...damages accessed by way of penalizing the wrongdoer or making an example to others.”

19. In the case of **The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo [2018] eKLR** the Court Of Appeal observed as follows:

“33. As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury’s Laws of England, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

(1) Oppressive, arbitrary on unconstitutional action by servants of government;

(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or

(3) Cases in which the payment of exemplary damages is authorized by statute.”

20. When it comes to assessment of exemplary damages this court is not bound to evidence such as that required in respect of general damages. All that is being asked of the court by a litigant is that it ought to take note that the conduct of the offending party is so egregious that he requires to be punished by way of an award of damages against him. Exemplary damages are at the discretion of the court.

21. An award of exemplary damages against the defendants in this case is deserved. I assess the quantum of exemplary damages to be in the sum of **Kshs.50,000/=**.

(d) Who should bear the costs?

22. The defendants, having instigated the commencement of this suit should bear the costs.

CONCLUSION

23. The upshot of the foregoing is that the plaintiff has established his claim against the defendants on a balance of probabilities. I therefore enter judgment in favour of the plaintiff against the defendants jointly and severally and I issue the following final orders:

(a) A declaration that the defendants have offensively obstructed a public road of access.

(b) An order of mandatory injunction compelling the defendants to forthwith open the road of access which serves all the plots subdivided from title No. Kitale Municipality Block 16/36 and Kitale Municipality Block 16/14.

(c) A permanent injunction to restrain the defendants from in future obstructing or otherwise interfering with the road of access, opening to the Kitale - Webuye highway.

(d) The defendants shall pay general damages to the plaintiff in the sum of Kshs.50,000/= (Fifty Thousand Shillings Only).

(e) The defendants shall pay exemplary damages for trespass in the sum of Kshs.500,000/=(Fifty Thousand Shillings Only) to the plaintiff.

(f) The defendants shall bear the costs of the suit.

(g) The defendants shall pay to the plaintiff interest (d) and (e) above at court rates computed from the date of this judgment till payment in full.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGI

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyama for the Plaintiff

Mr. Nakitare for Defendants

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

30/9/2019