



Limo v Jebitok (Sued as the administrator of the Estate of the Deceased Sawe Arap Chebui) (Environment & Land Case 91 of 2021) [2023] KEELC 22298 (KLR) (11 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 91 OF 2021
MN MWANYALE, J
DECEMBER 11, 2023**

BETWEEN

KENNEDY KIPLAGAT LIMO PLAINTIFF

AND

EMILY JEBITOK (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE DECEASED SAWE ARAP CHEBUI) DEFENDANT

JUDGMENT

1. The Plaintiff Kennedy Kiplagat Limo vide his plaint dated 25/8/2016 filed before the ELC Court at Eldoret case No. 242/2016 sought the following reliefs;
 - a) declaration that there is a road of access within NANDI/NDURIO/92, serving land reference NANDI/NDURIO/890 and that the said road closed by the Defendant ought to be re-opened.
 - b) A permanent injunction to prevent the Defendant her agents and servants from closing the road passing through Nandi reference NANDI/NDURIO/92.
 - c) A declaration that the decision of the Subordinate Court in Kapsabet Principal Magistrate's Court Civil Suit No. 137 of 2013 striking out the Plaintiff's case is erroneous and legally untenable.
 - d) Costs of the suit herein and the suit in the Subordinate Court in Kapsabet PMCC No. 137/2013.
2. A memorandum of appearance was filed by the firm of S. K. Kitur Advocates on 3rd October 2016.
3. The suit was transferred to Kapsabet chief Magistrates Court and assigned case No. Kapsabet E & L 18 of 2018.



4. The suit was once again transferred to the ELC Court at Eldoret and assigned ELC No. 45/2019 and upon establishment of this Court at Kapsabet it was transferred here and assigned case No. 91/2021.
5. Other than entering appearance through the firm of S. K. Kitur Advocates, the Defendant did not file a defence to the suit.

The Defendant however filed a Notice of Intention to Act in person on 4th March 2022, and directed all future service to be effected on her personally.

6. During the pendency of the hearing of the suit on 26th July 2017, Hon. Mr. Justice A. Ombwayo then seized of the matter, ordered the Land Registrar and Surveyor Nandi County to visit L.R. NO. NANDI/NDURIO/890, NANDI/NDURIO/891, NANDI/NDURIO/892, NANDI/NDURIO/893, NANDI/NDURIO/894 and NANDI/NDURIO/895, as well as NANDI/NDURIO/92 to ascertain the existence of a road of access to serve them and file a report within 30 days.
7. The said report was dated 30/8/2017 was filed on 5th September 2017.

Plaintiff's case and evidence:

8. It is the Plaintiff's case against the Defendant Emily Jebitok who was sued as the administrator of the estate of Sawe Arap Chebui
 - i) that the Defendant had without any colour of right and/or legal justification blocked the road of access meant to service the Plaintiff parcel of land, NANDI/NDURIO/890, which access road was within NANDI/NDURIO/92, which was adjacent to the Plaintiff's land, NANDI/NDURIO/890.
 - ii) that the road of access had been in existence and use prior to the adjudication exercise and had been noted on the certificate of official search of NANDI/NDURIO/92.
 - iii) that by dint of the Defendant's actions, the Plaintiff had suffered loss and damage and the Plaintiff held the Defendant liable for the loss; and based on the above averments the Plaintiff sought for judgment as set out at paragraph 1 of this judgment.

Plaintiff's Evidence: -

9. The Plaintiff testified as the sole witness, and adopted his witness statements dated 31/01/2022 and it was his evidence that the Defendant was his neighbour and they shared a common boundary.
10. The Plaintiff owned NANDI/NDURIO/890 while the Defendant was the administrator of Estate of Sawe, who was the registered owner of NANDI/NDURIO/92.
11. The Defendant had blocked an access road leading to his parcel and that the County Land Registrar and Surveyor had visited the suit properties and filed a report, in their report they had found an access road existed within NANDI/NDURIO/92, measuring 9.1 metres, and the plaintiff produced the report as P Exhibit 1, official search for NANDI/NDURIO/92 dated 28/11/2015 as P Exhibit 2, and search for NANDI/NDURIO/890 as P Exhibit 3, and she produced a Grant of Letters of Administration issued of Emily Jebitok as P Exhibit 4 and a copy of the title deed for NANDI/NDURIO/890 as P Exhibit 5. The Plaintiff thus requested the Court for opening of the access road and the prayers sought in the plaint.
12. With the testimony of the Plaintiff, and being the sole witness, the Plaintiff's case was closed.



13. Having not filed a defence, the Defendant's case was deemed undefended and the same was closed.

Plaintiff's Submission: -

14. The Plaintiff's Advocate Mr. Wainana submitted orally and stated the Plaintiff had proven his case on a balance of probabilities and placed reliance on the report by Land Registrar and Surveyor, which indicated there is a road of access of 6 metres width in 63 metres length, which recommended the re-opening of the access road.

15. Before framing the issues for determination, although this matter was undefended the Plaintiff's burden to prove his case did not shift as was held in the decision in the case of Karugi and Another vs Kabiya and 3 others 1983 (eKLR) where it was held inter alia

“ the burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended, the burden of proof is not way lessened because this is heard by way of formal proof....”

16. Having analyzed the pleadings, evidence and submissions, the Court frames the sole issue for determination being;

i) whether the Plaintiff has proven his case and is entitled to the relief's sought

17. The testimony of the witness and his evidence was uncontroverted. The Plaintiff proved that the Defendant was the administrator of the Estate of Sawe Cheboi, the registered owner of NANDI/NDURIO/92 vide the Grant produced as P Exhibit 4. In the search (P Exhibit 2) in respect of NANDI/NDURIO/92, it is indicated that 9.1 metre road passes through the same. Hence an access road of 9.1 acres is reserved in the title of NANDI/NDURIO/92.

18. The Plaintiffs has also proved that he is the registered proprietor of property No. NANDI/NDURIO/890, vide the certificate of official search P Exhibit 3.

19. As noted at paragraph 6, the Court had ordered for a survey to be done and a report filed. The said report was produced as P Exhibit 1. In the said report the Land Registrar and the Surveyor found that there was a 6 metres by 63 metres long access road which was used to access parcels No. NANDI/NDURIO/889 – 895. The said access road was within NANDI/NDURIO/92.

20. In preparation of the findings, the Land Registrar and Surveyor had interviewed person including the Defendant and her two brothers, a Mr. Sila Sawe and Daniel Sawe, who had both indicated that an access road had been opened by their late father in 1981 and the same had been opened in serve the parcel of Kapkoiya in exchange to a parcel giving by Kapkoiya to their land.

21. The Land Registrar and the Surveyor found that a road of access existed in NANDI/NDURIO/92. The Surveyor report produced by the Plaintiff as P Exhibit 1.

22. The report dated 30/8/2017 is thus a determination of a boundary report in terms of Section 18 (2) of the *Land Registration Act* and under the said section, the same may now be acted upon by the Court.

23. The Court finds that the Plaintiff has proven his case on a balance of probabilities and is entitled to the reliefs sought. No evidence was adduced in support of prayer 3 of the plaint and the same is dismissed.

24. Accordingly, Judgment be and is hereby entered in favour of the Plaintiff in terms of prayers (a) and (b) of the plaint and the Defendant is ordered to open the access road within NANDI/NDURIO/92 upon service of this judgment on her, so as to give access to parcels NANDI/NDURIO/889 – 895 all



inclusive, failure to which the O.C.S Nandi Hills and officers acting under him to effect the opening of the access road.

25. The Plaintiff is awarded costs of this suit, which was undefended on the lower scale.

JUDGMENT, DELIVERED AND DATED AT KAPSABET THIS 11TH DAY OF DECEMBER, 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

1. Mr. Momanyi for the Plaintiff

KAPSABET ELC 91 OF 2021 JUDGMENT

2

