



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 63 OF 2015

PETER NJENGA KINUTHIA.....PLAINTIFF

VERSUS

KIMERANCO ENTERPRISES LTD.....DEFENDANT

RULING

(Application for injunction; plaintiff having subdivided his land and having sold some subdivisions to the defendant; a road created to access these subdivisions; defendant closing up the road; defendant also placing a chain link fence between the road and the plaintiff's land and digging up a trench on land owned by the plaintiff; plaintiff prima facie demonstrating that the road is a public road and defendant has no right to close it; plaintiff also demonstrating prima facie that defendant had no right to put up the chain link fence or dig the trench on the plaintiff's side of the land; application allowed; defendant to open up the gate, remove the chain link and refill the dug trench)

1. This suit was commenced by way of plaint that was filed on 6 March 2015. The facts of the case are largely not in dispute. The plaintiff owned two parcels of land registered as land parcels Laikipia/Nyahururu/3867 and Laikipia/Nyahururu/3868. He subdivided the land parcel Laikipia/Nyahururu/3868 (hereinafter parcel No. 3868) into four portions and avers that he made a provision for a 6 metre road of access to serve these four portions. The land parcel No. 3867 is opposite the four subdivided portions and the 6 metre road of access separates them. The four portions carved out of the land parcel No. 3868 became registered as Laikipia/Nyahururu/10714, 10715, 10716 and 10717. The land parcels No. 10714 and 10715 were sold to the defendant through sale agreements executed on 1 March 2014 and 10 December 2014. The defendant thereafter developed the two portions that he purchased by putting up hostels for university student accommodation. What prompted the suit is that the defendant put up a metal gate at the beginning of the 6 metre road of access and also dug up a trench and put up a fence on the opposite side of the road, that is along the boundary of the land parcel No. 3867. The effect was to create a sort of a gated community encompassing the 4 subdivided portions served by the road of access. It is the view of the plaintiff that the action of the defendant is wrongful. The plaintiff wants the defendant ordered to remove the gate and the fence and in his suit he has asked for a permanent injunction to restrain the defendant from interfering with the said road of access and costs of the suit.

2. Together with the suit, the plaintiff filed an application seeking an order of mandatory injunction to require the defendant to unblock the 6 metre road of access by removing the metal gate, leveling the trench dug and removing the perimeter fence. It is his view that the defendant has no justifiable cause in interfering with the road and he has averred that the same denies access to the land parcels No. 10716 and 10717. It is also his position that the defendant has no right to put a fence in his land parcel No. 3867. It is that application which is the subject of this ruling.

3. The defendant filed Grounds of Opposition and a Replying Affidavit to oppose the motion through its director Erastus K. Muthondu. He has averred inter alia that after the agreement to purchase the two plots, both parties entered into a further agreement where the 6 metre road was excised from the land parcels No. 10714, 10715, 10716 and 10717. He has stated that the road in issue is not a public road but a private one for which he paid the sum of Kshs. 350,000/= to co-own with the plaintiff. He has deposed that after developing the hostels, he reinforced the existing fence between the parcels No. 3867 and the subdivided portions. He has stated that the gate was erected purely for security reasons and particularly that of the students. He has averred that he has given the plaintiff the keys to the gate so that he can access the land parcels No. 10716 and 10717 and does not see what quarrel the plaintiff has since the parcel No. 3867 has road frontage to the Nakuru-Nyahururu Road. He has stated that the trench in question was dug strictly at the edge of the private road for drainage purposes, to avoid flooding during rains, and that the road is still passable.

4. When the application first came before me, I thought it fit to have the District Surveyor visit the site and establish whether the road is a private road or a public road. A report was filed which stated inter alia that the road is a public road which was created when the land parcel No. 3868 was subdivided, specifically to provide access to the newly created four subdivisions. He affirmed the presence of the gate and also observed some blockage by the plaintiff who had deposited some hardcore materials at the main highway road reserve.

5. Both counsels filed submissions which I have considered.

6. The main issue in my view is whether or not the plaintiff has established, prima facie, that the defendant has no right to block the 6 metre road and that the defendant has no right to erect the chain link fence and dig the trench. From the material tabled before me at this stage of the proceedings, it is apparent to me, subject to the defendant proving otherwise at the trial, that the road in question is a public road. It does not appear to me to be a private road as contended by the defendant. Now, if it is a public road, I do not see how the defendant can rightfully close a public road so that it is only accessed by a select group of persons. To me, it is immaterial that the plaintiff has a key to the gate that has been erected at the entrance of the road. If the road is public, then it is supposed to be open and accessible to the whole public.

7. The defendant has not, at this stage of the proceedings although he may very well do so at the trial, demonstrated that the law allows him to close a public road and use it as one would use a private road within a person's land. The defendant has also erected a chain link fence on the opposite side of the road which abuts the plaintiff's land parcel No. 3867. Again, the defendant has not convinced me that the law permits him to do so. The defendant could of course perfectly fence its two purchased portions in whichever way that is permissible, but I am not persuaded at this point, that the defendant was justified to cross the road and go and fence the portion that abuts the plaintiff's parcel of land. That to me is an interference with the plaintiff's boundaries. The defendant does not share a common fence with the plaintiff's land parcel No. 3867 and I do not see how the defendant can fence off land that does not belong to it.

8. The defendant cited security concerns, but these in my view, do not justify one to trespass into another's portion of land or to fence off a road that ought to be accessible to the public. These of course are my observations at this interlocutory stage of the proceedings and as I have mentioned, the defendant will have his day in court to justify his actions. But given my views above, I am of the view that the plaintiff has established a prima facie case with a probability of success. As the case pends, the defendant will have to remove the metal gate, and remove the chain link fence that is on the edge of the boundary of the land parcel No. 3867. The defendant will also have to cover up the dug trench. The trench as dug, is clearly either on the road or in the land parcel No. 3867 and I am not persuaded that the defendant ought to have dug that trench on that side of the land. The defendant could perfectly have achieved the same aim of creating a drainage by digging a trench alongside its parcels No. 10714 and 10715. Nobody will stop him from doing so on its land parcels.

9. From the above discourse, I make the following orders pending hearing and determination of this suit.

(i) *The defendant is hereby ordered to remove the metal gate erected at the entrance of the 6 metre road of access in issue.*

(ii) *The defendant is hereby ordered to remove the chain link fence abutting the land parcel Laikipia/Nyahururu/3867 and restore the same to the position it was before the said fence was erected.*

(iii) *The defendant is hereby ordered to cover up the dug trench alongside the land parcel Laikipia/Nyahururu/3867 and restore it to the position it was before the trench was dug.*

(iv) *The above to be done forthwith and no later than 7 days.*

(v) *The costs of the application will be to the plaintiff.*

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of

No appearance on the part of Mr. Nderitu Komu for applicant and Mr. Mugo Kamau for the respondent.

C/Asst: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU