



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 302 OF 2010

NYANCHAMA KIMAITI PLAINTIFF

VERSUS

SAMUEL GUTO ONGUSO 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. This suit was brought by the plaintiff on 27th October 2010 through a plaint dated 26th October 2010 in which the plaintiff sought as against the defendants jointly and severally:-
 - a. **A declaration that the decision by the Land Registrar to create non-existent road of access on the plaintiff's land was unlawful and improper.**
 - b. **A permanent injunction to restrain the defendants by themselves and/or their servants from entering in and/or trespassing onto all that parcel of land known as LR No. North Mugirango/Magwagwa I/904.**
 - c. **Costs of the suit.**

The plaintiff averred that the parcel of land known as LR No. North Mugirango/Magwagwa I/904 (hereinafter referred to only as “**the suit property**”) is registered in his name and as such he is entitled to exclusive use and possession thereof. The plaintiff averred further that sometimes in the month of July 2009, the 2nd defendant who is occupying the parcel of land known as LR No. North Mugirango/Magwagwa I/909 (hereinafter referred to as “**Plot No. 909**”) as a licensee lodged a complainant against the plaintiff with the Land Registrar, Nyamira District claiming that there was a dispute over the boundaries of the suit property and Plot No. 909 which required determination. In response to the 1st defendant's said complaint, the Land Registrar, Nyamira District visited the area where the two parcels of land are situated and instead of determining the purported boundary dispute between the plaintiff and the 1st defendant which did not exist in the first place, the said Land Registrar created an access road through the suit property without the consent of the plaintiff and contrary to the registry index map for the area. The plaintiff averred that the said action by the Land Registrar amounts to an infringement of the plaintiff's property rights and has denied the plaintiff the right to occupy and use the portion of the suit property where the said road was created.

2. The plaintiff's suit was defended by the 1st defendant. The 2nd defendant neither entered appearance nor filed a statement of defence. In his statement of defence filed on 24th January 2011, the 1st defendant denied the plaintiff's claim in its entirety and contended that the road which the plaintiff claims to have been opened on the suit property was a public surveyed road of access which had been closed by the plaintiff. The 1st defendant denied that the plaintiff's

- property rights were infringed by the opening of the said road. The plaintiff's suit was heard on 2nd July 2013 and 22nd October 2013. The plaintiff gave evidence and called one witness. In his evidence, the plaintiff told the court that; he is the proprietor of the suit property while the 1st defendant is the owner of Plot No. 909. The suit property and Plot No. 909 are on the registry index map No. 34. The suit property and Plot No. 909 do not share a common boundary. Sometimes in July, 2009, the District Land Registrar, Nyamira District wrote to the plaintiff with a copy to the 1st defendant notifying them that he would visit the suit property and Plot No. 909 to determine a boundary dispute between the plaintiff and the 1st defendant.
3. When the said Land Registrar came, he did not determine the boundary dispute that was said to exist between the plaintiff and the 1st defendant but instead, he made a road through the suit property which he opened for the use of the 1st defendant and the public. The said Land Registrar prepared a report on the proceedings which took place when he visited the suit property and Plot No. 909. The plaintiff had objected to the road being made through the suit property because the suit property does not share a boundary with the Plot No. 909. In the process of creating the said road, the defendants destroyed the plaintiff's trees and banana plants. The said road also traversed over the graves of the plaintiff's parents and grandparents. There was no road in that area before the Land Registrar, Nyamira District created one.
 4. In cross-examination and re-examination, the plaintiff stated that the person who had made a complaint to the Land Registrar, Nyamira District was one, Misinte Nyandorekia and that the person in occupation of the suit property is the plaintiff's son one, Charles Nyabero Nyanchama. The plaintiff denied that his said son had blocked the road which used to pass through the suit property which road was the one that was opened by the Land Registrar, Nyamira District (hereinafter referred to only as "**the Land Registrar**"). The plaintiff stated that the 1st defendant is the son of Misinte Nyandorekia, deceased and that the 1st defendant is the one who is in occupation of Plot No. 909 and who also appeared before the Land Registrar when he came to the two properties to resolve the boundary dispute. The plaintiff produced in evidence as exhibits; a copy of the registry index map for North Mugirango/ Magwagwa I, registration section, a copy of the title deed for the suit property, a copy of the letter from the Land Registrar dated 14th July 2009 to the plaintiff, a copy of a photograph of the road in dispute and a copy of the Land Registrar's report dated 10th March 2010.
 5. The plaintiff's single witness was his son, Charles Nyabero Nyanchama (PW2). PW2 is residing on the suit property. He corroborated the plaintiff's evidence concerning the ownership of the suit property and Plot No. 909, the 1st defendant's complaint to the Land Registrar, and the said Land Registrar's visit to determine the complaint. PW2 reiterated the plaintiff's evidence that instead of determining the boundary dispute that had brought him to the suit property; the Land Registrar instead opened an access road through the suit property. PW2 told the court that there is already a road which has traversed the suit property and that the road that was opened by the Land Registrar makes the number of roads through the suit property to two (2). PW2 denied that he had blocked an access road and stated that the road that was created by the Land Registrar passes inside the suit property. PW2 denied that the said road is on the boundary between the suit property and another parcel of land. PW2 contended that by creating the said road, the Land Registrar had given a portion of the suit property to the public.
 6. In cross-examination and re-examination, PW2 stated that the road in dispute is entirely on the suit property and that the road is being used by the public. He stated that the road was created at the junction where the main road which traverses the suit property joins the suit property and LR No. North Mugirango/Magwagwa I/910. He reiterated that the said road is not on the boundary between the suit property and Plot No. 910 but entirely on the suit property. The 1st defendant also gave evidence and called one witness. The 1st defendant testified that; the plaintiff is his cousin and neighbour and that the plaintiff owns and occupies the suit property while the defendant occupies Plot No. 909 which is owned by his father. He produced a copy of a certificate of official search in respect of Plot No. 909 in proof of that fact. The 1st defendant testified further that the dispute that he had with the plaintiff concerned a footpath which he had used over the years and which the plaintiff blocked in the year 1998.
 7. The 1st defendant produced in evidence a copy of an extract of the registry index map (Sheet Map

Nos. 33 and 34.) for North Mugirango/Magwagwa I to demonstrate the existence of the said footpath. The 1st defendant testified that when the plaintiff blocked the said footpath, the matter was reported to the area chief who ordered the plaintiff to open up the same which order the plaintiff ignored. The matter was thereafter reported to the District Officer of the area who convened a meeting at which it was resolved that the said road or footpath be opened up. The 1st defendant denied that he had reported a boundary dispute to the Land Registrar, Nyamira. He stated that before the road complained of was opened, it was confirmed that the road existed in the registry index map for the area.

8. In cross-examination and re-examination the 1st defendant stated that the road in dispute is a surveyed road and that it is in use by the public. He stated that Plot No. 909 shares a boundary with the suit property and that there is an access road in the form of a footpath which lies at the said boundary which he uses to join the main road in the area. He reiterated that the plaintiff had blocked the said foot path that he had used over the years. The 1st defendant's witness was one, Shem Mogeni Nyasimi (DW2). DW2 is a cousin to both the plaintiff and the 1st defendant. He testified that the dispute between the plaintiff and the 1st defendant arose over a road that was closed or blocked by the plaintiff's son. After the closure of the said road, several attempts were made to resolve the dispute amicably through the help of the clan elders and the area chief but the attempts did not bear fruit. The dispute was escalated to the area District Officer who ordered the said road to be opened which order was not complied with by the plaintiff.
9. The 1st defendant was then advised to seek assistance from the survey department who came and opened the said road ultimately. DW2 testified that the road in dispute was in existence even before the Land Adjudication was done in the area and when the Land Registrar came to the site, it was to resolve the dispute over the said road and not to determine a dispute over boundary. DW2 testified that the plaintiff's son had blocked the road using trees and thorns. In cross-examination and re-examination, DW2 testified that the suit property shares a boundary with Plot No. 909 and that the road that was opened was the one that had been closed by the plaintiff's son. He confirmed that the road had been in existence for several years before it was closed as aforesaid.
10. After the close of the defence case, the advocates for the parties agreed to file written submissions. The plaintiff filed his submissions on 9th January 2014 while the defendant filed his submissions in reply on 13th January 2014. I have considered the pleadings filed herein together with the evidence tendered by the parties and their witnesses. I have also considered the submissions filed by the advocates for the parties and the authorities cited in support thereof. The parties did not agree on issues to be determined by the court. In their written submissions, each party framed his own issues. I have looked at the separate issues drawn by each party, the pleadings filed herein and the evidence tendered. I am of the opinion that the following are the issues which arise for determination in this suit:-

- i. **Whether the plaintiff is the registered proprietor of the suit property.**
- ii. **Whether the suit property and Plot No. 909 share a common boundary.**
- iii. **Whether there existed a road of access to Plot No. 909 through or next to the suit property.**
- iv. **If the answer to No. iii above is in the affirmative, whether the plaintiff had closed the said access road.**
- v. **If the answer to No. iv is in the affirmative, whether the land registrar was entitled to open the said road.**
- vi. **Whether the plaintiff's property rights were infringed by the defendants.**
- vii. **Whether the plaintiff is entitled to the reliefs sought**

11. Issues Nos. (i) and (ii);

I am satisfied on the material before me that the plaintiff is the registered proprietor of the suit property. The plaintiff testified that he is the registered proprietor of the suit property. In support of this testimony, the plaintiff produced as exhibit a copy of a land certificate dated 21st February 1974 in respect of the suit property which shows that the suit property is registered in the name of the plaintiff. The plaintiff's evidence on the issue of his ownership of the suit property was not challenged by any material evidence by the defendant. I therefore answer the first issue in the affirmative. The plaintiff produced in evidence

as plaintiff's exhibit 2 a copy of an extract of the registry index map for North Mugirango/Magwagwa I registration section. The defendant produced similar evidence as defence exhibit 2. It is clear from the two (2) exhibits that the suit property and Plot No. 909 converge at a particular point. There is a point where the boundaries of the suit property, LR. No. North Mugirango/Magwagwa I/ 908 (Plot No. 908), LR. No. North Mugirango/Magwagwa I /909, (Plot No. 909) and LR. No. North Mugirango/Magwagwa I /910, (Plot No. 910) converge. It can be safely said therefore that Plot No. 909 and the suit property have a common boundary at that point. Issue No. ii is also answered in the affirmative.

12. Issue No. iii;

The plaintiff's exhibit 2 and the defendants' exhibit 2 are unanimous that there is a road of access between Plot No. 910 and the suit property which serves Plot Nos. 909 and 908. According to the two exhibits, the said road seems to be entirely on the suit property. The reason for this is not clear and it is not an issue for determination in this suit. The plaintiff's exhibit 4 (the report by the Land Registrar) also supports the defendant's contention that there is a road of access through the suit property to Plot No. 909. In his evidence the plaintiff contended that the said road was not in existence until it was opened by the Land Registrar. This contention is inconsistent with the contents of plaintiff's exhibit 2 and the defendant's exhibit 2 which I have referred to above. The evidence placed before me by both parties points to the existence of a road of access through the suit property to Plot No. 909 and Plot No. 908. The contention by the plaintiff and his witness (PW2) that there is no access road through the suit property to Plot No. 909 is not supported by any independent evidence. In my view, the registry index map carries a lot of weight when what is to be determined is whether a road passes through a particular parcel of land. As I have already stated above, the two versions of the registry index map produced by both parties are in agreement that there is a road of access through the suit property to Plot No. 909. In the absence of any other evidence to the contrary save for the plaintiff's and PW2's testimonies which are not backed by any independent evidence, it is my finding that there is an official surveyed road of access through the suit property to Plot No. 909.

13. Issue No. IV:-

The defendant contended that the plaintiff's son (PW2) had closed the access road referred to hereinabove and this is what prompted him to seek assistance from the Land Registrar to have the said road which serves Plot No. 909 opened. The 1st defendant testified that before the dispute was referred to the Land Registrar the same had been arbitrated by the area chief and District Officer and that the two officers had ordered the said access road to be opened which order was ignored by the plaintiff. The plaintiff did not challenge this evidence which was supported by the testimony of DW2 and the Plaintiff's exhibit 4. I am of the view that if the said access road was not closed then there was nothing for the Land Registrar to open. I have seen on record a copy of a letter dated 9th April 2009 by the District Officer, Nyamusi Division to the District Land Registrar, Nyamira District on the issue of this access road. In this letter which was not produced in evidence by either party but was among the bundle of documents filed in court on 24th January 2011 by the 1st defendant, the said District Officer requested the Land Registrar to assist in opening "closed routes" which he stated to have been closed by among others the owner of the suit property. I have also seen a copy of a letter dated 25th January 2010 which was addressed to among others the plaintiff by the Land Registrar in which letter the Land Registrar indicated that he was going to visit the site of the suit property, Plot No. 909 and Plot No. 910 on 11th February 2010 to open an access road which passes through the suit property. This letter was also not produced in evidence by either party but was attached to the affidavit of the 1st defendant that was sworn on 24th January 2011 in opposition to the application that the plaintiff had filed for a temporary injunction. It is not clear why none of the parties produced this letter in evidence. The plaintiff chose instead to produce the Land Registrar's letter dated 14th July 2009 (P.exh.3). This letter of 24th January 2011 was very categorical that the purpose of the registrar's visit to the suit property and Plot No. 909 was to open up a road of access that had been blocked. On the material before me, I would answer issue No. (iv) in the affirmative.

14. Issue No. V:-

The plaintiff's case is that the Land Registrar had visited the suit property and Plot No. 909 among others to determine a boundary dispute and as such the Land Registrar had no business opening up a road of access which in any event was non-existent. In my view, there is a very thin line between determining a boundary dispute and opening up a road of access the existence of which is in dispute. The dispute between the plaintiff and the 1st defendant was over a road of access. Whereas the 1st defendant contended that a road of access existed along the boundary of the suit property and Plot No. 910 to Plot No. 909, the plaintiff contended as he has done in this case that no such road existed. In the face of these opposing views, the Land Registrar had to determine the boundaries of these parcels of land and if at all, any access road existed through the suit property and Plot No. 910 to Plot No. 909. According to P.exh. 4, when the Land Registrar visited the site of the suit property and Plot No. 909 together with the District Surveyor, they confirmed that a road existed through the suit property to Plot No. 909 and that it had been closed by the plaintiff. The Land Registrar proceeded and placed beacons to mark the boundaries of the said road on the ground and opened it for use by the public. I am of the view that the exercise that the Land Registrar undertook was within the powers conferred upon the Land Registrar by section 21 of the Registered Land Act, Cap 300, Laws of Kenya (now repealed) and section 18 of the Land Registration Act, 2012. The exercise complained of was therefore lawfully undertaken due notices having been given to all the parties who would have been affected therewith.

15. Issues No. VI and VII:-

As I have already found hereinabove, there is a surveyed road of access through the suit property which serves Plot No. 909 and the neighbouring parcels of land. The plaintiff has no proprietary right over the land where this road is situated. By opening the said road of access for use by the public and the 1st defendant, neither the Land Registrar nor the 1st defendant can be said to have infringed on the plaintiff's property rights. Since the defendants did not infringe on any of the plaintiff's rights, the plaintiff is not entitled to the reliefs sought in this suit.

16. Conclusion

In conclusion, I am not satisfied that the plaintiff has proved his claim against the defendants on a balance of probability. Although the 2nd defendant did not file a statement of defence to the plaintiff's claim, the onus was still upon the plaintiff to prove his claim against the 2nd defendant. I am not in agreement with the plaintiff's submission that failure by the 2nd defendant to file a defence to the plaintiff's claim can be construed as an admission of the plaintiff's claim. Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya that were cited by the plaintiff's advocate and the defendant's advocate respectively support this position. Since the provisions of the Evidence Act, Cap 80 Laws of Kenya is clear on this issue, there is no room for making inferences as I have been invited to do by the plaintiff's advocate. I have considered Mulla, Code of Civil Procedure that was cited by the plaintiff's advocate. I have not found the passages relied on by the plaintiff relevant in the circumstances of this case. If I was to agree with the plaintiff's argument on the effect of failure to file a statement of defence then there would be no need for formal proof in all cases where no defence has been filed. I have said enough to show that the plaintiff's case has not been proved. The same is hereby dismissed with costs to the 1st defendant.

Delivered, signed and dated at KISII this 31st day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

N/A Court Clerk.

S. OKONG'O

JUDGE