



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 128 OF 2010

SHEM ASIRIGWA SHIPAKULI PLAINTIFF

V E R S U S

DAVID AGAIRE OKOTO 1ST RESPONDENT

TOM ASILIVWA MASINZA..... 2NDRESPONDENT

CHRISTOPHER MUDOGA 3RD RESPONDENT

J U D G M E N T

The originating summons dated 31.8.2010 seeks the determination of the following questions:-

1. *Whether the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya relating to claim of interest to law also apply to a claim of road of access to private land.*
2. *Whether the defendants have a right to claim road of access through the plaintiff's land which they have never used for the past 28 years.*
3. *Whether the permanent house which the plaintiff built on his land in the year 1982 lies on the road of access to the defendants' private lands.*
4. *Whether if the plaintiff's house indeed lies on the road of access to the defendant's private lands, through his own land, the defendants have the right to claim the road and seek to demolish the plaintiff's house when they never raised a complaint against its construction 28 years ago.*
5. *Whether if any of the defendants had an interest in the land parcel known as N. MARAGOLI/KEDOLI/1097 either by way of access or otherwise the same has been extinguished by passage of time.*

The matter proceeded by way of oral evidence. The plaintiff's evidence is that he bought plot number **KAKAMEGA/KEDOLI/1097** in 1982 and he built a permanent house thereon in 1985. The defendants are his neighbours and they have been living in the neighbourhood before he bought his land. The defendants are claiming that there is a road passing through his land yet he has lived there for over 30 years. The Vihiga Land office summoned the parties and the intention was to create the road which is not there on the ground. Currently the defendants are using a road which does not go through the plaintiff's land. The plaintiff would not like the defendants to go through his land. He is willing to allow the defendants to use the lower part of his land where there is a path so long as the defendants can compensate him. His plot was a creation from the original plot number **MARAGOLI/KEDOLI/197**. The plaintiff is not aware that there is a road on the ground. He was sold his plot by **DAVID OKOTO**

(1stdefendant). When he bought his plot he signed the mutation forms and he was not told that there would be a road on his land. Since 1982 no one has claimed that there is a road.

KALORI MWARA OKWARO, the Vihiga Land Registrar testified as DW1. His evidence is that the defendants went to his office in March 2010 complaining that the plaintiff has blocked a road. One of the defendants told him that he was the one who sold part of the land to the plaintiff. DW1 went to the site on the 23.7.2010 and noted from the mutation forms that the original plot number **KAKAMEGA/KEDOLI/197** was in the names of **DAVID AGAIRE OKOTO** who subdivided it into two portions namely – **KAKAMEGA/KEDOLI/1096** and **1097**. The plaintiff bought plot number 1097 and the road being complained of was indicated in the mutation forms. The plaintiff later bought plot number **KAKAMEGA/KEDOLI/1086** which is adjacent to his plot **1097** and he combined the two plots. Plot 1096 was later subdivided into two plots namely **KAKAMEGA/KEDOLI/1165** and **1166**. DW1 produced the area map sheet number 4 which indicates that the road complained of was catered for. According to DW1 the plaintiff's homestead was built on the road and if the road was to be established it will affect the plaintiff's home. DW1 went to the site several times but the plaintiff is not willing to open the road.

DW2, DAVID AGAIRE OKOTO, testified that he is the one who sold plot number 1097 to the plaintiff. The other two defendants **CHRISTOPHER MUDOGA** and **TOM ASILIVWA MASINZA** are his neighbours. Christopher is his brother and he owns plot number 1166. Tom owns plot number 1125 while he owns plot number 1166. His further evidence is that when the plaintiff bought the plot from him he closed the road. He currently uses neighbours' plots to access his land. The plaintiff built a toilet near the road and he has put two gates hence blocking the road.

The court directed DW1 to visit the site and see if a road could be created without interfering with the plaintiff's house. DW1 present to the court his report dated 15.8.2012 which gives four different options. The court visited the site on the 17.10.2012 and was able to see the scenario on the ground. The Vihiga District Land Registrar in his letter dated 3.3.2011 addressed to the court does indicate that there was an access road that was created during the subdivision of plot number **N.MARAGOLI/KEDOLI/197**. The main issue to be determined is whether indeed there was an access road leading to the defendants' plots and whether if that road did exist its use has been extinguished since it has not been utilized for a long period of time. The other issues are the ones raised in the originating summons. According to the mutation forms that were signed by the plaintiff and the 1st defendant when the original plot number 197 was being subdivided, there is an access road that was created. According to DW1 the road is meant to be four (4) meters. It is the evidence of DW1 that the area map sheet also shows that the road was there. Both parties produced the area map sheet which was prepared during the subdivision of the original plot number **197** and the map shows that there is a road running parallel to plot **1097** up to the end of the plot. From the mutation form plot number **1097** is on the upper part while plot number **1096** is on the lower part. The road was created and it was leading to the lower portion of the original plot number **197** which became 1096 and was later sub-divided into **1165** and **1166**. The evidence also shows that the plaintiff also bought plot numbers 1086 and 1128 which are enjoined together with his plot number **1097**. When the court visited the site the plaintiff informed the court that plot number 1086 lies between plot number **1097** and **1128**. Plot number **1086** is about ten meters wide and plot number **1128** is also about 10 meters wide.

It is established by the evidence on record that the original subdivision did create the access road which led to the lower part of the plot number **197**. The mutation forms do confirm this fact. The original plot number **197** was divided into two and there was no way it could have been left like that without a road leading to plot number **1086**. I am satisfied that there was a road meant to serve plot number 1086. The plaintiff contends that he has been in occupation for over 28 years and nobody has claimed the road. He however acknowledged that the defendants at times pass over his land so as to reach their homes. On the issue whether the defendants' claim for the access road is barred by statute under the Limitation of Actions Act Cap 22 Laws of Kenya, I do find that that claim is not statute barred. An access road is a public utility and the mere fact that it has not been utilized for over 12 years does not bar anybody from claiming the right to use the road. In other words the plaintiff cannot claim to own the road because he has converted it into his own property. Allowing the plaintiff to remaining with an access road is

tantamount to legalizing his unlawful act of annexing public property for his own use. On the second question as per the originating summons I do find that the defendants have the right to claim the access road despite the long period of time. The evidence on record shows that the plaintiff's permanent house lies in the middle of the access road. The answer to question number 3 of the originating summons is that it is true that the plaintiff's house lies on the access road. That also answers question number 4 as to whether the defendants have the right to claim the demolition of the plaintiff's house. I do find that the defendants' claim on the access road has not been extinguished by the passage of time.

According to DW1's report dated 15.8.2012 if the access road was to be established as per the mutation forms the plaintiff's house would be divided into two. The road will also go through the plaintiff's pit latrine and two steel gates. The second option indicate that a road can be created next to the neighbouring plot number 196 but it will be less than one meter from the plaintiff's permanent house. According to DW1 if a road is to be created through plot number 1086 it will affect the plaintiff's semi-permanent house, four pillars and a steel gate. The fourth alternative is to create a road between the plaintiff's two gates but the plaintiff is not willing to do so. It is clear from the evidence that those affected by the closure of the road are the two brothers **DAVID AGAIRE** and **CHRISTOPHER MUDOGA**. The plaintiff contends that he has talked to a neighbor by the name **MARIKO** who is willing to have the road pass through his land. I do find that all the options are meant to assist the plaintiff so that his permanent house is not affected. His two other plots namely 1086 and 1128 are enjoined to his main plot number **1097** where the permanent house is located. Although the plaintiff contends that if a road is created through his three plots it will compromise his security, I do find that the plaintiff's security must be subservient to the defendants' rights to have an access road leading to their properties which lie behind plot number 1097.

In the end, I do order the Vihiga Land District Registrar and surveyor do create an access road passing through the plaintiff's plot number **KAKAMEGA/KEDOLI/1086** and remove the four pillars, the semi-permanent house and the steel gate. This is in line with option number 3 of the report prepared by DW1. The road to be created should have equal measurements as the one originally planned as per the mutations forms. The plaintiff's originating summons dated 31.8.2010 is hereby dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E