



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 31 OF 2012.

JOYCE RITA MAKHANU :::::::::::::::::::: PLAINTIFF/APPLICANT.

VERSUS

JOSEPH OMAE)

SIMON WAWERU) :::::::::::::::::::: DEFENDANTS/RESPONDENTS.

BEN WENANI)

J U D G M E N T.

The plaintiff Joyce Rita Makhanu brought this suit against the defendants seeking a declaration that the intended creation of an access road on her plot No. 1382 is illegal, null and void and a permanent injunction restraining the defendants by themselves, their agents, servants, proxies or by any person acting for or on their behalf or under their instructions from surveying, creating or opening access road, demolishing structures or in any other manner interfering with the plaintiff's quiet possession of the said plot.

The plaintiff contends that she is the owner of Plot No. 1382 measuring 282 by 83 ft at Namanjalala farm hereinafter referred to as the suit land. The plaintiff contends that the suit land was bought by her late husband vide sale agreement dated 6/12/1978. The suit land was bought from Trans Nzoia investment Company Limited. A sale agreement to that effect was produced as exhibit 2. Before the demise of her husband, he transferred the suit land into her. The suit land was bought from Boniface Wasike. After the demise of the vendor, his sons started selling plots which were behind the suit land. Those who bought the land which was behind hers started passing through her land to access the tarmac road. Her husband who was then alive wrote a protest letter to the area chief. She produced the letter as exhibit 2. The chief called the sons of Wasike and asked them not to let buyers pass through the plaintiff's land. The dispute persisted and it went to the DO's office. The D.O. Advised the plaintiff to file a suit in court. She then decided to bring a suit against the defendants who were officials of a group calling itself Sinoko group. She contends that the defendants are behind plans to agitate for the creation of a road of access through her land.

The defendants urged their case through the 2nd defendant Simon Waweru who contends that when he bought land at Namanjalala, he noticed that there was a road of access which passed through from where his land and that of his fellow Sinoko villagers was exiting at the tarmac road to Endebess. He noticed that the access road had been reduced from 6 metres to 2 metres at the point where it passes through the plaintiff's plot. As the secretary of Sinoko group, he mobilised villagers to raise money and bring a surveyor who could determine the extent of the access road but before this could be done, the

plaintiff moved to court and blocked any further moves. He produced photographs taken showing the access road which is wider at the rear but when it nears the tarmac where it exits, it narrows. The photographs show that the road has been reduced by a building which has been built encroaching part of the access road. This is the building which is owned by the plaintiff. The defendants contend that they are not intent on creating any access road but are only out to have the District Surveyor determine whether there exists an access road touching on the suit land and if so its extent thereof.

I have carefully considered the plaintiff's case as well s the defendant's defence. The issue which arises for determination is whether the defendants are seeking to create an access road over the plaintiff's land or not. The plaintiff's contention is that there is no access road through the area. She contends that the access road which is existing and is being used was created for the convenience of children to and from her school which is on the suit land. This contention is not supported by any evidence. The plaintiff did not adduce evidence to show that during the subdivision of Namanjalala farm, there was no road of access passing by her plot. The photographs which were produced by the defendants show a road which only narrows at the point where the plaintiff's land lies. The narrowed road is due to a building which apparently has eaten into a portion of the road. The defendants only concern was to engage the services of a surveyor who would have ascertained if a road of access exists and if so its extent. There was no intention of creating a new access road through the plaintiff's land. There was a map of the area which was marked for identification but was never produced. The map is part of the defendant's documents. It clearly shows that the road runs through to the point where the plaintiff's land is situated. Whether this road ended at the plaintiff's plot or it went through to the tarmac road leading to Endebess will only be determined by a surveyor equipped with an area map. The plaintiff seeks to permanently restrain the defendants or their agents from ever surveying the road of access. This cannot be possible. If there is a dispute as to whether there is or there is not an access road, this dispute cannot be resolved without involving surveyors. In the plaintiff's own testimony, she admitted that she had paid survey fees on 31/7/2008 so that the surveyors can come and establish the extent of her land as against the road. It does not therefore make sense that she can seek to restrain others from bringing in the surveyor to establish if there is an access road or not.

The plaintiff's advocates have submitted that the defendants are seeking to have an easement over the plaintiff's land and that they have not met the conditions for grant of the same as per the law. The case of **Govindji & Another Vs. Sifa Insurance Company Ltd 2003 KLR 446** was cited. This case has no relevance to the situation in the present case. The defendants were neither seeking to create an access way where none existed nor were they seeking acquisition of easement by way of prescription. What the defendants wanted ascertained is whether there is blockage of part of the access road which existed. The defendants contention is that the access road has been reduced from six metres to 2 metres and this is only when it reaches the plaintiff's land. I find that the plaintiff has failed to prove a case against the defendants on a balance of probabilities. Her case against them is hereby dismissed with costs to the defendants.

[Dated, signed and delivered in open court on this 29th day of July, 2013.]

E. OBAGA.

JUDGE.

In the presence of Mr. Ingosi for 2nd defendant and M/s. Kibe for 1st defendant and Mr. Wafula for Mr. Bundi for plaintiff present.

Court Clerk – Rumaita.

E. OBAGA.

JUDGE.

29/7/2013.

