



NO.136

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 218 OF 2012

ABSOLOM ORURU.....PLAINTIFF

VERSUS

HENRY NYABUTO ONDITI.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 28th June, 2012 through a plaint dated 26th June, 2012. The plaintiff is the registered proprietor of all that parcel of land known as LR. No. Majoge/ Magenche/ 534 (hereinafter referred to as “**the suit property**”). The plaintiff claims that on or about the 4th and 5th day of April, 2012 the defendant entered the suit property unlawfully, created an illegal road of access on apportion thereof and in the process caused destruction of the plaintiff’s trees that were planted on the said portion of the suit property and the features that existed in the boundary of the suit property and LR. No. Majoge/ Magenche/ 533 (hereinafter referred to as “**Plot No. 533**”). The plaintiff claims that as a result of the defendant’s said acts of trespass, the plaintiff has been deprived of the use and enjoyment of the said portion of the suit property and has suffered loss and damage. The plaintiff demanded admission of liability from the defendant and compensation for the loss suffered as a result of the defendant’s said acts of trespass but the defendant refused and/or declined accede to the plaintiff’ demand. It is as a result of the foregoing that the plaintiff was forced to bring this suit. The plaintiff sought a declaration that the defendant is not entitled to enter, create or use the road of access on the suit property or at all, an order of injunction to restrain the defendant from remaining on or continuing in occupation or use of the said illegal road of access created on the suit property and an order directing the Land Registrar assisted by the District Surveyor to visit the suit property and Plot No. 533 and fix their common boundary in accordance with the area survey map.
2. The defendant was served with the summons to enter appearance but failed to do so. The plaintiff applied for interlocutory judgment in default of appearance and the same was entered by the deputy registrar on 17th September, 2012. On 7th February, 2013 this suit was fixed for formal proof on 28th May, 2013. The plaintiff gave evidence and called no witness. The plaintiff (hereinafter referred to as “**PW1**” where the context so admits) in his evidence stated that the defendant is a former councilor of Magenche ward where the plaintiff comes from and where also the suit property is situated. The plaintiff stated that on 4th April, 2012, his wife went to the suit property and found a group of people making a road of access on a portion thereof. The plaintiff’s said wife reported this incident to him on the same day. On the following day, namely, 5th April, 2012 the plaintiff went to the suit property to find out what was happening. On arrival, he found the said group still continuing with their work of creating the said access road on the suit property.

On inquiring from the said group as to who had allowed them to create a road on the suit property, the defendant came forward and informed the plaintiff that he was the one in charge of the exercise and that the access road was being made for the area residents. The plaintiff wrote to the Land Registrar, Kisii District to confirm if there is an official road of access passing through the suit property to which the said registrar responded in the negative. The plaintiff made further inquiries on the same subject at the department of survey. The survey department gave him a copy of the survey map for Magenche registration section which confirmed that no road of access passes through the suit property. The plaintiff stated that the said road of access was made at the boundary between the suit property and Plot No. 533 and resulted in the destruction of the boundary features of the two plots. The defendant and his group aforesaid also destroyed 80 trees that were on the portion of the suit property on which they created the said road. The said access road was created where there was no road before and the same is now in use. The plaintiff stated that there is an official access road passing through the suit property. He urged the court to enter judgment in his favour as prayed in the plaint. The plaintiff produced as exhibits, copies of; a certificate of official search dated 12th June, 2012 with respect to the title of the suit property, a copy of a land certificate dated 22nd June, 1973 for the suit property, a copy of a demand letter dated 2nd May, 2012 addressed to the defendant, a copy of a letter dated 21st May, 2012 addressed to the District Land Registrar Kisii/Gucha Districts, a copy of a letter dated 23rd May, 2012 addressed to the plaintiff's advocates by the Land Registrar, Kisii Central District and a copy of Magenche registration section Map (Diagram) No. 15.

3. I am satisfied from the evidence adduced by the plaintiff that the plaintiff has proved his claim against the defendant on a balance of probability. The plaintiff has proved that he is the registered proprietor of the suit property and that the defendant had no lawful excuse for entering thereon and creating an access road. The plaintiff has also proved that there is no officially recognized road of access which passes through the suit property. What have given me some difficulty are the remedies that the plaintiff is entitled to in the circumstances of this case. What I have gathered from the evidence tendered by the plaintiff is that the defendant who was Magenche ward councilor at the material time entered the suit property in the company of a group of people and created an access road through it which according to the defendant was to serve the area residents. According to the letter dated 29th May, 2012 from the Sub-Chief of Mokubo Sub-Location that was produced by the plaintiff in evidence, the road that was created by the defendant and which passed through the suit property was from Magenche Sub-Location to Mokubo Sub-Location. The plaintiff testified that as at the date of the hearing of this suit, the said access road was in use. I can grant the declaration sought by the plaintiff that the defendant was not entitled to create a road of access through the suit property. I am however of the view that the injunction sought against the defendant if granted would be in vain. There is no evidence that the defendant created the said access road for himself. There is also no evidence that the defendant is occupying and/or using the said road which to me looks like a road that is open to the public. The evidence put before the court shows that the said access road/traverses two sub-locations. The plaintiff from the evidence tendered suffered some damages both general and special. No evidence was however led that could assist the court in assessing such damages. The law on special damages is settled. Special damages must be pleaded with the necessary particulars and strictly proved. The plaintiff did not specifically plead the value of his trees that were damaged neither did he prove the same at the trial. I am also unable to grant the plaintiff prayer for the fixing of boundaries between the suit property and Plot No. 533. Plot No. 533 is owned by someone who is not a party to this case. This court is unable to make any order that would affect the said third party's interest in Plot No. 533 without giving him an opportunity to be heard. Furthermore, the land registrar does not require an order from the court before it can fix a boundary between two parcels of land. The land registrar has power under section 19 of the Land Registration Act, 2012 to fix boundaries. The plaintiff can move the registrar to act accordingly without the necessity of a court order. Due to the foregoing, I hereby enter judgment for the plaintiff against the defendant as follows;
- a. **I declare that the defendant was not entitled to create a road of access through the parcel of land known as LR. No. Majoge/ Magenche/534.**

b. The Plaintiff shall have the costs of the suit.

Dated, signed and delivered at Kisii this 11TH day of OCTOBER, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ombachi for the plaintiff

No appearance for the defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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