



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 656 of 2008

KAHUUH WANG'ANG'A. APPELLANT

VERSUS

KIMANI WARUINGE. RESPONDENT

(From the judgment and decree of D Mulekyo, SRM in Kiambu CMCC No.52 of 2005)

J U D G M E N T

The Appellant herein was the Plaintiff, before the lower trial court. In a plaint dated 7th March, 2005, the Appellant/Plaintiff claimed for a judgment against the Respondent/Defendant for

a) An order to demolish and remove an illegal fence and other illegal structures blocking an access road between L.R. No. Kiambaa/Thimbigua/3137 belonging to the Plaintiff and L.R. Nos. Kiambaa/Thimbigua/3136 and 2907 both belonging to the Defendant and in default of removal, plaintiff to do so at Defendant's cost.

b) General damages.

c) Costs and interests.

The Defendant had filed his defence stating that he had no legal obligation to provide the claimed access road in view of the fact that L.R. No. Kiambaa/Thimbigua/3137 had been sold to the Plaintiff by a third party who should have provided the access road. The defendant had further denied that he had obstructed the alleged access road.

During the hearing of the suit at the lower court, the plaintiff testified that the width of the access road had been determined by the District Land Registrar and Surveyor in accordance with a court order dated 28th January, 2000 under Kiambu RMCC No. 428 of 1999. He further testified that the Defendant was by a letter dated 6th March 2000 from the District Land Registrar, ordered to restore the access road measuring 20ft wide but that the Defendant had thereafter ignored or refused to restore the part of access road which he still occupied. That, that is what necessitated the filing of the suit. The Registrar's Report, letter and the court order aforesaid were produced as exhibits.

In his evidence in rebuttal the Defendant admitted that he had built toilets and put a fence on the disputed part of the road. He clearly admitted that the land sold to the Plaintiff i.e. L.R. No. Kiambaa/Thindigua/3137 was registered in his own name and was transferred by him to the plaintiff after

Defendant's son sold it. He admitted that the access road existed. He did not deny that the Land Registrar and his surveyor had resurveyed and marked the road with beacons. He did not deny receiving the Registrar's letter to release the full access road to Appellant for use.

In her short judgment, the honourable trial magistrate appears to have taken the position that the Defendant's defence to the effect that the seller of L.R. No. 3137 should have provided the access road, was not disproved by the plaintiff. The trial magistrate also said that the plaintiff did not prove that the Defendant (and not Defendant son), had sold the said land to the Plaintiff. As to the issue of Ksh.50,000/- general damages sought by the Plaintiff, the trial court stated that the same was not proved and dismissed it.

I have carefully perused the evidence as well as the pleadings before the lower court. The Plaintiff's case was clearly that the Defendant had blocked part of the road of access between his land L.R. No. Kiambaa/Thindigua/3136 and plaintiffs land L.R. No. Kiambaa/Thindigua/2907 on the other side. He gave clear evidence that Defendant had constructed toilets and a fence on part of the access road. He clarified that the access road appeared on the area map and that under Kiambu Civil Case No. 428 of 1999, the Land Registrar had visited the land with his surveyor and established that a part of the access road, had been blocked by the Defendant. The Plaintiff had further testified that the Defendant had been ordered by the Registrar through a letter dated 6th March 2000, to let go the part of the access road that he was illegally holding, but that, the Defendant had refused to do so, making the filing of this suit necessary.

It is not in dispute that all the above evidence by the Plaintiff was not responded to or rebutted by the Defendant's evidence. All the Defendant had said in his testimony, was that since his son Stephen was the one who had sold part of his land to the Plaintiff, and he is the one who should have, at the same time, provided access road to the Plaintiff.

I have carefully considered the evidence. In my view and finding, it was necessary in deciding the suit, that the trial court should have dealt with the relevant issues raised in the pleadings and evidence adduced before him. He, for example, failed to address his mind as to whether or not, a provision of an access road had been provided in the area map, between the parcels of land owned by the parties as pleaded. Furthermore it was relevant also for the trial magistrate to establish whether or not the Land Registrar and his surveyor had earlier re-established the access road under the reference of the matter made to him by court in Kiambu Civil Suit No. 428 of 1999. It is not clear also why the trial court ignored all that evidence and decided to magnify the importance of the sale of the relevant piece of land to the Plaintiff, which was irrelevant. In any case, there was adequate evidence on the record that L.R. No. 3137 belonged, and was registered in the Defendant's name although sold to the Plaintiff by the Defendant's son, Stephen. All sale executions must, therefore, have been carried out by the Defendant personally.

Finally, on the same issue, the map produced as evidence before the trial magistrate, confirmed the existence of the disputed access road. It was not denied by the Defendant that the same was the access road that the land Registrar and his surveyor identified and re-marked by beacons. The fact that the Plaintiff filed a fresh suit to enforce the access road established under orders or directions made in a different earlier suit, was not unprocedural because his cause of action arose after the Defendant refused to follow or obey the Land Registrar's instructions, following a Report made under Kiambu CC No. 428 of 1999.

While this court supports the trial court's decision not to award general damages as claimed by the Plaintiff/Appellant, the court totally erred in not granting the latter's claim related to the access road. There was ample and undisputed, as well as documentary evidence, that the access road claimed, existed and that the Defendant who was illegally using it, had refused to restore it to the detriment of the Plaintiff.

The result then is that this appeal has merit. It is hereby allowed to the effect that the Defendant/Respondent is hereby ordered to restore the part of access road he has presently fenced in and built toilets on. If the Defendant fails to remove the fence and toilets as hereby ordered, the Plaintiff/Appellant shall through the process of execution, at the Respondent's cost, re-establish the

access road by having the toilets and the fence removed so that the access road measuring 20ft, shall be restored. Costs are to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 27th day of February, 2012.

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D A ONYANCHA
JUDGE