



**Mugenyo & another (Suing on behalf of Giakaburi Kianjikeru S.H.G) v Ngunu & another
(Environment & Land Case 667 of 2014) [2022] KEELC 4912 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 667 OF 2014**

**L WAITHAKA, J
JUNE 16, 2022**

BETWEEN

MOSES KINAUCHU MUGENYO 1ST PLAINTIFF

WANJENI KANGERI 2ND PLAINTIFF

SUING ON BEHALF OF GIAKABURI KIANJIKERU S.H.G

AND

MARGARET WANDIA NGUNU 1ST DEFENDANT

DISTRICT LAND REGISTRAR, NYERI 2ND DEFENDANT

(FORMERLY NYERI HCC NO 12 OF 2012)

JUDGMENT

Introduction

1. The plaintiffs herein instituted this suit seeking an order to compel the 1st defendant to open a public road of access allegedly existing between the parcels of land known as Magutu/Gatei 444 and 445.
2. The suit is premised on the grounds that on or about May 11, 2006 the 1st defendant's husband (now deceased) blocked a public road of access that allegedly existed between the parcels of land known as Magutu/Gatei 444 and 445; that closure of the access road inconvenienced the plaintiffs and other members of Giakaburi Kianjikeru S H G by blocking their access to public utilities like spring well, cattle dip, shopping centre, school, health centre, tea factory and the chief's office; that their plea to the defendants to re-open the access road was not heeded and that the orders which barred the 2nd defendant from re-opening the access road were vacated by the court.



3. In reply and opposition to the plaintiff's suit, the 1st defendant filed a statement of defence on March 21, 2014 in which she denies the existence of the access road and states that the properties of the plaintiffs have not been disclosed.
4. The 2nd defendant neither entered appearance nor filed a statement of defence to the suit.

Evidence

The Plaintiff's Case.

5. When the matter came up for hearing, the 1st plaintiff relied on the statement he recorded on December 19, 2011 filed on February 16, 2012. He produced the list of documents filed on an even date and a supplementary list filed on April 16, 2019 as Pexbt 1 to 24.
6. On cross examination, he stated that their Self Help Group is registered but the registration certificate is not one of the documents in their list of documents. They are over 100 members but he is the only member present in court.
7. He explained that parcels number 444 and 445 are adjacent to each other and are jointly developed; that the 1st defendant's husband closed an access road where they had been passing through for many years and are still using the access road today. He stated that they filed a case before the Land Disputes Tribunal but the tribunal did not make any decision because the case was transferred to Embu.
8. According to the map produced by the 1st plaintiff filed on December 9, 2013 there is no access road between plots number 444 and 445 going to the end.
9. He stated that he obtained the map he produced from survey of Kenya and he urged the court to use their map to determine the issue of access road. He acknowledged that the notes at the bottom of the map are to the effect that the map is not an authority on boundaries.
10. He confirmed that while the Embu case was ongoing the 1st defendant's husband gave a path to access the well at the edge of parcel number 444 and the access path has been used for the last 10 to 13 years.
11. He stated that the 1959 map is the correct map to be used by the court for determination of the case herein.
12. He stated that they have used the access road since time immemorial but stated that the access road given by the 1st defendant's husband is not safe for their children to use.

The Defendant's Case.

13. The 1st defendant who testified as DW told the court that she is the registered owner of plots number 444 and 445. She got registered as the proprietor of the plots in 2009. Before her registration as the proprietor of the parcels of land, the parcels were registered in the name of her husband, Samuel Ngunu Kimondu (deceased) but her husband transferred the parcels to her during his lifetime.
14. She stated that she has been in occupation of the land since 1972. She has developed it extensively by planting crops and building a permanent house. The two parcels are not separated and the developments are on both parcels.
15. According to her, the dispute started between her late husband and the plaintiffs and she only got involved after her husband passed on.



16. She informed the court that in 2005, the plaintiffs came into the land and created an access road between the two parcels.
17. In 2007, her husband donated some 10 feet at the edge of parcel number 444 for use by the public and the access road is being used by the public to date. She stated that they have never sought compensation for the land where the access road exists.
18. She stated that in the map obtained from the lands office, there is no access road between the parcels (Dexbt 1).
19. She further stated that they have no problem with their neighbours apart from the plaintiffs in this case although she does not have any grudge with the plaintiffs.
20. In cross examination, she stated that it is not true that before she got married there existed an access road between the two parcels of land, 444 and 445. It is also not true that her husband blocked the well and that the Provincial Administration had to intervene to get it opened and demanded that they open an access road through parcel No 444.
21. She maintained that the access road was voluntarily donated by her husband.
22. At close of hearing, parties filed submissions which I have read and considered.

Analysis and Determination.

23. The sole issue arising from the pleadings, evidence and submissions, is whether the plaintiffs have proved that there exists a public road of access between the parcels of land herein.
24. Concerning that issue, reference is made to the plaintiff's submissions and the plea by the plaintiffs to the court not to admit the map produced by the defendant. The reason given for that plea to wit without evidence of the Land Registrar and the Surveyor is that the court may have difficulties in making a logical conclusion on the issue. Further, the plaintiffs have not discharged the burden placed on them of proving that there indeed exists a public road of access running through the parcels of land known as Magutu/Gatei/444 and 445.
25. With regard to that issue, the map produced by the plaintiffs shows that at the time of demarcation of the land in 1959, there existed a public road of access between the two parcels of land herein. However, that public road of access does not feature in the Registry Index Map produced by the defendant.
26. *Vide* a letter dated July 18, 2005 (the letter is one of the documents produced by the plaintiffs in evidence), the Chief Land Registrar advised the District Land Registrar, Nyeri to handle the matter (dispute concerning existence of a public access road between the parcels of land herein) in the usual manner of handling boundary disputes.
27. Document number 7 in the plaintiff's supplementary list of documents (undated letter from the Provincial Surveyor, Central region, the Provincial Surveyor advised that the map produced by the plaintiff is the one to be used for solving disputes but not registration.
28. The evidence produced by the plaintiffs further indicates that there has been a long standing dispute between plaintiffs and the owners of the parcels of land herein. That dispute led to donation of an access road at the edge of parcel number 444. The dispute is still outstanding.
29. From the totality of the evidence adduced by the plaintiffs, I have no difficulty in finding that there was a public road of access passing through the parcels of land herein at the point of demarcation. The



access road was, however erased in the Registry Index Map (RIM) that was produced by the defendant in circumstances that have not been explained.

30. It is my considered view that having proved that there existed a public access road on the parcels of land herein, the burden of proof of how the access road was erased shifted to the defendant and/or her predecessors in claim.
31. Faced with a case similar to this one, *Kiplangat Mibei William v Alice Cherenon Tonui* (2017)eKLR, the court stated:-

“...the plaintiff states that the road of access was created during the process of demarcation. This would mean that defendant’s late husband who bought the suit land in 1970 was the first registered owner thereof and in accordance with sections 28 and 30 of the *Registered Land Act Cap 300 (repealed)* under which the defendant’s title was registered, his title was subject to any subsisting overriding interests at the time which were not noted on the register. Section 30 of the *Registered Land Act (repealed)* which has a similar provision as section 28 (a) of the *Land Registration Act, 2012* provides as follows:

Unless the contrary is expressed in the register, all registered land shall be subject to such overriding interests as may for the time being subsist and affect the same, without their being noted on the register:

- a. Rights of way, rights of water and profits subsisting at the time of first registration under this Act....”.

32. Having found that there existed a public road of access running through the parcels of land herein at the point of demarcation, I find that the plaintiff’s suit has merit and I allow it as prayed.
33. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 12TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, DELIVERED AND SIGNED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O Olola

JUDGE

