



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 30 of 1998

JOSEPH KAHAGIPLAINTIFF

VERSUS

**MONICA M'IKIARA.....1ST DEFENDANT
BENSON MUTWIRI RIUNGU.....2ND DEFENDANT
RIUNGU RUKARIA3RD DEFENDANT
KIRIMI M'IKIARA.....4TH DEFENDANT
ISABELLA KARWITHA.....5TH DEFENDANT**

JUDGMENT

Joseph Kahagi sued the five defendants in this case claiming that he had been denied access to his property by the creation of a fence on a road leading to his property. In order to understand his claim, I will reproduce some paragraphs of his plaint as follows:-

3. ***That before partition the plaintiff and the defendants deceased husband were registered joint owners of land No. Ntima/Igoki/2734.***
- 3A. ***Before partition of Ntima/Igoki/2734 plaintiff and 1st defendant deceased husband were joint registered owners.***
4. ***That on the partition of the said joint ownership, the said land parcel was parts subdivided into two and an access road of about 10 metres wide was provided for between the sub divisions.***
- 4A. ***Further the land subdivided into various portions vide No. Ntima/Igoki/4924, 4927, 4926 and 4929 owned by the 2nd, 3rd, 4th and 5th defendants herein respectively as transferees.***
5. ***The defendant later on sub divided her portion of land and sold some parts to three different people. She then illegally intergranted the access road to the portion she retained.***
- 5A. ***The aforesaid portions had intergranted the access road into them before subdivision and transfer by the 1st defendant.***
6. ***That the defendant has denied the plaintiff the use or access to the said road thus causing untold suffering to plaintiff.***
- 6A. ***The plaintiff is suffering great hardships by the acquisition of the access road by the aforesaid portions illegally.***

As will be seen from the above plaint the plaintiff alleged that all the 5 defendants had blocked access to the road leading to his property. The court ordered for the District Land Registrar and the District Surveyor to do a report in respect of that dispute. This they did and also attended court and gave evidence. The District Land Registrar in evidence stated:-

“Our visit was to ascertain boundaries and the road access between the parcels.”

The District land Surveyor Meru Central had this to say:-

“The existing road was blocked when Ntima/Igoki/4914 was subdivided into Ntima/Igoki/6413 and 6414 but the amendments to the registry index mark had not been done. This explains why on the sketch map it is No. 4924 appears (sic). We found that the road was blocked by a fence but we did not know who blocked it.”

What comes out of that testimony is that the dispute related to boundary dispute; that the index map had not reflected the road the plaintiff was claiming had been blocked; that the alleged blocked road occurred when parcels number 4914 was subdivided into number 6413 and

6414; and that both the District Land Registrar and the District Land Surveyor did not know who blocked the road. The plaintiff when he testified contradicted the District Surveyor and the Land Registrar by saying that the blockage was caused by parcels numbers 4929 of the first defendant number 4927 of the first defendant and the 3rd defendant, number 4926 of the first defendant and the 4th defendant, number 4924 of the first defendant and the 2nd defendant. That evidence entirely contradicted the District Surveyor and the Land Registrar's evidence. They in their evidence gave different parcels that were causing blockage. But I think of the greatest consideration is that the road that the plaintiff was alleging had been blocked was not an official road since it was not reflected in the index map. The 4th and 5th defendants defended this case. It should be noted at this stage that by the time this case came to a conclusion most of the defendants had died. In the evidence of the 5th defendant before court, the plaintiff's claim was denied. I am of the view that the plaintiff's case failed to be proved on the required standard of proof. At the conclusion of the evidence of the 5th defendant, the advocates informed the court that since the road had been unblocked by the land Registrar and the Surveyor, the plaintiff was not interested in proceeding with his case. The parties however requested the court to determine whether costs were payable and if so, who would pay the same. I am of the view that the plaintiff's case failed because of the contradictions that I have highlighted above. The evidence of the Land Registrar, the Surveyor and the plaintiff was recorded before Justice Lenaola. I only received the evidence of the 5th defendant who gave evidence on her behalf on behalf of the 4th defendant. The plaintiff's claim as can be seen from above did not identify his plot which allegedly had been blocked. That I believe is a failure which goes to the very root of this case. Even if I had been requested to consider the merits of the plaintiff's case on the evidence on record and the pleadings, I would have found that the plaintiff could not succeed. Section 27 (1) of the Civil Procedure Act provides in part as follows:-

“.....The costs of any action cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise order.”

I can find no good reason not to award costs to the 4th and 5th defendants who were put to costs of defending a suit that had no merit. I therefore order the plaintiff to pay the costs of the 4th and 5th defendants of this suit.

Dated and delivered at Meru this 12th day of March 2010.

MARY KASANGO
JUDGE