

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE 33 OF 2004

GITUKU KAMAITHA PLAINTIFF

VERSUS

MICHAEL KABUGI MUTEMBEI 1ST DEFENDANT

JAMES W. N. KARIUKI & OTHERS 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

DISTRICT SURVEYORS NYERI 4TH DEFENDANT

DISTRICT LAND REGISTRAR NYERI 5TH DEFENDANT

J U D G M E N T

The 1st and 2nd defendants together with the 3rd, 4th and 5th Defendants herein were sued by the plaintiff courtesy of a plaint dated 22nd April 2004 and filed in court the following day. The plaintiff sought orders against the 1st, 2nd defendant whom I will henceforth refer to as “the defendants” to be restrained by way of permanent injunction from entering into his parcel of land known as **Naromoru Block 2/Muriru/1435** (*the suit premises*) purporting to open a road of access. The plaintiff further sought that the 3rd defendant do rectify the erroneous Registry Index Map by removing the road of access across the suit premises aforesaid and an order instructing the 4th and 5th defendants to carry out the necessary rectification. The defendants on being served filed a joint amended statement of defence and counterclaim. They denied the plaintiff’s claims and in their counterclaim sought the dismissal of the plaintiff’s suit, a declaration that a road of access exists as per the Registry Index Map in their possession and further declaration that the Registry Index Map in possession of the plaintiff was erroneous and not a true reflection of the existence or non existence of the access road and a permanent injunction restraining the plaintiff his agents and servants from in any way barricading, fencing of, digging trenches or placing armed agents to prevent use of the access road and/or upgrading of the road by the defendants. On behalf of the 3rd, 4th and 5th defendants, the Attorney General entered appearance and subsequently filed a joint statement of defence. Apart from denying the plaintiff’s allegations, the Attorney General in his defence also raised the issue of competence of the suit. Nonetheless he was in agreement with the defendants averments that there had always been an access road between the respective parcels of land belonging to the plaintiff and the defendants which the plaintiff was seeking to erase.

Following the close of pleadings, the case was then set down for hearing on 2nd October 2008. Come that day and the plaintiff was nowhere to be seen as it was alleged by his counsel when applying for adjournment that he had been ailing and had just been discharged from hospital. I refused the application for adjournment on that spurious ground as there was no evidence, documentary or otherwise in support of the allegation. Their being no evidence in support of the plaintiff’s suit therefore, I proceeded to dismiss the same with costs upon the request of counsel for the Defendants.

The suit then proceeded for hearing on the defendants’ counterclaim. The 2nd Defendant testified on his own and of the defendants. His testimony was brief and to the point. He testified that they and the plaintiff were neighbours. That the plaintiff had interfered with and or blocked the access road by digging trenches and erecting barbed wire. He had also placed guards armed with crude weapons to stop

the defendants from accessing their parcels of land through the said access road. The witness went on to produce an official map showing that indeed there existed an access road that the plaintiff was now seeking to block them from utilising. Apparently in 1999 the plaintiff had his three parcels of land numbers **Naromoru Block 2/Muriru/229, 221 and 219** consolidated into a single unit which henceforth became **Naromoru/Block2/Muriru/ 1435** and in the process tried to erase the access road which according to him, he had contributed to service his parcels of land aforesaid only. In February 2004 the Defendants' held a meeting with the Provincial Surveyor, Land Registrar, District Surveyor, D.O. Naromoru, local Chief and the Assistant Chief over the dispute for purposes of establishing whether there existed an access road or not. The meeting resolved that indeed there existed such access road. The witness tendered in evidence the report of the meeting. According to the witness the access road had existed since demarcation of the land contrary to the allegation of the plaintiff in the plaint. In the premises, the witness prayed that the plaintiff's suit be dismissed with costs and judgment be entered in their favour as per their counterclaim together with costs.

The evidence of the defendants is uncontroverted and unchallenged. I have no reason to disbelieve it nor refuse to act on it. Accordingly I find that the defendants have proved their counterclaim against the plaintiff on the balance of probability as required. I therefore find and hold that there has always been an access road on the plaintiff's suit premises. The defendants also adduced evidence that the plaintiff had since closed the access road thereby denying them convenient access to their respective parcels of land with the consequence that they now have to use a longer route. They now seek a permanent injunction to restrain the plaintiff from preventing them the use of the road. On the evidence on record, how can possibly resist this request.

The defendants' case is further fortified by the defence put forth by the 3rd, 4th and 5th Defendants which the plaintiff did not respond to. That defence is indeed in tandem with the defendants' arguments aforesaid. Since it is the 3rd, 4th, and 5th defendants who are charged with the issues such as those that this court has been called upon to determine then the contents of the defence should be taken as correct with regard to the access road. There is Exhibit number 4, the report prepared by the District Surveyor Nyeri with regard to the existence or otherwise of the said access road. It is on all fours with the Defendants' contention. I have no doubt at all that defendants have proved their case against the plaintiff. Accordingly I would enter judgment on the counterclaim in terms of prayers 1, 2, 3, 4, 5, and 6 of the amended statement of defence and counterclaim. The Defendants' meaning 1st and 2nd defendants too shall have the costs on the counterclaim.

Dated and delivered at Nyeri this 28th day of November 2008

M. S. A. MAKHANDIA

JUDGE