



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1527 of 2000

PRAKASH KANTILAL GADANIPLAINTIFF

VERSUS

ANUJ SHAH & OTHERSDEFENDANTS

JUDGMENT

1: PROCEDURE

1. The subject matter of this judgment concerns an easement or right of way from one parcel of land belonging to the plaintiff Prakash Kantilal Gadai through land belonging to the defendants concepts apartments and six others.

2. The dispute in question arose when the defendant blocked the road and right of way of the plaintiff from his property through the defendants property to a main road.

3. When the plaintiff filed suit in Hccc 1527/00 he only sued some defendants. The defendants in turn filed a subsequent suit which they attempted to be and did transferred to the subordinate courts for hearing. The file was returned to the High Court and was consolidated with this present suit. Its subsequent number was given as Hccc 365/05. In the latter suit the other defendants sued the Nairobi City Council (City Council of Nairobi) and its employee. The plaintiff was not party to the said suit.

i): Parties

4. For ease of reference in this trial the parties were therefore referred as follows in the two consolidated suits:-

Prakash Kantilal Gadani plaintiff

Represented by Kyalo & Associates

Hccc 1527/00

Versus

4.1. Concept Apartments Ltd Defendant No.1

Represented by M/s Wakter Konto & Co.

Hccc1527/00 and Hccc 365/01

(The original plaintiff in Hccc 365/01)

4.2. Concept Developers Ltd defendant No.2

(Hccc1527/00) M/s Walker Kontos & Co.

4.3. Anuj Shah Defendant No.3

(Directors) (Hccc 1527/00) M/s Walker Kontos & Co. Advocates

4.4. Bharat Shah Defendant N.4

(Directors) (Hccc 1527/00) M/s Walker Kontos & Co. Advocates

4.5. Sanjay Parmar Defendant No.5

(Director) (Hcc1527/00M/s Walker Kontos & Co. Advocates

4.6 City Council of Nairobi Defendant No.6

M/s Kentalal Maitalel & Co. Advocates

Hccc 365/05

4.7 Christopher Kioko Mbithi Defendant No.7

Hccc 365/05 M/s Kentalal Maitalel & Co.

ii) Delay

5. This trial was delayed to come to hearing on various factors. The first being that in dealing with the certificate of urgency, a consent was entered into (Mulwa J. 9.10.00) which consent the plaintiff disputed. It was set aside (Githinji J 3.8.01). This consent had required that a wall erected by the defendants be pulled down till the plaintiff prepares another access road. The wall in effect was demolished by the City Council of Nairobi necessitating a new and the second suit being filed against them.

6. The trial commenced for the first time before Mugo J on 27 July 2006. It was subsequently adjourned. The Hon. Judge was assigned duties at a new station outside Nairobi. The Land and Environmental Law Division was formed during the same period where this file was allocated for hearing.

7. Only two witnesses gave evidence before me. The plaintiff who testified on his behalf and on behalf of defendants 1 – 5 one, Nista Hasmik Shah a former lady director of the defendants company. She is still a shareholder and occupiers one of the residential flats. The 6 and 7 defendants called no evidence.

8. II Background

In the Parkland area of Nairobi, there are two properties adjacent to each other LR209/106/10 that is owned by the plaintiff which he purchased in 1974. LR 209/106/13 owned by the defendants and was purchased initially in 1994. Both titles are registered under the Registration of Titles Act Cap. 281 Laws of Kenya

9. Originally in 1950 a deed was entered into between one Ibrahim Yakuh (LR209/106/10) and Mulji Jadva (LR 209/106/13) that a right of way would be granted to the occupier of LR209/106/10 to access the road through LR.209/106/13. This agreement was re affirmed in a debenture of 18.9.1970 between Abdul M. Taibju and Charan Singh Sohall that stated inter alia.

“Whereas by a deed (hereinafter referred to ‘the deed’ also made 18.7.1950 registered in the Government Lands Registry at Nairobi in volume No.34 folio 370/2 and in volume No.34 Folio 216/3 and made between Ibrahim Yakub ... of the one part and he said Mulji Jadva of the other part and the said Mulji Jadva was granted by the said Ibrahim Yakub all that full and decree “right and liberty for the said Mulji Jadva and his successor in title owners and occupiers for the time being of the said plot number 209/106/10 and all other persons having his or their permission at all times thereafter by day or night to pass to or from the said plot of the said Mulji Jadva along the road of access across Plot No.209/106/13 of the said Ibrahim Yakub with or without vehicles of any description and with or without a annual for all purposes connected with the use and enjoyment of the said plot of the said Mulji Jadva as a private residence. To hold the said right of way as appurtenant to the said plot of the said Mulji Jadva until such time as the proposed road of access about 50 feet wide in front of the said plot the said Mulji Jadua has been made a carriage way and declared public side the private streets act one thousand twenty-four or any at substituted thereon ...”

10. When the plaintiff bought the parcel of land consisting of a residential home in 1974 he used the access road to access the 1st Parklands Avenue road. At the back of his property was another road which used to be called Bulemia road. It was later renamed Valmiki road. On the plaintiff said property was a small stream referred to as an anti malaria channel preventions stream. During the rainy season this stream would over flood and would therefore make it impossible to effectively access the said property through the Bulemia road.

11. The defendants having obtained title under the Registered Title Act from the government of Kenya in 1994 through Rantilal Palatial Shah thereafter registered the title and transferred to Concept Developers Ltd. The said company proceeded to develop 12 residential flats. In turn 12 sub leases were registered as of 1.4.1994 (except the last 10 days) for a period of 50 years. I seems that a new company the Concept Apartment Limited took over the ownership and management. The tenants became shareholders in the company including Nisha Hasmukh Shah the defence 1 – 5 witness.

12. The lease held by defendant 1 – 5 did not reflect that there was an easement on their property. The genuine belief by defendant 1 – 5 from the evidence before this court was that the said easement expired with the issuance of the new registration of titles act Cap.281 title. With this belief, the defendant 1 – 5 through their contractors proceeded to block the gate and access road to the plaintiff residence. Their arguments was that now Bulemia road has been developed the plaintiff can access the said road that was formerly his property on the other side of his land.

13. The plaintiff was therefore shocked when on 8 September 2000 he found a wall blocking his entrance. He lived with his two elderly parents and was unable to access his home to reach them. A neighbour next to the defendants 1 – 5 property permitted him to make a hole through their fence where he was able to walk but not drive to his property.

14. When he came to court a consent was entered into (Mulwa J 9.10.00) that the wall be demolished. That 30 days be given to the plaintiff to find an alternative access road then the wall be returned. Whilst this consent was subsisting the Nairobi City Council who were not party to the suit demolished the wall. The second suit as stated earlier for an injunction was then filed together for a prayer for damages.

15. The plaintiff stated that he was not party to the consent nor was his advocate instructed to so enter into such a consent. The consent was set aside by Githinji J (Mulwa J declined to hear the same).

16. The question that arose between the parties to whether there exists on easement and or a right of access through the defendant 1 – 5 property? This is the issue for determination before me.

III Issues for determination

17. There exists a deed of 18 July 1950 which provides an easement through the defendant 1 – 5's property LR 209/106/13. The terms of this deed is that there be an easement include the personal representatives and successor in title. This would include the title owners and occupiers of the LR 209/106/10. The question arose whether this includes the present plaintiff.

18. From the correspondence of the City Council of Nairobi by a letter of 14.5.96 Engineer C.M. Chiuri informed the then plaintiffs advocate that the plaintiffs property was accessible through Bulemia road which was currently being used by other residence. He further stated in his letter that the right of way is no longer required anymore through the defendants – 1- 5's property. I believe it may have been this impression given in 1996 that made the defendants 1- 5 believe that they were exercising their rights in blocking the access road.

19. In 1998 the same City Engineer C.M. Chiuri wrote to the defendants through Mukesh Shah notifying them that a site visit had been made on the site that revealed a wall being constructed. That there was a right of easement that was binding till the same is removed from the title deeds of both plots this letter (27.3.98) had been written and acted upon as a result of complaints by the plaintiff to his office again.

20. The then Ministry of Lands and Settlement in their letter of 2 April 1998 recognized that the deed was still in force that granted the easement. It was therefore binding on the owners and successors of LR209/106/13 the defendants 1 – 5 property. The parties therefore must agree to delete the terms of the conditions from the title. The developers were notified by the said letter that the access road was still in force. The defendants 1 - 5 proceeded to block the access road. The Commissioner of Lands informed the defendants that they were not alerted when the defendants did away with the easement. The defendants were requested to surrender the new title in order to enable the commissioner of land register the road easement and to re open the road. The Chief land registrar was then requested to place a caveat on LR 209/106/13 until the road easement was registered.

21. The City Council of Nairobi then issued a notice on 27.11.00 that the said wall be removed within 14 days and to accordingly amend the building plans. This notice appeared to have been responded to by a letter whereby the defendant 1 –5 notified the City Council of Nairobi that the matter was in court and they would be in contempt of court if they demolished the wall. Further it was the same City Council that informed them the access was no longer required.

22. The City Council of Nairobi demolished the said wall.

24. The basis, the defendant used, that the easement no longer applies is that the agreement provided when the Bulemia road was made a public road then the easement would cease and the plaintiffs uses that road as an alternative as do other residence in the area. They relied on the resolution of the Town Planning Committee of 19 February 1974. This though was actually a resolution to rename the streets of various areas, subject to the approval of the Minister of Local Government. On closer inspection of the renaming process it appeared to be an effort made by the City Council of Nairobi to 'Africanize' street names from European or Asian names to African names of prominent deceased African chiefs, Plants, fauna, seasons and animals. In cross examination the defendants witness admitted that the said resolution was not actually making Bulemia road (now Valmiki road) a public road. It is not a public road to date.

IV) Finding

25. I therefore find that City Council of Nairobi never adopted Bulemia road now Valmiki road as a public access road at all. It therefore does not qualify to automatically terminate the plaintiff easement of way to the defendant 1 – 5's property LR 209/106/13.

26. The plaintiff had earlier stated there was an anti malaria stream channel that prevented him from

accessing the Bulemia road. All he was required was to put a culvert. He found this to be a hardship.

27. I find that the plaintiff was granted an easement by way of deed dated 18.7.50. The easement exists to date. The defendants therefore were not entitled to erect a wall across the plaintiffs road of access on 8 September 2000.

28. The City Council of Nairobi permission was required to have been sort before the erection of the said wall. This was not. They therefore had a right to demolish the said wall.

29. The defendant 1 – 5 seek damages from the defendant 6 – 7 both special, general and exemplary. They are not entitled to the said damages as the act of constructing a wall in blocking the plaintiffs access was an illegality Equity would not remedy a wrong doer. I therefore reject this claim. The law requires I give what my probable award would be if the defendant 1 – 5 would have been successful. As to Special damages a normal amount of Ksh.5000/- would have been awarded. General damages would have Ksh.5,000/- awarded. The reasons being that the gate was recovered and could be re used. The defendants proceeded to act maliciously when they dumped the debris in the plaintiff right of way after the demolition. This was an act of malice.

V) Conclusion

26. I hereby enter judgment for the plaintiff herein and declare that he has a right of way/easement through the suit premises LR209/106/13 that is binding on the defendants and their successors.

26.2 I award General Damages to the plaintiff for the embarrassment inconvenience and injury caused to him and put through. I assess this at Ksh.250,000/-.

26.3. I dismiss the suit against the City Council of Nairobi by the defendants 1 – 5.

26.4. I award the costs of this suit to the plaintiff, to be paid by defendant 1 – 5. I award the costs of this suit to the defendant 6 and 7 to be paid by the defendant 1 – 5.

The interest on General damages to the plaintiff be awarded from the date of this judgment.

Dated this 22nd day of March 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Kyalo for Kyalo & Co. Advocates for the plaintiff

A. Gichuru for Walker Kontos & Co. Advocates for the 1st – 5th defendants

T. Koceyo for Kenta Moitalel & Co. Advocates for the 6th and 7th defendants

NOTE

1: Surrender of title