



**Mukhabi v Wanyonyi (Environment & Land Case 39 of 2014)  
[2022] KEELC 14849 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14849 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 39 OF 2014  
FO NYAGAKA, J  
NOVEMBER 17, 2022**

**BETWEEN**

**SILAS WANYONYI MUKHABI ..... PLAINTIFF**

**AND**

**JOHN KITUYI WANYONYI ..... DEFENDANT**

**JUDGMENT**

1. This is a judgment on a determination of an allegation of the blocking of a road of access to some two parcels of land and also on a mandatory injunction to reopen the said road of access and a permanent injunction against blocking again the said alleged road. The parcels of land in issue border each other but the parties herein are not immediate blood relatives. The Defendant is alleged to have bought part of the land that he owned from the uncle of the Plaintiff but it is absolutely unclear how, if the Plaintiffs allegations could be true, that would have happened and the parcel successfully transferred to him yet, as the Plaintiff alleged, his late father was the registered owner of the entire parcel of land including that portion.

**The Pleadings**

2. The Plaintiff brought this suit vide a Plaint dated February 26, 2014 and filed on February 27, 2014. It was verified by an Affidavit sworn by the Plaintiff on the same date as the Plaint. He averred that he was the son of the late Jafether Mukhabi Wamacho who was the registered proprietor of land parcel known as Kiminini/Matunda Block 7/11, 7/12 and 7/20 originally measuring approximately 26 acres. For purposes of this judgment I will refer the parcel numbers as Block 7/11, Block 7/12 and Block 7/20 respectively.
3. He pleaded further that the Defendant then bought parcel number Block 7/20, measuring 4 acres or thereabouts, by way of an illegal purchase of the same from an uncle to the Plaintiff when he was young. The said parcel number bordered Blocks 7/11 and 7/12. His further claim was that before the



Defendant came onto and got registered as owner of the parcel there was a road of access being used by the Plaintiff's family and the neighbours.

4. He averred, at paragraph 8 of the Plaintiff, that sometime in June, 2013 the Defendant, without any legal right closed the road of access leading to the Plaintiff's parcels of land known as Blocks 7/11 and 7/12. The Plaintiff called the Land Registrar of Trans Nzoia County to the ground who ordered the Defendant to re-open the road in vain hence the instant suit. He prayed for an order of reopening the road of access and a permanent injunction restraining the Defendant from closing the road again. Specifically, the Plaintiff prayed for: -
  - a. A declaration that the Defendant herein has no legal right to close the road of access accessing the Plaintiff's parcel of land Kiminini/Matunda Block 7/11 and 7/12.
  - b. An order compelling the Defendant to reopen the road of access.
  - c. Permanent injunction restraining the Defendant from closing the road of access.
  - d. Costs.
  - e. Interest in (sic) (d) above
  - f. Any other relief that this honourable Court may deem fit.
5. On March 13, 2014 the Defendant entered Appearance and then filed a Statement of Defence dated March 19, 2014 on the same date. In it he denied the contents of paragraphs 4 and 5 of the Plaintiff but admitted that he was the registered owner of parcel number Block 7/20 which measured about 3.98 Hectares. He denied the claim of him having bought the land from an uncle to the Plaintiff and the existence of road of access on the land and that he had closed the alleged road. He stated that in 1976 he bought 6 acres of land from Masaba Cooperative Society and in 1986 he bought 4 more from a neighbour.
6. His further averment was that in 1992 the Survey of Kenya conducted a survey of the parcels and merged the two pieces of land to form Block 7/20 whereupon he was issued with a title deed thereto. He pleaded that it was in that year that the road of access was closed and the Plaintiff given a road of access along the Defendant's parcel of land and Blocks 7/13 and 7/14. His further allegation was that the Plaintiff sought to divide his parcel of land into two and have two access roads to the two. He then denied having been ordered to reopen the road of access and refused or blocking the Plaintiff's family and other neighbours or that the alleged road of access legal or on the map (which this Court understands as the Registry Index Map - RIM). He prayed for the dismissal of the Plaintiff's suit.

### **Evidence of the Plaintiff**

7. When the suit came up for hearing on February 14, 2018, the Plaintiff testified as PW1. Although he wrote, signed and filed an undated witness statement on February 27, 2014 when he filed the suit, he did not adopt it as his evidence in-chief. Therefore, the Court treats the same as a mere non-evidentiary document in the Court file. When he testified, he stated that he and Protus Mukand Mukhabu owned, by way of registration, parcel number Block 12. He produced in evidence the title thereto as P Exhibit 1. His evidence was that the Defendant was his neighbour who owned Block 7/20. His further evidence was that in 2013 the Defendant blocked the road of access between his land and the main road. He then reported to the Area Chief and his Advocate who sent him to the Land Registrar who wrote to him a letter and later visited the ground. The letter was dated May 9, 2013 and produced as P Exhibit 2. The Land Registrar visited the site on July 16, 2013 whereat he met the Plaintiff and neighbours. The



Defendant refused to cooperate and the Land Registrar left, asking the Plaintiff to seek redress from Court. He then asked the Court to grant him the reliefs sought.

8. Upon cross-examination the Plaintiff admitted that he did not avail the RIM of the area. He stated that the road of access was between Block 7/13 and 7/14 and it had not been opened. He stated that the road touched Block 7/20. He denied that it was between Blocks 7/10 and 7/11. He stated that if the road was working it would have served Blocks 7/13, 12 and 20. It was the road that the Defendant blocked. He testified that the owner of Block 7/12 uses the road serving Block 7/20 but his (Plaintiff's) parcel was blocked.
9. In Re-Examination, he stated further that there were other people who were affected. He stated that it was not his fault that the other people did not come to Court to complain. He admitted that there was a RIM but he left it away. He then closed his case.

### **Evidence of the Defendant**

10. On July 6, 2021, the Defendant testified as DW1. He adopted the witness statement that he had filed on March 11, 2019. He also gave in evidence a number of documents in support of his Defence. He stated that he was the registered owner of Block 7/20. He produced in evidence as D Exhibit 1 a copy of the title to the land parcel, D Exhibit 2 a copy of the Certificate of Official Search and D Exhibit 3 a copy of the RIM.
11. He testified that the Plaintiff had another road of access that served his parcel of land. He stated that it was shown on the RIM, produced as D Exhibit 3, and pointed it out thereon. He testified further that the County Surveyor of Trans Nzoia County visited the ground and surveyed his parcel of land. He prayed for the dismissal of the Plaintiff's suit.
12. The Witness Statement that the Defendant adopted, apart from containing the oral testimony summarized above, was to the effect that in 1992 when the survey in the whole of Masaba Farm and his two parcels consolidated in the process, giving rise to one title whose approximate size was 3.98 Hectares or 9.83 acres, as a good and patriotic neighbor he donated some points (small part) of his land to be utilized for public utilities. He stated further that the work of consolidation of his land was of the surveyors and they are the ones who designed where roads and public utilities would be in the area. He then stated that Block 7/12 was accessed by a good road touching Blocks 7/13 and 14. He stated that the owner of Block 7/13 was the one who blocked the road that connected his parcel with Block 7/12. Lastly, he stated that when the Land Registrar and surveyors visited the site on 16/07/2013 they confirmed that there was a road reserve on the RIM that connected Blocks 7/11 and 12 without passing through his parcel of land, Block 7/20. He asked for an order of a resurvey of the parcels to confirm the said position.
13. On cross-examination he reiterated that his parcel of land was Block 7/20 while that of the Plaintiff was Block 7/11 and 12. He stated how in 1976 he bought 6 acres of land and in 1986 he added another parcel. He stated that by then the parcels he had bought were disconnected as shown on the sketch map which was annexed to the Surveyor's report dated June 11, 2021. Before the survey was done in 1992 the disconnecting line on the sketch used to be a road of access serving the Plaintiff's parcels and others. After the survey, his two parcels of land were joined and the access road was moved to eastern part of his parcel of land, Block 7/20 and adjacent or along parcels Blocks 7/13 and 14. The road of access then connected to another one which got to the main road. He stated that the latter road of access was still in existence and not fenced or blocked.
14. He testified that the Plaintiff would access the road from his parcel Block 7/12 as shown on the RIM and no one had blocked him. He stated that there was a pit latrine at the starting point at the start of



the road of access but he did not know whose it was. He stated that contrary to the Plaintiff's assertion, he had an alternative road of access than the one claimed. At that point the Defendant closed his case.

15. The parties were given time to submit on the evidence and pleadings but they did not. The Court retired to write Judgment.

### **Issues, Analysis and Determination**

16. I have given due consideration of the pleadings, the evidence adduced and the law on this matter. I formulate five issues, namely,
- a. Whether there was a road of access on land parcel Kiminini/Matunda Block 7/20;
  - b. Whether the Defendant blocked the road of access;
  - c. Whether the Defendant should be ordered to reopen a road of access on parcel number, Block 7/20;
  - d. Whether an injunction should issue against the Defendant restraining him from closing the road of access;
  - e. Disposition and who to bear the costs of the suit.
17. It is trite that he who alleges a fact must prove it unless the law shifts the burden to the adverse party. Thus, it was incumbent on the Plaintiff herein to adduce evidence sufficient enough to support his case to the required standard of a balance of probabilities. I determine all the issues above except the last one, jointly.
18. The Plaintiff prayed for a declaration that the Defendant had no legal right to close the road of access on Block 7/20 to his parcel of land number Block 7/11 and 12, and another order compelling the Defendant to re-open the said road of access and an order of injunction against the Defendant restraining him from ever closing again the road of access.
19. I must state that the reliefs sought by the Plaintiff flow in sequence and starting with the first one as stated above, the next two are dependent on the Plaintiff proving the previous one. Therefore, it was incumbent on the Plaintiff to prove that indeed there was a road of access to his parcel of land and that the Defendant had blocked the same. After that the Court would consider whether the Plaintiff had proved that the Defendant had no legal right to close the road of access and if so, whether the Plaintiff had adduced sufficient evidence to warrant an order of re-opening the said road of access and then for an order of injunction against its closure once reopened.
20. The Plaintiff proved that he, together with one Protus Mukanda Mukhebi, was the lawful owner of parcel number Block 7/12. He did this by producing the copy of title deed thereto issued on July 27, 2007, as P Exhibit 1, and a Certificate of Official Search to the property. He failed to prove that he was the owner of Block 7/11, as averred in paragraph 8 of the Plaintiff. Additionally, what he did not prove was whether the said joint owner of the property, one Protus Mukanda Mukhebi, gave him authority to sue and give evidence on his behalf as the law requires. It is my view that the joint owner of the parcel of land number Block 7/12 ought to have been joined to the suit as a Plaintiff or given authority to the Plaintiff to sue. That was a serious omission which should have caused this suit to be dismissed. But relying on Article 159(2)(d) of the *Constitution* of Kenya 2010 which provides for the mandate of Courts not to decide matters on technicalities, and Order 1 Rule 9 of the *Civil Procedure Rules, 2010* which provides that a suit should not be defeated for non-joinder of a party, I am prepared to excuse the failure to enjoin the said Protus Mukanda Mukhebi.



21. I must state that apart from the oral testimony of the Plaintiff that there existed a road of access to his parcel of land, there was no documentary proof of the same or that the said road of access was one that would fall within the meaning of Sections 143, 145 and 146 of the *Land Act*, Act No 6 of 2012 on the public right of way. The Plaintiff produced only P Exhibit 2, the letter dated May 9, 2013 issued by the Land Registrar, titled, 'Boundary Dispute', to show that the Land Registrar of Trans Nzoia County visited the disputed parcel of land on July 16, 2013. The letter does not in any way show that there existed a road of access on the said parcel of land or that the Land Registrar indeed went to the ground to deal with a road of access problem. Rather, it shows that he visited the parcel to deal with a boundary dispute as related to Block 7/12 and Block 7/20. Thus, in my view, the Plaintiff failed to prove on a balance of probabilities that there existed a road of access on land parcel number Block 7/20 as he alleged.
22. Apart from my finding above on the Plaintiff's failure to prove the existence of a road of access as pleaded, although it was not obligatory for the Defendant to disprove the allegation by the Plaintiff of the existence of a road of access on parcel number Block 7/20, and I would have dismissed the case even without the Defendant's evidence, it is my view that the Defendant who proved that he was the registered owner of Block 7/20 by producing a copy of the title deed to the parcel as D Exhibit 1, adduced sufficient evidence to show that indeed there was no road of access on his parcel of land. He did this by producing as D Exhibit 3 the RIM of the area showing where there were roads of access to each of the parcels of land, namely, Blocks 7/11, 12, 13, 14, 20 among others. All the roads led in one way or other to the main road.
23. Since the Plaintiff failed to prove that there existed a road of access through land parcel number Block 7/20 or how the Defendant had blocked the alleged road of access, it goes without saying that he failed to prove that there was need for the Court to order the Defendant to reopen the alleged road of access and that he was fit to be restrained by way of injunction from blocking the road that should have been ordered reopened. Therefore, it would be an academic exercise to engage in by discussing the principles of grant of a mandatory and permanent injunction. I leave it at that.
24. In conclusion, this Court finds that the Plaintiff's suit is without merit in its entirety. Therefore, it must suffer the fate of still births in the realm of justice. That it does by being dismissed, as I now order, with costs to the Defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS  
17<sup>TH</sup> DAY OF NOVEMBER, 2022**

**HON. DR. *IUR* FRED NYAGAKA  
JUDGE, ELC KITALE**

