



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 1143 OF 1999**

**FRANCIS MUTURI MUNIU ..... PLAINTIFF**

**VERSUS**

**WALTER KABETU .....DEFENDANT**

**JUDGMENT**

By a plaint filed in court on 9<sup>th</sup> June, 1999, Francis Muturi Muniu, the plaintiff sued Walter Kabetu seeking an order directed at the defendant to,

**“remove the illegal and unlawful fence and structures built along and on the road of access bordering the parcel of land known as Kabete/Kibichiku/32A and 32B and joining the plaintiff’s parcels of land Kabete/Kibichiku 1189, 1190, 1191,1192 and 1100, to the main road”.**

The plaintiff also prayed for general damages and costs of the suit.

The defendant denied the plaintiff’s claim, stating that the issue of the alleged access road, **“was the subject of H.C. Misc. Application no. 1058/92 Nairobi, whereby the Land Registrar was prohibited from excising or putting a road of access in the defendant’s land known as Kabete/Kibichiko/32A which the defendant will crave leave to refer to at the hearing of this suit.....”**

The plaintiff, Francis Muturi Muniu described himself as the registered proprietor of the 5 pieces of land referred to in para 5 of the plaint, i.e. Kabete/Kibichiko/1189, 1190, 1191, 1192 and 1100.

His farm (shamba) is adjacent to that of the defendant, Walter Kabetu described as Kabete/Kibichiko/32A. It is in front of his farm.

Originally the plaintiff bought one ace out of Kabete/Kibichiko/660.

The one acre he bought bordered Kabete/Kibichiko/32A, owned by the defendant.

The plaintiff recalled that there was a road passing through plot No. 32A and through his one acre. He showed this on the map which he said was from the Director of Survey. He produced it as Ex.1 in court. The map was drawn in 1992. He had another map drawn in 1974, before Kabete/Kibichiko/660, was subdivided. It shows the road which came with demarcation.

The plaintiff testified further that the “shamba” he bought was No. 59 from Grace Wanjiru in 1974. he subdivided the shamba into 4 pieces and gave them different numbers, as shown in a map which he produced as an exhibit – i.e. title Nos. 1189, 1192, 1190 and 1191. He said that a road existed even then. That the original road came form plot 32A to plot 660, and the subsequent road continued down.

The plaintiff contended that the defendant built 4 stone houses on the road where he could pass. He was him starting to build and even talked to him, but the defendant said there was no road. The plaintiff paid the surveyor to put the road back but such survey was not conducted because the defendant chased the plaintiff and the surveyor.

The plaintiff prayed the court to give him back the road, used as a public road. He also prayed for costs of the suit.

The defendant Walter Kabetu Bacha is a retired civil servant. He lives in Mwimuto in Kikuyu Division of Kiambu District, in plot No. 32A.

The defendant denied that the plaintiff is his neighbour, and gave the names of his neighbours as John Kariko, James Kahenya and Wambui Wagendo.

He showed court his plot No.32A in the map produced as Ex.3, and denied there having been any road passing through it. He testified further that the plaintiff made that allegation in 1992, but he denied it, saying, **“no road was physically made passing through my land to date”**.

The defendant filed a suit, HCCC No. 1058 of 1992, against the Land Registrar Kiambu, and the court, **“declared that there is no road in the parcel of land known as plot O.32A”**. He had the court order registered against the title at Kiambu land Registry. He produced the same as an exhibit in court.

The order which was issued by me on 8<sup>th</sup> June 1993 reads,

- 1. “That a writ of certiorari and prohibition quashing and prohibiting the respondent (Land Registrar, Kiambu) from exercising a path in the parcel of land known as KABETE/KIBICHIKO/32A be and is hereby issued”.**
- 2. “The respondent do pay the applicant costs of this application to be taxed and certified by the taxing officer of this court.”**

The defendant confirmed that his land measures over one acre and he has subdivided it to his 3 sons, and built houses on his portion which also bears the grave of his father. The entire land is fenced.

The defendant explained on questioning that he did not sue Francis, the plaintiff herein, in HCCC No. 1058 of 1992, because it was the Land Registrar who alleged that there was a road passing through his land.

The defendant said that in the map there is something shown as a road between plot No. 32A and 32B, but there is nothing on the ground which is as it was during demarcation.

The defendant called a witness, the Land Registrar, Kiambu District, one Jonathan Ndirangu Kingori. He identified a map of the area in question, and confirmed that there is a main road which serves plot Nos 790, 32A and 32B.

Looking at the Index Map Sheet No. 11, Kabete/Kibichiko and particularly at parcel No. 59, immediately after parcel No. 58 and bordering parcel No.32A, this area is served by the same main road. He observed that parcel Nos. 790 and 791 emanate from the original parcel 660.

The Land Registrar had a certified copy of a demarcation map of the Registration Section of Kabete/Kibichiko. It was the original map drawn when land was being demarcated. It shows parcels of land Nos. 58, 59, 32A and 32B. It also shows the same main road passing through parcel No.32, going to the main road. He produced the map as defence exhibit A.

He also identified a copy of a green card dated 14.6.2005, showing that Kabete/Kibichiko/32A has an acreage of 1.2 acres, and belongs to Walter Kabetu, the defendant who was issued with a title certificate

on 2<sup>nd</sup> December 1980.

The title has an encumbrance registered against it, i.e. a prohibitory order from H.C. Misc. Application No. 1058/92 restraining the Land Registrar from exercising any road from this parcel of land which was charged to AFC in 1981 for Kshs.13,000/=. The same parcel No. 32A was initially registered on 28.12.1956, and the acreage has not changed to date.

The Registrar explained further that the effect of a road passing through would mean a change of the parcel number as a new number would be assigned to it, and again the acreage would change.

The Registrar explained further that there is an irregularity in an access road passing through parcel No.32A on the surveyor's map since the green card does not reflect it. That if there was an extinction of parcel No. 32A to create a road, this would have been reflected in the green card to show that parcel No.32 closed on excision of a road.

According to the Registrar, if there is a road which passes through parcel No. 32A as reflected in the index map then the correct procedure was not followed in having the road there.

Any survey map, according to the Registrar showing that there is a road between parcel Nos 32A and 32B is an error because the said road is not in the demarcation map. Besides, the road was not in the original map of 1956, but came in the subsequent map of 1961 to date. That the error has not been corrected because the owner of parcel No. 32A has not complained to the Registrar that there is an access road in the map which is not on the ground. In fact, it is because the road does not exist on the ground that the defendant was able to get a court order to stop his land being excised to make a road.

The advocates representing the parties herein filed written submissions by consent for consideration in this case. I have duly considered these.

My consideration of the evidence on record, particularly the evidence of the Land Registrar, Kiambu shows that the details in the survey map and those in the demarcation map differ, substantially.

The Registrar termed it, "**an error**", any survey map showing that there is a road between plot No. 32A and 32B.

Though the plaintiff was not party in a suit which was filed in 1992 by the defendant against the Land Registrar, being H.C Misc. Application No. 1058 of 1992, the result and or final order, was relevant to this suit.

The Misc. Application was filed against the Land Registrar Kiambu, who "**had made a decision to excise a path between parcel numbers 32A and 32B, which is unconstitutional as it is compulsory acquisition of my parcel of land without following the correct procedure**".

I find that the mere fact that the Land Registrar, Kiambu, made a decision to excise a path between plot 32A and 32B as stated above, showed that there was no path or road on the ground between parcels Nos. 32A and 32B, otherwise the Registrar would not have made a decision to excise one.

That court decision which was never appealed against or set aside actually "**prohibits**" the Land Registrar, Kiambu from exercising a path or road between land parcel number KABETE/KIBICHIKO/32A and 32B. I suppose the Land Registrar, Kiambu would be involved if a road had to be excised between parcel Nos.32A and 32B.

Considering the evidence on record, I find that the plaintiff has failed to prove the existence of an access road between plot Nos. 32A and 32B, to warrant the Court to order the Defendant to remove the illegal and unlawful fence and structures built along and on the road of access bordering parcel of land L.R No. Kabete/Kibichiko/32A and 32B and joining the plaintiff's parcels of land known as L.R Kabete/Kibichiko 1189, 1190, 1191, 1192 and 1100, to the main road. I also decline to grant general damages as prayed.

The effect of my orders is that the plaintiff's suit is dismissed with costs to the defendant.

**Dated at Nairobi this 17<sup>th</sup> day of March, 2006.**

**JOYCE ALUOCH**

**JUDGE**