



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 26 OF 2018

ABDALLA ALI NASSORO.....APPELLANT

-VERSUS-

WYCLIFF LUKIO.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. Kassam, SRM delivered on 9 November 2018 in Mombasa CMCC No. 907 of 2018)

JUDGMENT

1. By a Memorandum of Appeal filed on 7 December 2018, the appellant appeals against the entire judgment, delivered by Hon. J. Kassam, in CMCC case No. 907 of 2010, on 9 November 2018.

2. To put matters into context, the suit in the Magistrates' court was commenced through a plaint filed on 14 April 2010, with the 1st respondent as plaintiff, the appellant as 1st defendant, and the 2nd respondent as 2nd defendant. In his plaint, the 1st respondent averred that he is the lawful owner of the plot No. 4178/II/MN, which property he claimed is served by an access road identified as 41601/II/MN. He pleaded that in the beginning of the year 2010, the appellant commenced the construction of a wall on the aforesaid road, which resulted in partially blocking, and denying the plaintiff the right of passage to his land. He further pleaded that the appellant's action had also led to blockage and use of the road by motor vehicles, thereby denying ambulances and firefighting vehicles, an opportunity to gain entry in case of an emergency. He complained that the 2nd respondent had neglected to enforce its by-laws by failing to stop the said blockage. In the suit, the 1st respondent sought the following orders :-

i. A permanent injunction compelling the 1st defendant (appellant herein) *to restrain him from further constructing a wall or fence, digging, removing or otherwise blocking the access road known as 41601/II/MN serving inter alia all that parcel of and known as Plot No. 4178/II/MN.*

ii. A mandatory injunction directed at the 1st defendant (appellant herein) *to pull down and demolish the wall he has constructed upon and to restore the access road known as 41601/II/MN serving inter alia all that parcel of land known as Plot No. 4178/II/MN to the condition it was prior to the construction aforesaid.*

iii. A mandatory injunction directed at the 2nd defendant (2nd respondent herein) *to compel it to demolish the said wall blocking and interfering with the access road known as 41601/II/MN serving all that parcel of land known as Plot No. 4178/II/MN as by law mandated.*

iv. In the alternative and without prejudice to the foregoing, a declaration that the plaintiff (1st respondent herein) *has a permanent right of way through the access road known as 41601/II/MN serving all that parcel of land known as Plot No. 4178/II/MN and that the 1st defendant (appellant herein) is not entitled to erect a wall or any other development thereon.*

v. Cost of the suit.

vi. Any other orders that this honorable court may deem necessary.

3. The appellant (as 1st defendant) filed a defence. He contended that a perimeter wall had been erected strictly along the boundary of his

Plot No. 4179 Section II Mainland North, without any encroachment on any access road, road reserve, and/or any other adjoining property whatsoever. He further stated that the perimeter wall erected along the boundaries of his land, had not occasioned blockage to any existing access road, and that the 1st respondent had not been prejudiced in any manner whatsoever, by the erection of the said perimeter wall, but to the contrary, more space was made available on the existing access road by causing the eviction and/or re-location of the kiosks and/or temporary structures that had abutted his land.

4. The 2nd respondent (as 2nd defendant) also filed defence. In its defence, it basically denied the claims of the 1st respondent, and further pleaded that the erection of the wall, if any, was wholly caused by the appellant.

5. In his evidence, the 1st respondent testified that he owns the Plot No. 4178/II/MN together with his wife, Lydia Nabwire. He did state that on this plot he has built his residence. He stated that his residence is accessed by the road said to have been blocked by the appellant. He stated that he made several complaints about the encroachment, including to the 2nd respondent, but no action was taken, and he thus filed this suit. He was cross-examined on whether his wife had given him consent to file the suit and he said that she did not. Among the witnesses that the 1st respondent called was Teddy Mulusa, a surveyor working with the Ministry of Lands, Mombasa. Mr. Mulusa produced a report and a sketch demonstrating the alleged encroachment by the appellant. Inter alia, his report stated that the appellant had built a wall encroaching into the road by approximately 0.50 metres. He also pointed out another encroachment from the owner of the plot No. 4179. He further noted an open drainage passing along this access road.

6. In his evidence, the appellant testified that he erected a perimeter wall along the boundaries of his plot No. MN/II/4178 and denied encroaching on the road. He denied that his wall had caused blockage of any existing road. He further stated that the 1st respondent was not prejudiced in any manner, and that to the contrary, more space was created on the existing road by causing the eviction and/or relocation of kiosks. He also said that there is another access road to the 1st respondent's plot. Cross-examined, he acknowledged that he did not have any document to dispute what the surveyor had availed and he appeared to concede that there was indeed an encroachment.

7. The 2nd respondent did not avail any witness.

8. Counsel made their submissions, and I do observe that among the submissions made by counsel for the appellant, was that the alleged encroachment was caused solely by the 2nd respondent, who made a drainage on the road; that there is an alternative road of access for the 1st respondent; that the 1st respondent had no locus as his wife did not give him consent to file suit; that no search to demonstrate proof of ownership of the 1st respondent's land was availed. In her judgment, the court held that there was no dispute as to ownership of the land. She further found that the encroachment had been established by the surveyor. On the argument that the 1st respondent had no locus, she held that this is misplaced, as the issue in dispute was an access road and not matrimonial property. She thus allowed the prayers in the plaint.

9. The appellant being dissatisfied by the decision of the trial court, proceeded to file this appeal and listed the following grounds :-

- a. The learned Magistrate erred in fact and in law in failing to appreciate and consider both the contents and legal purport of the written submissions filed by the 1st defendant therein or at all in arriving at such a decision.
- b. The learned Magistrate misdirected herself on the law in declaring the plaintiff has locus standi to file suit.
- c. The learned Magistrate misdirected herself on the facts and law in determining that the perimeter wall and part of the building erected by the 1st defendant has encroached on the access road known as 4160/II/MN without regard to the true circumstances obtaining and affecting any possible use and application of the said access road.
- d. The learned Magistrate failed to appreciate that there is in existence a ditch that was dug and/or constructed by the 2nd defendant for the general public good which encroaches on the access road to the extent that it completely blocks and makes the access road irretrievably unusable as storm water drainage.
- e. The learned magistrate erred in law and fact in appreciating that the 2nd defendant being the legal custodian of the access road has since with the drastically changed circumstances in the use of the access road provided and constructed an alternative access road for the use by the plaintiff and residents of the area.

The appellant prays for orders :-

- a. The judgement and decree of Hon. J. Kassam entered on the 9 November 2018 be set aside with the suit being dismissed with costs.
- b. The cost of this appeal be awarded to the appellant.

10. Counsel agreed to dispose of this appeal by way of written submissions and I have seen the submissions of all counsel. In her submissions, counsel for the appellant, inter alia, asserted that the impugned wall was strictly on the parameters of the appellant's land. He submitted that the surveyor testified that he ought to notify every affected party to the dispute but that he had not attached any notification in his report. Counsel added that the only hindrance to the 1st respondent's land is the drainage done by the 2nd respondent. He submitted that the drainage is a vehicular hindrance, but human access is possible. Counsel further submitted that the 1st respondent stated during trial, that he had a deed plan for his property, but he did not have any document to show whether the road is registered. He added that he (the 1st respondent) did not produce a certificate of search for the access road, and equally did not have a map of the area. Counsel submitted that the learned magistrate should have been guided by the appellant's submissions to the extent that the 1st respondent ought to have done due

diligence in establishing whether the said access road was indeed registered as such, and as to whether circumstances have changed, and if its use remains the same. He relied on the case of *Alexander Ngotho Ngunyi & Another vs John Ngugi Gachau, Nakuru CA No. 123 of 2010* cited with approval in the case of *Muiruri Njuro & 5 Others (2018) eKLR*.

11. Counsel further submitted that the learned magistrate erred in declaring that the 1st respondent had *locus standi* to file the suit. He submitted that there was no consent from the 1st respondent's wife. He submitted that the alleged rights which the 1st respondent sought to vindicate were in respect of his property, more so, access to his property, and with alleged hindrance to the access road, thus private rights. Counsel went on to argue that the drainage created by the 2nd respondent had changed the character of the road, making it impassable. He submitted that in an attempt to correct this, the 2nd respondent constructed an alternative access road for use by the 1st respondent and other residents of the area. He relied on the case of *Homescope Properties Ltd & Another vs David Gachuki & Pamela Odera sued as Chairman & Secretary of Karen Ngong View Estate & Another (2014) eKLR*.

12. Counsel for the 1st respondent, on his part, submitted inter alia that the trial court observed that the District Surveyor's report dated 22 March 2013 is one of evidentiary value, since it is the duty of the district survey office to determine disputes relating to general boundaries. He submitted that the appellant did not dispute the evidence of the surveyor. On *locus standi*, he submitted that in this case, the 1st respondent acted in his own interest and also in the public interest, to secure both his proprietary rights and the right of way of the public to use the access road, and he thus had the legal capacity to do so. He submitted that the issue of the drainage or alternative access were non-issues and submitted that parties are bound by their pleadings. He did not see any fault in the decision of the trial court.

13. For the 2nd respondent, counsel submitted that the 2nd respondent was sued as a peripheral defendant. She nevertheless submitted that the survey report demonstrates that the appellant has encroached on the road which evidence was not disputed by the appellant. She submitted that the trial Magistrate did not misdirect herself.

14. Upon consideration of the materials presented in respect of the Appeal herein, the following are the issues for determination:

- i. Whether the 1st respondent had *locus standi* to institute the suit in the trial court;
- ii. Whether there was encroachment on the access road.

15. The appellant in his submissions cited Section 93 (3) and (4) of the Land Registration Act, in support of the claim that the 1st respondent had no *locus* to institute the suit.

16. Section 93 (3) and (4) of the Land Registration Act are drawn as follows :-

“(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

17. The above sections of the law require spousal consent for all dispositions of land. Section 2 of the same act gives meaning to disposition. It states that disposition means :-

“(a) a sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, usufructuary right, or other servitude or any other interest in land or a lease and any other act by an owner of land or under a lease whereby the person's rights over that land or lease are affected; or

(b) an agreement to undertake any such disposition.”

18. These provisions are aimed at ensuring that when one spouse wishes to dispose of land, then the consent of the other spouse is needed. The intention is to avoid a situation where one spouse secretly disposes of land. In the case at hand, there was no issue about any disposition of land. All the 1st respondent was claiming was an encroachment of a road of access to land that he owns. As joint or part owner of the land, he has an interest to ensure that the land has good access and is thus entitled to protect all pathways and avenues that lead to his land. It is immaterial that another party or joint owner of the land is not enjoined in the suit, for any owner can sue to protect his interest in the land. It has certainly not been alleged that the other joint owner is resisting this suit. Further, the road in issue is not a private road, exclusively within the land of the 1st respondent. It is a road that is open to the public. It follows therefore that any person would have capacity to sue on behalf of the public interest, and in such scenario, ownership of any adjacent land would be immaterial. The issue of *locus* is nothing but a red herring. The 1st respondent was fully entitled to file suit to complain of encroachment of the road.

19. There was claimed that there was no evidence tendered that this is a road. Within the trial, there was actually no dispute as to the existence of the road. But if it is the allegation of the appellant that there was no proof, I will refer him to the report of the surveyor, which is clear about the presence of the road. The scenario herein is not similar to what arose in the case of *Homescope Properties v David Gachuhi* cited by counsel for the appellant, where the dispute was whether a road was public or private. That is certainly not the nature of the dispute that was before the trial court herein. The dispute that was before court was whether the appellant had encroached onto a road.

20. On the question whether or not there was encroachment onto the road, the surveyor's report was categorical that there was encroachment. There is evidence that the appellant has built a wall away from the confines of the boundary of his land and has partly encroached into the road. To me, it is immaterial whether there is an alternative access to the 1st respondent or whether the 2nd respondent has built a drainage on the road. What is material is that the appellant has built in an area that ought to be a road. He was under obligation to ensure that whatever he built was within the boundaries of his plot. He cannot build on a road then hope to get away with it because the 2nd respondent has also built a drain on it. The fact that the 2nd respondent has built a drain does not give the appellant the permission to extend his boundaries into the road. Neither does the presence of an alternative access to the 1st respondent give him permission to flout the law and build on a road. I find the appellant's conduct to be both callous and reckless. But also the inaction by the 2nd respondent, despite being duly informed, is also inexcusable. The 2nd respondent, as a regulatory body, ought to have intervened upon receiving the complaint that the appellant was constructing on the road. They chose to see no evil and hear no evil. That must also be condemned.

21. From the foregoing, it will be seen that I see no merit in this appeal. It is hereby dismissed and I proceed to fully affirm the judgment of the trial court. In the judgment the trial Magistrate gave the appellant 90 days to pull down the offending wall. Those days are now long past. In my discretion, I order the appellant to ensure that the impugned wall is removed from the road reserve, within the next 30 days, and to ensure that no part of it encroaches on the road. If he does not do so, within the said 30 days, the 2nd respondent is hereby ordered to proceed and pull it down and the costs thereof be shouldered by the appellant.

22. On the issue of costs, I order that the costs before the trial court be paid jointly and/or severally by the appellant and 2nd respondent. The appellant will pay the costs of this appeal to the 1st respondent. On this appeal, there is no order of costs in favour of or against the 2nd respondent. For the avoidance of doubt, the County Government of Mombasa is now the entity responsible for the obligations herein imposed upon the 2nd respondent.

23. Judgment accordingly.

DATED AND DELIVERED THIS 24TH DAY OF MARCH, 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA