



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL CASE NO. 22 OF 2020**

**ANASTACIA MIDIALO MASIME.....APPELLANT**

**VERSUS**

**ATTORNEY GENERAL (Sued on behalf of**

**DISTRICT LAND REGISTRAR- SIAYA DISTRICT**

**DISTRICT LAND SURVEYOR- SIAYA DISTRICT**

**MINISTRY OF LANDS AND SETTLEMENT SIAYA DISTRICT.....RESPONDENTS**

**JUDGEMENT**

The Appellant filed a claim in the Environment and Land Court at Kisumu being no. 114 of 2014 against the Respondents claiming that sometimes in the year 2013, the District Land Registrar and the District Land Surveyor Siaya District created a road reserve (access road) on land parcel number NORTH GEM/MARENYO/515 without consent and/or knowledge of the registered owner of the said land parcel and totally in breach of the procedure set out in the law. That the said act was done without the consent and/or involvement of the plaintiff who is the registered owner of the suit land parcel and amount to breach of her right to peaceful enjoyment of property.

The particulars of illegality were the creation of a road reserve in a private land where there is none. Creating a road reserve without consent and/or knowledge of the registered owner of the land parcel. Amending the map sheet without consent and/or knowledge of the registered owner of the suit parcel. Failing to follow the procedure set out in the law.

The Appellant claimed that as a result of the said illegalities, the Plaintiff has been denied full enjoyment of her constitutionally guaranteed right to the right and enjoyment of property. The Appellant prayed for Judgement in the lower court for a declaration that the said road reserve on land parcel number NORTH GEM/MARENYO/515 is illegal, irregular, null and void and an order for the cancellation of the said road reserve and amendment of the map sheet for the parcel number NORTH GEM/MARENYO/515. General and exemplary damages. Cost and interest.

The Respondents in defence denied having participated in creating the road reserve. They denied the illegality as alleged and denied having infringed on the Appellant's rights.

The matter was subsequently transferred to the Principal Magistrates Court at Siaya for hearing and determination.

When the matter was placed before the Hon. Magistrate for hearing on 26/7/2018, the Appellant Anastacia Midialo Masime testified that sometimes in the year 2013, the District Land Registrar and the District Land Surveyor Siaya District created a road reserve (access road) on land parcel number NORTH GEM/MARENYO/515 without her consent and/or knowledge being the registered owner of the said land parcel and totally in breach of the procedure set out in the law. That the said act was done without her involvement and this amount to breach of her right to peaceful enjoyment of her property.

She prayed for a declaration that the said road reserve on land parcel number NORTH GEM/MARENYO/515 is illegal, irregular, null and void and an order for the cancellation of the said road reserve and amendment of the map sheet for the parcel number NORTH GEM/MARENYO/515 to its original position together with the cost of the case. On cross-examination she stated that the parcel was 2.6 acres. It had reduced because of the road. She could not recall when the road was made.

The Appellant's witness Ochola Masime, the Appellant's son testified that he is 65 years of age and married with children. That he has lived in land parcel number NORTH GEM/MARENYO/515 since birth and its his ancestral land in the name of his mother who is the Plaintiff. That since birth there has never been road on the said land parcel and it has never been used as road by anybody.

That it was until 2013 that the District Land registrar Siaya and the Surveyor created road reserve on the land parcel without involving him or his mother who is the plaintiff. That the said road as created in the map encroaches on their land parcel and it should be declared illegal and cancelled. On cross-examination, he stated that the road was created in 2013. The road had never been used since he was born.

The 2<sup>nd</sup> defendant, Shadrack Opiyo Wasonga testified that he is the proprietor of parcel number 538. He produced a Title deed. The Plaintiff was his neighbour who was inherited by his father and gave birth to the daughters. He states that there is an access road created in 1971. The road was in existence before 2013 for over 43 years.

The 2<sup>nd</sup> defendant called Johannes Obare who knew the Appellant and 2<sup>nd</sup> Respondent. He states that a road of access existed and that he had used it before.

The 1<sup>st</sup> defendant called James Kamau Maina a surveyor by profession engaged with Siaya County Government. He stated that the road in dispute has been in existence for use since 1970 during adjudication and that it was not created in 2013 as alleged. The road can't be cancelled as it serves parcel number 538. The road has been in existence for more than 50 years.

After considering the submissions of the parties, the Learned Magistrate found that although the Plaintiff produced the maps PE2 and PE3, showing that the road in question did not exist in PE2 but existed in PE3, the Plaintiff did not produce any evidence to indicate that the road was created on North Gem/Marenyo 515 and not on 1125. The Learned Magistrate found that it was not clear whether the road was on North Gem/Marenyo 1125 or North Gem/Marenyo 515. A further report was necessary. Moreover, the Plaintiff did not demonstrate that her acreage was affected. The Learned Magistrate found that the Plaintiff had not proved his case on a balance of probabilities.

The Plaintiff came to Court on appeal on the following grounds namely:-

- 1) The Learned trial magistrate erred in law and fact by treating the appellant's evidence and the appellant advocates submissions superficially and without adequate weight and thereby grossly misdirected himself and consequently arrived at an erroneous decision.**
- 2) The Learned trial magistrate erred in law and fact by failing to understand that the main issue in the case was the illegal creation of a road reserve on suit land parcel number NORTH GEM/MARENYO/515 and not the size of the road thereby arriving at a wrong decision.**
- 3) That the Learned trial magistrate erred in law and facts by failing to appreciate that all the witnesses and the evidence in court confirmed that there was road on the suit land parcel which has not been therefrom before and which was the subject of dispute.**
- 4) That the Learned trial magistrate erred in law and fact by failing to properly analyse the evidence on record thereby arriving at a wrong decision.**
- 5) That the Learned trial magistrate proceeded on wrong principles and disregarded the generally applicable principles of law.**
- 6) The Learned trial magistrate's decision was against the weight of evidence.**
- 7) That Learned trial magistrate misapprehended the evidence adduced by the plaintiff in material degree and a result arrived at a wrong decision.**

The Appellant prays that the appeal be allowed and the Judgement of the trial court be set aside and be substituted with an order allowing the Plaintiff's suit in Siaya PMCC ELC no. 66 of 2018.

This being a first appeal, the court is guided by the duty of the first appellate court so clearly set out in the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang stated:

*This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*

*However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*

I have considered the evidence on record and do find as follows, thus that in the retraced map for February 2005 produced by the plaintiff/appellant as PE2, the road of access does not exist. However, in the map produced as PE3 and in the uncertified photocopy of the extract of the map produced by the County Surveyor, the road exists. It is clear from the original map that the road did not exist in the year 2005.

The said map produced by the Plaintiff as Plaintiff Exhibit 3 shows the last amendment to have been done on 25<sup>TH</sup> November 2013 and does not show the creation of the road as alleged by the appellant. Moreover, it does not show which parcel of land was subdivided to create the road.

For the Appellant to have succeeded in the claim, she ought to have demonstrated to the lower court that her parcel of land number NORTH GEM/MARENYO 515 was illegally subdivided to create the road and that as a result of the subdivision, a portion of her land was lost to the road. The appellant had the legal burden of proof to establish that her parcel of land was subdivided to create the road of success.

*The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya. The said section states as follows: -*

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

The County Surveyor equally did not explain the absence of the road in Plaintiff Exhibit 2 and the creation of the road in Plaintiffs Exhibit3.

However, in law he who comes to court ought to prove. The burden of proof is on the person alleging the fact. In this case it is the Plaintiff alleging that the road was created on her land. She ought to have proved but she did not. The standard of proof is on a balance of probabilities.

I do find that the first two grounds of appeal fail as the plaintiff did not prove that Land parcel North Gem/Marenyo/515 was subdivided to create a road. It is true that there was a road created between the two parcels of land but it is not clear how the same was created and on which land.

I do find that the Learned Magistrate applied the right principles of law and arrived at his decision properly. I do dismiss the appeal.

**DATED AT KISUMU THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**