



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 272 OF 2016

JOHN KABINGA ONGWENYA.....1ST PLAINTIFF

FRANCIS AMENYA NDUBL.....2ND PLAINTIFF

LILLIAN MORAA MONGARE.....3RD PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Complaint dated 8th September 2016, the Plaintiffs filed suit against the Defendant claiming that the Defendant had threatened to move into their land parcels number NORTH MUGIRANGO/IKONGE/1058, 2345 2418 AND 2577, NORTH MUGIRANGO/MOKOMONI/1236 and NORTH MUGIRANGO/BOISANGA/497, 2299 and 895 on which the Plaintiffs have constructed business premises and threatened to demolish the said premises for allegedly encroaching on the highway. The Plaintiffs seek an order of injunction restraining the Defendant from demolishing or in any way interfering with the Plaintiffs' properties aforementioned until the suit is heard and determined.
2. The Defendant filed a Defence dated 20th April 2017 denying the Plaintiffs' claim and stating that the Plaintiffs' developments were within the road reserve and had accordingly encroached on the Kisii- Ngoina Road highway.
3. Contemporaneously with the Complaint, the Plaintiffs filed an application for injunction restraining the Defendants from interfering with the suit properties and the court ordered that the *status quo* be maintained pending the hearing and determination of the main suit.
4. After a failed attempt to have the matter settled through Alternative Dispute Resolution the case was fixed for hearing on 27th January 2020. On the said date, the Defendant and its advocate did not attend court despite being served with a hearing notice. The case therefore proceeded *ex-parte*.

PLAINTIFF'S CASE

5. In his evidence the 1st Plaintiff (PW1) who testified on behalf of all the Plaintiffs stated that he was the registered owner of land parcel number NORTH MUGIRANGO/IKONGE/1058 while the 2nd and 3rd Plaintiffs owned land parcels number 2345 and 2577 respectively. He told the court that they had sued the Defendant because its agents had marked the Plaintiff's buildings which were along Kisii-Ngoina Highway for demolition, on allegations that the said buildings had encroached on the road reserve. It was his testimony that he had called the Physical Planning Officer Nyamira to establish if the suit properties were indeed on the road reserve and he was assured that the same were not on the road reserve. He produced the documents in the Plaintiffs' list of documents as Plaintiffs' exhibits 1-9.
6. The Plaintiffs called Elias Rioba, a Draftsman in the Department of Physical Planning Office, Nyamira as PW2. He testified that the official measurement of the road according to the Registry Index Map was 120 ft. He stated the Plaintiff had applied for building approval from the Department of Physical Planning, Nyamira, which was duly granted. After the Plaintiff had constructed his house, he went to complain to the Physical Planning office that the Defendant had threatened to demolish his building on allegations that it was on the road reserve.
7. PW2 told the court that he was tasked by the Director of Physical Planning to go and ascertain whether the Plaintiffs' buildings had encroached on the road reserve. He explained that he went to the suit properties and took measurements from the centre line to the Plaintiffs' building whereupon he ascertained that the Plaintiff's building was not on the road reserve. He ended his testimony by producing the Sketch Plan that he prepared as Plaintiff's exhibit 10.

8. In his submissions learned counsel for the Plaintiff summarized the Plaintiffs' evidence and submitted that the Plaintiffs had proved their case as their evidence was unchallenged. He submitted that the Plaintiffs had called PW2 as an expert witness who testified that Kisii-Ngoina Road reserve measures 120 feet or 36.5 metres. It was counsel's submission that the Defendant in its Defence at paragraph 4 admitted that the road reserve was initially 120 feet and no evidence had been tendered to show that the position had changed.

ISSUES FOR DETERMINATION

9. Having considered the pleadings and evidence on record, the following issues fall for determination:

1. Whether the Plaintiffs have encroached on the road reserve.
2. Whether the road reserve on the suit property measures 120 feet in width.
3. Whether the Plaintiffs are entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

10. There is no dispute that the Plaintiffs are the registered owners of the various suit properties listed in the Plaintiff. The Plaintiffs produced certificates of official search to prove ownership of the same. The main bone of contention is whether the Plaintiffs have encroached on the road reserve.

11. PW2 testified that he personally visited the suit property and took measurements from the centre line of the road to the Plaintiff's building and confirmed that the said building is not on the road reserve.

12. Despite filing a Defence, a witness statement and bundle of documents and despite being served with a Hearing Notice, the Defendant did not attend court. The Plaintiff's evidence is therefore uncontroverted and it stands in support of the Plaintiff's case.

13. That being the position, I have no choice but to find and hold that the Plaintiffs have proved their case on a balance of probabilities. I therefore enter judgment for the Plaintiffs and make the following final orders:

(i) A permanent injunction is hereby issued restraining the Defendant, their agents and/or servants from demolishing or in any way interfering with the Plaintiffs' properties on land parcels number NORTH MUGIRANGO/IKONGE/1058, 2345 2418 and 2577, NORTH MUGIRANGO/MOKOMONI/1236 and NORTH MUGIRANGO/BOISANGA/497, 2299 and 895.

(ii) The Plaintiffs are awarded the costs of this suit.

Dated, signed and delivered at Kisii this 13th day of April 2021.

J.M ONYANGO

JUDGE