



Muinde & another v County Government of Makueni & 4 others (Environment & Land Case 03 of 2017) [2022] KEELC 2348 (KLR) (6 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 03 OF 2017**

**CG MBOGO, J
JULY 6, 2022**

BETWEEN

PATRICK MUMO MUINDE 1ST PLAINTIFF

WINFRED WANJIRU MUNENE 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF MAKUENI 1ST DEFENDANT

MAUI COMPANY LTD 2ND DEFENDANT

MAKUENI COUNTY DIRECTOR, ROADS & TRANSPORT . 3RD DEFENDANT

**MAKUENI COUNTY MINISTER, ROADS, TRANSPORT &
INFRASTRUCTURE 4TH DEFENDANT**

**CHIEF OFFICER, ROADS, TRANSPORT & INFRASTRUCTURE 5TH
DEFENDANT**

JUDGMENT

1. The submissions and proceedings make reference to a plaint amended on January 18, 2018 (not in the file) through which the plaintiff prays for the following orders:-
 - a) A permanent injunction restraining the defendants by themselves, agents, employees, servants, proxies and or anybody acting on their behest from entering, wasting, trespassing, excising road thereof, damaging fence, cutting down trees, interfering in any way and/or doing any acts that will interfere with the plaintiff's right to the use and or enjoyment of land parcel No. 1047 Kathyaka settlement scheme.
 - b) An order stopping the road to be excised beyond ten(10) meters by the defendants in land parcel No. 1047 at Kathyaka settlement scheme in Kibwezi, Makueni County.



In the alternative, the Court to order that the 7 or 10 meters taken by the defendant be declared to belong to the plaintiffs or the plaintiffs be compensated for 7 or 10 meters given by the plaintiffs earlier for the portion outside 10 meters already taken in accordance with the valuation given by the plaintiffs' valuer.

- c) Costs of the case.
 - d) Special damages in the sum of kshs 1,361,015.00/=.
 - e) General damages for trespass into the plaintiffs' land.
 - f) Any other relief the Court deems fit and just to grant.
2. The plaintiffs' case is that at all material times, they were the exclusive owners of land parcel No. 1047 (suit land) at Kathyaka Settlement scheme in Kibwezi. That the suit land borders a public road and at the time of acquiring it, they were instructed to give 6 meters for road reserve. That in anticipation of future road expansions, they gave 10 meters instead of 6 but their neighbors did not surrender the required 6 meters. That in November 2016, the defendants announced the expansion of Masalai-Kasayani road and without notice, they encroached the suit land and went beyond the 10 meters thus occasioning damage which included; destroying the fence and uprooting the gate.
 3. The 1st, 3rd, 4th & 5th defendants filed a joint statement of defence and denied the claim. They averred that according to existing survey maps, the road corridor is 15 meters wide from the centre line and not 6 meters as alleged by the plaintiffs. That the plaintiffs encroached on the road corridor and erected a fence within 7.5 meters from the centre line thus blocking the road access. Further, they averred that the other land owners along the road corridor agreed to move and gave way to the road expansion in accordance with the existing survey maps. They averred that before the road works began, the contractor mapped the road and pegged the actual road route. That the said pegging determined the landholders who had encroached on the road reserve and all of them including the plaintiffs were notified to remove any fencing within the pegged area. They denied causing any loss or damage and averred that it was the plaintiffs who encroached onto the surveyed road reserve against the public interest.
 4. The 2nd defendant did not file a statement of defence.
 5. During the hearing of the plaintiffs' case, they called Abednego Mutunga Maithya (PW1), a surveyor with the Ministry of Lands-Ruaraka. At the time of testifying, he said that he had worked for Government for over 15 years. That he was allowed to do private work and the plaintiffs were known to him. That he had previously worked at Kibwezi Land Adjudication office as a surveyor and by that time, Kathyaka had already been demarcated.
 6. He testified that he was specifically instructed to determine the acreage of the suit land as some damage had been done on the farm in 2017. That he went back to the land and found a road, approximately 9 meters, which had brought down the fence. That there were missing maps in Kathyaka. Further, he said that there was encroachment of 3 meters from the boundary on the western side, another encroachment of 6 meters and another one of 8 meters in the small sections. That the average encroachment was between 3 to 8 meters.
 7. He said that the plaintiffs' land is more or less rectangular and the road runs across hence affecting two sides. That the barbed wire fence comprising metallic and wooden posts was destroyed. He testified that the suit land is approximately 5.49 ha and produced the sketch as P.Ex 1 and his fees receipt of kshs 50,000/= as P.Ex 2. Further, he said that plot No. 1047 does not appear in the map provided by the County Government of Makueni.



8. On cross examination, he confirmed being a full time employee of the Kenyan Government since 2016. He reiterated that he has authority to carry out private survey work but did not have a written authorization, a gazette or circular authorizing him to carry out the work. He did not approximate the total acreage of the encroached area but said that only a small portion was affected. He agreed that the area had been demarcated when he first interacted with the plot. The area is yet to be titled since it is a settlement scheme. It is taken as an adjudication area in terms of survey work.
9. He said that previously, the demarcation officer would go to the ground, register the interests of the people and prepare a Preliminary Index Diagram (PID) which would be used by the surveyors to show the boundaries. He proceeded to say that once the map is completed without issues, it is taken to Nairobi for verification where it is checked to ascertain whether there are other interests. After that, the map is published. He said that the map for the area where the plaintiffs' plot falls has not been published. He agreed that the boundary of any plot in the PID can change before the map is published.
10. Upon being shown DMFI-1, he said that it is known as a Registry Index Map (RIM) and agreed that it relates to Kathyaka settlement scheme generally. That at the RIM level, boundaries are more or less permanent because they can change. That a deed plan cannot apply in the case of a RIM.
11. He said that the bottom right of DMFI-1 shows index to adjoining sheets and their numbers. That he looked at the adjoining sheets and about 8 of them were missing. That it was not easy to tell the side of the map where the plaintiffs' plot lies. That the numbering of the plots is random. He said that unless he saw the map, he could not tell whether the plaintiffs' plot lies to the north of the map. He did not know whether the 18 meter road represented on the map was the same road they were talking about.
12. He was not able to establish the length of the road project when he went to execute his instructions. He denied limiting himself to the plaintiffs' portion and said that he also considered other plots on the other side. He agreed that the road project did not begin and end at the plaintiffs' plot. That the total part attaching the plaintiffs' plot is only 400 meters but he was aware that the road was many kilometers.
13. He agreed that he visited the land in question and said that the road passing to the neighbours land to the north is more or less the same size as the one passing through the plaintiffs' plot. That it was also more or less the same size in respect of the neighbour to the south. He said that he would not be surprised to learn that only the plaintiffs had complained. Further, he said that he checked a few plots as he moved along and found that the width of the road was approximately 9 meters.
14. Further, he said that his sketch was based on what he saw on the ground and not what he was told by the plaintiffs. He agreed that the suit land had beacons which were not established under a beacon certificate. That there is no specific way of determining the accuracy of the beacons which he saw on the ground. He said that beacon certificates are issued where there is a fixed survey. He agreed that the sketch is based on the way the plaintiff had marked his land and was not in reference to any registered map. He agreed that the 9 meters is what he found on the ground represented by the plaintiffs' fencing. That he had no way of telling whether the fencing represented the actual boundary.
15. The 1st plaintiff, Patrick Mumo Muinde, testified that he worked as a trainer at the Kenya School of Government and the 2nd plaintiff is his wife. He adopted his statement filed in Court on November 17, 2016 as his evidence. He testified that he bought the property from Lena Munyalo and produced the sale agreement as P. Ex 3. He also produced a letter from the Sub-County Land Adjudication and Settlement Officer as P.Ex 4. He said that when he bought the land, there were weather roads which had never been cleared by the Government. That he was required to surrender 6 meters on either side but he surrendered 10 meters.



16. That he created a barbed wire, chain and droppers in some sections and intended the fence to be permanent. That he also constructed a gate, a farmhouse, a toilet and indigenous trees. The posts were both wooden and metallic. That a person who did not identify himself ordered him to move his fence but he did not comply. After about two weeks, his fence was demolished without notice. He identified two reports, PMFI 5 & 6, which were prepared by the valuer he engaged known as Mr. Muange.
17. He demanded kshs 1,361,015/= as compensation as well as general damages and permanent injunction.
18. On cross examination, he said that the suit land is approximately 5.4 ha. He agreed that he heard PW1 telling the Court that he (PW1) did not calculate the acreage of the encroached land. He agreed that his statement of December 19, 2017 shows that the size of encroachment is 0.70 acres. He agreed that he did not measure the size of encroachment but relied on the report by PW1. He said that he bought the property at kshs 580,000/= and was now claiming kshs 1,361, 015/=. That part of the money was to cater for the 0.70acres.
19. He said that when he bought the land in 2015, the road beacons had been done but could not tell when they were put or the person who put them. That the letter from Kibwezi Adjudication Office (P.Ex 4) was signed for Njuguna but he collected it from a lady. He agreed that the sale agreement does not say anything about the road. That when he went to the ground, the road was supposed to be 6 meters on both sides and the section on his part had been cleared by the County Government since it was near the market.
20. He said that the barbed wire fence was put by the original owner but he (plaintiff) added chain link and droppers after buying the land. He bought the posts together with the land. He bought the land at kshs 500,000/= and there were beacons at the time of purchase. That the fence was 4 meters from the beacons and the road was clearly demarcated. That when he bought the land, its width was 12 meters. That when the process started, he was guided by the sisal plants along the boundaries.
21. He was not aware that when the project began, the contractor went along the road pegging it. He said that 4 meters of his land was touched and that he was aware that no one else had sued the Government. That the road from Kisayani to bush workers site was not done uniformly and is not a busy road. He agreed that the road is public and is useful.
22. Further, he said that he had seen DMFI 1 before it was obtained from the survey office and had his own copy. That his land parcel was not on the map and falls on a sheet unknown to him. That in Kibwezi lands office, the record is marked as file number 11 but the map is not there. That he had the privilege of seeing all the available sheets in the area. He could not remember the sheets that were available. He then said that 7 sheets were available and DMFI 1 was one of them. He could not tell the position of his plot on DMFI 1 but it is closer to Masaleni shopping centre.
23. PW2 was Gideon Muthama Muange. He testified that he is a holder of Bachelor of Arts in Land Economics and Masters degree in business administration, Finance option. That he is registered and licensed to practice as a valuer and had 24 years experience at the time of testifying.
24. He testified that the 1st plaintiff was his client who instructed him to assess damage to the fence and trenches on plot No. 11/1047. He relied on his statement recorded on January 12, 2018. He produced the first report showing damage of kshs 842, 365/= (P.Ex 5) and the second one showing damage of kshs 126,800/= (P.Ex 6).
25. On cross examination, he said he valued what the plaintiff showed him as his property. That he did some background check on how the boundary was, checked with the neighbours boundaries but was



- not able to get a map. That he specifically confirmed the plaintiffs' boundary. That he did not see a deed plan of the farm and he checked the existing boundaries on the ground. He did not locate the beacons but the plaintiff showed him the sisal plants as the boundary. He agreed that he did not confirm where the boundary was independently. He also agreed that his report is based on what the plaintiff told him and physical examination.
26. He agreed that during road construction, it is not an unusual occurrence for some land owners to be found to have encroached onto the land. He reiterated that he did not locate any map of the land and agreed that he could not determine the width of the road authoritatively. Further, he said that he would not be surprised to learn that the land had encroached onto the road. He also said that the fence was not made of old materials but he was not able to establish when the fence was constructed. He would be surprised to learn that it was there when the plaintiff purchased the land. He was also not aware that the fence was part of the purchase price of the land.
 27. PW2 was recalled to produce his fees receipt for the two reports and he produced them as P.Ex 7(a) & (b). He said that his fees was based on the valuers scale of fees.
 28. The plaintiff closed his case at that juncture.
 29. It is important to note that after closure of the plaintiffs' case on November 22, 2019 the defence hearing was adjourned five times at the instance of the defendants. On January 18, 2021 the defence case was deemed as closed and parties were directed to file submissions. By the time of writing this judgment, only the plaintiffs' submissions were on record.
 30. According to the plaintiffs, the Court should take judicial notice that construction of roads is guided by Road Inventory Reports (RICS) and in this case, the subject road was guided by Road Inventory Report 210. They submitted that according to the report, the intra sub location road sets 4 meters for carriage way and a reserve of 9-10 meters from the centre line. They contend that the contractor went over 10 meters on their side thus implying a road reserve of over 20 meters.
 31. They submitted that the testimony of the 1st plaintiff and his two witnesses was never challenged because the defendants did not testify in Court.
 32. The plaintiffs contend that the damage caused by the defendants was malicious and submit that they are entitled to general damages of kshs 10 million for trespass. They relied on the following authorities;
 - a) *Rhoda S. Kiilu -vs- Jiangxi Water & Hydropower Construction Kenya Ltd* (2019) eKLR where the plaintiff was awarded general damages of kshs 10 million for trespass.
 - b) *John Chumia Nganga -vs- Attorney General & Anor.* (2019) eKLR where the plaintiff was awarded general damages of kshs 1 million for trespass.
 33. Having looked at the pleadings, evidence and submissions, it is my considered view that the following issues arise for determination:-
 - a) Was the suit land encroached/trespassed by a public road?
 - b) If (a) above is answered in the affirmative, what is the compensation payable to the plaintiffs?

Was the suit land encroached/trespassed by a public road?

34. The ownership of the suit land is not in dispute and the main issue for determination is whether it was encroached by the public road. According to the plaintiffs, they went over and above to give 10



meters for road reserve instead of the required 6. On their part, the 1st, 3rd, 4th & 5th defendants averred that according to existing survey maps, the road corridor is 15 meters wide from the centre line. I have looked at all the exhibits produced and there is no single document showing the dimensions of the road.

35. I am afraid that the evidence of the surveyor and valuer did not advance the plaintiffs case. Both of them agreed that their work was largely influenced by information given to them by the plaintiffs. The surveyor, PW1, produced a sketch which was not in reference to any registered map but purely based on the way the plaintiffs had marked their land. He also admitted that he had no way of telling whether the plaintiffs' fencing represented the actual boundary.
36. Further, it was his evidence that where a map has not been published, the boundary of any plot falling in such an area can change. He testified that the area where the plaintiffs' plot falls has not been published hence the probability that the boundaries of the suit land had changed cannot be ruled out.
37. The valuer, PW2, agreed that he did not do an independent confirmation of the boundary and that since he did not locate any map of the land, he could not determine the width of the road independently.
38. The plaintiffs urged this Court to be guided by the Road Inventory Report which they attached to their submissions. I am at a loss as to why the document was not introduced during evidence in chief. As it is now, it appears that the report is being sneaked through the back door and allowing it would be tantamount to ambushing the defendants who will not be afforded an opportunity to test its contents in cross examination.
39. The totality of the evidence on record is such that, despite the fact that the defendants did not testify, the balance of probability does not tilt in favour of the plaintiffs. It would be against the weight of the evidence for this Court to conclude that the public road encroached into the plaintiffs' land.
40. Failure by the 2nd defendant to participate in this suit does not affect the outcome because as a contractor, he was simply executing instructions of the County Government.

Compensation

41. The plaintiffs have not proved their claim of encroachment/trespass to the required standard and as such, there is no basis for awarding any compensation.
42. The upshot is that the plaintiffs' suit fails and is dismissed. Each party to bear their own costs.

SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 6TH DAY OF JULY, 2022.

C. G. MBOGO

JUDGE

6/7/2022

In the presence of:

CA:T.Chuma

