



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 271 OF 2017

MUIRURI NJURU.....1ST PLAINTIFF

STEPHEN MWANGI MAINA.....2ND PLAINTIFF

SIMON NJOROGE KAMUNGE.....3RD PLAINTIFF

STEPHEN MUREGI CHEGE.....4TH PLAINTIFF

DAVID GICHOHI WAIHAGA.....5TH PLAINTIFF

JOHN THINDI KABAYA.....6TH PLAINTIFF

-VERSUS-

ESTHER MUCHIRI.....DEFENDANT

JUDGMENT

By a Plaint filed on 12th July 2016, the Plaintiffs brought this suit against the Defendant and sought for the following orders that;

a. A Mandatory Injunction to issue against the Defendant compelling her to remove the gates erected as access points to LR.No.14270/23,14270/24 and 14270/25 through Kugeria North Crescent Road and to restore the hedge and close the entries created to the said plots through Kugeria North Crescent Road.

b. A Permanent Injunction to issue against the Defendant either by herself, her agents, servants, tenants and/or any other person acting at the behest of the defendant whomsoever from singularly or jointly using Kugeria North Crescent Road to access LR LR.No.14270/23, 14270/ 24 and 14270/25 and to desist from erecting any other gate along the hedge adjacent to Kugeria North Crescent Road

c. A Permanent Injunction to issue against the Defendant either by herself, her agents, servants, tenants and/or any other person acting at the behest of the defendant whomsoever from singularly or jointly interfering with the Plaintiffs' right to use Kugeria North Crescent Road and from trespassing on the said access road.

d. Damages.

e. Costs and interest.

In their statement of Claim, the Plaintiffs' averred that they are the registered owners of *LR.No.17239,17238,17237,17242,17241, and 17240* and the Defendant is the beneficial owner of LR 14272/14, subdivided into LR.No.14270/23, 14270/24 and 14270/25. That in 1992, one Winfred Wanjiku Kibathi, whom at the time owned L.R 7022/53, subdivided the same into 15 plots and as a result thereof L.R 17237,17242,17241, and 17240, were excised in due course and acquired by the Plaintiffs. That as a result of the subdivision, the Plaintiffs plots were at the rear end, hence it became necessary to create an access road to enable the owners' access their land. That the said Winfred Kibathi surrendered part of her land to create an access road to the said plots named Kugeria North Crescent road, which ends at L.R No. 17242. That the Plaintiffs have since 1992 enjoyed exclusive use of the same.

Further that **L.R 14270/14** (as it then were before subdivision) bordered the main public murrum road, in which side the Defendant had a public access road and a gate to her property which borders the Kugeria North Crescent road on one side. However, in 2012, the Defendant carried out subdivision in **L.R No. 14270/14**, which resulted into three plots to wit L.R No. 14270/23, 14270/24 and 14270/25. That at the time of subdivision and according to survey plans presented at the time, L.R 14270/24 and 14270/25, have direct access to the main public

murram road which side the Defendant has access to both plots. That L.R No. 14270/23, which is behind the two other plots has an access road from behind.

That the Defendant has put up a gate and opened a hedge thus creating an entry to L.R No. 14270/23, through the Plaintiffs' access road without any justification thereby interfering with the Plaintiffs' exclusive right to enjoy the usage of the access road to their plots. Further that the Defendant intends to open the hedge on L.R 14270/25, whereon she has put a gate facing Kugeria North Crescent road so as to create entry into the said plot. That the Defendant cannot claim a right to the access road and therefore her actions amount to unlawful trespass.

The suit is contested and the Defendant filed her Statement of Defence dated 22nd March 2018, and denied all the allegations made in the Plaintiff. It was averred that the issue of surrender of part of the property due for subdivision for purposes of creating an access road is not obligatory of the land owner, but a statutory requirement. That though the road was to provide access to the Plaintiffs, the same is not narrow nor is it for the sole use by the Plaintiffs having been surrendered back to the Government. The Defendant admitted that L.R 14270/23 & L.R No. 14270/25, were subdivided in a manner that allowed access through Kugeria North Crescent road. That at the time of her subdivision, there were no restrictions that were put in place by the County Surveyor on the use and access of the road in question. Further that the Plaintiffs cannot purport to term her use of the public road illegal and if any objections were there, they would have been raised when she was building the two homes on the demised property and no approvals would have been granted by the County Surveyor. That the fact that the Plaintiffs have maintained the road does not bar any use by third parties, as the same is government land and only the Government can bar its use. That the use of the road for extended times by the Plaintiffs does not equate its conversion as private land.

After Close of pleadings, the matter proceeded by way of *viva voce* evidence on the 30th September 2020, wherein the Plaintiffs called two witnesses and the Defendant gave evidence for herself and called one more witness.

PLAINTIFF'S CASE

PW1 – MUIRURI NJURU adopted his witness statement and testified that he lives at Kugeria North Crescent. That the bone of contention is that the road was excised by a person who sold the 15 plots to them. That out of 15 plots 12 of them have no outlet. That the access road was surrendered by the former owner – Kibathi, for exclusive use by the owners of the 15 plots. He produced the map for the original land LR 7022/53, with proposed subdivision as Exhibit 1. Further, map of LR NO.14270/14, for the Defendant was produced as Exhibit 2. He further produced a 2nd map for L.R No. 14270/14 as Exhibit 2(a).

It was his evidence that they repaired the road and the same, is motorable and the Government has never repaired the road. That the map from the Defendant shows she is able to access the main road and also their access road. He produced photographs to show the plots owned by themselves and the Defendant as Exhibit 3. He produced a Demand Letter to the Defendant as Exhibit 5. He further testified that the Defendant had no right to use their access road.

That the road is narrow and there is storm water drainage and if the Defendant is to use the road, it will create problem of volume of vehicles and damage of the same. That they expected the Defendant to expand the road by surrendering a portion to be added to the road, but she refused.

Further that he was not the original owner of the said plot and he bought the property because there was a road. He further stated that the plots are subdivided and there must be access through the road and at the time of surrendering to the Government, it becomes a government road. That the surrendered access road becomes a public land. That the Defendant has not constructed her property on the government road. That the access road is sufficient for the 15 people, but not the Defendant.

On re-examination, he stated that the Defendant has not surrendered the land for purposes of use and for the access road and that the main road is maintained by the Government.

PW 2 – Joan Wangu Kibathi, adopted her witness statement as her evidence in Court and testified that her mother gave the **Access road** to the six plot owners, so that they could access their properties and the main road. That the access road is a private road.

That ten roads are provided for different purposes and the essence of the road is to provide access to the property. That the road can be used by others, but with consent of the other road users. That the Plaintiffs maintain the road.

DEFENDANT'S CASE

DW1 – Esther Muchiri adopted her witness statement and also produced Surveyor's Map with the Index Report and Surveyors Report as Exhibits 1 and 2 respectively. She stated that the **County Government of Kiambu**, gave her the go ahead to construct the three houses and that the access road is indicated "GL" which means Government Land. She further stated that the **Access Road** was surrendered to the Government and should be used by the public. She contended that if she is allowed to use the **Access Road**, she will pay all the fees for its maintenance. That she accesses her house by being carried on a wheel chair and the Plaintiffs have never approached her to help in maintaining of the said road. She urged the Court to allow her use the access road.

Further that she was the one who finished the process of subdivision and she does not know why the Surveyor never indicated that she could access the plots through the **Kugeria North Crescent Access Road**. Further that that she used her documents to obtain the approvals and that Kugeria road is maintained by the County Government of Kiambu since 1992. That she has no Deed Plan to show how the road was surrendered to the government. That Kugeria road has never been maintained by the County government of Kiambu. That she used to access her plot through a path and not a road.

On re-examination, she stated that after subdividing the plots, the Surveyor advised that she access her plot through Kugeria North

Crescent Road.

DW2 – Hussein Hirsi produced a Survey Report as Exhibit 4. He testified that the access road is indicated on the index map and the subdivision was for 1992. He further stated that it is not shown on the Survey Plan that access road would be through **Kugeria North Crescent Road**. **That he did not see a deed plan for this surrendered road as there are deed plans for the surrendered road. That the Road has however been indicated as GL. That Government roads are maintained by Government entities and surveyors rely entirely on maps. Further that the roads are mapped out by Physical Planners and he did not have a Physical Planners report in court. That a public road should be about 9 meters . That the Defendant can also access the Kugeria road.**

The Court directed that parties do file written submissions and in line with the said directions, the Plaintiffs' through the *Law Firm of Ngugi & Wamuyu Advocates*, filed their written submissions dated **11th November 2020** while the Defendant through the *Law Firm of Gichamba & Co. Advocates* filed her submissions dated **1st December 2020**.

The Court has Carefully read and considered the Pleadings by the parties, the evidence adduced , the written submissions and the provisions of law and finds that the issues for determination are;

i. Whether Kugeria North Crescent access Road is a public or private road?

ii. Are the Plaintiffs' entitled to the orders sought?

1. Whether Kugeria North Crescent access Road is a public or private road?

The Plaintiffs' have averred that the Defendant has opened a hedge and purported to put gates along the Access Road for purposes of accessing her plots using the said very narrow access road. On the other hand, the Defendant has contended that Kugeria North Crescent Road, falls under the category of Public land and not Private land and thus she has a right to use the same. It was her contention that the road in question being a Government road, the proper authority barring her use herein would have been the stated County Government and not the Plaintiffs.

It is not in doubt that ownership of the aforementioned parcels of land are not disputed. It is also not disputed that the road of access in dispute herein was created following the sub-division of **LR 7022/53**. What is in dispute is the access road.

Section 9 of the Public Roads and Roads of Access Act, Chapter 399 Laws of Kenya provides for two ways in which an access road may be created. It thus provides;

(1) Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act: Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.

(2) Any owner or occupier of lands who has constructed a road in circumstances which did not require the making of an application under subsection (1) of this section may make application to the board of the district in which the road is situated for a declaration that the road is a road of access, and for the registration of the road of access as though an order had been made under section 11 of this Act.

(3) Every such application shall be accompanied by such fees as the Minister may prescribe, and the board shall not be obliged to proceed upon any such application except upon payment of such fees.

There is no doubt from the above provisions of law, that there are two ways in which an access road may be created. One where there is public land and or road the Act requires the party to make an Application. However, from the reading of **Section 9(2)** where the land is not public land, then the party may make an Application. In the Court's considered view, the use of the word **may** does not connote a mandatory nature.

The Court must make a determination on whether upon subdivision of **LR 7022/53**, then the access road became public road. DW2 who is a **Surveyor** testified that when land is surrendered to the government, the same becomes government land. Further that each access road has its own Deed Plan and that he had not seen the same for the particular road. It was however, his evidence that the fact that the map had marked the access road as **G.L**, then it means that the same is Government Land . It is the Court's considered view that upon subdivision as required under **Section 14(d) of the Physical Planning Act**, a party causing the said subdivision is required to mark the roads and lanes in blue which signify surrender. It provides;

“the proposed scheme of subdivision, the boundaries in red and the approximate\ dimensions of sub-plots and the proposed means of access, road or lane system (if any) with the widths of such streets, roads or lanes clearly indicated appropriately in blue on each plan. Other colours to be used in the subdivision plan shall be blue for surrender and yellow for demolition;”

It therefore follows that at the point of subdivision, it should already have been indicated whether or not the land had been surrendered. DW2

having testified that **GL** means **Government Land**, the Plaintiffs did not call any evidence to rebut the said evidence. It is not in doubt that the onus of proving the case lied with the Plaintiffs. They are the ones who were to prove that the access road was private land and not public land and that the same was not surrendered. In the Court's considered view, the Plaintiffs failed to provide any documentary evidence to prove the same.

Without any alternative as to what the initials **GL** on the road on the said map could have been, the Court finds and holds that the evidence of DW2 is credible and that the same is Government land and therefore the access road is public.

Having held that the land was Government land, it therefore follows that in order to privatize the access road, the Plaintiffs needed to make an application to have the access road privatized. The **Kugeria North Crescent Access Road** is not designated as a private road or at least no evidence has been tendered to show that it is a private road. If indeed it is a private access road, there would have been an Application under the provisions of the **Public Road and Roads of Access Act, Cap 399, Laws of Kenya** by the Plaintiffs' and the same tendered as evidence in Court. There is also no evidence that the Plaintiffs' have put a **notice** on the said road to the effect that it is a private road as required under **Section 13** of the Act. From the foregoing, any subdivision scheme would normally be subject to terms, which ordinarily would interalia, include the provision of services such as Roads of Access.

The Plaintiffs' consequently, had an obligation to summon the County Planner and a Surveyor as witnesses during the hearing to prove the contents of the maps which they produced in their favor, but they failed to do so. Thus, no such proof has been tendered by the Plaintiffs' either in their pleadings or during the hearing to convince this court that the access road is a private road.

It is this court's finding that the Plaintiffs have failed to prove that the **Access Road** which was created following the subdivision of Plot No. **LR LR 7022/53**, is a private road, whose use is restricted to private use only. The Court therefore finds that as per the indication G.L the same is a public road.

2. Are the Plaintiffs' entitled to the orders sought?

Having found that the Plaintiffs' have failed to prove that the Access Road created after the subdivision of title **LR.NO 7022/53** to create **LR.No.17239, 17238, 17237, 17242, 17241 and 17240** is a private access road, the Court finds and holds that the Plaintiffs are therefore not entitled to the orders sought, which orders include a permanent injunction amongst others as they failed to discharge their burden of proof.

Having carefully considered the available evidence, the exhibits produced in court, the written submissions and the relevant provisions of law, the Court finds that the Plaintiffs failed to prove their case on the required standard of balance of probabilities. Consequently, the Court finds that the Plaintiffs are not entitled to the prayers sought in their Plaint dated **12th July 2016**, and thus the Plaintiffs' claim is dismissed entirely with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 4TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

4/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiffs

Though Notice issued.

No appearance for the Defendant

L. GACHERU

JUDGE

4/6/2021