



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 51 OF 2014

CATHERINE MULANDISI MUTESHI

ANTHONY KEDOGO AGEVI

LORRINE ANDIA KHALENYA AGEVI.....PLAINTIFFS

VERSUS

JOSEPH ONZERE DAVID *alias* JOSEPHAT ONZERE DAVID....1ST DEFENDANT

CHARITY ONZERE.....2ND DEFENDANT

JOHN KARANJA.....3RD DEFENDANT

DAVID OBWANA.....4TH DEFENDANT

MARITA KIBERENGE.....5TH DEFENDANT

BEN LUTTA.....6TH DEFENDANT

JUDGMENT

INTRODUCTION

The original plaintiff one Elijah Agevi filed a plaint dated **20/3/2014**. Upon his demise he was substituted with the current plaintiffs, the legal representatives to his estate. The plaint was subsequently amended on **26/11/2019**. In that amended plaint the plaintiffs seek judgment against the defendants jointly and severally for:-

a. An order permanently restraining the defendants from encroaching onto the access road once and for all.

(ai) An order directing the County Surveyor Trans Nzoia to go to the ground to re-establish the road as it appears in the RIM in the survey records.

b. Costs of the suit.

c. Any other relief the court thinks fit.

PLEADINGS

The Plaint

2. In their claim, the plaintiffs averred that they own **plot Number Kiminini Matunda Block 5/Stova/40** which is served by a **6** meter wide access road off the Kiminini – Ndalu road; that the defendants have gradually encroached on the said road by moving their fences and/or using part of the access road for agricultural purposes thereby reducing the width of the road to hardly **3** meters, making it impossible to drive without the plaintiffs' car being scratched by the live hedges on either side of the road. It is pleaded that the dispute had arisen in **2006**

and the District Land Registrar had re-established the road. The current actions of the defendants are said to date back to the year **2013**.

The Defence

3. The defendants filed their joint written defence on **14/5/2014**.

Defence to Amended Plaintiff

4. On **13/12/2019** the defendants filed defence to amended plaintiff, denying the claim and stating further that the road had been re-established in **2006** in the presence of all the parties including the assistant chief and security officers upon complaint by the deceased Agevi. The defendant deny having interfered with the boundaries as re-established by the surveyor. They state that the road is **6** metres wide all through.

The Plaintiffs' Evidence

5. **PW1, Catherine Mulandisi Agevi**, testified on **30/7/2018**. She adopted written statement dated **20/3/2014** of **Elijah Agevi** (deceased) as her evidence-in-chief. She stated that she lives on **plot Number Kiminini Matunda Block 5/Stova/40**; that she is the widow to the deceased Elijah Agevi; that she adopts the statement made by the deceased in the suit; that the road has been encroached on; that it is difficult to even manoeuvre one car on the road due to the encroachment; that a demand letter was written to the defendants and that the road should be restored.

6. Upon cross-examination she stated that the surveyor and the registrar visited the site and restored the road to **9** metres. She seemed unsure as to whether the road is **9** or **6** meters in width. She stated that the defendants access their lands using the same road. She stated that the surveyor never put permanent marks on the site but erected sticks which the defendants removed. The defendants allegedly interfered with the road by erecting barbed wire fences and digging trenches where they were not supposed to. On re-examination she indicated that some defendants have encroached onto the said road more than others.

7. **PW2, Regina Shimola Kalia** testified on **30/7/2018**. She adopted her statement recorded on **20/3/2014** as her evidence-in-chief. Her evidence is that she has lived on **plot Number Kiminini Matunda Block 5/Stova/40** since **1992**; that she knows some of the defendants; that there is clearly a problem in that the said road has been encroached on and that it is not as it was before; that when a county government grader came to the site it only levelled the road without addressing the encroachment.

8. **PW3, Moses Nyaboe**, Trans Nzoia County Surveyor, testified on **20/5/2021**. His evidence is that he received an order to visit the site of the dispute; that he visited it on **12/9/2018**; that his findings were that the road had encroached on several parcels of land; that the road as it appears physically on the ground differs with the manner provided for by the registry index map; that the road has therefore diverged from its proper course; that the road was **6** metres wide and that on the official map the road is reflected as being **8** metres wide.

9. The plaintiffs then closed their case.

The Defendants' Evidence

10. **DW1, Charity Onzere**, testified on **20/5/2021**. He adopted his written witness statement dated **27/5/2014**. She denied encroaching onto the road; she stated that at one time Elijah Agevi came with a tractor and her fence was damaged; that a surveyor later came on to the site and established that the road was the right size. She prayed for dismissal of the claim.

11. **DW2, John Njoroge Karanja**, testified on **24/5/2021**. He adopted his witness statement dated **27/5/2014** as his evidence-in-chief. He stated that the access road is **6** metres wide; that the land registrar and the county surveyor have visited the site twice over the dispute; that he is content with the road as it is and he thinks that the other defendants are content too; on cross-examination he stated that vehicles do overtake one another without difficulty while on that road. He further stated that he has viewed the official map and he know that the road is **6** metres. His belief is that there are no **8** metre wide roads in the rural areas and that the road position on the ground is as stipulated on the map.

12. The defendants closed their case at that juncture.

SUBMISSIONS

13. Submissions were filed on behalf of both the plaintiffs and defendants on **30/5/2021**. I have considered those submissions.

DETERMINATION

Issues for determination

14. The main issues for determination in this matter are:

a. Whether the defendants have encroached on the road?

b. What Orders should issue?

15. The issues are addressed as hereunder:-

a. Whether the defendants have encroached on the road?

16. The plaintiff's evidence that the road has been encroached on by the defendants is corroborated by the County Surveyor. The latter stated that the existing road is 6 metres wide while the map states that it should be 8 metres wide. Further he stated that the existing road does not follow the course provided for on the official Registry Index Map. Different parties are using different expressions in this case to describe the failure of the road to follow the course stipulated by the official map but what remains clear is that the road on the ground is not where it should be if the map were followed.

17. The County Surveyor states that the road has encroached on the defendants' parcels of land while the plaintiffs aver that it is the defendants who have encroached on the road. The defendants are satisfied with the road as it is while the plaintiffs are offended that the road has been made narrower than it ought to be and that it does not follow the course provided for in the official map.

18. It is only an official map from the custodian of the government records relating to survey that can state the proper boundaries and positioning of a road. The County Surveyor is an expert in such matters and he was called as an expert witness in the plaintiffs' case. The defendants never called any expert evidence. I am satisfied from the evidence of the plaintiffs and the surveyor that the defendants have encroached on the road.

(c) What orders should issue?

19. It would not be proper to let the official status of the RIM continue being different from the ground status. It is a recipe for chaos in future perchance transactions occur regarding the affected lands, and it may create a conundrum not easily resolvable. I find that the road should be reinstated to its proper position in accordance with the official Registry Index Map and the defendants should desist from encroaching on the road once it is re-established as per the official Registry Index Map. Since the defendants all opposed this claim which in this court's view was needless action on their part, they should bear the costs of this suit.

CONCLUSION:

20. The upshot of the foregoing is that the plaintiffs have established their claim against the defendants on a balance of probabilities. Judgment is hereby entered for the plaintiff against the defendants jointly and severally and the following orders of this court are hereby issued:

a. The County Surveyor Trans Nzoia shall visit the road serving the plaintiffs' and the defendant's lands and he shall re-establish the said road as it appears in the RIM in the survey records by placing the necessary beacons in the ground showing where the defendants' plots abut the road.

b. The defendants are hereby permanently enjoined from interfering with the said road's position and width once it is reinstated as per the official registry index map as ordered in order no. (a) above.

c. The defendants shall pay the plaintiffs the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJOROGI

JUDGE, ELC.