



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 59 OF 2018 (O.S)

APPOLONIA OMBOK.....APPLICANT

VERSUS

MAURICE ODHIAMBO OWITI...1ST RESPONDENT

LAND REGISTRAR KISUMU.....2ND RESPONDENT

RULING

The Applicant Appolonia Ombok has come to court against Maurice Odhiambo Owiti and Land Registrar Kisumu asking for determination as to whether land parcel Kisumu/Othany/572 belonging to the applicant's husband the late Manas Ombok Jagero adjoins land parcel Kisumu/Othany/575 which the respondent purports to have bought and had transferred from the deceased registered owner Aloice Odudu Mwanda on 8/02/2013. Further whether both the applicant's husband and the late Aloice Odudu Mwanda executed an unwritten agreement in about 1982 of sale of a portion of Kisumu/Othany/575 in consideration of Kshs. 5,000 and a swop of a portion of Kisumu/Othany/572 and which bought portion of Kisumu/Othany/575 was to be used as an access road connecting Kisumu/Othany/572 to the main road from Bodi Center to Chuth Ber Market and whether the applicant and the public have enjoyed the right of access and use of the access road hived from Kisumu/Othany/575 connecting Kisumu/Othany/572 to the main road from Bodi Center to Chuth Ber Market for more than twenty years from 1982.

Moreover, the applicant asks whether the 1st respondent as purported purchaser of the interest of the late Aloice Odudu Mwanda in Kisumu/Othany/575 in 2013 about 30 years after his death is bound by easements that have been continuously enjoyed by the applicant since 1982 and for more than twenty years before the alleged third party purchase and whether the Land Registrar-Kisumu should be compelled to recognize and fix in the registry map the access road hived from Kisumu/Othany/572 connecting Kisumu/Othany/575 to the main road from Bodi Center to Chuth Ber Market. Last but not least, whether the court should condemn the Defendant's to pay costs.

The summons is supported by the affidavit of Appolonia Ombok and grounds that the applicants have been in adverse possession of the said parcels for over 12 years prior to the filing of these proceedings. The access and use of access road hived from Kisumu/Othany/572 connecting 5 to the main road from BODI Center to Churth Ber Marekt have been enjoyed with the portion of Kisumu/Othany/575 as an easement.

The applicant has enjoyed easement, peaceably and openly as of right, and without interruption, for thirty-six years (more than twenty), in terms of the right to access a portion of land parcel Kisumu/Othany/575.

The said usage of the portion of Kisumu/Othany/575 is absolute and indefeasible. The applicants have had continuous and uninterrupted occupation and usage of the access road from 1982 until 2018.

In the supporting affidavit the applicant states that that she is the eldest wife of the late Manase Ombok Jagero who passed away sometimes in the year 2006 and was buried in their home in Kisumu/Othany/572 in Seme area of Kisumu County.

That She is aware that sometimes in the year 1965, which was before adjudication, her late husband and the late Aloice Odudu Mwanda reached an arrangement where the latter was to give her husband a portion of the latter's parcel Kisumu/Othany/575 for purposes of allowing him to access the main road from Bodi Center to Chuth ber Market.

That as consideration, her late husband gave the late Aloice Mwanda a portion of parcel Kisumu/Othany/572 and some money then totaling to about Kshs. 3,000.

It is instructive that the portion which her husband received was strictly for purposes of being an access road in fact it has always been used

by the family and the entire community from 1965 until 25/07/2018 when the defendant inexplicably moved in to fence off the access road.

It is also important to note that on the other had the portion which her late husband gave to ALOICE ODUDU MWANDA was merged with his land 575 during adjudication and therefore it currently constitutes land parcel KISUMU/OTHANY/575.

That they have been using this access road for the last 53 years and right now they are completely blocked out and they have to cover a distance of about 2KM for to reach the main road as the defendant has blocked the access road.

She is aware that as a result of the closure of the access road, her son SHELKH CLEMENT OMBOK proceeded to place a caution on the parcel KISUMU/OTHANY/575 on 10/8/2018 so as to have the aspect of our original parcel of land which was swapped to facilitate the creation of an access road addressed.

She is further aware that together with her son PAUL OMBOK, did a letter to the Land Registrar Kisumu requesting for the opening of the access road in question to which they have not received any response to date.

That what they want is the recognition of the access road and its inclusion in the official map of the WEST OTHANY SUB LOCATION adjudication area which as of now does not reflect it.

That the green card indicates that the parcel KISUMU/OTHANY/575 was transferred to MAURICE ODHIAMBO JOWITI on the 8/02/2013 from the late ALOICE ODUDU MWANDA and yet the said ALOICE ODUDU MWANDA is their relative and she is aware that he passed away sometimes in the year 1989 so that the purported transfer is questionable.

She is aware that the family of ALOICE ODUDU MWANDA are aware of the circumstances pertaining to the access road and the fact that this was an arrangement between parties which had been practically domesticated and acquired the force of law through usage so that it breeds anarchy and mayhem for the defendant to purport to change this long held arrangement.

That she is aware that the benefit accruing to her family out of the use of the access road amounts to servient and dormant tenement and satisfies the conditions set in section 32 of the Limitations of Actions Act as stated in *MURANGA ELC. CASE NO. 422 OF 2017 (OS) – ESTHER WANJIKU MWANGI & OTEHRS VS WAMBUI NGARACHU* that *'Where the above requirements have been satisfied the right of a way is attached to land even if the land is sold to a third party. The encumbrance in form of a right of way subsist on the land and land would be sold subject to that right of way. This being a general right of way, the neighbours who uses it acquires the right over a period of time. There is no provision that the portion of the land on which the right is embedded or attached need be surveyed or excised out of the land. It remains attached to the land;*

That the closure of the access road has caused untold suffering to us and the family and because the Land registry is of no help, she has now come to this court to assist them in the restoration the access road and the fixing of the same in the map.

That she prays that this court orders the Land Registrar Kisumu to visit the subject land and issue a report on the existence of the unregistered access road which has always been in use for the last about fifty-six (56) years and that the same be registered in the map for the West Othany Sub-location Adjudication Section.

That this court also compels the respondents to open the access road hived from Kisumu/Othany/572 connecting Kisumu/Othany/575 to the main road from Bodi Center to Chuth Ber Market.

The respondent has raised an objection that the applicant lacks capacity to bring this suit. In this matter, I had found earlier that the applicant lacks capacity to bring the application for the opening of the access road on parcel number Kisumu/Othany / 575 because she is not the registered owner of parcel number Kisumu/Othany / 572 that adjoins parcel number Kisumu/Othany / 575. The former is registered in her husband's name and therefore she requires a grant of letters of administration intestate to derive any right or privilege appurtenant thereto. To benefit from any easement associated with the parcel number Kisumu/Othany / 572 which is registered in the names of Manas Ombok Jagero she has to demonstrate capacity by producing a grant as aforesaid to demonstrate that she is the representative of the late Manas Ombok Jagero. I do find the objection merited and the Originating Summons herein is struck out with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 14TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling 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 15th March 2020.

ANTONY OMBWAYO

JUDGE