



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 335 OF 2016

LAWRENCE NGINGA MARANGA.....PLAINTIFF

-VERSUS-

HEADMASTER CHAANI PRIMARY SCHOOL.....1ST DEFENDANT

THE BOARD OF MANAGEMENT CHAANI PRIMARY SCHOOL.....2ND DEFENDANT

HEADMASTER CHAANI SECONDARY SCHOOL.....3RD DEFENDANT

THE BOARD OF MANAGEMENT CHAANI SECONDARY SCHOOL.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

(Suit by plaintiff contending that the 1st – 4th defendants, responsible for management of Chaani Primary and Chaani Secondary Schools have proceeded to undertake developments on a road that leads to his property; evidence presented demonstrating that indeed part of the school developments are located in the road of access; not permissible for the defendants to develop on a road; subject road being the only road of access to the plaintiff's property; orders issued for the school to remove the said developments; costs to the plaintiff)

A. Introduction and pleadings

1. This suit was instituted by way of a plaint filed in court on 22 November 2016. The original plaint had two defendants, the Headmaster, Chaani Primary School and the Board of Management of Chaani Primary School. The plaint was later amended on 25 January 2017 to include the Headmaster of Chaani Secondary School, the Board of Management of Chaani Secondary School and the Attorney General as the 3rd, 4th and 5th defendants respectively. It is the case of the plaintiff that he is the lawful registered owner of the Plot No. 511 located in Chaani, within Changamwe area of Mombasa County (the suit land). He has pleaded that his plot can only be accessed via the public road separating the plots No. 151 and No. 2412. The plaintiff pleaded that over the years, he has accessed his land via the said public road, and despite having knowledge of that fact, the defendants were unlawfully setting up foundations of structures, buildings, and developments on the said public road, which will hinder access to the suit land. He avers that the actions of the defendants will cause him irreparable harm, occasion him injustice and loss. In the suit the plaintiff has asked for the following prayers : -

a) An order of permanent injunction restraining the defendants, their servants, workmen, agents, employees and/or otherwise whosoever from encroaching, putting up structures, buildings and in any way modifying the public road separating, plot No. 151 and Plot 2412 as a result of which the plaintiff's quiet enjoyment, possession and ownership of the plot No. 511 shall not be violated.

b) An order of mandatory injunction compelling the defendants to demolish the structures the defendants have set up on the said road.

c) Costs and interest of this suit.

2. It may be instructive to state that when the plaintiff filed suit, he accompanied it with an application seeking orders for an interlocutory injunction to stop the developments in issue, pending hearing of the suit. The application was however dismissed through a ruling of Komingoi J, made on 19 July 2017. The matter therefore proceeded without the plaintiff having the benefit of an order of injunction.

3. The defendants filed a rather belated joint defence on 4 April 2019. In it, they denied the contents of the plaint and put the plaintiff to strict

proof. They denied that there is an access road separating the Plots No. 151 and 2412. They denied that the plaintiff has been accessing the suit land through the claimed public access road. They also denied constructing on the alleged public access road. They contended that since there is no road as claimed by the plaintiff, they have not violated his rights. They asked that the plaintiff's suit be dismissed with costs.

B. Evidence of the Parties

4. The matter first came up for hearing on 9 May 2019 before Waitaha, J, who was visiting Mombasa Court during service week (a programme where judges visit the station in order to clear case backlog) and the plaintiff testified. He adopted his witness statement in which he stated that he is the owner of the Plot registered as MN/VI/511 (Plot No. 511). He reiterated that the said plot can only be accessed through a public road separating the Plots MN/VI/151 (Plot No. 151) and MN/VI/2412 (Plot No.2412) . He stated that he has used the said public road for the last 14 years. He stated that the road is MN/VI/156/R and that this road also serves the Plots Nos. MN/VI/2403 to MN/VI/2412, MN/VI/151, and MN/VI/313. He stated that in September 2016, the 1st to 4th defendants started constructing on the subject road yet they have space within their Plot No. MN/VI/151 (plot No. 151). As a result, he is unable to access his property. In his oral evidence in court, he stated that he carries out dairy farming in his plot. He also mentioned that the owner of the Plot No. 2412 has a separate suit against the school. He had his title deed, some reports of surveyors, and photographs, to demonstrate that the school developments are on the road. He stated that when the schools started the developments, he visited the school principals, but they did not take any action, and instead continued to build. He instructed his advocate to write a demand letter, which was done, but the same was not heeded.

5. Waitaha J did not manage to conclude the hearing of the suit and I took it over at this juncture.

6. PW-2 was Edward Marenje Kiguru, who gave his evidence on 23 October 2019. He is a licenced surveyor based in Mombasa who has been in private practice for over 30 years. He testified that he was instructed by counsel for the plaintiff to study a survey report dated 5 December 2016, prepared by Mr. D.M Karanja licenced surveyor (now deceased), and if necessary, carry out a fresh survey. He studied the report and went to the site. His findings were that Mr. Karanja's report and drawings were correct. He testified that what he did, and what Mr. Karanja had earlier done, was to reestablish the boundary between plot No. 151 which is the school's property, and the southern neighbor plots including plot No. 511 belonging to the plaintiff and the sub-plot No. 156. He identified the plots No. 511, 156 and 154 as the plots of interest as they surround the school plot No. 151. He provided a background to the dispute. The background is that there was a Plot No. 156 which was subdivided to produce the plots numbers 2403 to 2412. During this subdivision, which was done in the year 1959, part of the Plot No. 156 was surrendered as a road, identified on the map as a Plot No. 156R (the subject road). He testified that the mother Plot No. 156 had a masterplan which would have created a road through the school Plot No. 151 but this did not happen. Instead, the Plot No. 156 surrendered part of its portion for a road (that is the Plot No. 156R). He mentioned that there is an area development plan which indicates the road networks and this road is one of them. He testified that the survey plan has actually no roads indicated but that there are many roads on the ground. Over the years, a path was created, which was not on the survey plan, though the Plot No. 151. He found out that the developments of the schools fall on the subject road reserve (Plot No. 156R) and overshoot their boundary. He testified that the topocadastral survey and the survey plan show the road in the maps. He pointed out the boundary of the schools plot and the road as being marked by the beacons C660, C659, C658 and C657. He was categorical and had no doubt in mind that the developments of the school have encroached into the road. This encroachment, he stated, causes a blockage to the suit land. He produced in evidence, the survey report of Mr. Karanja (deceased) and his subsequent report dated 2 April 2019. He testified on a survey report dated 18 July 2017 prepared by the defendants (which denied any encroachment). He did not agree with it.

7. Cross-examined, he acknowledged that he did not produce the masterplan and the Part Development Plan (PDP) of the area. He mentioned reference to two survey plans, FR No. 89/65 and FR No. 14/56 in Mr. Karanja's report. He testified that the survey of the schools' Plot No. 151 was done in the year 1919 (indicated in the survey plan FR No. 14/56) and subdivision of this plot has been undertaken.

8. With the above evidence, the plaintiff closed his case.

9. DW-1, was Rose Atieno Onyango, the Head Teacher of Chaani Primary School. She became the Head Teacher in the year 2010. She relied on an affidavit that she had sworn on 5 December 2016 as her evidence in Chief. This affidavit was in reply to the plaintiff's application for injunction. In it, she stated that there is a nursery school, a primary school, and a secondary school on the Plot No. 151 which was allocated to Chaani Primary School on 2 February 2007 by the Municipal Council of Mombasa as allocation Plot No. R569/Chaani. She averred that the Primary School has allowed the Secondary School to extend their classrooms and administration block. She denied that any buildings constructed or under construction encroach on a public road separating the Plot No. 151 and 2412. She also added that she is aware that the plaintiff resides in the Plot No. 1247. In her oral evidence, she testified that his gate (in plot No. 1247) opens into a cabro road and he therefore has access to this cabro road. The school is accessed through another separate cabro road. She testified that the construction of the Secondary School started in the year 2013 using CDF financing and is a Ministry of Education project. She testified that if the plaintiff gets his way, the road would pass through the constructed block, and will divide the buildings into two. She mentioned that there have been attempts to grab school land especially by the plaintiff. She stated that the Plot No. 511 (the plaintiff's plot which is said to be served by the disputed road) was initially school land and that students used to plant vegetables here. She wondered where the plaintiff came up with the idea that there is a road through the school.

10. Cross-examined, she testified that the plaintiff approached her in the years 2015/2016 and mentioned to her that where they are putting up the secondary school belongs to him. She asserted that what they are developing is within the Plot No. 151. She could identify the disputed area as that being developed by the Secondary school.

11. DW-2 was Rachel Mutheu Mwambuki. At the time she testified, she was the District Land Surveyor, Taita Taveta County. In the year 2017, she served in Mombasa. She testified that on 31 May 2017, the Principal of Chaani Primary School requested the District Surveyor, Mombasa, to reestablish the boundary of their land parcel MN/VI/151 (Plot No. 151). They carried out the survey on 6 July 2017 and she prepared a report dated 18 July 2017. She produced the report in evidence. Her findings were that the Plot No. 151 was surveyed on 12 September 1919 as per survey plan No. 14/56. In this survey, no access roads were made for the plots. She explained that it was a tradition that they would introduce roads when one would have activity on their land. She testified that the school plot No. 151 bordered a Plot No. MN/VI/156 (Plot No. 156) which was subdivided to create 10 plots. The survey plan for this subdivision is the plan FR No. 89/65 of 25 August 1959. A road therefore needed to be created for access. She testified that they introduced a road, as a proposal, but which was not

surveyed, to cut through the Plot No. 151 which was the school plot. She stated that this was never actualized and remained a mere proposal, thus marked by a dashed line in the survey plan. She testified that the school buildings have only encroached into this proposed road area. She testified that the owner of the Plot No. 151 (the school) is not under any obligation to provide a road for the Plot No. 511 (plaintiff's land) and therefore the buildings are within the limits of the Plot No. 151. She stated that according to the survey plan FR No. 89/65, there is an access road, though narrow, to the Plot No. 511 marked by the beacons R28, R27, C658, C659, C660, H601, R3, R2, R1a, and R16. She was not aware of Mr. Karanja's survey when she went to the ground.

12. With the above evidence, the defence closed its case.

13. I could not at this juncture of the case, reconcile the evidence of the surveyor of the plaintiff and that of the surveyor of the defendants. I therefore made orders for a joint survey between a new surveyor appointed by the plaintiff and the current Mombasa District Surveyor. I directed inter alia that the joint survey ought to identify whether there was any encroachment by the school buildings into the road MN/VI/56/R, and if so, the extent of such encroachment. A joint report dated 27 January 2020 was filed. Of significance was the boundary between the road and the school plot marked by the beacons C658, C659, and C660 and the opposite end of the road marked by the beacons R1a, R2, and R3. The report observes inter alia that the beacon No. C659 could not be found as it was lying inside the Administration Block of the Secondary School. The consensus in the joint survey report is that the buildings of the Secondary School Administration Block and a tuition block do encroach into the access road MN/VI/156. It was also agreed that we could visit the site so that the report can be explained.

14. The disputed site was visited on 12 February 2021. The representatives of the schools were present and so too the plaintiff. Also present were Mr. Munuve Kasyi, the plaintiff's surveyor, and Mr. Teddy Mulusa, for the Regional Surveyor, Coast Province. We all observed the school developments, the school plot, the plots of the plaintiff, and the disputed road. Mr. Mulusa showed us the necessary beacons. We could not see the beacon C659 because it was inside the administration block. In other words, a school building is now on top of it. The beacon R2 was also not visible as it was at the edge of an ablution block building of the school. The beacons C658, and C657 were noted to be within the school compound. Mr. Mulusa was examined on the report and he explained inter alia that when the Plot No. 156 was subdivided, part of it was surrendered as a road. He also elaborated that if the owner of the Plot No. 511 (the plaintiff's land) wished to proceed northwards, he would need to pass through what is now occupied by the school. He stated that the road has a parcel number MN/VI/156/R and serves the plots No. 511 and 313. He affirmed that the suit land (plaintiff's Plot No. 511) has no other access apart from this road.

C. Submissions of Counsel

15. After the site visit, and with no party wishing to call additional evidence, I directed that written submissions be filed. I have taken note of the submissions filed. Mr. H.N Njiru, learned counsel for the plaintiff, thought that the plaintiff's case is clear and he pointed to the joint survey report. He also referred me to case law related to grant of mandatory and interlocutory injunctions. Mr. Makuto, learned State Counsel, for the defendants, submitted inter alia that there is no legal person called the Head Master Chaani Primary School or Chaani Secondary School, and that there can be no claim against the 5th defendant as this was a case of trespass. He submitted that the developments in issue were being undertaken for the benefit of Chaani Secondary School, and therefore the case against the 2nd defendant, Board of Management of Chaani Primary School, should be dismissed. He submitted that when the school Plot No. 151 was created, no roads were demarcated. He further submitted that when the Plot No. 156 was subdivided, an access road between it and the school plot was proposed but this never revised the boundary of the school plot. He referred me to the survey report of DW-2 as concluding that the developments are in the school plot. He faulted the plaintiff for developing a wall between the suit land and the Plot No. 1241 which opens to a cabro road. He submitted that the plaintiff has access through the land parcel No. 1241 which he also uses. He submitted that the 3rd defendant has no intention of encroaching into the road reserve MN/VI/156/R.

D. Analysis and Decision

16. I have taken note of all the above.

17. The complaint of the plaintiff is simple, that the 1st – 4th defendants have encroached onto a road which serves his Plot No. 511, and owing to that encroachment, he cannot access the subject plot. There is an issue raised that the suit should be dismissed against all other parties since the development in question is being undertaken by the Secondary School. That may be true, but I cannot fault the plaintiff for suing all the parties herein. It emerged during trial that the land of the school, the Plot No. 151, was actually allocated to Chaani Primary School, but the school has permitted the development of a Secondary School on its land, thus Chaani Secondary School. In such instance, you cannot separate liability of the developments of the Secondary School from the Primary School itself, for the two, as far as the land is concerned, are joined at the hip. I agree that it was probably not necessary to sue the two head teachers, but again, I cannot fault the plaintiff for doing so. Sometimes, it is not easy for a plaintiff to know exactly who is liable for an activity, and such plaintiff cannot be faulted for suing everyone that he thinks is culpable. The AG is certainly a necessary party as he is being sued on behalf of a Government institution. There is nothing wrong therefore with the joinder of the Attorney General to the suit.

18. Now to the meat of the matter, the question really is whether or not the schools have caused the encroachment of their buildings into a road serving the plaintiff. Some germane facts are not in dispute. The school plot is identified as Plot No. MN/VI/151 (simply Plot No. 151 or the school plot). This plot was created in the year 1919 as can be seen in the survey plan FR No. 89/65. The boundaries of the school plot in the 1919 survey plan, which are material to this case, are noted to be the beacons C657, C658 and C659. There is also consensus that the school plot's original neighbor was the Plot No. 156. This Plot No. 156 was subdivided in the year 1959, through the survey plan FR No. 89/65. The result of that subdivision was the creation of 10 plots. So that there may be access for all the 10 subdivisions, a portion of the land was surrendered as a road. That road is identified in the map as MN/VI/156/R (simply Plot 156R or the road) which is the road in contention. There is actually no dispute from the defendants about the existence of this road on the survey map, and even if there were, that would be spurious because the road is there in black and white and is even identified by a Plot Number. The extent of that road, towards its boundary with the school, is indeed marked with the beacons C657, C658 and C659. These are the same beacons that also mark the boundaries of the school plot No. 151. It follows that the school must confine itself to the area inside the beacons C657, C658 and C659, for anything outside

that, would be encroaching into the road Plot No. 156R. The width of the road on the opposite side is marked by the beacons R1a, R2 and R3. As I mentioned, it is indeed patently clear, that this road Plot No. 156R was created from the Plot No. 156 when it was subdivided.

19. There was some attempt by DW-2 to argue that this is not the position and that what happened when the Plot No. 156 was subdivided, is that there was a proposal only to create a road through the school plot, but which proposal was not actualized. DW-2 referred me to the survey plan FR No. 89/65 and pointed to a dotted line between the school plot and the original plot No. 156. She argued that the owner of a neighboring plot cannot bear the responsibility of creating a road to a neighbor who has decided to subdivide his land.

20. The evidence of DW-2 does not hold any water. In fact, it is not a true reflection of what happened. I can see for myself, and this, as I have mentioned is patently clear from a look at the survey plan FR No. 89/65, that the owner of the Plot No. 156 actually surrendered part of his land for a road, when he subdivided his land into 10 plots, and that road, as I have pointed out, is the Plot 156R. I have seen the dotted line in the survey plan which DW-2 referred to. That is a proposal to increase the width of the road, which would mean that the school cedes a portion of its land. It is correct that this proposal was probably never actualized. However, the fact that it was not actualized does not in any way compromise the fact that the road No. 156R exists. It exists. I repeat that it exists as follows : to the extent of its boundary with the school, this is marked by the beacons C657, C658 and C659 which is also the boundary of the school, and the other extent of its width is marked by the boundaries R1a, R2 and R3. The road terminates at the plaintiff's plot No. 511, and at the point of termination, it is marked by the beacons C660 and H601. This road is what feeds the suit Plot No. 511. Without it, the Plot No. 511 would be "landlocked".

21. It is also true that the Plot No. 511 is bordered by a plot No. 1247 (not Plot No. 1241 as alluded to in Mr. Makuto's submissions) which is also owned by the plaintiff. That plot No. 1247 has an access road. Thus, when the plots No. 511 and 1247 are used together, you can access the Plot No. 511 from the Plot No. 1247. But we ought to remember that these are two different plots and the owner must be free to use them independently. If, as he is perfectly entitled, he decides to sell the Plot No. 511, or make use of it that will involve other people, such as a high density residential development, then there would need to be an active road to serve this Plot No. 511. There is therefore need for there to be a road serving this Plot No. 511. As I have mentioned, the only road serving the Plot No. 511 is the subject road 156R.

22. The plaintiff's surveyors, Mr. Karanja and Mr. Kiguru, did affirm that the developments being carried out have encroached into the road. This was confirmed by the joint survey report of Mr. Kasyi and Mr. Mulusa. The report by Ms. Ndambuki that all the developments of the school are within the Plot No. 151 is not true. We were all at the site, and it was clear that there are some developments that have encroached into the access road. The administration block has certainly encroached into the road and has indeed stretched beyond the beacon C659 which should be the school boundary. This beacon C659 is now inside the school administration block. There is also a class on the opposite side of the road, and an ablution block which has taken up the beacon R2 which is the other boundary of the road. It is not within the purview of this litigation, but from what I can see, this class and the ablution block suspiciously appear to have been built in another plot, that is the Plot MN/VI/2412. They are certainly developments that are not within the boundaries of the school plot as noted by the beacons C657, C658, and C659. The conclusion that I reach is that the school development of the administration block and the ablution block have indeed encroached into the road 156R.

23. I am at a loss as to why the school administration thought of making a development right inside the road which is the only road allowing access to the suit land. We are dealing with a fixed and not a general survey, meaning that the boundaries are clearly marked, or are clearly identifiable. Indeed the boundaries of the school, as I have repeatedly demonstrated above, are marked by the beacons C657, C658 and C659. It was callous and irresponsible for the school to proceed to make developments outside its boundaries, when its boundaries are so clearly marked and/or identifiable. I am indeed at a great loss as to why the school did not stop its developments, when confronted by the plaintiff, but instead continued with the same. At this point in time, they had the perfect opportunity to verify the correctness of the plaintiff's claims and take remedial action before public resources are spent. It doesn't help any person to be difficult and insist on his/her way, when there is a chance to confirm whether the issue being raised is genuine or not. We hear a lot of complaints about private individuals grabbing school land but this is a tragic case where a school is actually grabbing another person's land and a public road. You would expect better from a public institution which has a Board and has access to Government facilities. Where was the Board when all this was happening ? Why didn't it seriously consider the concerns of the plaintiff ? The act of developing school buildings on a public road that serves private land were acts of recklessness and impunity. Merely because this is a public school does not give it licence to act with impunity and neither is it above the law. In fact, as a public institution, the school needs to lead from the front in adherence to law and order. What example are they showing to the pupils therein ?

24. It is a shame for a public institution to have conducted itself in the manner that has played out in this case. If the school really needed some extra space to expand, it needed to follow the law and seek the compulsory acquisition of the Plot No. 511 and of the road. The option was not to close its eyes to the rights of the plaintiff and trample on his proprietary rights. Private rights to land must be respected by all including by public institutions.

25. This court must make an emphatic statement that it is not permissible for any entity to violate another person's rights. This court must assert that it does not matter who you are and that everybody is under the law and that includes public institutions. Painful as it may be, the only remedy is to have the developments that encroach into the road Plot 156R removed. It is regretful that public resources will have gone to waste, but we must respect people's rights. The school must confine its activities within the boundaries of its Plot MN/VI/151, meaning that it cannot encroach beyond the beacons C657, 658, 659 and C660. That is the only extent to which its proprietary rights reach on its southern side. I therefore hereby order the 2nd and 4th defendants to remove all structures that encroach into the road Plot MN/VI/156/R and must clear all their materials from this road within the next 90 days. They must also ensure that the path of this access road, which they have consumed and purported to use as part of the school land, is cleared all the way to the main cabro access road. Upon removing their structures and clearing the path for this road, the 2nd and 4th defendants, and/or their servants/employees/agents, or anyone acting at the behest or in the purported interest of Chaani ECD School, Chaani Primary School and Chaani Secondary School, are hereby permanently restrained from encroaching, putting up structures, or in any other way interfering with the use of the public access road, by the plaintiff, or by any other member of the public. I would readily have awarded the plaintiff general damages if he had asked for the same, but since none were pleaded, I make no award.

26. The only other issue is costs. I am aware that Mr. Makuto, learned State Counsel, in his submissions, pleaded that each party should bear its costs on the basis that the survey carried out by the District Surveyor indicated that the building was on the school land. I am of course

taken aback by the report of DW-2. As a public servant, I would have expected DW-2 to take her task seriously and properly advise the school. It however appears that DW-2 caressed the whims of the 1st to 4th defendants and tried to pad the fact that the schools have gone beyond the scope of their boundaries. She indeed came up with a report that was only massaging the position of the 1st – 4th defendants when it was clear that their developments have encroached into a public road. She needed to call a spade a spade and act as a professional. I must reprimand DW-2 in the strongest terms possible. In the same breadth, it will be remiss of me not to make a special commendation for Mr. Teddy Mulusa, the Mombasa District Surveyor, who exhibited rare and impartial professionalism when dealing with the dispute herein. Public institutions do indeed depend on such public professionals and it doesn't help when they fail to give impartial advice. But having said that, I have little sympathy to the 1st to 4th defendants. As I have mentioned, they ought not to have brushed aside the complaints of the plaintiff. When your neighbor tells you that you have encroached, you better take that seriously, and be sure that you have completely discounted that position. And since it is a boundary, you are better off involving that other party before you come up with a unilateral conclusion. The School had the resources to confirm whether or not their activities were confined within the boundaries of the school land, which as I have pointed out, was very easy, as the same was marked by fixed boundary beacons. They could have cooperated with the plaintiff to confirm the boundary. They did not do so but instead acted unilaterally and developed a see-no-evil, hear-no-evil, attitude. They cannot hide behind the ineptitude of DW-2. Costs shall therefore be paid by the 2nd, 4th and 5th defendants jointly and/or severally.

27. Judgment accordingly.

DATED AND DELIVERED THIS 14TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA