



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO.266 OF 2017

(formerly machakos hcc no.37 of 2014)

MWONGA MUSWIIPLAINTIFF/APPLICANT

-VERSUS-

MBULI KIVUVA.....1ST DEFENDANT/RESPONDENT

MUSILA KIMIA 2ND DEFENDANT/RESPONDENT

COSMAS MAWEU..... INTERESTED PARTY

R U L I N G

1. By his plaint dated 20th August, 2014 and filed in court on 22nd August, 2014, the Plaintiff prays for judgement against the 1st and 2nd Defendants jointly and severally for: -

a. Orders to Defendants, to open the road of access in plots Nos. Nzai/Ikangavya/189, 186,187, 188, 172 and 173 herein.

b. Cost and interest of this suit.

2. The Plaintiff has pleaded in paragraphs 4, 5, 6 and 7 of his plaint that the Defendants are the registered and beneficial owners of land parcels Nos.Nzai/Ikangavya/189, 186, 187, 188, 172 and 172 respectively, that the Plaintiff is the registered owner of land parcel number Nzai/Ikangavya/593, that the Defendants have closed the road of access to the Plaintiff's parcel of land Number Nzai/Ikangavya/593 and that despite several demands by the Land Registrar Makueni to the Defendants to open the road which is also a public road of access to several places, the Defendants have refused and/or neglected to open the said road.

3. The two Defendants were served on 30th September, 2014 with summons to enter appearance and to file their defence as can be seen from the affidavit of service sworn at Machakos on 21st October, 2014 and filed in court on 7th February, 2020. The two Defendants have confirmed through their Counsel, Mr. Kisongo, that they were indeed served and did not file their defence.

4. On the 13th November, 2014, the Plaintiff/Applicant filed a Notice of Motion application dated 04th November, 2014, for orders: -

1. Spent.

2. That the defendants be ordered to open the road of access in plots Nos. Nzai/Ikangavya 189, 186, 187, 188, 172 and 173.

3. Cost of this application be in the cause.

5. The application is predicated on the grounds on its face and is supported by the affidavit of Mwonga Muswii, the Plaintiff/Applicant herein, sworn at Machakos on 04th November, 2014.

6. The two Defendants/Respondents were served on 15th November, 2014 as can be seen from the affidavit of service sworn at Machakos on the 18th November, 2014 by Andrew K. Mwanzia, a process server.

7. On the 19th November, 2014, the 1st Defendant/Respondent filed a replying affidavit sworn at Machakos on even date. The replying affidavit was filed without the 1st Defendant/Respondent having entered appearance.

8. On the 17th February, 2015 the Interested Party filed a notice of appointment dated 17th February, 2015. The Interested Party proceeded to file a supporting affidavit on the 27th February, 2015 the same having been sworn at Nairobi on 24th February, 2015.

9. The application came up for interpartes hearing on 27th November, 2014 when the Court made the following order: -

“Before the Court makes the ruling herein the Land Registrar and the District Surveyor Makueni to visit parcels 186, 189, 268, 188, 187, 172, 273 and 593 disputed road to establish the location of the public road of access within the next 45 days. The report be filed in court before 22/01/15. The affected parties be invited when the Court will make further direction.”

10. The matter was mentioned on several occasions until the 20th December, 2017 when the Court fixed the matter for hearing on 20th March, 2018. Come the hearing date Mr. Nzioka for the Interested Party informed the Court that the matter arose out of a court order that directed that a road of access be created for Muonga Muswii. The Counsel went on to inform the Court that the Surveyor cut through his client's land i.e. parcel number 268. He added that his client does not object to the road but wanted the Surveyor to follow the boundary existing on the ground.

11. The matter was fixed for further mention on 15th May, 2018 when the Court directed the Land Registrar and the County Surveyor Makueni to visit land parcels numbers 186, 189, 268, 188, 187, 172, 273 and 593 to establish the location of the road of access as per the survey plans and/or records. The two officers were directed to file their report within 45 days from the date of the order and the matter was fixed for mention on 23rd July, 2018. Come the mention date of 15th July, 2018, the two officers were given an extra 60 days to comply with the order of 15th July, 2018. The matter was thereafter fixed for mention on 30th October, 2018 when the court was informed that the officers and more particularly the Surveyor were yet to act on the court order. The Court summoned the two officers to appear before it on 19th November, 2018 when a report dated 15th November 2018 was found to have been filed in court on 16th November, 2018. Parties were directed to read the report in question and when the matter was mentioned again on the 16th May, 2019, the 1st and 2nd Defendants/Respondents expressed their dissatisfaction with the Surveyor's report. On the other hand, the Counsel for the Interested Party urged the Court to adopt the Surveyors report as its judgement. The Plaintiff/Applicant was equally satisfied with the said report. As a result of the Defendants'/Respondents' dissatisfaction with the report, the Surveyor was summoned to appear in court on 20th June, 2019 to shed light on the said report.

12. Fresh summons to the Surveyor were issued on the 20th June, 2019 and the matter was fixed for mention 25th July, 2019 when the summons were further extended to 08th October, 2019 when Gabriel M. Maingi, informed the court that in making his report, he used sheet No.8 of Nzau/Ikangavya registration section. He said that he drew a diagram that is a tracing from the aforementioned map. That according to the map, there were orange groves on the side where the road of access was supposed to pass on the ground. He said that as a result of the development, he did not create the road. He went on to say that the Plaintiff/Applicant and the Defendants/Respondents showed him the reference points which they all agreed upon. He also said that he used measurements from the map by using a GPS machine. He pointed out that he can show the parties sheet number 8 Nzau/Ikangavya registration section if they were to visit his office.

13. As earlier on observed, the Defendants/Respondents were served with summons to enter appearance and to file their defence. The two did not file any defence. Nevertheless, the two Defendants/Respondents participated in these proceedings as if they had entered appearance and filed their defence notwithstanding the fact to the contrary. The two Defendants/Respondents only appointed Mr. Kisongoa on 06th June, 2019 who proceeded to file a notice of appointment of advocates. No defence or a replying affidavit was ever filed after a Counsel came on record on their behalf. In my view therefore Kisongoa's submissions on 08th October, 2019 remain evidence from the bar.

14. The dispute herein is essentially one of boundary concerning where the road of access in respect of land parcel number 593 ought to be. The said road of access affects several other parcels of land namely 186, 189, 268, 188, 187, 172 and 273. From what I can gather from the plaint, the two Defendants/Respondents are among others beneficial owners of the aforementioned parcels of land. The registered owners are said to be deceased! There is no evidence to show if the issue of ownership of the parcels of land has ever changed since this matter was filed. Be that as it may, the Plaintiff/Applicant contends that the Defendants/Respondents are also registered owners.

15. I am mindful of the provisions of **Section 18(2) of the Land Registration Act No.3/2012** which provides as follows: -

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

16. From the documents filed by the Plaintiff/Applicant together with the plaint, the Land Registrar rendered his ruling concerning the dispute herein that is to say, that Plaintiff/Applicant herein was to file a civil case against the purported heirs and users of the parcels for an order to have the road of access passing through the various plots opened.

17. In paragraph 4 of his plaint dated 20th August, 2014 and filed in court on 22nd August, 2014, the Plaintiff/Applicant has averred that the Defendants/Respondents herein are the registered and beneficial owners of land parcels numbers Nzau/Ikangavya/189, 186, 187, 188, 172 and 173 respectively.

18. The two Defendants/Respondents have not denied and/or controverted this averment as they have not filed any defence. The averment by the Plaintiff/Applicant must therefore be taken as factual.

19. I have looked at the Surveyor's reports dated 15th November, 2018 and 26th February, 2019 and in my view, the two reports have solved the Plaintiff's/Applicant's prayer 2 of the application as well as prayer (a) of his plaint. I am mindful of the fact in granting prayer 2 of the application the court will have disposed off both the suit and the application and I see no reason why I should act otherwise.

20. I see no reason why I should not adopt the two reports as well as the Land Registrar's report dated 28th August, 2013 and proceed to enter judgment for the Plaintiff/Applicant and against the Defendants/Respondents in terms of prayers of the plaint;

a. Orders to Defendants/Respondents, to open the road of access in plots Nos. Nzau/Ikangavya/189, 186,187, 188, 172 and 173 herein.

b. Cost and interest of this suit.

It is so ordered.

Signed, Dated and Delivered at Makueni this 28th day of February, 2020.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Muthiani for the 1st and 2nd Defendants/Respondents

Plaintiff/Applicant present in person

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

28/02/2020.