



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 351 OF 2017

KAMAU KUNGU - 1ST PLAINTIFF

PETER KUNGU KAMAU - 2ND PLAINTIFF

VS

FRANCIS KUNGU NJOROGE - 1ST DEFENDANT

MUNGAI NJOROGE - 2ND DEFENDANT

JUDGMENT

1. This suit was filed on the 25/4/17 by the Plaintiffs against the Defendants seeking the following orders;

a. A declaration that the Defendant's action of trespassing onto land parcel No LOC18/GITHIMA/1823 and the creation of the road therein and the destruction of the Plaintiff's property in the land is wanton, illegal and reckless and a permanent injunction do issue restraining the Defendants from such acts.

b. The Defendant be ordered to pay the Plaintiffs a sum of Kshs 185,000/- being the value of the damages as caused and the cost of the valuation.

c. An order be issued for the resurveying by the District Land Surveyor Muranga of the boundary and affixing of the boundary between land parcel Numbers LOC18/GITHIMA/1824 and LOC18/GITHIMA/1823.

d. The cost of the suit

2. The averments of the Plaintiffs are that the 1st Plaintiff is the registered owner of parcel LOC18/GITHIMA/1824 while the Defendants own LOC18/GITHIMA/1823 which parcels of land border each other. They aver that the Defendants trespassed onto their land and purported to create a public road thereby damaging their properties and causing them loss. The actions of the Defendants have been termed as illegal and the Plaintiffs have pleaded particulars of illegality and recklessness under para 9 of the plaint. They have assessed damages in the sum of Kshs 185,000/- which they claim from the Defendants.

3. The suit was resisted by the Defendants through their defense on record. They aver that there existed an access road that traversed across the two suit lands which was present even before the partitioning of the original land LOC18/GITHIMA/206 into LOC18/GITHIMA/1823-1825. They admit that though the 1st Plaintiff is the owner of the parcel LOC18/GITHIMA/1824, he and his son have deliberately constructed on a public access road which traverses both parcels of land LOC18/GITHIMA/1823 and 1824 from the water point to the main feeder road on the upper part of the suit lands. The Defendants deny any trespass and in particular deny the particulars of illegality and recklessness pleaded in the plaint and seek to put the Plaintiffs into strictest of proof. They also deny any damage on the parcel of land belonging to the 1st Plaintiff.

4. The Defendants have accused the Plaintiffs of fraud by causing the change of the access road that hitherto traversed the two suit lands to the end of parcel LOC18/GITHIMA/1823. That earlier on, the road traversed through parcel LOC18/GITHIMA/1823 and 1824. That they diverted the road from its original path in a clandestine manner and without the knowledge of the Defendants through inducement of the surveyors.

5. At the hearing of the suit Peter Kungu Kamau stated that he is the son of the 1st Plaintiff and owner of parcel LOC18/GITHIMA/1824. He further testified that he has built a permanent house and carries out farming activities on the farm where he has settled with his family. That he grows coffee as well on the suit land. That his grandfather owned the original land parcel No LOC18/GITHIMA/206 which was subdivided into LOC18/GITHIMA/1823-1825 in 1985. The resultant subdivisions became registered in the names of the three brothers, sons

of his grandfather Kungu Kangara. That there existed a road through parcel LOC18/GITHIMA/206 before it was subdivided but the said road was shifted to one side in 1964 although it was not indicated in the map. However, in 1985 the road was fixed on parcel LOC18/GITHIMA/1823. He informed the Court that the road shown in the mutation of 1985 did not exist on the ground and when pressed further he stated that his father had more knowledge about the road than him. He stated that the dispute before the Court surrounds the position of the road access on the ground. He informed the Court that the road should be shifted back to the edge of parcel LOC18/GITHIMA/1823 as indicated in the mutation and Registry Index Map(RIM). He accused the Defendants and the county officials of redirecting the road through 1824 ostensibly because the terrain on 1823 is steep and not suitable for the road access.

6. PW2 – Hanna Wanjiku Nyuthe testified and informed the Court that she is a surveyor by profession holding a degree in Geospatial Engineering and a Diploma from Kenya Institute of Survey & Mapping. She produced a report dated the 6/6/18 which she prepared pursuant to a Court order dated the 7/3/18.

7. She informed the Court that she visited the lands in the presence of the parties. Using the 4th edition of the map of the area she explained that the road traversed through the original parcel LOC18/GITHIMA//206 before subdivision. During the subdivision of parcel LOC18/GITHIMA/206, the road remained in the position as was in parcel LOC18/GITHIMA/206 running from parcel LOC18/GITHIMA/1476 – 1823-1824. She referred to the mutation forms dated the 10/7/85 and registered on the 9/8/85.

8. It was her testimony that after the subdivision, Edition 8 of sheet No 17 as prepared and amended on the 18/12/85 showed that the road has shifted to the edge of parcel LOC18/GITHIMA/1823. This is the current position of the road on the map. She informed the Court that on the ground the road position has not changed and is not in conformity with the 8th Edition of the map. She informed the Court that she learnt from the interested parties that the road position on the ground was shifted by the county Government during the grading of the roads in the area for the reason that the map position is too steep. She explained that this is what has caused the dispute on the ground.

9. Asked to explain the basis of the changes in the 8th Edition, she informed the Court that the original maps are kept at the Nyeri provincial offices and that is where the changes are made. That before any changes are effected to the survey of a parcel of land, the owners must be notified who, if they agree, are required to sign the mutation forms. She stated that in the absence of any mutation forms the changes are illegal.

10. She informed the Court that using the 4th edition map, the road ran across parcel LOC18/GITHIMA/206 whilst on the 8th edition the road is now shifted to parcel 1823 and does not cross through LOC18/GITHIMA/1824. She stated that she does not have any authority (approval) to show the change of the road to the edge of parcel LOC18/GITHIMA/1823. In respect to the position of the road in RIM on edition 8 – the road is passing along LOC18/GITHIMA/1823 only. But on the ground the road has been aligned from LOC18/GITHIMA/1476 -1823 - 1824. She confirmed that there exists no boundary dispute between parcel LOC18/GITHIMA/1823 and 1824 except that the owners of LOC18/GITHIMA/1823 are unhappy with the new position of the road. They want the road to pass through LOC18/GITHIMA/1823 and 1824 as it was before. She informed the Court that her report is not conclusive as to which path the road should be. She informed the Court that she did not get access to the provisional survey records at Nyeri and that explains why her report is not conclusive. That the Defendants are fully aware of the amendments on RIM sheet No 17 – 8th edition. She explained that the acreage of the two parcels is not in dispute. It was her testimony that the County Government shifted the road to plot LOC18/GITHIMA/1823 which did not affect plot No LOC18/GITHIMA/1824.

11. PW3- Kamau Kungu testified and informed the Court that the 2nd Plaintiff is his son and the Defendants are his nephews being the sons of his elder brother. He explained that the original land was LOC18/GITHIMA/206 and after subdivision gave birth to parcel LOC18/GITHIMA/1823 and 1824. That the original land was family land owned by his father Kungu Kangaa. His father died during demarcation and the family land was registered in the name of Njoroge Kungu, his brother. He explained that the position of the road on parcel 206 was traversed the whole land but after subdivision the road was placed on the end of LOC18/GITHIMA/1823 in 1985. He explained that the 3 brothers signed the mutation forms in 1985 and agreed that the road be placed at the edge of LOC18/GITHIMA/1823.

12. PW4- Peter Gitau Ngugi testified and stated that on instructions from the 1st Plaintiff he carried out the valuation of the damages occurred on parcel LOC18/GITHIMA/1824 and presented the valuation report dated 27/3/17. He informed the Court that he relied on sheet No 17 to identify the said parcel of land. He stated that his client informed him that an illegal road was created in 2016 which is cutting through LOC18/GITHIMA/1824 instead of following sheet No 17 – 8th Edition which shows the road access through the edge of LOC18/GITHIMA/1823. He opined that the official road is the one along parcel LOC18/GITHIMA/1823 and the one running across LOC18/GITHIMA/1824 is illegal. That there is also an issue of encroachment of LOC18/GITHIMA/1824 by 1823 by close to 11 meters. He gave a list of the crop damage totaling Kshs 130,000/-

13. On the 3/4/19 at the close of the Plaintiffs case the Defendants and their advocate did not attend Court and their defense was deemed closed. The Court notes that the hearing date was taken by the consent of both Counsels on record on the 19/2/19. The Defendants were however represented by their Advocate on record on the 12/11/18 and 22/1/19 during the hearing.

14. Thereafter the Plaintiff filed written submissions which I have read and carefully considered.

15. The key questions for the Court to determine are; which is the position of the access road between the two plots; Did the Defendants trespass on the Plaintiff's land; are the Plaintiffs entitled to special damages?

16. It is not in dispute that the parties in this dispute are related. The 1st Plaintiff is the father of the 2nd Plaintiff and the uncle to the Defendants. It is also not in dispute that the parcels of land are the subdivisions of the original parcel of land known as LOC18/GITHIMA/206 which was owned by Kungu Kangaa their patriarch but was registered in the name of one of the sons Njoroge Kungu upon demarcation and consolidation. It is in 1985 that the said Njoroge Kungu caused the subdivision of the parcel LOC18/GITHIMA/206 to yield LOC18/GITHIMA/1823-1825 which became registered in the names of his 3 brothers. The lands were and are therefore family lands.

17. To answer the 1st issue the Court has reviewed the evidence on record, the surveyors report and the maps for sheet No 17 in respect to edition Nos 4 and 8. According to edition No 4 the road is passing through parcel LOC18/GITHIMA/206 from the water point at LOC18/GITHIMA/1476 to the main feeder road at the top. I have seen the mutation form registered on the 9th August 1985. According to this document signed by the then owner the access road would run from the water point No LOC18/GITHIMA/1476 through 1823 and exit through LOC18/GITHIMA/1824 to the main road.

18. According to the map edition No 8 the access road is now shifted so much so that it runs along the edge of parcel No LOC18/GITHIMA/1823. The Plaintiff has not explained nor tabled any documents to show how the changes were approved. The 2nd Plaintiff informed the Court that he was born in 1960 and did not know how the access road was fixed. He explained that it is information that would be in the knowledge of his father. His father, the 1st Plaintiff was not of much help to the Court either. He gave conflicting evidence firstly stating that he could not remember the position of the road before subdivision and at one time stated that the road was at the edge of parcel LOC18/GITHIMA/206. He informed the Court that during subdivision of the parcel LOC18/GITHIMA/206, all the three brothers signed the mutation forms and agreed that the road would be at the edge of parcel LOC18/GITHIMA/206. According to the record and the mutation form presented by the Surveyor and registered on the 9/8/85 it is only Njoroge Kungu who signed the mutation form. There is no evidence that the three brothers, the 1st Plaintiff being one of them, signed the mutation forms. And if there were other mutation forms that they did sign in respect to the subdivision and the position of the road in particular post- subdivision, the Plaintiff did not present them to the Court in support of his case. The surveyor was very categorical that a survey map cannot just be altered without authority of the land owner. She stated as follows;

“ Before changes are effected on the survey map, the owners are informed. They sign the mutation forms. In the absence of mutation forms the changes are illegal”.

19. The question that begs an answer is how the access road changed from the position as shown in the mutation form registered on the 9/8/1985 to the position as captured on the 8th Edition of Sheet No 17/Githima. In other words where is the authority for effecting the changes on the RIM? It is not explained how the mutation form which acts as an authority to effect changes led to amendments on the RIM dated the 18/12/85 which are in direct opposite with the mutation form. There must be another explanation.

20. Further the surveyor who testified in Court informed the Court that her report was not conclusive. She stated;

“ in respect to the 4th edition, the access road was across parcel 206. It is a public road. There is no mutation to support the change of the road from the position of 206 to the current position. I am not aware what prompted the changes in shifting the road in the 8th edition. They are using the land that was occupied by the road. I do not know if they were compensated.

..... My report is not conclusive as to where the road should be placed. The custodian of the maps is the provincial surveyor, Nyeri. I did not get all the documents from the provincial surveyor. I did not have access to the Nyeri provincial documents/maps. I carried out the survey using the current maps (the 4th and 8th Editions) which do not explain the new position of the road”.

21. Section 30 (2) of the Survey Act provides that ;

“No plan deposited in the Survey Office in accordance with subsection (1) shall be altered or amended in any way without the permission of the Director.

22. From the analysis above, it is evident that the position of the public road access is not clear from the evidence received in this Court. The Court cannot with certainty determine the matter. The onus of proof rested with the Plaintiff. They did not discharge that duty.

23. Given the evidence adduced before the Court, it is the finding of the Court that the correct position of the access road is as given on the mutation form registered on the 9/8/1985. It is the finding of the Court that the 8th Edition map has not been supported by any mutation showing the authority to shift the road to the edge of parcel LOC18/GITHIMA/1823. In the absence of any contrary evidence it is the finding of the Court that the road access is as per the said mutation form which shows that the road runs from the water point at parcel LOC18/GITHIMA/1476 to 1823 to 1824 to the road at the top.

24. In respect to the issue of trespass, the Plaintiffs aver that the Defendants did trespass onto the suit land ostensibly to create a road access through parcel 1824. The Defendants have denied any trespass onto the suit land. They insist that it is the county Government officials that were clearing old access road and not them. The County Government was not made a party to the suit. It is noteworthy that the Plaintiffs did not tender evidence to prove the claim of trespass. The Plaintiffs stated that they did not table any police report either. The valuation report does not link the damages to the Defendants. This issue is determined in the negative.

25. As to whether there was a boundary dispute between the two parcels, PW4 testified that parcel LOC18/GITHIMA/1823 encroached onto parcel LOC18/GITHIMA/1824 by 22 meters. He stated that there is need for the District Land Surveyor to confirm the boundary of the two parcels of land. PW2, the surveyor testified in Court that there is no boundary dispute between the two parcels. In the absence of any evidence by the Plaintiffs the issue is determined in the negative. I find no reason to grant prayer No c.

26. The totality of this is case is that the suit is dismissed.

27. The Plaintiffs are condemned to pay the costs of the suit.

28. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF FEBRUARY 2020.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Gacheru HB for Mwangi for the 1st & 2nd Plaintiffs

Ndegwa HB for Morigori for the 1st & 2nd Defendants

Irene and Njeri, Court Assistants