



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 816 OF 2013**

**THERESA WAMBUI KIAGO.....PLAINTIFF**

**(Suing as the Administrator of the Estate of DANIEL GAIITHO KIAGO (Deceased))**

**VERSUS**

**JOHN MAINA KABUCHUA**

**JULIUS MUNENE**

**LAZARUS MURIITHI NJANJO**

**THE DISTRICT LAND SURVEYOR KERUGOYA.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

The plaintiff filed this suit simultaneously with a Chamber Summons under *certificate of urgency seeking judgment for the following orders*:

- (a) A declaration that the defendants are trespassers on the suit land.**
- (b) A permanent injunction restraining the defendant by themselves, their servants, employees or any one claiming under them from entering, encroaching on, obstructing, trespassing on or in any way whatsoever from interfering with land Reference No. KIINE/SAGANA 466 and 877.**
- (c) An order for mandatory injunction to compel the defendants by themselves, their servants, agents and employees to restore the suit property to its original state and the boundary be restored to its original status prior to the said illegal destruction.**
- (d) General damages for trespass at Court rates.**
- (e) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.**

When the application was placed before the duty Judge in Embu on 22<sup>nd</sup> July 2010, the same was certified urgent and temporary injunction orders were issued in terms of prayers 1 and 2 of the said application pending the inter-parties hearing. On 24<sup>th</sup> August 2010, the 2<sup>nd</sup> defendant filed statement of defence. On 15<sup>th</sup> May 2012, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint amended defence.

**PLAINTIFF'S CASE**

The plaintiff who is the widow of Daniel Gaiitho Kiago (deceased) testified on oath and stated that her deceased husband is the registered owner of land parcel numbers KIINE/SAGANA/466 measuring 6.1 Hectares and KIINE/SAGANA/877 measuring approximately 2.02 Hectares. The 1<sup>st</sup> defendant is the registered owner of L.R. No. KIINE/SAGANA/2543 which borders the deceased's two parcels of land No. KIINE/SAGANA/466 and 877 though they are separated by a road. The plaintiff stated that the 1<sup>st</sup> defendant has caused extensive and deep stone quarrying and excavation on his land parcel No. KIINE/SAGANA/2543 and also extended the quarrying and excavation of stone and soil into the road separating the deceased's land and the 1<sup>st</sup> defendant's land. She stated that the 1<sup>st</sup> defendant continued with the illegal acts despite numerous protests by the plaintiff and her deceased husband. The plaintiff also stated that the 1<sup>st</sup> defendant together with his co-defendants have on diverse dates in year 2010 by themselves, their servants, agents and employees and without any colour of right or any

lawful justification entered the plaintiff's land parcel No. KIINE/SAGANA/466 and 877 and carried out quarrying and excavation on stone and soil on the said road and have been encroaching on the deceased's parcels of land purporting that they were repairing the road. She stated that the said acts have tampered and threaten to tamper with the boundary to the plaintiff's suit properties.

#### 1<sup>ST</sup> DEFENDANT'S CASE

The 1<sup>st</sup> defendant stated that he is the registered proprietor of land parcel No. KIINE/SAGANA/2543 and that he does not border the plaintiff. He stated that there was no stone quarry carried out in his land but that it is the plaintiff who is carrying out stone quarry on her land.

#### 2<sup>ND</sup> DEFENDANT'S CASE

The 2<sup>nd</sup> defendant stated that he is the registered owner of land parcel No. KIINE/SAGANA/2544 but that his land does not border the plaintiff's. That the Land Registrar assisted by the District Surveyor came to the land and marked access road. He stated that his access road has been interfered with the quarry and that he applied from Sagana Town Council together with other neighbours to repair the access road but the plaintiff refused to accept the measurement.

#### 3<sup>RD</sup> DEFENDANT'S CASE

The 3<sup>rd</sup> defendant stated that while he was working as a councilor, he received complaints that there was a road which had been destroyed by people who were using it as a quarry. He stated that he took them to the County offices where they were helped. The Council sent a surveyor and other officials. They measured the land of the plaintiff and saw there was a road from Kwa V to Kianjogu. The road was opened. They were asked to report as Council to go to the District Land Registrar and District Surveyor. They did and said the land should be opened. They Council came there and opened the road. The plaintiff has not been satisfied that the road is there. That is what made her bring this case to Court. He stated that the plaintiff maintains that there is no road and that the same is her land. He stated that the road is in use now.

#### 4<sup>TH</sup> DEFENDANT'S CASE

The suit as against the 4<sup>th</sup> defendant was withdrawn by the plaintiff.

#### ANALYSIS AND DETERMINATION

From the pleadings, the issues for determination are as follows:

- (1) *Whether the defendants trespassed into the plaintiff's land?*
- (2) *Whether an order for permanent injunction is substantable?*
- (3) *Who shall bear the costs?*

#### ISSUE 1

##### **Whether the defendants trespassed into the plaintiff's land?**

The plaintiff has alleged that the defendants have trespassed into her land parcels No. KIINE/SAGANA/466 and 877 respectively. The onus of proof for trespass is a matter of evidence. **Section 107 of the Evidence Act Cap. 80 Laws of Kenya** states as follows:

***“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.***

The plaintiff in her testimony made general allegations without specifying the date and time the defendant trespassed into her parcels of land. I also note that the plaintiff in her testimony stated that the 1<sup>st</sup> defendant is her neighbor owning land parcel No. KIINE/SAGANA/466 and 877 respectively but separated by a public road. It was imperative for the plaintiff to demonstrate when the said acts of trespass were committed and also call an expert witness such as a surveyor to identify the beacons separating the two parcels of land and the road and her two parcels of land. I find from the evidence that the plaintiff has not proved her claim on a balance of probabilities.

#### ISSUE 2

##### **Whether an order for permanent injunction should issue?**

Having found that the defendants did not trespass onto the plaintiff's parcels of land, it follows therefore that the second issue fails too.

#### ISSUE 3

The third issue is on costs. Since the plaintiff's claim has not succeeded on all the three prayers, the suit is hereby dismissed with costs to the defendants. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 22<sup>nd</sup> day of May, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. *Mr. Asimwe holding brief for Ndirangu for Plaintiff*
2. *Plaintiff – absent*
3. *John Kabuchua – absent*
4. *Julius Munene – present*
5. *Lazarus Muriithi – present*
6. *Okatch, Court clerk – present*