



**REPUBLIC OF KENYA**

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

**ELC. CASE NO 136 OF 2014**

**MOSES WAMUTI KINUTHIA .....PLAINTIFF**

**VERSUS**

**JOHN NJAU KIMANI .....DEFENDANT**

**JUDGMENT**

**Background**

1. At all material times, the plaintiff and the defendant owned neighbouring parcels of land in Ruaka Area of Ruaka, Kiambaa, Kiambu County. Up to the year 2010, the defendant's land was registered as Parcel Number **Kiamba/Ruaka/2428**. The plaintiff on the other hand owned Parcel Number **Kiambaa/Ruaka/486**. The defendant's parcel had access to Limuru Road through Gachihi Road. The plaintiff's parcel did not have access to Gachihi Road. The two neighbours agreed to undertake resurvey, sub-division and reparation of the two parcels. The resurvey, sub-division and reparation entailed: (i) creation of a road out of the defendant's land to enable the plaintiff's land have access to Limuru Road through Gachihi Road; (ii) creation of two subdivisions out of the plaintiff's land and registration of one of the subdivisions in the name of the defendant to compensate the defendant for allowing the creation of the road out of his land. According to the registered survey plans containing the resultant layout, the two subdivisions created out of the plaintiff's land got access to Gachihi Road, and ultimately to Limuru Road, through the land surrendered by the defendant to create the road. The exercise was successfully completed and the two neighbours briefly lived in harmony thereafter.

2. The present dispute subsequently arose when the plaintiff laid claim to the newly created road and told the defendant he would not allow the defendant and/or the new owners of the parcels owned by the defendant to use the road because he had already compensated the defendant for the road. The plaintiff asserted that the road was a private road for exclusive use by him. The key issue in this suit therefore is whether the said road is a public road available for use by the owners/occupiers of the resultant parcels and the general public. The plaintiff's position is that the road is not a public road. According to the plaintiff, the road is a private road serving his land. The position of the defendant is that the road is a public road.

**Prayers**

3. Through a plaint dated 11/2/2014, the plaintiff sought the following verbatim orders:

*a) A declaration that the access road is a private road purposely created for the exclusive use of the plaintiff and the defendant or any other person cannot use the road without written authority from the plaintiff, and the defendant, his servants or agents and members of the public be restrained by a permanent injunction from using the road, or destroying the fence, gate or in any other way interfering with the plaintiff's use of the road.*

*b) Costs of the suit.*

4. The defendant filed a defence and counter-claim dated 3/4/2014. He sought the following prayers in the counter-claim:

*1. A declaration that the said access road is a public road meant to serve Land Parcel Nos **Kiambaa/Ruaka/3600 and Kiambaa/Ruaka/3602** and the plaintiff should remove any obstruction to such access.*

*2. Costs.*

**Plaintiff's Case**

5. The Plaintiff's case is contained in the plaint dated 11/2/2014, witness statement dated 11/2/2014, oral and documentary evidence tendered by him on 13/2/2019, and written submissions dated 22/5/2019. In summary, the plaintiff contends that he owned land **Parcel**

**Number Kiambaa/Ruaka/486.** He wanted an access road to Gachihi Road on the lower part of his land, leading to Limuru Road. The upper part of his land had direct access to Limuru Road. He wanted an access road for private use. He approached the defendant who was his neighbour and the defendant agreed to give him a portion of his land as an access road provided: (i) the defendant would not be required to meet any costs; and (ii) the plaintiff would give the defendant part of his land as compensation. Both parties carried out surveys for excision of the agreed portions. Both parties obtained requisite consents on 4/4/2007. The defendant's land was resurveyed and reparcelled to create a road measuring 0.0072 hectares. The defendant's resurveyed parcel was registered as **Number 3600**. Similarly, the plaintiff's land was resurveyed and sub-divided to create two sub-divisions; **Kiambaa/Ruaka/3601 and 3602**. The plaintiff caused one of the sub-divisions, **Kiambaa/Ruaka/3602**, to be registered in the name of the defendant. He retained the other subdivision, **Kiambaa/Ruaka/3601**. As soon as the plaintiff started using the new road, the defendant asserted his right to also use the road, contending that it was a public road. The plaintiff erected a metallic gate to prevent the defendant from using the road. The plaintiff further contends that the defendant subsequently sold the portion he received from the plaintiff but did not create a separate road to be used by the new owners.

6. Through his written submissions dated 22/5/2019, the plaintiff submitted that the single issue for determination in this suit is whether the said road is a public road or a private road. He argued that the common intention of the parties was to create a private road to be used by the plaintiff. He added that the defendant was obligated to provide a separate road for use by the purchasers of the portion which he acquired from the plaintiff. The plaintiff relied on the decision in **Sarah Nasambu Musundi v David Wafula Tela (2016) eKLR**.

#### **Defendant's Case**

7. The defendant's case is contained in his defence and counter-claim dated 3/4/2014, witness statement dated 3/4/2014, oral and documentary evidence tendered on 13/2/2019, and written submissions dated 28/5/2019. In summary, the defendant's case is that the plaintiff approached him with a proposal that the defendant gives his land access to Limuru Road through Gachihi Road. The plaintiff undertook to compensate the defendant by transferring a portion of **Parcel Number Kiambaa/Ruaka/486** to the defendant. It was further agreed that the portion to be excised from **Parcel Number 486** would have its separate title to enable the defendant exercise all the rights of an absolute owner. Both parties engaged a common surveyor. The surveyor sub-divided the plaintiff's land, **Parcel number 486**, to create two sub-divisions; **Kiambaa/Ruaka/3601 and 3602**. Similarly, the defendant's land was also resurveyed and reparcelled to create the access road and the resultant parcel was registered as **Number 3600**. He adds that the road he created through resurvey and reparcelation of his land was not amalgamated with the plaintiff's land but was a public road meant to serve both **Parcel Numbers 3601 and 3602**.

8. The defendant adds that in January 2011, the plaintiff alleged that he (the defendant) had demolished the fence between **Parcel Nos 3601 and 3602**. The Police investigated the allegations and did not find him culpable. The plaintiff then decided to block access to **Parcel Nos 3600 and 3602** belonging to the defendant. The defendant reported the dispute to the District Officer who summoned the surveyor who had carried out the re-survey. The surveyor confirmed that the access road was created to serve **Parcel Nos 3601 and 3602**. The defendant contends that he sold Parcel Number 3602 in exercise of his rights as a proprietor.

9. The defendant argued in his written submissions that the surveyor who carried out the resurvey had confirmed through his letter dated 7/7/2011 that **Parcel Numbers 3601 and 3602** were sub-divisions out of **Parcel Number 486** and were served by a common road. He adds that if it had been the intention of the parties that the road created was to only serve **Parcel Number 3601**, the portion forming the road would have been amalgamated as part of the plaintiff's land and the portion given to the defendant would similarly have been amalgamated to form one parcel in the name of the defendant. He added that under Section 25 of the Land Registration Act 2012, the defendant was entitled to all privileges and appurtenances belonging to the title, including the right of way/access.

#### **Analysis and Determination**

10. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues. However, having considered the parties pleadings, evidence and submissions, the key issue falling for determination in this suit, as outlined in paragraph 2 above, is whether the road created as a result of mutual resurvey, sub-division and reparcelation of the plaintiff's land, **Parcel Number Kiambaa/Ruaka/486**, and the defendant's land, **Parcel Number Kiambaa/Ruaka/2428**, to create **Parcel Numbers Kiamba/Ruaka/3601** (belonging to the plaintiff), **Parcel Numbers 3600 and Parcel Number 3602** (both belonging to the defendant) is a public road.

11. Firstly, the resurvey, sub-division and reparcelation took place between 2007 and 2010. The exercise was partly carried out under Section 26 of the now repealed Registered Land Act which provided thus:

*"26. (1) the Registrar may, on the registration of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in the parcels is registered and of any cautioner, cancel the registers relating to those parcels and prepare new registers in accordance with the revised layout.*

*Provided that, where in the opinion of the Registrar a proposed reparcelation involves substantial changes of ownership which should be effected by transfers without invoking this Section, he may in his discretion refuse to effect the reparcelation.*

*(2) upon such reparcelation, the new parcels shall, notwithstanding Section 38, vest in the persons in whose name they are registered"*

12. Secondly, the resurvey, sub-division and reparcelation was a physical planning exercise regulated by the legal framework in the now repealed Physical Planning Act of 1994 and the regulations made thereunder. The exercise was similarly regulated by the then existing legal framework on roads. It suffices to observe that the principles of proper physical planning did not and do not countenance the creation of land parcels through resurvey and subdivision without a proper road network. Put differently, any proposed resurvey, sub-division or reparcelation had to make provision for access roads to serve each parcel created as a result of the resurvey, sub-division, or reparcelation.

13. Thirdly, road networks were and are still governed by the legal framework in the Public Roads and Roads of Access Act [Cap 399]. The said Act recognized two categories of roads. The first category is that of public roads. A public road is defined under Section 2 of the Public Roads and Roads of Access Act as:

- a) *any road which the public had a right to use immediately before the commencement of this Act;*
- b) *all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;*
- c) *all roads and thoroughfares hereafter reserved for public use;*

14. The second category of roads envisaged under the Public Roads and Roads of Access Act is the **road of access**. Although the Act does not expressly define what a road of access is, Section 9 stipulates an elaborate procedure through which a road of access is created. It is created in a scenario where a parcel of land does not have reasonable access to a public road which is passable to vehicular traffic or to a railway station or halt. The owner or occupier of the land is required to make an application to the Roads Board for leave to construct a road of access over any lands lying between his land and the public road, railway station or halt. After due process, the application is determined. If found to have merit, leave for creation of a road of access is granted under Section 11 of the Act and a notification is sent to the Land Registrar for registration of an entry against the affected title or titles.

15. Parties in this suit have used the phrase “private road” severally. The Act does not, however, contemplate this category of roads. The rationale for Parliament’s deliberate failure to define a private road, in my view, is that, generally, roads are public utilities. This is the reason why the predominant category of roads is that of public roads. Where special circumstances outlined in Section 9 of the Public Roads and Roads of Access Act exist, there is provision for creation of the second category of roads called roads of access.

16. From the materials presented in this suit, the road created as a result of the resurvey, sub-division and reparation of the two parcels of land, respectively owned by the parties to this suit, was not and is not a road of access as contemplated under Section 9 of the Act. I say so because its creation did not take the elaborate statutory procedure for creation of a road of access. Its creation took the route of mutual resurvey, sub-division reparation, and transfer, within the then existing legal framework on land planning, land survey, land registration, and roads. It was consequently created as a public road to serve the three parcels created out of the mutual resurvey, sub-division, and reparation.

17. If the parties to this suit intended to create a “private road” for the plaintiff as contended by the plaintiff, the route to take would have been to parcel out the portion which now exists as a public road and give it a separate title in the name of the plaintiff or amalgamate it as part of the plaintiff’s land. Were that to happen, the land registrar would have to satisfy himself that every new parcel contemplated in the new layout is served by a public road before accepting the layout. This did not happen. What therefore exists is a public road created to serve the three new parcels created through the mutual resurvey, sub-division and reparation. It is also a public road created to serve the general public seeking access to the three parcels. This is so notwithstanding the fact that the plaintiff compensated the defendant for the land currently constituting the public road.

18. Consequently, my finding on the single issue in this suit is that the road subject matter of this dispute is a public road created to serve the three parcels of land created as a result of the resurvey, sub-division, and reparation of the two parcels of land which belonged to the parties to this suit. The road is similarly available for use by the general public. The net result is that the plaintiff’s suit fails and the defendant’s counterclaim succeeds in terms of prayer 1. In view of the history of this dispute, each party will bear his respective costs of the suit.

#### **Disposal Orders**

19. I accordingly make the following disposal orders in tandem with the prayers sought in the plaint and counter-claim:

- a) *The plaintiff’s suit is dismissed for lack of merit*
- b) *It is hereby declared that the road created as a result of resurvey, sub-division and reparation of Parcel Numbers Kiambaa/Ruaka/486 and 2428 is a public road within the meaning of the Public Roads and Roads of Access Act, created to serve, inter alia, the three new parcels created as a result of the resurvey, sub-division and reparation, namely, Kiambaa/Ruaka/3600, 3601 and 3602, and the general public.*
- c) *The plaintiff is ordered to remove any obstruction erected in the said road within 14 days. In default, the defendant shall remove the obstruction at the plaintiff’s costs and the Officer Commanding the relevant Police Station shall ensure law and order during the removal.*
- d) *Each party shall bear his own costs of this suit.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF MAY 2020.

**B M EBOSO**

JUDGE

**In the presence of:-**

Mr Stanley Wandako for the plaintiff

June Nafula - Court Clerk