

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO.37 OF 2013

FRANCIS WANYONYI HASSAN.....PLAINTIFF

VERSUS

JAFRED SIBULI.....DEFENDANT

JUDGEMENT

1. The Plaintiff sued the defendant seeking an order to compel the defendant to create access road between title nos. Ndivisi/Ndivisi/1396 and 1395 as per the report of the Land Registrar dated 20th March 2012. He also prayed for costs of this suit. The suit is defended and the defence filed a statement of defence which denied the plaintiff's claim in toto.

2. The matter proceeded to hearing. The plaintiff testified that sometime in 1991 the defendant approached him to buy a portion of his land L.R. Ndivisi/Ndivisi/1116 measuring 2 acres. The defendant informed the plaintiff he had a loan with A.F.C. Ltd Kimilili and they wanted to auction his land parcel. After negotiations, the plaintiff agreed and they entered into a sale contract. The plaintiff stated that he verified this information with A.F.C. before making any payments.

3. Subsequently they brought in a surveyor who curved out 2 acres being the portion sold to the plaintiff. The defendant signed all the requisite forms transferring the sold portion of land to the plaintiff who on 4th November 1991 secured a title deed for his plot now No. Ndivisi/Ndivisi/1396.

The new title for the defendant's remaining portion was L.R. Ndivisi/Ndivisi/1395. It is the plaintiff's case that at the time when the Surveyor visited the land, an access road was created which road the defendant blocked by allowing his son to build a semi-permanent house on part of it.

4. The blocking of the access path was confirmed by the evidence of PW2 and PW3. PW2 Samwel Nayombe Chenonoi is the area Chief for Lukusi location. The plaintiff made a complaint to him about the blocked road. He did address a letter to the District Land Registrar Bungoma to come on site to resolve the dispute. The Registrar acted on his request and came on the disputed site. He was present when the Registrar visited site and he confirmed the plaintiff does not have access to his land. He also confirmed that the defendant refused the District Land Registrar from opening the access road as appearing on the map. He therefore advised the plaintiff to file the case in Court. PW3, Fred Makori is the Land Registrar who visited the disputed road.

5. PW3 made his visit in the presence of both the defendant and the plaintiff and a Ms. Maryline Wanyonyi of the Survey Office, Bungoma. According to his evidence, access path was created during the sub-division procedure. He asked the defendant if the defendant knew he had an obligation to provide access road to the plaintiff. He also said the map confirmed there is an access road but on the ground the defendant has put up a semi-permanent house on it. He produced his report and asked this Court to compel the defendant to provide an access road or open one. The plaintiff closed his case at this stage.

6. The defendant on his part stated that he sold to the plaintiff two(2) acres of land in 1991 to pay off a loan he owed A.F.C Ltd. His case is that it is the plaintiff who chose the location he wanted to buy. The purchase price was paid in full. The plaintiff told him he did not require a road as he would access the plot using a neighbour's home. He denied the surveyor had created any path and demanded to see the mutation forms if at all. He proposed that if the road were to be created, then the same be put on the side

which is empty. He produced the Chief's and Registrar's letter about the visit of 20th March 2013 as his exhibits. In his view he was the Complainant for the damage on his land but instead he was made an accused. The defendant stated that if the plaintiff wanted access road then he ought to buy land from him since his remaining land is small. He also wondered why he sold the plaintiff two (2) acres of land yet his title reads 0.86ha. He closed his case.

7. From the evidence, it is clear that what is in dispute is how the plaintiff should access his parcel no. Ndivisi/Ndivisi/1396. PW3 averred that there is an existing path that was created on the map at the time of sub-division of L.R. no. 1116 which path the defendant has blocked by building a semi-permanent house on part of it. In his report dated 20th March 2012, he concluded that the road should be opened and the house removed. He asked for a court order and security to open the road and plant beacons to allow the applicant access his parcel. The defendant on his part wants the plaintiff to buy a piece of land from him to create the access path. He also argues that the plaintiff never sought for the access road at the time he purchased the land because according to him the plaintiff opted to use a path which passes through a neighbour's home. This in my view is an admission by the defendant that the plaintiff lacks access road to his plot. The defendant did also not appeal the Land registrar's report.

8. The Land Registrar (PW3) said it was an obligation of the defendant to provide the plaintiff with an access road. The plaintiff's parcel of land was created from the defendant's original parcel no. Ndivisi/Ndivisi/1116. I agree with PW3's contention that it was incumbent upon the defendant to create access to the plot since he is the one who sold the plaintiff that land. The defendant's averment that the plaintiff did not ask for access is a ploy to deny the plaintiff his right to access his land. I have seen the R.I.M. annexed as number 2 in the plaintiff's documents which clearly shows a road to the plaintiff's plot was marked.

9. The road existing in the index map is said to have been blocked by a semi-permanent house put up by the defendant's son. This fact was not denied by the defendant. Therefore taking all matters into consideration, I find the plaintiff has proved his case on a balance of probabilities and thus I allow the suit as presented. Consequently, I do give the defendant an option to open the access road voluntarily on the side he says has no coffee trees within 30 days from date of service of this decree on him. If the defendant shall show to the District Land Registrar the marked area (proposed access) and if it is found suitable for the creation of an access road, an order be and is hereby given for the amendment of the R.I.M to reflect the change. In default by the defendant as stated above, the District Land Registrar and Surveyor Bungoma be and are hereby authorized to proceed and open the road as it is on the map (R.I.M). The O.C.S. Webuye Police Station to provide security during the exercise. The plaintiff is awarded costs of the suit.

Dated, Signed and Delivered in Bungoma this 17th day of July 2014

A. OMOLLO

JUDGE