



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 41 OF 2004.

MOSES WATAYI KITERESI:::PLAINTIFF.

VERSUS

DANIEL WANYONYI)

BUSINA MUSAMIA):::DEFENDANTS.

THE DIRECTORS OF SURVEY)

J U D G M E N T.

The plaintiff, **Moses Watayi Kiteresi**, is the registered proprietor of all that parcel of land known as **L.R. No. 5389/8** situated within the County of Trans Nzoia. The first defendant, **Daniel Wanyonyi**, is said to be the chairman of Shangalamwe Farm while the second defendant, **Rusina Musamia**, is said to be the secretary of the same farm which is the proprietor of the parcel of land known as **L.R. No. 5389/7** which borders the plaintiff's aforementioned land. In the plaint dated 24th March, 2004, the plaintiff avers that in the month of February, 2004, the first and second defendants on behalf of members of Shangalamwe farm lodged a dispute with the District Surveyor alleging that the plaintiff had closed an access road. Consequently, without seeking verification from the plaintiff, the District Surveyor unlawfully created a road measuring approximately 16 acres inside the plaintiff's land and erected beacons whereas no access exists on the plaintiff's land as per a deed map prepared by the Director of Surveys (the third defendant herein).

The plaintiff therefore contends that members of Shangalamwe farm have no right to request an access road through his land as they never purchased the land from him and prays for a permanent injunction restraining the defendants, their servants and/or agents from trespassing on his land or using the alleged access road and that an order be made declaring the creation of the access road on L.R. No. 5389/8 null and void.

The plaintiff also prays for costs of the suit and interest.

In the amended statement of defence dated 8th June, 2007, the first and second defendants contend that the plaintiff's suit is defective for non-compliance with the Government Proceedings Act as the third defendant is not a legal entity capable of being sued and that the second respondent not being an official of the Shangalamwe Self Help Group ought not have been made a party to the suit and also that, the first defendant being the chairman of the said group which owns Shangalamwe Farm ought not have been sued in his individual capacity but as a representative of the group and as such no leave was sought and obtained by the plaintiff to sue him (first defendant) or any other person in a representative capacity thereby rendering the suit fatally defective.

The first and second defendants admit that Shangalamwe farm comprising L.R. No. 5389/7 borders the plaintiffs land comprising L.R. 5389/8 and aver that it is the right of members of the farm to have the access road which actually exists as per the Deed plan and the official map issued by the Director of Surveys. That, the plaintiff was at all material times aware of the visit to the site by the District Surveyor while considering the dispute and fully participated in the exercise that established the existence of the contentious access road. That, the District surveyor merely confirmed the existence of the access road between L.R. No.5389/7 and L.R. 5389/8 and marked it out in accordance with the official Deed plan and the map duly registered with the Director of Surveys. That, the road access does indeed exist but without any colour of right the plaintiff unilaterally closed it and leased part thereof to a third party. He (plaintiff) therefore has no legal basis for his claim and clearly admits that the access road was marked out by the District Surveyor.

The first and second defendants ultimately prayed for the dismissal of the plaintiff's suit with costs.

The third defendant did not file a statement of defence and appears not to have taken any part in these proceedings. The probable explanation for this would be that the dispute at hand primarily revolves around the plaintiff and the first and second defendants with regard to an access road created through their respective portions of land by the District Surveyor acting on behalf of the third defendant Director of Survey.

From the pleadings, the basic issue for determination is whether a lawful access road exists in the portion of the plaintiff's land that borders the first and second defendant's portion of land otherwise known as Shangalamwe Farm i.e. whether there exists an access road between L.R. No. 5389/8 and L.R. No. 5389/7 and if it does, whether the plaintiff was justified to block or in any other manner interfere with it.

With regard to the alleged defectiveness of the suit, the matter was dealt with in a ruling delivered by the court (F.A. Ochieng – J) on the 21st January, 2008. This explains why the matter has reached this stage. The obligation to establish on a balance of probabilities that there is no valid road access between the material portions of land lay with the plaintiff who testified that he purchased his land from the late Justice Chesoni and that it measured thirty six (36) acres. He produced a letter of consent from the Land Control Board (P.Ex. 2) for the transaction. The letter is dated 22nd March, 1985.

The plaintiff also produced a copy of a deed plan dated 17th December, 1984 (P. Exh. 3) and a sub division plan dated 20th December, 2000 and contended that the disputed access road was non-existent and that it was created by a District Surveyor in the year 2004 and in the process six (6) acres of his land were utilized.

The plaintiff indicated that the surveyor was brought to the land by the first and second defendants without his consent and without being given prior notice. He further indicated that he never gave any authority for the creation of the access road in his land which has beacons still intact. He said that the land together with that owned by the first and second defendants were previously owned by the Late Justice Chesoni and that whereas he occupied his portion in 1982, the two defendant occupied their portion in 1994. He said that he only gave the second defendant a passage on her own request but that the passage was never a road. He said that a surveyor confirmed that there was no road between the material portions of land and that the two defendants and others normally used a road passing through a plot No. 6.

The plaintiff denied that he was in attendance when the surveyor visited the site and that he did not know surveyors called Giomatics.

In his testimony, the first defendant (Daniel) said that he purchased his land from the second defendant (Rusina) in 1995 and that the land was part of a larger portion purchased from one Sheldom Muchilwa (now deceased) who had purchased it from the late Justice Chesoni. That, it was the second defendant who sold the land to the land buying group called Shangalamwe Farm in which he (first defendant) was a member and its chairman. That, the group was made up of three (300) hundred members who did not include the plaintiff.

The first defendant went on to testify that for a period of five (5) years they utilized a public access road running between that farm and that of the plaintiff before it was suddenly closed by the plaintiff on allegation that the road was not a public access road. He (first defendant) said that they went to the land office in Nairobi and obtained the area map (D. Ex. 1) after which they instructed a private surveyor (DW3) to examine the map and confirm whether or not the path closed was a public access road.

The first defendant produced a letter from the surveyor dated 15th October, 2005 (D. Exh. 2) and further testified that earlier on the 2nd March, 2004, the District Surveyor and the area chief (DW4) summoned the plaintiff and all members of his (first defendant's) group to the disputed site and after necessarily perusal of the area map the surveyor confirmed that a public access road indeed existed.

The first defendant produced the letter dated 19th February, 2004 (D. Exh. 3) which indicated that the District Surveyor accompanied by the private surveyor were to visit the site and fix the beacon as well as re-open the road as per the survey plan.

The first defendant stated further that after the re-opening of the road, the plaintiff came up with a deed plan (P. Exh. 3) which he used to file the present suit. He (first defendant) contended that the said deed plan was not genuine as it had been corrected by hand and that they went to Nairobi and obtained the correct deed plan which he produced (D. Exh. 5). They also obtained the latest copy of the area map (D. Exh. 6) from Nairobi in the year 2009. The first defendant thus contended that the present claim by the plaintiff is not merited.

As for the second defendant, she adopted and treated as her own, the evidence adduced by the first defendant.

The private land surveyor, **Eliud Wakhuka Sore (DW3)**, confirmed that he was consulted by the first and second defendants and after examining the necessary maps (D. Exh. 1 and D. Exh. 6) he found that there was an access road running through the material L.R. No. 5389/7 and L.R. No. 5389/8 and that it also served L.R. Nos. 5389/6, 5389/5 and 5389/4 upto the nearby main road. He replaced the beacons for the access road and advised the defendants to seek further advice from the District Surveyor and wrote the necessary report (D. Exh. 2). He confirmed that he was part of the team that visited the site with the District Surveyor on the 2nd March, 2004 and stated that the plaintiff was also in attendance.

The area chief, **Samwuel Kiplagat Biwott (DW4)**, also confirmed that he was in the same team and that the plaintiff was present at the time. He said that the area-map relied on by the District Surveyor did not agree with that produced by the plaintiff thereby causing the plaintiff to protest and leave the site.

The deputy County Surveyor, Trans Nzoia County, **Emmanuel Mtange (DW5)**, confirmed that according to the area maps (D. Exh. 1 & 6), an access road runs through the two material portions of land and that a survey done in the year 1984 confirmed as much. He contended that the road runs along the common boundary of the two portions.

From all the foregoing evidence by both sides, it is apparent that the issue for determination would only be resolved by a consideration of all the relevant documents pertaining to the material portions of land. After all, both parties are relying on their own respective documents to make their own case against each other. However, the greatest burden fell on the plaintiff firstly, in establishing that his documents are valid in portraying the actual status on the ground when he purchased his portion of land in 1985 and secondly, in disproving as valid the documents produced by the defendants one and two in opposition to his claim.

To start with, reference is made to the plaintiff's deed plan dated 17th December, 1984 (P. Exh. 3) i.e. **Deed Plan No. 121571**, it shows that the plaintiffs portion L.R. No. 5389/8 (original No. 5389/1/6) measured approximately 14.71 Hectares of which 2.26 hectares were reserved for a public access road. Therefore, the entire portion measured approximately 12.45 hectares. The road reserve is marked as running through the portion on the side bordering L.R. 5389/16 as well as L.R. 5389/9 and L.R. 5389/10. There is no indication that the road runs through the plaintiff's L.R. 5389/8 and the defendant's L.R. 5389/7.

However, the sub-division map dated 20th December, 2000 (P. Exh. 4) shows that there is provision for an access road to run near the common boundary between the plaintiff's and the defendants' portions as well as portion No. L.R. 5389/6 but more on the defendants' L.R. 5389/7 and L.R. 5389/6. The map clearly shows that the access road was to be inside the defendants' portion No. 5389/7 and portion No. 5389/6 and not inside the plaintiffs' portion No. 5389/8.

These two documents (P. Exh. 3 and P. Exh. 4) led credence to the plaintiff's contention that the alleged access road between his land and that of the first and second defendants was non-existent and that it was later created by the District Surveyor at the instance of the first and second defendants without his authority and/or consent.

Indeed, the private surveyor (DW3) seems to have agreed with the plaintiff's documents. (P. Exh 3 and 4) as depicted in his report of the 15th October, 2005 (D. Exh. 2). The area chief (DW4) confirmed that the alleged access road was erected in the year 2004 but was not meant to be inside the plaintiff's land but on its boundary with the defendants' land.

The first defendant agreed with the plaintiff's deed plan (I. Ex. 3) and his own deed plans (D. Exh. 4 & D. Exh. 5) in so far as they show that there is a public access road on the border of their land (defendants') and the plaintiff's land. He denied that the said deeds show the existence of a road inside the plaintiff's land. However, the denial was clearly baseless as the said deed plans show a road reserve inside the plaintiff's land on the side adjacent to L,R. No. 5389/16.

A provision for an access road between the plaintiff's and the defendants' land was made during the creation of the sub-division map (P. Exh. 4) in the year 2000. However, the road was to run inside the defendants' land and L.R. No. 5386/6 as well as other portions of land which did not include the plaintiffs' land. The contention by the defendants that the access road between their land and that of the plaintiff was always in existence and that it ran right on the border of the two portions of land was not supported by cogent evidence as the deed plan (P. Exh. 3, D.Exh. 4 and D. Exh. 5) firstly developed in 1984 clearly showed that a provision for an access road was made inside the plaintiff's land on the side facing L.R. No. 5389/16 and the survey map (P. Exh. 4) showed that if there were to be an access road between the plaintiffs' and the defendants' land that it would be on the defendant's side rather than the plaintiff's and certainly not right on the border of the two portions. Therefore, any purported creation of an access road between the two portions of land on the plaintiff's side or along the boundary was improper in as much as it was not done with the consent and/or authority of the plaintiff.

In essence, the plaintiff did not dispute the defendants' documents (D. Exh. 4 and 5) which are more or less similar to his document (P. Exh. 3). On the other hand, the defendants did not substantially dispute the plaintiff's sub-division map (P. Exh. 4).

The maps which were produced by the defendants (D. Exh. 1 and 6) and heavily relied on by County Surveyor (DW5) in an attempt to show the existence of a road access running along the common boundary of the plaintiff's and the defendants' land, were also relied upon by the surveyor (DW3) in compiling his report (D. Exh. 2). Only that the maps indicate that the access road is inside the plaintiff's land contrary to what is shown in the deed plans (P. Exh. 3, D. Exh. 4 and D. Exh. 5) and the survey map (P. Exh. 4) which establish on the balance of probabilities that at the time the plaintiff purchased his land there was no access road anywhere between the land and L.R. No. 5389/7 and that the alleged access road was created later by the District Surveyor at the behest of the first and second defendants.

The to maps (D. Exh. 1 and D. Exh. 6) cannot be relied upon as their original is unknown, they are undated and it may be that they were produced for the purposes of this case to aid the defendants in their opposition to the plaintiff's case.

All in all, the plaintiff's case against the three defendants has been established to the required standard.

The plaintiff is thus entitled to the orders sought in the plaint in terms of prayers (a) and (b).

Judgment is accordingly entered for the plaintiff against the defendants jointly and severally together with costs and interest.

[Delivered and signed this 4th day of December, 2014.]

J.R. KARANJA.

JUDGE.