



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 171 OF 2013**

**NELSON KAKAI SIKANGA ..... PLAINTIFF**

**VERSUS**

**SIRENGO MOHAMMED SAMUEL .....DEFENDANT**

**J U D G M E N T**

**NELSON KAKAI SIKANGA** (the plaintiff herein) moved to Court vide his plaint dated 10<sup>th</sup> June 2013 and filed herein on 22<sup>nd</sup> July 2013 seeking Judgment against **SIRENGO MOHAMMED SAMUEL** (the defendant herein) in the following terms: -

**(a) Eviction orders to remove the defendant, his family, relatives and property from the plaintiff's land parcel NO NDIVISI/MIHUU/2157.**

**(b) A permanent injunction restraining the defendant, his servants, agents or anyone claiming through them from entering, trespassing into, erecting structures or cultivating or in any way interfering with the land parcel NO NDIVISI/MIHUU/2157.**

**(c) Costs of the suit**

**(d) Interest**

The plaintiff pleaded that he is the registered proprietor of the land parcel number **NDIVISI/MIHUU/2157** (the suit land) but in September 2012, the defendant without any colour of right or lawful justification trespassed thereon and erected structures.

Together with the plaint, the plaintiff recorded his statement dated 10<sup>th</sup> June 2013 and also filed two lists of documents dated 10<sup>th</sup> June 2013 and 10<sup>th</sup> July 2014 which he asked the Court to adopt as his evidence.

In his statement, the plaintiff reiterated that he is the registered proprietor of the suit land having purchased the same from **FRANCIS LUCHUMA NABANGI** in 2004. However, in 2009, the defendant started trespassing thereon and erected a mud structure and also planted sisal. The plaintiff's attempts to have the Provincial Administration intervene and solve the problem bore no fruits and he has been unable to occupy the suit land hence this suit. When he testified on 27<sup>th</sup> June 2018, he added that the defendant owns land parcel **NO NDIVISI/MIHUU /3049** and that there is a 5 metre road between the defendant's land and the suit land although the suit land was created first in 1999 and defendant's land in August 2013. He added that at his request, the firm of **THAGISHU LAND SURVEYORS** visited the land and prepared a report which showed that the defendant had encroached onto a portion of the suit land measuring 9 metres by 23 metres which is half of the suit land.

The plaintiff called as his witness **MARYLINE WANYONYI (PW 2)** an Assistant **SURVEYOR** at the **COUNTY SURVEYOR'S OFFICE**. She produced a report dated 8<sup>th</sup> November 2016 which she prepared following a Court order which had directed her to confirm if there was any encroachment on the suit land. Her observation was that there was a road serving the land parcel **NO NDIVISI/MIHUU/3011** as per the map of the site but no road existed on the ground. Further, as per the mutation forms, the suit land measured 0.04 Ha but, on the ground, it was 0.037 Ha. Parcel **NO NDIVISI/MIHUU/3049** was 0.023 Ha but the mutation form was missing from their office. Also, according to the records, there is supposed to be a road between the suit land and parcel **NO NDIVISI/MIHUU/3049** but no such road exists on the ground.

In his defence dated 11<sup>th</sup> February 2014 and filed on the same day, the defendant admitted that the suit land and his land parcel **NO NDIVISI/MIHUU/ 3049** are adjacent to each other but denied all the allegations of encroachment levelled against him and put the plaintiff to strict proof. He pleaded further that it was the surveyors who made a mistake by assigning the suit land wrong measurements. He added that the plaintiff's claim is bad in law and should be dismissed.

Together with the defence, he filed his statement dated 4<sup>th</sup> October 2013 which he asked the Court to adopt as his evidence. He also asked

the Court to adopt as his documentary evidence the list of documents dated 11<sup>th</sup> February 2014 and 9<sup>th</sup> November 2018 as well as the report by the **LAND REGISTRAR** dated 21<sup>st</sup> December 2016 as well as the report dated 8<sup>th</sup> November 2016 by **MARYLINE WANYONYI (PW 2)**. He also filed the witness statement by **FRANCIS LICHUMA NAVANGI (DW 2)** dated 4<sup>th</sup> October 2013.

In his statement, the defendant states that he is the owner of the land parcel **NO NDIVISI/MIHUU/309** measuring 25 feet by 100 feet which he purchased from **SAMUEL KABILO** on **LUTALI** on 10<sup>th</sup> August 2009 at a consideration of Kshs. 35,000/= . That the land was well demarcated using sisal plant but in 2013, the plaintiff destroyed the boundary and started making bricks and drying them on the defendant's land. His attempts to have the **ASSISTANT CHIEF, CHIEF** or **DISTRICT OFFICER** intervene also bore no fruits. When he enquired from **FRANCIS LUCHUMA NAVANGI**, he told him that the plaintiff has his own land and wants to fraudulently occupy the land.

When he testified, he confirmed that he also adopts as his evidence the report by the **LAND REGISTRAR** dated 21<sup>st</sup> December 2016 and that by the **LAND SURVEYOR** dated 8<sup>th</sup> November 2016. He added that his land parcel **NO NDIVISI/MIHUU/3049** borders the suit land but denied that there is an access road between them although both parcels were part of the same land prior to the sub – division.

His witness **FRANCIS LUCHUMA NAVANGI (DW 2)** also adopted as his evidence his statement dated 5<sup>th</sup> October 2013. In the said statement, he states that he sold the parcel **NO NDIVISI/MIHUU/3049** to the defendant in 2009. Earlier in 1999, he had also sold a portion measuring 25 X 100 feet to the plaintiff. He later also sold three plots to the plaintiff being land parcels **NO NDIVISI/ MIHUU/2157, 2158** and **3011**. However, the plaintiff registered the suit land as measuring 40 x 100 feet instead of 25 x 100 feet. He added that the plaintiff has no right to take the defendant to Court.

The plaintiff filed a reply to the defence joining issues with the defendant and maintaining that it is the defendant who has encroached onto the suit land.

The trial commenced on 27<sup>th</sup> June 2018 when the plaintiff testified. His witness **MARYLINE WANYONYI (PW 2)** testified on 24<sup>th</sup> September 2020 and thereafter the defendant and his witness. They all adopted as their evidence the statements which I have already referred to above and also produced their documentary evidence.

Submission were thereafter filed both by **MS MUMALASI ADVOCATE** instructed by the firm of **ANNET MUMALASI & COMPANY ADVOCATES** for the plaintiff and by **MR J. W. SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties including the documents filed and the submissions by Counsel.

The plaintiff's claim, as per paragraph 4 of his plaint, is that in or about September 2012, the defendant without any colour of right and without any lawful justification, trespassed on the suit land **"and erected structures thereon."** The onus therefore, as per **Section 109 of the Evidence Act**, was upon the plaintiff to prove that the defendant **"erected structures"** on the suit land. That provision reads as follows: -

**109: "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

Among the documents that the plaintiff produced in support of his case in a supplementary list of documents dated 10<sup>th</sup> July 2014 was a photograph allegedly showing the offending structure erected on the suit land by the defendant. In his defence however, the defendant denied that allegation and put the plaintiff to strict proof thereof. He pleaded in paragraph 5 of his plaint that it was the surveyors who **"made a mistake by giving the plaintiff's land wrong measurements and gave a false impression that the plaintiff's land has encroached (sic) on the defendant's portion."** This averment was supported by the defendant's witness **FRANCIS LICHUMA NAVANGI (DW 2)** who in his statement dated 4<sup>th</sup> October 2013 states as follows: -

**"That NELSON KAKAI made a mistake, he registered plot NO NDIVISI/MIHUU/2157 as measuring 40 ft x 100 ft instead of 25 ft x 100 ft which I sold to him."**

The suggestion therefore is that the measurements of the suit land as indicated on the title document is not a true reflection of what the plaintiff purchased from **FRANCIS LICHUMA NAVANGI (DW 2)**. A perusal of the two title deeds shows that the suit land measures 0.04 Hectares while the defendant's parcel **NO NDIVISI/MIHUU/3049** measures 0.025 Hectares. Although **FRANCIS LICHUMA NAVANGI (DW 2)** indicates in his statement that he sold the plaintiff a parcel of land measuring 25ft by 100 ft which was however registered wrongly as 40 ft by 100 ft, the sale agreement was not produced as part of the documentary evidence herein. The Court can therefore only rely on the measurement indicated on the title deed to the suit land. And according to the evidence of **MARYLINE WANYONYI (PW 2)** who is a **LAND SURVEYOR** and therefore an expert in this field: -

**"A parcel measuring 25 feet by 100 feet is equivalent to 0.025 Ha."**

Clearly therefore, the suit land is larger than the defendant's land parcel **NO NDIVISI/MIHUU/3049** and, most importantly, is not 25 feet by 100 feet as alleged by the defendant's witness **FRANCIS LICHUMA NAVANGI (DW 2)**. The plaintiff denied in his oral testimony on 27<sup>th</sup> June 2018 that he purchased a parcel measuring 25 feet by 100 feet from **FRANCIS LICHUMA NAVANGI (DW 2)** adding that it was in fact 23 metres by 18 metres which is 0.04 Ha. The contents of the title deed to the suit land confirms the plaintiff's assertion with regard to the size of the suit land.

The issue for determination is whether the defendant has put up structures on the suit land. My evaluation of the evidence herein leads to the

conclusion that the encroachment by the defendant is in fact on the road of access and not on the suit land. It is instructive to note that the defendant did not deny having put up the structure. He however denied having encroached onto the suit land. In his oral evidence, he denied that there is an access road between his land and the suit land. This is what he said: -

***“My land parcel NO NDIVISI/MIHUU/3049 measures 25 feet by 100 feet. It borders parcel NO NDIVISI/MIHUU/2157 belonging to the plaintiff. There is no access road between those two parcels. There has never been any road between the two parcels but both parcels were initially the same parcel.”***

However, when he was cross – examined by **MR WEKESA**, he said: -

***“I and the plaintiff are not supposed to be sharing a boundary. There is supposed to be a road between the plaintiff’s parcel and mine. However, on the ground, there is no road.”***

Earlier on in his evidence in chief, he said: -

***“I was present when the surveyor and the Land Registrar visited the land. I agree with both the Surveyor’s report dated 8<sup>th</sup> November 2016 and the Land Registrar’s report dated 21<sup>st</sup> December 2016.”***

In the two reports dated 8<sup>th</sup> November 2016 and 21<sup>st</sup> December 2016 which the plaintiff disagrees with, the surveyor **MARYLINE WANYONYI (PW 2)** and Land Registrar **JOHN MOMANYI OCHARO** both suggest that the solution to this dispute is to do away with the 5 metre road of access between the suit land and the defendants parcel **NO NDIVISI/MIHUU/3049**. This is how the Land Registrar has put it in his report dated 21<sup>st</sup> December 2016 at paragraph (e): -

***“After we had done our work, we had humble (sic) time to explain, argue and discuss all aspects which caused the problem they have in a brotherly way and came up with a suggestion which is to conciliate the two parties in this case before you, your Lordship. Further we restored the boundary between parcel No 3049 and parcel NO 2157 and did away with 5 metres road of access”*** Emphasis added

On her part, the Land Surveyor **MARYLINE WANYONYI (PW 2)** states as follows in paragraph 2 of her findings in the report dated 8<sup>th</sup> November 2016: -

***2: “The registered owner of parcel numbers NDIVISI/MIHUU/2157, 2158 and 3011 MR NELSON KAKAI SIKANGA was advised to amalgamate his parcel deleting the access road created to serve parcel NO NDIVISI/MIHUU/3011.”*** Emphasis added.

When she testified on 24<sup>th</sup> September 2020, this is what **MARYLINE WANYONYI (PW 2)** stated: -

***“From my observation, parcel NO NDIVISI/MIHUU/2157 was registered first and it was parcel NO NDIVISI/MIHUU/3049 which encroached onto parcel NO NDIVISI/MIHUU/2157. On the ground, there is no road leading to parcel NO NDIVISI/MIHUU/ 3011 but on the map, there is a road. As per the record, the parcel NO NDIVISI/MIHUU/3011 was created earlier than parcel NO NDIVISI/MIHUU/3049 and had an access road leading to it. That is as per the record. The record shows that there is supposed to be a road between parcel NO NDIVISI/MIHUU/2157 and 3049 but on the ground, there is no road.”***

In his report, the Land Registrar tried to lay the blame for this dispute on an earlier report done by a private surveyor in 2011. This is how he puts it in paragraph (c) of that report: -

***“A private surveyor in 2011 did some work on the disputed side using mutation serial NO 0389158 he created imaginary road of access crossing through parcel 3049 down along parcel 2157 into parcel 3011. This caused more of a problem for it was done un – professionally and with total disregard of what existed on the ground then.”***

However, when she was cross – examined by **MR SICHANGI**, **MARYLINE WANYONYI (PW 2)** said: -

***“The parcels border each other. So, the problem was the map in our office. There should have been an access road on the ground to parcel NO NDIVISI/MIHUU/3011. The map was done by a private surveyor. I agree that the road created by the private surveyor was proper as per the record.”***

When she was re – examined by **MR WEKESA**, however, she said: -

***“The road was created by a private surveyor but I don’t know if it was properly created.”***

**MARYLINE WANYONYI (PW 2)** is in the class of expert witnesses. And in relation to the private surveyor’s report, she cannot be seen to approbate and reprobate at the same time. What comes out clearly from both the report of the Land Registrar dated 21<sup>st</sup> December 2016 and the report by **MARYLINE WANYONYI (PW 2)** dated 8<sup>th</sup> November 2016 is that while both reports recognize the fact that a road of access had been created to serve the parcel **NO NDIVISI/MIHUU/3011**, it no longer existed on the ground when the two officers visited the suit land. The two officers therefore suggested in their reports that the solution to the dispute would be to do ***“away with 5 metre road of***

access” – as per the report dated 21<sup>st</sup> December 2016 or by “deleting the access road created to serve parcel number NDIVISI/MIHUU/3011” – as per the report dated 8<sup>th</sup> November 2016. Having found as a matter of fact that there existed an access road to the plaintiff’s other land being parcel NO NDIVISI/MIHUU/3011, it was of no help that the Land Registrar in his report dated 21<sup>st</sup> December 2016 assumed that he would be able “to conciliate the two parties by doing “away with 5 metre road of access” or, as suggested by MARYLINE WANYONYI (PW 2), by “deleting the access road created to serve parcel number NDIVISI/MIHUU/3011.” It must be appreciated that as the registered proprietor of the land parcel NO NDIVISI/ MIHUU/3011, the plaintiff was entitled to access the same as provided under **Section 28(c) of the Land Registration Act** which provides that: -

*28 “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without their being noted on the register–*

*(a)*

*(b)*

*(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.”*

A similar provision was found in **Section 30 of the repealed Registered Land Act**. It is also instructive to note that MARYLINE WANYONYI (PW 2) annexed to her report dated 8<sup>th</sup> November 2016 a map showing the suggested amalgamation of the plaintiff’s three (3) parcels of land being the suit land and parcels NO NDIVISI/MIHUU/2158 and 3011. However, such amalgamation cannot be effected without the consent of the plaintiff and neither can it be forced upon him. **Section 22 (1) of the Land Registration Act** provides that: -

*22 (i) “Subject to authentication of the cadastral map, if contiguous parcels are owned by the some proprietor and are subject in all respects to the same rights and obligations, the Registrar, on application by the proprietor, may combine these parcels by closing the registers relating to them and opening a new register or registers in respect of the parcel or parcels resulting from the combination.”* Emphasis added.

There is no evidence to suggest that the plaintiff applied to the Land Registrar for any such combination of his parcels of land. It could not therefore be done without his consent.

The view that I take of this matter having considered all the evidence herein is that whereas there was encroachment on the part of the defendant in putting up the structure and planting sisal, the said encroachment was on the access road and not on the suit land. Indeed, when he was re – examined by his Counsel, the plaintiff confirmed as much. He said: -

*“The road was actually created on the ground. The defendant encroached onto the access road in 2009. I have three (3) distinct title deeds for my three (3) parcels of land. It is impossible to access my land parcel NO 3011.”*

On costs, the plaintiff has only partially succeeded in his claim and I award him half of the costs agreed or taxed.

Ultimately therefore, there shall be Judgment for the plaintiff against the defendant in the following terms: -

- 1. An order is issued directed at the defendant, his family and relatives to remove any structure or property that has encroached onto the access road leading to land parcel NO NDIVISI/MIHUU/3011 within three (3) months from the date of this Judgment.**
- 2. Thereafter, the Land Registrar and Land Surveyor Bungoma shall re – establish the boundary between the land parcels NO NDIVISI/MIHUU/2157 and NDIVISI/MIHUU/3049 to re – open the access road to land parcel NO NDIVISI/MIHUU/3011.**
- 3. In default of (1) above, the defendant his family, relatives, agents or servants shall be evicted from the access road leading to parcel NO NDIVISI/MIHUU/3011.**
- 4. A permanent injunction is issued restraining the defendant, his family relatives, agents or servants from erecting structures or cultivating on the access road to land parcel NO NDIVISI/MIHUU/3011.**
- 5. The plaintiff is awarded half costs of this suit.**

Boaz N. Olao.

J U D G E

12<sup>th</sup> November 2020.

Judgment dated, signed and delivered at BUNGOMA this 12<sup>th</sup> day of November 2020. The same is delivered by way of electronic mail in keeping with the COVID – 19 guidelines.

**Boaz N. Olao.**

**J U D G E**

**12<sup>th</sup> November 2020.**