



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 345 OF 2016

JACINTA NJERI GICHUKI.....1ST PLAINTIFF

RAYMOND KABUCHO NJIRIRI.....2ND PLAINTIFF

=VERSUS=

DAMSYL INVESTMENT LIMITED.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

JUDGMENT

The plaintiffs' claim.

The plaintiffs brought this suit by way of a plaint dated 11th April, 2016. The plaint was amended on 18th July, 2016. In their amended plaint dated 12th July, 2016, the plaintiffs averred that they were the registered proprietors of all that parcel of land known as Title No. Dagoretti/Riruta/6236 (hereinafter referred to only as "the suit property"). The plaintiffs averred that the suit property was adjacent to the 1st defendant's parcel of land known as Title No. Dagoretti/Riruta/6235 (hereinafter referred to only as "Plot No. 6235"). The plaintiffs averred that during the subdivision that gave rise to the suit property and Plot No. 6235, roads of access to each of the two parcels of land were clearly provided for in the mutation form and subsequently in the amended Registry Index Map (RIM).

The plaintiffs averred that the 1st defendant had claimed that access to Plot No. 6235 was through a road on the suit property and had sought assistance of the 2nd defendant to create a road through the property. The plaintiffs averred that the 2nd defendant acting on the influence of the 1st defendant was intent on creating a road of access to Plot No. 6235 through the suit property. The plaintiffs sought judgment against the defendants jointly and severally for;

- a) A declaration that the plaintiffs were the indefeasible owners of the suit property and were entitled to quiet and uninterrupted possession of the same free from any interference whatsoever from the defendants.
- b) An injunction restraining the defendants by themselves or their employees, servants and/or agents from entering, trespassing or in any way whatsoever interfering with the plaintiffs' quiet possession of the suit property.
- c) An injunction restraining the defendants by themselves or their employees, servants and/or agents from interfering with the beacons and/or boundary features or the mutation/survey records of the suit property.
- d) Costs of the suit.

The 1st defendant's defence and counter-claim.

The 1st defendant filed a defence and counterclaim on 9th June, 2016 and denied the averments in the plaint. The 1st defendant averred that the 2nd defendant had disowned as a forgery the documents that were relied upon by the plaintiffs as a basis for their claim that roads of access to the suit property and Plot No. 6235 were provided for during the subdivision that gave rise to the two parcels of land. The 1st defendant averred that his right to a road of access through the suit property was confirmed by the 2nd defendant while approving the subdivision of a parcel of land known as Title No. Dagoretti/Riruta/6080 (hereinafter referred to only as "the original parcel") which gave rise to the suit property and Plot No. 6235. The 1st defendant averred that approval for the subdivision of the original parcel was given on condition that a 12m wide strip of land that was proposed for a road to serve the two parcels of land was to be surrendered to the government free of cost.

The 1st defendant averred that the plaintiffs had illegally appropriated as part of the suit property the said strip of land that was reserved for a road of access to the two parcels of land. The 1st defendant averred that the plaintiffs had always acknowledged that there was a road of access to Plot No. 6235 through the suit property and had agreed to have the same restored. The 1st defendant averred that the plaintiffs falsified documents to facilitate the closure of a road of access to Plot No. 6235 thereby undermining the 1st defendant's property rights and the 2nd defendant's planning authority.

In its counterclaim, the 1st defendant averred that the subdivision of the original parcel gave rise to the suit property and Plot No. 6235. The 1st defendant averred that the plaintiffs purchased a portion (now the suit property) of the original parcel before the original parcel was subdivided. The 1st defendant averred that in the agreement of sale that the plaintiffs entered into with the owner of the original parcel, the portion of that parcel of land that was sold to the plaintiffs measured 0.10ha. The 1st defendant averred that contrary to what the plaintiffs purchased, they obtained a title in which the measurement of the portion of the original parcel that they purchased was indicated as 0.138ha. The 1st defendant averred that the difference in acreage between the land that the plaintiffs purchased and what was indicated in their title was equivalent to the measurement of the contested access road.

The 1st defendant averred that during the subdivision of the original parcel and up to the year 2015, the plaintiffs acknowledged by word and conduct the existence of the said road of access to Plot No. 6235 through the suit property. The 1st defendant averred that the plaintiffs colluded with others not parties to this suit to block the road of access and render Plot No. 6235 owned by the 1st defendant inaccessible. The 1st defendant averred that it sought relief from the 2nd defendant which confirmed that the plaintiffs had interfered with documentation relating to the access to Plot No. 6235. The 1st defendant averred that the plaintiffs' acts aforesaid amounted to interference with the 1st defendant's right to property. The 1st defendant sought judgment against the plaintiffs by way of a counter-claim for;

- a) A declaration that the 1st defendant as the indefeasible owner Plot No. Dagoretti/Riruta/6235 was entitled to the access envisaged in the approval that was given for the subdivision of the original parcel.
- b) An order of mandamus compelling the 2nd defendant to create, restore and provide access to Plot No. 6235.
- c) An injunction restraining the plaintiffs by themselves, their agents, servants and or employees from interfering with the 1st defendant's right of access to Plot No. 6235.
- d) An injunction restraining the plaintiffs by themselves, their agents, servants and or employees from blocking or in any other way interfering with access to Plot No. 6235.
- e) An award of mesne profits for the use of access to Plot No. 6235.
- f) Damages for the destruction of the 1st defendant's property situated next to the access road.
- g) Costs of the suit.

The 2nd defendant's defence.

The 2nd defendant filed its defence on 5th August, 2016. The 2nd defendant denied the plaintiffs' claim in its entirety. The 2nd defendant averred that the mutation form and the RIM upon which the plaintiffs had based their claim could be faulty. The 2nd defendant admitted that the 1st defendant had sought its assistance to create an access road through the suit property to the 1st defendant's parcel of land. The 2nd defendant averred that it was within its mandate to create such road and that it was not actuated by malice. The 2nd defendant urged the court to dismiss the plaintiffs' suit with costs.

The evidence tendered by the parties.

At trial, the 2nd plaintiff, Raymond Kabucho Njiriri (PW1) gave evidence after which the plaintiffs called two witnesses, Miriam Wanjiru(PW2) and Kinyangi Kailemia (PW3). The 2nd plaintiff told the court how the plaintiffs acquired the suit property. He stated that they acquired the suit property from one, Leonard Gitau. He stated that Leonard Gitau (hereinafter referred to only as "Gitau") owned the original parcel which he subdivided into two portions; the suit property and Plot No. 6235. He stated that after the subdivision was completed, Gitau transferred to them the suit property which measured 0.139ha. He stated that according to the mutation form through which the original parcel was subdivided, access to the suit property was from the South while access to Plot No. 6235 was from the North. He stated that the access road to the suit property was not supposed to serve Plot No. 6235. He stated that there was a road to the North of Plot No. 6235 through which the said plot was to be accessed and that he could not understand why the defendant was insisting that he had to access Plot No. 6235 through the suit property. He stated that if a road was to be created through the suit property to Plot No. 6235, the size of the suit property would be reduced by 50%. He admitted that in the agreement of sale that they entered into with Gitau, the measurement of the portion of the original parcel that they were purchasing was given as 0.10ha. He stated that that measurement was an approximation since the portion that was being sold had not been surveyed. He stated that after the original parcel was surveyed during the subdivision, the portion thereof that was sold to them was found to be measuring approximately 0.139ha. and that that was what was transferred to them by Gitau. He stated that the 1st defendant did not purchase Plot No. 6235 from Gitau but from a person who had purchased the same from Gitau. He stated that a dispute over access to Plot No. 6235 only arose after the 1st defendant purchased the parcel of land. The 2nd plaintiff urged the court to grant the reliefs sought in the amended plaint. He produced several documents as exhibits.

The plaintiffs' first witness, Miriam Wanjiru Kigathi (PW2) was a surveyor working with the Survey of Kenya at its Nairobi Regional Office in Ruaraka. She told the court that following a dispute that arose between the plaintiffs and the 1st defendant over access road, she was asked by the area Chief to assist in resolving the same. She stated that she went to the site on 10th January, 2017 with the Nairobi Land Registrar to establish the measurements of the suit property. She stated that the measurement of the suit property in the RIM matched with that on the ground and that the access road to the property did not serve Plot No. 6235. She stated that if the said access road was to serve Plot No. 6235, the area of the suit property would be reduced by about 50%. She stated that she noted from the RIM that the surveyor who subdivided the original parcel considered that there was already an existing road to Plot No. 6235 and that may have influenced his decision not to provide for another road of access to the parcel of land.

Kinyangi Kailemia (PW3) who was the plaintiffs last witness was a land registrar. He confirmed that on invitation by the area Chief, he accompanied Miriam Kigathi (PW2) to the site of the suit property and that they took measurements to establish its boundaries. He stated that the suit property measured 0.116ha. on the ground and that there was an access road measuring 0.022ha. He stated that the road was approximately 6m and that the access road together with plot measured approximately 0.14ha. He stated that according to the mutation form that he made available to PW2, the access road to the suit property did not serve Plot No. 6235. He stated that there was an existing road that served Plot No.6235.

Nixon Wanjohi Mburungo (DW1) a director of the 1st defendant gave evidence on behalf of the 1st defendant. He told the court that the 1st defendant owned Plot No. 6235. He stated that in 2010 when he presented plans for a building the 1st defendant wanted to put up on Plot No. 6235 for approval, he discovered that the plot had no access road. He stated that he discussed the issue with the 2nd plaintiff who agreed to have the road created through the suit property to Plot No. 6235 and the RIM amended accordingly. He stated that the 2nd plaintiff undertook to go to the lands office to assist in putting the missing access road on the RIM. He stated that the plaintiffs later changed their minds and as such the access road to Plot No. 6235 was not created. He stated that after the plaintiffs filed this suit, the 2nd plaintiff blocked the 1st defendant's access road to Plot No. 6235 through the suit property. He reiterated that the subdivision of the original parcel was approved by the City Council of Nairobi on condition that a strip of land measuring 12 m that was reserved for a road was to be surrendered to the government. He stated that the said approval was disowned by the 2nd defendant which termed it a forgery. He stated that the proper procedure was not followed during the subdivision of the original parcel and that explained why there was a problem on the ground regarding access road.

He told the court that the 1st defendant's plot did not have an access on northern part. He stated that what was referred to by the plaintiffs as a 3m road on the northern part of Plot No. 6235 was a foot path that had been provided by the owners of the neighbouring plots to access a grave yard. The 1st defendant stated that according to the approved plan that was prepared for the subdivision of the original parcel, a 9 m access road to Plot No. 6235 was reserved. He stated that if the court grants the reliefs sought by the plaintiff, the 1st defendant would be left without access to its property. He stated that from the agreement of sale between the plaintiffs and Gitau, the portion of the original parcel that was sold to the plaintiffs measured 0.10ha. only and yet the title they held was for 0.13ha. He stated that plaintiffs' land had increased in size following the annexation of the road of access to Plot No. 6235. He stated that the subdivision that gave rise to the suit property was irregular and that if Plot No. 6235 was to have no access, it will be of no use. He stated that the 1st defendant's counter claim was in pursuit of its right of access to Plot No. 6235. He stated that a proper subdivision should be conducted to provide an access road for Plot No. 6235. He stated that when the 1st defendant bought Plot No. 6235, there were toilets standing next to the disputed access road that were sold to it together with the plot and that the 2nd plaintiff demolished the same without notice. He stated that the 1st defendant was claiming damages for the demolished structures and the loss suffered as a result of its inability to develop Plot No.6235 following the refusal by the 2nd defendant to approve its building plans. He urged the court to grant the reliefs sought in the 1st defendant's counterclaim and to dismiss the plaintiffs' suit. He produced a number of documents as exhibits.

Submissions and determination of the issues arising.

The 2nd defendant closed its case without calling evidence. After the conclusion of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 27th November, 2019, the 2nd defendant filed its submissions on 17th June, 2020 while the 1st defendant filed his submissions on 30th June, 2020. I have considered the pleadings, the evidence tendered and the submissions of the respective counsels. In my view, the main issues that arise for determination in this suit are the following;

1. Whether there is a road of access through the suit property to Plot No. 6235.
2. Whether the plaintiffs are entitled to the reliefs sought against the defendants.
3. Whether the 1st defendant is entitled to the reliefs sought against the plaintiffs in the counter-claim.
4. Who should bear the costs of the suit?

Whether there is a road of access through the suit property to Plot No. 6235.

There is no dispute that the suit property and Plot No. 6235 are subdivisions of the original parcel. It follows therefore that, any road of access to the two parcels of land either existed as at the time of the subdivision of the original parcel or was created during the subdivision. From the evidence on record, the original parcel was subdivided in 2012 although the process of subdivision started in 2011. According to the mutation form through which the original parcel was subdivided to give rise to the suit property and Plot No. 6235, the suit property was supposed to measure 0.139 ha. while Plot No. 6235 was supposed to measure 0.081ha. The subdivision was carried out by Gitau who was the owner of the original parcel. It is not disputed that the suit property measures 0.139ha. while Plot No. 6235 measures 0.081ha. in accordance with the mutation form. In the mutation form, the only road that was provided for during the subdivision of the original parcel was that for accessing the suit property. I am in agreement with the 2nd plaintiff, PW1 and PW2 that no road of access was provided for through the suit

property to Plot No. 6235 and that the said road that was provided for during the subdivision was not meant to serve Plot No. 6235. It is my finding therefore that there is no road of access through the suit property to Plot No. 6235.

The 1st defendant contended that the subdivision of the original parcel was approved by the City Council of Nairobi on condition that a 12 m road of access was to be created from an existing main road in the southern part of the original parcel to serve both the suit property and Plot No. 6235. The 1st defendant contended that the subdivision aforesaid should have been in accord with the plan that was approved by the City Council of Nairobi and since it did not, the same was fraudulently carried out rendering it null and void. In proof of that illegality, the 1st defendant placed before the court what it claimed to have been the approval that was given by the City Council of Nairobi on 28th September, 2011 for the subdivision of the original parcel. Surprisingly, the 1st defendant also produced in evidence a letter from the 2nd defendant disowning the purported approval and declaring it a forgery. The said letter from the 2nd defendant rendered the purported approval of no evidential value as concerns the conditions under which the subdivision of the original parcel was approved by the City Council of Nairobi if indeed there was such approval. It follows therefore that the only official documentary evidence on the manner in which the owner of the original parcel wanted to subdivide the same and proceeded to do so is the mutation form. Since the purported approval by the City Council of Nairobi which purportedly imposed a condition for the creation of a 12 m access road to the suit property and Plot No. 6235 by the 1st defendant's own evidence was a forgery, there is no basis upon which this court can find that the subdivision of the original parcel was fraudulent and illegal. I wish to point out also that from the evidence before the court, the 1st defendant purchased Plot No. 6235 after the subdivision had been completed and a separate title issued for the property. I believe that if he had engaged a surveyor at that stage, he would have learnt that there was no road of access to Plot No. 6235 through the suit property and that during the subdivision of the original parcel, the access road that was left to serve the plot was a 3m road on the northern part of the property. For the reasons that I will give later in this judgment, this court cannot determine in these proceedings whether the said 3m road is adequate access for Plot No. 6235. What I can say for now is that there is no evidence before the court of the existence of an access road through the suit property to Plot No. 6235 or of an intention to create one. There is also no evidence to support the 1st defendant's contention that the subdivision of the original parcel was carried out illegally and fraudulently. I wish to add that for the court to make a finding that the subdivision of the original parcel was illegal and fraudulent, the 1st defendant should have joined Gitau, the owner of the original parcel who carried out the subdivision as a party to the suit.

Whether the plaintiffs are entitled to the reliefs sought against the defendants.

In view of the findings that I have made above, I am satisfied that the plaintiffs have proved their claim against the defendants. The plaintiffs have proved that they are the registered owners of the suit property and that the defendants have no basis for interfering with the enjoyment of their proprietary rights to the property. The 1st defendant has no right to use the property to access Plot No. 6235. The 2nd defendant which claimed that due process was not followed in the subdivision of the original parcel did not tender any evidence at the trial to substantiate those claims. The plaintiffs are in the circumstances entitled to the declaratory and injunctive reliefs sought in the amended plaint.

Whether the 1st defendant is entitled to the reliefs sought against the plaintiffs in the counter-claim.

The 1st defendant has not established that the subdivision of the original parcel was approved on condition that a 12m road of access would be created to serve among others Plot N. 6235. Even in the purported approved subdivision plan, there is no mention of a 12m road. The 1st defendant is therefore not entitled to the declaration sought. There also no basis laid in these proceedings for compelling the 2nd defendant to create a road of access through the suit property to Plot No. 6235. In the event that Plot No. 6235 is landlocked as claimed by the 1st defendant or that the 3m road that was meant to serve it is inadequate, the 1st defendant can bring proceedings under section 140 of the Land Act, 2012 for an access to be provided for Plot No. 6235. The 1st defendant's counter-claim herein was not brought for that purpose. The 1st defendant sought a road of access as of right. The court cannot therefore consider the 1st defendant's need for an access road to Plot No. 6235 under section 140 of the Land Act, 2012. For the reasons I have given above, the injunctive reliefs sought by the 1st defendant have no basis and are not for granting. There is also no basis for the mesne profits and damages sought. The damages sought are in the nature of special damages. The same was neither specifically pleaded nor proved.

Who should bear the costs of the suit?

Award of costs is at the discretion of the court. In this case, the plaintiffs have succeeded in their claim against the defendants. No reason has been advanced that would justify denying the plaintiffs the costs of the suit. The costs would however be borne by the 1st defendant whose conduct led to the filing of this suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendants in terms of prayers (a), (b), and (c) in the amended plaint dated 12th July, 2016. The 1st defendant's counter-claim is dismissed. The plaintiffs shall have the costs of the suit and the counter-claim to be paid by the 1st defendant.

Dated and Delivered at Nairobi this 17th Day of December 2020

S. OKONG'O

JUDGE

Judgment read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Masese for the Plaintiffs

Mr. Mutahi for the 1st Defendant

Mr. Gituma for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant