



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA AT MERU**

**E.L.C CASE NO. 86 OF 2010**

**BONIFACE MUGAMBI MARETE** Suing as Legal Representative of  
**S.M MARETE M'AMBURU**.....**PLAINTIFF**

**-V-**

**THE DISTRICT ROADS ENGINEER LAIKIPIA**

**EAST DISTRICT**.....**1<sup>ST</sup> DEFENDANT**

**THE PERMANENT SECRETARY**

**MINISTRY OF ROADS**.....**2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL**.....**3<sup>RD</sup> DEFENDANT**

**JUDGMENT.**

1. The plaintiff instituted this suit by a paint filed in court on 29<sup>th</sup> June 2010, seeking the following reliefs as against the defendants;
  - a. **A declaration that LR No. ONTULILI/ONTULILI/BLOCK 1 (KATHERI) 1252,1253,1254,1255 and 1256 are the property of the plaintiff and that the 1<sup>st</sup> defendant had no jurisdiction over the same**
  - b. **A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have no rights whatsoever to plan and make any roads or roads across the plaintiff's LR NO. ONTULILI/ONTULILI/BLOCK 1 (KATHERI) 1252, 1253, 1254, 1255 and 1256.**
  - c. **Payment of the value of the land damaged and the damaged developments thereon at Kshs 22,500,000.00 as pleaded above.**
  - d. **Payment of the loss of user and lost rents and/or mesne profits.**
  - e. **Costs and interests.**
  - f. **Any further or better relief as the court may deem fit to grant.**
2. Briefly, the plaintiff's case was that he was the son of S.M Marete (deceased) and that he had brought this suit on behalf of the estate and that the deceased was at all the material time the sole registered proprietor of **Land Reference No's Ontulili/Ontulili Block 1 (Katheri) 1252,1253,1254, 1255 and 1256** (hereinafter the suit property). It was his case that on 28<sup>th</sup> August 2009, the 1<sup>st</sup> and 2<sup>nd</sup> defendants unlawfully made two roads across the said parcels of land despite a court order barring them from doing so or damaging the deceased property. The plaintiff contended that the deceased had developed the land extensively and has therefore suffered loss and damage thus provoking the instant suit.
3. The defendants on the other hand denied the plaintiff's allegations and urged the court to dismiss the suit.
4. **PW1 was Boniface Mugambi Marete.** He adopted his witness statement filed in court on 23<sup>rd</sup> March 2012 and testified that he was bringing this suit in his capacity as a Legal Representative of the Estate of his father S.M Marete (deceased) and that at all material times his father was the registered owner of the suit property. It was his further evidence that on 14<sup>th</sup> September 2009, the defendants without any colour of right unlawfully and illegally unprocedurally entered the suit land and maliciously destroyed and demolished several properties

belonging to the Estate of his father despite a court order restraining them from doing so and that further the defendants actions were unlawful in that the suit property was private land and that the relevant index map did not provide for the intended roads and there was no acquisition made as required by law and that the suit property had been extensively developed for more than 15 years and the same valued at over Kshs 16,900,000/= at the time. Consequently, he asked the court to declare that the said portions of land legally belonged to the Estate of his father and the defendants had no legal right to plan and make roads on the suit property.

5. **PW2 was Douglas Gikunda Ruchiua** retired senior chief of Ontulili location. He adopted his witness statement dated 22<sup>nd</sup> November 2017 and testified that he knew the plaintiff herein as he had known his father (S.M Marete-deceased), since his childhood as a Senior Chief of Ontulili location where he had properties that were damaged by the defendants and that as a chief then, he witnessed issuance of title deeds at Katheri together with the D.C including the issuance of title deeds belonging to the deceased. It was his further evidence that the suit property was situated within Meru county and not Laikipia County and that there were beacons on the ground indicating the same and that there was no road on the deceased property as alleged by the defendants.

6. **PW3 was David Kirimi**. He adopted his witness statement dated 23<sup>rd</sup> March 2012 and testified that on or about 14<sup>th</sup> September 2009, at about 9.00AM while at his place of work at Makutano, a tractor belonging to the ministry of works which was escorted by policemen in uniform came and began demolishing S.M Marete's buildings . It was his further evidence that a lot of loss was caused on the said properties as he watched.

7. **P4 was Doris Kagundu**. She adopted her witness statement dated 23<sup>rd</sup> March 2012 and testified that on or about 11<sup>th</sup> september 2009, at about 9AM, the defendants and their agents/servants came to the suit property where she was working as a caretaker and immediately disconnected electricity and soon thereafter commenced demolishing and destroying everything on the land. It was her further evidence they did not notify them of the demolition and that further the same was done in an inhumane manner.

8. **PW5 was Godfrey Muthuma** a valuer and an estate agent. He produced a valuation report dated 1<sup>st</sup> September 2009, conducted by him in respect of the suit property pursuant to instructions given to him by the plaintiff. According to the report, the open market value for the suit property was Kshs 22,500,000 broken down as follows; land 5,600,000 and improvements Kshs 16,900,000/=.

9. **DW1 on the other hand was Naftaly Mutegi**, a surveyor with the Ministry of Lands. It was his evidence that the suit property borders Turkuma in Laikipia. It was his evidence that the old Meru/Nanyuki road was passing through the suit property and that when he digitized that section of Ontulili and Turkuma, the old road could be seen as well as the new road visibly on the sketch. It was his further evidence that he also checked the same on the Google maps and images of the two roads were visible. It was his further evidence that he also looked at the mutation forms adjacent to parcel No. 1256 which has been subdivided into parcels 1712-1735 and there was no indication that the road passes through parcel no 1265 which was sub divided.

10. After close of the respective parties' case, they were directed to file submissions. It was submitted for the plaintiff that by the defendants demolishing the property forming part of the deceased estate which was erected on the suit property, the state through the defendants arbitrarily deprived the estate of the deceased its property and failed to allow it to access a court of law before the said demolition took place and it was not in doubt that the deceased estate suffered loss and damage occasioned through illegal and unlawful demolition of the property through the action of the defendants. It was further submitted that the defendants carried out the demolition in contravention of an existing court order in Civil Suit No. 450 of 2009 issued on 9<sup>th</sup> September 2009 and that therefore the action was illegal, null and void.

11. On the other hand, it was submitted for the defendant that there was no valid court order against them that barred them from undertaking the exercise of reopening a public road since they were not parties to Meru CMCC No 450 of 2009 which was against the municipal Council of Nanyuki and neither was the defendant's agents employees or servants of the Municipal council of Nanyuki and that it was therefore apparent from the face of the order that the same was not addressed or applicable as against the defendants. It was further submitted for the defendants that that the plaintiff was well aware that the suit property was built on a road reserve and was illegally thereon and that from the plaintiff's exhibits, in court proceedings in Nanyuki SRM case No.9 of 1995, the court rightfully therein observed that the buildings were illegally constructed without authority and ordered the plaintiff to go sit with the defendant and attempt to regularize the illegal constructions and that despite this olive branch, the plaintiff never tried in any way to regularize the same 10 years after the court had directed him to do so. It was further submitted that the plaintiff had not demonstrated why the mother Elizabeth Ncekei could not bring her own suit in respect of 1254, 1255 and 1256 as there was no corresponding letters of administration if the mother is deceased or any record to indicate where the mother was and why she didn't testify if alive.

12. With regard to loss, it was submitted that the valuation report which formed the basis of the claim for compensation should be dismissed as it did not sunctily state the value of each property and the constructions thereon but binds 5 properties together not stating which property was located where, the value of that property and the constructions thereon.

### **Disposition**

13. I have carefully considered the evidence on record, the rival submissions by the parties and the authorities in support thereof.

14. PW1 testified that he was bringing this suit in his capacity as a Legal Representative of the Estate of his father S.M Marete (deceased) and that at all material times his father was the registered owner of the suit property. It was his further evidence that on 14<sup>th</sup> September 2009, the defendants without any clour of right unlawfully and illegally unprocedurally entered the suit land and maliciously destroyed and demolished several properties belonging to the Estate of his father despite a court order restraining them from doing so. In cross examination he stated inter alia that in CMCC NO. 450 of 2009, the defendant was the Municipal Council of Nanyuki and that the Ministry of Roads was not a party to the suit though they gave them a copy of the order. He further stated they gave them a copy of the order though there were no evidence that they had been served. He further stated that he was not aware if the buildings had been approved.

15. PW2 on the other hand testified of having witnessed issuance of title deeds at Katheri to the deceased (S.M Marete) but later heard that

the same were allegedly illegally demolished. In cross examination, he stated that he had no document to show that an access road had been created in the land of Mr Marete. He further appeared to contradict himself when he stated; ***"I cannot confirm whether the plaintiff was served with the notice. I am aware of a demand by the ministry of public works for the demolition of the structures belonging to the plaintiff."***

16. PW3 and 4 on the other hand testified of having witnessed the plaintiff's property being demolished by the defendants. PW4 caretaker at the premises readily admitted that they had indeed been given a notice of the said demolition.

17. DW1 on the other hand was Naftaly Mutegia surveyor with the ministry of lands. It was his evidence that the suit property borders Turkuma in Laikipia. It was his evidence that the old Meru/Nanyuki road was passing through the suit property and that when he digitized that section of Ontulili and Turkuma, the old road could be seen as well as the new road visibly on the sketch. It was his further evidence that he also checked the same on the Google maps and images of the two roads were visible. It was his further evidence that he also looked at the mutation forms adjacent to parcel No. 1256 which has been subdivided into parcels 1712-1735 and there was no indication that the road passes through parcel no 1265 which was sub divided. His evidence towards this respect remained unchallenged even in cross examination.

18. On 9<sup>th</sup> September 2009 in Meru CMCC NO. 450 of 2009, Hon A.K Mwicigi had issued an injunction order restraining the defendant in that suit namely; **Municipal Council of Nanyuki** from entering, making roads, demolishing or damaging the plaintiff's property or otherwise interfering the same. None of the present defendants was a party to that suit. The plaintiff admitted as such in cross examination and further added that though the Ministry of Roads was not a party to that suit, they gave them a copy of the said order. He however offered no evidence to support these contentions. Even if it was to be accepted that indeed Ministry of Roads was served with the alleged court order, the same would be null and void and of no legal effect since they were not a party to that suit. The issue of disobeying of court orders does not therefore arise.

19. It is also not lost to this court that in Nanyuki SRMCC NO. 9 OF 1995, the deceased had filed suit against the Municipal Council of Nanyuki seeking inter alia an order to restrain the defendant from interfering with the suit property which suit was dismissed on 29<sup>th</sup> May 2001 with the court inter alia observing that the buildings built on the suit property were done without approval and directed the plaintiff and the defendant to work out modalities on how the plaintiff could obtain these approvals. It is apparent that the plaintiff took no action to regularize this position. The plaintiff strikes me as an indolent person who has slept over his rights.

20. It is also not in dispute that on 28<sup>th</sup> August 2009, the plaintiff was served with a 14 days' notice to remove structures along the suit property and he apparently took no action culminating with 2<sup>nd</sup> defendant issuing him with a letter for reimbursement of demolition expenses dated 17<sup>th</sup> September 2009. It would appear that the plaintiff sat pretty easy till 29<sup>th</sup> June 2010, when he filed the instant suit long after the property had been demolished.

21. In ***Snell's Equity, 30th Edition at p 33 para 3-16***(quoting Lord Camden L.C in *Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n*) **it is asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."**

22. In dealing with laches, ***Halsbury's Laws of England, 4<sup>th</sup> ed. Vol. 16(2) at 910*** has this to say;

***"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant , not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches')."***

23. Lord Selbourne L.C. delivering the opinion of the Privy Council in ***The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221*** said at page 240:

***"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."***

24. I fully associate myself with the sentiments expressed by the Learned Judge in the above cited judgments and the Learned Authors.

25. Taking into totality all the circumstances in this case, and in light of the defendant's evidence which remained uncontroverted, I am not satisfied that the plaintiff has been able to proof his case to the required standard namely; proof on a balance of probabilities.

26. Suffice to say that the plaintiff had filed two other cases in the lower court being SRMCC No. 9 of 1995 (Nanyuki) and CMCC No. 450 of 2009 (Meru). In the former suit, the suit was filed against the then Nanyuki Municipal council and one D. Riri seeking the following orders:

- (i) An order restraining the defendants jointly and severally from interfering with the plaintiffs plot No. 1252 Katheri farmers.

- (ii) The defendants be ordered to return to the plaintiffs his properties which were wrongly taken or their value.
- (iii) The defendants to be ordered to pay general damages to be quantified at the hearing.
- (iv) Costs of and incidental to this suit.
- (v) Interest at court rates.

27. At the conclusion of the case the trial court dismissed the suit in its entirety. The same plaintiff filed the subsequent suit in Meru being CMCC No. 450 of 2009 (Meru) where he obtained temporary injunction orders on 9<sup>th</sup> September 2009. Despite these previous two cases which the plaintiff has even referred in paragraph 8 of his plaint, he has brazenly averred in paragraph 12 of the same plaint dated 24/6/2010 that there is no other suit pending in court and there have been no previous proceedings between the parties over the same subject matter. Those averments cannot be correct. The truth of the matter is that the plaintiff had sued different parties over the ownership of the same subject which was dismissed but the plaintiff did not prefer an appeal to the superior court.

28. Accordingly, the plaintiff's suit is without merit and the same is accordingly dismissed with no order as to costs.

**READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2019**

**E.C CHERONO - JUDGE**

**In the presence of:**

- 1. Ms. Rimita for plaintiff**
- 2. Mr. B. Kimathi for the defendant**
- 3. C/A Kananu**