



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 300 OF 2013**

**JOSHUA ONZERE KIJEDI .....PLAINTIFF**

**VERSUS**

**ISAAC LISALIZA**

**LAND REGISTRAR, KAKAMEGA**

**DISTRICT SURVEYOR, KAKAMEGA.....DEFENDANTS**

**JUDGEMENT**

This case is that at all material times, the plaintiff is the registered absolute proprietor of that parcels of land known as South Kabras/Shamberere/2664 and 2665. That on the 25<sup>th</sup> day of April, 2013 or thereabout the 2<sup>nd</sup> defendant in company of the 3<sup>rd</sup> defendant and under the instructions of the 1<sup>st</sup> defendant encroached by trespassing on the plaintiff's parcel of land known as South Kabras/Shamberere/2664 and created a road of access without the plaintiff's consent and/or at all. The plaintiff avers that the defendants maliciously and without any colour of right opened the road of access and cut down trees from his farm and holds the defendants liable. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) An order of permanent injunction restraining the defendants, their agents, employees, servants and/or anybody claiming through them from opening the road of access through land parcel NO. Kabras/Shamberere/2664.
- (b) An order directing the District Surveyor and District Land Registrar Kakamega district to close the road of access to land parcel No. Kabras/Shamberere/2664.
- (c) Costs of this suit.
- (d) Any other relief this honourable court deems just and fit to grant.

The 1<sup>st</sup> defendant denies that alleged access road was created on 25<sup>th</sup> April, 2013 by 2<sup>nd</sup> defendant as alleged but avers that the said access road was created long since 1995 to access 1<sup>st</sup> defendant's land when the original number S. KABRAS/SHAMBERERE/141 was sub divided by the original owner one Joseph Amondo Munyando creating new numbers S. KABRAS/SHAMBERERE/2001 and S. KABRAS/SHAMBERERE/2002. The 1<sup>st</sup> defendant avers that he is the registered proprietor of all that land parcel known as S. KABRAS/SHAMBERERE/2002. The 1<sup>st</sup> defendant avers that on the alleged date, 25<sup>th</sup> April, 2013 the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant's visit was only to open the access road that the plaintiff had blocked which access road was duly created long since 1995, hence the alleged trespass and or encroachment is a false allegation. The defendant produced the area map and mutation form to show where that road is marked DEx 2 and 3. He also confirmed from the surveyors report the position of the access road DEx7. From the letters to the plaintiff it shows he has severally been asked to clear the access road DEx 8 and 9.

This court has carefully considered the plaintiff's and the defendant's cases and the submissions therein. It is not disputed that the plaintiff is the registered absolute proprietor of that parcels of land known as South Kabras/Shamberere/2664 and 2665. It is also not disputed that the defendant is the registered absolute proprietor of that parcel of land known as South Kabras/Shamberere/2002. The issue in contention is that, on the 25<sup>th</sup> day of April, 2013 or thereabout the 2<sup>nd</sup> defendant in company of the 3<sup>rd</sup> defendant and under the instructions of the 1<sup>st</sup> defendant encroached by trespassing on the plaintiff's parcel of land known as South Kabras/Shamberere/2664 and created a road of access without the plaintiff's consent and/or at all. I have perused the documents produced in court by both parties and specifically the surveyors report dated 8<sup>th</sup> May 2013. It states that;

*“There was no existing boundary that marked the road access. There was no boundary between 2665 and 2664 and it showed that the owner of parcel 2664 had made a combination of the two parcels but the map has not been amended on the ground to effect the*

*boundary on the ground.”*

I find that the road access does exist on 2665 and 2664 and the plaintiff cannot say he does not agree with it and that he was not involved in opening of the access road by the surveyors. The maps and mutation forms of 1995 are clear that the road access does exist and should be opened up. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same. I find the counter claim has merit and I grant the following orders;

1. That the access road used by the 1<sup>st</sup> defendant to access his land parcel No. South Kabras/Shamberere/2002 through land parcels No South Kabras/Shamberere/2664 and 2665 blocked by the plaintiff be ordered re-opened forthwith by uprooting all the trees planted by the plaintiff.
2. The plaintiff is permanently restrained from interfering with the access road once the same is re-opened.

Since the parties are neighbors there will be no orders as to costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> DAY OF FEBRUARY 2019.**

**N.A. MATHEKA**

**JUDGE**