



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 102 OF 2017

WILFRED LIMIRI MUKUCHIA.....1ST PLAINTIFF

KAYOI THAMUTA MUGWIKI.....2ND PLAINTIFF

STEPHEN MUCHUI MWORIA.....3RD PLAINTIFF

NTUARA MUKUCHIA.....4TH PLAINTIFF

FRANCIS MWIKA.....5TH PLAINTIFF

GEOFFREY MUNGORI.....6TH PLAINTIFF

SAMWEL KILEMI AKWALU.....7TH PLAINTIFF

DAVID KIRIANKI NGEERA..... 8TH PLAINTIFF

JEREMIAH KINYUA.....9TH PLAINTIFF

LINTARI KENNETH GITONGA.....10TH PLAINTIFF

GODFREY NKUMBUKU.....11TH PLAINTIFF

JULIUS GAKUBI MUKUONGO.....12TH PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MERU.....DEFENDANT

JUDGMENT

Background

1. The plaintiffs are residents of Mbuya Kalimba area in Meru County, within which lies a hospital known as Miathene District hospital. The genesis of the dispute is that the hospital administration closed or attempted to close some public roads in its vicinity thus blocking plaintiffs' access to their homes.
2. The initial plaint was filed on 23.3.2017 along with an application for orders of temporary injunction restraining defendants from blocking the roads of access. The injunction orders were granted at the ex parte stage on 27.3.2017 and were confirmed on 27.9.2017.
3. It appears that there was no compliance with the injunction orders prompting the plaintiff's to file an amended plaint on 1.3.2018 to capture the prayer for the removal of the barricades.
4. The defendant's filed a memorandum of appearance on 6.4.2017 but not a statement of defence.

5. Just before the commencement of plaintiff's case on 23.5.2018, defence had sought for an adjournment ostensibly in order to settle the matter out of court and to record a consent to that effect in a weeks' time. The plaintiff's case proceeded on that day of 23.5.2018 and defence side was given another date 26.7.2018 to prepare for the trial or to settle the matter. Come 26.7.2018 and there was neither a settlement nor did the defence have any witnesses. Defence counsel requested the defence case to be marked as closed.

6. As the matter was pending judgment, defence filed an application to re-open the case which application was not prosecuted and was dismissed on 27.11.2018 for want of prosecution.

Plaintiff's case

7. Plaintiff's case is that they are residents of **Mbuya/Kalimba area of Tigania West sub-county in Meru County** and own land parcel numbers 542, 6485, 3717, 2211, 3718, 6519, 5991, 1554, 1603, 9141, 2827 and 42220 respectively in that area.

8. The plaintiffs access their homes through two public roads known as **Miathene to Kalimba primary school** through Miathene sub-district hospital and **Miathene to Kanjalu coffee factory** through Miathene sub-district hospital. The two public roads were duly planned and existed in official Government records since **1966** and as such, the roads have been in use since then.

9. Without any color of right and in blatant contravention of the law, the officers of the defendant namely the Executive member for health and his counter-part for transport and infrastructure gave an oral notice for closure of the two public roads aforesaid. They then deployed a contractor on the ground to permanently barricade and close the public roads.

10. The plaintiffs' aver that during the pendency of this suit and while injunctive orders were in force, the defendant's agent namely **Mrs. Mutuma the administrator Miathene District Hospital** has continued to block the road in issue by erecting structures thereon in blatant disregard of court orders. Plaintiffs' state that defendant's officer's action have no basis in law and if allowed to stand, will deprive the plaintiffs their right of use of the public roads aforesaid and deny them access to their homes with ease or at all.

11. Plaintiff's pray for judgment against the defendant for;

a. An order of permanent injunction restraining the defendant, its agents, servants or anyone acting through it from barricading, closing or in any manner whatsoever interfering with the public roads known as Miathene to Kalimba Primary school through Miathene sub-district hospital and Miathene to Kanjalu coffee factory through Miathene sub-district hospital.

b. An order directing the defendant, its agents or servants to remove any offending structures erected or standing on the roads in issue and in default the court bailiff be empowered to remove any such offending structures at the defendant's cost.

c. Costs of the suit.

12. **PW 1, Wilfred Limiri Mukuchia** is the 1st plaintiff and he testified for and on behalf of the other plaintiffs. He also adopted his statements as evidence. He avers that the public roads in question have been in existence and in use since 1966.

13. The plaintiff's and other members of the community had apparently written a memorandum to the defendant to protest the closure of the two public roads but they were ignored. Instead the roads were barricaded. Guards were then deployed on site to prevent the plaintiffs from using the roads.

14. The plaintiffs site one Mrs. Mutuma, the hospital administrator as the culprit in the blockage of the roads but they aver that the hospital is under the county government. Even after the plaintiffs' obtained a court order restraining the defendants from blocking the road, defendant went on to put structures to fence the road completely. They also apparently constructed a house in the middle of the road.

15. In support of their case, plaintiffs have produced the following documents as their exhibits;

1. Honourable Judge Njoroge's order of 27.3.2017 (Plaintiff Exhibit 1)
2. The original area map (Plaintiff exhibit 2)
3. The scene visit report (Plaintiff exhibit 3)
4. A photograph showing the structure and the wire barricade (Plaintiff Exhibit 4)
5. Memorandum of complaint (Plaintiff Exhibit 5)

16. PW 1 avers that the community members now have a problem accessing the schools, the hospital, the coffee factory and the market due to the closure of the roads.

Defence case

17. Defendant did not call any witnesses though it was duly represented during the trial.

Determination

18. I have considered the pleadings herein, the evidence tendered and the rival submissions. I frame the issues for determination as follows;

- i. Whether there existed two/three public roads.
- ii. Whether the said roads have been barricaded.
- iii. Whether the prayers for a permanent injunction as well as the removal of the barricades are merited

Whether there existed two/three public roads.

19. Under **section 2** of the **Public Roads and Roads of Access Act**, Public roads are defined as;

a. “Any road which the public had a right to use immediately before the commencement of the Act;

b. All proclaimed or reserved roads and thorough fares being or existing on any land sold or leased or otherwise held under the East African Land Regulations 1897, the Crown Lands Act 1902, or the Government Lands Act (cap280) at any time before the commencement of this act.

c. All roads and thorough fares hereafter reserved for public use”.

20. I find that plaintiffs’ exhibit 2 is the **area map** for **KIANJAI SUBLOCATION SHEET NO. 24**. The roads in question have been shaded in green. They are three roads which have one convergence at the hospital. No evidence has been adduced to challenge the existence of this document.

21. During the course of the trial, the court had ordered for a scene visit and a report to that effect was availed by the Court’s Executive Officer. The observations in that report were that there was a road from Miathene shopping Centre on the North Eastern side which cuts through the hospital. There is also a road which branches from the hospital towards Kalimba Primary school. There is also another road that passes between the hospital main blocks and the staff quarters and is the one known as Miathene Kanjalu coffee factory road.

22. The map and the scene visit report do corroborate PW 1’s evidence that the public roads had been in existence. The roads appear to be three.

Were the public roads blocked?

23. Plaintiff exhibit 5 is the **Mbuya/Kalimba Community letter** to the defendant. The community members were expressing their displeasure in respect of the intention by the defendant to close the roads. Defendant has again not rebutted the existence of this letter.

24. According to the scene visit report, it was observed that for the **Miathene shopping Centre hospital road;**

“About 200 metres there are mounds of concrete on the road and on the side of the road, there is an abandoned metal grill gate. On inquiry, 1st plaintiff stated that these are remnants of barricades erected by the hospital. The hospital administrator agreed that the hospital erected the barricade but the community demolished it in April 2017”.

25. For the **Miathene-Kalimba primary school road**, the observations made during the scene visit were that **the road had been blocked but blockage had been brought down.**

26. For the **Miathene Kanjalu coffee factory road**, the observations were that **“the road was blocked by a recently built stone building and there was recently dug out dump pit. The road is blocked by old iron sheets, barbed wire and mesh wire. It was however clear that there used to be a road that used to pass through the hospital to Kanjalu Coffee factory”.**

27. The scene visit was conducted sometime between 31.5.2017 (when order for scene visit was made) and 5.7.2017 (when report was compiled). The hospital administrator had apparently claimed that the blockage was done a long time ago. The plaintiffs claimed the road was blocked in May 2017 while it was observed that the road had been in disuse probably for about six months.

28. During his testimony PW 1 stated that after the court order (injunctive order) was served, it is when the defendant went on to erect the structures to fence the road completely (**the Miathene Kanjalu factory road**), whereby a structure was constructed right in the middle of the road.

29. From the foregoing it is clear that two of the roads (Miathene shopping Centre road and Miathene – Kalimba primary schools) had been blocked but were somehow unblocked.

30. For the Miathene Kanjalu coffee factory road, the road is completely blocked. It is rather surprising that defence would make submissions to the effect that there are no barricaded roads yet their own officer, the hospital administrator was present during the scene visit where she made her comment regarding the barricades. The claim by the hospital administrator was that the road was blocked a long time ago.

31. I have no doubt that the defendant had blocked the roads in question where by two of the roads have been unblocked by the area residents.

Are the prayers in the plaint merited?

32. Section 14 of the **Public Roads and Road of Access Act** provides that:

“It shall be competent for a board for sufficient cause to order the cancellation or alteration of the alignment of a road of access, provided due notice has been previously given to any person who might be affected by such order.....”.

33. Thus a public road can only be altered in accordance with the law. The case of **Mary Njeri Gatuha & 3 others vs George Muniu Mungai & 5 others (2017)eKLR** cited by defence can therefore be distinguished from the instant suit since in the Mary Njeri case, the court was dealing with the issue as to whether the road in question was a private one.

34. I am appalled by the flippant manner in which the defendant has conducted this matter during the pendency of the suit. The defence did not participate in the prosecution of the application for injunction, they also did not call any witnesses during the trial. Yet the person who is allegedly lording it over the community, one Mrs. Mutuma, the hospital administrator is available and even participated in the scene visit proceedings. At some point, on 23.5.2018, defendant was offering to settle the matter in a week’s time! This did not come to pass.

35. I am in agreement with plaintiff’s submissions that the actions of defendant to bar and restrict the plaintiffs from using the roads were not anchored on any valid legal foundation and this is a clear case where defendant is attempting to trump and negate the rights of the community.

36. I therefore conclude that plaintiffs have proved their case on a balance of probability.

37. Final orders:

1. An order of permanent injunction is hereby issued restraining the defendant, its agents, servants or anyone acting through it from barricading, closing or in any manner whatsoever interfering with the public roads known as Miathene to Kalimba Primary school through Miathene sub-district hospital and Miathene to Kanjalu coffee factory through Miathene sub-district hospital, or the road to the Miathene shopping centre.

2. An order is hereby issued directing the defendant, its agents or servants to remove any offending structures erected or standing on the roads in issue and in default the court bailiff is empowered to remove any such offending structures at the defendant’s cost.

3. Defendant is hereby condemned to pay costs of this suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Nyaga for plaintiffs

Plaintiffs present

HON. LUCY. N. MBUGUA

ELC JUDGE