



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 570 OF 2017

(Formerly Milimani ELC No. 1303 of 2013)

AIMA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

ANDREW M. MWONGA.....1ST DEFENDANT

MRS. F. M. MWONGA.....2ND DEFENDANT

MARY NGENDO TIBA.....3RD DEFENDANT

ATTORNEY GENERAL (SUED FOR AN ON BEHALF

OF THE DISTRICT LAND REGISTRAR.....4TH RESPONDENT

JUDGEMENT

By a Counterclaim dated the 3rd December, 2013, the 1st and 2nd Defendants prays that the Plaintiff's suit be dismissed with costs and Judgement be entered in favour of the Defendants for:

- i) A declaration that the Plaintiff's parcel of land and the access road of which the location and size are as per the determination of the Kajiado District Land Registrar made on 30th September, 2013.
- ii) Mandatory injunction to issue against the Plaintiff to compel it to remove the stone wall erected across the said Road of access.
- iii) Permanent injunction to issue against the Plaintiff restraining it from ever blocking in any way the Road of Access of which the location and size were determined by the District Land Registrar, Kajiado on 30th September, 2013.
- iv) General and Punitive Damages for blocking a public road
- v) Costs of the suit

The Plaintiff did not file a reply to the Counterclaim and neither attended court to proceed with the matter. The court hence directed that the counterclaim be set down for hearing and determination.

Evidence of the 1st and 2nd Defendants

The 1st and 2nd Defendants are the registered proprietors of land parcel number Kajiado/ Kaputiei North/ 15744 which they purchased from David Somoire Shanka in 2004. The said parcel of land was excised from Kajiado/ Kaputiei North/ 14773 which was subdivided into 15743 and 15744 respectively. After purchase, they took possession of their land and their access road had been curved from Kajiado/ Kaputiei North/ 14773. There were other parties who bought land in the neighbourhood that have also used the said access road. The Plaintiff has blocked the access road by erecting a concrete wall across it claiming that it is within his parcel of land. They contend that when parcel 14773 was being subdivided, plaintiff's parcel number 14774 was there and the road was curved from parcel number 14773. They made a complaint to the District Land Registrar Kajiado who together with the District Surveyor and all parties involved, visited the area and made a determination of the common boundaries. The District Land Registrar issued a report dated the 30th September, 2013 in respect of the said common boundaries. They insist the Plaintiff has to remove the concrete wall which it had erected and blocked the access road. Further, the Plaintiff to confine its activities within the boundaries established by the District Land Registrar Kajiado in accordance with the report dated

the 30th September, 2013.

The Plaintiff though duly served did not attend court. The 1st and 2nd Defendants filed their submissions in respect of the counterclaim which I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the counterclaim herein, the following are the issues for determination:

- Whether the Plaintiff should be compelled to open the access road to the 1st and 2nd Defendant' parcels of land
- Whether general and punitive damages should be awarded to the 1st and 2nd Defendants
- Who should bear the costs of the suit.

As to whether the Plaintiff should be compelled to open the access road to the 1st and 2nd Defendant' parcels of land.

It is the 1st and 2nd Defendants' contention that the Plaintiff has blocked the access road to their plot claiming it is part of his land. They claim the Plaintiff has a habit of encroaching on peoples parcels of land. Further, the District Land Registrar deliberated on the issue herein and prepared a report dated the 30th September, 2013. In the said District Land Registrar's report , the Plaintiff was found to have blocked the access road which did not form part of his land.

I note the District Land Registrar is legally mandated to deal with boundary disputes as stipulated in section 18 and 19 of the Land Registration Act that provides as follows: **'18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).**

Section 19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries. (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel. (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.'

From the 1st and 2nd Defendants evidence, I note there is no dispute in relation to their title. The dispute only relates to the Road of Access. From the Land Registrar's Report dated the 30th September, 2013 prepared after the determination of the boundary dispute, he concluded as follows: **' From the observation as indicated above, it is clear AIMA Enterprises Limited encroached on land parcel number Kajiado/ Kaputiei North/ 27594 effectively blocking an access road to land parcel number Kajiado/ Kaputiei North/ 14774. Therefore the Land Registrar assisted by the Government Land Surveyor had no other option than except determine the approximate common boundaries between the land parcel number Kajiado/ Kaputiei North/ 14774 and Kajiado/ Kaputiei North/ 27594 (new numbers 29726; 29227 and 29228) and also demarcate the Access Road to land parcel number Kajiado/ Kaputiei North/ 15744, as per the Land Registration Act section 18(1) and (3) and Survey Ac, also mark you these general common boundaries are under Land Registration Act 2012 , which are normally approximated, hence not necessary the size(s) should be exact.'**

From this excerpt of the Land Registrar's report, which was produced as an exhibit, it is evident that it is the Plaintiff who has indeed encroached on the land by blocking the road of access. I note the Plaintiff though duly served twice, failed to attend court to controvert the 1st and 2nd Defendants' averments. It further failed to set down the main suit for hearing where it had sought restraining orders against the Defendants. Since the 1st and 2nd Defendants' hold title to their land, I find that this is prima facie evidence of their ownership and they are entitled to enjoy the same including any rights appurtenant thereto. By the Plaintiff erecting a wall to block the road of access to the 1st and 2nd Defendants' parcel of land, it is interfering with the 1st and 2nd Defendants' rights to freely access their land without interference from any party whatsoever. The 1st and 2nd Defendants' witness testified that the said road of access was used by the neighboring persons that had purchased land around. Since this evidence was not controverted by the Plaintiff, I find that this was a public road for all intents and purposes as described in section 2 of the Public road and Road of Access Act which provides as follows:'

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 Crown Lands Act, 1902 or the Government Lands Act (Cap 280) at any time before the commencement of the Act;

c. all roads and thorough fares hereafter reserved for public use.

I wish to refer to the case of Homescop Properties Ltd & another v David Gachuki & Pamela Odera Sued as Chairman & Secretary of Karen Ngong View Estate & another [2014] eKLR, where Justice Mutungi while dealing with a similar matter on road of access held as follows: **'Having regard to the provisions of the Public Roads and Roads of Access Act the court is persuaded there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. Limitation as to use may be as to the nature or type of vehicles that may not use such a road. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt.'**

In relying on the aforementioned legal provisions as well as being persuaded with the authorities and facts as presented, I find that the Plaintiff has indeed infringed on the 1st and 2nd Defendants' rights to freely enjoy their land by constructing a wall across their road of access.

As to whether general and punitive damages should be awarded to the 1st and 2nd Defendants

In terms of general damages, the 1st and 2nd Defendants have averred that they have suffered general and punitive damages as a result of the Plaintiff's blocking the road of access. The 1st and 2nd Defendants' witness however did not adduce any evidence on the loss they had incurred as a result of the Plaintiff's action. .

In the circumstances, I will decline to grant them general as well as punitive damages.

Costs

Costs generally follow the event, and in this instant case I do award the 1st and 2nd Defendants' the costs of this suit as they have been inconvenienced with the Plaintiff's actions as well as this suit.

In the circumstances, I find that the 1st and 2nd Defendants have proved their case on a balance of probability and proceed to dismiss the Plaintiff's suit for want of prosecution and enter judgment in favour of the 1st and 2nd Defendants and make the following final orders :-

- i) A Mandatory injunction be and is hereby issued against the Plaintiff and it is directed to remove the stone wall erected across the road of access within 90 days from the date hereof, failure of which the 1st and 2nd Defendants will be at liberty to demolish the said wall.
- ii) A Permanent injunction be and is hereby issued restraining the Plaintiff from ever blocking in any way the Road of Access of which the location and size were determined by the District Land Registrar, Kajiado on 30th September, 2013.
- iii) The costs of the counterclaim are awarded to the 1st and 2nd Defendants

Dated signed and delivered in open court at Kajiado this 28th day of March, 2019

CHRISTINE OCHIENG

JUDGE