



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 312 OF 2013

DANIEL KAMAU KARERA.....PLAINTIFF

=VERSUS=

CATHERINE WANGARI NYAGAH.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd February 2013 the plaintiff has filed this suit against the defendant seeking:-

(a) That the defendant do vacate from the public access road between Plot No. LR Lari/Magina/1239 and Lari/Magina/1238 forthwith so as to create a public access as per the mutation form.

(b) That the defendant do pay general damages to the plaintiff for the said unlawful encroachment upon the public access road.

(c) That costs of this case be awarded to the plaintiff.

2. Upon being served with the copies of the plaint and summons to enter appearance, the defendant entered appearance through the firm of M/S Gachoka Mwangi & Co. Advocates. She also filed a defence dated 22nd April 2013 and an amended defence and counterclaim dated 20th November 2013 in court on the same date.

3. PW1, Daniel Kamau Karera told the court that LR NO. Lari/Magina/1239 is registered in the name of his wife Jane Wanjiru Kamau. The adjacent plot Lari/Magina/1238 belongs to the defendant. He further told the court that the defendant has constructed on an access road. That as a result members of the public pass through his plot. He stated that he has suffered loss as he is unable to develop the plot. He has building plans approve but cannot construct because he was stopped by the Chief. He prays for general damages and that the defendant vacates the access road. He produced photographs of the scene as Exhibit P2. He called one witness.

4. PW2 Willis Sikasa a surveyor told the court that on 13th December 2014 he carried out a survey on LR NO. Lari/Magina/1239. He found that the dimensions on the mutation form did not tally with those in the ground. He also found that Plot No. LR Lari/Magina/1238 had encroached on a footpath. He produced his report and the mutation form as exhibit P2a and 2b respectively.

5. On her part the defendant Catherine Wangari Nyagah told the court that she is the registered owner of Land Parcel No. Lari/Magina/1238 which neighbours Lari/Magina/1239. She told the court that the two plots are separated by a path measuring about two meters. She denied that her building has encroached on the access path. She further told the court that the building plans were approved by Kiambu County Council. In support of her case she produced the following documents as exhibits: Lari/Magina/1076 sheet No 8; sketch map of Magina Sub location; letter dated 23rd August 2010 from the Chief Kijabe location addressed to the plaintiff; letter dated 2nd April 2009 from the County Commissioner of Kiambu addressed to the plaintiff herein; letter dated 1st February 2012 from the District Land Registrar; building plans approved by Kiambu County council; development plans for the area and copy of the title deed Lari/Magina/1238 as exhibit D1-D7 respectively.

6. She called one witness David Nyaga Ndogoh (DW2) who told the court that he was present when the surveyor visited the site and pointed out the beacons. He further told the court that the defendant's building has not encroached on the access path. He also stated that the building is aligned with the adjacent ones.

7. I have considered the pleadings, the evidence on record and the written submissions of counsel. The issues for determination are:-

(i) Has the defendant encroached upon the public access between her LR No. Lari/Magina/1238 and the plaintiff's LR NO.

Lari/Magina/1239?

(ii) Is the plaintiff entitled to damages and if so what is the quantum?

(iii) Who should bear the costs of this suit?

8. The plaintiff relies solely on the evidence of PW2, Wills Sikasa a surveyor PW2 told the court that he carried out the survey on the 13th December 2014. He said that in compiling his report he relied on the mutation forms which he got from the survey office. He told the court that the dimensions on the ground did not tally with the dimensions on the ground. He told the court that the building on LR NO. Lari/Magina/1238 had encroached on footpath. However, when he cross examined by Mr. Gachoka for the defendant, he told the court that he did not have the mutation forms that he used to prepare his report. He also stated that not all beacons were there. That the beacons on the access road was missing.

9. It would be noted that this witness is a surveyor. He is not a government surveyor nor did he work in the office of the county surveyor. He clearly told the court that he was instructed by the plaintiff to undertake the survey. It is also not clear why the defendant and the owners of the neighbouring plots were not invited to witness the said exercise. His report must be treated with caution since he admitted he did not have the mutation forms that he had relied on.

10. The defendant's exhibit 1 and 2 show that the plaintiff and the defendant plots are served by a path in between of about two meters wide. They are not the only plots served by this access path. The owners of the neighbouring plots have not complained. I find that the plaintiff has not proved the defendant has encroached on to a public path. Parties are bound by their pleadings. It was incumbent upon the plaintiff to prove that the defendant had encroached on the public access path. It is a well settled principle of law that whoever alleges must prove. The plaintiff has failed to discharge this burden.

11. Having found that the plaintiff has failed to prove that the defendant building has encroached onto the public path, it goes without saying that the plaintiff is not entitled to any damages for trespass. I will leave it at that.

12. It is not in doubt that LR NO. Lari/Magina/1237 is registered in the name of Jane Wanjiru Kamau and not the plaintiff. The plaintiff told the court that Jane Wanjiru Kamau is his wife. He however failed to produce a marriage certificate, a power of attorney or a form of consent allowing him to sue on her behalf. The question is why did the said Jane Wanjiru Kamau not institute this suit? Why she was not called as a witness?

13. Black's Law Dictionary 9th Edition defines *locus standi* as follows:-

"The right to bring an action or to be heard in a given forum".

From the above meaning it is clear that the plaintiff lacks the *locus standi* to institute this suit against the defendant. In the case of **Alfred Njau & Others vs City Council of Nairobi [1953] eKLR**. It was held:

".....to say a person has no cause of action is not necessarily tantamount to shutting the person out of the court, but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth of listening to".

14. In the case of **Wilmot Mwadilo and 3 Others vs Eliud Timothy Mwanmunga & another [2017] eKLR** where the learned judge quoted the case of **Patrick Kiseki Mutisya (suing as the personal representative of the Estate of Nzomo Mutisya (Deceased) vs K. B. Shangani & Sons Ltd & Another [2012] eKLR** where the learned judge cited with approval the case of **Macfoy vs United Africa Ltd [1961] 3 ALL ER where at page 1172, Lord Denning held:**

"If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

15. I am guided by the above authority, the plaintiff not being the owner of LR No. Lari/Magina 1239 does not have *locus standi* to institute this suit against the defendant.

16. I find that the defendant failed to prove the particulars of her counterclaim against the plaintiff. No evidence was adduced in support of the counterclaim and same must fail. It is dismissed.

17. The upshot of the matter is that the plaintiff has failed to prove his case as against the defendant on a balance of probabilities. The suit is accordingly dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MARCH 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate Plaintiff

.....Advocate Defendant

.....Court Assistant