



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANGA**

**ELC NO 441 OF 2017**

**KARIUKI GAKURE.....PLAINTIFF**

**VERSUS**

**PAULINA MUTHONI KARERI .....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant seeking orders as follows;

- a. That the Defendant be ordered to uproot, clear and or remove her tea bushes from the access road to the land parcel No. LOC 19/RWATHIA/2489 and alternatively the Plaintiff be allowed to remove and or clear the said access road to the said land parcel.
- b. That the officer commanding station Kangema Police Station be authorised to supervise the enforcement of the orders.
- c. Costs of the suit and interest thereof.
- d. Any other relief the honourable Court shall deem fit to grant.

2. The Plaintiff avers that he bought parcel No LOC 19/RWATHIA/ 2489 from the Defendant, which was a subdivision of the original land, parcel No LOC 19/RWATHIA/2320 owned by the Defendant. Upon completion of the purchase price he took possession. He asserts that the Defendant has denied him access to the said land by refusing to clear the tea bushes on the road reserve indicated in the mutation form.

3. The Defendant initially on 2/5/18 filed an admission in which she requested for time to remove the tea bushes growing on the access road to provide the access road for the Plaintiff. Later vide a letter filed on the 14/5/18 the Defendant purported to withdraw the admission on account that she did not understand the Plaintiffs claim. Later without the leave of the Court having been sought and granted, the Defendant filed a defence and Counterclaim on the 12/9/18. This was after the close of the pleadings.

4. In the statement of defence, she denied the Plaintiffs claim. She stated that the suit land as excised from Parcel No LOC 19/RWATHIA/2320. The Plaintiff purchased a portion of 0.4 acres in the year 2000 being parcel LOC 19/RWATHIA/2489. The Defendant subdivided the original parcel LOC 19/RWATHIA/2320 and transferred the portion of LOC 19/RWATHIA/2489 to the Plaintiff who took possession of the suit land.

5. She denied that the dispute was determined by the Land Dispute Tribunal Mathioya and also that the Principal Magistrate Court at Kangema ordered the Defendant to avail the access road to the Plaintiff. In the Counterclaim she sought the following orders;

- a. The Court should not issue orders since the Defendant sold 0.4 acres and giving access would mean giving him more land.
- b. The Defendant has his own access to his land.
- c. The suit be dismissed.

6. At the hearing of the suit the Plaintiff testified and called one witness. He stated that he bought 0.4 acres from the Defendant at the sum of Kshs 120,000/-. Upon completion he took possession of the suit land. He produced a copy of title registered on the 17/11/2000 in his name to support his ownership of the suit land. The Defendant subdivided the suit land LOC 19/RWATHIA/2320 which yielded two parcels of land; LOC 19/RWATHIA/2489 and 2490. The Defendant transferred LOC 19/RWATHIA/2489 to him and retained LOC 19/RWATHIA/2490. During the subdivision, provision for access to parcel LOC 19/RWATHIA/2489 was provided in the mutation forms. However, he stated that the Defendant denied him access to his property through the access provided. On the access road are tea bushes

belonging to the Defendant which she has refused to remove. He produced *inter-alia* the following documents; official search for LR No LOC 19/RWATHIA/2320, 2489 and 2490, title for LOC 19/RWATHIA/2490 registered in his name, LDT No 51 of 2001 issued on 28/3/02, mutation form for parcel LOC 19/RWATHIA/2320, letter from the chief Kihoya dated the 22/11/11.

7. In cross examination by the Defendant, the Plaintiff denied that there is any access road existing on the lower part to his land. He explained that at no time did the Land Dispute Tribunal Court at Kangema challenge the manner in which he purchased the land. That Land Control Board consent was obtained for subdivision and transfer of the suit land to him. That the access road was surveyed by the surveyor and included in the mutation form.

8. PW2 – Isaac Wainaina Karani stated that he is a surveyor working at the District Survey Office at Muranga. He produced the mutation form dated the 30/8/2000 and explained that the subdivision of parcel LOC 19/RWATHIA/2320 belonging to the Defendant resulted into two parcels LOC 19/RWATHIA/2489 and 2490. An access road was created during the subdivisions to serve parcel No LOC 19/RWATHIA/ 2489. He informed the Court that the registered owner being the Defendant signed the mutation which included the access road. He stated that the access road to parcel LOC 19/RWATHIA/2489 measured 0.05 ha. That the access road was not issued with a land reference number. The land measuring 6 meters was surrendered to serve as the access road to the parcel LOC 19/RWATHIA/2489. He explained that the Plaintiff and the Defendant got titles, which were less by 0.05Ha, which is the area of the road reserve or access. He informed the Court that the process of obtaining land control board consent was complied with and that is why the subdivision was carried out.

9. On the 30/5/18, the Defendant was stood down from testifying to allow her to serve the Plaintiff with her the statement of defence which she had not served despite being ordered by the Court. On the 24/7/18 the Defendant sought for more time to serve the defence as she had not complied with the orders of the Court issued on the 30/5/18. On the 4/10/18 the Defendant informed the Court that she was not ready to proceed with her defence case as she was unwell. The Court granted her the last adjournment when the suit was scheduled for the 11/10/18. Come the 11/10/18 the Defendant was absent in Court and after the matter had been called twice in and outside the Court, the Court proceeded to deem the defence case closed. The Plaintiff sought time to file Written Submissions.

10. The Plaintiff filed Written Submissions on the 19/10/18 which I have read and considered.

11. Having considered the pleadings and the evidence of the parties adduced in evidence the issues for determination are

- a. whether there is an access road leading to the Plaintiff's parcel of land.
- b. Whether the Plaintiff is entitled to the prayers sought.
- c. Costs of the suit.

12. It is not in dispute that parcel No LOC 19/RWATHIA/2320 belonged to the Defendant. It is not contested that the parcel LOC 19/RWATHIA/2320 was subdivided and sold LOC 19/RWATHIA/2489 to the Plaintiff and retained LOC 19/RWATHIA/2490 in her name. Both parcels of the land border each other, one being on the upper side and the other on the lower side.

13. It is also not in dispute that on the mutation form the access road is provided to serve the parcel LOC 19/RWATHIA/2489. PW2, the surveyor presented the mutation form dated the 28/8/2000 which shows the subdivisions of LOC 19/RWATHIA/2489 and 2490 as well as the road reserve measuring 0.05 Ha. The said mutation form is signed by the Defendant. The Defendant did not challenge the said mutation form in evidence.

14. In view of the oral and the documentary evidence placed before the Court, the Court holds that the road access of 0.05 Ha. was provided for in the mutation form for which the Defendant consented to. This is the same mutation that gave birth to the parcel of land which she has admitted having sold and transferred to the Plaintiff.

15. Having arrived at the conclusion, there is no justifiable reason why the Defendant is denying access to the Plaintiff's parcel of land. The Defendant appears to want to hold the Plaintiff to ransom so that she is paid for the land that is earmarked as an access. The PW2 informed the Court that the Plaintiff and the Defendant contributed to the land for access in that both their parcels are less by the combined acreage of 0.05 Ha.

16. The Defendant elected not to defend her case and prosecute her Counterclaim despite several accommodations by the Court in the spirit of Article 159 of the Constitution. Her case was therefore undefended.

17. In the absence of any contrary evidence, the Court finds for the Plaintiff and dismisses the Defendant's Counterclaim.

#### **18. Final orders;**

- a. The Defendant is ordered to provide access and remove the tea bushes on the road access to LOC 19/RWATHIA/2489 measuring 0.05 Ha. and as shown on the mutation form within the next 90 days from the date of the judgment.
- b. In default the Plaintiff shall uproot the said tea bushes at the expense of the Defendant to give way to the access road aforesaid. The Officer Commanding Police Station Kangema shall supervise the enforcement of these orders.
- c. The Defendant's Counterclaim is dismissed.

d. The Defendant shall meet the Plaintiff's cost of the suit and the Counterclaim.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS DAY OF 25<sup>TH</sup> MARCH 2019.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff: Present in person

Defendant: Present in person

Irene and Njeri, Court Assistants