



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 569 OF 2008

STEPHEN KIMOTHO KARANJA.....PLAINTIFF

VERSUS

PAUL WANDATI MBOCHI.....DEFENDANT

JUDGMENT

The plaintiff commenced this suit by way of a plaint dated 19th November, 2008 seeking the following principal reliefs:

- 1) A mandatory injunction compelling the defendant to remove forthwith any obstruction, barrier, impediment or hindrance that is in the way of the plaintiff's passage to his homestead.
- 2) A permanent injunction restraining the defendant, his servants, agents, nominees or howsoever from returning to, entering or otherwise interfering with the parcel of land known as L.R No. Limuru/Ngecha/2004 (hereinafter referred to as the "suit property") until the hearing and determination of the suit or further orders.
- 3) General damages for trespass.
- 4) Costs of the suit.
- 5) Any other order that the court may deem just and fit to grant.

The plaintiff averred that he was the absolute proprietor of the suit property which he purchased from one, John Igamba Mbochi on 14th February, 2008. He averred that on 19th November, 2008, the defendant wrongfully pulled down his perimeter fence bordering the defendant's parcel of land and thereafter, placed obstructive objects on his gate and access path thereby preventing him from using the same to access his home. The plaintiff averred that the defendant wrongfully claimed that he owned half of the access path to the suit property and had a right to use the same and that unless restrained by the court, the defendant would continue with the obstructions complained of.

The defendant entered appearance and filed a defence dated 22nd November, 2012. In his defence the defendant averred that the suit property was a portion of the original parcel of land known as Limuru/Ngecha/779 (hereinafter referred to as "Plot No. 779") which after sub-division gave rise to Limuru/Ngecha/2004 owned by the plaintiff (the suit property) and Limuru/Ngecha/2153 which is owned by the defendant (hereinafter referred to as "Plot No. 2153"). The defendant averred that the access path referred to in paragraph 4 of the plaint was a private path that was created by his family with his permission to give access through his land to the grave of his mother, Miriam Mugure Mbochi who died in 1968. The defendant averred that the said path was being used only by the family for the purposes of accessing the said grave. The defendant averred that John Igamba Mbochi who sold the suit property to the plaintiff had no right to transfer the said access path which passes through the defendant's land to the plaintiff without the defendant's permission. The defendant averred that the plaintiff had access to the suit property through a road on the lower side of the said property. The defendant denied that on 18th November, 2008 he brought down the plaintiff's perimeter fence and blocked and obstructed the access path to the plaintiff's home. The defendant averred that the path in contention was for private use and that the plaintiff had no right to use the same.

At the trial, the plaintiff (PW1) gave evidence and called one witness. The plaintiff stated that he had lived most of his life in Rift Valley and that following tribal clashes which affected the region in 2007/2008, he decided to purchase land and settle his mother who was living in Molo at the time. That is when he learnt that Joseph Igamba Mbochi was selling the suit property. He met Joseph Igamba Mbochi and confirmed after conducting a search that the suit property was owned by him. The plaintiff stated that Joseph Igamba Mbochi (hereinafter referred to only as "Joseph") was the defendant's elder brother and that he lived away from the suit property while the defendant had put up a residence adjacent to the suit property next to a road. The plaintiff stated that Joseph showed him the suit property and informed him that the suit property was a subdivision of a hitherto larger parcel of land known as Limuru/ Ngecha/779(Plot No. 779) in which Joseph owned 2/3 share while the defendant owned 1/3 share. He stated that he was shown a copy of the mutation dated 31st July, 2004 through which Plot No. 779 was subdivided to give rise to the suit property and Limuru/ Ngecha/2153(Plot No. 2153) owned by the defendant. The plaintiff stated

that he was shown the beacons of the suit property which measured 0.44 hectares and was “L” shaped. He stated that he thereafter entered into an agreement for sale with Joseph in respect of the suit property which was subsequently transferred to him and a title deed issued in his favour on 20th May, 2008.

The plaintiff stated that he built a home for his mother on the suit property after purchasing the same. He also fenced the property and erected a gate towards his mother’s home. He stated that he erected another fence along the section of the property towards the main road and put up a gate near the road. He stated that the defendant also had a gate through which he accessed his Plot No. 2153. He stated that the defendant closed the gate that he was using to access his said parcel of land and opened another gate which gave him access to his home through the suit property. The plaintiff averred that the defendant proceeded to block his 6meter road of access to the suit property from the road and also pulled down his perimeter fence.

The plaintiff stated that the District Land Registrar and Surveyor visited the suit property and Plot No. 2153; showed them the beacons and clarified that the 6meter access road leading to the suit property was not a public road but was part of the suit property. The plaintiff denied that the suit property had an alternative road of access. The plaintiff averred that the defendant’s mother’s grave was on the defendant’s land and that there was no reason why the defendant wanted his relatives to pass through the suit property while visiting the said grave.

The plaintiff urged the court to protect him against the defendant’s acts of trespass. He produced as exhibits documents which were attached to his list of documents dated 19th June, 2012 which included copies of: the title deed for Plot No. 779, a mutation form dated 31st July, 2004, Registry Index Map for Limuru Location, Ngecha Sub-location, the agreement for sale dated 14th February, 2008, the title deed for the suit property, application for determination of the boundary dispute and the receipts for the payments made in respect thereof.

In cross-examination, the plaintiff stated that he purchased the suit property in the year 2008 after subdivision had taken place and that the disputed narrow strip of land measuring 6 meters in width was not a road but part of the suit property. He stated further that the dispute before the court was not over boundary but a trespass claim. He contended that the defendant had blocked the access to the suit property from the road and maintained that the defendant had no right to use the disputed strip of land.

The plaintiff’s witness was Joseph Igamba Mbochi (Joseph) (PW2) from whom he purchased the suit property. PW2 told the court that he sold the suit property to the plaintiff and that the defendant was his younger brother. He stated that the suit property was a subdivision of Plot No. 779 which the defendant and he inherited from their father. He stated that Plot No. 779 was subdivided into three equal portions and shared between him and his brothers namely, Francis Waweru Mbochi and Paul Waweru Mbochi (the defendant). PW2 averred that Francis Waweru Mbochi (“Waweru”) who was his older brother sold his portion of land to him while the defendant retained his portion. He stated that he sold his share and the share he purchased from Waweru to the plaintiff. He stated that as at the time of subdivision of Plot No. 779, Waweru had already sold his share of the same to him and that explains where Plot No. 779 was subdivided into two portions measuring 0.44 ha. and 0.22ha. between him and the defendant respectively.

PW2 stated that there was no agreement between him and the defendant that they would each contribute land from their respective portions for an access road. He averred that the defendant refused to give part of his land for a common access road and this explains why the land he sold to the plaintiff was “L” shaped as could be seen in the survey plan Folio No. 363 Register No. 89. He stated that the said survey plan also showed that Plot No. 2153 owned by the defendant was adjacent to a road. PW2 concurred with the findings contained in the letter dated 14th March, 2012 by the District Land Registrar, Kiambu. He stated that he and the defendant were present when the District Land Registrar visited the suit property and Plot No. 2153. PW2 stated that their mother’s grave was at the edge of the defendant’s parcel of land and that it was easily accessible to the defendant.

In cross-examination, PW2 stated that their mother passed on before the subdivision of Plot No. 779 and was buried in her home on Plot No. 779. He stated that during the subdivision, no land was reserved for a grave yard and that after the exercise, their mother’s grave fell on the defendant’s land. He stated that those wishing to visit their mother’s grave would pass through the defendant’s land. He contended that his siblings had not been going to his mother’s grave for anniversaries.

PW2 stated that before the subdivision of Plot No. 779 and at the defendant’s request, he had allowed the defendant passage through his land which the defendant later claimed to be an approved access road. He reiterated that there was no access road on the lower part of the suit property and contended that what appeared on the survey map Folio No. 363 as a road on the lower part of the suit property was not a road. He maintained that the public road was on the upper part of the suit property and that what the defendant was claiming to be an access road was part of the suit property.

In examination by the court, PW2 stated that he had earlier allowed the defendant to pass through his land to access the main road but later on revoked the license when the defendant refused to give a portion of his land to be used as a common road of access.

In his testimony, the defendant (DW1) averred that Plot No. 779 belonged to his parents and that their mother passed away in 1968 before the subdivision of the property. He stated that their mother was buried on Plot No. 779 in an area which was converted into a family cemetery where his daughter was also buried. The defendant stated that the cemetery was between his Plot No. 2153 and the suit property and that it had been agreed between him and his brother, Joseph (PW2) that a road of access to the family cemetery would be reserved.

The defendant stated further that Plot No. 779 adjoined two main roads, one on the upper side next to his property and the other one on the lower side next to the suit property. He contended that a private surveyor that carried out the subdivision of Plot No. 779 did not carry out a proper survey in that if there was no access road on the lower side of Plot No. 779 as claimed by the plaintiff, the said surveyor would have created an access road for the suit property through the road that had been reserved for the family cemetery.

The defendant contended that the access road in dispute was created after their mother’s burial for the purposes of accessing her grave. He stated that the plaintiff was not present when the said access road was created as he purchased the suit property in the year 2008. The defendant denied that he was involved in the sale of the suit property to the plaintiff. The defendant also denied that he had blocked the

access road to the suit property and that he had destroyed the plaintiff's fence. The defendant contended that the said access road had been fenced off by the plaintiff and as such the same was inaccessible to him. He accused the plaintiff of blocking the access road. The defendant contended that the plaintiff's claim had no basis. He contended that the plaintiff had no right to stop him from using the said access road which originated from their ancestral land.

The defendant produced as exhibits copies of; Mutation No. 182997, certificates of official search dated 13th March, 2012 for Plot No. 2153 and the suit property, survey plan folio No. 363/83, memorandum dated 21st February, 2005 between the defendant, Joseph Igamba Mbochi (PW2) and one, James Mbochi Igamba, the decision of the Land Disputes Tribunal in Tribunal Case No. KW. LND/9/6/6/2010, the decree issued in Limuru SPMCC Land Case No. 7 of 2010 and the ruling of the High Court in JR. ELC Misc. Civil application No. 14 of 2011.

In cross-examination, the defendant admitted that he owned 1/3 share in Plot No. 779 while the remaining 2/3 share was owned by Joseph(PW2). He admitted further that his mother's grave was on his land and that he had planted bananas on the graveyard. The defendant contended that although he could access the main road from Plot No. 2153, his children who lived further down from the road could not access the main road without using the disputed road.

The defendant contended further that the report that was prepared by the Land Registrar dated 14th March, 2012 did not relate to Plot No. 2153 owned by him. He contended that he was not present when the Land registrar and surveyor visited the road of access in dispute. The defendant maintained that he wanted the access road that he claimed to have been blocked by the plaintiff opened.

In re-examination, the defendant reiterated that the disputed road was reserved as an access road. He contended that before the subdivision of Plot No. 779, they had agreed on how the exercise was to be carried out. He reiterated that if there was no access road on the lower side of the suit property, the surveyor who carried out the subdivision would have created an access road for the whole land before the subdivision.

After the close of evidence, the parties were directed to make closing submissions in writing. The defendant filed his submissions on 6th September, 2018 while the plaintiff filed his submissions on 4th April, 2019. The plaintiff submitted that the disputed narrow strip of land measuring 6 meters in width adjacent to Plot No. 2153 which touches the road was part of the suit property as indicated in the report by the Land Registrar dated 14th March, 2012 and the Registry Index Map that were produced in evidence. The plaintiff submitted that the said strip of land was not a public access road. The plaintiff submitted further that there was no evidence that the defendant had acquired an easement of a right of way through the suit property. In conclusion, the plaintiff submitted that he had proved his case against the defendant and was entitled to the reliefs sought in the plaint.

In his submission, the defendant reiterated the facts giving rise to the dispute as pleaded by the parties and the evidence that was adduced by the parties in proof of their respective cases. The defendant submitted that the Land Registrar's report dated 14th March, 2012 that was produced in evidence by the plaintiff which was purported to be a determination of a boundary dispute between the plaintiff and the defendant was not credible. The defendant submitted that the said report referred to land parcel numbers Limuru/Ngecha/2003 and Limuru/Ngecha/2004 as belonging to the defendant and the plaintiff respectively yet the defendant's parcel was Limuru/Ngecha/2153. The defendant submitted further that it was indicated in that report that the suit property and the defendant's parcel of land were partitions of Plot No. 779 which was not correct since Plot No. 779 was subdivided and not partitioned. The defendant submitted further that the Land Registrar did not explain in the said report how he determined the boundary dispute more particularly whether the parties were given a fair hearing.

The defendant submitted further that the plaintiff's suit was premature in that this court lacked jurisdiction to entertain a boundary dispute which jurisdiction was reserved for the Land Registrar under section 18(2) of the Land Registration Act, 2012. For this submission, the defendant relied on the cases of Willis Ochola v Mary Ndege, Malindi ELC No. 137 of 2015 and Azzuri Ltd v Pink properties Ltd, Malindi ELC No. 3 of 2015.

Determination:

I have considered the evidence adduced by the parties and the submissions by the parties' respective advocates. From the pleadings and the evidence adduced by the parties, I am of the view that the issues arising for determination in this suit are the following:

1. Whether the court has jurisdiction to entertain the plaintiff's suit.
2. Whether the defendant committed acts of trespass on the suit property.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Who is liable for the costs of the suit?

Whether the court has jurisdiction to entertain the plaintiff's suit:

The defendant's submission that this court lacked jurisdiction to entertain this suit is in my view misplaced. What is before the court is a claim for trespass hinged on the plaintiff's contention that there exists no public road of access traversing through the suit property. In any event, I wish to point out that when the issue of jurisdiction of the court was raised, the dispute was referred by the plaintiff to the Land Registrar and District Surveyor, Kiambu District for determination. The Land Registrar and the surveyor visited the site of the properties in dispute and prepared a report dated 14th March, 2012 which they submitted to court on 22nd March, 2012. Although the defendant went to a great length in his submission in his attack on the said report, there is no evidence on record that the defendant objected to the production of the said report in evidence or as part of the record of the court or that he appealed against the same. In my view, the matter having been referred to the Land Registrar for determination and the registrar having considered the dispute and prepared a report which is part of this

court's record; in the absence of an agreement between the parties on the said report, it is only this court that can determine the parties' dispute. In the circumstances, the defendant's objection to the plaintiff's claim based on jurisdiction is overruled.

Whether the defendant committed acts of trespass on the suit property:

From my analysis of the evidence before the court, I have come to the conclusion that the disputed narrow strip of land measuring 6 meters in width adjacent to Plot No. 2153 which touches the road on the upper part of the suit property is part of the suit property and that the same is not public access road. I am in agreement with evidence that was adduced by the plaintiff and the submissions of the plaintiff's advocates that the disputed strip of land was meant to serve as the suit property's access to the road which it abuts. I am not persuaded by the evidence adduced by the defendant that the disputed strip of land was reserved as an access road to his mother's grave and that it was supposed to be open for all those who wished to access the said grave from the main road. This contention was not supported by the mutation forms, registry index maps and copies of the title deeds that were produced in evidence. The defendant's own survey map that was produced as defence exhibit 3 shows that the disputed strip of land is part of the suit property. The mutation form and certificates of official searches in respect of the suit property and Plot No. 2153 which were produced by the defendant in evidence as defence exhibits 1, 2(a) and 2(b) respectively do not show that when the original parcel of land, Plot No. 779 was subdivided, Joseph who sold the suit property to the plaintiff obtained more than 2/3 share of the said parcel of land that he was entitled to or that any portion of that parcel of land was reserved as an access road to the resultant subdivisions. It is clear from the evidence on record looked at as a whole that the disputed strip of land was meant to provide access only to the suit property. The defendant's plot No. 2153 did not require access to the main road because it had ample frontage to the said road. The disputed strip of land being part of the suit property was therefore not open to public use even though it was being used to access the suit property from the main road. In the Court of Appeal case of Dellian Langata Limited v Symon Thuo Muhia & 4 others, Nairobi CA No. 144 of 2014 (2018) eKLR, the court made a distinction between a public road and a road of access follows:

“...having regard to the above provisions we are persuaded that 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. 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. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.”

From the evidence tendered, there is no recognised public road of access through the suit property. The defendant was in the circumstances not entitled to use the disputed strip of land which is part of the suit property to access Plot No. 2153. The defendant was also not entitled to block the plaintiff's access to the suit property through the disputed strip of land.

In Kipkirui Arap Koske v Philemon Kipsigei Tangus & another (2015) eKLR Munyao J. stated as follows in a similar case:

“We have already seen from the evidence that there is no recognized public road of access through the land of the defendant. There could have been some road of access, but the same is not a public line of travel. I am unable to hold that there exists a public road through the defendant's land. If one existed, it ought to have been reflected in the RIM which is not the case.

It is apparent to me that what the plaintiff wants, is to have a road of access created through the defendant's land. If this is the case, then the plaintiff needs to approach the Minister or the District Roads Board, pursuant to Sections 8 and 9 of the Public Roads and Roads of Access Act, so that they may consider creating a road of access for the plaintiff, or the public, passing through the defendant's land. But I am unable to grant a declaration that there exists a public road of access through the defendant's land as sought by the plaintiff, and neither can I order a rectification of the Registry Index Maps to reflect a public road, for none exists, over the defendant's land”

In his evidence at the trial, the defendant did not deny that he was using the disputed strip of land to access his parcel of land and that he had removed or demolished the fence that the plaintiff had erected around that strip of land that prevented his use of the same. In his testimony, the plaintiff stated that as at the time he was giving evidence, the defendant was still using the disputed strip of land to access Plot No.2153. The defendant did not dispute this allegation in his testimony. Arising from the foregoing, it is my finding that the disputed strip of land is owned by the plaintiff and that the defendant trespassed thereon having entered on the land without the plaintiff's permission.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The plaintiff had sought injunction under several heads against the defendant and general damages for trespass. Arising from my findings above, I am satisfied that the plaintiff has proved his claim against the defendant and as such, he is entitled to the injunctive relief sought in prayer 2 of the plaint. With regard to the prayer for general damages for trespass, the law is settled that once trespass is established, the plaintiff need not prove that he had suffered damages as a result of the trespass to be able to be awarded general damages. See the case of Park Towers Ltd. v John Mithamo Njika & 7 others (2014) eKLR where the court stated as follows:

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...”

The plaintiff nevertheless had a duty to place material or evidence before the court to assist the court in determining the appropriate award to make. That was not done in this case. I would in the circumstances only award the plaintiff nominal damages.

Who is liable for the costs of the suit?

The law on costs is that costs follow the event. The court however has a discretion to order otherwise for good cause. In the circumstances of this case, no reason has been given to warrant a departure from the well-established rule on costs. The plaintiff having succeeded in his claim is entitled to the costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendant in terms of prayers 2, 4 and 5 of the plaint dated 19th November, 2008. General damages for trespass is assessed at Kshs. 5,000/- and the same shall attract interest from the date hereof until payment in full.

Delivered and Signed at Nairobi this 30th day of April 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Kivindu h/b for Mrs. Koech for the Plaintiff

Ms. Okoth h/b for Ms. Njoroge for the Defendant

C. Nyokabi-Court Assistant