



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 44B OF 2015**

**ANTHONY GITONGA KAMUNDI.....PLAINTIFF**

**VERSUS**

**TITUS KYUI .....DEFENDANT**

**JUDGMENT**

1. In his Complaint dated 7<sup>th</sup> September, 2015, the Plaintiff averred that he is the absolute registered owner of land parcels number Matuu/Machakos/ 5056 and 5057 (*the suit properties*) and that on 24<sup>th</sup> April, 2015, the Defendant unlawfully encroached on the suit properties and blocked a surveyed road within the Plaintiff's parcel of land.
2. The Plaintiff is claiming for an order of reinstatement of the boundary as it appears on the original map and for general damages.
3. In his Defence and Counter-claim, the Defendant denied the averments in the Plaintiff's Complaint. In the Counter-claim, the Defendant averred that he is the proprietor of parcel of land known as Machakos/Matuu/5105; that it is the Plaintiff who has trespassed on parcel of land number 5105 and that a permanent injunction should issue in that regard.
4. In his evidence, the Plaintiff, PW1, informed the court that he is the proprietor of parcel of land known as Matuu/Machakos/5056 and 5057; that on 24<sup>th</sup> April, 2015, the Defendant went to his land and damaged his live fence and that he reported the said damage to Matuu Police Station. PW1 produced in evidence copies of the Title Deeds in respect of the two parcels of land and the map of the area.
5. It was the evidence of PW1 that he used to access his two plots through a road running in between parcel number 5058 and 6343 and that the Defendant has since closed the said road; that he has never seen parcel number 5105 which the Defendant is claiming on the map and that the access road to his two parcels of land should be opened up.
6. The Defendant, DW1, informed the court that he is the owner of a parcel of land known as Matuu/Machakos/5105; that the said parcel of land does not share a boundary with the Plaintiff's parcels of land number 5056 and 5057 and that there is no access road to the Plaintiff's parcels of land through his land parcel number 5105. According to the Defendant, it is the Plaintiff who destroyed his fence by creating a road through parcel number 5105.
7. In cross-examination, DW1 stated that he purchased a portion of parcel number 5058; that the live fence that the Plaintiff uprooted was on portion number 5058 and that the land that he bought is not on the map of the area.
8. DW2 informed the court that he knows both the Plaintiff and the Defendant; that the Plaintiff's parcel of land is known as Matuu/Machakos/5056 and it does not share a boundary with the Defendant's land known as Matuu/Machakos/5105; that it is his family that sold to the Defendant parcel number 5105 and that it is the Plaintiff who has encroached on parcel number 5105. According to DW2, parcel number 5058 was sub-divided.
9. The Plaintiff's advocate submitted that the Plaintiff produced the area survey map which shows the access road leading to the Plaintiff's parcels of land and that the Plaintiff proved his case on a balance of probabilities.
10. The Defendant's advocate submitted that the Plaintiff did not produce a Surveyor's report to prove his claims; that Section 18 of the Land Registration Act requires parties who have a boundary dispute to appear before the Land Registrar and that this court does not have jurisdiction to determine the dispute herein.
11. It is not in dispute that the Plaintiff is the proprietor of parcels of land number 5057 and 5058. According to the copies of the Title Deeds, the Plaintiff was registered as the proprietor of the two parcels of land on 17<sup>th</sup> July, 2013 and 16<sup>th</sup> March, 2000. The registers for both parcels of land were opened on 25<sup>th</sup> January, 2000.

12. The Plaintiff also produced in evidence the Registered Index Map for the area. The said Map shows the Plaintiff's parcels of land, with the road of access to the two parcels of land being in between parcels number 5058 and 6343.

13. On the other hand, the Defendant produced in evidence a copy of the Title Deed for parcel of land number Matuu/Machakos/5105. The said Title Deed was issued to the Defendant on 7<sup>th</sup> October, 2004. The parcel of land number 5105 was created on 29<sup>th</sup> September, 2004, long after the Plaintiff's parcels of land had been created and entered into the register.

14. The Defendant and DW2 informed the court that parcel number 5105 was created from parcel number 5058, which abutts the road of access to the Plaintiff's two parcels. Although the Defendant's parcel of land number 5105 is a sub-division of parcel number 5058, the Defendant did not produce in evidence the duly registered mutation form showing how parcel number 5058 was sub-divided to create the Defendant's land.

15. Indeed, it is only the mutation form that created parcel number 5105 that would have shown the alignment of the road of access to the said plot, which cannot extinguish the already existing road between parcels number 5058 and 6343.

16. To the extent that the Registered Index Map does not show the existence of the Defendant's parcel of land number 5105, or the change of the existing road between parcel number 5058 and 6343, the Plaintiff is entitled to continue accessing parcel numbers 5057 and 5056 through the road that is indicated in the Registered Index Map, which runs in between parcels number 5058 and 6343.

17. Indeed, there is no evidence that the Defendant shares a boundary with the Plaintiff. The issue of the Defendant interfering with the road between parcel numbers 5058 and 6343 by the Defendant should therefore not arise. In fact, there is no dispute in respect of the boundary between the Plaintiff and the Defendant, unless and until the Registered Index Map is amended to show that the two individuals share a boundary.

18. Other than the entitlement of the usage of the road running between parcel number 5058 and 6343, the issue of the Defendant having damaged the Plaintiff's live fence was not proved.

19. For the reasons I have given above, I allow the Plaintiff's Plaint as follows:

*a. The boundary and the road of access in between parcel numbers 5058 and 6343 as per the Registered Index Map be reinstated by the Defendant.*

*b. The Defendant to pay the costs of the suit.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF APRIL, 2019.**

**O.A. ANGOTE**

**JUDGE**