



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 323 OF 2017

EDGAR-GEAR INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

1. GUIDO PALLADA

2. KIKAO PROPERTIES LIMITED.....DEFENDANTS

JUDGMENT

1. By a plaint dated 11th September 2017 and filed on even date, the Plaintiff prays for a declaration that the road of access is a public road available for use by all public members and an order compelling the Defendants to forthwith open and/or remove the wall barricading the road of access and a permanent injunction restraining the Defendants from barricading and/or obstructing the said road of access.

2. The Plaintiff avers that it is the owner of properties **TITLE NUMBERS KWALE/DIANI COMPLEX/1664, 1665, 1666, and 252** where the Plaintiff's directors have built residential houses. Adjacent to the Plaintiff's properties are the Defendants' properties **TITLE NUMBERS KWALE/DIANI COMPLEX/953 and 523** which have a public access road which starts from the Plaintiff's properties and cutting through the Defendant's properties to Diani Beach Road. The Plaintiff avers that the Defendants have in their properties, developed a gated community known as Snow Drop, and have barricaded and obstructed the Plaintiff's directors, customers and servants from accessing Diani Beach Road and the beach through the said road of access, claiming that the road of access was created during subdivisions of the Defendant's property known as Title number 499 and therefore was only open for use by residents of Snow Drop. It is the Plaintiff's contention that the road of access was surrendered as a road reserve by both the Plaintiff and the Defendants and the Defendants cannot therefore claim ownership.

3. The Plaintiff states that on 30th March, 2017, it sought to ascertain the Defendants' contention from the jurisdictional district surveyor and the survey office vide its letter dated 3rd April 2017 advised that the road of access was a public road and should therefore remain open for the public. It is the Plaintiff's case that despite demand to open the road of access, the Defendants have refused.

4. The Defendants were duly served with summons to enter appearance but failed to do so and upon request by the Plaintiff, interlocutory judgment was entered against them in default of appearance on 7th November, 2017. Although the 2nd Defendant entered appearance on 26th January, 2018, there was no application made to set aside the interlocutory judgment. The suit proceeded for formal proof hearing on 23rd July 2018 in the absence of the 2nd Defendant and their advocate who were otherwise served but failed to attend.

5. PW1, Guildalberto Cuturi is a director of the Plaintiff's Company. He produced the map showing the access road as P.exhibit No.1 and testified that because of the obstruction by the Defendant, they are forced to go round for about one kilometre instead of about 200 metres to access the main road, and that to access the beach they have to cover about two kilometres instead of about 300 metres. He produced the demand notice dated 18th April 2017 issued to the Defendants as P. Exhibits No.2 and the response by the 1st Defendant as P. Exhibit No.3. PW1 also produced the surveyor's letter dated 30th March 2017 confirming that the blocked road is a public road, P. Exhibiti No. 4.

6. The Plaintiff called the surveyor in charge of Kwale District Survey office, Herbert Mboya Ndolo who testified as PW2. He produced his letter dated 3rd April 2017 (P.Exhibit 5) confirming that from the map (Diani Complex R.I. M No. 2) the road in question does not have a parcel number and is therefore a public road and should remain open for anyone to use.

7. I have considered the evidence places before me by the Plaintiff. What is clear from the evidence adduced is that the subject road was surrendered to the government during subdivision of **TITLE NUMBER KWALE/DIANI COMPLEX/199**. It is not a road of access envisaged under Section 9 of the Public Roads Act Cap 399 Act. There was no material placed before the court to prove that the subject road is a private road as envisaged under Section 13 of the Public Roads Act. The Defendants who acquired the subdivision to **TITLE NUMBER KWALE/DIANI COMPLEX/199** being parcels Nos. 523 -528 cannot claim any proprietary interest over the access road. In my view, the Defendants' proprietary interests were restricted to title Numbers 523 and 953 which are registered in their names and no more. According to the Registry Index Map that was produced, the access road in question is a public road.

8. The Defendants did not defend this suit. The Defendants having not called evidence to rebut what the Plaintiff's witness stated, the evidence on record remains uncontroverted. In the circumstances, I am satisfied that the Plaintiff has proved its case on a balance of probabilities and is entitled to the reliefs sought in the plaint.

9. Accordingly, I enter judgment for the Plaintiff as prayed in the plaint.

10. The Plaintiff will have costs of this suit.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mwanzia holding brief for Bwire for Plaintiff

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE