



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 196 OF 2017

JACKSON MUMO MUNYWOKI.....1ST PLAINTIFF

PETER BROWN LIKU.....2ND PLAINTIFF

VERSUS

ROSE MATALI.....1ST DEFENDANT

REGISTRAR OF LANDS, MAKUENI COUNTY.....2ND DEFENDANT

DISTRICT SURVEYOR, MAKUENI COUNTY.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

J U D G M E N T

1. By their plaint dated 17th December, 2015 and filed in court on 18th December, 2015 the 1st and 2nd Plaintiffs pray for judgment against the 1st to 4th Defendants for:-

(a) An order for demolition of all structures build and or erected on access road linking land parcel No.UKIA/UTAATI/1362 and land parcel No. UKIA/UTAATI/1452 to the main Machakos Makueni Highway.

(b) An order to exhume all bodies illegally buried on access road linking land parcel No.UKIA/UTAATI/1362 and land parcel No.UKIA/UTAATI/1452 to the main Machakos Makueni Highway.

(c) An order directed to the OCS, Makueni County to supervise the enforcement of the orders of this Honourable Court.

(d) Costs of this suit.

2. The claim is denied by the 1st Defendant vide her defence dated 17th February, 2017 and filed in court on even date. The 2nd to 4th Defendant's did not enter appearance nor did they file their defence. However there is no evidence of service of summons upon the three to enter appearance and to file their defence.

3. During the hearing, the two Plaintiffs adopted their witnesses' statements recorded on 17th December, 2015 and filed in court on 18th December, 2015 as their evidence.

4. The 1st Plaintiff told the court that he is the registered owner of land parcel number Ukia/Utaati/1362 measuring 1.4 hectares which he purchased from one Mutinda David. That the 2nd Plaintiff is the beneficial owner of the said parcel of land after the latter purchased it from him. That the 2nd Plaintiff is yet to obtain a title deed for the said land parcel number Ukia/Utaati/1362. The 1st Plaintiff went on to say that the 1st Defendant has encroached onto the road reserve and illegally planted crops, built houses and even buried relatives on the said road reserve that links land parcels numbers Ukia/Utaati/1362 and Ukia/Utaati/1452 resulting into the two Plaintiffs being unable to access their parcel of land.

5. The 1st Plaintiff produced documents numbers 2 and 3 in their list of documents as P.Exhibit No.1.

6. His evidence in cross-examination was that he visited land parcel number Ukia/Utaati/1362 before he purchased it. He said that the 1st Defendant has fenced off her land and that the latrine and the buildings on the road reserve were built after he purchased his land. He said

that the surveyor whom he took to the scene confirmed that some people were buried on the access road but could not tell for how long they remained buried on the site. He pointed out that he was aware of the offer by the 1st Defendant to provide an alternative route to his land and added that he did not agree with the offer.

7. The evidence in chief of the 2nd Plaintiff is similar to that of the 1st Plaintiff. His evidence in cross examination was that he was present when the surveyor visited the land in August, 2015 and it was during the said visit that he learnt of the grave yard.

8. The 1st Defendant's evidence in chief was that land parcel number Ukia/Utaati/1452 is registered in the name of her father in-law, one Kimende Mutua. She went on to produce the 12 documents in her list of documents dated 17th February, 2017 as D.Exhibit Nos.1 to 12 respectively. She said that the mother to her father in-law as well as about three children of her mother in-law are buried in the disputed land. She said that she has offered an alternative route which is at the rear part of her land so as to make sure that the graves are not disturbed. She pointed out that whereas she built a house and a latrine in 1990, the access road was fixed in 1991.

9. Her evidence in cross-examination was that survey in the area was carried out in 1974, she said that she built her house in 1989/90 and pointed out that about four people have been buried in the disputed area. She said that she did not know if her husband objected to the creation of the access road when survey was carried out. She said that she has not produced any documents to support her offer of an alternative route. She said that the access road was created in 1991 when the second survey was carried out but in her evidence in re-examination, the 1st Defendant told the court that she learnt of the access road when the 1st Plaintiff bought his land.

10. The 1st Defendant called Patrick Juma Balua (DW1) as her defence witness. Balua (DW1) adopted his statement which was filed in court on 10th July, 2018 as his evidence.

11. His evidence was that the disputed land is ancestral land that belongs to the larger family of Mbaa Mutwa. That the Plaintiffs are purchasers of land owned by Vavu Kikwau Mutwa. Balua (DW1) went on to say that Vavu first sold a portion of land to one James Matali Kimende who is the husband of the 1st Defendant. That when he sold another portion to one Mutinda Muia, the latter portion included what Vavu had sold to Matali. According to him, there is an existing access road to the Plaintiffs' land and that what the latter are now claiming would cut across the 1st Defendant's family gravesite.

12. Balua's (DW1) evidence in cross-examination was that no access road to the Plaintiffs' land was created by the survey department. That the Plaintiff uses a pathway to access his land. He said that the graves are on the access road. He said that he was aware of the survey that was carried out in 1974 and in 1991. He said that he is aware that the 1st Defendant has offered the 1st Plaintiff an alternative access road after the latter showed them a map that shows an access road that passes through their graveyard.

13. By the time of writing this judgment, it is only the 1st Defendant's counsel who had filed his submissions. His submissions were that the Plaintiffs would suffer no prejudice should the access road be adjusted so as not to pass the 1st Defendant's gravesite.

14. The Plaintiffs and the 1st Defendant rely on the report dated 02nd September, 2015 and referenced TEC/18/MKN/VOL.III/133 from the Ministry of Land, Housing and Urban development. It is signed by one P. S. Nyagol. The Plaintiffs produced a copy of the same as P.Exhibit No.2 while the 1st Defendant produced another copy as D.Exhibit No.2. The report shows that on the 19th August, 2015, Makueni District Survey Office visited the site upon the request of the 1st Plaintiff who is the owner of Ukia/Utaati/1362. The purpose of the visit was to help identify the position of the road of access to his parcel of land. The report shows that the Plaintiffs' land parcel No.Ukia/Utaati/1362 as well as land parcels Ukia/Utaati/1361 and 1452 are all in sheet map 13. It shows that the road of access for parcel number 1362 passes between parcels numbers 1361 and 1452 up to 1541. It further shows that the boundary of parcel 1361 exists and that there is no road since there is farming activity being carried out. A grave and a house built at some point of the road could be seen. That the registered owner of parcel number 1452 is deceased and that people living on the said land are the ones who carry out the activities that make it impossible to access parcels number 1362.

15. The surveyor's report (P.Exhibit No.2/D.Exhibit No.2) as well as the 1st Defendant's evidence in chief shows that land parcel No.Ukia/Utaati/1452 is registered in the name of a deceased person. However from the evidence of the 1st Defendant, it is clear that she takes an active role in running the said parcel of land to an extent that she offered an alternative road of access to the Plaintiffs herein. Even though no orders should be issued against the estate of a deceased person unless its personal administrators have been enjoined as parties to a suit, in the matter before me, the 1st Defendant herein appears to have presented herself as such personal representative of the estate of the deceased or even a person with authority to deal with land parcel No.Ukia/utaati/1452.

16. From the evidence on record, it is clear that the access road to land parcel No.Ukia/1362 should pass between land parcels No.Ukia/Utaati/1452 and 1541. I am therefore satisfied that the Plaintiffs have a cause of action on a balance of probabilities against the 1st Defendant.

17. For the reasons that I gave at the outset of this judgment, I will make no orders against the 2nd to the 4th Defendants. In the circumstances, I hereby proceed to enter judgment for the Plaintiffs and against the 1st Defendants in terms of prayers (a), (b), (c) and (d) of the plaint.

Signed, dated and delivered at **Makueni** this **21st** day of **May, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Mumo holding brief for Mr. Mulei for the Defendant

No appearance for the Plaintiff

Mr. Kwemboi – Court Assistant

MBOGO C.G, JUDGE,

21/05/2019.