



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CASE NO. 124 OF 2017
(FORMERLY NAIROBI HCC CASE NO. 51 OF 2009)

DAVID MUNYUI KIMANI.....PLAINTIFF

Versus

STEPHEN GICHIA MBURE.....1ST DEFENDANT

DOMINIC MBURU MBURE.....2ND DEFENDANT

DAVID GACHIRA MBURE.....3RD DEFENDANT

JUDGMENT

1. On 1st August, 2014, the plaintiff filed an amended plaint dated 21st May, 2014 pursuant to leave granted on 25th July, 2014. He is seeking a declaration that the access road passing between LR No. Kiambaa/Ruaka/ 2455 and LR No. Kiambaa/ Ruaka/ 1639 (herein after referred to as the access road) is a public road of access and does not belong to the estate of Mbure Gachira or anybody else for that matter. The defendant is also seeking that their agents or whomsoever who have closed the said access road be ordered to open the road forthwith and allow the Plaintiff free access onto the road and into his property and costs of this suit and interest thereon at court rates.
2. The plaintiff is represented by learned counsel, Mr. J. Gichachi. The defendants are represented by learned counsel, Mr. Mburu instructed by J.M Waiganjo and Company Advocates.
3. The gist of the plaintiff's case as per the amended plaint is that in or about the year 2006, the plaintiff together with one Patrick Munyui Njau bought a piece of land known as title number Kiambaa/Ruaka/2455 from one Tirus Kamau. The said parcel of land was served by a public road of access passing between it and L.R No.Kiambaa/Ruaka/1639. That later, the said parcel No. Kiambaa/Ruaka/2455 was partitioned into parcel Nos. Kiambaa/Ruaka/2860 and Kiambu/Ruaka/2861 for the plaintiff and his co-proprietor respectively. That both parcels of land were still served by the access road until February, 2009 when the defendants and or their agents unlawfully closed the road by erecting a gate at the entrance and forcefully refused the plaintiff's entry through the gate to access his land.
4. The plaintiff claimed that the access road was surveyed, demarcated and it is distinct from the defendants' parcel of land or any adjacent land thereto. That the defendants raised a defence of justification to the effect that the access road was a private one owned by the estate of their deceased father. The plaintiff further claimed that he is entitled to the access road without any interference from

any quarter including the defendants hence it provoked the present suit.

5. The plaintiff (PW1) testified and relied on his list of documents dated 14th July, 2015 (P Exhibits 1 to 9(e)) in favour of the claim. He stated, inter alia, that he was using the access road during its purchase and the subdivision of L.R No. Kiambaa/Ruaka/2455 and that the access road is for public use.

6. In their defence to amended plaint dated 20th April, 2015, the defendants affirm that the access road is no longer in existence and that this suit is overtaken by events as the orders sought in the amended plaint are unenforceable against them. That the plaintiff is guilty of multiplication of suits including a criminal case whereby the plaintiff was allocated and the pending Civil case before a Kiambu Court. That litigation must come to an end. They denied the plaintiff's claim and sought the dismissal of the same with costs. They state that the access road has never been surveyed and demarcated as a public access road because it was created by beneficiaries of the estate of Mbure Gichira (deceased).

7. The defendants further affirm that the plaintiff has no right to demand provision of access road from them but from Tirus Kamau. That the access road serving L.R No. Kiambaa/Ruaka/2860 is supposed to be as shown on the deed plan of the area (D Exhibit 2).

8. The 1st defendant (DW1) relied on, inter alia, a copy of the restriction (D Exhibit 1), D Exhibit 2 a certificate of official search dated 28th November, 2013 showing a registered restriction as directed by the Land Registrar (D Exhibit 3) and a mutation in respect of LR Kiambu/Ruaka/1033 as subdivided into LR Numbers Kiambu/Ruaka/1638 and 1650 (D Exhibit 5). He stated in part that the access road has never been converted into a public road.

9. The 3rd defendant (DW2) relied on his statement dated 20th April, 2015 and testified that the access road was created after the subdivision of his late father's land, LR No. Kiambaa/Ruaka/1033. He made reference to D Exhibit 3 and stated that the road has never been converted into a public road.

10. On 1st November, by consent of counsel for the respective parties the court ordered that;

(a) The suit against the 2nd defendant be and has hereby abated following his death.

(b) Mutation form dated 16th March, 2001 in respect of LR. No. Kiambaa/Ruaka/1033 is hereby admitted as D Exhibit 5 herein.

11. Learned counsel for the plaintiff filed submissions dated 30th January, 2019. Wherein analysed the evidence on record and framed the following two (2) issues for determination;

(a) Whether the access road is private road of access or a public road of access.

(b) Do the defendants have the right to and/or power to deny the plaintiff access and use of the access road?

12. Counsel relied on the case of Mary Njeri Gatuha and 3 others-vs- George M Mungai and 25 others 7017 eKLR and sections 9 to 13 of the Public Roads and Roads of Access Act (Cap 399) Laws of Kenya. Counsel submitted that the defendants surrendered the portions which form the access road to the local authority. That the defendants have no power to deny the plaintiff the access and use of the access road. He urged the court to enter judgment for the plaintiff in terms of the orders sought in the plaint as the plaintiff has proved his case against the defendants on a balance of probabilities.

13. Learned counsel for the defendants filed submissions dated 31st January, 2019. Whereby he framed and analysed two (2) issues for determination namely;

(a) Whether the impugned road is a public road or a private road

(b) Whether this Honourable Court should make a determination that the said road is a public road as sought.

14. Counsel relied on two authorities and Sarah Nasambu Musundi-vs- David Wafula Tela (2016) eKLR, and Mary Njeri Gatu (supra). He cited section 8 of the Public Roads and Roads of Access Act (Cap 399) in support of his submissions. He urged the court to dismiss the plaintiff's case as the access road is a private road which is no longer in existence and that the orders sought are unenforceable.

15. I have carefully considered the entire pleadings, evidence of PW1, DW1, and DW3 as well as the submissions of the respective parties. I embrace the defendants' list of disputed issues dated 4th July, 2018 and issues framed by the parties in their respective submissions; see Great Lakes Company (U) Limited –vs- Kenya Revenue Authority (2009) KLR 720. Therefore, the questions for determination are;

(a) Is the access road a public road of access or a private road of access?

(b) Are the parties entitled to the orders sought in their respective pleadings?

16. PW1 asserted that the access road is for public use as many people and passenger service vehicles (PSV) use the same. That whereas the defendants claim that the access road was curved out of their parcel of land, the road existed as shown in P Exhibit 3.

17. DW1 contended that the access road in dispute was created after the subdivision of his late father's land LR No. Kiambaa/Ruaka/1033. That the road is a private road of access and that he has never received a notice to have it converted to a public road.

18. Accordingly to PW1 the disputed access road has been in existence from the year 2006 when Patrick Munyui Njau and himself bought Tirus Kamau's land Reference No. Kiambaa/Ruaka/2455. That he is now land locked as the defendant erected a gate made of steel across it as shown in the photos (P Exhibit 9 (a) to (e)). Under sections 10 and 149 of the Land Act, 2016 (2012), the owner of land may apply to the court for an access order, and that this court has powers to enforce public rights of way respectively.

19. I take into account sections 8 to 13 of the Public Roads and Roads of Access Act (Cap 399). I am of the view that Sarah Musundi and Mary Gatuha cases (supra) relevant herein.

20. Under Article 10(2) of the Constitution of Kenya, 2010, all persons including the parties in this suit and this court are bound by the national values and principles of governance which include sharing and sustainable development. The parties in present suit are bound to share access road to promote sustainable development.

21. More fundamentally, Article 62 (2) (1) (c) of the constitution of Kenya, 2010 stipulates that public land include: land transferred to the state by way of surrender. It is common baseline that P Exhibit 4 and D Exhibits 2 and 5 reveal that the access road was surveyed and surrendered to the public for use. There is no evidence to show that the access road is a private road; see Gatuha case (supra).

22. The upshot is that the road of access passing between LR No. Kiambaa/Ruaka 2455 and LR No. Kiambaa/Ruaka1639 and serving LR 2860 and 2861 is public road of access. I find that the plaintiff has proved his case against the defendants jointly and severally on a balance of probabilities.

23. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally in respect of the access road in terms of orders (1a), (1b) and 2 sought in the plaintiff's amended plaint dated 21st May, 2014. By dint of the proviso to section 27 (1) of the Civil Procedure Act (Cap 21) and in view of the circumstances of this case, each party will bear their own costs.

DATED AND SIGNED AT MIGORI THIS 10th DAY OF MAY, 2019

G.M.A ONG'ONDO

JUDGE

DELIVERED, SIGNED AND DATED IN OPEN COURT AT THIKA THIS 14th DAY OF JUNE 2019

L.N.GACHERU

JUDGE

In the presence of;

1. Mr. Kimani holding brief for Mr. Gichachi for plaintiff
2. Mr. Mburu for the defendant
3. Lucy –Court Assistant