



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 39 OF 2014**

**SILAS WANYONYI MUKHEBI.....PLAINTIFF**

**VERSUS**

**JOHN KITUI WANYONYI.....DEFENDANT**

**RULING**

1. The application dated **22/10/2019** and filed in court on the same date has been brought by the plaintiff/applicant. It seeks an order that this court be pleased to order the County Surveyor, Trans-Nzoia County to re-visit **LR. Nos. Kiminini/Matunda Block 7/11, Kiminini/Matunda Block 7/12 and Kiminini/Mutanda Block 7/20** to ascertain and determine the access road and that the costs of this application be in the cause.
2. The applicant has brought the application pursuant to **Order 3, 3A and 63 (c) Civil Procedure Act**.
3. The grounds upon which the said application is premised are that the plaintiff had served the County Surveyor with witness summons twice but he failed to attend court on grounds that there was no report in their survey office file regarding the same; that the present County Surveyor who succeeded the earlier surveyor has advised that the court needs to issue an order before he can re-visit the site to enable him to testify and that unless the order herein is issued the applicant shall suffer unjustly.
4. The application is supported by an affidavit of the applicant sworn on **22/10/2019** which reiterates the above grounds. In addition that affidavit avers that in **June, 2013** the defendant without any legal right closed the access road leading to the two parcels making it impossible to the plaintiff to access his home. It is deponed that only the evidence of the County Surveyor is now required, but he cannot attend for the reasons stated above.
5. The defendant filed replying affidavit sworn on **7/11/2019**. His response is that the County Surveyor visited the site on **16/7/2013** and made a report of the findings and that that report will assist the court to arrive at a just conclusion of the matter. A copy of that report is annexed to that replying affidavit. The deponent states that the report is already listed in his list of documents and he intends to produce it and that the responsibility to call the maker of that report lies on the defendant since he introduced it on the record. For the above reasons he maintains that the County Surveyor does not need to be ordered to re-visit the site and the application will only waste precious time if it is granted.
6. The matter came up on **12/11/2019** when the court ordered parties to file submissions on application. I have perused through the record and found no submissions filed on behalf of any of the parties.
7. I have examined the court record and found that the said report dated **16/7/2013** was filed on **9/5/2019** as part of the defendant's supplementary bundle of documents. I have noted that report is not conclusive as to where the road is required to be.
8. It is the conviction of this court that where land parcels have been registered there must be a recorded history of the subdivision of the land which if properly analysed will identify who was supposed to provide a road and where it ought to be on the ground. For this reason I do not find the surveyor's report dated **16/7/2013** to be helpful at all in this matter. That report should have provided a sketch showing exactly where the road ought to be but it has not.
9. The application dated **22/10/2019** therefore has merit and the same is granted.
10. This court hereby orders that the county surveyor shall visit the land comprised in **LR. Nos. Kiminini/Matunda Block 7/11, Kiminini/Matunda Block 7/12 and Kiminini/Mutanda Block 7/20** and after making ground observations and analyzing the history of how the suit lands came into being, make a fresh report to this court indicating where the road ought to be which report shall attach a map showing that position of the road.

It is so ordered.

**Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGI**

**JUDGE**

**28/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kraido holding brief for Nasike for Plaintiff

N/A for the Defendant

**COURT**

Ruling read in open court at 2.50 p.m.

**MWANGI NJOROGI**

**JUDGE**

**28/11/2019**