



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CIVIL CASE NO. 39 OF 2015

REX ZADOCK ESAU.....PLAINTIFF

= VERSUS =

JUDE OPAILO.....1ST DEFENDANT

ALOICE MISIKO OJUMA.....2ND DEFENDANT

JUMA OKELLO SEBETE AKA

OJUMA ESIEPELE.....3RD DEFENDANT

J U D G E M E N T

1. The Plaintiff instituted this suit against the Defendants vide the Plaint dated and filed on 23rd April 2015. The Plaintiff is the registered owner of land parcel LR. BUKHAYO/EBUSIBWABO/3483 measuring 0.424ha which he purchased from the 3rd Defendant on 24th September 2004. The Plaintiff's property is adjacent to BUKHAYO/EBUSIBWABO/3482 which belongs to the Defendants.
2. The dispute between the parties concerns an access road to the Plaintiff's property that runs alongside the Defendants' parcel. According to the Plaintiff, the easement was demarcated by the district surveyor during the sale. Moreover, its location was proposed by the Defendants who gave their consent for it to be demarcated thus. However, the Defendants later changed their position and blocked the easement by planting trees and crops on it thereby preventing the Plaintiff and his workers from accessing his property. The Plaintiff seeks a permanent injunction against the Defendants restraining them from blocking, cultivating on, planting on or in any other way interfering with the easement towards BUKHAYO/EBUSIBWABO/3483 demarcated by the District Surveyor. They also seek orders for removal of any trees or crops planted thereon as well as structures erected on it to restore access to the Plaintiff's property; together with costs of the suit.
3. The Defendants filed a joint Defence on 25th August 2015. They denied consenting to the creation of an access road alongside their property; BUKHAYO/EBUSIBWABO/3482. They asserted that they use a distinct portion of land separate from the Plaintiff's and that they have never blocked the disputed easement nor have they attempted to re-route it. They accused the Plaintiff of trespassing onto their land by forcefully transporting his produce through it which prompted them to report him to the local administration. Consequently investigations were carried out and charges preferred against the Plaintiff in Criminal Case No. 1629 of 2014. The Defendants prayed for the suit to be dismissed with costs.
4. The Plaintiff's case was heard on 3rd May 2017 with only the Plaintiff testifying as **PW 1**. He stated that he purchased his property from the 3rd Defendant for a consideration of Kshs.36,000 and produced a sale agreement and title deed as proof of ownership. That the sketch map on the mutation form, P. Ex 3 showed the access road to PW 1's property running alongside both properties towards the east. It was **PW 1's** evidence that problems with the easement began in 2007. He sought intervention of the area elders on 14th April 2014 and produced minutes of the said meeting as P. Ex 4. That the elders directed the Defendants to open the access road but they declined to do so.
5. **PW 1** continued that he also sought redress through the area assistant chief. His efforts bore fruit as the Defendants decided to remove the blockages they had placed on the access road. Shortly afterwards, the Plaintiff was arrested and charged in Criminal Case No. 1629 of 2014 and subsequently he was acquitted. However, on cross-examination, **PW 1** admitted that the minutes of the meeting with the elders, P. Exh 4 did not indicate that the access road be opened. He also admitted to uprooting the trees planted by the Defendants on the access road resulting in his arrest.
6. The Defendants' case was heard on 16th October 2019 with the 2nd Defendant, **DW 1** testifying as the sole witness. He stated that at the time the Plaintiff purchased his property many people had bought land and built in the area. Later on in his testimony **DW 1** changed his position and admitted that the Plaintiff validly bought his portion from the 3rd Defendant and was shown the now disputed access road to his plot. The Defendants then planted trees on the access road and reported the Plaintiff to the police for uprooting them. **DW 1** stated that he was aware that the Plaintiff was acquitted. In an interesting turn, **DW 1** testified that the said access road had been re-opened and was in use.

7. Parties elected not to file final submissions. I have considered the parties' pleadings, evidence adduced at the hearing and frame the following questions for determination:

- a) *Whether or not the Plaintiff is entitled to road of access*
- b) *Whether or not the Defendants blocked the road of access*
- c) *Who bears the cost of this suit?*

8. There is no dispute that the parties herein are neighbours, the Defendants having sold a portion of their land to the Plaintiff. The 2nd Defendant stated in his evidence in chief that there was an existing from the main road to the river. According to him, it is the plaintiff who had encroached on a part of this road. In cross-exam, **DW1** stated that the Plaintiff was shown a road to his plot at the time of buying the land. **DW1** further admitted that they planted trees on the access road and later reported the Plaintiff to the police when he removed the offending trees.

9. It is clear from the 2nd Defendant's evidence that the Plaintiff was entitled to an access to the plot sold to him. This deductible from DW1's evidence when he admitted that there exists a road which runs from the main road to the river. DW1 answered that the Plaintiff was shown a road by the 1st Defendant who had sold to him the land.

10. On whether the Defendants had blocked this road/access, the Plaintiff presented a sketch drawn on the mutation map (Pex-3) showing how the disputed road runs along the boundaries of land parcel numbers Bukhayo/Ebusibwabo/3482 & 3483. The Two parcels of land were curved out L.R Bukhayo/Ebusibwabo/3458. The 2nd Defendant (DW1) was a witness in the sale agreement produced as Pex 1. The Defendants having participated in the sale transaction were therefore aware of the obligation to provide an access road for the Plaintiff to use. The 1st and 3rd Defendants did not give any evidence to controvert the evidence presented by the Plaintiff.

11. The 2nd Defendant admitted that they planted trees that caused a blockade of the access road. When the Plaintiff removed the trees, DW1 said they reported him to the Police and the Plaintiff got charged in criminal case no 1629 of 2014. The evidence shows that the Defendants are hell bent on denying the Plaintiff the access road when they are the ones who invited him to the place by selling to him the plot no Bukhayo/Ebusibwabo/3483. It is therefore incumbent for the Court to intervene to enable the Plaintiff enjoy the peaceful use and occupation of his land.

12. In the foregoing, it is my finding that the Plaintiff has proved his case on a balance of probabilities. I enter judgement in his favour in the following terms:

- i) An order of a permanent injunction be and is hereby issued against the Defendants jointly and severally, there agents and or relatives restraining them from blocking, cultivating on, planting on or in any other way interfering with the easement to land parcel no. BUKHAYO/EBUSIBWABO/3483 demarcated by the District Surveyor.
- ii) An order be and is hereby issued directed at the Defendants jointly and severally to remove any structures erected on and/or trees or crops planted on the access road and to restore access to the Plaintiff's property BUKHAYO/EBUSIBWABO/3483.
- iii) Costs of the suit to the Plaintiff.

Dated and signed at BUSIA this 14th day of November, 2019.

A.OMOLLO

JUDGE