



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L. NO. 30 OF 2014

NICHOLAS KIPLAGAT MIBEI.....PLAINTIFF

-VERSUS-

MICHAEL KIRWA CHEPSOY.....1ST DEFENDANT

ELLY KOBOT CHERUIYOT.....2ND DEFENDANT

RULING

This is the ruling with respect of the Surveyor's report dated 4th December 2018. This matter came up for hearing on 8th March 2018 when the plaintiff testified but midway he stated that he had no problem with the defendants taking 8 acres out of the suit land.

Counsel therefore filed a consent to the effect that the plaint and the counterclaim are compromised on the following terms:

- a. That the defendants be given 8 acres out of the plaintiff's land parcel No SOY/KAPSANG BLOCK 1/KIMILILI/50.
- b. That the 8 acres be surveyed on or before 8th April 2018 by the Uasin Gishu County Surveyor
- c. That the defendants to meet the survey costs
- d. Each party to bear their own costs of the suit and counterclaim.

The consent was adopted as an order of the court and a mention date given for the Surveyor to implement the terms of the order and file a report in court. The Surveyor duly filed the report and counsel prayed that he be called to explain the contents of the report.

The County Surveyor gave evidence and stated that the suit land extends to G to F on the sketch map produced in court and that A to D have an access road which is a public access road. He further stated that plot No. 50 has a 9 meter road which provides access to parties who are not in court and use it as their access road. The Surveyor further stated that the owner of the suit parcel of land does not require the 9 meter access road and that the registered owner will lose 1/8 acre.

Plaintiff's Counsel filed submissions on the report and stated that based on the report and the explanation by the Surveyor, it is evident that the Surveyor has acted contrary to the court order. That the order was very clear that the Surveyor was to hive off only 8 acres for the defendants from the portion where they were ploughing.

Counsel further submitted that the court order had no provision for creation of a 9 meter road. That the plaintiff and the defendants having not been landlocked, there was no point in having a 9 meter road placed on the land.

Counsel further submitted that the Surveyor could not act at the instance of persons who are unnamed and are not parties to the suit to create a 9 meter road through the plaintiff's land. The parties in the pleadings and in the eventual compromise of the suit did not raise any issue as to the existence of a road of access of 9 meter therefore it is improper for the Surveyor to create one.

Mr. Kigamwa submitted that the proposal by the County Surveyor offends the procedure for the creation of access road under section 9 (1) of the Public Roads and Roads of Access Act, Cap 399 which provides;

"Where any owner or occupier of Land is in respect of his Land so situated in relation to a public road which is passable to Vehicular traffic, or to a railway station or halt that he has not reasonable access to the same, he may make application to the

board of the district in which such Land is situated for leave to construct a road or roads (herein after called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required in the first schedule to this Act.

Counsel further submitted that the intended creation also violates the plaintiff's rights to a hearing and notification as provided for in section 10 (1) of the Public Roads and Roads of Access Act, Cap 399 which provides;

"On the receipt of such application for leave to construct a road of access, the board shall serve a notice by personal service or by registered post to the last known address of the owner or occupier of Land over which the proposed road of access is to pass, calling upon him to show cause within one month why the proposed road of access should not be granted. "

Mr. Kigamwa, Counsel for the plaintiff further submitted that the proposal by the Surveyor would offend the provisions of section 98 of the Land Registration Act, 2012 as an owner of land cannot be compelled to create an easement. It is a matter of his sole discretion and not even the court can compel the creation of an easement. The same provides;

"An owner of Land or a less or may, by an instrument in the prescribed form, grant an easement over the land, lease or a part of the Land to the owner of another parcel of Land or lease for the benefit of that other parcel of Land. "

Counsel relied on the case of Johnbosco Muinde Kamali & 5 others —v- Stephen Katili & Another, (2019) eKLR where Justice Oscar Angote observed,

"If indeed the most convenient road to their properties is parcel number

450, then the procedure for creating a public access road should be followed. That procedure is provided for under the Public Roads and Roads of Access Act or Section 98 of the Land Registration Act.

Under section 98 of the Land Registration Act, an owner of the Land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the Land to create an easement. If indeed the proposed interested parties are Land locked, which they have admitted they are not, then the court, under the provisions of section 140 of the Land Act, can make an access order in respect of the suit land subject to several conditions including reasonable compensation.

It was Counsel's submission that nowhere in the Applicant's affidavit have they agreed that they are ready and willing to pay the 1st Respondent for the easement whereby the respondent will lose 1/8th of an acre. That the proposed creation of the road and loss of 1/ 8th of an acre shall also be an abrogation of article 40 of the Constitution of Kenya, 2010 as the plaintiff is being deprived of his property arbitrarily.

Counsel therefore urged the court to order that a new survey be done without the road access and with the right of the plaintiff to participate and if he so desires to retain a private Surveyor.

Defendants' Submissions

Counsel for the respondent gave a brief background to the case and submitted that the 9 Meter road forms the right of way for the other purchasers of the said land. He further submitted that it is the duty of the plaintiff, having sold the said land to various parties, to ensure that they all get access to their respective parcels.

Counsel cited section 14 of the Land Act, Act No. 6 of 2012 whereby he stated that the Court has power to make orders to ensure that there is a public right of way over all land that is to be occupied by the public. Counsel further cited Section 23 of the Survey Act, Cap 299 Laws of Kenya, which provides that:

23 (1) a) Making or supervising any survey or resurvey

b) Affixing or setting up thereon or therein any survey mark

Counsel therefore urged the court to adopt the Surveyor's report as an order of the court.

Analysis and determination

The court has been asked to determine whether the survey report by the Uasin Gishu County Surveyor should be adopted as presented in court or order that a resurvey be done. This is a matter where a consent order was recorded between the parties compromising the suit and the counterclaim. The consent order was adopted as an order of the court whereby the County Surveyor was to excise 8 acres out of the plaintiff's land to be given to the defendants.

The Surveyor did so and filed a report dated 4th December 2018 and upon filing of the report parties urged the court to summon him to come and explain the contents and the implication of the report.

From the report the Surveyor created a 9 meter road from the plaintiff's parcel of land plot No. 50 which effectively means that the plaintiff will lose 1/8th of an acre of his land without compensation to serve as access to persons who are not parties to this suit.

The question is whether the Surveyor was implementing the order of the court to excise 8 acres from the suit land or creating access road for the unknown parties. Is there a known procedure for creating access road in the Act and if so did the Surveyor follow the procedure.

When the court asked the Surveyor to clarify on the issue of the loss of 1/8 of an acre by the plaintiff and whether the 9 meter road created was public, he responded that there is a public access road that serves the plaintiff and the defendants and that the 9 meter road was private and being created for other parties who are not in court.

The Public Roads and Roads of Access Act, CAP 399, Laws of Kenya establishes a **District Roads Board** and **Sections 8 and 9** which provide as follows :-

S. 8 Dedication of line of public travel

1. Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.
2. In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described.
3. Where an order under this section dedicates a line of public travel or converts a road of access into a line of public travel, such line of public travel shall be absolutely dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads.
4. Before making and publishing any order under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.

The two sections cited above do not deal with the current situation as this is not a dedicated public travel that has been declared as such.

The case of **Sheema Co-operative Ranching Society and 31 others –vs- the Attorney General, (2013) UGHC 35** the court held that the government corporation could not just enter on anybody's land without first acquiring it and paying compensation and the court found that Article 26(1) (2) and Article 237 of the Ugandan Constitution had been violated.

Article 40(3) of Constitution of Kenya 2010 prohibits deprivation of private property by the state unless the same is carried out in accordance with the Constitution and any Act of Parliament.

I therefore find that the Surveyor went beyond the instructions by the order of the court and therefore his report cannot be adopted as it would occasion deprivation of plaintiff of 1/8th of an acre. I order that the County Surveyor implements the order of the court and that the parties be at liberty to appoint their private Surveyors in the exercise in conjunction with the County Surveyor.

DATED and DELIVERED at ELDORET this 12TH DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Mugambi for Plaintiff and Mr.Kuria holding brief for Dr.Chebii for Defendant.

Mr.Mwelem – Court Assistant