



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 247 OF 2009**

**LILLIAN NJERI GICHOVI.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit on 20<sup>th</sup> August 2009 pursuant to plaint dated 19<sup>th</sup> August 2009. The plaintiff is the holder of a power of attorney donated by Fredrick W. Mbugua. Subsequently, an amended plaint was filed on 6<sup>th</sup> September 2016 in which the plaintiff sought judgment against the defendant for:

***(a) An order of declaration that the plaintiff is the sole rightful owner of Kiambogo/Kiambogo Block 2/199 (Mwariki) and that the defendant's action constitute acts of trespass.***

***(b) An order of permanent injunction against the defendant by itself, its servants, agents and/or employees from entering, trespassing and/or in any way encroaching upon all that parcel of land known as Kiambogo/Kiambogo Block 2/199 (Mwariki).***

***(c) An order compelling the defendant to close the diversion it has created upon the aforesaid Kiambogo/Kiambogo Block 2/199 (Mwariki) within a time to be specified by this honourable court.***

***(d) Costs of this suit.***

***(e) Interest on (d) above.***

2. It is averred in the amended plaint that the donor of the power of attorney is the proprietor of a parcel of land known as **Kiambogo/Kiambogo Block 2/199 (Mwariki)** the suit property and that the defendant had allowed private third parties to grab and block a public service road that runs between the suit property and other properties known as **Kiambogo/Kiambogo Block 2/2132; 2153; 2154 and 2181** among others. The plaintiff therefore seek judgment against the defendant as stated above.

3. The defendant responded to the amended plaint through Amended Defence filed on 13<sup>th</sup> September 2016. The defendant generally denied the averments in the amended plaint and stated that if there was any re-planning or re-surveying then the suit property was not affected. The defendant added that if any third parties trespassed into the plaintiff's land then the plaintiff ought to have filed a case against them.

4. The plaintiff's case was heard and closed before Ouko J. (as he then was). When the matter came up before me for hearing parties agreed that hearing proceeds from where it had stopped.

5. The plaintiff testified on 8<sup>th</sup> June 2011 as PW1. She told the court that **Kiambogo/ Kiambogo Block 2/199 (Mwariki)** belongs to her brother Fredrick Wakuria Njau who is in America – California. He went there in 1978 and gave PW1 power of attorney. She produced it as Plaintiff's Exhibit 1. It empowered her to deal with the suit property. She also produced a copy of the title deed as Plaintiff's Exhibit 2. She also produced a copy of Certificate of Search dated 27<sup>th</sup> June 2009 as Plaintiff's Exhibit 3.

6. PW1 further testified that the suit property is within Nakuru Municipality and that in 2009 between January and February she was told a grader was on the land. She went to the land and found a grader from the municipal council grading the road. She stopped them as the grading was on part of the suit land. However, Humphrey Mwaniki the local councillor told them to proceed with grading. She later consulted her advocate who applied for and obtained a map which she produced as Plaintiff's Exhibit 5. The road is on the western side of the land to the right of the map. She also took photographs of the encroachment. The encroachment is about 9 meters into the suit land. She produced the photographs as Plaintiff's Exhibit 7. She urged the court to order that the road be blocked.

7. Under cross examination, she stated that the suit land initially belonged to her mother who gave it to her brother in the year 2006. Regarding the grader, she stated that she did not record the registration number but that knew it was for the municipal council because of the green number plate. The roads in the area were being graded by Municipal Council of Nakuru.

8. In re-examination, she testified that the roads in the area are usually repaired by the defendant and that the grader that was involved belonged to the defendant. She added that the road was straight but now bends into the suit property and then comes out to join the original road.

9. Having produced the Surveyor's Report dated 19<sup>th</sup> April 2012 by consent as plaintiff's Exhibit No. 6, the plaintiff's case was closed on 21<sup>st</sup> June 2013.

10. Defence case was heard on 22<sup>nd</sup> March 2017 before me. Mr. Wilson Waweru Kinyua DW1 an Administrative Officer in the defendant's Legal Office told the court that prior to counties coming into existence, he worked with Municipal Council of Nakuru as an Administrative Officer in the Legal office and that when the summons and plaint in this matter were taken to the legal office, the said office consulted the Garage Superintendent who informed DW1 that the council had not carried out any activity on Kiambogo/Kiambogo Block 2/199 during the time around 2009 and further that the council's grader had been grounded. No other machine could have done that task complained of by the plaintiff and it is therefore not true that the council had trespassed on the land. We had no machinery that could have done what is alleged. Regarding the alleged involvement of Humphrey Mwaniki, the then area councillor, DW1 stated that as a councillor he was a policy maker but not an employee of the council.

11. Regarding the survey report by G.K. Kibowen, DW1 stated that the approval of the survey for the subdivision of Kiambogo/Kiambogo Block 2/200 which resulted in new numbers 2132, 2153, 2154 and 2181 was done by the national government. The Municipal Council was not involved in creating the subdivision or even in the resulting encroachment. not involved in any encroachment.

12. Under cross examination, he stated that Municipal Council graders had green number plates but added that even if the grader that was used had green plates, it may have been hired from another local authority.

13. Parties filed written submissions. The plaintiff's submissions were filed on 21<sup>st</sup> July 2017. Counsel for the plaintiff submitted that the surveyor's report showed that there was encroachment on the plaintiff's land while the photographs produced by the plaintiff showed that there was excavation and that the evidence showed that the defendant's vehicle was on site on the material day. The plaintiff thus urged the court to order closure of the diversion and to generally allow the plaintiff's case as prayed.

14. The defendant's submissions were filed on 4<sup>th</sup> October 2017. It was submitted on behalf of the defendant that there was no proof of involvement of the defendant's grader since no number plate had been stated and no records from registrar of motor vehicles had been produced. Further, the defendant's counsel submitted that this suit could not be determined without giving the owners of plot numbers 2132, 2153, 2154 and 2181 an opportunity to be heard. Accordingly, the defendant submitted that the plaintiff had not proven her case and it should therefore be dismissed with costs.

15. The issues that emerge for determination are firstly whether the defendant was responsible for the construction of the road and secondly whether the plaintiff is entitled to the relief sought.

16. I have carefully considered the pleadings, the evidence, submissions and authorities cited by the parties. The plaintiff's case and evidence is that the defendant trespassed on the suit property by constructing a road on a portion of it. The construction is said to have been done using the defendant's grader. No registration number was given for the grader but the plaintiff maintains that the grader belonged to the defendant since it had green number plates which was usually used by local authorities.

Though encroachment and construction of the road on a portion of the plaintiff's land is confirmed through the Surveyor's report which was produced as plaintiff's exhibit 6. I am not persuaded that it has been shown that the defendant's grader was involved. Since no registration number was given, it is not enough to say that the grader belonged to the defendant since it had a green number plate. As DW1 stated, the grader may have come from another local authority. Further, even though PW1 alleged that a councilor of the defendant told the operator/driver of the grader to proceed with grading, there was no evidence that he was acting on behalf of the defendant. In the circumstances, I find that there is no proof that the defendant was responsible for the construction of the road.

17. The second and last issue for determination is whether the plaintiff is entitled to the prayers sought. I have reproduced the prayers sought in the amended plaint at paragraph one above. It is stated at paragraph 5 of the amended plaint that the road that the plaintiff is complaining about was between the suit property and Kiambogo/Kiambogo Block 2/2132; 2153; 2154 and 2181 among others. This is confirmed by the Surveyor's report (plaintiff's exhibit 6) where it is shown in the annexed sketch that the suit property shared the original road as a boundary between it and Kiambogo/Kiambogo Block 2/200. The report further states that Kiambogo/Kiambogo Block 2/200 was subdivided into the new plots already mentioned and that there was encroachment into the suit property during the subdivision. Neither the owner of the original plot Kiambogo/Kiambogo Block 2/200 nor the owners of the new subdivisions were joined as parties to this suit.

18. It is a cardinal principle that the court will not issue orders against parties who have not been given an opportunity to be heard. The plaintiff having chosen not to join the owners of the new subdivisions, the court cannot issue orders which will result in changes in the sizes of their properties without first giving them a hearing.

19. Though the plaintiff sought a declaration that she is the owner of the suit property, there was no evidence adduced to show that anyone was challenging the title of the donor of the power of the attorney. Similarly, I see no evidence that the defendant has plans to trespass or encroach upon the suit property. I therefore find that the plaintiff is not entitled to the reliefs sought.

20. In the end, the plaintiff's suit is dismissed. Each party to bear own costs.

**Dated, signed and delivered in open court at Nakuru this 22<sup>nd</sup> day of February 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Muriithi holding brief for Mr. Mwangi for the plaintiff

No appearance for the defendant

Court Assistant: Gichaba/Lotkomoi