



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE NO. 182 OF 2016

TUMBO MIRONGA.....1ST PLAINTIFF

CHARLES MIRONGA.....2ND PLAINTIFF

VERSUS

EUCABETH MORAA MAOBE.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. The plaintiffs commenced the instant suit vide a plaint dated 28th June 2016 filed on the same date. They claimed that the 1st defendant was the owner of land parcel **West Kitutu/Bogeka/1597** while their deceased father owned land parcel **West Kitutu/Bogeka/1599**. The plaintiffs averred the 1st defendant was claiming there was an access road to his land parcel through their land parcel **1599** yet no such access road was provided for in the survey map. The plaintiffs claimed that the land registrar had summoned them to attend at the disputed site for resolution of the access dispute but state they were not satisfied by the land registrar's conduct. The plaintiffs alongside the plaint filed in interlocutory application seeking inter alia an order restraining the defendants from in any manner interfering with the plaintiffs land parcel **West Kitutu/Bogeka/1599**.

2. The 1st defendant vide a replying affidavit sworn by one Phoebe Monyenche Nyamweya a donee of a power of attorney by the 1st defendant averred that the plaintiffs had constructed a building that extended onto the access road thus blocking the 1st defendant's access to his land parcel **1597**.

3. The court on 12th October 2016 when the matter came for directions in regard to the disposal of the interlocutory application observed that the issue whether or not there was an access road and its location was one that could only be resolved by the land registrar and the surveyor. The court in making the order of reference expressed itself thus:-

“Having perused the pleadings I am satisfied the issue raised is whether or not an access road servicing land parcels West Kitutu/Bogeka/1597 and 1599 exists where the 1st defendant's asserts it exists. This is an issue that can only be determined by the land registrar and the surveyor as the custodians of the land records. Accordingly I order and direct that the land registrar Kisii County and the County Surveyor do visit the two land parcels aforementioned and to ascertain whether an access road servicing the two parcels of land exists and if it does to cause the same to be opened up. The land registrar to file his report within the next 90 days from today. Mention on 15/2/2017. The pending interlocutory application is dispensed with on terms that the parties will observe the obtaining status pending the report by the land registrar.”

4. In making the order of reference to the land registrar and the surveyor the court was cognizant of the fact that it lacked the jurisdiction to deal with matters touching on disputes to boundaries of registered land in terms of Section 18(2) of the **Land Registration Act, 2012** which provides thus:-

18.(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

5. The land registrar and the surveyor prepared a joint report dated 18th April 2017 filed in court on 19th April 2017. As per the report the site visit was made on 14th March 2017 and both parties were present and/or were represented. The following were the observations made by the land registrar and the surveyor as per the report:-

1. The parcels in question appear on sheet number 15 of West Kitutu/Bogeka registration section.

2. There exists a 4 metre access road serving parcel West Kitutu/Bogeka/1597 on the map.

3. The same road exists on the ground. However, it has been blocked at the point where it joins the tarmac road.

4. There exists a building by the Mironga's family who are the plaintiffs which is built on the access road.

The report annexed a sketch plan illustrating the position of land parcel 1597 and 1599 and the disputed access road. The report recommended the demolition of parts of the building that was blocking the access road to facilitate the opening of the road.

6. The land registrar's and the surveyor's report was read out to the parties on 20th April 2017 and the matter was fixed for mention on 30th May 2017 when the court was to give directions in regard to the report. On 30th May 2017 there was no representation for the plaintiff. Mr. Ogari advocate appeared for the 1st defendant and as there was no opposition and/or objection to the land registrar's report he sought for the adoption of the report. The court proceeded to make an order for the adoption of the report as an order of the court and directed the implementation of the order to have the access road opened.

7. The adoption of the land registrar's report provoked the Notice of Motion application by the plaintiffs dated 18th June 2017 which is the subject of this ruling. By the application the plaintiffs inter alia seek the following orders:-

(i) That the honourable court be pleased to grant a stay of the orders made on 30th May 2017 and all consequential orders thereof pending the hearing of the application interpartes.

(ii) That the honourable court be pleased to set aside its orders made on the 30th May 2017 and all consequential orders thereof and the suit herein be heard on its merits.

(iii) That the costs of the application be provided for.

8. The plaintiffs' application is predicated on the grounds set out on the body of the application. Principally the applicants aver that the orders were made ex parte in the absence of their counsel who was late in attending court. Further the plaintiffs aver that the report attached a sketch map which showed there was an access while the area map shows no access road. The application was further supported on the annexed affidavit sworn by the 2nd plaintiff dated 15th June 2017. The 2nd plaintiff deposes that on the date, the matter was called out when he had left the court room to look for their counsel and that when he found him and came back to the court room, the matter had been called out and orders made ex parte. He further deposed that the original maps did not show there was an access road where their building stands (No map however was annexed).

9. The 1st defendant vide a replying affidavit sworn by Pheobe Monyenche Nyamweya on 4th July 2017 opposed the plaintiffs application. She deposes that the land registrar's report clearly demonstrated that a road of access exists. She further asserted that the land registrar and the surveyor were the custodians of the necessary records and documents relating to land and were therefore the appropriate persons to determine whether or not an access road existed.

10. With the leave of the court the plaintiffs filed a private surveyor's report made by Olweny and Associates dated 26th September 2017. The court has perused the said surveyor's report together with annexed copy of the area map. Bogeka Registration Section (Sheet No. 15). This map shows the plaintiffs land parcel as 1590 and is shown to border parcels 1541 and 1891. The 1st defendant's land parcel 1597 is separated from land parcel 1541 by an access road which runs and joins the main road at the foot of land parcel 1590. This is definitely the access road in dispute between the plaintiffs and the 1st defendant. The land certificate (title deed) annexed by the plaintiff in their bundle of documents shows their parcel of land to be **West Kitutu/Bogeka/1599**. The sketch plan annexed to the land registrar's report shows parcel 1599 to border parcels 1541 and 1891 and to abut the access road serving parcel 1541. I am convinced the parcel number 1590 indicated in Olweny & Associates report is the same as parcel No. 1599 shown in the sketch attached to the land registrar's report.

11. The plaintiffs have sought to set aside the court order adopting the report by the land registrar on the ground that it was made ex parte in the absence of counsel for the plaintiffs. The assertion by the plaintiffs is that there is no road of access where the 1st defendant alleges to be one. As I have pointed out above both sketches by the land registrar and the private surveyor show there is infact an access road. It is the mandate of the land registrar and the surveyor to identify where there are access roads and to cause the same to be opened up if they are blocked. I am satisfied that the land registrar and the surveyor appropriately and properly carried out their mandate. The court would have no capacity or ability to establish the location of access roads as such function is entirely within the province of those persons who are entrusted with that mandate.

12. Having considered the application by the applicants and the affidavit filed in support and in opposition and the submissions filed by the parties, I am not satisfied that the application has merit. I accordingly disallow the same. The adoption of the land registrar's report as an order of the court finally disposed of the plaintiffs' suit and the net effect is that the plaintiffs' suit has no merit and the same is ordered dismissed. I order that each party bears their own costs of the suit.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the 1st and 2nd plaintiffs

..... for the 1st and 2nd defendants

..... court assistant

J. M. MUTUNGI

JUDGE