



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 102 OF 2013**

**DAVID KAYAJA WAFULA.....PLAINTIFF**

**VERSUS**

**JOSEPH KHALEA LUSINDALO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In the plaint in this suit dated 23<sup>rd</sup> July 2013 the plaintiff sought the following principal orders:

- a) **An order directing the defendant to sign mutation forms for Parcel No Kiminini/ Matunda Block 7/ (Masaba)159;**
- b) **An order directing the district surveyor Trans-Nzoia County to give effect to the drawing on the mutation form;**
- c) **Costs of the suit;**

2. The defendant filed his defence on the 23<sup>rd</sup> August 2013 denying the claim and seeking that the plaintiff's claim be dismissed with costs.

**THE PLEADINGS**

**The plaintiff's case**

3. The plaintiffs' case is that vide two agreements dated 8/4/2011 and 29/10/2011 he purchased two plots measuring 50 feet by 100 feet and 25 feet by 100 feet respectively out of **Parcel No. Kiminini/ Matunda Block 7/(Masaba)159** which belonged to the defendant, paid for them and immediately took possession thereof; that the defendant sought and obtained the relevant Land Control Board Consents and executed some documents including the Application to the Land Control Board, and The Land Transfer Forms and issued his personal identity and tax documents as well as photographs to facilitate the transfer. However the defendant subsequently refused to execute the mutation forms showing the access road and the boundaries and insisted that the road of access be carved out of the adjacent land Reference Number 164, a parcel foreign to the transaction the plaintiff entered into, in order for him to execute the forms. The defendant's delay has therefore denied the plaintiff an access road.

**The defendant's defence.**

4. The defendant denied the plaintiff's claim. He specifically admitted the sale of two plots to the plaintiff and that the plaintiff took possession thereof as pleaded. He also admits signing the transfer forms but denies ever applying for and obtaining the land control board consents. He also pleads that in the alternative the consent was obtained after a six month period hence the sale agreements are invalid. He denied refusing to execute mutation forms or that he had been involved in the survey of the land for the purpose of creation of a road of access, but avers that he is willing to have a road of access created along the boundary to his parcel next to plot No. 158. He avers that creation of a road of access along his plots boundary with plot No.164 would make his land cease to be economically viable. He denies wanting to create a road of access on a neighbouring parcel; of land and pleads that the plaintiff, while buying the land did not pay any money for a road of access to be carved out of the defendant's land and thus the defendant should be content with any road of access created for him. The defendant states that he has not interfered with the plaintiff's possession of the land he bought.

**The Consent of the Parties.**

5. The parties entered into a consent on the 2<sup>nd</sup> December 2013 in which it was agreed that the County Surveyor do proceed to the ground and create an access road between parcels no **Parcel No Kiminini/ Matunda Block 7/ (Masaba)158** and **159**. The surveyor proceeded and

created a 6-metre wide road of access in the parties' presence without any objection. The applicant then came to court vide an application seeking to restrain the plaintiff from creating a road of access. This court observed that it was not the plaintiff who created the road of access but the surveyor in accord with the consent of the parties. The application was thus dismissed. There is a surveyor's report dated 29<sup>th</sup> February 2016 forwarding to the Deputy Registrar of this court a bundle of documents including the mutations meant for the processing of title deeds. I am surprised that this matter still proceeded to hearing on the merits after this but we will see why in a short while.

## **THE EVIDENCE OF THE PARTIES.**

### **The Plaintiff's Evidence**

6. PW I the plaintiff, testified reiterated the contents of the plaint. He produced a certificate of official search for plot 159, the two sale agreements, the executed transfer forms, the defendant's PIN and ID card, he stated that the defendant wanted him to continue using his neighbour's access road. He narrated the events of the date when the surveyor, pursuant to an order of this court went to the site and created a road of access without any demur on the part of the parties. The surveyor then recommended that the mutation be endorsed by the court since the defendant failed to execute the mutation form. He produced the surveyor's report as evidence. He prayed that the defendant be compelled by this court to execute the mutation forms failing which the Deputy Registrar should execute them.

7. The surveyor also testified for the plaintiff. She described how she complied with the order of this court and visited the site on 23/1/2014 and carved out a 6-metre wide road between parcels 158 and 159. Thereafter the defendant refused to execute the mutations whereupon the surveyor forwarded them to the Deputy Registrar of this court for execution.

### **The Defendant's Evidence.**

8. The defendant testified that he sold the land to the plaintiff on two different occasions. He averred that the parties never went to the Board for a land board's consent. He denied being involved in the procurement of a consent of the board. He refused to execute the mutation forms for he never attended the Board meeting. He avers that he can not be compelled to execute the documents to effect the transfer without the consent of the Board and prays for a dismissal of the plaintiff's case. However he admitted executing the transfer. When asked whether he executed *P.Exh 3(a)* his conduct changed. His tone became very aggressive as he denied that the signature was not his, yet he admitted that he has not raised any complaint of forgery with the authorities concerned. He denied knowledge of how the letter of consent was obtained. He admitted that the surveyor visited the land on two occasions but denied that he participated or allowed the creation of a road. On 23/1 /2014 the surveyor came to the land and showed him what she had drawn and he rejected it. The defendant's oral statement portrays a person who is almost paranoid that the plaintiff would acquire the whole of parcel No. 159 rather than the two small portions which he bought.

### **The Parties' Submissions**

9. The plaintiff filed his submissions on 3<sup>rd</sup> April, 2018. The defendant had filed his earlier on 11<sup>th</sup> April, 2018. I have perused and considered those submissions.

## **DETERMINATION**

### **Issues for Determination**

10. The issues that arise in this suit are as follows:

- a. Whether the plaintiff is entitled to a road of access from the defendant;*
- b. Whether the defendant should execute the mutation forms.*
- c. Who should bear the costs?*
- a) Whether the plaintiff is entitled to a road of access from the defendant;*

11. The defendant is the seller in this case. The court takes note that in normal transactions the seller takes charge of the process and ensures that the works that are required to be done in respect of subdivision of the land are carried out to facilitate the issuance of title to a purchaser.

12. The defendant does not deny even signing the transfer. What he states is that he is apprehensive the documents that the plaintiff has would lead to transfer of all the land comprised in plot No. 159 to the plaintiff. Secondly according to his defence the plaintiff never paid any money for the road of access. I find that this concern is no justification for his refusal to execute the mutations.

13. The plaintiff cannot remain landlocked yet the defendant is the seller of land. I find it improper for the defendant to suggest that one can be entitled to sell a landlocked portion of land to any person. It goes against public policy and conventions of subdivision of land in this country.

14. I therefore find that the plaintiff is entitled to a road of access to the land that he has bought from the defendant.

***b. Whether the defendant should execute the mutation forms.***

15. The defendant has not demonstrated any good reason why he should not execute the mutations which will give effect to the agreement between him and the plaintiff. I therefore find that the defendant should execute the mutations to facilitate the creation of such a road in the official map.

**CONCLUSION.**

16. I therefore find that the plaintiff's claim has merit and I hereby enter judgment in favour of the plaintiff against the defendant as prayed in prayers (a) , (b) and (c) of the plaint dated **23<sup>rd</sup> July, 2013** in this suit.

Dated, signed and delivered at Kitale on this **31<sup>st</sup>** day of **May, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**31/5/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for defendant

Ms. Arunga for plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**31/5/2018**