



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT KISII**

**CASE NO. 1144 OF 2016**

**(FORMERLY HCC NO. 339 OF 2010)**

**PHILIP MATOKE ABUGA.....PLAINTIFF**

**VERSUS**

**DUNCAN OMBUI ONTITA.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff instituted this suit against the defendant on 25<sup>th</sup> November 2010 by way of a plaint dated the same date. The plaintiff averred that at all material times, he was registered as the absolute proprietor of the parcel of land known as **Kisii/Central Kitutu/Daraja Mbili/1447** (hereinafter referred to as “**suit property**”) measuring 0.05 hectares or thereabouts. The plaintiff further averred that on or about the months of May and June 2010, the defendant unlawfully and without any justifiable cause started digging and constructing a sewer line from his compound through the neighbouring plots towards the main sewer without first obtaining consent from the owners of the neighbouring plots.
2. The plaintiff further averred that in as much as the defendant’s plot did not share a common boundary with the suit property (which was about five plots away), the defendant nevertheless, unlawfully and without any justifiable cause entered the suit land; with the help of his agents, servants and employees and started to dig and construct a sewer line. However, due to protests from the plaintiff and other neighbours, the defendant stopped his unlawful acts of trespass temporarily; but on 19<sup>th</sup> November 2010, the defendant entered onto the plaintiff’s land once again and continued digging and constructing the sewer line.
3. The plaintiff further contended that the said sewer line is now fully constructed across the plaintiff’s land and the same passes outside the plaintiff’s house posing health and environmental hazards to the plaintiff and his family.
4. The plaintiff asserts that due to the defendant’s unlawful acts, he has suffered and continues to suffer great inconvenience as his right to quiet enjoyment of the suit property has been curtailed and as a result of the defendant’s action, he has suffered irreparable loss and damage for which he holds the defendant solely liable.
5. The plaintiff has sought judgment against the defendant for a permanent injunction restraining the defendant by himself his servants, agents or employees from entering onto, digging, constructing a sewer line or in any manner whatsoever interfering with the suit property, an order of eviction of Defendant from the suit land, mesne profits/ general damages, costs for the suit and any further or other relief deemed just.
6. The defendant on his part filed his defence dated 8<sup>th</sup> March 2013 and stated that he was lawfully constructing a sewer line which passes through a common survey road and has no intention of encroaching or trespassing onto the plaintiff’s land as alleged. The defendant stated that there was no reasonable cause of action disclosed against him by the plaintiff and prayed that the present suit as filed be struck out.
7. The plaintiff and one witness testified in support of the plaintiff’s case while the defendant was the sole witness who testified in support of the defence case. The plaintiff testified that he was the owner of land parcel **Central Kitutu/Daraja Mbili/1447** where he has developed two permanent houses and resides. He stated that the defendant also lives in the same area though he was not an immediate neighbour. It was his evidence that the defendant in May and June 2010 was constructing a sewer line and that he had dug up and laid pipes on the plaintiff’s said land parcel. The plaintiff stated that the sewer line was not on the road reserve as alleged by the defendant in his defence but on his land. He denied there was a public road where the sewer was being constructed.
8. The plaintiff called one Benard Nyabuga Motanya (PW2) who is a survey Assistant with Geomatic Services Licenced Surveyors who testified that he was engaged by the plaintiff to ascertain the position of the sewer line being constructed by the defendant and the boundary of the plaintiffs land parcel. It was PW2’s evidence that when he visited the site and carried out measurements he found the sewer line was being laid in the plaintiff’s parcel of land and that the measurements on the ground and on the map were not matching. He produced his report as “**PEx.3(a)**” and the copy of the survey map as “**PEx.2(b)**”. PW2 further testified there was no access road between parcel **675** and

the plaintiff's land parcel 1447 which border each other. The witness denied there was a footpath between land parcel 675 and the plaintiffs land. PW1 in cross examination stated that between his plot and parcel 675 there is a separation of 6feet out of which he had contributed 3 feet and the owner of parcel 675 had also contributed 3 feet and it is this passage which was being used as a foot path but had not officially been converted into a road.

9. The defendant testified that he is the owner of land parcel **Central Kitutu/Daraja Mbili/2882** which borders parcels 2883 and 839 and thereafter parcels 913 and 675 which are before the main access road. The defendant maintained there is an access road as per the sketch plan attached to his replying affidavit and stated that the sewer line was being laid on the access road. He denied having trespassed onto the plaintiffs land. He stated further that after the plaintiff filed the suit and obtained an injunction he stopped the project. Under cross examination the defendant stated that following the dispute herein he relocated the sewer line and it now passes through land parcel 2883. He further stated he is no longer interested to have the sewer line pass through the initial route. The defendant asserted that he had been allowed by the sewerage department to pass the sewer line through the initial site and that the District Surveyor had informed him that there was a road where he had initially planned to put the sewer line. The defendant stated further that he did not relocate the sewer line because it was on the plaintiff's land but because he needed to have the sewer completed. He asserts that the road along which he had laid the sewer line is still in existence and in use.

10. Parties filed written submissions after directions by the court on 15<sup>th</sup> January 2018. The issues for determination in this case is whether the defendant trespassed onto the plaintiff's land parcel 1447 and if so whether an order for the defendant's eviction ought to issue and whether any mesne profits and/or general damages for trespass are payable.

11. On the evidence that has been tendered, the court is not satisfied that the plaintiff has proved that the defendant trespassed onto his land. The plaintiff has predicated his case on the fact that the survey map that he tendered in evidence does not show there is an access road where the defendant claims there is one. However, by his own evidence the plaintiff accepts that he gave 4 feet from his land parcel 1447 and his immediate neighbour also gave 4feet from his land parcel 675. The land between the two parcels of land was being used as a foot path and the plaintiff stated that it was now being used as **"an illegal road of access"**. The plaintiff in his evidence stated:-

**"...on the ground there is now a road passing next to Plot No. 675 and 913 to Plot No. 2883. The road has been there for some time. This road is interfering with my parcel of land. We had left it to be used as a path. The late Masese had contributed 3 feet and I did the same. It is now being used by Onsongo to access his home."**

In re-examination the plaintiff infact stated thus:-

**"When I was putting up my fence, I left about 4 feet between my plot and plot no. 675. The late Masese had also given 4 feet. This portion that we left has now been expanded to form an illegal road. My complaint is about the sewer line. This portion that we contributed has not been officially made or converted into a road."**

12. The sketch plan produced by the defendant clearly illustrates the **"footpath"** as a 10feet access road running between parcels 1447, 675, 913 and 860 (1446 and 1447) to parcels 2883 and 2882. The survey map produced by the plaintiff shows an access road from parcel 839 terminating at parcel 913. The intention by the plaintiff and the owner of parcels 675 and 913 to cede or give land was clearly to have the access road run through to join the main access road. The defendant no doubt was convinced there was an access road and so were the departments of sewerage and survey. The fact that the road may not have been formalized does not change the position that there is a road on the ground. The plaintiff from the evidence voluntarily gave his portion of the land as the owner of land parcel 675 did. The evidence of PW2 was deliberately tailored in favour of the plaintiff and failed to reflect the status on the ground. PW2 was emphatic there was no road and did not even mention there was a footpath in active use. He stated there was no footpath between the plaintiff's land parcel 1447 and land parcel 675 yet the plaintiff acknowledges there is one and is now being used as an illegal road. I do not find PW2 evidence to be of any assistance.

13. Taking into account the totality of the evidence and material placed before the court I accept the defendant's evidence that he believed he was constructing the sewer line along the access road. The defendant's position is fortified by the fact that when the dispute arose he sought and obtained an alternative route for the sewer line. That would not be the act of a person who willfully wanted to engage in trespass. I find no trespass has been proved by the plaintiff against the defendant. The defendant having rerouted the sewer line, the prayer for injunction was rendered superfluous.

14. Trespass having not been proved there can be no case for mesne profits and/or damages.

15. In the final result, I find and hold that the plaintiff has failed to prove his case on a balance of probabilities and his suit commenced by way of plaint dated 25<sup>th</sup> November 2010 is dismissed with costs to the defendant.

16. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 11<sup>TH</sup> DAY of MAY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Anyona for the plaintiff

Mr. Masese for the defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**