



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 40 OF 2017

DAVID MWIYEL.....PLAINTIFF

VERSUS

JULIUS MUSYOKA KILYA.....DEFENDANT

JUDGEMENT

BACKGROUND

The plaintiff first instituted this case in the principal's magistrate court in Mwingi PMCC Case No. 42 of 2016. The case stalled after the Law Society of Kenya Malindi branch filed Petition Cause No. 3 of 2015 where they obtained orders stopping magistrate from handling Environment and Land Court matter in the country. The plaintiff then sought to transfer that case from Mwingi Law Courts to the ELC Court, Garissa for hearing and determination. That application was allowed.

The plaintiff's claim as shown in his plaint dated 16th May, 2016 is for a permanent injunction restraining the defendant by himself, or anybody acting under his behest from blocking, occupying, claiming the access road. The plaintiff is also seeking a declaration that the defendant is not entitled to block the premises which forms part of the plaintiff's access road and that any developments or blockage thereof be demolished by the County Government of Kitui in accordance with the statutory notice given. In paragraph 4 of that plaint, the plaintiff averred that on or about 2015 the defendant made developments on his land parcel No. Mwingi/mwingi/339 that literally blocked access road and right of way to the plaintiffs parcel of land No. Mwingi/Mwingi/4114. The plaintiff further averred that the defendant's actions were reported to the County offices situated at Mwingi town who gave the defendant notice dated 12th February, 2016 to open the access road by removing structures on the road reserve within 21 days from the date thereof.

The said letter further noted that the land surveyor Mwingi Sub-county visited the land in question and established that indeed the defendant actions were illegal and ordered him to open up the access road. In a brief statement of defence dated 20th June, 2016 and filed in court on 20th June, 2016, the defendant denied the plaintiffs claim saying that the same does not disclose any cause of action against him and that the same is premature. The defendant averred that the plaintiffs claim is bad in law for misjoinder and that he would raise a preliminary objection at the hearing of the suit.

PLAINTIFFS CASE

During the hearing of this case, the plaintiff adopted his statement filed in Mwingi Law Courts on 18th May, 2016 in which he stated that he is the registered owner of land parcel No. Mwingi/Mwingi/4114. The plaintiff further stated that sometime in the year 2015 the defendant made developments on his land parcel No. Mwingi/mwingi/339 that literally blocked access road to his land parcel No. Mwingi/Mwingi/4114. He made complaints to the relevant authorities who issued the defendant with a notice to open up the access road but the defendant refused and/or declined to open up the access road. The plaintiff referred to various letters which he wrote complaining against the actions by the defendant marked P Exhibits 1,2,3,4 and 5 respectively.

The plaintiff also referred to a survey map of the area certified by the District Surveyor. After he lodged the complaints, the District Land Registrar together with the District Surveyor visited the alleged road reserve where they filed a report which was produced as P. Exhibit No. 9(a). Attached with that report is a sketch map which was also produced as D Exhibit No.9 (b). According to the map there is an access road which has been blocked by the defendant. He sought an order compelling the defendant to open up the access road. PW2 was Christopher Mbuvi Nzengu who is the District Surveyor Mwingi Sub-county. The witness recalled that in the year 2015 or thereabouts, his office received a letter of complaint from the Land Registrar dated 6th November, 2015. They also received another letter on the same subject from the town administrator dated 12th February, 2016. The two letters were complaining about the blockage of an access road leading to a plot parcel No. Mwingi/mwingi/4114 and 4113.

On 27/01/2016, they went to the scene together with the Land Registrar, Deputy Town Administrator, and the complainant. After taking measurements using the maps, they found out that there were temporary structures built on the access road to plots No. mwingi/Mwingi/4114 and 4113 respectively. They were using preliminary index map (PIM) for the year 2003 for Kanzanzu registration section. He stated that the

road measures 8x6 metres of 20 feet. The witness produced the report which they prepared with the Land Registrar, Mwingi District.

DEFENDANT'S CASE

The defendant gave a sworn testimony and stated that there is an access road between his plot parcel no. Mwingi/Mwingi/339, 4113 and 4114. That road is not accessible. However, he denied that he has blocked that access road. The defendant stated that the two plots should be measured to know who has blocked the access road. He said that the report produced by the plaintiff's witness as P Exhibit 9 (a) is not correct. He did not call any witness(es).

ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their witnesses. I have equally considered the submissions by counsels appearing on their behalf. The claim by the plaintiff is that the defendant has blocked an access road and that he cannot access his land parcel No. mwingi/Mwingi/4114. The plaintiff testified on oath how he wrote numerous letters to the authorities concerned with a view of opening up of access roads which include the Sub-area, the District Land office in Mwingi and the Town Administrator. He also instructed his lawyers who wrote demand letters to the defendant to remove the structure but he refused and/or neglected to do so. The plaintiff also complained to the District Land Registrar and the District Land Surveyor who together with the Sub-County Administrator visited the scene and prepared a joint report marked P. exhibit No. 9 (a).

The plaintiff also produced a survey map of the area showing the existence of an access road but do not exist on the ground. That survey map was also produced as P exhibit no.7. The plaintiff also testified how he has been accessing his plot No. 4114 through a neighbours land Parcel No. 328. The testimony of the plaintiff was supported by the District Surveyor (PW2) who confirmed having visited the scene and witnessed for himself the blockage of the access road by the defendant. The defendant in a brief testimony denied the allegations by the plaintiff and his witness and asked the two plots to be measured.

I find that the plaintiff has given candid and credible evidence in support of the claim herein. The District Surveyor Mr. Christopher Mbuvi Nzengu gave testimony and produced a report showing that the access road was encroached by the defendant. That report has not been challenged by the defendant in any respect. I am satisfied that the plaintiff has proved his case on a balance of probabilities.

In the result, I hereby enter judgment for the plaintiff against the defendant as prayed in the plaint with each party to bear her own costs of this suit.

It is so ordered.

Read, Delivered and Signed in the open court this 27th day of June 2018.

Hon. Justice E. C. Cheron

ELC JUDGE

In the presence of:

1. Mr. Nzili for plaintiff
2. Defendant in person present
3. Court clerk: Ijabo