



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 2276 OF 1998

PETER MBURU BURUGU.....PLAINTIFF

VERSUS

MARGARET NJERI MBURU.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff instituted this suit on 15/10/1998 against Peter Mungai (1st defendant), Robinson Cege Mataara (2nd defendant), Peter Njuguna Matereto (3rd defendant), Town Council of Limuru (4th defendant) and Margaret Njeri Mburu (5th defendant). Through a written consent dated 15/11/1999 and filed in court on 21/1/2000, the suit against the 1st, 2nd, 3rd and 4th defendants was withdrawn, leaving the 5th defendant, Margaret Njeri Mburu, as the only defendant.

2. The plaintiff is the proprietor of two parcels of land, Land Reference Numbers 4859/17 and 4859/18, both situated in Limuru, Kiambu County. Both of them abut Land Reference Number 4859/9 which is registered in the name of Cyrus Mburu Gichua, the deceased husband of the defendant (the deceased). The issue in this suit is whether or not there exists a public road or a road of access in the plaintiff's properties.

Plaintiff's Case

3. Through the plaint, the plaintiff contended that on or about 6/9/1998, the defendant together with her agents/servants unlawfully entered into his property, Land Reference Number 4859/18 (the **suit property**) broke and damaged his fence, and asserted that there existed a public road and or road of access through the said land. He contended that no public road or road of access existed through his land and that the defendant's assertion of a public road or road of access through his land was without any basis.

4. Consequently, the plaintiff sought the following orders against the defendant:

- a) A declaration that no road of access or public road traverses the suit property;***
- b) A permanent injunction to restrain the defendant from being an, remaining on, and trespassing upon the suit property;***
- c) Special damages of Kshs 20,000/-;***
- d) General damages for trespass to land, malicious damage to property and conversion and detinue to the plaintiff's goods;***
- e) Costs with interest at court rates.***
- f) Interest on (c) and (d) at court rates; and***

Defendant's Case

5. The defendant filed a statement of defence and counterclaim dated 17/11/1998 in which she denied invading the plaintiff's property or causing damage as alleged by the plaintiff. In the counterclaim, she contended that Land Reference Numbers 4859/17 and 4859/18 were subdivisions out of Land Reference Number 4859/8. She added that access of Land Reference Number 4859/9 to Riara Road was provided through Reference Number 4859/8 which was subsequently subdivided into Land Reference Number 4859/17 and 4859/18. She added that her late husband who purchased Land Reference Number 4859/9 in 1973 had used the disputed road until June 1998 when the plaintiff, without any reasonable cause, barricaded the road. She sought the following orders in the counterclaim:

a) A declaration that a road of access or public road exists on LR No. 4859/8 now subdivided into LR No. 4859/17 and the suit property.

b) A permanent injunction restraining the plaintiff from blocking, barricading or closing the access road on the suit property.

c) Special damages.

d) Costs and interest

Plaintiff's Evidence

6. The suit was first heard on 10th April 2002 before Hayanga J. The plaintiff (PW1) testified that he owned both Land Reference Number 4859/17 and Land Reference Number 4859/18 (the **suit property**) whose titles he produced as Plaintiff Exhibits 1 and 2 respectively. He made reference to a map showing both properties and produced the map as Plaintiff Exhibits 3. He stated that the suit property was contiguous to Land Reference Number 4859/9 to the south. PW1 stated that when he bought the suit property in 1986, he entered into an arrangement with Mr. Mburu who was the owner of Land Reference Number 4859/9 to allow him passage through his farm to Riara Road Ridge on condition that he maintained the road. He stated that Mr. Cyrus Mburu maintained the road until his death and that the people who took over Cyrus Mburu's farm continued to use the passage without maintaining it. He contended that he approached the defendant and her manager to repair the road and when no response was forthcoming, he decided to close the road by erecting a gate and a notice stating that no vehicles were allowed through.

7. PW1 further testified that on 6th October 1998, he went to the farm and found that the gate had been uprooted and taken away. The gate was worth Kshs 20,000/-. He was informed by his workers that the defendant and her farm workers had removed the gate. He reported the incident to Tigoni Police Station. He contended that there had never been an access road through his land.

8. In cross-examination, PW1 stated that when he bought the land, there was a tarmacked truck road along Riara Ridge which Mr. Thiani who sold the property to him had built and was not for use by the neighbours. He denied knowledge that the deceased tarmacked the road and further denied that the road existed before he bought the land.

Defendant's evidence

9. The defendant (DW1) testified that she was the owner of Land Reference Number 4859/9 which her late husband bought before the plaintiff purchased his properties. She stated that the disputed road was in existence when they bought the property but had been blocked by the plaintiff. She reported the matter to the District Officer at Limuru who referred her to the District Commissioner at Kiambu who in turn referred her to an advocate who advised her to seek recourse in court. DW1 stated that the disputed road had been tarmacked by her late husband but denied knowledge that the access was pursuant to an agreement with the plaintiff. She stated that her manager never informed her that the plaintiff wanted the road repaired.

10. The defendant stated that no other land owner needed that access road. She admitted that the disputed road was not a public road and averred that her land was 150 acres. DW1 stated that, besides the disputed road, there exists another road which serves Nazareth Hospital. She stated that besides visiting the District Commissioner, she also visited the District Surveyor who confirmed the existence of the road. She made reference to a letter dated 11th June 1998 from the District Surveyor as well as an invoice for the road repair costs by her husband which were marked as MF1 and MF2 respectively.

11. During cross-examination, DW2 stated that MF1 did not mention any property. She maintained that there existed a public road which her husband had repaired.

12. The second defence witness was Gibson Wahome Werugia (DW2), a licenced land surveyor based in Nakuru. His statement dated 5th August 2015 was adopted as his sworn evidence in chief. He stated that on instructions from the defendant, he prepared a survey report dated 8th April 2014 which he produced as DExh. 3. He stated that in preparing the report, he relied on four survey plans dated 25th July 1941, 16th January 1954, 14th November 1984 and 1st March 1988 which he produced as DExh. 4(a)-(d) respectively.

13. DW2 made reference to the plan marked as folio no. 53 register no. 1 and contended that it showed LR No. 4859 was divided into 4 portions namely 4859/1-4 which had a frontage to Riara Road. Further, he stated that folio no. 60 register no. 148 showed the subdivision of 4859/1 into 3 portions namely 4859/7, 8 and 9. He contended that on the Map, LR 4859/9 did not touch Riara Road and that its access was to be through LR. No.4859/8 as informed by the dotted lines.

14. DW2 stated that the proposed subdivision of LR No. 4859/8 should have provided an access road for LR 4859/9 through portion B and A. He informed the court that the proposed subdivision was approved and resulted into Survey Plan Folio No. 170 Register No. 49. He made reference to Exhibit 4(d) which was the subdivision survey plan for LR No. 4859/8 which resulted into LR. 4859/17 and the suit property and noted that it did not have any provision for an access to Riara Road by LR. No 4859/9.

15. In cross-examination, DW2 stated that he did not examine Survey Plan No. 122058 which formed the survey base for the suit property. He stated that the Survey Plan attached to the title did not have the dotted line. The evidence of DW2 was that on Survey Plan No. 122058, the boundary between the suit property and LR No. 4859/9 was the centerline of a river. DW2 did not establish if the defendant's land had access to any other road. He stated that the conclusion in his report was that it was not clear why the access road to LR No. 4859/9 had not been provided for in the existing plans. He contended that the omission to make provision for an access road for LR No. 4859/9 through LR No. 4859/8 called for rectification. DW2 admitted that until rectification is done, there was no access road in the official plans.

16. In re-examination, DW2 stated that the access road to LR No. 4859/9 should pass through the suit property and LR No. 4859/17 in accordance with the survey plans. He stated that his recommendation for rectification was based on the fact that subdivision is carried out in accordance with approved development plans and that the deed plan was supposed to be an extract of the approved plans.

17. The last defence witness was John Makato Mulwa (DW3). He adopted his statement dated 26th October 2016 as his evidence in chief. In his statement, DW3 stated that he was a farm manager at the defendant's farm where he had worked for 13 years. At the time of joining the defendant's farm as a manager, the plaintiff had already barricaded the disputed road prohibiting access to the main Limuru-Nazareth Road from LR No.4859/9. He stated that the blockage was erected from the bridge where the plaintiff had planted trees, approximately 20 metres from the boundary of his property.

18. DW3 stated that following the barricade, the defendant had been forced to repeatedly seek easements from neighbours in order to access her property. He stated that the road which was being used by the defendant belonged to Menengai Farmers Ltd who allowed usage in 2004 pending this suit. DW3 contended that proprietors of Menengai Farmers had begun erecting road blocks around the property and that after completion, the defendant would be completely cordoned off without access to any roads. DW3 averred that barricading of the road had caused them difficulties and loss as the distance from the farm to Mabroukie and Kalirana Tea Factories where they sold green tea had increased from 3km to 10Km, making it uneconomical to transport and sell their produce to the said factories. DW3 contended that due to the aforesaid circumstances, they had resorted to selling their tea to Maramba Tea Factory at Kshs 20 per kg instead of Kshs 24 per kg offered by Mabroukie and Kalirana Tea Factories. He further stated that the long distance threatened the quality of produce arriving at the factories owing to the perishable nature of tea leaves, in addition to exposing them to accidents since the road from the farm to the factory was hilly and slippery during rainy season.

19. In cross-examination, DW3 stated that the defendant covers a long distance to access the tea factory since there is no access road through the suit property. He denied knowledge of existence of another access road.

20. In re-examination, DW3 stated that there was a huge difference when using the road through Maramba Farmers and that school going children were affected by having to use a longer road.

Submissions

21. The plaintiff filed submissions dated 6th July 2018 in which he reiterated the facts as pleaded and adduced in evidence. He relied on the case of **Kipkirui Arap Koske vs. Philemon Kipsigei Tangus & Bomet District Land Registrar (2015) eKLR** where the court declined to hold that there existed a public road through the defendant's land as none existed and held that the plaintiff needed to approach the Minister or the District Roads Board to create an access road under Sections 8 and 9 of the Public Roads and Roads of Access Act.

22. Similarly, the defendant in submissions dated 24th May 2018 reiterated the pleadings and evidence and relied on the case of **Nyanchama Kimaiti vs. Samuel Nguto Onguso & another Kisii ELC No. 302 of 2010** where the court relied on the registry index map to find that there existed an official surveyed road of access through the suit property and that the plaintiff's property rights had therefore not been infringed upon. Counsel argued that there can be no trespass on the suit property as the defendant had been using the disputed road before the plaintiff purchased the suit property for a period of 25 years since 1973. The defendant relied on the case of **Aquila Properties Ltd vs. Bhupendra Patel Nairobi ELC No. 173 of 2012** where the court held that the defendant was not a trespasser as an easement had been created under Section 32 of the Limitation of Actions Act.

Determination

23. **I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal framework on public roads and roads of access. Similarly, I have considered the prevailing jurisprudence on the key issue in this suit.** The plaintiff's case is that no road of access or public road traverses the suit property. The defendant's case is that a road of access or public road exists on the suit property. The single issue for determination in this suit, therefore, is whether a road of access or public road exists on the suit property.

24. The legal framework on public roads and roads of access is contained in the **Public Roads and Roads of Access Act, Chapter 399** of the **Laws of Kenya**. This statute was enacted in 1920 and came into **all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise** force on 10/8/1920. The Act has been amended severally to address emerging issues. Under Section 2 of the Act, "a **public road**" is defined as:

a) *"any road which the public had a right to use immediately before the commencement of this Act.*

25.

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.

27. It is common ground that the plaintiff is the registered proprietor of Land Reference Number 4859/17 and Land Reference Number 4859/18 (the **suit property**). The two parcels of land abut Land Reference 4859/9 which is registered in the name of the defendant's deceased husband, Cyrus Mburu Githua. It is also common ground that prior to the erection of the challenged barrier by the plaintiff, the deceased accessed Riara Road through the suit property. What is in contest is whether the access was pursuant to the plaintiff's consent or as a result of an existing public road or road of access within the meaning of the Public Roads and Roads of Access Act.

28. The Public Roads and Roads of Access Act makes a distinction between a road of access and a public road. This distinction was explained by the Court of Appeal in the case of **Dellian Langata Limited vs. Symon Thuo Muhia & 4 others, Nairobi CA No. 144 of 2014 (2018) eKLR**, as follows:-

“...having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.”

29. The plaintiff produced copies of the registered title and survey plans which do not bear evidence of any public road. The defendant called a private surveyor who confirmed that indeed the existing registered survey plans in respect of the plaintiff's properties do not bear any public road. What therefore emerges from the evidence before court is that the prevailing registered survey plans do not bear the public road pleaded by the defendant.

30. Similarly, there is no evidence that a road of access connecting Land Reference Number 4859/9 to Riara Road through the suit property exists because there is no evidence that an application was made to the district roads board under Section 9 of the Act and the same was granted and noted in the land register within that framework. There is also no evidence of any application made to the Minister within the framework of Section 8 of the Act.

31. In my view, the deceased's use of the plaintiff's properties to access Riara Road with the consent of the plaintiff did not make the passage a public road or a road of access within the meaning of the Public Roads and Roads of Access Act. A public road is defined by statute. On the other hand, a road of access is created in the manner prescribed by the statute. Both the definition of a public road and the creation of a road of access have not been established by the defendant. The defendant's counterclaim in which she urges the court to declare the existence of a public road or a road of access where none exists in the current registered survey maps and without following the procedure laid down in the statute is therefore wholly unmerited.

32. Courts have stated umpteen times in a myriad of decisions, among them, **Speaker of National Assembly v Karume (2008 eKLR (FP) 425** that where Parliament has provided a clear procedure of redress against any grievance, that procedure should be utilized exhaustively before court action is contemplated. Regrettably, the defendant did not deem it necessary to utilize the redress mechanism laid down in Sections 8 and 9 of the Public Roads and Roads of Access Act. She instead elected to mobilize hooligans to pull down the barrier erected by the plaintiff. She thereafter moved the court to declare a public road or road of access on the suit property in total disregard of the above framework.

33. If indeed previous registered survey plans provided for a public road or any other form of road through the plaintiff's properties, the defendant ought to have challenged the subsequent registered survey plans in the manner provided under the law instead of resorting to hooliganism.

34. The upshot of the above findings is that there is no evidence of existence of a public road or road of access through the plaintiff's property, Land Reference Numbers 4859/17 and 4859/18. Consequently, save for the plea for special damages, the plaintiff's suit succeeds. The defendant's counterclaim fails wholly.

35. The plaintiff prayed for special damages of Kshs 20,000. No single document was presented to the court to support the figure of Kshs 20,000/-. In the absence of specific proof of this special damages claim, the court has no evidential basis upon which to grant the sum of Kshs 20,000/-.

Disposal Orders

36. In light of the above findings, I make the following disposal orders:-

(a) It is hereby declared that no legitimate road of access or public road traverses the plaintiff's property Land Reference Number 4859/18.

(b) The defendant together with her servants and agents are hereby restrained against trespassing upon the plaintiff's property, Land Reference Number 4859/18.

(c) The defendant's counterclaim is dismissed.

(d) The plaintiff shall have costs of this suit to be borne by the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF OCTOBER 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Mwiti Advocate for the Plaintiff

Mr Mukungu Advocate for the Defendant

June Nafula - Court clerk