



Ludco Limited v Pemca Enterprises Limited & another (Environment & Land Case 49 of 2018) [2024] KEELC 115 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 49 OF 2018
NA MATHEKA, J
JANUARY 25, 2024**

BETWEEN

LUDCO LIMITED PLAINTIFF

AND

PEMCA ENTERPRISES LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT

JUDGMENT

1. The plaintiff avers that they are the registered owner of the property known as Sub-Division number 14850/11/MN registered as CR.67950 property. The 2nd Defendant had contracted the 1st Defendant under contract number CMG/T/&l/PRO/133/2016-2017 to make improvements on gave standard of access road to estate opposite Utange Petrol Station (Afro Estate) Kisauni Sub-County. On or about 1st March,2018, the 1st Defendant entered without authority or justification and did works pursuant to contract number CMG/T/&I/PRO/133/2016 2017 awarded by the 2nd Defendant and illegally and unlawfully trespassed on the Plaintiffs Property and destroyed the Plaintiffs Structures and development on the Suit Property. The Plaintiff reported the matter to the Bamburi Police Station OB No. 50 of 28.2.18. That the excised portion of land occupied by the illegal road created by the defendants contains by measurement 0.0269 Ha and it is valued at Kshs.2,700,000/= as at 24th June 2022 which is a considerable investment to loss without compensation being offered to the Plaintiff. That due to the unlawful excision and the arbitrary manner in which it was carried out by the Defendants coupled up with the history of the area where the property is located of notorious and illegal occupants (squatters) the Defendants’ actions exposed the plaintiff’s property to the danger of illegal invasion by squatters. The said exposure forced the Plaintiff to invest heavily on security to the tune of kshs. 7,662,000/= as at June, 2022 from March 2018 which amount the plaintiff herein hereby claims from the Defendants. The plaintiff will still continue incurring further cost to provide security



as the danger of invasion is still eminent at an estimated cost of Kshs. 67,000 per month. The plaintiff prays for judgement against the defendants for;

1. A Declaration that the defendants' actions are unconstitutional, illegal and further a declaration that there is no public cutting through suit property.
 2. That the contract number CMG/T/&I/PRO/133/2016-2017 be cancelled in its entirety.
 3. As an alternative to prayer (1) and (2) herein a declaration that he excised portion of the Plaintiff's land limited to the portion cover by the road was compulsorily acquired unlawfully without his knowledge and arbitrary without being offered compensation in total disregard and violation of the law and the Constitutional provisions and a denial of natural justice and fairness which adversely affected the Plaintiff's right to property and order do issue compelling the Defendants to pay the Plaintiff the sum of Kshs.2,700,000/= as just compensation for the excised portion of the Plaintiff's land.
 4. That the 2nd defendant be stopped from issuing and/or awarding any such other contracts that directly and/or indirectly affect the Plaintiffs property known as Sub- Division number 14850/11/MN registered as CR. 67950 to the title C.R.67950
 5. General Damages.
 6. Special damages
 7. Cost of suit and interest.
2. This court has considered the evidence and the submissions therein. Through the amended plaint dated 17th October 2022 the plaintiff averred that the 2nd defendant contracted the 1st defendant to commence road works of improving to gravel standards an access road to estate opposite Utange petrol station, Afro estate within Kisauni sub-county vide a contract No. CGM/PRO/133/2016-2017. It is the plaintiff's case that while constructing the said road, the 1st defendant trespassed into Plot No. 14850/II/MN. The 1st defendant is said to have hived off a road without following due process or authorization from the plaintiff, which was said to be an infringement to the plaintiff's right to property. The plaintiff maintained that the invasion of the suit property by the defendants exposed the suit property to potential squatters who were notorious in the area. The 2nd defendant denied the plaintiff's averments that it had trespassed on the suit property nor was the said road illegally created by the defendants.
3. The plaintiff has established that it is the registered proprietor of the land known as Plot No. 14850/II/MN measuring 0.06043 as seen from the Certificate of Postal Search dated 9th June 2016. As a registered owner within the meaning of Section 26 (1) of the *Land Registration Act*, the plaintiff has an indefeasible title and is conferred with all the rights and privileges accruing to it as stated in Sections 24 and 25 of the *Land Registration Act* including the right to possession, to a quiet and peaceful occupation and right to use of their property. After establishing ownership, the plaintiff is required to demonstrate through evidence, on a balance of probabilities, that indeed the defendants trespassed onto the suit property.
4. The suit property Plot No. 14850/II/MN was a subdivision from Plot No. 366/II/MN of an area size 3.41 acres which was previously owned by Zahrabai Amiral Tayabali as seen from the Certificate of Search dated 23rd November 2015. Zahrabai Amiral Tayabali sought the subdivision of Plot No. 366/II/MN from the County Government of Mombasa Department of Lands, Planning and Housing, which was approved on 25th August 2015. The said approval created Plots No. 14848/II/MN, 14849/II/MN and 14850/II/MN (the suit property); subject to the condition that there would be a surrender



- of deed plans in respect to the roads and subplots earmarked for public purpose to the county before subdivision certificates are issued; which according to the 2nd defendant, this was never done. The 2nd defendant claimed that the registered owner of Plot No. 366/II/MN never surrendered the deed plans to the county with the roads earmarked for public purposes as required, making the subsequent subdivisions with the exclusion of access roads across the suit property illegal. DW1 insisted during his evidence that the subdivision as made by the initial registered owner did not provide for a road, but the same had to be provided for hence the construction of the access road cutting across the suit property.
5. These averments are supported by the Surveyor's report dated 22nd June 2018 which was prepared by Gilbert Nderitu Surveyor, County Government of Mombasa. In the said report, it was noted that while applying for subdivision, the owner of Plot No. 366/II/MN refused to follow the road network. This road network had been followed by the two neighboring plots; Plot No. 365/II/MN which was subdivided in 2009 and 348/II/MN which was subdivided in 2010 respectively. The said road network brought the road to the boundary of Plot No. 366/II/MN so that when it subdivided the said road would be interconnected and continuity of the road permitted. The report concluded that the owner of Plot 366/II/MN failed to surrender any road from the plot to ease accessibility taking advantage of the fact that the neighbours had surrendered parts of their suit property as road reserve.
 6. I have examined the survey plans for the following parcels of land, Plot No. 366/II/MN, Plot No. 365/II/MN and Plot No. 348/II/MN and I agree with the findings of the county surveyor. There is a 12-meter road cutting across Plot No. 348/II/MN as seen from its survey plan dated 21st May 2009, the access road running across Plot No. 348 finds Plot No. 366 at the corner, then makes a junction with a right and left turn respectively. From the survey plan of Plot 366 which created Plot No. 14848, 14849 and 18850 (the suit property) dated 11th December 2015 it can be seen that the road from Plot No. 348 ought to have cut across Plot No. 366 into Plot No. 355. It is evident that out of the three plots that were created from the subdivision of Plot 366, it is the suit property that touches the 12-meter road from Plot 348. It therefore meant that while subdividing Plot No. 366, Zahrabai Amirali Tayabali ought to have created an access road across the suit property and have the same captured in the new deed plan that was created alongside the new title deeds. However, the same was never done, this therefore goes to support the defendant's position that there ought to be a road on the suit property but was not provided for.
 7. A report was prepared by T. Mulusa for Regional Surveyor, as per the orders issued by this court on 5th October 2018, makes similar findings to the one prepared by the 2nd defendant. In the report it is noted that the access road cutting across the suit property was joining a 9-meter surveyed road that was surrendered as 10758/II/MN, which was initially part of Plot No. 365. It, therefore, reinforces the position taken by the 2nd defendant that Plot No. 365 and 348 which are neighbours to Plot No. 366 set out access roads during subdivision, but Plot 366 never set out access roads during its subdivision. It then explains why the regional surveyor in that report concluded that the public access road was not captured in the existing survey plan for the suit property.
 8. The 2nd defendant has demonstrated to the court that indeed there ought to be a provision for an access road on the suit property before the plaintiff acquired title to the suit property. The court is satisfied that, though it was not indicated in the suit property's survey plan the access road created and constructed by the defendants did not trespass on the suit property as it should have existed there in the first place. The existence of such a road is an easement, which has been defined by Section 2 of the [Land Act](#) as a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit. From this definition the access road that pass through the suit property was an easement. From the reading of Sections 25, 26 and 28 of the [Land](#)



Registration Act, an easement is an overriding interest over the title of a registered proprietor whether registered or not on the title of the suit property. The defendants were therefore creating an access road which from the evidence adduced by DW1 and the road made by the 2nd defendant was meant to complete the road network that existed in the adjoining plots to create a complete road network in the area for accessibility by the public.

9. The actions of the plaintiff's predecessor of denying the public a road access across the suit property is unfortunate. Whether the plaintiff was aware of these actions or not is a nonstarter, the plaintiff sought to be aware of the existence of the access road, which as stated above is overriding his interests as a proprietor of the suit property. The plaintiff has therefore failed to demonstrate to the satisfaction of this court that the defendants trespassed on its suit property. Further, the plaintiff has not established to the court that the defendants constructed outside the 9-meter access road and into the suit property. The plaintiff's survey report dated 18th May 2018 prepared by Philip Mulaa speaks to the plaintiff's position that the road cutting across the suit property is an illegality amounting to trespass. However, the said report refers to survey plans which were created without making room for the access road, for that reason they were flawed.
10. In addition, from the plaintiff's valuation report prepared by Elite Africa Valuers Limited dated 24th June 2022 it has not been established that the plaintiff is unable to utilize or access the suit property as a result of the road construction. The improvements on the suit property are still intact, the destruction of the plaintiff's structures and developments have not been demonstrated to the satisfaction of the court as well as the allegations that the suit property has been exposed to invasion by squatters have not been established. It is the view of this court that the plaintiff has not suffered any loss or damage from the action of the defendants of upgrading the access road that passes through the suit property.
11. Consequently, the plaintiff's case has failed to meet the evidential threshold and cannot be sustained. I find that the plaintiff's case as pleaded in its Amended Plaint dated 17th October 2022 is devoid of merit and is dismissed with costs to the 2nd defendant.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

