



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1194 OF 2016

(FORMERLY HCC NO. 212 OF 2010)

JENIPHER NYANCHOKA KIMONGE.....PLAINTIFF

VERSUS

NYAMONDO ONCHWARI.....1ST DEFENDANT

HENRY ONCHWARI.....2ND DEFENDANT

GEDION ONSONGO.....3RD DEFENDANT

ZABLON ONSONGO.....4TH DEFENDANT

J U D G M E N T

1. The plaintiff is the registered owner of land parcel **South Mugirango/Botabori South/125** measuring approximately 1.8hectares (hereinafter referred to as **“the suit property”**). The plaintiff vide a plaint dated 22nd July 2010 filed in court on 23rd July 2010 claims that on or about 10th April 2010, the defendants unlawfully entered onto her said parcel of land and without any justification created a 6 feet pathway through her land thereby destroying her nappier grass growing thereon. The plaintiff stated that the defendants acts were unlawful and despite demand made, the defendants have ignored and have refused to stop their unlawful acts which has necessitated the filing of the present suit.

2. The plaintiff seeks judgment against the defendant for:

(a) An order of permanent injunction do issue restraining the defendants by themselves, agents, servants and/or anybody claiming under them from in anybody interfering with, damaging, wasting, alienating doing any construction and/or doing anything on the plaintiffs suit land and the defendants be ordered to close the 6feet foot path they imposed on the suit land known as South Mugirango/Botabori South/125.

(b) Costs and interest of this suit be provided for.

(c) Any other alternative relief that this honourable court may deem fit to grant.

The defendants entered appearance in the suit on 4th October 2010 through the firm of Mbeche & Company Advocates but did not file a statement of defence.

3. The suit was fixed for hearing on 18th July 2018 and a hearing notice dated 29th January 2018 to the defendants’ advocates notifying them that the suit was fixed for hearing on 18th July 2018 was duly served on the said advocates on the same date. An affidavit of service filed by one Isaiah Miruka a court process server on 17th July 2018 attaches the copy of the hearing notice which was served on the defendants advocates. The hearing notice was stamped with the advocates stamp, dated and signed.

4. The plaintiff and her advocate attended court on 18th July 2018 for the hearing of the case but there was no appearance by the defendants advocate or by the defendants. In the absence of any explanation for the absence of the defendants, the court permitted the plaintiff to proceed with the hearing ex parte.

5. The plaintiff in her evidence stated that she is the registered owner of the suit property. She stated that the defendants are neighbours and that they have created a footpath through her land to their parcels of land although their respective parcels of land are served by access roads. The plaintiff stated that she has not consented to the creation of a footpath through her land. She produced a photograph “**PEX.8**” which clearly shows a footpath running along a hedge which the plaintiff said was the boundary of her parcel of land. The plaintiff relied on her witness statement recorded on 10th June 2014 and the bundle of documents she filed as per the list of documents dated 10th June 2014 filed together with the witness statement on 18th June 2014. The documents were produced as “**PEX.1-7**”. The plaintiff stated further that when the land registrar visited the land he confirmed that the footpath was on her land. The land registrar’s report dated 1st July 2011 was produced as “**PEX.9**”. The plaintiff stated she wanted the defendants to be restrained by way of a permanent injunction from using the footpath on her parcel of land. She also prayed for damages for her nappier grass that she stated was damaged by the defendants.

6. The plaintiff is the registered owner of land parcel **South Mugirango/Botabori South/125** as per the copy of title and copy of certificate of official search tendered in evidence “**PEX.1 and 3**”. The copy of search shows that the plaintiff was registered as owner and issued a title deed in respect of the suit property on 30th April 1997 and 30th September 2009 respectively. There is therefore undisputed evidence that the plaintiff is the owner of the suit property. As the registered owner she is vested with absolute rights to exclusively occupy, possess and use without any interference from anybody. The report by the land registrar dated 1st July 2011 (“**PEX.9**”) affirmed that the footpath ran between parcels 125 and 124. The Land Registrar however, noted there was no road access where the footpath ran through as per the survey map (Sheet No. 39) which covered the area. He further noted that all the adjacent parcels 124, 126 and 129 were served by access roads but the owners were using the footpath as a short cut which was due to the fact that the parent land used to belong to one person who subdivided the land amongst family members. The defendants continued to use the foot path but it was without the consent and/or authority of the new owner.

7. The essence of land adjudication and/or demarcation is so that individual persons can acquire title to their individual parcels of land. The plaintiff’s land is private land and the defendants cannot insist on using the footpath through her land without her consent and/or authority. The rights of a registered owner under Section 24 and 25 of the Land Registration Act, 2012 are absolute and such owner is entitled to enjoy ownership rights free from all encumbrances and without interference from any third parties. The plaintiff following land demarcation and issue of individual titles was entitled to block the footpath and to fence off her property to secure the same from intruders. This is what she should do.

8. The defendants have no right to use a foot path on the plaintiff’s land to access their parcels of land. They cannot use the plaintiff’s land for their convenience. Their parcels of land have accesses through the access roads serving them and it is these access roads that they must use and not to create an access through the plaintiff’s land without her consent and/or authority.

9. The plaintiff in her evidence made a muted claim for damages for what she stated was nappier grass that was damaged. The claim as laid in her evidence had the hallmark of a special damage claim. Special damages have to be specifically pleaded and proved. They were neither pleaded and/or proved. Accordingly, no damages would be awarded to the plaintiff. On the evidence adduced by the plaintiff, I am however satisfied the defendants have unlawfully been utilizing a portion of the plaintiff’s land as a foot path without her consent and/or authority. I accordingly enter judgment against the defendants jointly and severally as prayed under prayer (a) of the plaint. I award the costs of the suit to the plaintiff against the defendants.

10. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Moracha for the plaintiff

N/A for the 1st, 2nd, 3rd and 4th defendants

Ruth Court assistant

J. M. MUTUNGI

JUDGE