



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 186 OF 2017**

**(Formerly Kisii ELcc No. 222 of 2016)**

**WIKA ONGONDI MAGE .....PLAINTIFF**

**VERSUS**

**SAMWEL OWITI OWINO.....DEFENDANT**

**JUDGMENT**

1. On 29<sup>th</sup> July, 2016, the plaintiff namely **WIKA ONGONDI MAGE** filed this suit against the defendant one **SAMWEL OWITI OWINO** by way of a plaint dated 7<sup>th</sup> July, 2016. She is seeking the following reliefs;-

- a) A mandatory injunction against the defendant his agents and/or servants to unblock the access road to the plaintiff's land parcel No. KAMAGAMBO/KAMEJI/568 (the suit land).
- b) A permanent injunction restraining the defendant by himself, his agents, servants and or any person acting on his behalf from blocking or in any manner interfering with the access road to the suit land.
- c) General damages
- d) Costs of this suit
- e) Any other relief this court deems fit to grant.

2. Briefly, the plaintiff claims that he is the registered owner of the suit land, **LR NO. KAMAGAMBO/KAMWANGO/568**. That there is six metre wide road of access separating the land and LR NO. **KAMAGAMBO/KAMWONGO/1026**. The road of access forms a common boundary between the two parcels of land.

3. The plaintiff further claims that in the year 1990, the defendant encroached and blocked the access road to the suit land without any justification and or without the consent of the plaintiff. It then prompted the Land Registrar, Migori to visit the locus and re-established the access road. Later in the year 2006, the defendant relentlessly encroached onto the access road which position was confirmed by the Land Registrar thus provoking the instant suit.

4. The defendant was duly served on 24<sup>th</sup> August 2016, and 7<sup>th</sup> September 2018 and shown on affidavits of service sworn on 30<sup>th</sup> August 2016 and 10<sup>th</sup> September 2018 respectively. He never filed any memorandum of appearance and or statement of defence. He also failed to attend court on 19<sup>th</sup> September 2018 hence hearing of the suit proceeded ex-parte.

5. The plaintiff is (PW1) testified and relied on his list of documents dated 7<sup>th</sup> July 2016 namely:-

- a) **Land certificate for the suit land No. KAMAGAMBO/KAMEJI/568 (PEXhibit 1)**
- b) **Certificate of Official Search for the suit land (Exhibit 2).**
- c) **Order dated 2<sup>nd</sup> day of April 1992.(Exhibit 3).**
- d) **Report by the Land Registrar South Nyanza (PEXhibit 4).**

e) Letter dated 7<sup>th</sup> day of June 2006 by the District Land Registrar Migori /Kuria District (PExhibit 5).

6. Mr. J.O. Soire counsel for the plaintiff did not submit in this matter.

7. I have carefully considered the plaint and the evidence of PW1 herein. Three (3) issues that emerge for determination are whether:-

a) PW1 is the registered owner of the suit land.

b) The defendant has encroached and blocked the road of access as alleged by the plaintiff (PW1).

c) The (PW1) is entitled to the reliefs sought in the plaint.

8. On the 1<sup>st</sup> issue, I am guided by the definition of “**Proprietor**” at Section 2 of the Land Registration Act, 2012 as well as Sections 26 and 30 of the same Act regarding certificate of title. I also consider interest conferred by registration and rights of a proprietor under Sections 24 and 25 of the Act respectively. PW1 stated that he owns the suit land. Clearly, PExhibits 1 and 2 show that PW1 is the absolute and indefeasible proprietor of the suit land.

9. In respect of the 2<sup>nd</sup> issue, on 2/4/1992 the court made an order by consent of the parties (PExhibit 3). It was made pursuant to **Sections 20,21 and 22 of the Registered Land Act Cap 300** (the repealed Act).

10. Further to PExhibit 3, the then District Land Registrar Migori/ Kuria Districts prepared PExhibit 4 which shows that the road of access is blocked. PExhibit 4 reads in part that:-

**“The road of access is blocked**

**The euphoria plants earlier planted to mark the boundaries of the road of access are uprooted.”**

11. In *Nguruman Ltd –v- Jan Bonde Nielsen and 2 others (204) eKLR*, the Court of Appeal held, inter alia:-

**“We stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”** (Emphasis added)

12. This court is empowered to grant permanent preservation orders including injunctions under **Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)**. The plaintiff is entitled to the right of way which is an overriding interest under **Section 28 (c) of the Land Registration Act, 2012**. Pexhibit 4 is pretty clear that the defendant blocked the access road. Therefore the plaintiff is entitled to the right of injunctive orders sought in the plaint.

13. The tort of trespass to land is actionable per se; see **Bhagwani Singh Kalsi –v- National Housing Corporation (2017) eKLR**.

14. The plaintiff has shown by way of PExhibit 4 that the defendant has blocked the road of access and trespassed into the suit land. He is entitled to general damages assessed at Kshs 50,000/= in the circumstances of the case and borrowing from the decision of the court of Appeal in case of **Erick Edome and another –v- Pauline Kasumba Osebe and another (2014) eKLR**.

15. In **Kirugi & another –v- Kabiya and 3 others (1987) KLR 347**, the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities. It was further held that such a burden is not lessened even if the case was heard by way of formal proof. In the instant case, the evidence of PW1 is cogent and unthwarted by defendant.

16. In summary, the plaintiff’s claim is unchallenged and merited. It has been proved against the defendant on a balance of probability.

17. The upshot is that there shall be judgment for the plaintiff against the defendant in terms of orders (a) and (b) sought in the plaint dated 7/7/2016, and general damages assessed at **Ksh 50,000/=** only.

18. Costs of the suit shall be borne by the defendant.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this 22<sup>nd</sup> day of **October, 2018**.

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of:**

Mr. Oguttu Mboya holding brief for Soire for the plaintiff

