



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC 129 OF 1999

(SITTING AT MAKUENI)

KASOLO MUTISO.....PLAINTIFF

VERSUS

PETER MBAI KISILU.....DEFENDANT

JUDGEMENT

1. The Plaintiff and the Defendant herein are neighbours in Kilembwa Location, Wamunyu Location of the then Machakos District and now Machakos County. The former owns land parcel number Wamunyu/Kilembwa/237 while the latter resides inland parcel number Wamunyu/Kilembwa/321 registered in the name of one Maingi Musembi who is now deceased.

2. Land parcels numbers Wamunyu/Kilembwa/237 and 321 are separated by a road of access to which the Plaintiff claims that the said road of access has been blocked by the Defendant. The Plaintiff further claims that the Defendant uprooted the barbed wire posts that were on the Plaintiff's land as a result of which the latter incurred loss amounting to Kshs. 2,300/=.

3. The Plaintiff further accuses the Defendant of having diverted the road of access onto the Plaintiff's parcel of land.

4. By his plaint dated 25th March, 1999 and filed in court on even date, the Plaintiff prays for judgement against the Defendant for:-

a) Declaration that the Defendant's actions are wrongful and unlawful as no public road passes/out through the Plaintiff's land parcel number Wamunyu/Kilembwa/237.

b) An order of injunction restraining the Defendant from interfering with the Plaintiff's aforesaid land in any way whatsoever,

c) General and special damages in the sum of Kshs. 2,300/=.

d) Cost of the suit or any other relief which this court may deem just to grant.

5. The plaintiff's claim is denied by the Defendant's amended statement of defence dated 12th June, 2002 and filed in court on the 13th June, 2002.

6. On the 27th June, 2002, the Plaintiff filed his reply to defence date the 26th June, 2002.

7. The evidence before me was substantially recorded by Justices R.V Wendoh and R. N Sitati. The two were transferred before they could finalize this case.

8. On the 5th July, 2012 directions were taken before Asike Makhandia, J (as he then was) to the effect that the case do proceed from where Sitati, J left. The Plaintiff in his evidence in chief produced a photocopy of his title to land parcel number Wamunyu/Kilembwa/237 as PEX. No 1. He said the map sheet number 7 (PEXNo.3) for Kilembwa shows land parcel numbers Wamunyu/Kilembwa 321 and 237. He pointed out that the two parcels do not adjoin each other as there is a road of access between them. He went on to say that he saw the Defendant blocking the road of access in 1998. According to the Plaintiff, the Defendant opened an access road in his (Plaintiff's) land.

9. It was also his evidence that the Defendant uprooted 43 posts which he had fixed with barbed wire. He gave the value of the posts and the barbed wire as Kshs.2,300/= even though he had no receipts to confirm their value.

10. The Plaintiff's evidence in cross-examination was that one Maingi Musembi who is now deceased and also uncle of the Defendant is the registered owner of land parcel number Wamunyu/Kilembwa/321. He said that Maingi Musembi, his wife and children have lived on the land since 1999 when this suit was filed. He further said that the Defendant is also settled on the same land. He also said that he was present when the Defendant closed the road and opened another one inside the Plaintiff's farm. He pointed out that the Defendant alleged that he knew nothing to do with maps. The Plaintiff admitted that he did not plead about the number of the damaged posts in his plaint. He said that he and the Defendant were summoned by the Land Registrar over their dispute but the latter did not visit the site.

11. The Plaintiff's evidence in re-examination was that the Defendant was the one who committed the acts he has complained of and reiterated that the road was diverted into his land.

12. The Plaintiff called Nicco Nzuki Mutiso (PW2), a Deputy Land Registrar at Machakos, as his witness. PW2's evidence was that Land Parcels Number Wamunyu/Kilembwa/237 and 321 were registered in the names of Kasolo Mutiso (Plaintiff) and Maingi Mutiso respectively. The witness produced two (2) abstracts of the registers as PEX Nos. 5(a) and (b). He went to produce a certificate of official search as PEX No. 2.

13. The witness told the court that parcels number 321 and 237 do not adjoin each other as there is a 9 metre road of access between them. He produced a diagram showing the access road between the two parcels as PEX no. 3.

14. Mutiso's (PW2) evidence in cross-examination that the diagram (PEX No. 3) that shows the access road came from the Survey of Kenya. He said that what was uprooted were boundary features. His evidence in re-examination was that access roads can change with the consent of the Registrar.

15. Theunga's (PW3) evidence in chief was that in 1998 he became aware of a dispute between the Plaintiff and the Defendant. He went on to say that when he visited the site, he saw the road had been diverted into the Plaintiff's land. He pointed out that there used to be a road of access since the time of survey which took place around 1969 to 1970.

16. In his evidence in cross-examination, Samson (PW3) admitted that he was not present when the acts the Plaintiff has complained of happened. He said that the Defendant lives on the land of Maingi Musembi.

17. On the other hand, the Defendant's evidence was that Wamunyu/Kilembwa/321 is registered in the name of Maingi Musembi who is his uncle. According to him, the road of access is in the land that he and his cousins occupy and that it was the Plaintiff who blocked it in 1998. He said that he was the one who unblocked the road in question. He said that though he and the Plaintiff were summoned by the Land Registrar over the issue of the blocked road, the Land Registrar did not attend the meeting.

18. The Defendant's evidence in cross-examination was that he has not denied the existence of a road between plots number 321 and 237 in his pleadings. He said that he and others do not use the surveyed road. He denied having ever blocked the road. He also said that he did not know if the Plaintiff had erected posts on the boundary.

19. Kisilu Musembi (DW2) in his evidence in chief told the court that it was the Plaintiff who wanted the road of access moved on the ground that it was in the wrong place. He said that when he visited the site, he found the road completely blocked thereby forcing members of public to pass through their homes. He added that there was no barbed wire on the Plaintiff's land even though he saw posts lying on the ground.

20. His evidence in cross-examination was that the road of access is the actual boundary between the two parcels of land and reiterated that he saw fencing posts lying on the ground in the Plaintiff's land.

21. Ms. Nzei for the Plaintiff in her written submissions urged the court to find that the Plaintiff has demonstrated, on a balance of probabilities, that he has a cause of action against the Defendant and therefore proceed to grant the prayers sought. Regarding damages, the counsel proposed an award of Kshs. 200,000/= plus special damages of Kshs. 2,300/=.

22. On the other hand, the Defendant's counsel submitted that the totality of the Plaintiff's evidence and that of the witnesses point to only one inescapable conclusion that the Plaintiff's case is not proved on a balance of probabilities that he has a cause of action against the Defendant and hence his suit should be dismissed with costs to the Defendant.

23. On the 19th December, 2003, the Plaintiff filed amended agreed issues dated the 18th December 2003. As was submitted by the Defendant's counsel, the Defendant is deemed to have adopted the agreed issues for his failure to file his own.

24. The amended agreed issues were:-

- 1) Does there exist a public road between land parcel Nos. WAMUNYU/KILEMBWA/237 and WAMUNYU/KILEMBWA/321, and if so, what is the size of the road?
- 2) Is Land Parcel No. WAMUNYU/KILEMBWA/237 traversed by any public road?
- 3) Does the Defendant have any proprietary rights on Land Parcel No. WAMUNYU/KILEMBWA/321?
- 4) Did the Defendant wrongfully uproot the Plaintiff's barbed wire posts as pleaded in the plaint, and if so, is the Plaintiff entitled to the value thereof?

5) Did the Defendant unlawfully divert a public road and cause it to traverse the Plaintiff's Land Parcel No. WAMUNYU/KILEMBWA/237.

6) Has the Plaintiff suffered loss and damage?

7) Is the Plaintiff entitled to the orders sought?

8) Does this Honourable Court have jurisdiction to hear and determine this suit.

25. As regard the first issue, the Defendant's counsel submitted that indeed a public road exists between parcels number Wamunyu/Kilembwa/237 and 321 but he was of the view that its size cannot be ascertained nor be the subject matter of this suit until and unless the Land Registrar has visited the site. The counsel was of the view that in such circumstances, the Plaintiff's claim cannot be proved and he should pursue his boundary dispute case.

26. On my part, I hold that from the evidence of Mutiso (PW2), it is clear that the diagram (PEX NO.3) from the survey of Kenya clearly shows that there exists a public road whose size is 9metres between land parcels number Wamunyu/Kilembwa/237 and 321.

27. On the issue of whether or not land parcel number Wamunyu/Kilembwa/237 is traversed by any public road, the Defendant's Counsel submitted that there is no answer to this question until and unless the Land Registrar visits the site. However, from the evidence on record and more so that of the Plaintiff and Mutiso (PW2), it is clear that the Plaintiff's land is not traversed by any public road.

28. I will not address issue number 3 since whether or not the Defendant has substantial or proves beneficial equitable interest in land parcel number 321, it is unrelated to the question of whether or not the Defendant interfered with the Plaintiff's boundary and diverted a public road. Suffice it to say, this is a non issue in the suit herein.

29. As to whether or not the Defendant wrongfully uprooted the Plaintiff's barbed wire posts as pleaded in the plaint, and if so, what value the plaintiff is entitled to thereof, the Defendant's counsel correctly submitted that no value of such posts was ever pleaded and as such in my judgement, I will not award the Plaintiff special damages.

30. On the issue of whether or not the Defendant unlawfully diverted a public road and caused it to traverse the Plaintiff's land parcel number Wamunyu/Kilembwa/237, the Defendant's Counsel submitted that the Plaintiff was the one who diverted the road. The Counsel further submitted that besides the diversion, the portion, size and extent of the road as well as the boundaries of the two parcels of land remain unknown. In my view, it is clear from the evidence of Mutiso (PW2) who is Deputy Land Registrar as well as the Plaintiff's evidence, there is no doubt that the public road between land parcels Wamunyu/Kilembwa/237 and 321 was diverted. The Plaintiff saw the Defendant uprooting the boundary markings.

31. On whether or not the Plaintiff suffered loss and damage, the Defendant's counsel submitted that no such loss and damage was proved by way of cogent evidence.

32. Halsbury's Laws of England 4th Ed, Vol 45, at para 26, 1503 provides as follows;

a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.

d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

33. From the above, I hold that the Plaintiff is entitled to prayers sought in his plaint. It is also clear that the Plaintiff is entitled to nominal damages even though he has failed to establish any actual loss. In an award of Kshs. 100,000 would suffice under the circumstances.

34. Being satisfied that the Plaintiff has shown on a balance of probabilities that he has a cause of action against the Defendant, I hereby proceed to enter judgement for him and against the Defendant as hereunder;

a) Declaration that the Defendant's actions are wrongful and unlawful as no public road passes/cuts through the Plaintiff's Land parcel No. Wamunyu/Kilembwa/237.

b) An order of injunction restraining the Defendant from interfering with the Plaintiff's foresaid land in any way whatsoever.

c) Kshs. 100,000/=being general damages.

d) Cost of the suit.

Signed, dated and delivered in Makueni this 8th day of October, 2018.

MBOGO C.G

JUDGE

In the presence of:

Mr. Mulei holding brief for MrsNzei for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

8/10/2018