



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT & LAND COURT AT KISUMU**

**ELC NO. 275 OF 2017**

**FREDRICK OTIENO OBONYO.....PLAINTIFF**

**VERSUS**

**GILBERT OTIENO NYANJOM.....1<sup>ST</sup> DEFENDANT**

**MANASSE OWADE NYANJOM.....2<sup>ND</sup> DEFENDANT**

### **JUDGMENT**

This case was filed by the plaintiff vide a plaint dated 22<sup>nd</sup> March 2001 for unblocking of a footpath on the disputed parcels of land namely Kisumu/Manyatta 'A'/2126 and Kisumu/Manyatta 'A'/3615 and Kisumu/Manyatta 'A'/3614.

The plaintiff further filed a Notice of Motion dated 23<sup>rd</sup> June 2004 seeking for orders that the court be pleased to order that the Kisumu District Land Registrar with the assistance of the plaintiff's private surveyor and the 1<sup>st</sup> and 2<sup>nd</sup> defendant's private surveyor do visit the disputed parcels Nos. Kisumu/Manyatta 'A'/2126 and Kisumu/Manyatta 'A'/3615 and Kisumu/Manyatta 'A'/3614. He also urged the court to order that the the survey report be filed in court within sixty days.

This application was heard and granted vide an order dated 18<sup>th</sup> October 2005 and the said reports were filed in court.

#### **Plaintiff's Case**

The plaintiff adopted his statement which was filed in court on 27<sup>th</sup> November 2011. He stated that he has sued the defendants because they have encroached and blocked the access road to his parcel of land.

It was the plaintiff's case that he bought land parcel number Kisumu/Manyatta 'A'/2126 from Pauline Atieno in the year 1970 before land adjudication but after the land adjudication process the land parcel was mapped out in the Manyatta 'A' 1995 registration map and he managed to register the land in the joint names of his wife and himself.

He stated that his neighbour Peter Otieno Nyanjom of land parcel number Kisumu/Manyatta 'A'/1221 subdivided his land and gave to his two sons the defendants herein thus giving them new land parcel number.

It was PW1's evidence that the 1st defendant has built his house on the footpath and has gone further to fence the house while the 2<sup>nd</sup> defendant has placed a permanent foundation on the same footpath leaving the plaintiff in between the two hence unable to access the main road and is therefore forced to squeeze himself in between the fence in order to access his compound.

The plaintiff stated that he went to the County Land Surveyor in 2011 to try and sort out the matter. He produced documents including the reports by surveyors and County Land Registrar in respect to this dispute.

The plaintiff therefore urged the court to order a resurvey of the suit land to establish the boundaries and open an access road plus costs of the suit.

#### **Plaintiff's Submission**

Counsel for the plaintiff filed written submissions and listed three issues for determination as follows:

- a) Whether the defendants have actually blocked the plaintiff's footpath.

b) Whether the plaintiff took the right steps when he learnt of the blockage on his footpath.

c) Whether the findings of the site visits were adhered to.

On the first issue Counsel submitted that when buying land one must be given an access road as a person cannot live in a landlocked parcel of land. That it is on record that the plaintiff bought land and was given a path to use so as to enable him access the main road.

Counsel submitted that the 1995 Manyatta A registration map that was in use during that era clearly shows the path that had been given to the plaintiff to enable easy access to his parcel of land. That the plaintiff filed a case with the Land Registrar on boundary dispute of which reports were prepared by both the Land Registrar and the District surveyor which showed that there exists a footpath that has been blocked. The Land Registrar gave recommendations that the blocked footpath be opened to grant the plaintiff a right of way.

Counsel submitted that the Constitution of Kenya guarantees right to property and that right should not interfere with the rights of others. The plaintiff's right to own property has been infringed by the defendants' action of blocking his footpath. This denies the plaintiff reasonable access to his land yet the plaintiff's right to his parcel of land should be protected at all costs.

Counsel therefore prayed that an order be issued to unblock the footpath and that the boundary between the plaintiff and the defendants parcel of land be determined using the Manyatta 'A' registration map of 1995 that was in place during the registration era of the plaintiff's parcel of land plus costs of the suit.

### **Analysis and determination**

The issue for determination is as to whether the defendants have blocked the plaintiff's access foot path and whether the plaintiff is entitled to the orders sought for resurvey to reopen the same. The other issue is as to whether the court has jurisdiction to hear and determine a boundary dispute.

**Section 18(2) and 19(2)** of the Land Registration Act 2012 provides that

*18(2) The court shall not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.*

*19(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.*

It is clear from the evidence and the documents produced by the plaintiff and the ones filed by the Land Registrar and Surveyors that the plaintiff took the right steps in conformity with the above mentioned section. The Registrar deliberated on the dispute as per the requirement of the section. The plaintiff did not just rush to court before filing a claim before the Registrar's office.

The plaintiff first filed a case with the Land Registrar on boundary dispute and also made an effort to avail his private surveyor from Arch Surveyors such that when he was dissatisfied with decision of the Land Registrar he used his private surveyors report to file a case in court.

The subsequent reports presented by the District Surveyor and the District Land Registrar on the site visits conducted recommended that the footpath that has been blocked by the actions of the defendants be reopened. The reports further provide that the Land Registrar be required to effect opening of the blocked footpath.

It is unfortunate that this matter has dragged in the court corridors for all these years and yet the recommendations were already in place but not implemented. What was the difficulty in complying with the recommendations by the Land Registrar?

It does not matter that the Defendant has erected a building on the access road or the footpath thereby infringing of the right of way and access of the plaintiff. What matters is that the Plaintiff has established that the Defendant's actions have infringed on its proprietary rights both as the owner of the suit parcel of land and as the user of the public access road that has been blocked by the Defendant.

I have considered the evidence on record, the reports submitted by the Land Registrar, surveyors and their recommendations for unblocking the access footpath and find that their expert recommendations are sound and should be implemented as soon as possible. This is an old matter which should have been resolved a long time ago.

I therefore find that the plaintiff has proved his case against the defendants on a balance of probabilities and order that the County Land Registrar together with the County surveyor do resurvey the disputed parcel Nos. **KISUMU/MANYATTA 'A'/2126 and KISUMU/MANYATTA 'A'/3615 AND KISUMU/MANYATTA 'A'/3614** for purposes of establishing the boundaries and opening an access road upon payment of the requisite charges. The implementation of this order should be given priority.

The defendant to pay costs of the suit.

**DATED and DELIVERED at KISUMU this 7<sup>TH</sup> DAY OF DECEMBER, 2018.**

**M. A. ODENY**

**JUDGE**

**JUDGMENT READ**, and **SIGNED** in open court in the presence of :-

Ms. Imbanya holding brief for Mr. Achura for plaintiff, court assistant Joanne and in the absence of the defendant.

**M. A. ODENY**

**JUDGE**