



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO.100 of 1997

MAGIRI NGUTHARI.....PLAINTIFF

VERSUS

GIDEON KIMATHI M'NGUTHARI.....DEFENDANT

JUDGMENT

Introduction

The plaintiff through a plaint dated 4th September 1997 and filed the same day sought the following prayers:

- (1) A declaration that the plaintiff has acquired the right to use a portion of the defendant's land parcel No's Kibirichia/1174 and 1621 measuring 15 feet in breath to gain access to the plaintiff's land parcel no. KIBIRICHIA/1175.**
- (2) An order of permanent injunction restraining the defendant either by himself or through his agents or servants from interfering with the said easement.**
- (3) Costs and interest**
- (4) Any other relief.**

On 24/9/1997 the defendant through the firm of Gikunda Anampiu & Co. advocates filed a defence denying the plaintiff's claim and put him to strict proof thereof.

In subsequent amendments to the said plaint, the plaintiff averred that sometime in August 1997, the defendant illegally and unlawfully closed the alleged access road which he acquired as an easement from the original owner and therefore sought orders to re-open the same. The plaintiff also sought damages for closing the said access road. The defendant by way of rejoinder denied the plaintiff's claim and averred that the plaintiff's claim is malicious and frivolous.

The case was then set down for hearing and parties testified and called their witnesses in support of their respective positions.

PLAINTIFF'S CASE

The plaintiff gave oral testimony and stated that the defendant is his brother from the same father but different mothers. He recalled that they used to live in the same original parcel no. 401 Kibirichia before their father sub-divided the land into different portions.

He was given land parcel no. 1175. His brother who is the defendant was given parcel no. 1174 measuring 2 acres. He stated that there was a passage which they were using before the sub-division was done. After the sub-division was done, the defendant was given more land that it can cover the access road. He stated that when his father died, the defendant closed the easement. The access road is closed todate.

On cross examination, the plaintiff said that his portion is measuring 4 acres but it has no access road. He said that his father is the one who instructed the surveyor to do the mutation. He said that the sub-division was done and the defendant's portion was transferred to him on 10.5.1978.

About 20 years later, the plaintiff filed this case. He did not check from the survey map whether his father created an access road to all the portions he had sub-divided. He stated that the defendant closed the access road in 1997. He said that he has been using a footbath through

the defendant land to access his land.

The plaintiff called two witnesses. PW 2 was M'Rukaria M'Nguthari. He testified that both the plaintiff and the defendant are his brothers. He stated that both the plaintiff and the defendant each has two parcels of land.

One parcel of land belonging to Kimathi is near the road. All the parcels of land belonging to the plaintiff and the defendant are ancestral land given to them by their father (deceased).

He stated that the three parcels of land were to be accessed through the defendant's land. The said access road was in existence even before the sub-division was done but the same was not reflected in the mutation map. Immediately after the sub-division, Kimathi (defendant) closed the access road and reduced its size.

The father (deceased) called a family meeting and invited their uncle M'Inoti. In that meeting their late father told Kimathi (defendant) to open the access road since he had added Kimathi half an acre to cover the access road. However Kimathi (defendant) refused and the plaintiff filed this case.

PW 3 was Francis Gikunda. He is the chairman of Ngiri clan where the plaintiff and the defendant are members. When he was elected as chairman, he was handed over minutes of a previous meeting held on 2.12.1999 which mentioned a case between the plaintiff and the defendant.

In that meeting it was agreed that Kimathi gives Magiri access road after which this case be withdrawn. The witness stated that there is a foot path but the same is not big enough to be used by a vehicle. He stated that the access road was in existence until the son of Magiri built a house next to the boundary. The alleged minutes were not produced by the witness in evidence.

DEFENDANT'S CASE

The defendant alone testified on oath and was referred to his written statement dated 27th June 2017. Attached to that statement is a copy of mutation form and a sketch map indicating the two parcels of land no. Kibirichia/1175 belonging to the plaintiff and Kibirichia/1174 belonging to the defendant. The defendant stated that they both inherited their respective parcels of land from their late father who had subdivided his land among all his sons before he passed on in 1985. He stated that this suit is an afterthought as the same was filed 12 years after their late father sub-divided the land and gave to his sons. He stated that all the parcels of land including his share a common road of access and there is no way the plaintiff should be allowed a luxury road across his land when there is already one provided for all the parcels of land subdivided from his father's land.

The defendant also stated that contrary to the testimony by the plaintiff there is no access road across his land which has been in use and if the plaintiff needed a luxury road across his land he should have approached him with a view to buying the same otherwise the plaintiff should not interfere with his right to property as provided for by law. He stated that there was no road or easement registered over his property. He produced a copy of green card for his property.

PLAINTIFF'S SUBMISSIONS

The plaintiff failed to file submissions despite having been given sufficient time.

DEFENDANT'S SUBMISSIONS

The defendant through the firm of Gikunda Anampiu submitted that there is no dispute that both parties hold their respective title deeds and the same is not challenged. The defendant also submitted that there is no challenge in the manner in which the defendant acquired his two title deeds and that section 25 of the Land Registration Act protects the indefeasible rights of a registered owner. The learned counsel further submitted that there is no law that recognizes unregistered easement which never existed in the first place. The defendant submitted that section 98 of the land registration act 2012 demonstrates how an easement can be created through consent of the owner in a prescribed form which must be registered.

The defendant cited section 98 (7) of the same act which provides that no easement and no right in the nature of an easement shall be capable of being acquired by any presumption of grant from long and uninterrupted use.

In conclusion, the defendant submitted that an easement can only be recognized when the owner of the land voluntarily creates the same through the prescribed instrument which is thereafter registered against the title.

ANALYSIS AND DECISION

The dispute between the plaintiff and defendant is whether or not the plaintiff has acquired an easement over the defendant's land parcel no's Kibirichia/1174 and 1621 measuring approximately 15 feet in breadth so as to gain access to his land parcel no. Kibirichia/1175. **Black's Law Dictionary** describes easement as follows:

“An interest in land owned by another person consisting in the right to use and control the land or an area above and below it for a specific limited purpose:..

In the case of ***Kamau versus Kamau (1967) EA 105***, the court held thus:-

“How are easements created” “At common law only by deed and will at equity however if there is an agreement whether under seal or not to grant an easement, for valuable consideration equity considers it as granted between the parties and persons with notice and will either decree a legal grant to restrain a disturbance by injunction”.

Again **section 32 of the Limitation of Actions Act** creates an indefeasible right to an easement where a person enjoys the easement peacefully and openly as of right without interruption for twenty years. The same **section 32 of the Limitation of Actions Act cap 22** provides as follows:

1 where;

(a)

(b)

(c) Any other easement has been enjoyed; peacefully and openly as of right and without interruption, for twenty years the right to such access and use of light or air, to such way on water course, or use of water, or to such other easement is absolute and indefeasible”.

It is not in dispute that the plaintiff is the registered proprietor of land parcel no. Kibirichia/1175 while the defendant is the registered proprietor of land parcel no. KIBIRICHIA/1174 and 1621 respectively. It is not also in dispute that both the plaintiff and the defendant are brothers and their parcels of land is an ancestral land which their late father one M’Nguthari had sub-divided for the two sons.

From the mutation form attached to the defendant’s witness statement dated 27th June 2017, it is clear that the plaintiff’s land parcel no. Kibirichia/1175 which borders the defendant’s land parcel no. Kibirichia/1174 have an access road measuring 88m and 58 m respectively.

It is evident from the pleadings and the evidence that the plaintiff’s claim is hinged on the right of an easement over the defendant’s land. It is not in dispute that for a right of easement over someone’s land to accrue, there has to be an agreement creating such an easement. The plaintiff has not produced any iota of evidence showing that there was an agreement between him and the defendant to create the alleged easement. The plaintiff has not also shown to the satisfaction of this Honourable court that the purported easement has accrued to him under **section 32 of the Limitation of Actions Act cap 22** Laws of Kenya. The plaintiff has not demonstrated that he has enjoyed the easement peacefully and openly as of right and without interruption for twenty years.

The defendant’s suit property L.R No. Kibirichia/1174 was registered in his favour on 10.5.1978 and this suit was instituted in September, 1997. According to the plaintiff the defendant closed the access road in August, 1997 or thereabouts. The plaintiff cannot therefore claim the alleged right of easement under section 32 of the limitation of actions act, cap 22 laws of Kenya as he has not demonstrated that he has used it peacefully and openly for twenty years.

I find and hold that there is no easement validly created under common law or equity and no evidence was produced that the plaintiff has established the threshold for creating an easement under section 32 of the Limitations of Actions Act.

In the case of **Ruth Wamuchi vs Monica Mirae Kamau (1984) eKLR**, it was held as follows:

“Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come”.

There is no evidence adduced by the plaintiff that an easement was ever created and registered over the original parcel No. Kibirichia/401 which passed on from the dominant tenement and the burden of it passed with the servient tenement to the defendant in this case.

I note that when the father of the plaintiff and the defendant the late M’Nguthari sub-divided the original land parcel No. Kibirichia/401 among his sons including the plaintiff and the defendant in this case, he created a common access road which is clearly shown in the mutation form and map attached to the defendant’s list of documents dated 27th June, 2017. Suffice to state that under the African customary law practice it was permissible for a sibling who has built a structure within the family ancestral land to access any of his siblings homestead or even his father’s homestead across any part of the land without restriction.

In fact there is nothing known as trespass in customary law as land was deemed to belong to the community and not an individual. The plaintiff and the defendant who are siblings were living in an ancestral/family land until their father M’Nguthari (deceased) sub-divided the same in 1978. Their father provided each parcel of land an access road. The plaintiff’s claim in my view is made in bad faith and the same must therefore fail. In the result, this suit is hereby dismissed and since the plaintiff and the defendant are siblings and in order to promote cohesion and co-existence between the two, I order each party to bear his own costs.

It is so ordered.

READ, DELIVERED AND SIGNED BY E. C. CHERONO,

ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

Mr. Gikunda Anampiu for defendant

Mr. Muthomi holding brief for Kaumbi for plaintiff

Court assistant: Janet