



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 627 OF 2010

MARY NJERI GATUHA.....1ST PLAINTIFF

DAVID ICHUNG'WA KARIUKI.....2ND PLAINTIFF

KARIUKI GATUHA.....3RD PLAINTIFF

ZACHARIA MBIYU KABIRU.....4TH PLAINTIFF

VERSUS

GEORGE MUNIU MUNGAI.....1ST DEFENDANT

SAMUEL MWAURA MUNGAI.....2ND DEFENDANT

DAMARIS WANJIKU MUNGAI.....3RD DEFENDANT

STEPHEN NJOGU MUNGAI.....4TH DEFENDANT

PETER MUNIU MUNGAI.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

The plaintiffs and the defendants are neighbours. The 4th and 5th defendants are deceased and the suit against them was withdrawn on 17th February 2015. At all material times, the plaintiffs occupied a parcel of land known as LR No. Muguga/Muguga/110(hereinafter “Plot No.110”)which was registered in the name of their father one, Gatuha Ndichu(deceased) while the defendants occupied all that parcel of land known as LR No. Muguga/Muguga/580 (hereinafter “Plot No.580”) which was registered in the name of their father one, Mungai Muniu(deceased). Plot No.110 and Plot No.580 were adjacent to each other. The two parcels of land which bordered a public road to the south had no access road between them. Sometimes in the year 1986 or thereabouts, the 3rdplaintiff who is said to be the legal representative of Gatuha Ndichu (deceased) subdivided Plot No. 110 into eight(8)portions namely,LR No. Muguga/Muguga/765-772(“Plot No.765-772”).The subdivisions were registered in the names of the plaintiffs. During the subdivision exercise, the 3rdplaintiff created a road so that the said subdivisions of Plot No.110 could have access to the public road at the southern end of the said parcel of land. All was well until Plot No. 580 was subdivided sometimes in the year 2000 which subdivision gave rise to LR No. Muguga/Muguga/953-959(“Plot No.953-959”) which were registered in the names of the defendants. It

appears that during the subdivision of Plot No.580, no provision was made for an access road from the said subdivisions of Plot No. 580 to the public road on the southern part of the said parcel of land. The defendants seem to have assumed that they would use the road of access which the plaintiffs had created for use by the occupants of Plot No. 765-772 while subdividing Plot No. 110 to access the said main road.

The plaintiffs filed this suit on 14th December 2010. In their plaint dated 9th December 2010, the plaintiffs averred that the said access road which was created during the subdivision of Plot No. 110 is a private road and as such the defendants have no right to use the same. The plaintiffs faulted the defendants for failing to provide for an access road during the subdivision of Plot No. 580 and for unlawfully and fraudulently using the plaintiff's access road in their subdivision scheme and causing the registry index map for the area to be amended. The plaintiffs sought the following reliefs against the defendants:-

1. A declaration that the surveying and subdivision of Plot No. 580 and the subsequent registration of land parcel numbers Muguga/Muguga/953 to 959 (inclusive) and any further subdivisions of the said parcels of land without providing for their own access road was unprocedural, fraudulent, illegal, null and void.
2. An order that titles known as Muguga/Muguga/953 to 959 (inclusive) and including their mutations and maps be rectified and/or cancelled.
3. An order restraining the intended(sic) defendants, their agents and or employees from trespassing upon, using or in any way accessing their illegal parcels of land numbers Muguga/Muguga/953 to 959 (inclusive) through the access road to the plaintiffs' land.
4. Such further or other orders be granted as the court deems fit.

The 1st to 5th defendants (hereinafter "the defendants") filed a statement of defence on 9th February 2011 denying the plaintiffs' claim in its entirety. The defendants averred that at no time did they use the access road in dispute or demanded equal right of use in respect thereof. The defendants contended further that, in any event, upon the subdivision of the Plot No. 110 the said access road was surrendered by the 3rd plaintiff to the Government of Kenya and as such the same constitutes is a public road which they have a right to use. The defendants denied the allegations of fraud leveled against them and contended that the subdivision and demarcation of Plot No. 110 and Plot No. 580 were done by the respective original owners thereof in respect of whose actions the defendants were not responsible. The Attorney General entered appearance but did not file a defence. It did not also participate at the trial.

At the hearing of the suit the 2nd and 3rd plaintiffs testified on behalf of the plaintiffs while the 1st defendant gave evidence on the part of the defendants. The 3rd plaintiff (PW1) stated that Plot No. 110 belonged to his late father Gatuha Ngechu. Upon his father's death, he (PW1) subdivided Plot No. 110 into several portions namely, Plot No. 765 to 772 and made provision for an access road to the said subdivisions. He stated that Plot No. 580 was adjacent to Plot No. 110 and when carrying out the subdivision of Plot No. 580, the defendants failed to reserve an access road to the resultant parcels and resorted to using the road that had been reserved by the plaintiffs to access their plots aforesaid. PW1 stated that unsuccessful attempts were made to resolve the dispute over the access road administratively through the offices of the area assistant chief, Kiambu district land registrar, the chief land registrar, Commissioner of lands and Kenya Anti-Corruption Commission. After the failure of these attempts at resolving the dispute, PW1 instituted a suit against the defendants at the Principal Magistrates Court at Kikuyu in, Kikuyu PMCC No. 52 of 2006 which suit was struck out for want of jurisdiction. PW1 stated that the subdivision of Plot No. 580 was carried out irregularly. He maintained that the disputed access road was meant to serve the plaintiffs only. He urged the court to nullify the subdivision of Plot No. 580 and stop the defendants from using the disputed access road.

In cross-examination, PW1 stated that he owned Plot No. 767. He stated that he divided Plot No.110 and allocated portions thereof amongst the heirs of his late father who owned the said parcel of land. He reiterated that during the subdivision, they left a portion of Plot No. 110 for use as an access road. He

stated that the said access road was not for public use and as such the defendants had no right to use the same. He denied that he had asked the defendants to pay for the use of the said access road.

The 2nd plaintiff (PW2) testified that he is a son of PW1. He stated that PW1 obtained a grant of letters of administration of his (PW2) grandfather's estate and subdivided Plot No. 110 portions of which he allocated to the beneficiaries of his grandfather's estate. PW2 was allocated Plot No. 772. He contended that the disputed access road was private and as such the defendants were not entitled to use the same. He stated that he had no problem with the way in which the defendants had subdivided Plot No. 580 save that they should keep off the disputed access road. He stated that apart from the defendants who were using the disputed road forcefully, other members of the public were not using the said road.

For the defence, the 1st defendant (DW1) told the court that the 2nd and 3rd defendants were his brother and mother respectively while the 4th and 5th defendants were his deceased brother and father respectively. He stated that he was the registered proprietor of Plot numbers 953, 955 and 958 while the 2nd and 3rd defendants owned plot numbers 954 and 957 respectively. He stated that the plaintiffs were their neighbours and that they originated from the same clan. He stated that Plot No. 580 was originally owned by his late father and upon his death, he (DW1) obtained a grant of letters of administration that enabled him to share the property among his father's heirs.

DW1 told the court that when he went before the Land Control Board to seek consent to transfer portions of his father's said parcel of land to the heirs as aforesaid, PW1 raised an objection which was rejected by the Board. PW1 thereafter filed a complaint with the District Land Registrar. DW1 stated that the said land registrar and a surveyor visited the site and observed that the defendants were using a different road to access their premises and not the contested access road. He stated that the disputed road was being used by other people. He contended that they subdivided Plot No. 580 in accordance with the law although he did not have a copy of the mutation for the subdivision. He denied having been summoned by the Kenya Anti-corruption Commission for interrogation on how they subdivided the said parcel of land.

In cross-examination, DW1 stated that he was not aware that the access road in contention was hived from Plot No. 110. He stated that Plot No. 580 and 110 used to have a common boundary and that he was occupying a subdivision of Plot No. 580 which bordered the access road. DW1 stated that although the disputed access road was a public road which the defendants had a right to use, they were not using the same. He stated that the defendants were using a private road which was not in the Registry Index Map. DW1 contended that the plaintiffs wanted them to pay for using the said access road.

In re-examination, DW1 stated that Plot No. 580 was subdivided by his father and that consent of the Land Control Board to carry out the subdivision was obtained. He denied that the defendants were provoking the plaintiffs and averred that it was the plaintiffs who were provoking them and that at one time, the plaintiffs had cut his fence and lit a fire which resulted in the death of his two cows.

After the close of the defendants' case, the court directed that the parties make closing submissions in writing. The plaintiffs filed their submissions dated 6th June 2016 on 7th June 2016 in which they reiterated that the disputed access road was not a public road as defined under the Public Road and Roads of Access Act, Chapter 399 Laws of Kenya. The plaintiffs submitted that under the said Act, a land owner who has no reasonable access to a public road passable by vehicular traffic ought to apply to the District Roads Board to construct a road of access or to use an existing road of access which does not pass through his land to enable him access the said public road. The plaintiffs contended that the disputed road was a private road which served Plot numbers 765-772 and that no application had been made under the Public Road and Roads of Access Act aforesaid to convert it into a public road. The plaintiffs submitted further that the defendants commenced the process of upgrading and/or constructing the disputed road for use by the general public without their consent. The plaintiffs submitted that, during the said upgrade, the defendants demolished and destroyed a wall fence separating the plaintiffs' and defendants' parcels of land which activities were unlawful since the defendants had no right to invade private property. The plaintiffs submitted that the titles held by the defendants in respect of LR. No. Muguga/Muguga/953 to 959 were issued fraudulently since there was no evidence as to how the subdivision which gave rise thereto was

conducted. The plaintiffs urged the court to find the defendants' acts complained of unlawful.

The defendants filed their submissions dated 6th July 2016 on 8th July 2016. The defendants argued that the access road in contention is a public road under the Public Road and Roads of Access Act, Chapter 399 Laws of Kenya ("the Act") aforesaid. The defendants contended that it was not in dispute that the disputed road was set aside at the time of subdivision of Plot No. 110 and that the sketch map presented to court showed the said road running along the edge of Plot numbers 765-772 and Plot numbers 953-959 to the main road.

The defendants submitted that the road was not designated as a private road since no application had been made under the Act for that purpose and furthermore, no notice bearing the words "private road" had been mounted by the plaintiffs to show that the road was meant for private use only as required under section 13 of the Act. The defendants submitted further that both parties had used the disputed access road for a period of over 15 years until 2007 when the suit herein was filed. The defendants submitted that the plaintiffs' parcels of land did not extend to the access road in dispute as shown in the Registry Index Map which was produced in court by the plaintiffs as exhibit 17. In support of their submission the defendants referred the court to the case of Homescope Properties Ltd & another vs. David Gachuki & Pamela Odera sued as chairman & secretary of Karen Ngong View Estate & another (2014) eKLR. The defendants argued that the access road in question was surrendered to the local County Government for use by the public and that the road ceased to be the plaintiffs' property the moment it was hived off from their land and a boundary created. The defendants submitted that mutation 16/837 for the subdivision of Plot No. 580 pursuant to which the aforesaid Registry Index Map was amended had never been in their custody and as such they could not be called upon to account for the same.

The parties did not agree on the issues for determination by the court. The plaintiffs framed a total of 13 issues which were not approved by the defendants. The defendants did not come up with alternative draft issues. From the pleadings and evidence on record, the following in my view are the issues which a rise for determination in this suit;

1. Whether the road which was created following the subdivision of Plot No.110 by the 3rd plaintiff is a private road whose use is restricted to the plaintiffs or a public road for use by the public at large?
2. Whether the subdivision of Plot No.580 and the registration of the resultant parcels 953 to 957 were fraudulent, unlawful, null and void for want of an access road?
3. Whether the plaintiffs are entitled to the reliefs sought?
4. Which party should bear the costs of the suit?

It is not disputed that the road of access in dispute herein was created following the sub-division of Plot No. 110 which was owned by Gatuha Ngichu deceased. Plot No.110 was registered under the Registered Land Act, Chapter 300 Laws of Kenya(now repealed).The subdivision of Plot No. 110 gave rise to Plot numbers 765 to 772. According to the plaint; Plot Numbers 765 and 769 are registered in the name of the 1st plaintiff and Plot numbers 767 and 772 are registered in the names of the 2nd plaintiff and 3rd plaintiff respectively. From the evidence on record, Plot No. 768 has been subdivided further into Plot No. 1598 and 1599. Plot No. 1599 is registered in the name of the 4th plaintiff. It is not very clear from the evidence on record as to who owns Plot numbers 766,770, 771 and 1598. It is common ground that during the subdivision of Plot No. 110, the then registered owner thereof surrendered the portion of land which forms the disputed access road to be used as a road. I am in agreement with the submission by the defendants that the plaintiffs who acquired the subdivisions of Plot No. 110 after the said access road in dispute had been surrendered cannot claim any proprietary interest over the said access road. In my view, the plaintiffs' proprietary interests were restricted to specific portions of Plot No. 110 which were registered in their respective names and no more. According to the Registry Index Map(PEXH.17), the access road in question is separate and distinct from the plaintiffs' parcels of land. It is not comprised in any of the subdivisions of Plot No. 110 owned by the plaintiffs. In addition to the foregoing, there is also

no evidence that the disputed road is registered as an access road under section 9 of the Public Roads and Roads of Access Act, Chapter 399 Laws of Kenya (“the Act”) so as to confer upon it private road status. There is also no evidence that the plaintiffs have put a notice on the said road to the effect that it is a private road as required under section 13 of the Act. From the foregoing, it is my finding that the plaintiffs have failed to prove that the access road which was created following the subdivision of Plot No. 110 is a private road whose use is restricted only to the plaintiffs.

On the second issue, I am not satisfied from the evidence on record that the subdivision of Plot No. 580 was carried out fraudulently and illegally. The standard of proof required where fraud is alleged is much higher than in ordinary civil cases. In the court of appeal case of Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd. [2004] 2KLR 269, it was held that:-

“Fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.”

No such proof has been tendered by the plaintiffs. There is no basis therefore upon which this court can hold that the titles for the parcels of land which resulted from the subdivision of Plot No. 580 are null and void.

In the final analysis and for the foregoing reasons, I find no merit in the plaintiffs’ claim. Consequently, the plaintiffs’ suit fails and is hereby dismissed. In view of the peculiar nature of this suit, each party shall bear its own costs.

Delivered and Dated at Nairobi this 24th day of January, 2017

S. OKONG’O

JUDGE

In the presence of

N/A for the Plaintiffs

N/A for the 1st and 5th Defendants

N/A for the 6th Defendant

Kajuju Court Assistant