



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 17 OF 2014

KIPLANGAT MIBEI WILLIAM.....PLAINTIFF

VERSUS

ALICE CHERONO TONU.....DEFENDANT

JUDGMENT

The plaintiff filed suit against the defendant praying that she be compelled to open the public access road between land parcel number KERICHO/CHEPTALAL/2417 and KERICHO/CHEPTALAL/912. In the Plaintiff the plaintiff states that he sold a parcel of land measuring 3.5 acres to the defendant's late husband in the 1970s. During the process of demarcation, the surveyors created a road of access on the defendant's land linking the plaintiff and other members of the public to the main road. The defendant's husband however refused to open up the road and instead blocked it by planting tea bushes on the road reserve.

The plaintiff initially sought the intervention of the local administration to no avail. He later involved the District Lands office, Bomet and it was confirmed that there is a road of access between the two parcels of land. The defendant was told to uproot the tea bushes on the road reserve but she declined.

Simultaneously with the plaint, the plaintiff filed a notice of motion seeking orders that the defendant be compelled to open the public access road as per the recommendation of the Ministry of Lands, Housing and Urban Development dated 27th February 2014.

The defendant filed a Defence and Counterclaim in which she denies that the road of access existed at the time her husband bought the land and claims that the plaintiff caused the road to be demarcated on the defendant's land after he bought it. In her counterclaim she claims that owing to the plaintiff's fraudulent activities, she has suffered financial loss and damage. In her particulars of fraud she alleges that the plaintiff sold the suit land to her late husband without informing him of the existence of an access road across the suit property. She further alleges that the plaintiff caused the suit property to be surveyed to demarcate an access road after selling it to the defendant's late husband and fraudulently using the authorities to force the defendant to open an access road. She claims a refund of the amount illegally obtained by the plaintiff for the portion to be demarcated as an access road.

In the Reply to the Defence and counterclaim the plaintiff maintains that the road reserve existed at the time the land was sold and that the defendant grabbed the road reserve which is separate from the 3.5 acres that he sold to her late husband.

Before the hearing commenced, the court observed that the issue in dispute was whether or not there was an access road on the suit land and directed the District Land Registrar and District Surveyor Bomet to visit the suit land with a view to establishing the existence of a road of access touching on land parcels

number KERICHO/CHEPTALAL/2417 and KERICHO/ CHEPTALAL/ 912 and file a report in court.

The Land Registrar filed their report on 2/3/2016 indicating that the road of access existed but had never been opened on the ground. He requested for a court order to enable them open the road. He attached an earlier report dated 17th December 2014 which showed that the parties to this suit had been summoned by the Land Registrar and it had been resolved that the road be opened immediately and the defendant had been told to remove her tea plantation that was on the road but she refused to abide by the decision of the Land Registrar.

The court then issued an order dated 27th June 2016 directing the District Land Officer and District Surveyor Bomet to proceed and open up the road of access pertaining to land parcels number KERICHO/CHEPTALAL/2417 and KERICHO/CHEPTALAL/912. This effectively resolved the issue of the opening up the road of access in favour of the plaintiff leaving the defendant's counterclaim.

The counterclaim was set down for hearing on 15/6/2017. The defendant testified that she is the widow of Richard Kibii Tonui- deceased. She stated that the plaintiff sold land to her late husband but there was no road of access at the time and that the plaintiff only started demanding for the road of access after her husband's death. She admitted that the issue of the access road had been discussed at the chief's office and she had been requested to open the road subject to payment of Kshs. 10,000 but she refused. She confirmed that the court had ordered that the road of access be opened. She produced a copy of the District Surveyor's report quantifying the value of the road at Kshs. 312,000. She also produced a map of the suit land and neighbouring parcels which clearly shows that there is a road passing through the defendant's land.

The defendant called two witnesses who testified that they were present when the land was sold and there was no access road.

The following issues were framed for determination with respect to the Counterclaim:

1. Whether an access road existed on the suit parcel of land when the plaintiff was selling it to the defendant's late husband
2. If the answer to the above is in the negative, whether the plaintiff fraudulently caused the access road to be demarcated on the defendant's parcel of land after he sold it to them.
3. Whether the defendant is entitled to the orders sought in the Counterclaim.
4. Who should bear the costs of this suit?

Regarding the first issue, the plaintiff and her 2 witnesses testified that the road of access did not exist at the time of sale. However, since none of them is a land expert, it is difficult to tell if they were stating the truth. The report from the Land Registrar dated 29th February attached proceedings of a dispute that was adjudicated on 27th February 2014 which indicate that there is a road of access between the suit parcel and the plaintiff's parcel number KERICHO/CHEPTALAL/2417 which leads to a water point that is supposed to be accessed by the whole community. The owner of land parcel number KERICHO/CHEPTALAL/912 has planted tea upto this road to the extent of one point of an acre. In his ruling Land Registrar recommended that the road be opened immediately and the owner of the land parcel number KERICHO/CHEPTALAL/912 be ordered to remove the tea plantation on the road of access.

He further ruled that any aggrieved party was at liberty to appeal to the Chief Land Registrar within 14 days. If indeed the defendant felt strongly that the road never existed at the time they bought the land, she would have appealed to the Chief Land Registrar or even filed suit against the plaintiff and the Land Registrar after the said ruling, but she did not do so. It is also instructive to note that the defendant did not produce her title deed and a survey report to show if her land acreage had reduced after the creation of the road of access.

Furthermore, at paragraph 3 of the Plaintiff, the plaintiff states that the road of access was created during the process of demarcation. This would mean that defendant's late husband who bought the suit land in 1970 was the first registered owner thereof and in accordance with sections 28 and 30 of the Registered Land Act Cap 300 (repealed) under which the defendant's title was registered, his title was subject to any subsisting overriding interests at the time which were not noted on the register. Section 30 of the Registered Land Act (repealed) which has a similar provision as section 28 (a) of the Land Registered Act ,2012 provides as follows:

Unless the contrary is expressed in the Register, all registered land shall be subject to such overriding interests as may for the time being subsist and affect the same, without their being noted on the register:

a) Rights of way, rights of water and profits subsisting at the time of first registration under this Act

I therefore find and hold that the plaintiff's allegations that the road of access did not exist are unfounded.

This leads me to the second issue which is whether the plaintiff fraudulently caused the road of access to be demarcated on the defendant's land. Apart from the statement that there was no access road on the land at the time of purchase, the defendant did not prove any fraud on the plaintiff's part. In any event, the defendant did not tell the court what influence the plaintiff has over the Land Registrar and the District Surveyor Bomet as to be able to cause them to create a road of access where none existed. The report of the Land Registrar clearly indicates that the road was intended to enable members of the public access a water point as that there was no alternative route.

The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of **Koinange & 13 Others V. Charles Karuga Koinange 1986 eKLR** at page 23 Justice Amin citing the case of **Ratilal Patel Makanji (1957) EA 314** observed as follows:

"When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof....Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required"

In the instant case, the defendant did not discharge the burden of proof in respect of the fraud she alleged against the plaintiff in her counter claim.

On the third issue as to whether the defendant is entitled to the orders sought, it follows that if she has not proved her case against the plaintiff then she is not entitled to the compensation she claims. The tea bushes on the road reserve ought not to have been there in the first place as the road was meant for use by the public. Their removal was ordered by the court after the defendant saw the Land Registrar's report and conceded that indeed there was a road of access on her land. It would therefore be unconscionable to award the defendant the amount she claims as compensation.

The upshot is that the defendant has failed to prove her counter claim against the plaintiff and the same is dismissed with costs to the plaintiff. The plaintiff having earlier on been determined in favour of the plaintiff, the defendant shall also pay the costs of the suit.

I therefore enter judgment for the Plaintiff as prayed in the Plaintiff and dismiss the Defendant's Counterclaim. The Defendant shall bear the costs of both the Plaintiff and Counter claim.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 18th DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

In the presence of:

Miss Chelimo for the Defendant

Plaintiff present in person

Court Assistant: Rotich