



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT KERICHO

CIVIL SUIT NO. 20 OF 2016

JOEL KIPKOECH TONUL.....PLAINTIFF

VERSUS

BONDET ARAP TUIKONG.....DEFENDANT

JUDGMENT

By a Plaint dated 14th April 2016 the Plaintiff instituted a suit against the Defendant seeking an order to compel the Defendant to open up a road of access leading to the Plaintiff's parcel of land number KERICHO/KAPKATET/376, general damages and punitive damages for wrongful restriction of the road of access and costs of this suit. In this Defence dated 18th May 2016 the Defendant denies all the allegations contained in the Plaint and in particular denies the existence of a road of access on his land.

When the matter came up for directions on 28th September 2016, the court directed that since the case was about an access road, the Land Registrar and surveyor should visit the disputed parcel of land and ascertain whether there exists a road of access and whether the defendant had indeed blocked the said road. The District Surveyor Bureti office and the District Land Registrar Kericho filed their joint report in court on 1st March 2017. When the matter came up for hearing on 10th July 2017, the District Surveyor Bureti was called as the only witness to shed more light on his report dated 28th February 2017. He then produced the said report together with the sketch maps as exhibits 1, 2 and 3.

The plaintiff is the registered proprietor of land parcel number KERICHO/KAPKATET/1618 while the Defendant is the registered proprietor of an adjacent parcel of land number KERICHO/KAPKATET/376. It is the Plaintiff's case that the Defendant has unlawfully extended his boundary and encroached onto the access road thus impeding the Plaintiff's access to his land.

The following issues were framed for determination:

- 1) Whether there is an access road from the main highway passing between the Defendant's parcel of land number KERICHO/KAPKATET/36 to the Plaintiff's land parcel number KERICHO/KAPKATET/1618
- 2) Whether the Defendant has unlawfully encroached onto the access road thus restricting the Plaintiff's access to his parcel of land
- 3) Whether the Plaintiff is entitled to the reliefs sought
- 4) Who should bear the costs of this suit

In his testimony the District Surveyor, Bureti Office stated that according to the Registry Index Map, there ought to be a public road of access opening on land parcel number KERICHO/KAPKATET/377 and passing along the main road to land parcels number 376, 1617, 1618, 1619 and 1620. According to the map, the road is 6 meters wide and 20 meters long. He further testified that the road of access does not exist on the ground and instead, there is a footpath serving all these parcels of land. He clarified that the boundaries of land parcels number 376 and 1618 were in place and there was no encroachment on the said parcels as they do not share a boundary since there exists land parcel number 1617 between them. He explained that the road which opens on land parcel number 377 has been blocked by the owners of land parcels number 376, 1617 and 1618 as each of them has extended their boundary by 0.02hectares. He explained that the road of access was generated from land parcel number 376 which is the mother title that gave rise to land parcels number 1617, 1618, 1619 and 1620. He testified that before the sub-division, there existed an access road between parcels number 377 and 376.

In his report which was filed in court the District Surveyor states as follows:

There is no encroachment by the defendant as there is no road of access opened on the Defendant's land parcel number KEREICHO/KAPKATET/376, instead there is a footpath used by the plaintiff and the owner of land parcel number 1617."

This statement which seems to be at variance with the surveyor's oral testimony must be taken in the context of the surveyor's entire report and his evidence in court as well as the sketch maps attached to report which were produced as plaintiff's exhibits 1 and 3. The report further notes that;

“The land parcels number KERICHO KAPKATET/376,1617 and 1618 were found to measure approximately 0.92Ha, 0.53 Ha and 0.53Ha respectively, on the ground against their acreage of 0.90Ha, 0.51Ha and 0.51Ha respectively. The discrepancies noted on the acreage of the above named parcels of 0.02Ha, 0.02Ha and 0.02Ha were found to be the acreage of the road of access that passes on the above-named parcels which needs to be opened for the plaintiff and the proprietors of parcel numbers KERICHO/KAPKATET/1617 and 1618 to access their land”.

Counsel for the Plaintiff has submitted that the defendant has actively prevented the plaintiff from accessing his parcel of land through the public access road by fencing it off and he should therefore be forced to open it up. Under section 27 and 28 of the Registered Land Act Cap 300 of the Laws of Kenya (repealed) a registered proprietor of land is entitled to all the rights and privileges belonging or appurtenant thereto and the said land is free from all other interests and claims unless they are shown on the register or do not require noting on the register. These include rights of way and rights of water subsisting at the time of registration. This was the position taken in the case of **Kamau V Kamau (1984) eKLR**.

From the District surveyor's testimony, it is clear that there was provision for a road of access passing through the defendant's parcel of land all the way to the plaintiff's land though this road does not exist on the ground. It is also true that the road has been blocked by the defendant even though the plaintiff has to some extent also encroached on the said road. For this reason, I find that the Plaintiff's claim for general damages and punitive damages is unsubstantiated and undeserved.

From the foregoing, I find and hold that the plaintiff has largely proved his case on a balance of probabilities.

Accordingly, I enter judgment for the Plaintiff as prayed in the Plaint and make the following orders:

- a) The District Surveyor do open up the road of access passing through land parcels number KERICHO/KAPKATET/377, 376,1617,1618 and all other resultant titles in accordance with the Registry Index Map, with immediate effect.**
- b) That the costs of this suit be borne by the defendant.**

Dated, signed and delivered at Kericho this 17th day of November 2017

J.M ONYANGO

JUDGE

In the presence of

Mr. Mwita for Orina for the Defendant

CA Wambany