



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 8 OF 2017

WILFRED KELI NDOLO..... PLAINTIFF

VERSUS

JESCAH GATAKAA AMBOKA.....1ST DEFENDANT

JACKSON AMBOKA WANYUNGU..... 2ND DEFENDANT

R U L I N G

1. On **13th February, 2017** the parties in this suit agreed by consent that the County Surveyor should determine whether there exists a road of access serving parcels Nos. **Kitale Municipality Block 16/36-70** and **Nos. 282 – 348**, whether the road of access exists on the ground, and whether the defendants have blocked the said road. A report was to be filed by the surveyor. The consent was adopted as an order of the court.
2. The surveyor took much time to avail his report. He filed one dated **29/3/2017**. However on **2/10/2017** Mr. Kraido, not satisfied that the surveyor had gone to the ground, urged, and the court ordered, the surveyor's cross examination, which proceeded on **24/10/2017**.
3. The plaintiff's case in the instant suit is that he subdivided **Plot No. Kitale Municipality Block 16/14** and **Kitale Municipality Block 16/36** into small parcels ranging from Nos. 36-70 (in respect of Plot No. **Kitale Municipality Block 16/14**) and 282-348 (in respect of Plot No. **Kitale Municipality Block 16/36**). He then sold Plot No. Kitale Municipality Block 16/37 to the 1st defendant. He also sold some of the small subdivisions to other people but he is still the registered owner of some of the resultant parcels; roads of access were provided for and they became public roads upon registration of the mutation.
4. The plaintiff avers that the 1st defendant's land parcel opens upto the access road leads to the Kitale - Webuye road. That is parcel No. **Kitale Municipality Block 16/37**. He states that the road serves all the plots subdivided from Plot No. **Kitale Municipality Block 16/36** and Plot No. **Kitale Municipality Block 16/14**. It is this road that the defendants are said to have blocked in January 2017 by depositing building materials thereon, thereby preventing the plaintiff and other persons from using it. The plaintiff's suit seeks among others, a declaration that the defendants have blocked a public road and secondly, a mandatory injunction compelling the defendants to open forthwith the road of access.
5. In her replying affidavit the 1st defendant avers that her Plot No. **Kitale Municipality Block 16/37** was sold to her in 2014 as a corner plot measuring **0.20 Ha** and it had no provision for a through way to plot number **Kitale Municipality Block 16/36** which the plaintiff subsequently subdivided into subplots in the year 2015. She says the plaintiff is attempting to use this courts orders to coerce the creation of a road on her land to reach the other plots after her plot was created. She says the plaintiff cannot do that

without first compensating her. She avers that all the building materials said to have blocked the road are deposited within her plot and within the area covered by beacons placed on the ground by the plaintiff himself.

6. This court has scrutinized the exhibits attached to the supporting affidavit to the Notice of Motion dated **23/1/2017**, including exhibit “**WKN5**”. Exhibit “**WKN5**” appears to include a road of access running along the width of Plot No. **Kitale Municipality Block 16/37**. It can also be observed that the map portrays Plot No. **Kitale Municipality Block 16/37** and Plot No. **Kitale Municipality Block 16/70** as bigger than all the other subplots.

7. As observed herein before, the 1st defendant believes her Plot No. **Kitale Municipality Block 16/37**, to have been a corner plot with no provision for a road through it, and alleges that the beacons placed on the ground by the seller who is the plaintiff herein, will bear her out. She says that based on this belief, she has already developed her plot, including the area now claimed to be a road by the plaintiff. She states in **paragraph 6** of her defence that the road of access created upon subdivision of Plot No. 14 in 1998 was and is a cul de-sac ending at the 1st defendant’s gate and that Parcel No. **Kitale Municipality Block 16/36** lay beyond the reach of that road of access. The defendants aver that the plaintiff failed to make provision for a road access on the ground for the land parcels subdivided from **Kitale Municipality Block 16/36**.

8. This court has not had the advantage of examining any other documents used in the subdivision of the two parcel No. **Kitale Municipality Block 16/14** and No. **Kitale Municipality Block 16/36**. The averments by the 1st defendant regarding the beacons placed on the ground by the plaintiff at the time of sale and the issue of compensation have not been replied to by the plaintiff and I find this to be irregular.

9. Orders of mandatory injunction can only be issued in the clearest of cases. In this particular case there is an order of mandatory injunction sought in the prayers in the plaint as well as other orders. That is the same order sought in the notice of motion under consideration. If the orders sought in the application are granted, it is clear that a greater part of the plaintiff’s claim in the plaint would be substantially addressed by the mandatory order before the court hears any evidence on the matter. I emphasize again the fact that this court has not had the advantage of examining any other documents used in the subdivision of the two parcels No. **Kitale Municipality Block 16/14** and No. **Kitale Municipality Block 16/36**.

10. I am satisfied that the material on the record is insufficient to warrant the grant of mandatory injunction at an interlocutory stage. Consequently I dismiss the application dated **23/1/2017** with costs to the defendants.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017**.

MWANGI NJOROGE

JUDGE

20/12/2017

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah

Ms. Mweneke holding brief for Kraido for Defendant

Ms. Mufutu holding brief for Kiarie for Plaintiff

Ruling read in open court.

MWANGI NJOROGI

JUDGE

20/12/2017