



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CASE NO. 1145 OF 2013**

**DEVLAN LIMITED.....PLAINTIFF**

**VERSUS**

**OBADIAH MUTISYA KITONYI.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed suit on 23/9/2013 seeking a permanent injunction to restrain the Defendants from interfering with the access road known as Kinoo Road on the point where it touches L.R. Numbers 209/10172/14, 209/10172/15, 209/10172/17 and 209/10172/18; and an order stopping the 1<sup>st</sup> Defendant from developing, charging or undertaking any action in relation to L.R. No. 209/13541 that may prejudice the Plaintiff's plots or persons residing on the said plots.
2. The Plaintiff also seeks a declaration that L.R. No. 209/13541 is a road and that the title over this plot is null and void.
3. The Plaintiff is the registered owner of L.R. Numbers 209/10172/14, 209/10172/15, 209/10172/17 and 209/10172/18 on which it has erected a block of flats which it has sublet to tenants.
4. At the time of acquisition of the plots the Plaintiff contends that there was an access road serving its plots and on the basis of the maps it proceeded to develop its plots.
5. On or about 13/9/2013, the 1<sup>st</sup> Defendant fenced part of the Kinoo Road and the road reserve claiming that it was his plot thereby blocking the access to the Plaintiff's plots. On procuring a recent map from surveys of Kenya the Plaintiff learnt that L.R. No. 209/13541 ("the Suit Property") had been illegally excised from the road which blocked the access to the Plaintiff's plots; and allocated to the 1<sup>st</sup> Defendant prompting it to file this suit.
6. The 1<sup>st</sup> Defendant filed his defence and counterclaim on 29/11/2013 in which he contends that the Plaintiff has been trespassing on his land from 2005 despite requests to cease doing so.
7. The 1<sup>st</sup> Defendant avers that there is a 9 metre road separating his plot from the Plaintiff's plots and that the Suit Property does not in any way block the access to the Plaintiff's plots. He claimed that the Plaintiff has been unlawfully using his plot as an access to its plots without his permission.

8. The 1<sup>st</sup> Defendant counterclaimed for general damages for trespass against the Plaintiff for having been denied peaceful and quiet enjoyment of the Suit Property and earning from his investment in the plot as he cannot develop it.
9. Parties agreed on 25/11/2015 to appoint surveyors to ascertain the position of the boundaries of their plots with the help of the Government surveyor after which the surveyors would file their reports for the court to render its decision on the dispute.
10. The report prepared by the Plaintiff's surveyor was filed in court on 15/6/2017. The report prepared by Kolmans Geomatic Consultants Kenya Limited surmises that the Suit Property was part of the road serving several plots including L.R. No. 209/10172 according to survey plan F/R no. 175/24. The report points out that there is an anomaly in that there was no change of user for survey plan F/R no. 328/89 which is the survey that resulted in the creation of the Suit Property.
11. The report states that survey plan F/R number 175/24 was the first survey done in 1984 which created L.R. Numbers 209/10172 to 209/10190. L.R. Number 209/10172 had an access road measuring 20 metres unlike the current road indicated as measuring 9 metres.
12. A further survey was undertaken in 1993 depicted by F/R No. 246/191 through which L.R. Number 209/10172 was subdivided to create L.R. Numbers 209/10172/1 to L.R. Number 209/10172/9 with each of the 9 parcels measuring approximately 0.05 hectares each. L.R. Number 209/10172/1 became a road reserve.
13. Another survey was done in 1997 depicted by F/R No. 318/191 which altered the survey plan F/R No. 246/191 which created L.R. Number 209/10172/10 to L.R. Number 209/10172/18 with L.R. Number 209/10172/10 being surrendered as a road.
14. A separate survey was also undertaken in 1997 which resulted in F/R No. 328/89 which created L.R. No. 209/13541, which is the Suit Property. The surveyor expresses his opinion as follows  

*“it appears that L.R. No. 209/13541 seems to block the access to former L.R. Number 209/10172 by 11 meters leaving a 9 metre access that hits a dead end at L.R. Number 209/10172/15.”*
- The surveyor further states that the survey was carried out by Mr. S. Mwangi who worked as the Provincial Surveyor yet the common practice was that private surveys were done by private licensed surveyors; without confirming that that was irregular.
15. The report points out that L.R. Numbers 209/10172/11 to 209/10172/18 were fully developed while the Suit Property was not occupied. It was basically being used as the public road to access Front View Estate erected on L.R. Numbers 209/10172/11 to 18.
16. The report concludes that the Suit Property was created as an afterthought due to road reserve expansion created by the initial survey plan no. 175/24 done in 1984 and that the planners curved out a 9 metre entry to L.R. Number 209/10172 bound by beacons JM2 and JM3 yet at the second truncation JM4 the road reserve was expanded to 20 metres.
17. The survey report presented by the Plaintiff confirms that there is a 9 metre access road to the Plaintiff's land even though an earlier survey had left a road measuring 20 metres.
18. The 1<sup>st</sup> Defendant instructed Boma Surveys Limited to prepare its report which was filed in court on 20/2/2017.
19. The 1<sup>st</sup> Defendant's survey report indicates that F/R No. 175/24 prepared in 1984 shows a 9 metre road that branches off Kinoo Road to serve L.R. Number 209/10172. The report states that there is dumping covering most of the demarcated 9 metre road.

20. The report makes findings similar to those made by the Plaintiff's surveyor including the fact that on the second truncation at beacon JM4 the 9 metre access road borders the Suit Property and that on F/R No. 246/191 the 9 metre access road is well defined.
21. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their defence on 18/4/2017 denying the Plaintiff's claim. They filed a report dated 2/8/2016 prepared by the Chief Surveyor. The report states that the beacons for the Suit Property fell on their approximate ground positions while the wall for L.R. No. 209/10172/1 encroached onto the Suit Property by 3 metres. The report confirms that L.R. No. 209/13541 exists and has no development on it. The report notes that an attempt to re-establish corner beacons NY and JM 44 will result in the demolition of the perimeter wall on L.R. No. 209/10172 so that it can be shifted to its correct position.
22. As the way forward, the report recommends that the wall demarcating L.R. No. 209/10172 should be realigned to its correct ground position since L.R. No. 209/10172/1 has encroached on the Suit Property. The Chief Surveyor notes that the Plaintiff's surveyor did not turn up when they visited the land in dispute.
23. The issue for determination is whether the Plaintiff has proved its case on a balance of probabilities for the court to grant the reliefs it seeks.
24. The court gave directions for parties to file and exchange submissions by 15/9/2017 and directed on 20/9/2017 that the submissions would be highlighted on 16/10/2017. The Defendants filed their written submissions but the Plaintiff did not. Only the 1<sup>st</sup> Defendant's counsel attended court and highlighted the submissions.
25. In his submissions, the 1<sup>st</sup> Defendant urges the court to direct the Plaintiff to remove its wall which has encroached onto the 1<sup>st</sup> Defendant's land at its cost within 30 days. The 1<sup>st</sup> Defendant also urges the court to dismiss the Plaintiff's suit with costs.
26. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urged the court to dismiss the Plaintiff's suit with costs since the survey reports had confirmed that the Plaintiff's fence had encroached onto the 1<sup>st</sup> Defendant's land.
27. The court has looked at the pleadings, analysed the survey plans together with the survey reports and considered the submissions of the Defendants. The court has also looked at the photographs annexed to the affidavits filed in court in support of the applications. They show a mound of soil dumped to the right of the road used to access the Plaintiff's flats. Where the mound of soil was dumped is what ought to be the access road to the Plaintiff's flats.
28. The three surveyors report confirm that a 9 metre road exists that ought to serve as the access to the Plaintiff's plots. They also confirm the existence of the Suit Property.
29. The Chief Surveyor's report which the court finds to be more reliable makes no mention of the Suit Property being part of a road as the Plaintiff's surveyor's report states.
30. The court finds that the Plaintiff has failed to prove its case on a balance of probabilities and dismisses the suit with costs to the Defendants.
31. The court enters judgement for the 1<sup>st</sup> Defendant as prayed in the counterclaim and awards the 1<sup>st</sup> Defendant general damages of Kshs. 100,000/= together with costs against the Plaintiff.

**Dated at Nairobi this 4<sup>th</sup> day of December 2017.**

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff

Mr. Osoro for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court Assistant