



No. 70

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 38 OF 2009

CHARLES SIRRO NYAIKONDO PLAINTIFF

VERSUS

ROBERT ISOE NYAMBWARI 1ST DEFENDANT

MAKABA OROBA 2ND DEFENDANT

ZEPHANIA OGAO OMARE 3RD DEFENDANT

HENRY NYAMBUTO NYAIRA 4TH DEFENDANT

JOSEPH ONGERI MAGORI 5TH DEFENDANT

SIMION OYARO ANGWARA 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated 27th February 2009 filed in court on the same date states that he is the registered owner of land parcel numbers **Majoge/Boochi/1754** and **1845** measuring approximately 0.33Hectares and 0.01 Hectares respectively. The plaintiff further avers that on or about 23rd September 2008 the 1st to 6th defendants unlawfully trespassed onto the suit property and damaged his fence and trees valued at kshs. 73,775/= in the guise of opening up a road of access. The plaintiff claims the defendants had no colour of right and/or lawful authority to trespass onto his parcels of land and prays for judgment against the defendants jointly and/or severally for:-
 - i. **Declaration that the plaintiff is the registered and/or lawful owner of LR Nos. Majoge/Boochi/1754 and 1845, respectively;**
 - ii. **Permanent injunction against the defendants;**
 - iii. **Special damages in the sum of kshs. 73,775/= only;**
 - iv. **Costs of the suit.**
2. The Attorney General appeared for the 1st and 7th defendants. The 2nd to 6th defendants did not appear after being served and did not file any pleadings or participate in the proceedings. The

- Attorney General filed a defence for the 1st and 7th defendants dated 24th March 2009 on 26th March 2009. By the defence the 1st and 7th defendants denied trespassing onto the plaintiff's property and/or cutting the plaintiff's trees and/or depriving the plaintiff of a portion of his land. The defendants state they acted lawfully and procedurally in creating the access road and/or pathway.
3. The hearing of the suit commenced before Hon. Lady Justice Sitati before whom the plaintiff and his one witness testified. Directions were taken before Hon. Justice Okong'o on 18th December, 2014 when the court directed that the matter proceed for hearing from the point where Hon. Lady Justice Sitati had reached. The defence case was heard before me on 28th October 2015 when the 1st defendant testified as the sole witness for the defence and the hearing closed with the parties being directed to file their final closing written submissions.
 4. The plaintiff (PW1) in his evidence testified that he was the registered owner of the suit properties. He stated that the 1st defendant was the assistant chief of Boochi sublocation while the 2nd to 6th defendants were clan elders who work together with the 1st defendant. The plaintiff stated that on 23rd September 2008 at about 10.00am he saw a huge crowd of people who were led by the 1st defendant at his plots. He stated that the group of people demolished his kieapple fence around his shamba and cut and felled his blue gum trees. He testified further that a total of 11 trees valued at Kshs. 66,775/= were cut down and produced an assessment report prepared by the District Forest Officer dated 8th October 2008 (PEx.8) in support of the valuation of the trees.
 5. The plaintiff said he later learnt that the group of people was making an access road which he maintained was on his land and that he had not given any authority and/or consented to the road being made on his land. The plaintiff produced the section survey map as PEx. 6 which showed the location of his two parcels of land 1754 and 1845 and illustrated the portion where the access road was being constructed. The plaintiff in cross examination stated that the crowd who were opening up the access road were hostile and he could not approach them. He stated the 1st defendant was not doing the work himself but he was issuing directives. The plaintiff denied being aware that it was the Ogembo Town Council who were opening up the access road. The plaintiff stated photographs of the scene were taken by PW2 which shows the damage made on his parcels of land.
 6. One Gideon Mambo, a photographer testified as PW2 and he stated that the plaintiff instructed him on 23rd September 2008 to take photographs relating to a path that had been made on his land without his consent. PW2 stated he on the same day (23rd September, 2008) took in total 18 photographs at the site of the access road construction and the photographs were collectively produced as PEx. 9. The witness stated there were people at various points of the path and he knew some of them. He stated he saw the 1st defendant at the site and he thought he was supervising whatever activity was going on.
 7. In his defence, the 1st defendant who testified before me on 28th October 2015 confirmed that he was the Assistant Chief of Boochi sublocation. He stated that the Chairman of Ogembo Town Council had informed him that members of the Town Council of Ogembo would on the 23rd September 2008 come on site to open up an access road to link the same with the main road to Ogembo Town. As the Assistant Chief he explained he was required to be present. The witness testified that on the material date 23/9/2008, the Chairman Ogembo Town Council, some councilors and the area chief and some area residents attended at the site and that it was the members of the Town Council who were coordinating and were in charge of the exercise. DW1 stated that the Town Council had hired a power saw that was used to cut down some 2 trees which were on the access road. DW1 further stated that the plaintiff's fence which was apparently on the access road was removed. The witness stated the Town Council brought their own equipment which included a tractor and a power saw which were used to grade the ground and to cut the trees respectively. The Assistant Chief further stated the residents provided support labour and they were paid by the Town Council at the end of the exercise.
 8. DW1 denied that he is the one who was leading the exercise maintaining that it was the Town Council who were executing their mandate. In cross-examination DW1 affirmed he knew where the access road was though he had not seen the physical plan and stated that the Town Council were responding to a public demand for the access road to be opened. DW1 stated that he had no

- authority to question or prevent the Town Council from doing what they were doing on the site as it was their duty to open up and maintain roads of access.
9. After the close of the defence case the plaintiff's counsel filed written submissions. The plaintiff's submissions were filed on 7th December 2015 and the defendant's submissions were filed on 3rd February 2016. Upon review of the pleadings the evidence and the submissions by the parties the issues that arise for determination are:-
- i. **Whether there was damage to the plaintiff's trees and fence on land parcels Majoge/Boochi/1754 and 1845.**
 - ii. **If so whether the defendants were liable for the damage?**
 - iii. **Whether the plaintiff is entitled to the reliefs sought?**
10. It has not been disputed that the plaintiff is the registered owner of land parcels **Majoge/Boochi/1754 and 1845**. The plaintiff tendered evidence which clearly shows he is the registered owner. It is also not disputed that on 23rd September 2008 there was an exercise to open up an access road running along the plaintiff's land to Ogembo Township and the main road. The plaintiff states it is the 1st defendant who was leading the exercise and directing the residents on the date in question. The 1st defendant for his part states he was merely informed by the members of Ogembo Town Council that they would attend at the site on 23rd September 2008 to open up the access road and he states that on the date the Chairman of the Council and his Councillors came to the site with their equipment and commenced the exercise that resulted in 2 trees belonging to the plaintiff being cut as they were on the access road and his fence being damaged. The 1st defendant denies he played any role. From the photographs annexed as PEx. 9 it is clear a tractor was used to grade part of the access road and a power saw was used to cut the trees. This is consistent with the 1st defendant's evidence that the members of the Town Council came with their own equipment for use during the exercise. While it is true that at least 2 of the plaintiff's trees were cut on 23rd September 2008 and part of his fence was removed, I do not find that the defendants were responsible for the acts and therefore liable. The 1st defendant in my view has explained his presence at the site. As the area sub chief, and having been asked to be in attendance by the Town Council Chairman, I do not suppose he had an option but to be present on site. I find his evidence credible and believable and I accept it.
11. Although PW2, the photographer stated that he took his photographs on 23rd September 2008 this is not depicted by the photographs. The trees stumps and the trunks and branches of the felled trees shown on the photographs are those of trees that had been cut a while back. The trunks and branches are virtually dry and they have no leave as would have been expected if the trees were being felled as the photographer was clicking on the camera. It is evident therefore the photographs were not taken on the date in question and the same appear to have been procured in an attempt to aid the plaintiff's case on the damages claim. The photographs do not show any snap shot of the kieapple fence that the plaintiff claimed to have been damaged. If the photographer was at the site as the activity was taking place as he states he would definitely have captured the events as they occurred. One may ask where is the tractor that was grading the road or the person using the power saw to cut the trees? I do not think the photographs really add any value to the plaintiff's evidence and I would not attach much evidential value on them. The photographs are only evidence of the site and location of the access road but not of the activity that took place on 23rd September 2008.
12. Having reviewed and considered the evidence adduced by the parties, I am not satisfied the plaintiff has proved his case on a balance of probabilities. The suit is for dismissal and I accordingly order the same to be dismissed with costs to the defendants.

Judgment dated, signed and delivered at Kisii this 20th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st to 7th defendants

J. M. MUTUNGI

JUDGE