REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 21 OF 2008

KIPKIRUI ARAP KOSKE…….PLAINTIFF

VERSUS

PHILEMON KIPSIGEI TANGUS…….. 1ST DEFENDANT

BOMET LAND DISTRICT REGISTRAR……2ND DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to have a road created through the defendant's land; argument that the road existed before and had been used for a long time; road not recognized in the RIM; contention that defendant interfered with the RIM to remove the road when the maps were being drawn; no evidence of any interference from defendant; no pleadings for an easement or easement by prescription; proper procedure was to proceed to press for creation of road by use of the *Public Roads of Access Act* ***; suit dismissed with costs)***

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 21st May, 2008 which was later amended. It is pleaded that the plaintiff is the registered proprietor of the **land parcel Kericho/Kipsonoi S.S/117 (parcel No. 117)** whilst the defendant is the registered proprietor of the **land parcel Kericho/Kipsonoi S.S/508 (parcel No. 508).** These land parcels are in Kiptulwo Location in Bomet District. It is averred in the amended plaint that since the year 1964 there was a 10 metre public road of access, which was registered as an independent road reserve for public use, and which the plaintiff used, to access the main Bomet-Chebole Road. It is pleaded that the defendant worked as a surveyor in the Ministry of Lands and Settlement and that on unknown dates between the years 1986 and 2005, he unlawfully and fraudulently caused the registry maps for the area to be prepared, and in the course thereof, erased the disputed road from the maps, meaning that the land therein became part of the defendant's **land parcel No. 508**. It is averred that the defendant took advantage of his position in the Ministry of Lands to alter the maps. It is pleaded that the defendant colluded to prepare and alter the map with the 2nd defendant, the District Land Registrar. It is pleaded that the dispute was referred to the **Bomet Central Land Disputes Tribunal** in the year 2006 and a verdict was passed in favour of the plaintiff.

In this case, the plaintiff wants an order that the "registered and independent road reserve" is not part of the 1st defendant's land. He also wants an order to cancel the land registry maps which have been prepared and altered in contravention of the earlier "deed plan" filed and the registered and independent road reserve meant for public use be re-opened.

Only the 1st defendant entered appearance and filed defence which was later amended owing to the

amended plaint. In his amended defence, the 1st defendant denied that there is a public road of access that was registered as a public road reserve. He also denied that he altered the registry index maps (RIMs) and also denied causing the alleged road to be closed or form part of his land.

B. <u>PROCEEDINGS AND EVIDENCE OF THE PARTIES</u>

In his evidence, the plaintiff testified that the defendant is his neighbour. He stated that he had complained to the Chief of the area in the year 1986 about the closure of the road. In the year 2006 the matter was referred to the Land Disputes Tribunal which decided in his favour, and directed that the road be opened. He produced the minutes of the tribunal. He also stated that the Land Registrar has confirmed the presence of the road and he produced some mutation forms meant to create the road through the defendant's land. He stated that the **land parcel No. 508**, owned by the defendant, was a sub-division of the **parcel No. 118.** He produced a map which he said was drawn in the year 1964 and which he stated shows the road. He testified that when the 1st defendant's parents were alive, the road was present, but when the 1st defendant took over, he closed the road.

PW-2 was Joseph Kipkorir Tesot. He is a neighbour of the plaintiff and defendant. He owns the **land parcel Kericho/Kipsonoi/114** and **119**. His latter parcel neighbours the former **land parcel No.118** from which the 1st defendant's **land parcel No. 508** was carved from. He testified that there is a public road that has been in place since the year 1965 and which the 1st defendant blocked. He himself used to utilize the road.

PW-3 was Jothan Kipkoech Ngeno. He is the District Land Officer Bomet County. He testified that his former colleague, a Mr. Moses Kirui, had visited the land and made a report dated 22nd July 2009 which he produced as an exhibit. The report states that there exists a 9 metre road. He testified that his own visit of the land showed that the 1st defendant has blocked the road and fenced it as part of his land. He testified that the physical features showed the presence of a road. He produced the Registry Index Maps of the area.

PW-4 was Samuel Kipsang Langat, He is the District Land Surveyor, Bomet. He testified that the road was not reflected in the RIM but was physically on the ground. He agreed that the acreage of the 1st defendant's land would be reduced by the road. It emerged in cross-examination that the **land parcels No. 117**, the former **parcel No. 118** and the **parcel No. 508** are at the far end of the Kipsonoi Registration Section and border the Chesoen Registration Section. The witness stated that on the map, there is a road on the bordering Chesoen section which abuts these land parcels.

After taking his evidence, I felt necessary to order the the two officers to go back to the ground and do the following :-

a. *Determine the boundaries of the **land parcels Kericho/Kipsonoi SS/117** and the former **Kericho/Kipsonoi SS/118;***
b. *Determine whether there is a road abutting the two land parcels on the Chesoen Section.*
c. *Determine whether the alleged blocked road is the road in the RIM of the Chesoen Section or whether it is within the former **parcel No. 118.***
d. *Determine whether the neighbouring land parcels abutting the Chesoen Section, which include the **land parcels Kericho/Kipsonoi SS/227,226,225,223,218,125,126,148** and **147**, have roads within their plots abutting the Chesoen Section, or whether they are also served by the road indicated in the Chesoen section RIM.*
e. *Determine whether the **land parcel No. 117** can well be served by the road indicated in the RIM of the Chesoen section or whether it is necessary for a road to be created from the **land parcel No.118.***

The two officers went to the ground and filed their report. In their report, it is stated that according to the residents of the two registration sections, the road which served **parcel No. 117** used to pass through the **parcel No. 118** since 1964. It is stated in the report that this road is physically on the ground and that

there are old trees and old fencing posts which mark how the road used to pass. The report states that the residents claim that the road, which was in the Chesoen section, was shifted to the other side (the Kipsonoi section) because there was no water on the side that the road served. So they closed the road and opened another one on the other (Kipsonoi) section, where they could get access to drinking water. Their report further states that it is necessary to create the road from **parcel No. 118**, since the other road, serving the **parcel numbers 227,226,225,223,218,125,126,148** and **147**, is not passable. It is stated that there is a swamp separating all these parcels and the **parcel No. 117**. It is further stated that a road cannot be created unless a long bridge of about 20 metres is constructed. The report concludes that there is need to adopt the already existing but blocked road of access in the former **Kericho/Kipsonoi/118.**

I asked the two officers some questions on their report and they stated that the road indicated on the RIM passing through the Chesoen Section was unused because of the swamp. Instead the public used the road passing through the former **parcel No. 118**. They stated that the road has been in use since the year 1964 and should be adopted. I asked them if there is a procedure for creating a road and I was informed that if a road has been in use for over 12 years, it is adopted without compensation. They stated that the map is not authority as they also use physical features on the ground.

The officers were unanimous that on the map there is no road but on the ground there exists or at least there used to exist a road.

The defendant opted not to give any evidence and relied entirely on the RIMs produced.

C. <u>SUBMISSIONS</u>

In his submissions, counsel for the plaintiff submitted that the matter had gone to the Bomet Central Division Land Disputes Tribunal which made an award in favour of the plaintiff. He submitted that the Land Registrar and Land Surveyor had confirmed that there was a road of access which was independent and not part of the **land parcel No. 508**. He submitted that this road was in what he termed a "Deed Plan" (plaintiff's exhibit No.2). He also submitted that **PW-2** had confirmed the existence of the road. He submitted that the blocking of the road altered the position of the boundary contrary to **Section 19** of the **Land Registration Act**. He further submitted that the plaintiff has an easement by prescription because he had used the road for over 20 years before the same was closed. He submitted that the Land Registrar had testified that the RIM is not final authority and that the same can be changed to suit what is clear on the ground.

The 1st defendant submitted that the Land Registrar's report was contrary to his earlier findings in the year 2006. He submitted that the trees (the cited road boundaries) do not exist on the map. He submitted that there is the other road passing between the Kipsonoi and Chesoen sections and that the plaintiff ought to have directed his claim to the owners of the land in Chesoen section who had blocked the road. He submitted that the swamp is not where the Land Registrar placed it.

D. <u>ANALYSIS AND DECISION</u>

I have considered the matter. I must first reiterate that parties are bound by their pleadings. A court only confines itself to the dispute that is set out in the pleadings, and probably what is incidental thereto, but no more.

In his plaint, the plaintiff pleaded that there existed a road, but when the RIM was being drawn, the defendant interfered with it and altered it, so that the same would not reflect a road. I have not seen any evidence that the defendant drew the RIM or altered it , or that he colluded with the Chief Land Registrar or Director of Surveys, or their subordinates, to have it altered. The plaintiff pleaded fraud against the defendant alleging that he fraudulently altered the map, but I am afraid that there is no evidence of any fraud that has been tendered. What was tendered in evidence was the RIM for both Kipsonoi and Chesoen sections. I have no evidence that the 1st defendant participated in the drawing of these RIMs or any evidence that he altered the RIMs to remove a road. Neither have I been given an earlier RIM which indicated a road of access through the former land **parcel No. 118**. The plaintiff produced what he called

a "deed plan" (plaintiff's exhibit No.2) and which he contended showed the presence of the road. But **plaintiff's exhibit No.2** is not a deed plan. It is a sketch plan of the area where the disputed parcels of land are situated. It is not known who drew the sketch and when or indeed for what purpose. That exhibit cannot be authenticated at all and is not worth the paper it is written on. I have no choice but to disregard it completely.

The plaintiff also hinged his case on what he stated was a decision of the Land Disputes Tribunal. I have seen the minutes thereof but I am not convinced that the same is a decision of the Land Disputes Tribunal created by the Land Disputes **Tribunal Act**, **Act No. 18 of 1990**. True the minutes are signed by a person who has described himself as Chairman of the Land Disputes Tribunal Bomet Central Division, but that dispute has no case number and neither was I given any evidence that the said "award" was adopted as a judgment by the subordinate court as required by the **Land Disputes Tribunal Act**. It looks to me, at least from the evidence before me, that the elders of the Tribunal were sitting in a mediation rather than any binding form of dispute settlement. I do not think they were sitting in their capacity as members of the **Land Disputes Tribunal**. If they were, then their decision would have been filed and adopted by the Magistrates Court and a decree issued. I have absolutely no evidence of this. I cannot therefore take it that there has previously been a decision in favour of the plaintiff in this dispute.

In his submissions, Mr. Weldon Ngetich for the plaintiff, submitted that the plaintiff has acquired an easement through prescription. I am afraid that I cannot delve into whether or not the plaintiff has acquired an easement by prescription, for that is not the case before me. As I stated earlier, parties are bound by their pleadings. Nowhere in the plaint is it pleaded that the plaintiff is pursuing a right of easement procured through prescription. It will be an ambush on the defendants and a denial of their right to a fair trial, if I am to allow the plaintiff to agitate a claim for an easement by prescription at the submissions stage. If the plaintiff thought that he has a right of easement, he needed to plead it, so that the defendants can be put on guard and address the issue. Given this position, I decline to be drawn to addressing whether the plaintiff has acquired an easement through the land of the 1st defendant by way of prescription.

Having shorn off the wool, what remains is for me to address whether or not there is a public road of access passing through the land of the 1st defendant, which is **land parcel No. 508**, and whether or not I need to direct the 1st defendant to open it. This land was comprised in the former **land parcel No. 118** before sub-division. From the evidence gathered, it appears as if physically on the ground, there was a road that was used by the plaintiff and other members of the public, which road passed through the former **land parcel No. 118,** and which road now falls in the **land parcel No. 508**, owned by the 1st defendant. On the ground, that road is marked by trees and it appears to be a beaten path. The Land Officers stated that it measures about 9 metres wide.

However, this road is not in the RIM. From the RIM the road which the plaintiff can use, and which is next to the alleged road in dispute, is in the Chesoen registration section. I mentioned earlier that the properties in dispute border the Chesoen Section.

I think that when the RIM was being drawn, the surveyors considered that the plaintiff will be well served by the road which is on the Chesoen section for it abuts his land and ends up at the main road. The Land Surveyor and Land Registrar in their evidence, stated that this road is only in the RIM, but does not exist on the ground, as the owners of the land parcels in the Chesoen section have subsumed it into their parcels of land. There is also the challenge that the road in the RIM is impassable at a certain section due to the presence of a swamp, and even if opened, this will necessitate the building of a bridge about 20 metres long.

We have to look at the law to find out whether it has solutions to a problem such as the one that is faced in this case.

Mr. Ngetich quoted **section 19** of the **Land Registration Act**. I have looked at this provision which is drawn as follows :-

Fixed boundaries.

> ***19.*** *(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.*
>
> *(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.*
>
> *(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.*

It will be seen that the above provision does nothing more than empower the Land Registrar to affix boundaries. It has nothing to do with blockages or closure of public roads of access.

The boundaries of parcels of land are supposed to be in line with the cadastral map as indicated in **Section 18** of the **Land Registration Act**, which provides as follows :-

Boundaries.

> ***18.*** *(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.*
>
> *(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.*
>
> *(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:*
>
> *Provided that where all the boundaries are defined under* ***section 19 (3),*** *the determination of the position of any uncertain boundary shall be done as stipulated in* ***the Survey Act, Cap. 299****.*

The approximate boundaries are supposed to be in line with the cadastral map. But what we have before us is not a boundary dispute. There is no dispute on where the boundaries of the land of the 1st defendant starts and ends. His boundaries are known. The only issue is whether, within these boundaries, there exists a public road of access.

I do not think the **Land Registration Act**, addresses this issue. The applicable law in my view is the **Public Roads and Roads of Access Act, CAP 399**, **Laws of Kenya**. The said statute establishes a **District Roads Board** and **Sections 8** and **9** are relevant in my view. They provide as follows :-

S. 8 Dedication of line of public travel

1. *Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.*

2. *In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described.*
3. *Where an order under this section dedicates a line of public travel or converts a road of access into a line of public travel, such line of public travel shall be absolutely dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads.*
4. *Before making and publishing any order under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.*

S. 9 Application to construct road of access

1. *Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between*

his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the **First Schedule to this Act:**

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.

2. *Any owner or occupier of lands who has constructed a road in circumstances which did not require the making of an application under* ***subsection (1)*** *of this section may make application to the board of the district in which the road is situated for a declaration that the road is a road of access, and for the registration of the road of access as though an order had been made under* ***section 11*** *of this Act.*
3. *Every such application shall be accompanied by such fees as the Minister may prescribe, and the board shall not be obliged to proceed upon any such application except upon payment of such fees.*

It will be seen that the above sections of the Act make provision for the Minister to dedicate a road of access into a public line of travel. **Section 9**, does provide for a person who feels that there is necessity to have a road of access pass through neighbouring land, to apply to the Board for leave to construct a road. If any person is aggrieved by the decision of the Board, he has a right of appeal to the subordinate court.

We have already seen from the evidence that there is no recognized public road of access through the land of the defendant. There could have been some road of access, but the same is not a public line of travel. I am unable to hold that there exists a public road through the defendant's land. If one existed, it ought to have been reflected in the RIM which is not the case.

It is apparent to me that what the plaintiff wants, is to have a road of access created through the defendant's land. If this is the case, then the plaintiff needs to approach the Minister or the District Roads Board, pursuant to **Sections 8** and **9** of the **Public Roads and Roads of Access Act**, so that they may consider creating a road of access for the plaintiff, or the public, passing through the defendant's land. But I am unable to grant a declaration that there exists a public road of access through the defendant's land as sought by the plaintiff, and neither can I order a rectification of the Registry Index Maps to reflect a public road, for none exists, over the defendant's land. Alternatively, the plaintiff can push for the opening of the recognized public road of access which exists in the map, but not on the ground, between the two registration sections which road will certainly allow him access the main road.

For the reasons given above, I am of the opinion that the plaintiff's case has no merit. It is hereby dismissed with costs.

It is so ordered.

Dated, Signed and delivered on this 24th day of July, 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Weldon Ngetich Advocate present for Plaintiff

Defendant present acting in person

Court Clerk; Kenei