



**Mutitu v Nduguya & another (Environment & Land Case 53 of 2014)
[2024] KEELC 14147 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 14147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 53 OF 2014
JO OLOLA, J
OCTOBER 17, 2024**

BETWEEN

JERIOTH MUTHONI MUTITU PLAINTIFF

AND

SIMON THUMBI NDUGUYA 1ST DEFENDANT

JOSPHAT KARIUKI NDUGUYA 2ND DEFENDANT

JUDGMENT

Background

1. By her Complaint dated and filed herein on 24th March 2014, Jerioth Muthoni Mutitu (hereinafter “the Plaintiff”) prays for Judgment against Simon Thumbi Nduguya and Josphat Kariuki Nduguya (hereinafter “the Defendants”) for:-
 - a). An access road requiring the Defendants jointly and severally to grant the Plaintiff reasonable access to her parcel of land LR. No. Thegenge/Kianjogu/409 by creation of an easement over LR. Nos. Thegenge/Kianjogu/663 and 664; and
 - b). Costs and interests.
2. Those prayers arise from the Plaintiff’s contention that prior to the sub-division of the Defendants’ parcels of land from the original LR. No. Thegenge/Kianjogu/410, there existed an access road to the Plaintiff’s land, which access road was however extinguished upon the sub-division thereby making the Plaintiff’s parcel of land-locked. It is the Plaintiff’s case that she has invariably sought negotiations with the Defendants in an attempt to obtain an easement but the same have been fruitless.
3. In their joint Statement of Defence dated and filed on 2nd May 2014, the Defendants deny that they have sub-divided the said land and/or that such sub-division has denied the Plaintiff access to her parcel



of land. They further deny that they have been in any negotiations with the Plaintiff with a view to providing her with access to her parcel of land.

4. The Defendants aver that the Plaintiff's parcel of land has a legally known access which the Plaintiff uses to –date and assert that this suit is yet another attempt by the Plaintiff to saddle them with unnecessary costs and litigation.

The Plaintiff's case.

5. At the trial herein, the Plaintiff called two witnesses in support of her case.
6. PW1- Jerioth Muthoni Mutitu is the Plaintiff herein and a farmer in Kianjogu. She told the court the land was transmitted to her name following the death of her husband. PW1 testified that they had been using the land from the year 1958 and that after the demise of her husband, the two Defendants who are her neighbours closed the access road they had been using.
7. PW1 testified that she cannot now access the land as the other side is landlocked while the lower side is marshy. It was her case that before the access was blocked, she could access her land using the access between Plot Nos. 416, 415 and 664.
8. PW2- Nathan Giothe Gathaiya is the Land Registrar Nyeri County. He told the court he was aware that two reports had been filed in regard to this matter. The 1st Report compiled by R.W. Waiteri dated 23rd March 2016 concludes that the only visible access to parcel 409 is the disputed parcel. The 2nd Report prepared by Ms. S.W.Mwanzawa dated 27th September 2018 concludes that the map is clear on the access to be used for each parcel and urges that the parties use the access provided on the R.I.M. PW2 supports the findings in the Second Report.

The Defence Case

9. On their part, the two Defendants called one witness in support of their case.
10. DW1- Simon Thumbi Nduguya is the 1st Defendant. He told the court that the 2nd Defendant who was his brother had passed away.
11. DW1 told the court his parcel of land is No. 663 while No. 664 belongs to his now deceased brother. He told the court that the two parcels were sub-divisions of Parcel No. 410 which had been in the name of their father. DW1 further told the court that the Plaintiff's parcel of land is below their own on the lower side and that the Plaintiff is supposed to use the lower side of her land to access the land.
12. DW1 further testified that the Plaintiff was until the year 2005 using their parcels of land for access before the Defendants discovered that there was no access road on their land. He told the court the access road to the Plaintiff's parcel is usable but the Plaintiff still uses other neighbour's parcels of land to access her own.

Analysis and Determination.

13. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocate representing the parties herein.
14. By her suit herein the Plaintiff urges the court to issue an order granting her reasonable access to her parcel of land known as LR. No. Thegenge/Kianjogu/409 through the creation of an easement over the Defendants' parcels of land known as Thegenge/Kianjogu/663 and 664.



15. Those prayers arise from the Plaintiff's contention that prior to the sub-division of LR. No. Thegenge/Kianjogu/410, which belonged to the Defendants' father, there existed an access road to the Plaintiff's land which was extinguished upon sub-division thereby denying the Plaintiff access to her parcel of land. It is the Plaintiff's case that since the Defendants caused the said parcel of land to be sub-divided into the portions now known as LR. No. Thegenge/Kianjogu/663 and 664, she has experienced great difficulty in accessing her parcel of land as she no longer has direct access thereto and has been forced to use other parcels of land belonging to her neighbours.
16. On their part the Defendants did not deny having sub-divided the parcel of land known as Thegenge/Kianjogu/410. It was however their case that upon carrying out the sub-division, and on checking with the records held at the lands office, they realized that there was no access road running from their parcel of land to the Plaintiff's parcel of land known as Thegenge/Kianjogu/409. It was the Defendants' case that the Plaintiff's parcel of land has a legally known access which the Plaintiff can use but she was reluctant to use the same.
17. In support of her case, the Plaintiff told the court that she had been using the access road from the year 1958 and that the Defendants who are her neighbours blocked the access sometime after the death of her husband. She told the court she was now unable to access the land as one side is landlocked while the lower side is marshy and unusable. It is on that account that she urges the court to grant her access to her land through the creation of an easement over the Defendants' parcels of land.
18. From the material placed before me, LR. No. Thegenge/Kianjogu/409 was initially registered in the name of the Plaintiff's husband. Following his death, the Plaintiff acquired the same by way of transmission. Similarly, the adjacent LR. No. Thegenge/Kianjogu/410 was initially in the name of the father of the Defendants. Following his death, the two brothers sub-divided the same and transferred LR. No. Thegenge/Kianjogu/663 to the 1st Defendant while LR. No. Thegenge/Kianjogu /664 was transferred to the 2nd Defendant. As fate would have it, the 2nd Defendant passed away in August 2021 and the suit as against him abated as he was not substituted in these proceedings.
19. While the crux of the Plaintiff's case was her position that there previously existed an access road to her parcel of land through the Defendants' parcels of land, there was very little that was placed before this court in support of that position. Testifying at the trial herein the Plaintiff told the court that prior to the sub-division, she had been given an access road between plots 415, 416 and 664 and that what is marked as a road on the south of her plot is usually flooded and therefore she cannot use it.
20. While it was conceded that the Plaintiff and her deceased husband had been using a portion of the land that had since been sub-divided and transferred to the 2nd Defendant to access her parcel of land, it was evident that there was no access road on the land and that the usage was out of some permission or understanding created between the Plaintiff's family and the Defendants' father.
21. Asked in cross – examination about the access road, the Plaintiff confirmed that in reference to the Registry Index Map for the area, there was in deed no access road from Plot Nos. 663 and 664 to her own parcel of land. From a perusal of the undated Boundary Dispute Report prepared by the Nyeri Land Registrar S.M. Mwanzawa and filed herein on 27th September 2018, it was noted that the access road was created as a result of an agreement between the initial owner of parcel No. 409 and 410 since the road on the lower side of the Plaintiff's land had not been cleared and was swampy.
22. That being the case I was unable to discern any intention of the parties to create a right of way that was enforceable in the manner in which the Plaintiff had purported to do herein.



23. It was also evident to me that despite the Plaintiff's claim that her parcel of land had no access, that was not the factual position. In that Boundary Dispute Report filed by the Land Registrar S.M. Mwanzawa aforesaid the Land Registrar concludes as follows:-

“On the Map

There is an access road to the Plaintiff's land from the lower side but no access road through the Defendants' land 663 and 664.

The Defendants' parcel of land 663 and 664 are accessible through the main road that runs from Gakanja Shopping Centre.

Both parcels are not landlocked and their parcels access roads are well outlined on the map.”

24. From a further perusal of the said Report and the Plaintiff's own testimony herein, it was clear that there was an access road to the Plaintiff's land but the Plaintiff had an issue with using it because it would occasionally get swampy and flooded. I was unable to fathom from these circumstances why the Plaintiff would want to insist that the Defendants cede a portion of their land as a matter of right to rescue her from her predicament.

25. At any rate, it was clear to me that the portion of land the Plaintiff was claiming lay on a portion of LR. No. Thegenge/Kianjogu/664. That parcel of land was registered in the name of the 2nd Defendant who passed away in the year 2021 and was not substituted herein. The Plaintiff can certainly not sustain a claim against the 1st Defendant whose parcel of land is situated on a different location.

26. It follows that I was not persuaded that there was any merit in the Plaintiff's claim. The Plaintiff has failed to prove that the Defendants owe her a duty to give her some access to her portion of land. I am not persuaded that she has proved that she has any right to be granted that access through the Defendants' parcels of land.

27. Accordingly, the suit herein is dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17TH DAY OF OCTOBER, 2024.

In the presence of:

Mr. Ng'ang'a for the Plaintiff.

Mr. Nderi for the Defendant.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

