



**Okong'o & another v District Surveyor Nyando District (Nyando, Muhoroni and Nyakach Sub-Counties) & 2 others (Environment and Land Appeal E075 of 2021) [2023] KEELC 15689 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15689 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E075 OF 2021  
E ASATI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REMJUS OGOLO OKONG'O ..... 1<sup>ST</sup> APPELLANT**

**GABRIEL JANNES ALARO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TERRY JEFF ODHIAMBO ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT SURVEYOR NYANDO DISTRICT (NYANDO, MUHORONI AND NYAKACH SUB-COUNTIES) ..... 2<sup>ND</sup> RESPONDENT**

**FREDRICK BABU OCHIENG ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgement and order of the Senior Principal Magistrate's Court (Hon. R.S. Kipngeno) given on the 21st day of September, 2021 and in NYANDO PMC EL CASE NO.4 OF 2020)*

**JUDGMENT**

**Introduction**

1. The Appellants herein were the Plaintiffs in NYANDO CMC E & L CASE NO.4 OF 2020 (the suit) wherein they sued the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide the plaint dated 31<sup>st</sup> January, 2020. The subject matter of the suit was a portion measuring 40 ft by 80 ft (the disputed portion) of land parcel originally known as KISUMU/WAWIDHI A II/813 and after sub-division, KISUMU/WAWIDHI A II/1835. The Appellants' claim in the suit was for;
  - a. "a declaration that the creation of the access road by the 1<sup>st</sup> Defendant on property KISUMU/WAWIDHI/A II/1835 particularly on the plot purchased by the Plaintiffs is illegal, null and void.



- b. A permanent injunction do issue restraining the 1<sup>st</sup> Defendant by themselves, their servants or agents from trespassing, accessing, alienating, sub-dividing or in any way interfering with the Plaintiffs' ownership and occupation of the plot they purchased and which is a portion of KISUMU/WAWIDHI A II/1835.
  - c. An order nullifying and revoking the entry of the Land Registry map creating the access road.
  - d. An order of mandatory injunction to the 1<sup>st</sup> Defendant to rectify the Land Registry map to reflect the renovation and nullification of the creation of the access road.
  - e. An order of mandatory injunction to the 2<sup>nd</sup> Defendant to sub-divide the property KISUMU/WAWIDHI A II/1835 to create a parcel number for the plot purchased by the Plaintiff and to obtain consent necessary for the transfer to be done.
  - f. An order of specific performance against the 2<sup>nd</sup> Defendant to transfer the plot purchased to the Plaintiff.
  - g. In the alternative to prayers (e) and (f) above, the Deputy Registrar or a Court appointed officer to carry out the orders of the court and execute the transfer forms in favour of the Plaintiff.
  - h. In the alternative to the prayers above, an order of refund of the purchase price by the 2<sup>nd</sup> Defendant at the current market value of the property being Kshs.1,000,000/- with interest at court rates from the date of filing this suit.
  - i. Costs of the suit.”
2. The Appellants' case was that they had bought the disputed portion of the original parcel from the 2<sup>nd</sup> Respondent and that the 2<sup>nd</sup> Respondent subsequently sub-divided the original parcel of land to create several portions including parcel NO. KISUMU/WAWIDHI A II/1835 (the suit land) where the disputed portion of land sits. That apart from refusing to transfer the disputed portion to the Appellant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents unlawfully created a road of access through the suit land and particularly the sold portion of land to serve a neighboring parcel of land NO. KISUMU/WAWIDHI A II/1836 registered in the name of the Interested Party.
  3. The 1<sup>st</sup> Respondent denied the Plaintiffs' claim vide the defence dated 24<sup>th</sup> July, 2020. His case was that the title in respect of the original parcel NO. KISUMU/WAWIDHI A II/813 is closed, that it was parcel NO. KISUMU/WAWIDHI A II/1225 which was sub-divided to create the suit land and parcel NO. KISUMU/WAWIDHI A11/1836 both of which are registered in the name of the 2<sup>nd</sup> Defendant. That there is an access road measuring 0.02Ha hived off.
  4. The 2<sup>nd</sup> Respondent through his Statement of Defence dated 24<sup>th</sup> February 2020 denied the appellant's claim. He denied selling a portion of land measuring 40 feet by 80 feet to the appellants. He denied that the sold plot was part of the suit land. He pleaded that the suit was bad in law for mis-joinder and non-joinder of parties and that the same was misconceived and an abuse of the court process. The 3<sup>rd</sup> Respondent later sought to be and was joined as an Interested Party in the suit.
  5. Before the suit was heard parties entered into a consent as follows: -

“BY CONSENT OF THE PARTIES

- i. A declaration be and is hereby issued that the 2<sup>nd</sup> Defendant sold a plot measuring 40 feet by 80 feet to be hived off from KISUMU/WAWIDHI A 11/1835 to the Plaintiffs.



- ii. Prayers e, f and g of the plaint are granted to wit:
 

An order of mandatory injunction is issued directing the 2<sup>nd</sup> Defendant to subdivide the property KISUMU/WAWIDHI A 11/1835 to create a parcel number for the plot purchased by the plaintiffs and to obtain consents necessary for transfer to be done.

An order of specific performance against the 2<sup>nd</sup> Defendant to transfer the plot to the plaintiffs

In the alternative to prayers e and f above, the Deputy Registrar or a court appointed officer to carry out the orders of the court and execute the transfer forms in favour of the plaintiff.
- iii. The court to determine the question of the validity of the creation of the access road.
- iv. The plaintiffs’ list and bundle of documents dated 31<sup>st</sup> January 2020 admitted as the Plaintiffs’ exhibits 1 to 4.
- v. The plaintiffs’ land map annexed to the supplementary list of documents dated 11<sup>th</sup> December 2020 admitted as the Plaintiffs’ exhibit 5
- vi. The plaintiffs’ valuation report annexed to the plaintiffs ‘further supplementary list of documents dated 28<sup>th</sup> June 2021 admitted as Plaintiffs’ exhibit 6
- vii. The witness statements of Alfred Obuya and Dickens Guya admitted as the Plaintiffs’ exhibit 7 and 8 respectively
- viii. The witness statement of the Interested Party admitted as his evidence in chief
- ix. The witness statement of Francis Dickens Oluoch admitted as the Interested Party’s exhibit 1.
- x. The interested party’s list of documents dated 27<sup>th</sup> November 2020 admitted as the Interested Party’s exhibit 2 to 5 and
- xi. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff to give evidence in the dock.”

The consent was adopted as a judgement of the court. It settled most of the issues in the suit save for the issue of validity of creation of the road of access which was sent for trial.

- 6. The trial court heard the evidence and rendered its judgement dated 21<sup>st</sup> September, 2021. Aggrieved by the judgement, the Appellants preferred the appeal herein vide the Memorandum of Appeal dated 12<sup>th</sup> October, 2021. They sought orders that the appeal be allowed, the judgement and consequential orders be set aside and costs of the appeal be awarded to the Appellants.

**Submissions**

- 7. The appeal was canvassed by way of written submissions. The Appellant’s written submissions filed on his behalf by the firm of Nchogu Omwanza Nyasimi Advocates were dated 15<sup>th</sup> November, 2022 and filed in court the same day. Counsel submitted on behalf of the Appellants that the trial court completely disregarded a basic concept of law and set a dangerous precedent to the effect that any rich



person can forcefully create a road on another person's land without the knowledge of the owner and without a mutation.

That the crux of the appeal is whether sub-division or portion of land can be done without mutation prepared by a Surveyor and registered with the District Surveyor, showing the boundaries and roads. That the main question for determination is whether a court of law can sanction an arbitrary creation of roads on people's properties without following due process.

Counsel submitted that property rights are protected under Article 40 of the *Constitution of Kenya*. That, to sub-divide, partition or create an easement, road or any interest in private land, the registered owner has to initiate the process by first seeking the consent of the Land Control Board as well as the area County Government if the land is situated in an urban area. That a Surveyor is then invited to survey the land, draw a sketch map showing the proposed sub-division, partition and fill mutation form. That the mutation form must be signed by the registered owner to signal his acceptance.

That the 1<sup>st</sup> Respondent did not observe this procedure in creating the contested road of access. That the mutation produced as exhibit neither mentioned the road of access nor made space for it. That the sketch map for the parcel does not show the road.

8. That the trial court simply stated that the 3<sup>rd</sup> Respondent has no access road, this was without any basis or supporting evidence and blamed the 2<sup>nd</sup> Respondent for not doing proper physical planning when sub-dividing the land.

That the trial court sanctioned an illegality and treated the Appellant's property rights as inferior.

Counsel relied on the case of *Kamau Kungu & Another Vs Francis Kungu Njoroge & Another* [2020] eKLR to emphasize the significance of a mutation in creation of a road of access. Counsel prayed for orders for nullification of the entry that created the access road as well as an order of rectification of the map.

The alternative prayer for refund of the purchase price at kshs.1,200,000/- as against the 2<sup>nd</sup> Respondent and cost be awarded to the Appellant against the 3<sup>rd</sup> Respondent.

9. The 2<sup>nd</sup> Respondent filed written submissions through the firm of Ariho Ngandu & Associates Advocates acting for him. Counsel submitted that there is no priority of contact between the 2<sup>nd</sup> Respondent and any of the parties in the appeal. That both parties bought land from parties who had bought from other parties who had purchase the same from the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent sold the land to Awasi Area Development Group on 12<sup>th</sup> July, 1991. That the only prayers that the Appellant sought against the 2<sup>nd</sup> Respondent is the lower court were that he sub-divides the property KISUMU/WAWINDI/A II/1835 to create a parcel number purchased by the Appellant and secondly in the alternative, that he refunds them Kenya Shillings One million (Kshs.100,000/-) alleged to be the correct value of the property purchased by them at the time.

That the Appellant conveniently and for reason best known to them avoided involving the party which sold them the land in the suit.

That since the Appellant have stated in paragraph 2 of their submissions that the 2<sup>nd</sup> Respondent was not involved in the creation of the access road, no adverse orders should be issued against him and since the evidence of the Appellant was that there was a suitable road which the 3<sup>rd</sup> Respondent was meant to use to access her property prior to the creation of the disputed road.

That the 2<sup>nd</sup> Respondent cannot be forced to refund what he did not receive. That the Appellant did not pay him the purchase price.



The 2<sup>nd</sup> Respondent prayed that no adverse orders should be awarded the cost of the appeal.

10. The 3<sup>rd</sup> Respondent filed submissions on 16<sup>th</sup> January, 2023. She submitted that the Appellants ran to court prematurely and never took the right steps in addressing the boundary dispute and that the trial court lacked jurisdiction to entertain the suit. That the appellants failed to prove their case hence the appeal must be dismissed with costs.

### **Issues for Determination**

11. The Memorandum of Appeal presents a total of 25 grounds of appeal namely; -
- a. Honourable Magistrate error in law and fact in not answering the question whether or not the access road was legally created;
  - b. In not finding that the access road was illegally and irregularly created;
  - c. In failing to consider the fact that there was no mutation for the sub-division/partitioning that created the access road;
  - d. In downplaying the evidence that the 2<sup>nd</sup> Respondent, the owner of the property did not participate in the creation of the road;
  - e. In disregarding the fact that neither the 1<sup>st</sup> Respondent nor the 2<sup>nd</sup> Respondent explained how the road was created;
  - f. In disregarding the failure of the 1<sup>st</sup> Respondent to involve the Appellant who had purchaser interest over the property in illegal creation of the road;
  - g. In disregarding the fact that the relevant consents were not sought and obtained before the purported partition of the land leading to creation of the road;
  - h. In failing to revoke the creation of the road inspite of glaring evidence on its illegal creation.
  - i. In sanctioning the illegal acts of the 1<sup>st</sup> Respondent in creating the road on the Appellant's property and without due regard to the law;
  - j. In setting a bad precedence whose net effect is that the 1<sup>st</sup> Respondent can just create a road anywhere and in whatever manner he pleases;
  - k. In failing to analyze the evidence before him;
  - l. In finding that the 3<sup>rd</sup> Respondent was innocent because he bought his land in 2019 after the road had been supposedly created in 2016 in total disregard of the evidence that the Appellant bought the land in 2002 and started developing it before the road was created.
  - m. In disregarding the evidence that the Appellants had development their portion of the suit land in form of construction of a house to knee level.
  - n. In failing to take into account the Appellant's investment on the property;
  - o. In disregarding the evidence that the 2<sup>nd</sup> Respondent could access road for the 3<sup>rd</sup> Respondent on the other portion of the land;
  - p. In failing to consider that the 2<sup>nd</sup> Respondent was agreeable to transferring the property to the Appellant once the road is closed.
  - q. In failing to consider the terms of the consent order recorded on 3<sup>rd</sup> August, 2021;



- r. In failing to consider and determine the merits of the other prayers sought by the Appellants;
  - s. In purporting to do equity to the 3<sup>rd</sup> Respondent at the expense of the Appellants;
  - t. In assuming that the 3<sup>rd</sup> Respondent's need to access his property outrides the Appellants' right to their property;
  - u. In sectioning the 1<sup>st</sup> Respondent illegality and violation of the Appellants right to their property.
  - v. In providing no remedy for the injury incurred by the Appellants;
  - w. In failing to appreciate the applicable principles of law therefore arriving at an erroneous finding;
  - x. In denying the Appellants the costs of the suit;
  - y. In failing to do justice before him.
12. The trial court found that since the road of access was created in 2016 long before the interested party purchased the land and the 2<sup>nd</sup> Respondent still owns all that L. R NO. 1835, the road should remain undisturbed as the prayers (e), (f) and (g) entered by consent shall secure the position of the Plaintiffs. As to whether creation of the road was valid or lawfully done the court blamed the 2<sup>nd</sup> Respondent for failing to do proper physical planning of his land and noted that the 2<sup>nd</sup> Respondent will pay dearly by way of providing access roads. The issue that presents itself to this court from evidence presented before the trial court and findings of the trial court is whether or not the trial court erred in finding or holding as it did.

### **Analysis and determination**

13. This being a first appeal, this court reminds itself of its obligation to independently analyze and re-examine the evidence adduced in the trial court, arrive at its own finding. The court is guided the holding in *Selle and another vs Associated Motor Boat Company Ltd and others* 1968 E.A 123 that:
- “An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not- necessarily bound to follow the trial court's findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.
14. The 1<sup>st</sup> Appellant's evidence before the trial court was that there is an access road created on the land they bought from the 2<sup>nd</sup> Respondent. That he was not involved in the creation of the road of access. That he, together with the 2<sup>nd</sup> Appellant bought from the 2<sup>nd</sup> Respondent a plot measuring 40ft by 80 ft from land parcel known as KISUMU/WAWIDHI A II/813 owned by the 2<sup>nd</sup> Defendant. That the plot was physically marked by the parties. That they paid the entire purchase price of Kshs.100,000/=.
- That the original title KISUMU/WAWIDHI A II/813 was severally sub-divided by the 2<sup>nd</sup> Defendant through various mutations and that as at the time of filing suit, the plot the Appellant bought was part of KISUMU/WAWIDHI AII/1835 a resultant parcel from the sub-division.



That on 26<sup>th</sup> September, 2019, the 1<sup>st</sup> Respondent wrote to the area chief communicating an intention to open an access road for property KISUMU/WAWIDHI A II/1836. That thereafter he was surprised to see the 1<sup>st</sup> Respondent erecting beacons on the plot they had bought. That the access road was unlawfully and illegally created by the 1<sup>st</sup> Defendant and the owner of plot No. KISUMU/WAWIDHI A II/1836. That there was never a road on the property they bought.

That the actions of the 1<sup>st</sup> Defendant were aimed at denying the Appellants their property rights. That the creation of the road of access has left the Appellant with no land and lost money. That the 2<sup>nd</sup> Defendant told them that he did not understand why the 1<sup>st</sup> Defendant created the road on the plot. That the plot they purchased was now valued at Kshs.1,000,000/-.

He testified further that as per the mutation there is no road cutting across the land. That the mutation was signed by the 2<sup>nd</sup> Defendant and registered on 23/6/2016. That he did not lodge a formal complaint with the Surveyor. That he has no problem with the mutation as it showed there was no road of access.

The evidence of the 2<sup>nd</sup> Appellant was same to that of the 1<sup>st</sup> Appellant in all material particulars.

15. The 2<sup>nd</sup> Respondent submitted that there was no privity of contract between the Appellants and the 2<sup>nd</sup> Respondent for the purchase of the disputed portion. Though it is true from the evidence that the appellants bought the suit land from a third party, the question of the contract of sale of the land and specific performance were settled by the Consent.
16. Among the exhibits produced by the appellants was the mutation registered at the land registry on 23<sup>rd</sup> June 2016. It was the mutation that created the suit land after subdivision of land parcel known as KISUMU/WAWIDHI A 11/1255. It shows that land parcel known as KISUMU/WAWIDHI A 11/1255 was subdivided to create KISUMU/WAWIDHI A 11/1835 measuring 0.23 hectares, KISUMU/ WAWIDHI A II /1836- measuring 0.03 hectares and an access road measuring 0.02 hectares. The mutation was signed by the registered owner of the land. The owner of the suit land did not file any complaint about the access road. There was no evidence by a surveyor that the road that was opened was not the 0.02 hectares created by the mutation dated. The 2<sup>nd</sup> Respondent has already consented and judgement entered in favour of the appellants for the purchased plot measuring 40 feet by 80 feet of the suit land. The totality of the evidence is that the appellants' interest on the suit land is the portion measuring 40 ft by 80 ft which they purchased. There is no evidence that the 2<sup>nd</sup> Respondent has been unable to transfer this land to the appellants. I agree with the trial court that the interest of the appellants in the suit land has been secured by the consent recorded.
17. Consequently, I find no reason to interfere with the findings and decision of the trial court. I find that the appeal lacks merit, dismiss it and uphold the judgement of the trial court. Costs to the 2<sup>nd</sup> Respondent.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Odhiambo Advocate for the Appellant



Ochieng Advocate for the 2<sup>nd</sup> Respondent.

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

