



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 401 OF 2017**

**JULIUS NZUVE SILLA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PATRICK NYAMAI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MINISTRY OF LANDS & PHYSICAL PLANNING.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JOHN KASIVUKU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MUSAU KASIVIKU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Application dated 25<sup>th</sup> September, 2017, the Plaintiff is seeking for the following orders:

*a. That pending the hearing and determination of this suit, the Defendant/Respondent, by themselves, their officers, their employees, their servants and/or agents or otherwise howsoever be restrained from moving/altering the Plaintiff's border or excavating or depositing any material on the contested border. (Machakos/Mua Hills/321).*

*b. That pending the hearing and determination of this suit the 2<sup>nd</sup> Respondent be directed to conduct a proper and comprehensive survey in the presence of an independent Surveyor appointed by the Plaintiff or in a manner as directed and the said reports be furnished to this Honourable Court.*

*c. The costs of this Application be awarded to the Plaintiff/Applicant.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the owner of land known as Machakos/Mua Hills/321 (*the suit land*); that the neighbouring land being parcel of land known as Machakos/Mua Hills/327 is owned by the family of the late Kasivuku Ingui Kasyoka whose children are the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that parcel of land number 327 was purchased by Michael Nzee and the family of the late Joshua Mbutu, the father of the 1<sup>st</sup> Defendant.

3. According to the Plaintiff, in the year 2013, the 1<sup>st</sup> Defendant created an easement, being an access road, between his land and the land of Michael Nzee; that the road was never provided for at the time he purchased his land and that the damage from that creation of an illegal access road was extensive on his land.

4. According to the Plaintiff, there was a clear fence and demarcation forming the boundary between his land and that of Michael Nzee and that there has been massive excavation on his land resulting in the felling of two mature trees on his land.

5. In response, the 1<sup>st</sup> Defendant deponed that he has no interest in the Plaintiff's land which is known as Machakos/Mua Hills/321; that he owns a portion of land known as Machakos/Mua Hills/327 as a beneficiary of his late father's property and that the Plaintiff was informed about the opening of a road of access between parcel number 321 and 327.

6. It is the 1<sup>st</sup> Defendant's deposition that the access road is clearly provided for in the official map; that he has never trespassed on the Plaintiff's land and that he is not the one who dispatched a grader to open up the road of access.

7. In his submissions, the Plaintiff's advocate submitted that the matters touching on the suit land can be made clear if a survey is ordered by this court; that no party will suffer prejudice if prayer number 4 is granted and that it is imperative that a proper court supervised survey be done to settle the dispute herein. The Defendants' submissions are not on record.

8. It is not in dispute that the Plaintiff is the registered proprietor of parcel of land known as Machakos/Mua Hills/321 measuring 4.8 Ha. According to the Title Deed, the Plaintiff was issued with the Title Deed in respect to the suit land on 5<sup>th</sup> March, 1991.

9. The Plaintiff's complaint is that in the year 2013, the 1<sup>st</sup> Defendant, who is one of the beneficiaries of parcel of land known as Machakos/Mua Hills/327 caused a road of access to be opened between parcels number 321 and 327; that the opening of the said access road has caused him to suffer loss and that an order of injunction should issue. The 1<sup>st</sup> Defendant has argued that the road that was opened up has always been on the map.

10. From the documents annexed on the Plaintiff's Affidavit, it would appear that the issue of opening the road of access between parcels number 321 and 327 commenced in the year 2013. According to the letter dated 4<sup>th</sup> April, 2013, the Machakos District Surveyor informed the Plaintiff and the Kasivuku family that he will visit the two parcels of land on 12<sup>th</sup> April, 2013 for the purpose of opening up the impugned road. From the photographs annexed on the Plaintiff's Affidavit, the opening up of the road of access was undertaken, and in the process some trees were uprooted.

11. Although the Plaintiff has claimed that a road never existed between parcels number 321 and 327 as at the time he bought the land, he did not annex the Registered Index Map that existed as at the time he purchased the land. On the other hand, the 1<sup>st</sup> Defendant exhibited on his Affidavit the amendments that were made on the Registered Index Map between 1993 and 2016.

12. In the Registered Index Map that was exhibited by the 1<sup>st</sup> Defendant, the sub-division of parcel of land known as 127, Mua Hills Settlement Scheme was done on 28<sup>th</sup> June, 1993. The sub-division of parcel number 127 created parcel number 327.

13. It would appear that by the time parcel number 121 was being sub-divided in 1993, parcel number 321 was already in existence. From the Registered Index Map exhibited by the 1<sup>st</sup> Defendant, by 1993, there was a road of access cutting through parcel number 321. Indeed, the map shows the existence of a road of access between the two parcels of land.

14. It is not clear if the road that was in existence when the Plaintiff bought Parcel No. 321 is the same road that was in existence in the 1993. Considering that the Plaintiff has not filed an independent Surveyor's report to dispute that the road that was in existence on the map of 1993 is the same road that was opened up later, I find that the Plaintiff has not established a prima facie case with chances of success.

15. Indeed, it would appear on the face of the Plaintiff's Application that the Plaintiff wants this court to direct the 2<sup>nd</sup> Defendant "*to conduct a proper and comprehensive survey in the presence of an independent Surveyor appointed by the Plaintiff.*"

16. It is not the function of the court to assist parties in establishing or proving their claims. What the Plaintiff is obligated to do is to engage a licenced Surveyor with a view of establishing whether indeed the road that was opened up by the Defendants ever existed. It is only after such an independent report is done that the court can establish if indeed the Defendants participated in any illegal activity by opening up a road of access between the Plaintiff's land and parcel number 327.

17. Having failed to annex an independent Surveyor's report to show that the opening up of a road of access between the two parcels of land was illegal, I find and hold that the Plaintiff has not established a prima facie case with chances of success.

18. For those reasons, I dismiss the Plaintiff's Application dated 25<sup>th</sup> September, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**



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