



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC NO. 421 OF 2017

HARRISON CHEGE KARIUKI.....PLAINTIFF

VERSUS

JEREMIAH KANYANJUA NJUGUNA.....1ST DEFENDANT

FRANCIS MUTHOTHO.....2ND DEFENDANT

PAUL NYOIKE NJUGUNA.....3RD DEFENDANT

CECILIA WANJIKU NJUGUNA.....4TH DEFENDANT

HANNAH WANGARI NJUGUNA.....5TH DEFENDANT

JUDGMENT

A. THE PLAINTIFF'S CLAIM

1. By a plaint dated 15th May, 2017 the Plaintiff sought the following reliefs against the Defendants:

(a) A permanent injunction restraining the Defendant jointly and severally from destroying the Plaintiff's property situated at **Title Numbers Nyandarua/Ol Aragwi/6283 and Title Number Nyandarua/Ol Aragwi/6282** and trespassing into Title Number **Nyandarua/Ol Aragwi/6283 and Title Number Nyandarua/Ol Aragwi/6282**.

(b) General damages for trespass.

(c) Damages to be quantified at the hearing.

(d) Costs of the suit.

(e) Any other or further orders that this honourable court may deem fit to grant.

2. The Plaintiff pleaded that he was the registered proprietor of Title Nos. **Nyandarua/Ol Aragwi/6282 (parcel 6282)** and **Nyandarua/Ol Aragwi/6283 (Parcel 6283)** having acquired them for valuable consideration from the 3rd and 4th

Defendants. It was further pleaded that the 1st, 2nd and 5th Defendants had sometime in 2015 trespassed into parcel 4283 and maliciously destroyed the Plaintiff's concrete pillars and gate on the false pretext that the gate had blocked an access road passing through parcel 4283.

B. THE DEFENDANTS' DEFENCE

3. The Defendants filed a joint statement of defence dated 6th June, 2017 denying the Plaintiff's claim in its entirety. The Defendants made a general denial of the Plaintiff's claim and pleaded that the suit was incompetent, ambiguous and did not contain sufficient material particulars of the claim. They consequently prayed for dismissal of the Plaintiff's suit with costs. It is notable that the Defendants did not plead that there was an access road traversing **parcel 6283** in their defence.

C. THE DEFENDANTS' PRELIMINARY OBJECTION

4. The material on record shows that the Defendants also filed a notice of preliminary objection dated 6th June, 2017 on grounds, *inter alia*, that the suit was incompetent and that there were pending proceedings before the Magistrates' Court being **Engineer SRMCC No. 21 of 2017** as consolidated with **No. 22 of 2017** between the same parties and involving the same subject matter. The record further shows that by consent of the parties recorded on 10th October, 2017, it was ordered that the proceedings before the Magistrates' Court shall be stayed pending the hearing and determination of the instant suit.

D. SUMMARY OF THE PLAINTIFF'S EVIDENCE AT THE TRIAL

5. At the hearing of the suit, the Plaintiff testified on his own behalf as the only witness. He adopted his witness statement dated 15th May, 2017 as his evidence in chief. He also produced the documents listed in his list of documents dated 15th May, 2017 as exhibits P1 – P5 in support of his case. The gist of his evidence was that he purchased the suit properties in 2013 from the 3rd and 4th Defendants for consideration and he was the current registered proprietor thereof. He testified that there was no access road traversing parcel 6283 and that none existed even in the official Registry Index Map (RIM) kept in the Survey Department. It was further his evidence that he was not involved in the subdivision of the original **parcel No 1618** to create the suit properties, since that was done by the 3rd and 4th Defendants.

6. It was the Plaintiff's case that the 1st and 5th Defendants had destroyed the gate and fence he had erected on **parcel 6283** without lawful justification or excuse hence the reason why he sought the remedies set out in the plaint together with costs.

E. SUMMARY OF THE DEFENDANTS' EVIDENCE

7. The 4th Defendant, on the other hand, testified at the trial on her own behalf and on behalf of her Co-defendants. She adopted her witness statement dated 6th September, 2018 as her evidence in chief. She also produced the documents in her list of documents dated 6th September, 2018 as exhibits D1 – D4. She conceded having sold the suit properties to the Plaintiff but denied having destroyed the fence and gate for **parcel 6283** as claimed by the Plaintiff. She, however, maintained that there was an access road traversing **parcel 6283** which connected Nyandarua County to a main road on the Rift Valley side but which her surveyor had omitted from the mutation during sub-division of the original **parcel No. 1618**.

8. During cross examination, DW1 conceded that the Plaintiff was not involved in the sub-division of **parcel 1618** and that she was the one who signed the mutation form. She also conceded that the issue of an access road traversing **parcel 6283** was not captured in the relevant sale agreement made with the Plaintiff. She further stated that she did not know if the access road was reflected in the survey records of the Government.

F. DIRECTIONS ON SUBMISSIONS

9. Upon conclusion of the trial the Plaintiff was granted 30 days to file his written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiff's period to file theirs. The record shows that the Plaintiff's submissions were filed on 9th December, 2021 whereas the Defendants' submissions were filed on 10th February, 2022.

G. THE ISSUES FOR DETERMINATION

10. The court has noted that the parties did not file an agreed statement of issues but they chose to file separate issues. **Under Order 15 Rule 2** of the **Civil Procedure Rules**, the court is enjoined to frame issues from any of the following:

- (a) the pleadings of the parties.
- (b) the documents produced by the parties
- (c) statements made on oath by or on behalf of the parties.

11. The court has considered the pleadings, documents and evidence on record and is of the opinion that the following issues arise for determination in this suit:

- (a) Whether there is an access road traversing the Plaintiff's parcel 6283 and, if so, whether the Plaintiff had illegally blocked the same.**
- (b) Whether the Defendants had trespassed upon parcel 6283 and destroyed the Plaintiff's fence and gate.**
- (c) Whether the Plaintiff is entitled to the reliefs sought in the plaint.**
- (d) Who shall bear costs of the suit.**

H. ANALYSIS AND DETERMINATION

(a) Whether there is an access road traversing the Plaintiff's parcel 6283 and, if so, whether the Plaintiff had illegally blocked the same

12. The court has considered the evidence and submissions on record on this issue. The evidence on record shows that the Plaintiff was simply relying on official Government records and mutation for sub-division of the original **parcel 1618** to assert that no such access road traverses **parcel 6283**. It is evident from the copy of the Registry Index Map tendered in evidence that such a road does not exist. The mutation for **parcel 1618** prepared by the Defendants' surveyor shows that upon sub-division thereof the access road which was created to serve the subdivisions terminated at **parcel 6282** and did not cross through **parcel 6283**. It is thus clear that all the sub- divisions are served by an access road and none of them were left without an access road.

13. The 4th Defendant testified at the trial that she was the one who facilitated the subdivision of **parcel 1618** and that the Plaintiff was not involved in the process. It was her evidence that she had orally informed her surveyor to include the access road traversing **parcel 6283** but that he had failed to properly execute her instructions hence the reason it was not reflected in the official survey records. She further stated during cross examination that she had never asked the Director of Surveys or other concerned authorities to rectify the alleged anomaly.

14. The court has noted that vide a court order made on 10th October, 2017, the court directed the County Land Surveyor-Nyandarua County to visit **Parcel No 6282 and 6283** to ascertain the boundaries and any roads thereon and file a report in court upon doing so. The record shows that the surveyor visited the site on 15th May, 2018 and filed a report dated 18th May, 2018. The surveyor reported that the 2 parcels were fenced with a barbed wire and that its boundaries were found to be correct according to official survey records.

15. The Defendants also filed a separate report dated 19th June, 2018 by a private surveyor from Arch works and Surveys. The report confirms that the boundaries of the Plaintiff's 2 parcels conformed with the mutation forms. However, the surveyor reported that the 2 parcels had an extra acreage of 0.2 acres which was not contained in the relevant sale agreement. The private surveyor then attached what appears to be a doctored copy of the mutation dated 24th January, 2013 by Obadiah Wainana. This is so because

the attached copy purports to show that the access road actually traverses through parcel 6283.

16. The court is satisfied from the material on record that there is no road traversing parcel 6283. Neither the Defendant's mutation form nor the official Registry Index Map reflects the existence of the access road. In fact, the mutation form shows that the access road terminates at the end of parcel 6182 and does not cross into **parcel 6283**. There is no evidence on record to demonstrate that the Defendants have taken any legal steps to extend the access road under the **Public Roads and Roads of Access Act (Cap 399)**. In view of this finding, it is not necessary to consider whether or not the Plaintiff illegally blocked a non-existent access road.

(b) Whether the Defendants had trespassed upon parcel 6283 and destroyed the Plaintiff's fence and gate

17. The court has fully considered the material and evidence on record on this issue. There is no doubt that the Plaintiff is the registered proprietor of Parcel 6283. There is really no contest on that issue. The Plaintiff's evidence at the trial was that whilst away from the suit property he was notified by one of his workers, Patrick Githu, that the 2nd and 5th Defendants had destroyed the pillars and gate on **Parcel 6283**. He then instructed the worker to report the matter to the nearest police Station. The court, however, notes that the said worker was not called at the trial as a witness. The photographic evidence simply demonstrates that the Plaintiff's gate was brought down but it does not show who was responsible for the destruction. Similarly, the police Occurrence Book record simply shows that a report was made on destruction of the Plaintiff's gate but it does not demonstrate that the Defendant did it. The court is thus not satisfied that the Plaintiff has demonstrated that the 1st and 5th Defendants were responsible for the destruction of the his property.

c) Whether the Plaintiff is entitled to the reliefs sought in the plaint

18. The court has noted from the plaint that the Plaintiff sought a permanent injunction restraining the Defendants from violating his property rights with respect to both **parcel No. 6282 and No. 6283**. The evidence on record, however, shows that the Defendants are only interested with the alleged access road passing through Parcel 6283. They do not seem to have an issue with the Plaintiff's ownership of **parcel 6282**. Since the court has found and held that the Defendants have failed to demonstrate the existence of an access road through **parcel 6283** the court is inclined to grant a permanent injunction to restrain the Defendants from destroying or interfering with the Plaintiff's property thereon.

19. Although the Plaintiff prayed for damages for trespass and destruction of property the court has already found that the Plaintiff has failed to demonstrate that the trespass and destruction of property was perpetrated by the Defendants or any of them. Moreover, special damages for destruction of the pillars and the gate were not properly particularized as required by law. Consequently, the court is not inclined to grant any damages (*whether general or special*) to the Plaintiff.

(d) Who shall bear costs of the suit

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. It is evident that the Plaintiff has partly succeeded and partly failed in his prayers. The court is thus of the opinion that the appropriate order to make on costs is that each of the parties shall bear their own costs.

I. CONCLUSION AND DISPOSAL

21. The upshot of the foregoing is that the court finds that the Plaintiff has partly succeeded and partly failed in his claim. Accordingly, the court makes the following orders for disposal of the suit:

(a) An order of permanent injunction be and is hereby granted restraining the Defendants jointly and severally from destroying the Plaintiff's property on, or interfering with his proprietary rights over Title No. Nyandarua/OI Aragwi/6283.

(b) The Plaintiff's claim for general damages for trespass and special damages is hereby declined.

(c) Each party shall bear his own costs of the suit.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 3RD DAY OF MARCH, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Chege for the Plaintiff

No appearance for the Defendants

CA- Carol

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Y. M. ANGIMA

JUDGE



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