



**Zumzum Investment Limited v Kenya Rural Roads Authority (Environment & Land Case 84 of 2020) [2023] KEELC 16515 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16515 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 84 OF 2020**

**NA MATHEKA, J**

**MARCH 21, 2023**

**BETWEEN**

**ZUMZUM INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**KENYA RURAL ROADS AUTHORITY ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff avers that at all material times relevant to this suit, the plaintiff has been the registered absolute owner and/or proprietor of all that parcel of land known as {LR No MN/II/8408(Original No.1482/994) herein after referred to as the suit property. That on or about the 6<sup>th</sup> of July 2020, the defendant without any color of right whatsoever unlawfully, illegally trespassed onto the aforesaid plaintiff's property LR No MN/II/8408(Original No. 1482/994) and in total disregard to the plaintiff's right to own property enshrined in the Constitution of Kenya 2020, the defendant purported to construct an alleged public road on the plaintiff's parcel of land without the plaintiff's consent and or authority. The plaintiff states that the suit property is private land and there has been no compulsory acquisition of the suit property by the national land commission on behalf of the defendant for any such purpose neither has the plaintiff been compensation for any purported acquisition of the suit property rendering the defendant's action unlawful, irregular and interference with the plaintiff's right to property. The plaintiff further avers that the said actions of the defendants have denied the plaintiff peaceful and quite enjoyment of the suit property yet the defendants have no right known in law to construct any road on the suit property and or in any way interfere with the plaintiff's quite enjoyment of the suit property. The defendant's action is prima facie breach or violation of the plaintiff's right to property enshrined under article 40 of the Constitution of Kenya 2010.. Particulars of breach/violation of the plaintiff's right to property are that the defendant's actions in constructing a road or otherwise interfering with the suit property has deprived the plaintiff of its constitutional right to own property. The defendant's said actions has deprived the plaintiff of the use, possession and quite occupation of the suit property. There has been no compulsory acquisition by national land



commission on behalf of the defendant to warrant the interference with the suit property. The plaintiff has not received any compensation towards compulsory acquisition of the suit property by the national land commission on behalf of the defendant. The plaintiff has not consented to the construction of the road by the defendants on his private property neither was the plaintiff notified of such construction. The defendants have frustrated any development projects by the plaintiff by interfering with the terrain of the suit property thus occasioning loss and damage. The nature of the defendants interference, to wit, construction of a road, is likely to permanently affect the use, possession and occupation of the suit property thus occasioning permanent loss and damage. The plaintiff prays for judgment against the defendants for;

1. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as LR NoMN/II/8408,
  2. A declaration that the plaintiff is the lawfully registered owner of all that parcel of land known as LR NoMN/11/8408,
  3. A declaration that the actions of the defendant either by themselves or their agents amount to trespass.
  4. A permanent injunction restraining the defendant whether by themselves or their agents from trespassing and or constructing any road on the suit property or otherwise interfering with the plaintiff's property LR No MN/II/8408(Original No.1482/994).
  5. General damages for trespass.
  6. Costs of the suit together with interest thereon at such rate and for such period of time this Honourable Court may deem fit.
  7. Any other such relief as this Honourable Court may deem appropriate.
2. The defendant denies that it unlawfully, illegally trespassed onto the plaintiff's property LR No MN/II/8408(Original No 1482/994) and in total disregard to the plaintiffs right to own property enshrined in the *Constitution of Kenya*. The defendant avers that the road works undertaken by the defendant in the discharge of its statutory mandate was done following a decision by the relevant stakeholders and in accordance with existing overriding interests of the rights of way subsisting on the suit parcel of land. The defendant denies that the suit property is private land. Further, the defendant avers that the procedure for Compulsory Acquisition of the suit property by the National Land Commission on behalf of the defendant is not applicable as the suit property is public land. The defendant denies undertaking any actions that are in breach or violation of the plaintiffs right to property enshrined under article 40 of the *Constitution of Kenya*.
3. This Court has considered the evidence and the submissions therein. It is the plaintiff's case that on July 6, 2020 the defendant illegally trespassed on Plot No. MN/II/8408 (Original No. 1482/994) purporting to construct a public road. The defendant repudiated being a trespasser and averred that the road works were undertaken on the access road which subsisted on the suit property.
4. Trespass to land is a common law tort that occurs when an individual or the object an individual is controlling negligently or intentionally enters onto another's property without the legal right or consent to do so. The plaintiff is required to demonstrate to Court on a balance of probability that he is the registered proprietor of the suit property, the defendant entered onto the suit property and without consent.



5. Section 3 (1) of the Trespass Act, cap 294 provides that;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Clerk & Lindsell on Torts 18<sup>th</sup> Edition at paragraph 18-01 defines trespass as follows;

Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

Should the trespass be proved the Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass;

- a) If the plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss
  - b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss
  - c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use
  - d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded
  - e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased”
6. In the instant case the plaintiff has demonstrated that it is the registered proprietor of Plot No. 8408/II/MN through the Certificate of Postal Search dated December 8, 2021 (PEX-7) and the Certificate of Title No. CR 33126 dated November 13, 1999 (PEX-8). The question therefore before this court is whether the defendant trespassed onto the suit property. The Deed Plan No. 226315 for Plot No. 8408/II/MN (PEX-8) dated August 12, 1999 does not show any access road passing through the suit property. Nonetheless, the defendant has produced a Survey Plan for the access roads for Kiembeni/Kishani- Mainland North Section II as prepared by T. Mulusa, the Regional Surveyor Mombasa in September 2018 (DEX-2). In the said plan it can be seen that there are two unsurveyed access roads cutting across the upper side of Plot No. MN/II/8408. Further the defendant has produced the topographical map of Mainland North from the Survey of Kenya 1978 (DEX-1), where the suit property is situated to demonstrate to Court that indeed there was provision of access roads and other forms of road works for the larger Mainland North before the plaintiff acquired title to the suit property. The Court is satisfied that there existed an access road before the adjudication of the suit property and issuance of the certificate of title dated 13<sup>th</sup> November 1999. The existence of such a road is an easement, as has been defined by section 2 of the Land Act as;

“a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit.”

7. On the issue of easements, section 32 of the Limitations of Actions Act chapter 22 of the Laws of Kenya as follows;



Means by which easements may be acquired

- (1) Where –
  - (a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or
  - (b) .....
  - (c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.
- (2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested”.

8. The above Section provides for the various measures through which easements may be acquired and submitted that an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceable, open and uninterrupted enjoyment of the same. Section 28 of the [Land Registration Act](#) No. 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, sections 28(c) and (h) of the same Act provides that;

“Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (j) any other rights provided under any written law.”

9. Sections 98-100 of the [Land Registration Act](#) provides for a framework for creation of easements through formal instruments and would like to point out that the easement pleaded by the plaintiff herein is not the type acquired through a formal registrable instrument. Similar provisions are contained in the [Land Act](#) at sections 136-141. In the Court of Appeal case of [Kamau v Kamau](#) [1984] eKLR the Court observed as follows;

“An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come. So, also in equity, do restrictive covenants because they are in the nature of negative easements.

A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A licence not coupled with an interest in land is revocable unless the contract for it contains a term express or implied that it shall not be



revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts, which are injurious to another and can be the subject of an action if their enjoyment is obstructed.

How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the licensor or licensee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties.

At equity, however, if there is an agreement (whether under seal or not) to grant an easement for valuable consideration equity considers it as granted as between the parties and persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. *Dalton v Angus* [1881], 6 App Cas 765, 782.”

10. From this definition and authorities cited above, the two access roads that pass through the suit property are easements. From the reading of section 25, 26 and 28 of the [Land Registration Act](#), an easement is an overriding interest over the title of a registered proprietor whether registered or not on the title of the suit property. The defendant was doing routine maintenance of Ugatuzi-Mulji access road which was from the evidence adduced by DW1, accessed by members of public. I find that the plaintiff has been aware of the existence of the access road, which as stated above is overriding his interests as a proprietor of the suit property.
11. The question that comes to mind is whether the plaintiff has demonstrated that the defendant trespassed onto his suit land while upgrading the said access road. It is well known that there are road reserves on both sides of a road where the defendant is legally allowed to get into and expand an existing road within the measurements provided in law. The plaintiff has not established to court that the defendant went outside the road reserve and into his suit property. The plaintiff has not provided the court with a comprehensive surveyor’s report that would paint a picture as to the extent the defendant has trespassed, if at all, into the suit property while upgrading the access road. It has not been demonstrated to court that the plaintiff has been unable to utilize or access the suit property. In my view, the plaintiff has not suffered any loss or damage from the action of the defendant of upgrading the access road that passes through the suit property. I am not satisfied that the plaintiff has proved its case on a balance of probabilities. I find the plaint dated July 17, 2020 is unmerited and the same is dismissed with costs to the defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF MARCH 2023.**

**N.A. MATHEKA**

**JUDGE**

