



REPUBLIC OF KENYA



**KENYA LAW**  
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**Baudry v Kiraya (Environment & Land Case 32 of 2019)  
[2023] KEELC 19884 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 19884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 32 OF 2019  
FM NJOROGE, J  
JUNE 20, 2023**

**BETWEEN**

**RICHARD GARTH BAUDRY ..... PLAINTIFF**

**AND**

**ALBERT KIRAYA ..... DEFENDANT**

**JUDGMENT**

**Plaint**

1. By the plaint dated 15/3/2019, the plaintiff seeks the following prayers:
  - a. A permanent injunction restraining the defendant either by himself or his agents, representatives and/or employees or otherwise howsoever from trespassing on, occupying, taking possession of, digging trenches on, laying pipes on, or in any other manner howsoever from interfering with the plaintiff's property Land Reference Number 4131/10 [IR 1002979] situate in N.E of Naivasha Municipality in Nakuru District.
  - b. General damages for trespass.
  - c. Special damages for the cost of restoring the property damaged by the defendant.
  - d. Interest on (b) and (c) above.
  - e. Costs of this suit.
2. The plaintiff's claim is that he is the registered proprietor of Land Reference Number 4131/10 [IR1002979]; that on 23/2/2019 the defendant approached the plaintiff and sought for permission to dig trenches and lay pipes to supply water from a community water supply to his piece of land adjacent to the suit property which he declined; that on 3/3/2019 the defendant informed the plaintiff that the part of the property where he intended to dig trenches and lay pipes was an access road and he



did not therefore need his permission to proceed with his plans; that on 5/3/2019 the defendant and his employees entered the suit property without the plaintiff's consent to undertake the digging of the trenches and laying of pipes; that he instructed Geomeasure Surveys Limited to prepare a report on whether there is a public or official road on that property and they submitted a report which indicated that the road that cuts across the property is not an official road; that the defendant and his agents have trespassed onto the suit property and that unless the defendant is stopped from digging the said trenches, he will proceed to lay the pipes for supply of water to his parcel of land.

### **Defence**

3. The defendant filed his further amended statement of defence and counterclaim on 17/12/2020. He denied the contents of the plaint and stated that on 5/3/2019, the occupants of LR 4131/9 removed and replaced leaking water pipes existing on the access road cutting across the plaintiff's property which took water to LR 4131/9; that the said road is an official road as shown by various maps; that the digging of the trenches did not constitute damage to the plaintiff's property since it was done along the access road; that he does not own the property adjacent to the suit property since it is registered in the name of Kilaya Ushora who is deceased and that he is non-suited as a defendant since he has been improperly sued as the registered owner of LR 4131/9. On a preliminary basis this court must state at this early juncture that owing to his conduct and unhindered claims and evidence in this suit the defendant will be taken as representing all the persons interested in the land known as LR No 4131/9 and his locus will not therefore be in issue.

### **Counterclaim**

4. In his counterclaim, he stated that sometime in the year 1980 his late father Kilaya Ushora acquired land parcel No. LR 4131/9; that the plaintiff is the owner of LR No. 4131/10; that at the time of creation of both parcels, there was an access road passing through Nanga Farm to Naivasha Prison road; that his late father found pipes laid through the access road for drawing water from a community tank to his property; that they have been using the access road to get to the other roads and the water sources; that they have used the said road for over thirty eight years; that later he tried to use the said access road and he found gates put at both ends ; that the plaintiff then denied them access to repair the pipes that are passing through the said access road and sought the following prayers:
  - a. A declaration that there exists an easement created on suit parcel of land known as LR No. 4131/10;
  - b. An order directing the District Land Registrar Naivasha to register the easement on LR No. 4131/10;
  - c. A permanent injunction restraining the defendant either by himself or his agents, representatives and/or employees or otherwise howsoever from interfering, blocking, closing, or dealing with the access route on parcel known as LR No. 4131/10 in such a manner so as to deny the plaintiff in the counterclaim, either by himself, or his agents or representatives use and/or access of the said access road;
  - d. Costs of the counterclaim.

### **Plaintiff's Evidence**

5. Eric Nduhiu testified as PW1 and adopted his witness statement dated 9/10/2019 as part of his evidence-in-chief. He stated that he is a private Licensed Land Surveyor at Geomeasure Surveyors Limited. He produced his report dated March 2019 and filed on 18/3/2019. He testified that he was



instructed to check whether the existing road passing through LR No. 4131/10 was an official road and he found that the said road was an un-surveyed road and not a public road. He concluded in his report that the acreage of the property as indicated on the Certificate of title for the property is computed using the corners of the property and no acreage has been subtracted for any road and further there is no mention of any easement through the parcel in the certificate of title for the property. He further stated that from his experience, a public road would have to be surveyed and have a separate land reference number and deed plan. With regard to the letter dated 3/04/2019 written by the Regional Surveyor, Rift Valley Region, PW1 stated that the Regional Surveyor used one Survey Plan, F/R No. 152/161, to reach the conclusion that there is an access road on the property which was prepared on 15/07/1980 and yet the property has since been re-surveyed and a deed plan dated 30/05/2005 prepared. He further stated that the road appears on F/R No. 152/161 as a dotted line which means it is an un-surveyed road and not a public road as alleged.

6. On cross-examination PW1 stated that when he went to the suit property he found a road with two gates at both ends of it; that he could not tell when the said gates were put up; that he did not find out when the road started existing on the suit property; that the survey plan was done in the year 1980 when it was marked as an unsurveyed road; that an unsurveyed road is marked by a dotted line; that a public road is marked by beacons and it is excluded from the title. He admitted that he did not establish an easement between the two parties since it has to be registered; that he could not confirm that usage and custom could create an easement; that when he visited the ground he found that the access road was leading to LR No. 4131/10 and turns to LR No. 4131/9; that if the road was to be closed at the point marked "Road" the owner of LR No. 4131/10 would be blocked off and so would the proprietor of LR No.4131/9; that as per his statement, FR 152/161 was used by the Regional Surveyor and it is marked as "road" on that survey plan; that the survey plan for LR No. 4131/10 is of the year 1985; that there were other survey plans which he did not have in court; that a road is a topographical feature which can be deleted upon a resurvey; that a surveyor could exclude a topographical feature for various reasons.
7. On re-examination, he stated that one reason for exclusion of a topographical feature is if upon the measurement of a parcel, upon a resurvey, whatever is between the beacons adds up to what is in the title, if the feature forms part of the acreage then it can be excluded. He also added that if it does not form part of the acreage, it can be beaconed and included if there is extra land beyond the acreage. When he was shown the survey plan he stated that the first gate is at MR2 and that between MR1 and MR2 there is no hindrance and that the people on plot 4131/9 are able to access their property.
8. Richard Garth Baudry, the plaintiff, testified as PW2. He adopted his witness statements dated 15/3/2019 and 29/8/2019 as part of his evidence-in-chief. He relied on his filed bundle of documents and testified that he acquired LR No. 4131/10 in March 1997 and occupied it immediately; that when he purchased the property it was a GLA lease for 99 years; he later applied for the title to be renewed under the RTA in 2004. He also testified that when he took possession of the suit property there was a beaten track used only for the people on the plot; that there was an iron gate with a padlock at the bottom gate; that the other gate appears at the beacon marked MR2; that the dirt track between MR2 and M5 was not used by members of the public; that the residents of plot No. 4131/9 have access to their premises. He further stated that no member of the public has insisted on passing through the suit property. He stated that on 23/02/2019, the defendant approached him seeking permission to lay pipes for water supply to his land which he declined but the defendant went ahead and laid the said pipes, alleging that he was doing so along the access road which he called a public road.
9. On cross-examination he confirmed that when he took possession of the suit property, there were two gates at the end of the access road; that immediately after taking possession, he locked the gates; that the first gate is at the point written 237 while the second gate is at MR2; that from plot No.4131/9 there



is no access towards the right, but only to the left; that when he leaves his land, he drives up to MR2 then follows the dirt track to MR1 then turns right at MR1; that the adjacent land belongs to Nanga Kihoto; that the road runs all the way to the tarmac; that there are other roads on the same farm that are not marked on the map; that the only road that has two gates, is his own; that there is no shopping center or school that is at the bottom gate; that at the bottom on the left of the FR 152/161 is the date received which is indicated as 15/7/1980; that the deed plan attached to the title is dated 30/5/2005; that it does not indicate an extension of a road or a dotted line within his property; that there are other roads that are not in use to date; that in the year 2019 the defendant approached him with a request to lay water pipes along the dirt track arguing it was a public road and insisted on laying the pipes despite his objection; that at the time of the request, there were no water pipes running through his property and neither were there any water pipes leading to the defendant's property; that there are now water pipes leading to the defendant's property which were put up despite of his objections; that he does not use the bottom gate as it goes through other people's property before it reaches the public road; that members of public have never used the said access road.

10. On re-examination he stated that a member of the public would have to go to the gate and request to pass through which has never been the case. He also stated that the pipes were put up in March 2019 and now seeks a permanent injunction so that he can live on the land peacefully.
11. Moses Mungai Gakiru testified as PW3 and adopted his witness statements dated 29/8/2019 and 26/1/2021 as part of his evidence-in-chief. He testified that he is a foreman in Ridge Farm; that he went to the suit property in the year 1997. It was also his evidence that on 11/11/2021 he was informed that there were three people at the bottom gate. It was his further evidence that he was approached by the defendant who asked him why he was adding more metal at the gate. He testified that the defendant, whom he identified in court, tried to slap him but he blocked him with his hand. He also testified that the defendant was in the company of two people who took the metal bars that were being used by the welder to try and beat him up but he fled to the main house; that he thereafter got an escort and reported the matter to the police; that when he went to see where the defendants were digging, he did not see any old water pipes. He also stated that the suit road has never been open to the public and those who try to use it are discouraged from doing so.
12. On cross-examination, he stated that he went to the farm as an employee and was permanently employed in the year 2002; that he knows the area well and that a road exists from Rich Farm towards Nanga Kihoto; that one gate blocks entry from the Nanga Kihoto side and the other gate blocks entry from the Gathengera side; that the road from the top gate ends at the tarmac road leading to North Kinangop and Naivasha while the road from the bottom gate leads to Naivasha or Mordan; that there is another farm known as Jenina Farm who use the dirt track road towards their farm; that the defendant has access to his land; that from the top gate one goes through the Nanga Kihoto Farm; that if the Nanga Kihoto farm blocked that route, he would not be able to access the Kinangop road; that if the access from the bottom gate was be closed, he would could not access Naivasha; that there were no schools or hospitals that can be accessed through either gates; that before the year 2019, there were no water pipes passing through the access road and that no member of public has ever used the said road. The plaintiff's case was marked as closed with the close of PW3's evidence.

### **Defendant's Evidence**

13. Charles Ouma testified as DW1. He stated that he is a Surveyor; in the year 2019, he was based at Regional Surveyor's office Nakuru; that at the defendant's instance through the letter dated 21/3/2019, he prepared a report on LR No. 4131/9 and LR No 4131/10 dated 3/4/2019 after visiting the two suit properties; that he requested for the base maps/survey maps F/R 152/161 and prepared



a report of observation dated 25/3/2019; that his findings were that there is a road of approximately 5 meters width on the ground which runs up to LR No. 4131/10; that the road is gated at a particular point but as per their survey plans the road was supposed to go beyond that parcel to serve LR No. 4131/9; that the proprietor of LR 4131/10 uses the said road to access his land; that at the end of the road on the survey plan it is marked with dotted lines meaning that it exists on the ground, only that it has not been surveyed; that LR Nos. 4131/9 and 4131/10 are a result of one subdivision and the road in question was used by both parcels as their access road; when he was referred to FR/152/61 he stated as follows: that the road comes from North East and gets into parcel No. 4131/9 then passes through LR 4131/10 then exits LR 4131/10 at a point marked 237 on the map and then goes all the way to the Nairobi Nakuru Highway; that from the point marked MR1 it runs and joins another main highway in the North East; that if it were closed at point marked "Road" in the North East both owners of LR 4131/9 and 4131/10 cannot access their lands; that the road has two gates; that from the survey plan there is a gate at each of the 2 points marked MR2; that he drove all the way to MR2 and there was a gate; that therefore they went round and joined Nairobi – Nakuru highway and accessed the same road from the other side and all through there were no other gates; that the road is motorable; that the road is all in use; that people are settled on the land along the road from the point marked M5 (near 237 °) all the way to the Nairobi Nakuru Highway; that on the other side near MR2 near 54 ° are large farms. He produced his report dated 3/04/2019 as DExh.1 and the survey plans FR 152/161 and 571/4 (also referred to as FR 70/62) as D. Exh. 2 and 3 respectively.

14. On cross-examination he stated that in the survey plan they have two categories of roads, surveyed Roads and un-surveyed Roads; that surveyed roads are marked by a continuous line and un-surveyed roads by a continuous dotted line; that from his training unsurveyed roads can also be public roads; that all public roads have to be surveyed, beacons and have their own Land Reference number; that there is no gate at MR1 and the owner of LR 4131/9 can access his land at the spot marked MR1. On re-examination, he reiterated that unsurveyed roads can be public roads.
15. Albert Kiraya, the defendant testified as DW2 and adopted his witness statement dated 17/10/2019 as part of his evidence-in-chief. It was his evidence that he did not assault anyone and neither has he been called to record a statement with regard to any said assault; that he knows the plaintiff and that he bought the suit property in the year 1997; that the owners of LR No 4131/9 preceded the plaintiff in settling in the area; that his mother occupies LR No. 4131/9 while he lives several kilometres away; that LR No. 4131/6/1 belonged to Mr. Marwin Swire who died in the year 1981; that after his death, LR No. 4131/6/1 was split into LR 4131/9 which belongs to his father and 4131/10 owned by the plaintiff; that LR 4131/10 was first given by way of gift by Mr. Swire to Richard Nightingale, his grandson who gave it to an Italian who later sold it to the plaintiff; that Mr. Swire gave parcel LR No. 4131/9 to the defendant's father and it is still in his father's name to date; that they used to use the subject road in this case; that in the year 1987, his mother had a water problem and so their family entered into an agreement with the people who then owned LR NO 4131/10, as they used to get water from natural springs within KWS precincts; that both LR No 4131/9 and LR No 4131/10 were getting water from the spring through pipes laid long before the parties herein settled in their respective portions: that Mr. Swire used the water and the pipes ran along Nanga Kihoto farm and Karate Farm then came to the suit land; that his younger brother Joseph Kiraya was tasked to see the pipes are not interfered with; that his brother repaired the pipes and they now get water from another supplier and not the spring; that before subdivision, the road they used ran from the north to the south of LR No. 4131/6/1; it passed through their land and ran south of LR 4131/10 through the south of Naivasha Town; that in the North it went up to the Naivasha-Kinangop road near the NYS; that in 1978 a meeting that included Mr. Swire, his sister Catherine, Mr. & Mrs. Nightingale, himself and his father took place and Mr. Nightingale gave the land measuring 2.001 Ha to his father by reason of his being an



employee; that they used to use the road to go to school in Naivasha since the year 1969; that after the plaintiff acquired the land in 1997 they continued using the road and water; that Mr. Swire used to go to Naivasha using the south road before and the North road to see Nightingale; that when the Plaintiff acquired his property, he was given instructions on road and water use and he seemed to understand until 2019 when he permanently closed that road; that he locked the gates and took control of the keys which meant that the visitors could not access them and neither could they access water; that he resides away from but farms on LR 4131/9; that the gates were put up for security reasons; that they are now not able to access Naivasha town from the south unless they go to North first and trespass on other's land; that the said road is longer; that if Nanga Kihoto closed the road, he and the plaintiff would not be able to access their farms; that there is no other blockage of the road except for the two gates; that he has never trespassed on LR No. 4131/10; that he was not present when the trenches were being dug; that the manager took photographs of his brother and his nephew who were digging the trenches; that Mr. Charles Nightingale is a brother to Richard Nightingale who was a grandson to Mr. Swire who was given the land by Mr. Swire; that he swore an affidavit dated 31/7/2019 which was marked DMFI-4; he produced various photographs as DExh.5(a)-(e); photograph 1 shows their farm with his father's land LR 4131/9 on the left and the plaintiff's land on the right; that it shows the gate at MR2 near the 54 on the map; that photo No. 2 shows the gate at MR2 which is taken from a shorter distance from the gate; that photo No. 3 shows the road is in use and on the left is the fence by the plaintiff; that the picture was taken at point marked MR 1 facing the gate at MR2 near 54; that photo No. 4 was taken from the point marked MR2 while facing point marked as 237; that it shows the fence along which the pipes run; that the road had fences on both sides which were removed before this case was filed; that photo No. 5 shows the tank built by his father before he died which collects water from the spring; that the water tank is inside LR 4131/9; that photograph No. 6 was taken from inside LR 4131/10, showing the vegetation; that the water lines are community property and that they cannot be denied use of the road and the water; that he should not have been joined as a defendant and he seeks that the two gates be removed to promote free movement and the plaintiff's should case be dismissed with costs.

16. On cross-examination by Mr Ondieki, he admitted that LR No. 4131/9 does not belong to him. He also admitted that he has lived on the suit property since the year 1956; that presently he only farms the land but does not live on it; that he filed a counterclaim because he farms on the land even though he does not have any evidence of farming on the land; that he uses the road that passes through the plaintiff's property and that he goes to the land everyday now that his mother is unwell; that the suit road is a public road as shown by survey map FR 152/61; that the said road is evidenced by a single dotted line. He confirmed that the plaintiff took possession of the suit property in the year 1997 and that the gates were there but they were closed in the year 2019. He further confirmed that they demanded that the plaintiffs open the gates, but he did not have the evidence of such demands. He also confirmed that from the year 1997 there were instances when the gates were closed but they used to find some means of entry through them in order to use the suit road; that he was not present when the pipes were being put up; that he is seeking for a declaration that the suit road be declared a public road; that on the ground the plaintiff has been moving the fences. He also confirmed that he is the administrator of LR No. 4131/9 even though he has no such evidence in court.
17. On re-examination he stated that he is farming the land as part of the family; that he engaged the services of a surveyor who gave evidence in this matter and that there is no land that can be surveyed without a road; that the picture produced as PExh.5(c) was taken from inside the plaintiff's land; that it showed the road they were using and the fence that had been moved. He further stated that the people who dug the trenches were not sued.
18. Joseph Javan Kiraya testified as DW3. He adopted his witness statement dated 8/11/2019 as part of his evidence. It was his evidence that the plaintiff is his neighbor while the defendant is his brother; that



he lives on his father's land which is LR 4131/9; that he was born in the year 1969 and has lived on the suit property since; that he always used the suit road; that the road was closed in the year 2019; that the plaintiff found his family using water from the springs delivered through pipes passing through LR 4131/10; that he was present when the water pipes were being repaired; that it was the plaintiff who disconnected the water but DW3 and his cousin repaired the pipes; that the defendant was not present; that soon after they begun to repair the water pipes, the plaintiff came to court; that it took them one month to repair the water pipes; that the upper side of the road passed through Nanga Kihoto Farm to join Naivasha –Kinangop road; that on the lower side it passes through another neighbors parcels of land, enters Jenina farm, through Muthengera, then Flower Business Park through Naivasha Prison land to join the Nairobi-Nakuru Highway; that they had been maintaining the road until the plaintiff closed the portion of the suit road in his farm; that there is another road from Muthengera junction to Karati Centre which is serviced by the County; that they service the road on the upper side that passes through the Nanga Kihoto farm; that if the Nanga Kihoto farm closes the road, then the plaintiff and DW3's family would not be able to access their parcels of land; that the defendant farms on the LR 4131/9 and he goes there regularly. In his statement he stated that they only repaired the pipes that were along the access road which is a public road and they did not therefore trespass on the plaintiff's parcel of land.

19. On cross-examination by Mr Ondieki, he confirmed that at point MR1 on the road is not closed; that no one stops them from using the road passing through the Nanga Kihoto farm; that there are documents that show the cost sharing of the repair of pipes between them and the plaintiff; that he did not know whether the defendant sought the authority of the plaintiff to dig the said trench; that before the year 2019, the plaintiff used to close the gate at 6.00 pm and open it again at 6.00 am; that they never used to jump over the gate because there was a gap near the gate that was always open and which they could use.
20. On re-examination he stated that the gate was permanently closed in the year 2019 and before that they used to access the road. He stated that they accessed the pipes through the gap because the gates were closed.
21. David Muriuki Zakayo testified as DW4 and adopted his witness statement dated 13/11/2020 and filed on 18/11/2020 and the one dated 7/5/2021 and filed on 11/5/2021 as part of the evidence-in-chief. It was his evidence that in the year 2019, he found the road that he used closed. In his statement he stated that he is a manager at Jenani farm which is adjacent to LR No's 4131/9 and 4131/10; that he has been the manager of the said farm since the year 1999 to date; that there exists a road that passes through their farm, to the plaintiff's farm (Ridge Farm Kenya) through the late Kiraya Ushora's farm, Gatamaiyu Farm and the Nanga Kihoto Farm; that the said road has been used since time immemorial; that since the gates were closed they have had to ask for permission to pass there; that the gates were closed when the defendant's representatives went to fix the water pipes that were running along the road; that the public used to use the road to access other public utilities.
22. On cross-examination, he stated that he began to work on Jenani Farm in 1999 and there were gates on the road then; that he used to use the road when going towards Nanga Kihoto and that he did not have to seek any permission to use the said road; that the padlocks were placed on the gates in the year 2019; that that he was not present when the water pipes were being repaired; that Gathengera Polytechnic cannot be accessed unless one uses the longer route.
23. On re-examination, he maintained that he used to use the road before and that by the time he wrote his witness statement, the road had already been closed. He also stated that he was not the only one using the road. He further stated that people accessing Gathengera Polytechnic have to use another route which is longer than the suit road.



24. The parties sought a site visit which was done on 10/11/2022. The court observed as follows: that the site inspection begun at the edge of the road not under dispute which begins from the Nanga Kihoto side of the area, running parallel to the boundary from MR1 to MR2 on the map; that beacon MR1 was prominent on the ground; that the road runs for some tens of meters up to a gate fixed at MR2; that the gate did not look recently erected; that there were some apertures beside the gate from the defendant's land which, according to the plaintiff's counsel the defendants and family used to access the road within the plaintiff's land when the gate was locked; that the defendant drew the court's attention to a piece of an old rusty pipe jutting out of the ground from the plaintiff's side into the defendant's land and stated that it was in its earlier, better condition used to deliver water to his homestead; that the pipe was about 30 meters away from MR2 but it was evident that it was laid from the direction of the plaintiff's land, and its orientation showed that its other remains may be running across the plaintiff's land, without any indications as to any turns that it may have made during installation; that there was no gate at MR1; that from MR1 to MR2, there was a fence separating the defendant's land from the road all the way to just before MR2 where the gate into the defendant's homestead begins; that from MR2, there is a beaten track, evidently motorable, which the court used all the way to the point marked 237 on the map; that there was a second gate at the point marked 237 on the map; that the second gate did not look recent; that there was no well-constructed road beyond point marked 237 and the existing track, quite rough in nature, ran in between bushes to the farmlands beyond; that from MR2 all the way to just before the point marked 237; there are young grevillea trees, about three years old around the point marked 237 on the inner side of the plaintiff's land; that from point MR2 all the way to point 237 there are no trees, hedge or other fence on the left side, and the land is full of fodder grass of a certain species on the left side; that the road of access from MR1 to 237 seems not extensively utilized in the recent times.

### Submissions

25. The plaintiff filed his submissions dated 23/01/2023 on 27/02/2023 while the defendant filed his submissions dated 24/02/2023 on 27/02/2023.
26. Submitted for the plaintiff: the issues arising for determination are: (1) whether the defendant is guilty of trespass; (2) whether the defendant has acquired an easement over Land Reference Number 4131/10; (3) which party is entitled to costs.
27. On issue (1), the plaintiff relying on Section 3(1) of the *Trespass Act* and the case of *Rhoda S. Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR submitted that the defendant entered LR No. 4131/10 without his consent and laid pipes after digging trenches; relying on Section 2 and 8 (1) of the *Public Roads and Roads of Access Act*, that a road of access can only become a public road upon being published in the gazette; that the defendant has not demonstrated that the said road of access is public land and that the defendant had trespassed onto his property in order to lay the pipes. On issue (2), relying on Section 32 of the *Limitation of Actions Act*, the case of *Esther Wanjiku Mwangi & 3 Others v Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege-deceased)* [2019] eKLR it was submitted that LR No. 4131/9 is not landlocked; that the occupants can access the Naivasha-Kinangop road without having to access the dirt road on LR No. 4131/10; that the defendant used the suit road with the permission of the previous owners and when the plaintiff acquired the land he locked the gates to stop the defendant's trespass and there is therefore no legal basis for the latter's counterclaim.
28. Submitted for the defendant: the issues arising for determination are: (1) whether there exists an access road through the plaintiff's land; (2) whether the defendant is entitled to an easement over the plaintiff's land; (3) whether the Defendant trespassed into the plaintiff's land on 5/03/2019. On issue



(1): that it is not disputed that there is a road that enters the plaintiff's land through the point marked MR2 and exits at the point marked 237; that from the map, it is clear that the said access road exists and that it has been blocked by the plaintiff. On issue (2), relying on Section 32(b) of the *Limitation of Actions Act*, Section 7(d) of the *Land Act*, Section 28(h) of the *Land Registration Act*, that the conditions that he has to satisfy for an easement to arise are that there must be dominant and servient tenements; that the easement must accommodate the dominant land, that there must be diversity of ownership or at least occupation and that the right must be capable of forming the subject matter of the grant; that from the evidence on record, it is clear that access through the road was restricted in the year 2019 and since they had been using the road since 1997, a period of over twenty-two years had passed; relying on *Fairview Estate Limited vs Ann Wangari Kirima & 2 Others* [2016] eKLR, *Kamau V Kamau* [1984] eKLR, that he has satisfied all the ingredients for an easement to be created. On issue (3): relying on Section 3(1) of the *Trespass Act*, that it is clear from the evidence that the trenches were dug along the access road to facilitate repair of water pipes; relying on *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR among other cases it was submitted that the plaintiff had failed to discharge his onus of proof to establish the tort of trespass and his suit should therefore be dismissed with costs and the counterclaim allowed.

### **Analysis and Determination**

29. It is not disputed that LR No. 4131/10 belongs to the plaintiff while LR No. 4131/9 belonged to the defendant's father. There is thus diversity of ownership, a crucial ingredient for declaration of an easement. It is also not disputed that there is an access road that passes through LR No. 4131/10 with a gate fixed at MR2 and a second gate fixed at the point marked 237. It is further not disputed that sometime in the year 2019, the defendant's brother and cousin entered the access road and purportedly repaired pipes for supplying water to LR No. 4131/9.
30. The issues that therefore arise for determination in this matter are in this court's view as follows:
- a. Whether the access road passing through LR No. 4131/10 is a public road;
  - b. Whether the defendant trespassed onto LR No. 4131/10 when they repaired the water pipes;
  - c. Whether a declaration should be issued that there exists an easement created on LR No. 4131/10 in favour of the defendant;
  - d. Who should bear costs of the suit.

### **Whether the access road passing through LR No. 4131/10 is a public road.**

31. The plaintiff's case is that the suit road is indicated on the map by dotted lines which means it is an unsurveyed road and therefore not a public road. The defendant's case on the other hand is that the road has existed since time immemorial and they have used it until 2019 when it was closed. DW1 seemed to agree with the findings of PW1 to the extent that he stated that from the map, the suit road is marked with dotted lines which shows that the road exists and is unsurveyed. On cross-examination he stated that unsurveyed roads can be public roads and then stated that all public roads must be surveyed, beacons and have their own LR number.
32. Section 2 of the *Public Roads and Roads of Access Act* defines a public road as follows:

- “(a) any road which the public had a right to use immediately before the commencement of this Act;



- (b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;
- (c) all roads and thoroughfares hereafter reserved for public use.”

33. Section 8(1) and (2) of the *Public Roads and Roads of Access Act* provides as follows:

- (1) Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.
- (2) In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described.

34. Section 9(1) of the *Public Roads and Roads of Access Act* provides as follows:

“Where an owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act:

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.”

35. The Court of Appeal in the case of *Dellian Langata Limited vs. Symon Thuo Mubia & 4 others*, Nairobi CA No. 144 of 2014 [2018] eKLR made a distinction between a road of access and a public road as follows:

“Having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.”

36. DW1 in his report dated 3/04/2019 which was produced as D. Exh 1 confirmed only the existence of a road of access on LR No. 4131/10. As was held by the court in *Dellian Langata Limited vs. Symon Thuo Mubia & 4 others*, Nairobi CA No. 144 of 2014 (supra), there is a clear distinction between a road of access and a public road.



37. This court has confirmed that the subject road is marked by a single dotted line in contrast to others marked by two dotted lines, for instance, the road passing through LR 8752, LR 8752, LR 394, LR 8761 on the survey plan FR 70/62. PW1 testified that a public road has to be marked by beacons and is excluded from the map which is not the case in the present matter. I have noted the presence of beacons roads marked with continuous lines on FR 70/62. At the end of these roads, the dotted lines that continue to the lands beyond have been marked with some words on the survey plan evincing an intention to formally carve out a road in future, for instance, “road reserve”, acreage ... Acres less road reserve ...Acres” and so on. Others, such as LR No 4131/R, have a brace sign joining the land on either side of the dotted lines to show that the land belonged to one land reference number and that there was a formal recognition of the road and possibly an intention to carve out a public road in future. None of these things applies to the road in question in this case. I have analyzed the foregoing facts with the evidence of DW1 on cross-examination in mind to the effect that all public roads have to be surveyed, beacons and issued with a land reference number. That would necessarily mean that the road acreage would not be presumed to be part of the acreage of the parcel that it passes through since it would have been deducted therefrom. In respect of the indication as to acreage reserved for roads this court notes that the computations of the surveyor who testified as PW1 indicated that the total acreage of the plaintiff’s land was as per the title document and there was no reserve area meant for a road. Besides, a careful scrutiny of FR70/62 and FR 152/161 shows that the path taken by the road in each document differs. In the first map it is seen that the road does not directly join the land that formerly constituted LR Nos. 4131/9 and 4131/10, but first cuts through the land known as LR 4131/3/R, slashing off a triangular shape from that parcel as it crosses it and runs into parcel No. 4131/6, the mother parcel to the plaintiff’s and the defendant’s land parcels. In FR 152/161, the road is shown to run directly into LR number 4131/6/2. An examination of FR 152/161 shows that the boundary between LR NO 4131/6/2 (plaintiff’s parcel) and 4131/6/1 (defendant’s parcel) is actually the straight line on the right side running from the point marked MR1 to the point marked MR2. This means that the stretch of road of access between those two points squarely lies within LR No 4131/6/2. It is not even shared between the plaintiffs and the defendant’s parcels. It is noteworthy that the defendant has not placed a gate beside the point marked MR1 to access his land without utilizing the plaintiff’s land. The evidence of PW2 is that he found the two gates to the road when he was taking over the property in 1997. In this court’s view, the only reason that led to the allowing of the defendant to utilize the road between points MR1 and MR2 is the former employer/employee relationship between his father and Marwin Swire which so became them thus rendering the defendant’s father a beneficiary to title to apart of his employer’s land. I would not assume that there was a deliberate meeting of minds that resolved that the defendant is entitled to use the road between MR1 and MR2, but since such use was harmless for the owners who preceded the plaintiff, that state of affairs was allowed, and for a very long time. However, the coming of the plaintiff in 1997 heralded a new relationship devoid of strings of employment and access to LR No 4131/9 being capable of being achieved at point MR1 without entering or treading upon to a great extent on the plaintiff’s land, it could not be assumed that the defendants were using the road between the two points as a matter of right until the plaintiff allowed them to do so for the lengthy period they have been using it, which entitles them now to that right. However, the same can not be said of the road stretch between the point MR2 and point 237; the court may not have been told when the plaintiff’s dwellings on LR NO 4131/10 were built but it is clearly evident that notwithstanding the sharing of the first stretch between the two land owners, the use of the second stretch was on a larger scale restricted to use by the plaintiff by virtue of the necessity to access his home. The greater indicator to this is that there were gates at each end of that stretch and a gate necessarily implies some restriction of entry and use of land to certain persons. If the defendant ever used that stretch of the road, it would not be for the specific access to facilities immediately situate outside the LR No 4131/10 after the point marked 237 but for general convenience while going to Naivasha for his purposes. Indeed, it was



confirming that there are no such specific man-made utilities or public facilities or amenities situated immediately after point 237 that would make this court think that the defendant was perfectly entitled to use that road stretch forever. However, I will distinguish those kinds of facilities from the natural springs that the piped water was drawn from by both owners of the two premises and state that the defendant was entitled to draw water through pipes running through the plaintiff's premises as he had done this without an element of hindrance since the times before the plaintiff acquired the land.

38. It is thus this court's view that from the totality of the evidence adduced in the present case, there is no evidence that the subject road is a public road; It is a mere access road.

**b. Whether the defendant trespassed onto LR No. 4131/10 when the water pipes were repaired.**

39. It is not disputed that sometime in 2019, the defendant's brother and cousin entered the suit access road, dug up trenches and repaired water pipes. The plaintiff alleges that this was done without his consent and so it amounted to trespass. The defendant on the other hand argued that the pipes were laid across LR No. 4131/10 and led to LR No. 4131/9 even before the parties settled on their respective parcels. It was not disputed that LR No. 4131/10 and LR No. 4131/9 are the resultant subdivisions of LR No. 4131/6/1 which only attained real and meaningful diversity of ownership upon the plaintiff's acquisition of LR 4131/10. I use the words real and meaningful deliberately due to the fact that there is evidence that before the plaintiff came onto the scene, the defendant and the earlier owners lived in amity and shared the use of the road and the water pipes running through the main parcel no LR 4131/6 and 4131/6/2 even before the coming into being of the parcels known as 4131/9 and 4131/10.

40. During the site visit, the court noted that there was an old rusty pipe jutting from the ground which the defendant stated that in its earlier, better condition, it used to supply water to the homestead on LR No 4131/9. The court further noted that it was evident that the pipe was laid from the direction of the plaintiff's land. Since both the plaintiff and the defendant's properties were as a result of the subdivision of LR No. 4131/6/1, there is a likelihood that there were pipes running through from the plaintiff's parcel of land to the defendant's.

41. Section 3 (1) of the *Trespass Act* (Cap 294) provides as follows:

“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.”

42. In the circumstances of this matter, it is my view that the defendant had reasonable excuse to enter the road of access to repair the water pipes since they had been in existence even before the subdivision of LR No. 4131/6/1 that led to the creation of LR No. 4131/9 and LR No. 4131/10. No act of trespass was therefore committed by the defendant or his agents.

**c. Whether a declaration should be issued that there exists an easement created on LR No. 4131/10.**

43. In his counterclaim the defendant is seeking a declaration that there was an easement that was created on LR No. 4131/10. The defendant argued that they have used the access road since time immemorial and that the plaintiff closed the said road without any color of right in the year 2019. The plaintiff on the other hand argues that there was no creation of such an easement as the defendants were using the suit road with the consent of the previous owners and that when he acquired the suit property in the year 1997 he closed the gates that allowed access to the access road.

44. First it must be noted that the defendant is not very consistent, for in his pleading he seeks an easement and in his evidence he asserts that the road is a public road. As I deal with the issue of whether the



defendant is entitled to an easement, I reiterate verbatim the analysis contained in the last half of paragraph 37 herein above for it is quite relevant for the conclusion on the present issue. However, I will in addition examine several provisions of statute and holdings in several cases which will enable this court arrive at a proper conclusion as to whether an easement ought to be declared in favour of the defendant or not.

45. Section 32(1)(c) and 32(2) of the *Limitation of Actions Act* provides as follows:
- (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.
46. The court in the case of *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - Deceased)* [2019] eKLR cited the case of *Re Ellenborough Park* (1956) Ch 131 which set out the 4 essential characteristics of an easement as follows: (a) there must be a dominant and servient tenement; (b) the right must benefit the dominant land; (c) there must be diversity of ownership or at least occupation; (d) The right must be capable of lying in grant.
47. As noted, before, LR No. 4131/10 and LR No. 4131/9 are the resultant subdivisions of LR No. 4131/6/1. The two parcels in this case are served by one road that emanates from the Nanga Kihoto Farm side. It is not disputed that the road of access runs past the defendant's gate and into LR No. 4131/10 and leads up to the plaintiff's dwelling which is near the point marked 237 where there is also a second gate. The court in *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - Deceased)* (supra) further stated as follows:
- “ 35. On the second limb relating to the benefit or dependence of the dominant tenement on the servient tenement, it is in evidence that there are alternative routes or access roads for the dominant tenement. This evidence was led by the Plaintiffs and the defence witnesses. I have perused both survey plans marked PEX2 a) and b) and indeed, there is a road below the original parcel LOC 8/Kaganda/77. None of the parcels is landlocked and therefore the need for benefit or dependency falls off. It would appear that the Plaintiffs are seeking an easement for purposes of convenience rather than benefit of a right of way.”
48. As had been indicated before, the plaintiff claims that the access road was closed to the public in the year 1997 while the defendant claims that the gates on the access road were closed in the year 2019. During the site visit, the court noted that the road of access did not seem extensively utilized in the recent times. From the totality of the evidence adduced in this matter, it is not clear whether the road of access was closed in the year 1997 as alleged by the plaintiff or the year 2019 as alleged by the defendant.
49. At the point marked MR1, there was no gate and that the defendant could freely access LR 4131/9. This was also corroborated by the pictures produced by the defendant that clearly show that he is able to access his land at MR1. It is my view therefore that the defendant has not proved that there was an easement created on LR 4131/10.
50. In conclusion therefore, it is my view that the plaintiff has failed to prove his claim for trespass for the court to grant the orders sought in the plaint and the defendant has also failed to establish the presence



of an easement in the form of a road of access on LR 4131/10 for the court to grant the orders sought in his counterclaim; the only easement that the defendant established is that of the right to access water through the plaintiff's land through water pipes laid therein, which the defendant's agents dug up the roadside in search of to repair. The piece of pipe jutting out of the plaintiff's land into the defendant's land was sufficient to prove that pipes supplying water to the defendant's homestead lay within the plaintiff's land or that they ran across the road, though and also afforded the defendant an adequate defence in terms of "reasonable cause" against the claimed tort of trespass pleaded by the plaintiff. The upshot of the foregoing is that I find that each party partially established their case against the other on a balance of probabilities. I therefore make the following orders:

- a. It is hereby declared that the defendant in the main suit has a right of easement over Land Reference Number 4131/10 [IR 1002979] restricted to the form of the right to access water through water pipes laid on LR Land Reference Number 4131/10 [IR 1002979] and has all rights concomitant or appurtenant to that easement of water supply including all reasonable action of digging trenches on, laying or repairing pipes on that land purely for use on the defendant's land is permissible and only on the scale that has been in existence before this order;
- b. The plaintiff's claim for general damages for trespass is dismissed for lack of proof;
- c. The plaintiff's claim for special damages for the cost of restoring the property damaged by the defendant is dismissed for lack of proof.
- d. The Registrar of Titles shall register against the title to Land Reference Number 4131/10 [IR 1002979] an easement only in the form of the right to access water through water pipes laid on Land Reference Number 4131/10 [IR 1002979] and all rights concomitant or appurtenant to that easement of water supply including all reasonable action of digging trenches on, laying or repairing pipes on that land purely for use on the defendant's land and only on the scale that has been in existence before this order;
- e. Within 180 days of this judgment, both the plaintiff and the defendant shall meet and amicably agree on the shifting of the water pipes laid through LR No 4131/10 to a location less intrusive to the plaintiff's use of his land in LR No 4131/10, or for the purpose of agreeing to abandon the pipes already laid and laying new ones along a location less intrusive to the plaintiff's use of his land in LR No 4131/10;
- f. In default of compliance with order no (e) hereinabove any already established water pipes shall remain in situ with all rights concomitant or appurtenant to that easement of water supply to LR No. 4131/9 through LR No 4131/10;
- g. A permanent injunction is hereby issued restraining the plaintiff in the main suit and his successors either by themselves or by their agents, representatives and/or employees or otherwise howsoever from interfering, blocking, closing, or dealing with the water pipes or in any other manner interfering with the water supply established through LR No. 4131/10 in such a manner so as to deny the plaintiff in the counterclaim, either by himself, or his agents or representatives use and/or access to water through those premises;
- h. As both parties have been partially successful, each party shall bear their own costs of the suit and counterclaim.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**MWANGI NJOROGE**



**JUDGE, ELC, NAKURU**

