



Wilken Telecommunicatios Limited & another v Kenya Airports Authority (Environment & Land Case 987 & 1140 of 2016 (Consolidated)) [2023] KEELC 18043 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 987 & 1140 OF 2016 (CONSOLIDATED)
LC KOMINGOI, J
JUNE 15, 2023**

BETWEEN

WILKEN TELECOMMUNICATIOS LIMITED 1ST PLAINTIFF

ANTIPEST KENYA LIMITED 2ND PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

JUDGMENT

1. This judgment relates to two consolidated suits namely Milimani ELC No. 987 of 2016 and ELC No. 1140 of 2016. In both suits, the Plaintiffs claim that the Defendant erected a barrier on a public access road at Wilson Airport therefore denying the Plaintiffs access to their privately owned property. They allege that the Defendant demands payment of charges from them for security and parking before they can access their business premises. On 13/13/2017, the two suits were consolidated upon which ELC 987 of 2016 became the lead file.

Milimani ELC No. 987 of 2018

2. By a Plaint dated 15th August 2016, the Plaintiff prays for judgment against the Defendant for the following;
 - a. A permanent injunction restraining the defendant, by itself or its servants or agents, from erecting a pay point/barrier on the public road adjacent to the road leading to Wilson Airport.
 - b. A permanent injunction restraining the Defendant from levying any access charges on anybody intending to access the land parcel no. LR 209/11292 (also known as “Wilken House”), be they employees or guests using the public road adjacent to the road leading to Wilson Airport,



- c. An order restraining the Defendant from interfering with the ingress if egress of Land. Parcel Number, LR 209/11292 (also known as “Wilken House”) by the Plaintiffs employees, visitors and any other members of the public who may wish to access it.
 - d. Costs of the suit.
 - e. Any other relief this honourable court deems fits to grant.
3. It is the Plaintiff’s case that it is the registered owner of LR 209/11292 registered as L.I No. 49/850/12 through a government grant No.121850. The property where it operates its business is accessible using a public road from Langata road. The Plaintiff avers that on July, 2016, the Defendant erected a barrier at a public road leading to Wilson airport with a view of charging motorists who drive through it including private property owners. The imposition of the said charges according to the Plaintiff not only violated it’s constitutional rights but also made it suffer loss and damages. This is because, its business was adversely affected therefore making it less competitive as it’s customers were also required to pay the charges. It is contended that the Plaintiff property is not a sub-lease of the Kenya Airports Authority.
 4. The Defendant filed a statement of defence dated 9th December,2016 on 13th January,2017 denying the allegation and prays that the suit be dismissed with costs. Through the defence, it confirms ownership of Wilson Airport which was set up by the Government of Kenya as Wilson Airport Aerodrome Reserve on LR.No.209/13080. Given the land was set for operation of Wilson Airport, the Defendant has command over all the public utilities within the airport. According to the Defendant, the process of setting up access control commenced in 2014 through public procurement for installation, operation and management of a parking and revenue management system. It is there case that the Plaintiff failed to attend its stakeholders meeting of 22nd June, 2016 despite an invitation through a letter dated 17th June, 2016.
 5. It asserts that the barrier seeks to control access to the airport for security purposes and also raise revenue as required by law. In addition, just like Jomo Kenyatta International Airport, private land owners do pay access fees. The court is urged to note that the Plaintiff does not want to pay public revenue needed for infrastructure improvement and provision of adequate security.

Milimani ELC No. 1140 of 2016

6. In this suit, the Plaintiff prays for judgment against the Defendant for;
 - a. A permanent injunction restraining the Defendant, whether by itself or by its servants or agents, from interfering with the Plaintiffs and its tenants and visitors free access ingress or egress to its premises known as Antipest House upon LR 209/11966,
 - b. Costs of the suit.
 - c. Any other relief this honourable court deems fit to grant.
7. The Plaintiff’s case is that, it is the registered owner of LR.209/11966 registered as I.R No.63316/3 where it’s business premises are located and which is accessible through a public road branching off Langata Road located near Wilson Airport. It claims that in July, 2016, the Defendant erected a barrier on the slip road leading to Wilson Airport despite the fact that the public road is not owned nor authorized by it. The Plaintiff alleges that the defendant’s actions of charging fees is unlawful and a nuisance as it interferes with it’s free access to its private property, therefore making it suffer loss. This is owing to the fact that the Defendant’s agents, Real-time Investment Limited always demand parking fees from the Plaintiff yet it is not entering or parking at Wilson Airport.



8. The Defendant filed a statement of defence dated 24th August, 2017 on 30th August, 2017 denying the Plaintiffs' claims and prays that it be dismissed with costs due to the following averments; Considering Wilson Airport was set up by the government as an aerodrome reserve, the Defendant is mandated to operate all public land parcel No. 209/13080 where it is located by virtue of [Kenya Airports Authority Act](#). Further, the access control was commenced in May 2014 when it legally procured a concession to install, operate and manage parking and revenue management system. The Plaintiff is there for obligated to pay the parking fee whose aim is to enhance public revenue since it failed to participate in the stakeholder's engagement for 22nd June, 2016 which approved installation of the parking system. The Defendant avers that the Plaintiff enjoys security services offered by it as stipulated by the International Civil Aviation organization. It claims that the suit which is bad in faith, frivolous and abuse of court process must therefore be dismissed because they are refusing to pay revenue which improves the infrastructure and amenities therein.

Evidence of the Plaintiffs.

9. PW1, Newton Omondi Osiemo, the 1st Plaintiff's Director told the court that the Plaintiff is the owner of LR 209/11292 through a Government Grant No. I.R.121850. While adopting his witness statement and the bundle of documents in support of the 1st Plaintiff case, he maintained that the construction of the barrier by the Defendant who imposes charges on every motorist driving through the barrier not only violated its right to property but also increased its business operational costs therefore making it less competitive. He acknowledged that the police have a right to offer security around the airport since it's paramount. According to his testimony, the Plaintiff was never invited for any engagement before the barrier was constructed despite being a regular road user. As a result, it's clients have to pay in order to access it's business premises yet the presence of the barrier did not enhance any security. On cross-examination, he testified that the public road leading to the airport must be maintained by Nairobi County government although it was being maintained by the Defendant. He testified that as a regular airport user who knows the mandate of the Kenya Airports Authority, its mandate does not extend to adjacent private owners properties. He indicated that they pay parking fee for their twenty (20) vehicles used in the telecommunication, solar energy, and finance and aviation business services. In addition to this, their customers were also required to pay.
10. PW2, Jeremy Richard Ashworth, a shareholder and manager of the 2nd Plaintiff confirmed that the 2nd Plaintiff's premises are located next to aerodrome entrance where the Defendant access barrier is located. According to him, they are only charged for parking and not for security. He produced payment receipts amounting to Ksh. 450,000/= paid since December, 2016 to support his case. While being cross-examined, he stated that initially, the road leading to the aerodrome was separated by the barrier and that the defendant never invited them for any meeting before putting the barrier yet they pay taxes to the Government of Kenya. Although he asserted that the Defendant never invited for them for any stakeholder before imposing the access charges upon them, he confirmed that they received an invitation letter from the Defendant addressed to all tenants.
11. PW3, Wycliffe Abiero, a professional valuer, produced a report dated 25th January 2017 in support of the Plaintiff's case whose objective was to conduct boundary verification for LR.No.209/11292, to verify whether the property was inside or outside the Airport and also verify the access road leading to the said property. He explained that the property alongside other properties was hived from the aerodrome reserve land. This reduces the reserve land to 146.5 hectares. On cross examination, he stated that the access road was a private land and that there existed another barrier before the construction of the current one.



Evidence of the Defendant.

12. DW1, Joseph Odipo Okumu, Regional Airport Manager, Wilson Airport while giving evidence insisted that the Defendant is mandated by Section 12 of the [Kenya Airports Authority Act](#) to charge fees to any person who uses the airport for security purposes. The Plaintiff is therefore mandated to pay such fees since they are within the aerodrome reserve and that the road is maintained by Kenya Airport Authority. Given the Defendant maintains the roads within the aerodrome reserve, the parking fee, also facilitates security services. On cross examination, he explained that the barrier is located before Langata road entrance and that no person has ever been denied restriction from access their respective premises, In addition, all private land owners were consulted before the barrier was erected. He testified that the parking fee tariffs are displayed everywhere within the reserve area for viewing. In addition, he testified that the Defendant has never denied any person access to the airport.
13. In the course of his testimony, DW1 was stood down upon which the Court directed that a site visit at the disputed barrier be undertaken upon request by the Plaintiff counsel. The site visit was to establish whether the Defendant operated any other barrier before. The court shall make reference to the said site visit report as filed by its court deputy registrar while making a determination on the issues raised by parties.
14. DW2, Harrison Machio, who served as the General Manager for Safety at Wilson Airport between 2012 to 2018 commenced his examination in chief by adopting his witness statement dated 22nd August 2017. He explained that the charges collected by the Defendant at the access point were used for airport operations and road maintenance. Upon increase in traffic, the Defendant introduced a digital parking system from which all persons entering the airport would make payment. He contended that the plaintiff never attended the stakeholders meeting to all private land owners within the airport despite being invited. By producing the attendance sheet of the said meeting, he confirmed that the said meeting took place. It was his case that the barrier was installed for security reasons and collection of revenue and therefore all persons accessing the airport were required to pay the relevant charges. This is due to the fact that Kenya National Highways Authority informed the Defendant that it does not maintain roads within the airport. He stressed that all persons operating and carrying on business within the airport were aware of the said charges since they considered them during the stakeholders meeting.
15. DW4, Charles Omwega, Defendant's Land surveyor produced a report dated 1st July 2009 in support of the Defendant's case during his testimony. He explained that according to the surveys and deed plan, the aerodrome land upon which the Plaintiffs properties were located was initially 265 Hectares. He stated that the Defendant has never denied the Plaintiff's entry to their respective premises and that the barrier for collection of the revenue is on private land. Upon being cross examined, he testified that the access road was not indicated on the deed plan as required. This proved that access road to the Plaintiff's land was mistakenly neglected and not indicated on the deed plan by the surveyor. In addition, the aerodrome reserve land was reduced due to illegal and fraudulent issuance of title deed's over its land.
16. DW3, Charles Owino, who served as Wilson Airport Manager from March 2016 to May, 2017 commenced his examination in chief by adopting witness statement and defendant's bundle of documents. He stated that the Defendant undertook stakeholder engagement meeting with all landowners and tenants operating within Wilson Airport on matters of installation of a parking management system. Despite being invited for the said meeting, the Plaintiffs never attended. It was his case that the access road within Wilson Airport which is maintained by the Defendant is also used by the Plaintiffs. He testified that the Defendant is empowered by Section 12 of the [Kenya Airports](#)



Authority Act to levy fees and/or charges. Further, the Defendant has never denied the Plaintiffs access to their premises.

17. At the close of oral testimonies parties tendered final written submissions.

The plaintiff's Submissions

18. The Submissions for the 1st Plaintiff in support of their case dated 11th August, 2022 raised nine issues for determination;
- a. Whether the 1st plaintiff should have unfettered access to their private property that does not stand on the land belonging to or lease from the defendant?
 - b. Whether the Defendant has control over the public road on which the barrier is build?
 - c. Whether the actions of the Defendants are arbitrary and not founded in law?
 - d. Whether paying the access fees at the barrier will increase the operational costs of the 1st Plaintiff?
 - e. Whether the 1st Plaintiff will lose business because of clients who may be unwilling to pay the access fees at the barrier?
 - f. Whether the actions of the Defendant infringe the Plaintiffs constitutional rights to enjoy the rights appurtenant to holding title to its property?
 - g. Whether the Plaintiff has suffered loss as a result of the Defendants actions?
 - h. Who pays the costs of this suit?
19. It is submitted by the 1st Plaintiff counsel that the Defendant has no authority to charge access fees at the barrier erected on a public road because the Plaintiff's survey report dated 25th January, 2017 confirmed that access road to LR/209/11292 is a public road used by the owners and occupants of the said property since 1978 even before the Defendant was set up as an entity. While relying on Section 2 of the *Public Roads and Roads Access Act* Cap 399 which defines "public road" and Section 28(1) of the *Land Registration Act*, it is maintained that the Defendant has no authority to charge access fees on the use of public roads by the general public. Therefore the Plaintiff, its employees and customers have a right to use the said road without any hindrance whatsoever.
20. Counsel further submitted that since an easement over the title as an overriding interest was not registered by the Defendant, then private property owners have a right of way as stipulated in Article 40(3) of the *Constitution*, Section 13(7) of the *Public Roads and Roads of Access* and the authorities in *Alexander Kiplimo Sego v Sub County Administration Nandi East Sub County & 6 Others* (2022) eKLR and *Kenya Power & Lighting co. Limited Moslara Trading Company Ltd* (2016) eKLR.
21. While relying of Section 10(1) of the *Kenya Roads Act* and Section 143 of the *Land Act*, the Plaintiff Counsel submitted that the creation of right of way is a mandate of the National Land Commission while maintenance of roads is undertaken by Kenya Urban Roads Authority. Therefore, the Defendant does not have any legal mandate to raise revenue seeking to maintain roads.
22. While restating Plaintiff's averments, the Plaintiff's counsel submitted that payment of access fees by the 1st Plaintiff has not only increased its operational costs but also infringed on its constitutional right to enjoy its property and therefore the plaintiff should be granted the orders sought.



23. It is further submitted that by virtue of Section 12 of the [Kenya Airports Authority Act](#) (Cap 395 Laws of Kenya) the mandate and power of the defendant is limited to aerodromes and facilities therein. That according to the professional survey services Report on LR. No.209/11292, the 1st plaintiff's property is not inside the extent and boundary line of Wilson Airport which is the aerodrome in this suit.

There is also in existence an access road which was in existence and in use before the defendant came into being. The said access road is used by members of the general public and is not a private facility of the defendant or of Wilson Airport.

24. It is further submitted that the defendant has acted arbitrarily and *ultavires* its mandate in seeking to manage and control the public access road by establishing a pay point/barrier which is limiting the 1st plaintiff, its employees, guests and agents from accessing LR. No. 209/11292 which is private property.

25. It is also the 1st plaintiff's submission that it is the mandate of the Kenya Urban Roads Authority to maintain and develop urban roads such as the access road in question. Any attempts by the Defendant to control and manage this access road is arbitrary move that is unfounded in law.

26. The 1st plaintiff further submits that since the pay point was erected its employees and visitors have been paying access fees. That is without any justification. It is the 1st plaintiff's proposal that the Defendant ought to collect the access charges from the previous pay point and the second barrier can operate as a security check point as it has always been.

It prays that the plaintiffs' suit be allowed with costs.

27. On the 28th September 2022 Mr. Rombo for the 2nd plaintiff told the court that they would not be filing any written submissions, instead the 2nd plaintiff would rely on the 1st plaintiff's submissions.

28. The Defendant Counsel through submissions dated 12th January, 2023 raised the following issues for determination;

- a. Whether the Plaintiffs properties are landlocked within Wilson Airport Aerodrome reserve?
- b. Whether the road on the landside of Wilson Airport Aerodrome Reserve on which the Defendant has erected a security barrier is a public road?
- c. Whether the Defendant acted within the law in erecting security barriers on the road in question?
- d. Whether the plaintiff's case has merit?

29. On the first issue, it is submitted that since Wilson Airport was delineated for Aerodrome Reserve through [Kenya Gazette No. 1149](#) of 17th July, 1953, it was not available for allotment to the Plaintiff as confirmed by Justice Okongo in ELC 495/2017; *Antony Oboi v Kenya Airports Authority (unreported)*. In addition, the Defendants deed plan No.FR.198/186 clearly showed that its parcel No.209/11292 showed it was on aerodrome reserve and therefore the Plaintiff does not have clearly marked access road to their respective deed plans.

30. On the second issue, counsel for the Defendant submitted that the Plaintiffs have not proved whether the access road upon which the barrier was erected was a public road. It is contended that the Plaintiff has an obligation to provide before this court evidentiary burden and standard of proof as held in [Netah Njoki Kamau & Eliud Mburu Mwaniki](#)(2021) eKLR and [Charterhouse Bank Limited \(under Statutory Management v Frank N. Kamau](#) (2016) eKLR.



31. The Defendant Counsel further submitted that the Defendant acted within the law when it erected the security barrier on the access road and levied fees since this was provided for in Section 12 of the [Kenya Airports Authority Act](#) No.3 of 1991. This provision mandates them to maintain private roads for the benefit of all airport users. In addition, it undertook stakeholder's engagement before implementing the contested project.
32. The Court is beseeched to find that the Plaintiff prayer seeking to stop operation of the barrier has been overtaken by events as confirmed by this court's Deputy Registrar site visit which found the barrier to be operational. These arguments are supported by court decisions in [WRM v FM](#) (2019) eKLR and [Samwel Njehia Gitau v Joyce Wanjiku](#) (2014) eKLR.
33. According to the Defendants submission, the Plaintiffs' can carve out their own access road without any objection from the Defendant like African Medical and Research Foundation did if they do not want to pay the charges. However, for as long as they are utilizing the private road which is being maintained by the Defendant, they must pay the stipulated fees. The Court is urged to dismiss the Plaintiffs' case with costs since they have not provided any evidence why they should be exempted from paying fee to use the private road maintained by the Defendant.
34. I have considered the pleadings, the evidence on record the written submissions and the authorities cited. The issues for determination are;
 - i. Whether the plaintiff's properties are landlocked within the Wilson Airport Aerodrome Reserve.
 - ii. Whether the defendant has the authority to charge access fees at a barrier erected on a public road.
 - iii. Whether the plaintiff's should have unfettered access to their properties which are private properties.
 - iv. Are the plaintiff's entitled to the reliefs sought?.
 - v. Who should bear costs of this suit?
35. It is the Defendant's contention that the Wilson Airport Aerodrome Reserve as per the 1928 survey plan has never been degazetted or amended. This was not the issue at the trial.
It is not in dispute that the plaintiffs' properties are private properties.
36. It is the plaintiffs' case that the road which the defendant claims to maintain is a public access road open to the general public from before the pay point/barrier was erected.
The defendant failed to controvert this evidence.
37. I find that the plaintiffs' have proved on a balance of probabilities that the road is a public road and was open to the general public way before the barrier was erected.
38. It is the plaintiff's evidence that since the issuance of their titles the access road was visible from then.
I find that the fact that the defendant maintains the road does not make it a private road.
39. Section 12(4) of the [Kenya Airports Authority Act](#) (Cap 395 Laws of Kenya) does not extend the mandate of the Defendant to private land such as that owned by the plaintiffs' herein.
40. DW4 Charles Omwega, a land surveyor with the Defendant, confirmed that the plaintiffs' surveys were done in 1990 and 1993 respectively while the defendant's was done in 1996.



- He also stated that the plaintiffs' survey plan do not show any access to their land.
41. However, he was cross examined by Mr. Osiemo for the 1st plaintiff, he admitted that the map of 1928 produced as exhibit D7 does not reflect the situation as it is currently.
 42. He also stated that the plaintiffs' titles were issued earlier and the surveyor neglected to apportion the access road to the plaintiff's properties. However no evidence was led to confirm this fact.
 43. DW2 Harrison Machio could not confirm if the plaintiffs' had been invited to the stake holder's meeting held on 17th June 2016 before the barrier was erected. He stated that he had no memo inviting the plaintiffs to the said meeting.
 44. There was no evidence led by the defendant to confirm that it maintains the said road.
 45. I find the plaintiffs' being private land owners ought to have unfettered access to their properties.
 46. In conclusion I find that the Plaintiffs' have proved their case against the Defendants on a balance of probabilities and they are entitled to the orders sought.
 47. However I agree with the Defendants' counsel that the prayer for permanent injunction to restrict the Defendant by itself, its servants and or agents from erecting a payment barrier on the public road adjacent to the road leading to Wilson Airport cannot issue at this point. The same has been overtaken by events as the pay point/barrier has already been erected and is operational. Courts do not issue orders in vain.
 48. The Deputy Registrar, on a site visit on 12/11/2019 confirmed that "all motorists gaining entry to the environs of Wilson Airport (Even though not necessarily going to the airport had only one entry point/barrier. Parking charges were levied depending on the number of hours one chooses to stay in the area....."
 49. Accordingly judgment is entered for the plaintiffs as against the defendant as follows:
 - a. That a permanent injunction is hereby issued restraining the Defendant from levying any access charges on anybody intending to access/and parcel Number LR.209/11292 (also known as "Wilken House") be they employees or guests using the public road adjacent to the road leading to Wilson Airport.
 - b. That an order of permanent injunction is hereby issued restraining the Defendant whether by itself its servants or as agents from interfering with the ingress or egress to land parcel Number LR. No. 209/11292 (also known as "Wilken House") by the 1st plaintiff's' employees, visitors and any other members of the public who may wish to access it.
 - c. That an order of permanent injunction is hereby issued restraining the defendant whether by itself, its servants and or agents from interfering with the 2nd plaintiff's, its tenants and visitors free access, ingress or egress to its premises known as Antipest Kenya House upon LR. No.209/11966.
 - d. That each party do bear own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15TH DAY OF JUNE, 2023.

L. KOMINGOI

JUDGE

In the presence of:



Mr. Rombo for the 2nd Plaintiff

Also holding brief for Mr. Osiemo for the 1st Plaintiff

Mr. Eredi for the Defendant.

Court Assistant: Mutisya.

