



REPUBLIC OF KENYA



**Birir v Kahindi & another (Environment & Land Case 328 of 2017)  
[2023] KEELC 21105 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21105 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 328 OF 2017  
A OMBWAYO, J  
OCTOBER 26, 2023**

**BETWEEN**

**JULIUS KIPROP BIRIR ..... PLAINTIFF**

**AND**

**AGNES CHEBET KAHINDI ..... 1<sup>ST</sup> DEFENDANT**

**JOHN MURAMBA NDA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Julius Kiprop Birir (hereinafter referred to as the defendant) has come to this court by way of plaint against Agnes Chebet Kahindi and John Muramba Ndaa (hereinafter referred to as defendants). The plaintiff contends that at all material times to this suit, the Plaintiff is the registered owner of Nakuru/Olongai/542 measuring approximately 8.1 Hectares (herein referred to as the suit property). The Plaintiff avers that he bought the suit land from Ashok Atmaram Ramchandani in the year 2009 and has been living on the said parcel of land with his family since 2010.
2. The Plaintiff further contends that the 1<sup>st</sup> Defendant is the owner of parcel of land known as no Nakuru/Olongai/24 which neighbours the suit land. The Plaintiff further avers that the boundaries to the various parcels of land are general in that they are marked with trees which were planted and continue to indicate the boundaries of the various parcels of land.
3. Further to the foregoing, the Plaintiff herein avers that the owners of the various parcels of land have co-existed together and in harmony without any disputes as to the boundaries of the various parcels of land for a very long period of time. The plaintiff laments that on 1st June, 2017, the Defendants herein in the company of unknown persons armed with weapons trespassed on the suit land and caused extensive damage to the fence and other structures owned and belonging to the Plaintiff herein.



4. The Plaintiff contends that the matter was reported to the Menengai Police Station who then arrested 1<sup>st</sup> Defendant and charged her with the offence of malicious damage to property in Nakuru CMC No 1506 of 2017, *Republic v Agnes Chebet Kaindi*.
5. The Plaintiff further laments that subsequently after the 1<sup>st</sup> Defendant was arrested and charged, there was further destruction on 21<sup>st</sup> June, 2017 on the fence and property of the Plaintiff by the 2<sup>nd</sup> Defendant herein who was also arrested and charged with the offence of malicious damage to property in Nakuru Criminal Case No 1758 of 2017 *Republic v John Muramba Ndaa*.
6. The Plaintiff further avers that as a result of the conduct and actions of the Defendants herein, he has continued to suffer substantial loss and damage over the property destroyed. The Plaintiff contends that his parcel of land has not encroached on the Defendant's parcel of land and as such there is no justification as to why the Defendants herein should trespass into the Plaintiff's parcel of land and cause the damage.
7. The Plaintiff avers further that the actions of the Defendants have caused tension and have caused the Plaintiff and his family emotional and psychological stress and fear of physical harm by the Defendants herein.
8. According to the plaintiff, the Defendants herein have no right to demolish the property owned by the Plaintiff and their actions and conducts are therefore unlawful and illegal. The Plaintiff prays for an order of injunction to restrain the Defendants from trespassing, cultivating and or dealing with the suit property in any manner whatsoever and further damages for trespass and the property already destroyed. The plaintiff further prays that there be a permanent injunction restraining the defendants themselves, agents and or servants from entering trespassing and or interfering in any way with the parcel of land known as Nakuru/Olongai/542.
9. The defendants on their part filed defence and counterclaim stating that the suit properties were surveyed and beacons placed and that they have always had a boundary dispute. They deny having caused any loss or damage. They deny demolishing the property of the plaintiff. They allege that it is the plaintiff who has encroached on Nakuru/Olongai/24 and Nakuru/Olongai/12 as Nakuru/Olongai/542 does not have a road whatsoever. The defendant (Agness Chebet Kahindi) in her counter claim alleged that the plaintiff and Elijah Arap Bii have encroached on parcels number Nakuru/Olongai/24 and taken away cumulative 3 acres of her land in pretext of getting a road to their land.
10. The said defendant counter-claimant ( Agness Chebet Kahindi) allege that the plaintiff and Elijah Arap Birrir have threatened her with violence and arrogance whenever she has attempted to align the boundary with Registry Index Map. The defendant prays for injunction against the defendant from encroaching and interfering with the defendant ownership of LR No Nakuru/Olongai/24.
11. The plaintiff filed a reply to defence and defence to counterclaim reiterating the averment in the plaint and denying to be the owner of Nakuru/Olongai/12 but reiterated that his parcel is Nakuru/Olongai/542. The plaintiff avers that the 1<sup>st</sup> defendant attempted to trespass in his parcel of land and destroyed a fence. He states that the land surveyor has visited the land and re-defined the boundary. He prays that the counter-claim be dismissed with costs.
12. The 2<sup>nd</sup> defendant in the counter-claim filed defence. The gist of the defence is that 2<sup>nd</sup> defendant was wrongly sued and prays that the counter-claim be dismissed with costs.
13. When the matter came up for hearing the plaintiff relied on his written statement and the report of the District Surveyor. The report of the surveyor was produced as PEX12. There was another report by J.K Mathege. The surveyor suggested that the existing boundary be left intact. He urged the court to



- look at the google map. Mr Birir states that he is the fifth owner of the land. The Registry Index Map does not correspond with the ground. According to PW1, the map should be amended to correspond with the ground.
14. DW1, Agness Chebet Kahindi testified that She entered the land in 1978 and that Julius Korir Birir is her neighbour. According to DW1, the boundary was interfered with by the previous owners of the plaintiffs land. Many surveyors have been engaged but have not resolved the dispute. The boundary dispute has been raging for long. She states that the Land Registrar, Birundi visited the site but did not measure the land.
  15. The 2<sup>nd</sup> defendant in the counter-claim testified that his property is Land Registration number Nakuru/Olongai/541 and the first owner of the land was called Ndivo. His land ownership has not changed since 1992. The 1<sup>st</sup> defendant's land is Nakuru/Olongai/24. The boundary has never changed since 1982. The 1<sup>st</sup> defendant's husband put a k-apple fence before he died. The 1<sup>st</sup> defendant started the dispute 4 years after the death of Mr. Kahindi. He has a gate that is 40 years old. On cross examination he states that he was the first to acquire the land in 1982 when he took possession he found Ndivo's fence.
  16. I have considered the pleadings, evidence and rival submissions on record and do find that the disputes revolve on 3 parcels of land and a road of access. The parcels of land are namely:-
    1. Nakuru/Olongai/542 belonging to Julius Kipkorir Birir.
    2. Nakuru/Olongai/24 belonging to Agnes Chebet Kahindi.
    3. Nakuru/Olongai/No 12/ allegedly belonging to Elijah Arap Bii.
  17. Agness Chebet Kahindi is the 1<sup>st</sup> defendant in the suit and the plaintiff in the counter-claim. Mr. Julius Kiprop Birir is the plaintiff in the main suit. He prays for injunction against the defendants from interfering with his possession of plot number Nakuru/Olongai/542.
  18. I have looked at the title deed for Nakuru/Olongai/542, it shows that the land measures 8.1 hectares. The title deed was issued on 27<sup>th</sup> November 2009 to John Kiprop Birir. The register was opened on 8<sup>th</sup> July 1985 in the name of Settlement Fund Trustees and the first allocation was in the names of James Ndivo on 19<sup>th</sup> September 1996 and the title deed was issued on 24<sup>th</sup> September 1996. The property was transferred to plaintiff by the 4<sup>th</sup> registered owner Ashok Atmaram Ramchandani on 27<sup>th</sup> November 2009 and title deed issued on the same date. The plaintiff has been residing on the land since 2010. He claims that the 1<sup>st</sup> defendant has been interfering with his quiet possession of the land. The road of access has existed on the parcel of land Nakuru/Olongai/24 for more than 20 years.
  19. The 1<sup>st</sup> defendant did not call surveyor to demonstrate that there was any encroachment. The surveyors' reports on record are opinions whose makers ought to be called for cross-examination failure to call the surveyors makes the reports unreliable. The 1<sup>st</sup> defendant ought to have called the surveyors to produce the reports. However, it is evident that the ground is not aligned with the Registry Index Map and that is why the plaintiff wants the Registry Index Map to be aligned with the ground whereas the defendant wants the ground to be aligned with the Registry Index Map.
  20. Moreover, the dispute herein revolves on an old boundary dispute that appears to have been resolved by the land Registrar. Before the hearing the land Registrar summoned all parties to attend hearing. Elijah Arap Bii, Julius Kirpop Birir and Agness Chebet Kahindi were summoned on 20<sup>th</sup> August 2014



and the Land Registrar dealt with the dispute. On 6<sup>th</sup> April 2016 the sub- County surveyor wrote to Mr. Birir through the Chief of Rongai location at Kampi ya moto stating that :-

The owner of parcel number 24 of the above scheme has requested this office for boundary determination of their common boundary with parcels number 12 and 542.

The office will send a surveyor to the ground to confirm their common beacons thus solving the dispute on 13<sup>th</sup> April 2016 at 10 a.m.

By a copy of this letter, please request the owners of the above parcels to be present in person for the occasion.

Please be present and provide security for the exercise.

Caleb, Kotut.

Sub County Surveyor

Rongai.”

21. The Land Registrar visited the site and made the following observations:

As per my visit to the ground I found the following observations, the current Registry Index Map (RIM) does not correspond with the ground situation. The road passing between parcels Nos. 24 and 23 is shown as being relatively straight contrary to the ground situations. The parcel No.542 and 12 has no access to the road. The road between parcel Nos.24 and 23 have a big curve and do not look like what is shown on the map.

The disputed boundary is well defined and marked with mature trees which have lasted for several years. The neighbours have lived for several years without any dispute.

This is a general boundary and is indicated on the Registry Index Map clearly states that, it is not conclusive on the precise position see bottom of the left corner of the map unless it is a fixed boundary under section 22. I order that the status quo remains and for future permanent solution, the scheme should be re-surveyed to agree with the ground situation.

C O Birundu

Land Registrar

Nakuru “

22. Though there is discrepancy in the boundaries between the Registry Index Map and the ground this court cannot interfere with the boundaries of the suit property as on the ground because the same have existed for a long period of time and that the dispute was determined by the Land Registrar. Moreover, the owners of parcel of land No Nakuru /Olongai/542 has enjoyed the use of the road adjoining the land in succession for over 20 years and therefore they have acquired easement of the same.

The Black’s Law Dictionary describes easement as follows:

An interest in land owned by another person consisting in the right to use and control the land or an area above and below it for a specific limited purpose. In his book Land law and Conveyancing: Principles and Practice, pages 184-185 Professor Tom Ojienda defines an easement as follows: “Easements are common law rights enjoyed by a person over the land of another. They include the right of way, right of light, right of water, profit among others. Whereas easements are nowadays recognized as incorporeal hereditaments, that is objects of property in



themselves, initially easements were construed as rights appurtenant to corporeal hereditaments, that is a privilege which could be obtained for the benefit of the corporeal land. For there to be declared an easement, four essential elements must be satisfied; i. There must be a dominant tenement and a servient tenement. That is an easement does not exist in gross but can only be appurtenant to (related to) a dominant tenement. A dominant tenement may be the adjoining land to which an easement (such as a right of way) is sought across another's land (servient tenement) ... . ii. An easement must confer a benefit on (accommodate) the dominant tenement. The benefit conferred to the dominant tenement is not necessarily analogous to personal advantage to the occupier of the land, the concern is how the easement makes the dominant tenement better and more convenient property by increasing its general utility, conferring access among others.iii.The dominant and servient tenement must not be owned and occupied by the same person. In its very nature easement is a right in the soil of another (in alieno solo). iv. The easement must be capable of forming a grant. Although in practice easement are established by long user, the presumption always is that a grant was once made.”

23. Section 32 of the [Limitation of Actions Act](#) provides that where an easement has been enjoyed, peacefully and openly as of right, and without interruption, for twenty years, the right to such access is absolute and indefeasible.

24. The legal framework for easements is found in section 32 of the [Limitation of Actions Act](#) which provides as follows:-

Section 32 Means by which easements may be acquired

1. Where

- a) access and use of light or air to and for any building have been enjoyed with the building as an easement; or
- b) any way or watercourse or the use of any water has been enjoyed as an easement; or
- 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. 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”

25. Moreover, section 28 of the [Land Registration Act](#) No 3 of 2012 categorizes the right of way as an overriding interest. The said section provides that;-

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



- a) ....
  - b) ...
  - c) - rights of way, rights of water and profits subsisting at the time of first registration under this Act.
  - d) -natural rights of light, air water and support.”
26. Sections 98 to 100 further provide for the creation of easements and analogous rights by a formal instrument and sets out what is to be contained in the said instrument, cancellation and extinguishment and enjoyment of the easement.
27. The courts have also pronounced themselves on the question of easements and in the case of *Kamau v Kamau* [1984] eKLR the Court of Appeal observed as follows:
- An easement is a convenience to be exercised by one land owner over the land of a neighbor 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 servient tenement to every person into whose occupation these tenements respectively come.”
28. In the case of *Re Ellenborough Park* (1956), the Court established the four characteristics of easements as follows; There must be a dominant and servient tenement, The right must benefit the dominant land, There must be diversity of ownership or at least occupation and The right must be capable of lying in grant.
29. In this case the land parcel no 542 is the dominant tenement whereas 24 is the servient tenement and that the plaintiff has enjoyed the right of access for a long period of time.
30. The upshot of the above is that the plaintiff is entitled to enjoy this right without interference and thus he is entitled to a permanent injunction to restrain the defendants from entering, trespassing and or interfering in any way with the parcels of land known as Nakuru/Olongai/542 as is demarcated on the ground. Ultimately, I do grant a permanent injunction restraining the defendants themselves, agents and or servants from entering trespassing and or interfering in any way with the parcel of land known as Nakuru/Olongai/542.
31. On the other hand the counter claim is not proved and is defeated by sections 7 and 32 of the *Limitation of Actions Act* Cap 22 Laws of Kenya as the plaintiff has already acquired the right of easement on the 1<sup>st</sup> defendants land and the same is dismissed with costs. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> OCTOBER 2023.**

**A O OMBWAYO**

**JUDGE**

