



**Gichimu v Primeland Holdings (K) Limited (Environment & Land Case 1107 of 2016) [2023] KEELC 20854 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20854 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1107 OF 2016  
OA ANGOTE, J  
OCTOBER 19, 2023**

**BETWEEN**

**SHEM ANDREW GICHIMU ..... PLAINTIFF**

**AND**

**PRIMELAND HOLDINGS (K) LIMITED ..... DEFENDANT**

**JUDGMENT**

**Background**

1. Before the Court for determination is an undated Amended Complaint filed on 30<sup>th</sup> June 2017. The Plaintiff is praying for the following orders:
  - a. Not interfering with the existing roads within the plots.
  - b. A permanent injunction be issued restraining the Defendant, its servants and/or agents from dealing with, blocking or interfering in any manner whatsoever with the passage/access road linking the main road to the Plaintiff's plot vide L.R No. 6845/2249.
  - c. A mandatory injunction compelling the Defendant to resurvey the property and generate a new deed plan in line with the previously existing boundaries between the Plaintiff and his neighbour.
  - d. The title deed be issued.
  - e. A refund of Kshs. 30,000 be paid to the Plaintiff.
  - f. Costs of the suit.
  - g. Any other relief the Court may deem fit to grant.



2. The Plaintiff averred that he purchased L. R. No. 6845/2264 (the suit property) in 2009 from the Defendant at a cost; that the Defendant promised that he would issue him with a title deed once the purchase price had been fully paid and that the Defendant asked him to pay Kshs. 30,000 for a non-existent plot.
3. It was averred in the Plaintiff that the Defendant was supposed to provide an access road linking the suit property to the main road and that the Defendant has interfered with the access road and it is using it for private purposes thus making it impossible for him and his clients to access the suit property freely.
4. The Plaintiff alleges misrepresentation by the Defendant, the particulars of which were stated as follows: the Defendant's statement of fact that it would provide an access road from the main road to his plot; his decision to purchase the suit property was premised on the Defendant's statement that L.R No. 6845/2249 would be the access to the suit property; he relied on the Defendant's subdivision scheme and agreement to provide the access road to the suit property and hence purchased the plot and proceeded to set up a business.
5. According to the Plaintiff, the Defendant failed to disclose that it was keen on converting the access road to a new parcel to be owned by it and that due to the Defendant's breach of agreement, he is unable to access his plot freely and has suffered loss to his business.
6. In conclusion, the Plaintiff averred that the Defendant replaced the original boundary beacons; that the new boundary encroaches on his land meaning that he will get a smaller parcel of land than what he bought and that he has severally requested the Defendant to open up the access road and issue him the title deed but that has not been done.
7. The Defendant filed an amended Defence on 30<sup>th</sup> August 2017 denying the Plaintiff's allegations and averred that the Plaintiff purchased two plots which were amalgamated at his request and that a deed plan was issued and the Defendant is ready to execute a transfer in the Plaintiff's favour.
8. The Defendant averred that the Plaintiff is a member of a welfare group that is made up of members who purchased plots from it and that the Plaintiff is bound by the group's rules including the Kshs. 30,000 contributions that was agreed upon by all the members.
9. With regard to the access road, the Defendant stated that the parcel that the Plaintiff claimed was the access road was not as there is a common plot owned by the association for that purpose and that this was known to the Plaintiff at the time of purchase.
10. The Defendant further stated that the members of the welfare group agreed to use LR. No. 6845/2249 as an exit as it was closer to the main road and that the Plaintiff's suit should be dismissed with costs to the Defendant.

### **Hearing and Evidence**

11. During the hearing, the Plaintiff testified as PW1. The Plaintiff adopted his witness statement as part of his evidence-in-chief and produced his bundle of documents as exhibits.
12. It was the evidence of PW1 that when he bought the suit property, he was shown the beacons. However, when he got the deed plan, the boundaries had been moved and there was encroachment on his land. It was the evidence of PW1 that the deed plan should be resurveyed as he had already put up structures and fenced the suit property. Without a correction of the deed plan, he stated, he would have to bring down the fence.



13. While referring to the Sketch Site Map (Exhibit 6), PW1 stated that there was an access road to the Eastern Bypass; that the access road informed his decision to buy the suit property; that he used the road between 2009 and 2011 and that when deed plans were issued, the road was privatized and they were asked to pay. PW1 asked to be refunded the Kshs. 30,000 he had paid to use the road.
14. On cross-examination, the Plaintiff stated that he bought plots No. 170 and 171 which were amalgamated. In reference to the Site Plan, he acknowledged that it was the proposed sub-division with the numbered plots; that there were in existence plots 113 and 115 and that plot 114 was a road which was donated to the members.
15. With regard to Amani Drive Association, the Plaintiff testified that he was aware of the Association; that they had colluded with the Defendant to grab the road and that there was a resolution by Amani Drive Association made on 8<sup>th</sup> March 2015 to the effect that the Defendant should surrender LR. No. 6845/145/114 and 6845/144/82 to the Association.
16. It was the evidence of PW1 that the plots were surrendered as roads at the time of purchasing the suit property but the Defendant colluded with others to have the road blocked. In conclusion, PW1 stated that the Site Map which was presented to the County Government was different from the Deed Plan and the Survey plan.
17. In conclusion, PW1 stated that they took the Association to court for titles and they were ordered to pay Kshs. 35,000 for processing the same.
18. Charles Kinyari, the Defendant's director testified as DW1. He adopted his witness statement as part of his evidence-in-chief and produced his bundle of documents as exhibits. DW1 stated that he knew the Plaintiff who had purchased the suit property after being shown the beacons and fenced it immediately.
19. According to DW1, the Defendant asked the purchasers to pay Kshs. 30,000 to process the titles; that an agreement was reached and a consent entered in Court concerning the same and that the titles were with the Association.
20. DW1 stated that the Association has put up a gate on a plot to which the Defendant has no claim. Concerning L.R No. 6845/2249, DW1 testified that it was the Defendant's plot but the Association asked for access to the Eastern Bypass and that it was agreed that the Association would pay Kshs. 30,000 per person for the processing of the same. He averred that the said plot has not been surrendered to the City Council.
21. On cross-examination, DW1 stated that when the suit property was being sold, the Plaintiff was shown a different access road; that the Plaintiff might have been using the road in contention but he had been shown a different road that goes round and that when the Association went to Court, the Defendant agreed to surrender a specific portion of land which was agreeable to the Association.
22. With regard to the approved sub-division scheme, he stated that someone had tampered with the copy which he was shown in Court and that what he was shown in court was initially a plot, not a road. DW1 conceded that the plot is currently an access road to the Eastern Bypass and that the same had been approved by the City Council. In conclusion he stated that the Association had hired a surveyor who picked the beacons.

### **Submissions**

23. Relying on Article 40 of *the Constitution*, Sections 138 and section 140 of the *Land Registration Act* and the cases of *Re Ellenborough Park* (1956) Ch 131, *Dalton vs Angus* (1881) 6 App Cas 765 and *Kamau vs Kamau* [1984] eKLR, the Plaintiff submitted that the owner of 'land locked' land (dominant



land) has a legal right to access his land as long as there is a servient land upon which he can exercise his right and he meets the criteria to exercise such right.

24. It was submitted that the suit property is the dominant land while LR. NO. 6845/2249 is the servient land and that the Plaintiff has been using the later to access his business. In conclusion, the Plaintiff submitted that the Court should grant him a right of easement which is an overriding interest.
25. Additionally, it was submitted, the Court should order the Defendant to replace the original beacons because the new boundaries have encroached on his land leaving him with a smaller portion than what he paid for.
26. The Defendant submitted that the Plaintiff's suit is based on a presumption of a haphazard subdivision scheme without following the provisions of the Physical Planning Act and that the Plaintiff's intention is to defeat the welfare of the residents of the area.
27. It was submitted that the parcels of land were sold under an informal scheme which was later approved by the physical planning offices and Deed Plans were issued; that the scheme of the subdivision therefore ceased to be the property of the Defendant and that it can therefore not be said that the Defendant is interfering with any roads.
28. The Defendant submitted that any area reserved for a road should have a distinct land reference number, which LR. NO. 6845/2249 does not have and does not qualify to be an access road. Additionally, it was submitted, the above mentioned parcel of land is not adjacent or opposite the suit property for the same to be said that it links the Plaintiff to the main road.
29. It was submitted that there was a Court Order directing the future use of Plot Number 6845/145/144 in ELC Case No. 122 of 2014 and that if this Court were to issue an order directing the use of that plot as a road, it would be sitting on an appeal as well as amending a plan approved by the relevant state department.
30. In conclusion, the Defendant argued that the evidence submitted by the Plaintiff with regard to the difference in degrees on parts of his land was not plausible as what the Plaintiff submitted as the subdivision scheme plan is a photostat copy which had been interfered with to suit the Plaintiff's case. The Defendant urged the Court to dismiss the Plaintiff's suit.

### **Analysis and Determination**

31. Based on the foregoing, the following three issues arise for determination:
  - i. Whether the Defendant should issue the Plaintiff with a title to the suit property;
  - ii. Whether the Defendant should grant the Plaintiff access to the suit property through Plot No. 6845/2249;
  - iii. Whether the Defendant should amend the boundaries to the Plaintiff's land.
32. It is not in dispute that in 2009, the Plaintiff purchased LR. No. 6845/2264 (the suit property) from the Defendant. The Plaintiff has prayed that the Court should order the Defendant to issue him with a title to the suit property.
33. According to the Defendant, an agreement had been reached between the Defendant and the Association of which the Plaintiff is a member that the Deed Plans and titles be handed over to the Association, which he did.



34. The Defendant having admitted that indeed the Plaintiff paid it the full purchase price, it is its obligation to transfer the suit property to the Defendant and not the Association.
35. Indeed, no evidence was presented to show that there is in existence an agreement between the Plaintiff and the Association in respect to the issuance of a certificate of title in favour of the Plaintiff.
36. It would appear that either the Plaintiff or the Association's intention is to frustrate the Plaintiff for unknown reasons, thus the withholding of the Deed Plan and the transfer instruments. This is in breach of Article 40 of *the Constitution* which grants the Plaintiff the right to own property in any part of the country.
37. Consequently, it is the finding of this court that the Defendant should facilitate the transfer of the suit property in favour of the Plaintiff. If indeed the Defendant surrendered all the Deed Plans to the Association, it is its responsibility to get the Plaintiff's Deed Plan from the Association and facilitate the transfer of the same in favour of the Plaintiff.
38. Various positions have been set forth with regards to the access to the suit property. The first relates to Plots No. 6845/145/114 and 6845/144/82. In cross-examination, the Plaintiff stated that the same were surrendered by the Defendant to the Association following a meeting of the Association held on 8<sup>th</sup> March 2015. This position is supported by the minutes of the said meeting.
39. Clause 3 (i) of the minutes reads as follows:

“It was unanimously agreed that plot owners shall pay to Primeland Holdings Ltd Kes 30,000 per plot as administration fee. This fee shall include consideration price to Primeland Limited to surrender and transfer full ownership of the two plots which are plot number 6845/145/114 and plot number 6845/144/82 currently being used by residents as the main exit to the Eastern Bypass Road. These two plots shall be held by individual associations for the benefit of members and that Primeland Holdings Ltd shall have no right of ownership henceforth. In this regard the title deeds of the two plots shall be processed in the name of the respective associations as per arrangement in place.”
40. The Plaintiff stated that the Association colluded with the Defendant to block access to the plots mentioned above. However, this assertion was not supported by any evidence. Further, there was a consent entered in ELC Case No. 1122 of 2014 reaffirming the position set out in the minutes.
41. The Plaintiff did not lead any evidence to show that the terms of the consent have been violated. In view of the foregoing, I take the position that the above plots were surrendered by the Defendant to the Association for use as a road of access by all the property owners.
42. That being the case, there is no evidence to support the Plaintiff's claim that he is being denied access through the said plots by the Defendant. Indeed, it is trite that the Plaintiff must access his land, and cannot be denied to use the surrendered plots.
43. The Plaintiff has alleged that he bought the suit property because there was access to the main road through Plot No. 6845/2249. He averred that he was shown the access when he was purchasing the suit property and started using it following the purchase.
44. The Defendant denied that position stating that the Plaintiff was shown a longer route when he purchased the suit property (though he might have been using a different access from the one he was shown). The Defendant's witness further testified that the members of the Association agreed to collectively purchase Plot No. 6845/2249 to use as a road as it was closer to the main road.



45. In its submissions, the Defendant stated that Plot No. 6845/2249 was not reserved as a road as it did not have the requisite plot number for roads. Indeed, that is apparent from the map that was produced in evidence. Indeed, the fact that the Defendant promised the Plaintiff access through Plot No. 6845/2249 was not proven on a balance of probabilities.
46. In any event, under section 3 (3) of the Law of Contract, all agreements in respect of land must be in writing. The mere fact that the Defendant allowed the Plaintiff to use the plot as an access road does not amount to an enforceable contract.
47. In his submissions, the Plaintiff stated that he was entitled to a right of easement with the suit property being the dominant land and Plot No. 6845/2249 being the servient land. The Defendant countered this position by stating that the above mentioned plot was neither adjacent nor opposite the suit property.
48. Section 98(1) of the *Land Registration Act* provides as follows:
- “ An owner of land or a lessor may, by an instrument in the prescribed form, grant an easement over the land, lease or a part of that land to the owner of another parcel of land or a lessee for the benefit of that other parcel of land.”
49. In *Re Ellenborough Park* (Supra) the Court set out four essential characteristics of an easement:
- 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.
50. In view of the law set out above, I am not convinced that the Plaintiff is entitled to an easement. Firstly, he has not proven that the Defendant from whom he is seeking the easement is the owner of Plot No. 6845/2249. Secondly, I find that he has not met the requirement of a dominant and servient tenement.
51. I say so because as per the map on record, the suit property, which the Plaintiff is arguing is the dominant tenement is located in a different area from Plot No. 6845/2249, the supposed servient tenement. The two do not share any border. The Plaintiff has not demonstrated a proximity between the two that would warrant the grant of an easement.
52. In the case of *Esther Wanjiku Mwangi & 3 others vs Wambui Ngarachu* (sued as the legal representative of the estate of Ngarachu Chege - Deceased) [2019] eKLR, the Court while analysing the requirements from *Re Ellenborough Park* (Supra) stated as follows:
- “ 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 LOC8/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.”
53. Having established in the preceding paragraphs that the Defendant surrendered two plots to the Association for use as a road and the Plaintiff having failed to prove that he has been denied access to



the said roads, I find that the Plaintiff has alternative access to the suit property and is not entitled to an easement. Additionally, as per the map on record, the suit property is not landlocked.

54. In view of the foregoing, I find that the Court cannot order the Defendant to grant the Plaintiff road of access as the Plaintiff has failed to prove he has been denied the use of the alternative road of access by the Defendant or that he is entitled to an easement over L. R. No. 6845/2249.
55. The Plaintiff has stated that the size of his land as per the Deed Plan is smaller than what he was showed when he purchased the land. According to the letter from the surveyor which is part of the Plaintiff's exhibits, the site map that was used during the purchase and the regularization map at Nairobi County tallied. However, the subdivision map from the Ministry of lands showed a different angle on the corner of the Plaintiff's land.
56. The evidence shows that the Plaintiff bought plots No. 170 and 171 which were amalgamated. At the time of the purchase, the said plots had not been surveyed. It is trite that the exact measurements of land can only be ascertained upon survey. It is also trite that Deed Plans are a replica of survey plans, and gives the exact measurements of land, unlike site maps which the Plaintiff is relying on.
57. That being the case, and in the absence of evidence by a surveyor to show that the change in the size of the Plaintiff's plot was substantial, and was fraudulently arrived at, I decline to issue a mandatory injunction compelling the Defendant to resurvey the property and generate a new Deed Plan in line with the previously existing boundaries between the Plaintiff and his neighbour.
58. For those reasons, the Plaintiff's claim partially succeeds as follows:
  - a. The Defendant to process the issuance of a certificate of title in favour of the Plaintiff for plots numbers 170 and 171 (amalgamated).
  - b. Each party to bear his own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Odhiambo for Mbuthia for Plaintiff

Mr. Irungu for Defendant

Court Assistant - Tracy

