



**Nyamu v Wangai (Environment & Land Case E41 of 2021)
[2022] KEELC 55 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 55 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E41 OF 2021**

JA MOGENI, J

APRIL 28, 2022

BETWEEN

PATRICK KANGERI NYAMU APPLICANT

AND

NANCY WANJIRU WANGAI RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 21/09/2021. The Applicant seeks a temporary road access order to through part of the respondent's property registered as L.R No. Nairobi/Block 97/23/47. In the Notice of Motion Application, the applicant seeks the following orders:
 1. Spent .
 2. That pending the hearing and determination of this suit, this Honorable Court be pleased to issue an order directing that the Applicant, his family, agents, visitors and/or any other person under the Applicant's permission continue using the temporary road of access going through part of the Respondent's property registered as Nairobi/block/97/2347.
 3. That this Honorable Court be pleased to issue a temporary injunction restraining the Defendant, her servants and/or agents from constructing, barricading, obstructing or in any other way denying, the Plaintiff his agents and/or visitors and their vehicles access to the Plaintiff/Applicant's property being Plot Number tassia-II-97/1389/221 through part of the Defendant/Respondent's parcel of land known as Nairobi/block/97/2347.
 4. That the Orders be served upon and enforced by the Officer Commanding Police Division Embakasi – Police Division.



2. The Applicant contends that his land became landlock by virtue of the court judgment obtained by the respondent in Nairobi ELC No. 554 of 2008, Nancy Wanjiru Wangai – vs- NSSF & 4 others. The Applicant contends that there has always been an access road passing through the now larger parcel of land registered as Nairobi/block 97/2347 which the respondent now owns. That following the judgment obtained the respondent/defendant got orders to demolish the structures on Nairobi/block 97/2347 as a result, the access road was blocked leaving his neighboring parcel of land locked therefore necessitating the institution of the current suit. The applicant has also submitted that he is currently in occupation and possession of the unsurveyed property known as Plot Number Tassia-II-97/1389/221 which he states that he acquired in 2008 and all this time he has been in quiet possession over 12 years now, there has always been an access road. The applicant has attached documents to show how he acquired the property and highlighted the process in the supporting affidavit sworn by Patrik Kangeri Nyamu.
3. The defendant/respondent opposed the application based on her Replying Affidavit sworn on 7/10/2021. She contends that she is the registered owner of Nairobi/block 97/2347 and that the applicant illegally occupies the adjacent plot Nairobi/block 97/2348 and that there exists no unsurveyed plot Number Tassia-II-97/1389/221 as alleged. That the owner of plot Nairobi/block 97/2348 is the one who ought to grant access on his land and not the applicant. That 07 the 2nd Respondent trespassed into his land and forced creation of an access road on the same. This forced the defendant/respondent to file Nairobi ELC No. 554 of 2008, Nancy Wanjiru Wangai – vs- NSSF & 4 Others and obtained a decree that ordered demolition of all the illegal structures which were demolished on 20/09/2021.
4. In the said judgment, the court issued a decree that the applicant should pay the defendant/respondent herein Ksh 5,000,000 as general damages for trespass. Further the respondent stated that Nairobi/block 97/2348 which the applicant illegally occupies is not landlocked but has an access road as evidenced by the Registry Index Map of the area that she attached to the affidavit. The defendant/respondent allege that the matters Milimani ELC E246 of 2021 and Milimani ELC E258 of 2021 filed against the defendant/respondent are non-starters because the family of the late Alfred Jose Nakaya through the Administrator have filed an affidavit and swore that the defendant/respondent is the bonafide purchaser of nairobi/block 97/2347 and none of the plaintiffs claim to have purchased the property.
5. The parties herein agreed to put in their submissions and let the Court decide the application. The plaintiff/applicant filed their submissions on 10/01/2022 and defendant/respondent filed their submissions on 15/11/2021. The defendant respondent in her Replying Affidavit and her submissions in in opposition to the application urged the Court to dismiss the application on ground that the it failed to comply with section 140 of the Land Act 2021.
6. I have carefully gone through the application herein, the affidavit in support of the same, the Replying Affidavit as well as the submissions by the parties herein. The Applicant is seeking an access order affecting Land Parcel No. Nairobi/block 97/2347 and nairobi/block 97/2348. This access order which the applicant seeks was a subject matter in Nairobi ELC No. 554 of 2008, Nancy Wanjiru Wangai – vs- NSSF & 4 others which finally and conclusively determined on the same. The position on the previous proceedings which have been determined have the net effect of holding that the applicant is entitled to an access road from the defendant/respondent. It does not matter what means the party herein is using to achieve their intended aim. Whether they come through civil suits, tribunals or applications, the fact remains that the subject matter is not an access road. It has been determined that the applicant is not entitled to an access road from the defendant/respondent. It therefore follows that this application by the Applicant is res judicata and amounts to an abuse of the process of Court.



7. Even if the Court were not to find that this application is res judicata, the same would not have succeeded as against the defendant/respondent. This is because the provisions under which the application was brought particularly section 140 of the Land Act provides for what the Court should consider in deciding whether to grant an access order. Section 140(4) lists the considerations as follows:-
 - a. the nature and quality of the access, if any, to the landlocked land when the Applicant first occupied the land;
 - b. the circumstances in which the land became landlocked;
 - c. the nature and conduct of the negotiations if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land;
 - d. the hardship that may be caused to the Applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making in the of the order;
 - e. the purpose for which access is or may be required and;
 - f. any other matter that appears to the Court to be relevant.
8. In the present case, there is evidence that the defendant/respondent owns Nairobi/block 97/2347 but there is no evidence that the applicant owns Nairobi/block 97/2348 which he claims to be landlocked. The applicant did not present any evidence to show that there existed an access road on the parcel Nairobi/block 97/2347 which would lead to Nairobi/Block 97/2348 being the portion for the applicant/plaintiff herein which is now landlocked.
9. Having considered the application, the response made and rival submissions. It is necessary to point out that each side tried to enrich its submissions with decided cases that favour the positions they took. For the Applicant the decided cases availed were *National Commercial Bank Ltd v Olint Corporation 2009 IV/r 1405*, *Ayajz Abdalla Ali Abdulrahman v Ministry of Lands, Planning and Housing & 5 others* [2017] eKLR and *Banque Villa Estate Management Ltd v Kenya Veterinary Vaccines Production Institute* [2018] eKLR. The Respondents cited Mombasa ELC No. 225 of 2016 (OS) *Abdalla Ali Abdulrahman vs The Ministry of Lands, Planning & Housing Mombasa County & others*. I have had a look at these and other cases availed.
10. Though the applicant has also submitted that he is currently in occupation and possession of the unsurveyed property known as Plot Number Tassia-II-97/1389/221 which he states that he acquired in 2008 and all this time he has been in quiet possession over 12 years now and that there has always been an access road. There is also evidence that Land Reference Nairobi/Block 97/2348 were comprised in one title which had access to the roads of access provided during the initial sub division. The land was blocked after the title was subdivided into different portions. There is no evidence to show whether at the sub division which resulted into title nos. Nairobi/Block 97/2347, Nairobi/Block 97/2348 and Nairobi/Block 97/2349 there was provision of access road serving all the owners of the above-referenced Plots. It is therefore clear that if there was to be an access road for the benefit of the Applicant, then the same would not come from the defendant/respondent who had nothing to do with the sub divisions which created the blockage the applicant finds himself in.
11. It is clear that an access road can properly be created affecting land all Parcels of land demarcated and subdivided without affecting the land of the defendant/respondent. If an access order was to be made affecting the defendant/respondent, it will amount to punishing her for the omissions of the person who sold land to the applicant as well as the owner of Plot No. Nairobi/Block 97/2348 who is not a



party to these proceedings. There is no evidence at all to brought to show that when the original owner of the land which became known as Nairobi/Block 97/2347 made provision for a road of access. If there was evidence that there was a road of access which was blocked by the defendant/respondent, then the issue would have been a different one altogether. This is not the position herein as the applicant is seeking an order of access which is different from an order for re-opening a blocked road. The Applicant is seeking an easement which is a burden on another's land. For the foregoing reasons, the application herein has no merits. The same is hereby dismissed with costs to the defendant/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT ON THIS 28 TH DAY OF APRIL 2022.

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MOGENI J

In the presence of

Mr. Wafula holding brief for Mr. Khaemba for the Plaintiff/Applicant

Mr. Shikanda holding brief for Osundwa for the 1st Defendant

No appearance for the 2nd Defendant

Vincent – Court Assistant

