



**Motachwa v Ogari (Environment & Land Case 11 of 2015)  
[2022] KEELC 92 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 92 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 11 OF 2015**

**JM ONYANGO, J**

**MAY 26, 2022**

**BETWEEN**

**JOHN KENNEDY MOTACHWA ..... PLAINTIFF**

**AND**

**WILBERT OGARI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff is the registered owner of all that parcel of land known as LR No WEST KITUTU/BOMATARA/4016 measuring approximately 0.027 Hectares while the Defendants own an adjoining piece of land known as LR NO WEST KITUTU/BOMATARA/3691 measuring approximately 50 feet by 80 feet. The Plaintiff filed suit against the Defendant claiming that before the transfer of land parcel number 3691 to the Defendant, there existed an easement measuring about 7 metres on the Defendant's land benefitting the Plaintiff's land. It was the Plaintiff's case that the Defendant had blocked the said easement or right of way thereby denying the Plaintiff the right to access his property.
2. The Plaintiff therefore claimed for:
  - a. An order of unlimited and unhindered access of the Plaintiff to his land known as WEST KITUTU/BOMATARA/4016 through the Defendant's parcel number WEST KITUTU/BOMATARA/3691.
  - b. An order of permanent injunction restraining the Defendant from erecting a boundary, constructing and/or blocking the right of way of the Plaintiff to his parcel of land known as WEST KITUTU/BOMATARA/4016
  - c. Any other order that this Court may deem just to grant
  - d. Costs of this suit.



3. Upon being served with the Plaint and Summons to enter appearance, the Defendant filed a Defence denying the Plaintiff's claim. In particular, he denied that he had blocked off any easement thus denying the Plaintiff access to his property and making LR No WEST KITUTU/BOMATARA/4016 completely landlocked and inaccessible. He further alleged that the Plaintiff also owns land parcel No. WEST KITUTU/BOMATARA/2917 which adjoins his land parcel no 4016 and that he has a road of access through parcel No 2917.
4. Since the parties were in agreement that the dispute between them revolved around the access road leading to the Plaintiff's land parcel number 4016 and whether the Defendant had interfered with the same, the court directed that the Land Registrar to visit land parcels number WEST KITUTU/BOMATARA/4016 and 3971 and open the access roads serving two parcels. The Land Registrar was required to file his report in court within 90 days.
5. The Land Registrar and County Surveyor visited the suit properties and filed their report together with a sketch plan and a copy of the Registry Index Map. The findings by the Surveyor were that parcel number 3691 was fully developed with a storey building and had a perimeter wall around it, while parcel 4016 had no buildings on it but was fenced with a stone wall on the lower side. The Surveyor also found that the road of access as provided in the Survey Map could not practically serve parcel 4016 and that the position where the Plaintiff alleged the road of access ought to be was already built up and there was a septic tank and a pit latrine constructed by the defendant.
6. It was the Surveyor's observation that the ground position did not correspond with the position on the Registry Index Map. He therefore concluded that the access road as provided in the Survey Map could not serve parcel 4016. The Surveyor was summoned to court to explain his report and he repeated the contents of his report.
7. After considering the Surveyor's report, the court was of the view that the same did not resolve the issue in dispute which was whether or not an easement or access exists over the defendant's land parcel number 3691 in favour of the Plaintiff's land parcel number 4016. The court therefore directed that the case proceeds to trial.

### **PLAINTIFF'S CASE**

8. The Plaintiff called Mr David Lemaiyan, the County Surveyor, Kisii County as his first witness. He told the court that he visited land parcels number WEST KITUTU/BOMATARA/4016 and 3691 in the presence of the Plaintiff and the defendant pursuant to a court order. He stated that he observed that parcel 3691 had a building on it with a perimeter wall round it, while parcel 4016 was fenced with a concrete wall but did not have any structures on it. He observed that there was a road of access on the upper side of parcel 3691. He testified that according to the map, the road of access is supposed to pass on the upper side of parcel 3691 and touch parcel 4016 but this was not possible as the road is about 19 metres away from parcel 4016.
9. Mr Lemaiyan explained that the measurements of the two parcels on the ground did not tally with those on the map as parcel 3691 measures 32.8m by 11.3m, while on the map it is supposed to measure 25m by 10m. On the other hand, parcel 4016 measures 30.5m by 14.4m while on the map it is supposed to measure 30m by 9m. He stated that he was not able to mark the road according to the map as it would not serve parcel 4016. He said that owing to an error during the process of sub-division, parcel 4016 was landlocked. He told the court that the only practical access for parcel 3691 was the one along the 14.4 metre line on parcel 3691.



10. Upon cross-examination, Mr. Lemaiyan stated that the Plaintiff also owns parcel No 2917 which borders parcel 4016 and he can access his parcels using the existing road that runs along parcel 2917. He produced his report as plaintiff's exhibit 1.
11. The Plaintiff testified as PW2. He told the court that he did not have access to his plot as the Defendant had blocked his access by constructing toilets and septic tank. He stated that he bought his land after the Defendant and the Defendant constructed structures on his parcel when the Plaintiff was out of the country. He stated that he was in agreement with the County Surveyor's report that the position on the ground differed with what was provided in the map.

## **DEFENDANT'S CASE**

12. . Wilbert Ogari, the Defendant testified as the only Defence witness. He relied on his witness statement dated 30.8.2021 and produced the documents in his Lists and Bundles of Documents dated 25.3.2015 and 23.5.2019 as his exhibits. He stated that since he bought his land, there had never been access road through his land.
13. Upon cross examination, he stated that the Plaintiff's parcels No 4016 and 2917 border his land parcel No 3691. He stated that he had bought his land from the brother of the person who sold land to the Plaintiff. He told the court that after he bought his land the vendor approached him to buy an additional portion of land which he did but his title deed had not been adjusted. He denied that there was an access road on his land and said that that the Plaintiff could access his parcel No 4016 through the access road used to access his other parcel No 2917. He confirmed that the Surveyor's report had not recommended that a road be opened on his parcel of land.
14. After the close of the Defendant's case, both parties were directed to file their submissions and both parties complied by filing their submissions.

## **ANALYSIS AND DEERMINATION**

15. The singular issue for determination is whether an easement exists on the Defendant's land parcel no WEST KITUTU/BOMATARA/361 leading to the Plaintiff's land parcel No WEST KITUTU/BOMATARA/4016 and if so whether the Plaintiff is entitled to the reliefs sought.
16. 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.”

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

S 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”

18. Further 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:

S 28. “ 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.”

19. Sections 98 to 100 further provides 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.



20. 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 neighbour without participation in the profit of that other land. the tenement to which it is attached it he 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.”

21. In the instant case, even though the Plaintiff claims that he is entitled to an easement in the nature of an access road over the Defendant’s land, it is clear that the said access road does not exist on the ground. He therefore cannot prove that he has used the road peaceably, openly as of right, and without interruption for twenty years as contemplated under the provisions of Section 32 of the Limitation of the *Limitation of Action Act*, in order for it to be created.
22. According to the evidence of the County Surveyor who testified as PW1, the map shows that the road of access was supposed to pass on the upper side of parcel 3691 and touch parcel 4016 but this was not possible as the road is about 19 metres away from parcel 4016 and it would therefore not be able to serve parcel 4016. This means that even if the said road was created, it would not serve the intended purpose. He admitted that owing to an error that occurred during adjudication, the measurements for the Plaintiff’s parcel No 4016 and the Defendant’s parcel No 3691 were larger on the ground than they were on the map.
23. He also explained that parcel No 4016 is fully developed and both parcels have perimeter walls round them which make it impossible to open an access road across parcel No 3691 to parcel 4016. He further stated that even though parcel 4016 is landlocked, the Plaintiff is able to access it as he owns the adjoining parcel No 2917.
24. From the foregoing, it is my finding that the Plaintiff has failed to prove his case on a balance of probabilities. The same is therefore dismissed.
25. In view of the circumstances of this case, it is in the interest of justice that each party bears their own costs.

**Dated, signed and delivered at Kisii this 26<sup>th</sup> day of May, 2022.**

**J.M ONYANGO**

**JUDGE**

