**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**ELC NO. 619 OF 2010**

**ESTHER NYAKIO KAIRU ……..PLAINTIFF/APPLICANT**

**V E R S U S**

**VIOLET NDEHI ……1ST DEFENDANT/RESPONDENT**

**GITHIRI NJONJO ……..……..2ND DEFENDANT/RESPONDENT**

**R U L I N G**

It would appear not to be in dispute that one Mr. J. F. Dyer owned land parcel No. 4885/11, South of Limuru Township in Kiambu out of which he sold to the Plaintiff 6.274 Hectares comprised in L.R. No. 4885/53 in 1965 and also sold 8.111 Hectares comprised in L.R. No. 4885/55 to the deceased Benson Njonjo Kiarie. The two bought parcels were adjacent to each other. Parcel L.R. No. 4885/55 is between the Nakuru/Nairobi Highway and L.R. No. 4885/53.

The Plaintiff's case is that at the time she bought her parcel she realized that there was no access to the road. She raised the issue with Dyer who in turn consulted with the deceased following which it was agreed that she (the Plaintiff) purchases a strip of land measuring 642ft x 30ft along the deceased's parcel to the road. She was to use that as her access road from and to the road. She was to pay for this in the sum of KShs. 225/40. She paid the amount to Dyer who forwarded it to the deceased. It was further agreed that the right of way would be on condition that she constructs, at her expense, both the road and a wire fence to protect the remainder of the property of the deceased. The Plaintiff complied and has used the road since 1965 until now when the Defendants, as beneficiaries of the estate of the deceased, have threatened to block or close it. She states that the Defendants are in the process of subdividing the deceased's parcel and now lay claim to the road on the basis that it is part of the deceased's land. When the Plaintiff received the Defendants' advocates demand letter ("ENK5") dated 22nd November 2010, she filed this case for a permanent injunction and declaration that this was her permanent right of way.

The letter in question indicated as follows:-

*"We act duly instructed by Mrs. Violet Ndehi the administratix of the estate of the estate of Benson Njonjo Kiarie deceased.*
*The above parcel of land requires partitioning and fencing by its various beneficiaries. You have lately been trespassing thereon and causing waste thereon. You have no right whatsoever to enter the land. The beneficiaries now wish to develop their properties and will be surveying and fencing.*
*NOTICE is hereby given that you cease trespass and damage to the property within TEN DAYS of the date hereof otherwise legal steps will be taken against you and you will be liable for damages due to loss*

*occasioned by your aforesaid unlawful acts."*

With the suit was filed an application under Order 39 rules 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for a temporary injunction to restrain the Defendants by themselves, their servants, employees or agents from blocking, closing, demarcating, subdividing, transferring, alienating, dealing or in any way howsoever from limiting stopping or interfering with the Plaintiff/Applicants' right of use of the access road and enjoyment of the access road pending the hearing and determination of the suit.

The replying affidavit by the 1st Defendant shows that she is the only administratix of the estate of the deceased as shown in annextures "A1" and "A2". If that is the case, the suit against the 2nd Defendant, who has no letters of administration, would be incompetent under sections 79 and 82 of the Law of Succession Act (Cap. 160).

Kenya Power & Lighting Company Limited has a high voltage 132 KV electricity power pylons passing through here. The 1st Defendant swore that they run across both the Plaintiff's and the deceased's lands whereas the Plaintiff states they cut only through the deceased's land. The Plaintiff states that by the time Kenya Power came into the picture to construct (between 1997 and 2005) she already had the easement and was in peaceful use of the road of access, and therefore that the company's easement was subject to this. It is not in dispute that the easement to Kenya Power is registered ("F") and there is a Deed Plan. The Plaintiff, relying on section 32(1) of the Limitations of Actions Act (Cap. 22), contends that she has peacefully enjoyed the easement through the deceased's land for over 40 years without interruption and has consequently acquired an indefeasible and absolute claim to the access road.

The Plaintiff questioned the easement to Kenya Power on basis that it was purportedly executed by the deceased's wife two months after her death. At this time of the case, however, there is a duly registered easement in favour of Kenya Power which registration gives it indefeasible claim and the company may have to be made a party if the easement has to be attacked by the Plaintiff.

The other issue raised by the 1st Defendant is that the Plaintiff owns land parcel No. Limuru/Rironi/208 through which she can access the Nakuru/Nairobi Highway without having to go through the deceased's land. The Plaintiff in the supplementary affidavit admitted owning this parcel and the fact that it can be used to get to the Highway as stated, but deponed that this fact was known all along by the parties by the time Dyer was providing the road of access through the deceased's land. She stated as follows in paragraph 9:-

*"……*
*……The fact that the two parcels of land are registered under different Acts of Parliament would make it even difficulty to curve the access road from Limuru/Rironi/208."*

I would not think that the different registration regime of the Plaintiff's the parcels would in any way impede the passing of a road of access in either. But the more serious point is that, the Plaintiff cannot argue that there exists no other legal way of access from her land to the main road given that she can pass through her other land to reach the road. Her counsel Mr. Ngunjiri sought to rely on the decision of the then Court of Appeal for East Africa in **Barclays Bank D.C.O –Vs- Patel [1990] EA 88 in which Sir Charles Newbold, P. at p.91** stated as follows:-

*"Under common law of England, where a landowner grants part of his land to a grantee and no possible way of entry to one of those parts exists, other than a way based upon the permission of a neighbouring owner or upon trespass, then a way of necessity arises by implication of the law over the other part ……"*

The Plaintiff must, however, show that there was no other possible access to the main road than through the deceased's land. Counsel further relied on the Court of Appeal decision in **Kamau – Vs- Kamau [1984] KLR 539** in **w**hich it was held that, at equity, if there is an agreement to grant an easement for valuable consideration, whether it is under seal or not, equity considers it as granted between the parties

and persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. In the instant case, however, parties are not at one that there was agreement between them to have an access road through the deceased's land. The Plaintiff says there was such agreement, but the 1st Defendant says there wasn't. There are letters "ENK4" and "ENK5" on which the Plaintiff sought to rely on the issue of agreement. However, the agreements of sale between the said Dyer and the Plaintiff and the Deceased were not annexed. Letter "ENK4" appeared to want to amend such agreement. The two letters do not appear to conclude the request to amend to include the road of access. "ENK8" is the alleged calculation of the value of the road of access. It is KShs. 224.40. There is no evidence the amount was accepted to be valuable consideration, or that it was paid. The position of the 1st Defendant is that there was no agreement to have the Plaintiff pass through the deceased's land to reach the main road.

The principles governing the grant of injunction have been settled since the decision in **Giella –Vs-Cassman Brown & Co. Ltd [1973] EA 358**. The applicant has to show he has a *prima facie* case with a probability of success; that he may suffer irreparable damage if injunction is not granted; and, in case of doubt, the court should decide the application on the balance of convenience. My preliminary view is that the Plaintiff has not demonstrated a *prima facie* case. I do not think that, given that the Plaintiff has an alternative access to the main road, she can say she will suffer irreparable damage if injunction is not granted. I find that the balance of convenience tilts in favour of refusing the application.

In conclusion, the application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI**
**THIS 30TH DAY OF MARCH 2011**

**A. O. MUCHELULE**
**J U D G E**