



**Nteere v Kongoni Camp Limited (Environment & Land Case
34 of 2021) [2022] KEELC 14891 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14891 (KLR)

(FORMERLY NYERI ELC CASE NO. 134 OF 2016)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND CASE 34 OF 2021

AK BOR, J

OCTOBER 13, 2022

BETWEEN

COL (RTD) LAWRENCE NTEERE PLAINTIFF

AND

KONGONI CAMP LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff who is the Chairman of Samat Estate Residents Association, created in line with the “nyumba kumi” initiative, filed this suit on his own behalf and that of the members of that Estate and its neighbours. The Defendant is the proprietor of Kongoni Restaurant which owns land reference number (L.R. No.) 12272, which it purchased in 2008 or thereabouts. The Plaintiff’s claim is that at the time they purchased their properties in the area, a public access road existed at the tail end of the area which they have always used to access their properties since 1936. He claimed that there was no other access road to their homes.
2. On April 27, 2016, the Defendant wrote to the Plaintiff and members of the Estate informing them that it intended to close the public road in the area. The Plaintiff averred that attempts to have the matter resolved amicably failed and the Defendant issued a notice to close the road. Before the 7 days’ notice given in the Defendant’s notice expired, the Defendant blocked the road on June 13, 2016 rendering the Plaintiff and the other neighbours landlocked and marooned with the risk of their properties being devalued and the businesses in the area facing closure with schools being forced to shut down.
3. The Plaintiff claimed that the Defendant had closed the public access road without due process and without involving the relevant government agencies and the National Land Commission (NLC). He urged that the closure of the road was done without regard to the plight of the Plaintiff and the entire neighborhood especially the sick. The Plaintiff averred that the public road was the only access to their



homes and Hampton Schools in the neighborhood and added that the children had been unlawfully denied access to school. He averred that when they first occupied their properties they knew the road was the only access to their homes and that blocking or closing it was in bad faith, oppressive and barbaric. Further, that the Plaintiff and his neighbours could not transport their agricultural produce especially milk to Nanyuki Town and that the customers of Leisure Gardens Restaurant could not access the restaurant thereby crippling their business.

4. The Plaintiff averred that despite protest and appeals, the Defendant refused to re-open the public access road and that unless it was compelled by the court the Plaintiff and his neighbors would remain landlocked while being denied the right to enjoy a public road to access their properties. Additionally, that the children would have no road to access school and the sick would not be able to access medication and treatment.
5. In the plaint filed in court on June 20, 2015, the Plaintiff sought a declaration that the road situated at the tail end of L.R. No. 12272 is a public road and an easement meant to be enjoyed by the members of Samat Estate and its neighbourhood. He sought a mandatory injunction to compel the Defendant to open the access road at the tail end of its land L.R. No. 12272 and a permanent injunction to restrain the Defendant from blocking the road. He also sought costs of the suit.
6. The Defendant denied the Plaintiff's claim in its defence filed in court on July 22, 2016. It averred that its land L.R. No. 12272 was free from any encumbrances and the Plaintiff and his neighbours were trespassers who were committing waste on its land. It stated that the trespass began when one of them blocked their unofficial access which initially was on L.R. No. 12271, which was subdivided and sold to various people. It averred that it had always resisted the trespass while pointing out that the official road of access to Samat Estate was in existence but after the subdivision of the Estate one of the resultant parcels was developed in a manner that blocked the official road of access. That recently part of the unofficial road got diverted slightly into the Defendant's land after the apportionment and sale of L.R. No. 12271.
7. The Defendant wrote the letter to the Plaintiff and his neighbours on April 27, 2016 but denied that it was required under any law to inform any government agency and NLC when stopping the trespass on its land. The Defendant admitted giving notice and averred that it rightly closed the trespass route on 17/6/2016 because the Plaintiff with the help of some rogue politicians graded the unofficial road to justify its existence prompting the Defendant to close it the following day. The Defendant maintained that the Plaintiff and his neighbours were their own enemies since one of them had blocked the official road of access. It urged the court to dismiss the suit.
8. The Plaintiff gave evidence on 22/6/2022. He stated that the Defendant was the proprietor of Kongoni Hotel and Restaurant and owned L.R. No. 12272. That the Defendant purchased its land in 2008 with full knowledge of the existence of the public access road on it. He added that in all the survey maps from 1941 to date, a public access road existed which they have been using. Further, that they purchased their respective parcels of land with the full knowledge of the existence of a public access road and that there was no other road to access their homes.
9. On April 27, 2016 they received a letter from the Defendant informing them that it intended to close the only public road in the area. They tried to resolve the matter amicably but the Defendant remained adamant. On 9/6/2016 the Defendant issued a notice indicating that it intended to close the public access road. The Defendant went ahead and blocked the road on 13/6/2016 blocking and marooning them. He averred that that road was the only means of access to their homes and the surrounding properties.



10. He produced survey plan number F.R. No. 136/173 showing the location of the Defendant's land and F.R. No. 47/186 showing the bigger parcels of land before subdivision, which is dated April 18, 1941. He produced photographs showing the blocked road as well as the notices.
11. On cross-examination, Colonel Nteere stated that his land was part of L.R. No. 5103/5 and conceded that the road was not shown on the map dated 18/4/1941 which he had produced. His parcel of land was L.R. No. 12273. He added that there was an access road measuring 120 feet or 36.58 meters. He also conceded that the road on F.R. No. 136/178 did not go to his land. He conceded that the road which they used to access their properties passed through the Defendant's land through beacon A1. He stated that there was no other road to his property except the one they were using and that he had lived on his property since 1990.
12. Hellen Wanjiku Kurutu gave evidence in support of the Plaintiff's case. She stated that the road in dispute was a public road and the only road which she uses to access her home since 1936. She told the court that her property known as L.R. No. 5103/21 had always been connected to the Nanyuki-Meru Highway through the public road in dispute in this case. She stated that she was the oldest settler and well acquainted with the facts of this case.
13. She also owns L.R. No. 12271 which borders the Defendant's land. She explained that from the Nanyuki Meru highway and above beacon A4, B8, B7, B6 B5 to A1, she created the road during the subdivision of the land and surrendered that portion to the State and it became a public road. She added that between the stream or valley and Samat Estate and her home on L.R. No. 5103/21 was the same public road which she surrendered to the State to provide an access or connection from Samat Estate, her home and the highway through beacon A1 which is the disputed area. She denied that she had blocked any part of the public road as the Defendant contended. She stated that from the survey map of 1941, the road in dispute is captured and is in use to date. She maintained that the road had existed in the area since 1936 and was reflected and confirmed in the 1969 map as revised in 1997.
14. She added that on F.R. No. 107/3 which was printed in 1997 the road was captured in red above the point called Sawmill and the same terminated at her home on L.R. No. 5103/21 and Samat Estate. She reiterated that from the highway to her home and to Samat Estate there was no other diversion or an alternative access road except the road which is the subject matter of this dispute. She told the court that her properties L.R. No. 12271 and 5103/21 were subdivided by a surveyor known as Karuga who made provision for the road to the main highway. To the best of her knowledge there had been no negotiation to divert the access road between the Defendant and anyone known to them. She denied hiring any goons and maintained that the photographs confirmed that the Defendant blocked the disputed road and caused them to be marooned.
15. Regarding the survey report which the Defendant relied on, she averred that it was done without the input or involvement of the residents of Samat Estate or herself and that it did not provide the correct position or the historical background of the road. She added that there was no other road of access between her home and Samat Estate to the Meru Nanyuki Highway. In her view the Google map marked EA -2 had settled the matter and proved that there was only one access road from Nanyuki Meru Road to Samat Estate and her home on L.R. No. 5103/21.
16. On cross-examination, she confirmed that her land L.R. No. 12271 was near the main road and had an access to the main road. She also confirmed that Colonel Nteere's land was not shown on the map he tendered in evidence. She shared a boundary with the Defendant and that their plots were adjacent to one another. Leisure Gardens is next to her property. She stated that the road to the Plaintiff's land passed through point A1 and is the road goes to Leisure Gardens. She stated that there was a road passing through L.R. No. 12271 which she created when her surveyor subdivided her land. She bought



- the land in 2007 and subdivided it into plots. She clarified that that land was subdivided in 2006 but before that there was a way which they were using. She maintained that she ensured that there was an access road for the plots which she created out of L.R. No. 12271 to enable them access their homes. She confirmed that beacon A1 was on the border between her land and that of the Defendant and that moving from point A1 to L.R. No. 5103/6 was private land.
17. She clarified that beacon A4 linked to A1 was not where the road is, that the road was inside her plot. That during the subdivision of her land she ensured that there was an access to the plots. She stated that they used to drive through A1 and that the road has been there since 1936. That when the Defendant bought its property the road was in existence and passed between her land and the Defendant's land.
 18. Major (Retired) Waweru Njoroge gave evidence in support of the Plaintiff's case. He resides in Samat Estate and is the owner of L.R. No. 12326/7 which he purchased in June 1990. He stated that when he purchased his property, the public road in dispute was in the same place and had never been closed until 13/06/2016 when the Defendant purported to close it. He told the court that the only road which they use to access the main highway was the road in dispute. He added that the deed plan for his property confirmed that there is no other road connecting Samat Estate to the highway. Further, that the google map provided by the Defendant on 8/6/2016 confirmed that there was only one road connecting Samat Estate and its environs which is the subject matter of this dispute. He stated that the road in dispute passes above beacon B5 to B8 through A1 which is in dispute.
 19. Major Njoroge averred that the road between beacon A1 and the stream passes through Leisure Garden Restaurant and was surrendered by the owner to the State to be maintained as a public road. He explained that the stream is on a depression between beacon A1 and Samat Estate and that from the stream the road connects Samat Estate and the home of Hellen Kurutu. To the best of his knowledge, the road from the stream to Samat Estate was surrendered by Hellen Kurutu to the State to be maintained as such.
 20. He stated that on the map his home is marked L.R. No. 12326/7 and had no road passing through it. He was aware that during the construction of Samat Estate the Chairman of the Central Authority, which was a government agency, wrote the letter dated 28/4/1976 confirming that the disputed road would be the only access road connecting Samat Estate and the Nanyuki Meru highway. He maintained that the only access to the highway from Samat Estate was the disputed road which in his view was a public road.
 21. On cross-examination, he confirmed that his land was not shown on F.R. No. 136/178. He stated that there was an existing road which connected his property to A1 and the main Nanyuki Highway. B5 to B8 was the boundary between the Defendant's land and Mrs. Kurutu's land. He added that the land after A1 which is L.R. No. 5103/6 was private land. He conceded that there was no road shown on the map passing through L.R. No. 5103/6 but maintained that the physical road was there.
 22. Edwin Anderson gave evidence for the defence. He stated that he was one of the Defendant's directors and was authorised to plead in this case. The Defendant held a leasehold interest from the Government of Kenya over L. R. No. 12272 for a term of 99 years with effect from 1975. This land lies between L.R. No. 12273 and 12271 which all originally formed part of L.R. No. 5103/05 as shown on F.R. No. 47/186 dated 9/04/1941. He stated that there was no indication of any public road on F.R. No. 47/186 contrary to the Plaintiff's allegations that such a road existed since the 1930s.
 23. The Defendant purchased the land in 2007 and the transfer was registered on December 10, 2007. Before purchasing the land, the Defendant carried out thorough due diligence on the title and engaged a surveyor who ascertained the boundary beacons of the land as A1, A2, A3 and A4 which were clearly marked in all the maps including F.R. No. 136/173 which the Plaintiff produced. He maintained that



- the Defendant's property was not and had never been encumbered by any easement known in law as could be seen from the title deed. He stated that the Plaintiff and his group were simply trespassers who were trying to justify their act of trespass on private property by all means.
24. He stated that Hellen Kurutu previously owned L.R. No. 12271 bordering the Defendant's property which she subdivided. Mrs. Kurutu told the court that she created the road during subdivision and surrendered that portion to the State which became a public road. He contended that it was therefore clear that if there is any public road then it is the result of Hellen Kurutu's subdivision of L.R. No. 12271 but it never existed prior to the subdivision as the Plaintiff claimed.
 25. That in the subdivision of L.R. No. 12271 through F.R. No. 528/96 produced by the Plaintiff, the corner beacons A4 and A1 were clearly marked and between them B8, B7, B6 and B5 were also clearly marked. Part of the road created during subdivision was clearly marked after B7 all the way to A1 and the road terminated at the boundary of L.R. No. 12271 and L.R. No. 5103/6 with the extent of the road being marked by the beacons A1 and NK 44. He noted that between B5 and A1 there was a straight line which is the boundary between L.R. No. 12271 and L.R. No. 12272. That if it were true as the Plaintiff contended that there was a diversion between B5 and A1 into the Defendant's land which in any case does not appear in any of the maps, then it would create an island at the corner of A1 requiring part of the Defendant's property to be hived off.
 26. Regarding the contention by Hellen Kurutu that she surrendered the road reserve making a public road on L.R. No. 12271 all the way to L.R. No. 5103/21, Mr. Anderson stated that this was virtually impossible because such a road would have to pass through L.R. No. 5103 /6 which belongs to a third party who is not party to this suit.
 27. He averred that there was an official road of access to Samat Estate which has been unused all through. Initially Samat Estate was one property and upon subdivision an access road was created however the current owners blocked the access road that lead to the official road. He maintained that if the residents of Samat Estate wanted to use the road created by Hellen Kurutu during the subdivision of L.R. No. 12271 they should not divert to the Defendant's property because Mrs. Kurutu could not create a road on the Defendant's land. In his view, the road should continue from where it terminated as marked by beacons A1 and NK. 44 and join the unsurveyed road traversing L.R. No. 5103/6 if its owner agreed to that.
 28. He stated that initially there was an unofficial dirt road being used but after Hellen Kurutu subdivided and sold plots on L.R. No. 12271, it was blocked resulting in the diversion of the unofficial road into the Defendant's land. He stated that the Defendant was opposed to the diversion but in the spirit of good neighborliness exercised patience as the Plaintiff and his group had always proposed to move to the official road of access upon rehabilitating it. On realising that the Plaintiff and his group had no intention to cease the trespass, the Defendant gave 7 days' notice of its intention to fence through its advocate which was to lapse on 16/6/2016.
 29. Mr. Anderson claimed that the Plaintiff illegally moved into the Defendant's land on 12/6/2016 with graders from the County Government of Meru and with the help of the area Member of the County Assembly (MCA), graded the unofficial road which passes through the Defendant's land. As a result, and in exercise of its constitutional right to property, the Defendant sought to secure its property by erecting a fence on its land on 13/6/2016. The Plaintiff and his group with the help of the area MCA and the Member of Parliament (MP) for Laikipia East hired goons who destroyed the fence prompting the Defendant to report to the police in Nanyuki. He relied on the photographs which he produced. The police at Nanyuki referred him to the Meru Police since the property falls within Meru County.



30. Mr. Anderson maintained that the Defendant was a victim of harassment by the Plaintiff and his group because they sought the intervention of the MP for Laikipia East yet the property is not in his constituency. That before the demolition the MP for Laikipia East had suggested that parties enter into an agreement in which the Plaintiff was to cease trespass and move to the official road. That suggestion was resisted by the Plaintiff and his group. He reported the matter to the police at Meru who advised him to put back the fence to secure the Defendant's property, which they did. He maintained that even if the Plaintiff's assertion that there was no road of access apart from the trespass through the Defendant's land were true, their recourse was not to forcibly and illegally grab the Defendant's land.
31. Mr. Anderson produced F.R. No. 136/178 as well as the photographs showing a group of people near the fence erected on the land. On cross examination, Mr. Anderson confirmed that he purchased the land in 2007 and that it touches the Nanyuki Meru Road on the west side. He stated that the road reserve on F.R. No. 136/173 was the Meru Nanyuki Road. He explained that there used to be an entrance on the other side of the Defendant's land before it was fenced while contending that the access was between A4 and B7 and not A1. He conceded that the road passed through his land and existed on the date he testified. He stated that there was a road which Mrs. Kurutu created on her land L.R. No. 12271 but that it crosses through the Defendant's land and was not on the boundary of A1.
32. He clarified that at point A1 the road proceeds through L.R. No. 5103/6 to Leisure Garden before going to Mrs. Kurutu's home and Samat Estate. He clarified to the court that Samat Estate was not shown on F.R. 136/178. He was not aware of another road which goes to Samat Estate but reiterated that the road on the land was not on the map drawn in 1976.
33. He confirmed that he found the road on the land in 2007 and engaged a surveyor who showed him the beacons for the Defendant's land. He instructed a private surveyor and later on involved a Government surveyor from Meru. He did not involve the Land Registrar from Meru. The Surveyor was to show him the beacons and boundaries for his land. When he asked the surveyor about the road the surveyor explained that it was normal for people to pass through your land if you did not have a fence. The surveyor advised him to inform his neighbours that he was going to fence his land and that they needed to find an alternative route.
34. He stated that he heard Mrs. Kurutu telling the court that she created a road on her land and that it connects at A1. He disputed this on the basis that the road cuts through his land L.R. No. 12272. He did not know when Mrs. Kurutu created the road but did inform her that the road was passing through the Defendant's land. He closed the road because it was within his land and he had not allowed any road to pass through his land. He did not agree that part of his land was an access road.
35. He clarified that the court had given injunctive orders on the road that is why it existed to date. He reiterated that the Plaintiff and the neighbours did not have to pass through his land and that they could go straight on without having to pass through his land.
36. Festus Safri Galgidele, a Land Surveyor II, based in Laikipia District under the Ministry of lands testified for the defence. Sometime in May, 2016 he visited L.R. No. 12272 which is the Defendant's land to establish the stability of the beacons and determine their accurate positioning in accordance with survey plan F.R. No. 136/173. This is the survey plan used in the survey of L.R. No. 12272. On the ground he found that all corner beacons being A1, A2, A3 and A4 were firm and stable in their correct positions and had not been interfered with. He also noted that online beacons B8, B7, B6, B5 and C8 were all well positioned and fencing had not encroached on the neighbouring parcel of land, which is L.R. No. 12271.



37. He claimed that based on the records, there was no public road that traversed the Defendant's land anywhere and there had never been one. While undertaking the exercise, he noted that L.R. No. 12271 had been subdivided by the owner creating 23 new parcels which all had access. He stated that it was clear that any public road which resulted from Hellen Kurutu's subdivision of L.R. No 12271 never existed as she claimed. However, he noted on the ground that close to beacon A1, there was an earthen road which had encroached on L.R No.12272. He determined that the earthen road was not an official road and it crosses L.R. No. 12272 just before beacon A1 and heads to parcel No. 5103/6.
38. According to him, the boundary between L.R. No. 12272 and L.R. No. 12271 was clearly defined by beacons A4 through online beacons B8, B7, B6 and B5 up to corner beacon B1. In undertaking the exercise, he examined F.R. numbers 136/173, 528/96, 47/186, 200/29 and 371/33. He combined these survey plans into one sheet to give a complete picture then prepared his findings and presented them through the letter dated 16/5/2016 which was filed as part of the documents in this suit. He had seen a report dated September 19, 2016 titled "Confirmation of Boundary beacons for L.R. No. 12272" prepared by Mr. T. M. Limiri from the District Survey Meru County and the findings of that report mirrored his own findings. He produced his reported dated 16/5/2016.
39. On cross examination he confirmed that he is a Government surveyor based in Nanyuki and that the land in dispute was in Meru. He clarified that a surveyor can work anywhere in Kenya. He used the main highway when he went to confirm the beacons and accessed the land through the Nanyuki- Meru Road. He stated that there was an access road passing through L.R. No. 12271 but there was no road passing through A4 to A1. He explained that there was an encroachment between A1 and B5 at the point where the fenced boundary line reaches near A1. His definition of a road was that it should be defined by coordinates and the beacons shown on the survey plan. According to him, the illegal road passes through L.R. No. 12272 and the encroachment passes between A1 and B5. He did not establish how long the encroachment had been in place.
40. Upon conclusion of the hearing, parties filed submissions which the court has considered. The Plaintiff submitted that there was no dispute that L.R. No. 12272 belonged to the Defendant and that a road emanating from Nanyuki-Meru Highway passed through this land between beacons B5 and A1 and that that was the only road in the area to Samat Estate where the Plaintiff lives as well as the other witnesses who testified in support of the Plaintiff's claim. Further, that same road connects Leisure Gardens on L.R. No. 5103/6.
41. The Plaintiff relied on the evidence of Hellen Kurutu that she made provision for a road on her land and surrendered it to the Government of Kenya to maintain the public road access which had been in existence since 1936 and that the Defendant should do the same to ensure that the inland neighbours and homes including Samat Estate were not landlocked and marooned without any access to the Nanyuki- Meru Highway. The Plaintiff submitted that there was no other road for him to access his home and maintained that the road had been in use for over 12 years and that it was in place when the Defendant purchased its land in 2007. The Plaintiff submitted that the survey report filed by the Defendant confirmed the existence of the road between beacon B5 and A1 on the F/R produced by the Defendant.
42. The Plaintiff submitted that the Defendant failed to prove that there was another road apart from the one in dispute to access Samat Estate and the general neighbourhood. He added that the road in dispute had become a public road and should be curved out and surrendered to the State under Section 28 (c) of the [Land Registration Act](#) which preserves rights of way, rights of water and profits subsisting at the time of first registration under the Act. He argued that under that section rights do not need to be noted on the register or on the title because they are overriding rights created by operation of the law.



43. The Plaintiff relied on the decisions in *Simiyu Mukholosi v John Khaemba* [2013] eKLR and *Esther Mutenyo Egesa v Danel Nyaga & Patrick Mabuka Wanjala* [2015] eKLR and urged the court to be persuaded by the findings in those cases and make a similar finding.
44. The Plaintiff submitted that Section 145 (5) of the *Land Act* recognised communal rights of way while Section 140 of the Act provided the right to an owner of landlocked land to apply to court for an access order granting reasonable access to any subservient or adjacent land as was the case here. Further, that Section 140 (4) gives the factors which the court should consider in determining whether or not to grant an access order. The Plaintiff submitted that that section empowered this court to grant the reliefs he seeks.
45. The Plaintiff submitted that the Defendant conceded that the road in dispute was in existence when it purchased the land and that Hellen Kurutu had made provision on L.R. No. 12271 and the Defendant should make similar provision. He argued that the issue of encumbrance was baseless in light of Section 28(c) of the *Land Registration Act*.
46. The Plaintiff submitted that his right of access or easement had not been extinguished and the court should grant it while relying on *Eastern Produce Kenya Limited v Chepsire (Savani) Farmers' Co-operative Society Limited* [2017] eKLR. The Plaintiff asked the court to go by the findings of Lady Justice Waithaka in her ruling on the interlocutory application in this suit.
47. The Plaintiff contended that the procedure for closing the disputed road which had been in existence since the 1930s had not been followed since the Meru Land Registrar, District Surveyor, Physical Planning Officer and NLC were not involved. Further, that there was no public participation to ascertain the inconvenience or hardship which the Plaintiff and the neighbourhood would suffer if the road was blocked. The Plaintiff maintained that the Defendant should have sought the assistance of the relevant government agencies before purporting to block the only access road in the area. The Plaintiff argued that the Defendant took a short cut when he hired the surveyor who testified in his favour and contended that the surveyor misled the court in light of Section 28(c) of the *Land Registration Act*.
48. The Plaintiff submitted that the definition of a public road under Section 2 of the *Public Road and Roads of Access Act* supported his claim because the disputed road had been in existence since the 1930s and had become a public road of access to the neighbourhood. Further, the Plaintiff submitted that under Section 9 of the *Public Roads and Roads of Access Act* the road in dispute should be registered as an access road to Samat Estate and the neighbourhood and that it should be captured in the survey map for the area.
49. The Plaintiff submitted that he had proved his case to the standard required and that the court should grant the orders he seeks in the plaint. He submitted that his case was supported by Section 28 (c) of the *Land Registration Act* as well as Sections 140, 141 and 143 (5) of the *Land Act*.
50. On its part, the Defendant submitted that the Plaintiff's case was that a public road exists cutting through its land L.R. No. 12272 leading to the Plaintiff's property through L.R. No. 5103/6. He submitted that none of the Plaintiff's witnesses were able to indicate their property vis- a- vis the Defendant's property on any map and the only property shown to the court was L.R. No. 5103/6 belonging to Leisure Gardens which is not a party to this suit. The Defendant submitted that the Plaintiff had failed to establish his locus standi in this case and urged that the suit should be dismissed at this stage.
51. It contended that Sections 98 (1) and Section 143 (1) of the *Land Act* which the Plaintiff based his claim on did not provide any relief to the Plaintiff and that Section 143 took away the jurisdiction of the court and gave NLC the discretion to create a right of way, which it urged had not been done in



- this case. The Defendant maintained that there was no evidence that it ever created any easement in the prescribed form nor did the previous owner of the land as envisaged by Section 98 (1) of the *Land Act*.
52. Further, that under Section 144, a public right of way could only be created for recreational activities or other prescribed activities permitted in a designated area for public purposes.
 53. The Defendant contended that it became obvious during the hearing that the disputed road was created after Hellen Kurutu subdivided her land L.R. No. 12271 and created access roads within it allowing persons to pass through the resultant subdivisions from the Nanyuki- Meru Road. That in her evidence, Hellen Kurutu told the court she bought L.R. No. 12271 in 2006 and subdivided it and that the road passing through point A1 was created in 2006 which was after the subdivision, which means that the road did not exist before then. The Defendant asked the court to dismiss the suit.
 54. The issues for determination in this dispute are whether the road situated at the tail end of L.R. No. 12272 is a public road and an easement meant to be enjoyed by the members of Samat Estate and its neighbourhood; and whether the court should grant a mandatory injunction to compel the Defendant to open the access road at the tail end of its land L.R. No. 12272 as well as a permanent injunction to restrain the Defendant from blocking that road.
 55. The Plaintiff contended that part of the Defendant's land had been in use as an access road since 1936 and that it had therefore acquired the nature of an easement for which he seeks a declaration to that effect. Apart from making statements that the road in dispute had been in existence since 1936, there was no evidence tendered to prove this fact. If this were the case, then that road would have been incorporated in all the survey plans prepared after 1936. F/R No. 136/173 which was prepared in 1976 does not show any such road. The surveyor who testified confirmed that the survey records did not show that there was a public road which traversed the Defendant's land. Additionally, it was his evidence that for a road to exist it must be defined by coordinates and the beacons shown on the survey plan. The survey plans tendered in evidence do not show the existence of any road.
 56. It would have been helpful if the Plaintiff had provided a map or sketch showing the location of his land and Samat Estate in relation to the Defendant's land for the court to appreciate the nature of the Plaintiff's claim to an easement over the Defendant's land.
 57. The court understood the Plaintiff to be arguing that since Mrs. Hellen Kurutu surrendered part of her land for use as a road when she subdivided L.R. No. 12271, then the Defendant should do likewise. The testimony of Hellen Kurutu was contradictory. On the one hand she claimed that she had surrendered part of her land L.R. No. 12271 to be used as an access road to the Highway when she subdivided her land and on the other hand she argued that the only access road to her home and the neighbourhood was through the Defendant's land. The surveyor who gave evidence confirmed that there was no public road resulting from Hellen Kurutu's subdivision of L.R. No 12271 as she claimed.
 58. F/R No. 47/186 for L.R. Nos 5103/5, 5103/6 and 5103/3 does not have any road for access to those parcels of land. F/R No. 136/173 on the subdivision of L.R. No. 5103/5 to create L.R. No. 12271, 12272 and 12273 prepared in 1976 does not any road passing through those plots which would be the access to Samat Estate and the area. When a surveyor undertakes subdivision of land, it is expected that that surveyor will make provision for access to the resultant portions. It is not clear why this was not done for Samat Estate and the other surrounding plots.
 59. There could be another road which the Plaintiff and the residents of Samat Estate can use to access their properties. The Defendant pleaded in his defence that it had always resisted the trespass and averred that there was an official road of access to Samat Estate but after the subdivision of that Estate one of the resultant parcels was developed in a manner that blocked the official road of access. Further, that



part of the unofficial road got diverted slightly into the Defendant's land after the apportionment and sale of L.R. No. 12271. The Defendant's witness stated that when the residents of the area sought the intervention of the MP for Laikipia East, he suggested that parties enter into an agreement in which the Plaintiff would cease the trespass and move to the official road and that the suggestion was resisted by the Plaintiff and his group. The Defendant's witness stated that he was opposed to the diversion but in the spirit of good neighborliness exercised patience as the Plaintiff and his group had proposed to move to the official road of access after rehabilitating it and that he gave notice of the intention to fence the land when he realised that the Plaintiff and his group were not prepared to stop the trespass.

60. It emerged from the evidence tendered that Hellen Kurutu subdivided her land L.R. No. 12271 on or about 2007 and sold the resultant plots. Hellen Kurutu did not produce the survey map for the subdivision of her plot L.R. No. 12271 showing the access road which she claimed that she surrendered to the Government for public use. If any such road was surrendered as she claimed, then the Plaintiff and the residents of Samat Estate would be using that road to access the Meru- Nanyuki Highway because F/R No. 136/173 shows that L.R. No. 12271 which Hellen Kurutu owned and subdivided adjoins the Highway.
61. A public road is defined by Section 2 of the *Public Roads and Roads of Access Act* as any road which the public had a right to use before the commencement of that Act, which was in 1920; all proclaimed or reserved roads and thoroughfares which existed on land sold or leased under the East Africa Land Regulations of 1897, the Crown Lands Act of 1902; and those reserved under the Act for public use.
62. Section 9 of that Act provides for the process through which an owner or occupier of land without reasonable access to a public road can apply to the district board created under the Act for leave to construct a road of access over the lands lying between his land and the public road. The board is required to serve a notice on the owner of the land over which the proposed road of access is to pass and apply to the highway authority responsible for the public road to which the proposed road of access will be joined for consent under Section 10. The board fixes the application for hearing and after hearing the applicant and any party who may be affected, it may grant the applicant leave to enter the land and construct the road of access. The road of access constructed is not deemed to be a public road according to Section 13 of the Act. The disputed road is not a public road created under this Act and cannot be registered as a public road as the Plaintiff submitted.
63. The essential characteristics of an easement under English law are that there must be a dominant and servient tenement, the easement must accommodate the dominant tenement, the dominant and servient tenements must be different persons and the easement must be capable of forming the subject matter of a grant, which means there must be a grantor, a grantee and the right granted must be sufficiently definite (Paragraphs 7 and 17 of Halsbury's Laws of England, 4th Edition, Volume 14).
64. Examples of easements are given in Halsbury's Laws of England, 4th Edition, Volume 14. Some of the common negative easements include the right of support to a building, the right to receive water flowing in an artificial watercourse, the right to light and the right to the passage of air through a defined channel. Examples of positive easements include the rights of way, the right entitling the dominant owner to place advertisement boards on another's land, to fix a name plate or sign board upon another's premises, and to subject the latter to the annoyance of the creaking when the sign board swings in the wind, to use a fascia on another's house for the purpose of painting his name and trade on it, to hang clothes lines over the servient tenement, to erect spoil banks on the servient tenement in the course of mining operations, to place boulders on the servient tenement to prevent sand or earth being washed away by the encroachments of the sea, to place a post in a river bed for purpose of mooring in connection with a wharf, to land nets on the servient tenement, to pass water or effluent under the servient tenement through an artificial watercourse, to enter the servient tenement to open locks in



time of flood or repair an outside wall and to construct and maintain a ventilation duct.(Paragraphs 31 and 32).

65. A distinction is made at paragraph 34 Halsbury's Laws of England between easements and other rights in that an easement does not give the dominant owner the exclusive or unrestricted use of any part of the servient tenement. This is because the grant of exclusive and unrestricted use of land passes the property or ownership in the land and not merely an easement in it. A right which amounts in effect to the whole beneficial user of the servient tenement to the exclusion of the owner or which would prevent the servient owner from making ordinary use of his land cannot take effect as an easement by virtue of a grant or by prescription. Applying this to the Plaintiff's claim to an easement or right of way over the Defendant's land, the Defendant would be prevented from making ordinary use of the part of its land being used as a road which therefore means that it cannot take effect as an easement.
66. A perusal of Section 98 of the [Land Registration Act](#) confirms that an easement is created by an instrument in the prescribed form, granted over land, lease or part of the land by its owner to the owner of another parcel of land or lease, for the benefit of that parcel of land. The land benefiting from the easement becomes the dominant land while the land burdened by the easement is the servient land. The instrument creating the easement must specify the nature of the easement and the conditions or restrictions under which it is granted, the period of the easement, the land or specific part of that land burdened by the easement and what land is to benefit from the easement. By implication, every grant of easement comes with the ancillary rights necessary for the enjoyment of the easement. The grant may contain an agreement between the owners of the servient and dominant land for maintenance of the easement. From this Section, it is clear that an easement can only be created by an instrument in the prescribed form. There is no evidence to suggest that an easement was created over the Defendant's land by the Defendant or its previous owner by an instrument in the prescribed form under Section 98 of the [Land Registration Act](#).
67. Part IV of the [Limitation of Actions Act](#) deals with acquisition of easements. Section 32 of the Act provides that where any easement has been enjoyed peaceably and openly as of right without interruption for 20 years then the right to such easement is absolute and indefeasible. Section 98(7) expressly states that no easement or right in the nature of an easement is capable of being acquired by any presumption of a grant from long and uninterrupted use. Based on Section 98(7), the Plaintiff's claim pegged upon long and uninterrupted use of the disputed access road would fail for an easement in favour of the Plaintiff could only be created in the manner prescribed by Section 98.
68. The [Land Registration Act](#) came into force on 2/5/2012 hence it is deemed to amend Part IV of the [Limitation of Actions Act](#) on the manner in which easements can be created. This means that by virtue of Section 98(7) of the [Land Registration Act](#) easements can no longer be created through prescription as envisaged by the provisions in the [Limitation of Actions Act](#).
69. Section 136 (2) of the [Land Act](#) contemplates that an easement must have been created and that it can exist only during the subsistence of the land or lease out of which it was created. The rights capable of being created under an easement pursuant to Section 138 of the [Land Act](#) are those for doing or refraining from doing something over, under or upon the servient land; any right to require the owner of servient land to do something over, under or upon his land; and right to graze stock on the servient land. The right to take anything away from the servient land or to the exclusive possession of any land cannot form the basis of an easement under that Section.
70. A reading of Section 98 of the [Land Registration Act](#) alongside Section 138 of the [Land Act](#) shows that an easement is granted by an owner of land or a lease by an instrument in the prescribed form to the owner of another parcel of land for the benefit of the latter land must create a definite right to do or



not to have something done over, under or upon the servient land or the right to require the owner of the servient land to do something over, under or upon his land.

71. In his submissions, the Plaintiff urged the court to issue an access order under Section 140 of the [Land Act](#). That provision requires an owner of landlocked land to apply to the court using the prescribed form, for an access order granting access to the landlocked land. The application is to be served on the owners of the land adjoining the landlocked land, the County Government where the land is situated and persons who may be affected by the grant of the application.
72. The Section specifies the factors which the court is to consider in determining whether or not it should grant an access order after hearing the parties. These include the nature and quality of the access to the landlocked land when the applicant first occupied that land; how the land became landlocked; the negotiations, if any, between the owners of the landlocked land and of the adjoining land towards obtaining an easement from the owner of the adjoining land; the hardship the applicant may suffer if an access order is refused compared to the hardship that may be caused to any other person if the order is granted; and the purposes for which is required.
73. This suit was commenced by an ordinary suit and the plaint which was filed in court is not the application contemplated by Section 140 of the [Land Act](#) for an access order. Even the manner in which the hearing of this suit was conducted does not conform to the provisions of that section. The County Government of Meru would have to be made a party to such an application as well as all persons who would be affected by the granting of the application. Had the Plaintiff moved the court under that section, the court would have considered the factors set out in subsection 4 in determining whether or not to grant an access order. Section 140 cannot therefore assist the Plaintiff.
74. The communal right of way envisaged by Sections 143 and 146 of the [Land Act](#) is created for the benefit of the public and entitles the public to pass and re-pass along that right of way. Such a communal right of way can only be created by NLC in conjunction with the Cabinet Secretary in the manner prescribed in Section 146 of the [Land Act](#) but not by the court.
75. The court declines to grant the orders sought in the plaint. The Defendant is awarded the costs of the suit.
76. In light of the fact that the Plaintiff and the other residents neighbouring the Plaintiff's land may not have access to their land, the Plaintiff and the other residents who have been accessing their homes or parcels of land through the Defendant's land are granted 60 days within which to pursue other avenues for getting access to their parcels of land.

DELIVERED VIRTUALLY AT NANYUKI THIS 13TH DAY OF OCTOBER 2022.

K. BOR

JUDGE

In the presence of: -

Mr. J. Okemwa holding brief for Mr. J. Abwuor for the Plaintiff

Ms. B. Maina holding brief for Mr. A. Nganga for the Defendant

Ms. Stella Gakii- Court Assistant

