



Portzman Bridge Ltd & another v Kigio Group Co. Ltd (Environment & Land Case 30 of 2018) [2022] KEELC 14848 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 30 OF 2018
LA OMOLLO, J
NOVEMBER 17, 2022**

BETWEEN

PORTSMAN BRIDGE LTD 1ST PLAINTIFF

MALEWA BUSH VENTURES LTD 2ND PLAINTIFF

AND

KIGIO GROUP CO. LTD DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit *vide* a plaint dated March 26, 2008.
2. It is their averment that the 1st plaintiff is a registered proprietor of the leasehold interest in in Land Reference Number 5663/1 registered as IR Number 4267/1 measuring 50 acres situate in the south East of Gilgil Township while the 2nd plaintiff is a tenant of the 1st plaintiff.
3. It is their averment that the 2nd plaintiff is currently in occupation and carries on animal conservancy and other related activities.
4. It is also their averment that the defendant is the registered proprietor of the leasehold interest in LR No 5663/2 and 5295/2 which borders LR No 5663/1 on the south western side.
5. They aver that LR No 56631 and 5663/2 and 5295/2 were at all material times part of LR No 5663 (Original Title Number 3777/41/21) measuring approximately 2103 acres and registered in the name of Apperly Estates Limited.
6. The plaintiffs aver that by a transfer dated April 25, 1936, Apperly Estates Limited transferred LR No 5663/1 measuring 50 acres to Fredrick Joseph Empson and Charles Webb Foster as tenants in common adding that the ownership of the said parcel has severally changed over the years until it was acquired by the 1st plaintiff on December 13, 1994.



7. The plaintiffs aver that the transfer of LR Number 5663/1 from Apperly Estates Limited was subject to several conditions one of which was right of way upon the road traversing LR No 5663 (Original Number 3777/41/20) giving the owner of LR No 56631 direct access to the Nairobi-Nakuru Highway.
8. It also their averment that all subsequent owners of LR No 5663/1 including the 1st plaintiff's employees, servants and agents or persons authorised by them have inherited and enjoyed the right of way without any interference.
9. They aver that in violation of their right of way, the defendant has unlawfully locked the gate and barred them from using the access road traversing LR Nos 5663/2 and 5295/2.
10. They aver that as a result of the actions of the defendant, they have been denied a direct 5 km access to the Nakuru- Nairobi Highway and are compelled to access the Highway through Gilgil town, a distance of more than 30 km on an impassable road.
11. They aver that the business of the 2nd plaintiff has been adversely affected due to inaccessibility by clients and suppliers and both of them have suffered loss and damage.
12. The plaintiffs pray for judgement against the defendant for:
 - a. A mandatory injunction do issue against the defendant its employees servants and/or agents to re-open the gate and remove all the barriers on the road traversing Land Reference Numbers 5663/2 and 5295/2 and allow the plaintiffs, their employees, servants, agents and/or clients enjoyment of the plaintiff's right of access.
 - b. General damages for breach of the right of access.
 - c. Any other order that this honourable court may deem fit to grant.
 - d. Costs.
13. I have perused the court record and did not did not find the defendant's statement of defence.
14. The suit proceeded ex parte after the court satisfied itself that the defendant had been duly served, as evidenced in the affidavit of service sworn on March 8, 2022.

Plaintiffs Evidence

15. At the hearing, Christine Mary Campbell testified as PW1. She prayed that her witness statement dated April 25, 2022 be adopted as part of her evidence and it was so adopted.
16. PW1 also made reference to a list of documents dated March 13, 2013. The documents were produced in the following order:-
 1. Resolution by Malewa BushExhibit P1
 2. Resolution by Portsman bridge..... Exhibit P2
 3. Certificate of the title dated April 29, 1936.....Exhibit P3
 4. Registry of titles dated April 29, 1936.....
.....Exhibit P4
 5. Agreement dated January 28, 2006.Exhibit P5



6. Letter dated July 31, 2007.....Exhibit P6
7. Letter dated September 18, 2007.....Exhibit P7
8. Letter dated March 21, 2008.....Exhibit P8
9. Letter dated October 15, 2008.....Exhibit P9
10. Letter dated October 18, 2008 Exhibit P10
11. Letter dated October 10, 2008.....Exhibit P11
12. Letter dated October 4, 2008.....Exhibit P12
17. PW1 testified that she is a director of the 2nd plaintiff and a tenant on the 1st plaintiff's parcel of land.
18. It was her testimony that she has authority from the 1st plaintiff to testify on its behalf adding that the suit is for order of mandatory injunction against the defendant.
19. PW1 went on to testify that the defendant opened the access road on October 4, 2010 on account of interim orders granted by the court. It was her further evidence that before that, the road remained closed for 3 years.
20. She testified that her business was adversely affected because most of her clients are from Nairobi and they were unable to access the property. She further testified that before she moved the court, she approached the defendant on numerous occasions but it did not open the access road until the court gave its orders.
21. In her witness statement dated April 25, 2022 PW1 also states the 1st plaintiff is the registered proprietor of LR No 5663/1 registered as IR 4267/1.
22. She further states that the 2nd plaintiff is a tenant of the 1st plaintiff currently in occupation of the suit parcel and carries on animal conservancy and other related activities. She states that the defendant on the other hand is the registered proprietor of LR Nos. 5663/2 and 5295/2 bordering the 1st plaintiff's parcel.
23. PW1 in her statement states that LR Nos 5663/1, 5663/2 and 5295/2 were part of LR No 5663 (original number 3777/41/20) and registered in the name of The Apperly Estates Limited.
24. In her written statement, PW1 states that by a transfer dated April 25, 1936 the said The Apperly Estates Limited transferred LR No 5663/1 to Fredrick Joseph Empson and Charles Webb Foster as common tenants. She states that the ownerships of the said parcel of land changed several times until December 13, 1994 when the 1st plaintiff acquired it.
25. She further states that the transfer of LR No 5663/1 from THE Apperly Estates Limited was subjected to several conditions one being the right of way upon the road traversing LR No 5663 giving the 1st plaintiff herein direct access to the Nairobi-Nakuru highway.
26. PW1 states that in complete violation of the plaintiffs' right of way, the defendant have unlawfully locked the gate and barred the plaintiffs' from using the access road traversing LR No 5663/2 and 5295/2 thereby violating their right of way.
27. Further in her witness statement, she states that the plaintiffs have been denied a direct 5-kilometer access to the Nairobi-Nakuru highway and therefore compelled to access the highway through Gilgil town, a distance of more than 30 kilometers on an impassable road.



28. She also states that the business of the 2nd plaintiff has as a result been adversely affected due to accessibility by clients and suppliers. It is her statement that as a result, the court in October, 2010 issued temporary orders compelling the defendant to grant them access to the said road.
29. PW1 in her written statement in conclusion urges the court to grant them the prayers as sought in the plaint.
30. This marked the close of the plaintiffs case.

Analysis And Determination.

31. As at the time of writing this judgment, I have not seen submissions by the plaintiff.
32. My analysis and determination is therefore based on the plaint, the oral evidence by the single witness of the plaintiffs, the documents produced in evidence and the plaintiffs' witness statement.
33. PW1 produced a resolution passed by directors of Malewa Bush Ventures and Portman's Bridge Limited as evidence of authority to testify on behalf of the plaintiffs.
34. The dispute between the plaintiff and the defendant pertains to an easmentary right. The question for determination is
 - a. Whether a mandatory injunction should issue against the defendant to re-open the gate and remove all the barriers on the road traversing Land Reference No 5663/2 and 5295/2.
 - b. Whether the plaintiffs are entitled to general damages for breach of right of access.
 - c. Who should pay costs of the suit.

A. Whether A Mandatory Injunction Should Issue Against The Defendant To Re-open The Gate And Remove All The Barriers On The Road Traversing Land Reference No. 5663/2 and 5295/2.

35. PW1's claim is based on conditions attached to certificate of title LR No 3079/5. IR No 3079/5. It is the instrument through which Apperly Estates Limited transferred LR No 5663/1 measuring 50 acres to Fredrick Joseph Empson and Charles Webb Foster as tenants in common.
36. The 1st plaintiff is among several persons who over the years have acquired proprietary interest in the parcel LR No 5663/1, the 1st plaintiff's rights having been acquired on December 13, 1994.
37. I have seen at page 2 of LR No 3079/5. IR No 3079/5 a condition giving

“... full and free right and liberty for the purchasers their heirs and assigns the owners or owner for the time being of the piece of land hereby transferred and all persons lawfully authorized in that behalf at all times hereafter by day or by night and for purposes with our without horses- cars wagons motor cars traction engines motor lorries or any other vehicles laden or unladen to go pass and repass and to drive cattle sheep and other animals along over and upon the existing road traversing the remaining portion or premises comprised in the said certificate of title dated the twenty- sixth day of June one thousand nine hundred and thirty and the premises comprised in the said certificate of title dates twenty-second day of July one thousand nine hundred and twenty six for the purpose of gaining access to and egress from the piece of land hereby transferred...”



38. As stated earlier, this claim is founded on breach of a right of easement. An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it for a specific limited purpose such as crossing it for purposes of access to a public road.
39. The land benefitting from an easement is the dominant estate and the one burdened by an easement is the servient estate. Easements are of different kinds. From my assessment, this suit is concerned with right of way. That is right of entry (ingress) and right to exit (egress).
40. This right which burdens the servient estate lasts forever and a change of ownership does not stand in the way of the existence or enjoyment of this right. Whoever acquires the servient estate is bound by the burdens touching and running with the land.
41. The documents produced confirm that an easementary right exists as between Land Reference No 5663/2 and 5295/2 owned by the defendant and Land Reference No 5663/1 owned by the 1st plaintiff.
42. The circumstances presenting in this case are that the defendant had denied the 2nd plaintiff, (a lessee of the 1st plaintiff) the right of way. This is supported by numerous letters that have been exchanged between the parties herein. The letters express displeasure and are also evidence of failed attempts at a compromise. These are exhibits P6 -P12.
43. A mandatory injunction is a superior order and which, by itself, when granted recognizes the plaintiff's claim. It is for this reason that it ordinarily not granted at the interlocutory stage save for when special circumstances exist and in clear cases.
44. PW1 testified that the court granted them mandatory injunction at the interlocutory stage which ordered the defendant to re-open the gate and remove all the barriers on the road traversing Land Reference No 5663/2 and 5295/2. This order was issued on October 1, 2010. What's left is for the trial court to find that the mandatory injunction was rightly granted.
45. Taking into account the decisions cited, documents produced, oral evidence and written statement of the plaintiffs, I find that the plaintiffs have fulfilled their evidentiary burden and as such this court grants them and confirms the orders of mandatory injunction previously issued at the interlocutory stage.

B. Whether The Plaintiffs Are Entitled To General Damages For Breach Of Their Right Of Access.

46. In *Jogoo Kimakia Bus Services Ltd Vs Electrocom International Ltd* [1992] KLR 177 the Court of Appeal gave a distinction between general and special damages. It stated as follows:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. (Emphasis is mine). Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
47. PW1 in her evidence stated that defendant opened the access road on October 4, 2010 on account of interim orders granted by the court. It was her evidence that before that, the road remained closed for 3 years.



48. She testified that on account of the actions of the defendant, her business was adversely affected because most of her clients are from Nairobi and they were unable to access the property. She further testified that before she moved the court, she approached the defendant on numerous occasions but it did not open the access road until the court gave its orders.
49. It is also her evidence that during the period of three years they were denied direct 5 km access to the Nakuru- Nairobi highway and were compelled to access the highway through Gilgil town, a distance of more than 30 km on an impassable road.
50. Based on my finding in A above, there is no doubt that the defendant was in breach of the conditions attaching to its enjoyment of Land Reference No 5663/2 and 5295/2 which in turn led to an infringement of the plaintiffs' right of easement over the said parcels.
51. By blocking the access road, the defendant acted unreasonably and in bad faith. This caused great inconvenience and loss to the plaintiffs which ought to be compensated.
52. The question that follows is what principles ought to guide the court in awarding damages. In *China Wu Yi Limited & another Vs Irene Leah Musau* [2022] eKLR, the learned Judge cited with approval the decision in *Southern Engineering Company Ltd Vs Musisngi Mutia* (1985) KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts...”

53. An analysis of this holding is that a Judge has discretion in the award of general damages and that this discretion has to be exercised judiciously taking into account conditions prevailing in the country and prior decisions relevant to the case in question.
54. The plaintiffs' testimony points to the hardship encountered by them for 3 years covering a distance of 30 kilometers instead of 5 in order to access the Nakuru – Nairobi Highway. This caused the 2nd defendant's business to suffer due to inaccessibility by their suppliers and clients.
55. As stated in the preceding paragraphs, general damages are awarded as recognition of an infringement of a legal right or duty. In *Coast Neurology Center Ltd vs Mohammed Kasim Bakari & 3 others* [2020] eKLR. The Learned Judge awarded Kshs 3,000,000/= for general damages for breach of trust and fiduciary duty. In the same breath, I am of the view that Kshs 3,000,000/= would be adequate compensation for breach of the plaintiffs' easementary rights.



C. Who Should Bear The Cost Of This Suit

56. The general rule is that costs shall follow the event in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janohamed & Sons Vs Twentsche Overseas Trading Co Ltd* (1967) EA 287.

Disposition

57. In *Shaneebal Limited Vs County Government of Machakos* [2018] eKLR, the Learned Judge cited with authority the decision in *Karuru Munyororo Vs Joseph Ndumia Murage & Another* Nyeri HCCC No 95 of 1988, where it was held that;

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

58. The upshot of the foregoing is that the plaintiffs’ suit as against the defendants succeeds and I grant orders as follows:

- a. A mandatory injunction is hereby issued against the defendant its employees servants and/or agents to re-open the gate and remove all the barriers on the road traversing Land Reference Numbers 5663/2 and 5295/2 and allow the plaintiffs, their employees, servants, agents and/or clients enjoyment of the plaintiff’s right of access.
- b. General damages are awarded to the plaintiffs in the sum of Kshs 3,000,000/= (Three million only) plus interest from the date of this judgment until payment in full.
- c. The plaintiffs shall have the costs of the suit and interest thereon from the date of this judgement until payment in full.

59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF NOVEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of:-

Mr. Alusa for Miss Cheloti for the plaintiffs.

No appearance for the defendant.

Court clerk; Miss Monica Wanjohi

