



**Mohamed v Karugui & another (Environment & Land Case 208 of 2016)
[2022] KEELC 14709 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 208 OF 2016
CK NZILI, J
NOVEMBER 9, 2022**

BETWEEN

MARINA NCEECE MOHAMED PLAINTIFF

AND

MICUBU KARUGUI 1ST DEFENDANT

JACOB MUTIGA 2ND DEFENDANT

JUDGMENT

1. By a plaint dated October 28, 2016 the plaintiff sued the defendants for trespassing into her registered Parcel No. 2098 Antuamburi Adjudication Section, for creating an access road on 19.10.2006, cutting down her barbed wire and uprooting fencing poles. She prayed for a permanent injunction restraining the defendant from encroaching into and or interfering with her peaceful occupation of the suit premises. The plaint was accompanied by a consent to sue dated 26.10.2016, confirmation letter dated 14.3.2016, sketch map and a notice dated 19.10.2016.
2. The defendants filed a joint defence dated 7.6.2017 denying the alleged trespass. They averred that the alleged access road was a public road has been in existence for long but the plaintiff between 18th – 17th October 2016 blocked it using a fence, prompting members of public to report to the police who eventually proceeded to unblock it to gain access to their business and houses, for which they took the uprooted exhibits to the police and booked the same.
3. The defendants denied that any demand letter was sent to them and insisted no cause of action was disclosed against them. The defense was accompanied by witnesses' statements and a list of exhibits dated 20.7.2017 and 18.10.2017 respectively.
4. By an order dated November 1, 2018 the court directed that a scene visit be made by the Executive Officer of the court together with the land surveyor, in the presence of the parties, to establish if an



- access road existed and whether it was created on the plaintiff's land. The two officers visited the land and filed their reports dated 22.3.2019 and 26.7.2019 respectively.
5. The plaintiff's testimony was that on 19.10.2016 the defendants visited her land, cut down her barbed wire and poles. He said her efforts to find out what was happening was met with threats whereof he reported the matter to Mikinduri Police Station and the office of the Assistant County Commissioner who called the defendants to find out the issue. PW 1 said that she wrote a complaint letter which he produced as P. Exh no (1), she also produced confirmation letter of ownership dated 14.3.2016 as P. Exh no (2). She denied the existence of an access road on the land as per the sketch map which she produced as P. Exh no (3).
 6. In cross examination, the plaintiff admitted that the road of access in existence was 3 plots away from her land which was not where the defendants allegedly cut down her barbed wire. PW 1 further said that she did not file any A/R objection but reported to the assistant chief. As to the meeting held on 12.10.2015, the plaintiff denied it took place over the access road. PW 1 said she even wrote a letter to the land adjudication officer who gave her an authority to close the access road.
 7. Further PW 1 said that the members of public were still using her land even though there was no such access road. She confirmed that he had produced no photographs or a letter from the agricultural officer showing the nature of the destruction occasioned by the defendants. She said the defendants are the ones who took the exhibits to the police after which the 2nd defendant was charged with destruction since she as the chief of the area allegedly created the access road.
 8. By a consent dated 23.9.2019, the report dated 26.7.2019 was adopted as evidence of the court.
 9. DW 1 adopted his witness statement dated 4.7.2017 and produced the proceedings regarding the existence of a public as D. exh1 photographs of members of public unblocking the road as D. Exh's sketch map as D. Exh (6), letter from land adjudication officer as D. Exh (7), proceedings as D. Exh. And a letter dated 6.6.2017 as D. Exh. (9). He denied that he was at the scene as alleged since on the material day he was at Isiolo stockyard from 6am – 6pm, according to him his plot was L.R No. 2149. Further DW 1 said that he did not agree with both the report and the sketch map.
 10. He denied his image was in D. Exh 4 though he could identify some people except the person in the photo who was holding a panga. He denied that he was involved in the events of the subject day in issue nor did he know that the access road had been blocked by the plaintiff. DW 1 admitted it was the police who took the photographs and shared the same with him. He admitted he attended the Assistant Chief's meeting on 19.10.2016 but denied he was among the members of public who had reported about the blocked access road. He denied the alleged trespass to the plaintiff's land since they were not immediate neighbours though he had no other road to access his home and the public facilities nearby.
 11. Further DW 1 said that the plaintiff had no order from the court and the Land Adjudication Officer authorizing her to close the access road. In his view the people who opened the road had a right to do so but denied that the members of public had encroached on the plaintiff's land or destroyed anything in the said land. Further, DW 1 denied he and the area chief were present on the material day or had sent agents or servants to open the access road.
 12. DW 1 said he was the only one sued but not the people appearing on the photo, D. exh (4) simply because the access road served his business premises. DW 1 however admitted that in his written statements he had stated he was at his place of work on 18th – 19th October 2017.
 13. DW 2 adopted his witness statement dated 4.7.2017 and associated himself with the exhibits produced by DW1. He denied the allegations of trespass into the plaintiff's land on 19.10.2016 since at the time



- he was at his office when he got a report of an access road had allegedly been blocked by the plaintiff, following which upon visiting the scene, he made a report to the police. He said that after a while the OCS told him the police he sends to the scene had found members of public reopening the access road.
14. Later on, DW 2 said that he saw some people carrying exhibits some of whom he could recall who have plots nearby. According to him, the exhibits taken to the police were the ones which the plaintiff had used in blocking the road. Asked about the scene visit report and whether the land adjudication officer had told him about the plaintiff's complaint, DW 2 said that if the report stated there was no access road, it could not be genuine. In his view, the plaintiff should have filed an A/R objection instead of closing the access road.
 15. Additionally, DW 2 that said it was the work of a demarcation officer to determine where an access road should be. DW 2 seemed to doubt the surveyors report since he was sure on the ground there was an access road which has been in existence since time immemorial. He denied that he interfered with the plaintiff's suit land and according to him he was only sued for making a report about her to the police.
 16. Further, DW 2 denied that any access road had been created on the plaintiff's land since the one she had blocked had been in existence for many years, which the members of public unblocked and who reported to him by way of phone calls. According to DW 2, the access road has been in existence to serve members of public accessing various public faculties in the area. He denied that the access road had reduced the size of the plaintiff's land.
 17. DW 2 denied having been used by the members to interfere with the plaintiff's land by creating a non-existent access road. He insisted that he was merely executing his lawful duties since he had no land in the area. Similarly, he said he had no blood relationship with DW 1 as alleged.
 18. Similarly DW 2 stated that at the lands office, a decision was made that the access road was a public road which should not be interfered with, in the presence of the plaintiff. DW 2 said that neither did the plaintiff challenge the said decision nor did she make a report to the police on the members of public who allegedly destroyed her land so that action could be taken against them. DW 2 also told the court that it was in order for the members of public to unblock any access road so that they could gain access to their homes and public facilities in the area.
 19. DW 3 admitted that the 1st defendant was his neighbour. He said that on the material day he was at the scene when members of public came to reopen the blocked access road alleged to have been done by the plaintiff, since she had previously complained that the access road was on her land.
 20. Further DW 3 said that he was among the users of the access road for many years and though they suspected the plaintiff was the one who had blocked the road, she was not asked to give reasons for that. DW 3 denied that they trespassed into the land as they unblocked the access road. He denied that the access road was on plaintiff's land. He however admitted that he was involved in unblocking the access road since it was the road he uses alongside other neighbours.
 21. In addition, DW 4 told the court that as the chair of the Njuri Ncheke Tigania Sub County he knew the history of the dispute. However, he was not involved in the adjudication process, so he could not state what was reflected in the adjudication records and maps. DW 4 said he sought for the map and established there was an access road but could not tell the size and measurements of the plaintiff's land. He told the court the access road was the only one servicing the members of public in the area and the neighborhood.
 22. DW 4 further said that he participated in unblocking the access road. He however denied that he was the one who was giving instructions to the community as they re-opened the road. He however admitted that the police took some photographs and carried some exhibits at the scene. He also said a



- group of people acting together and not a mob justice unblocked the access road. Similarly, he said that he was there in his personal capacity and not as a Njuri Ncheke chair exercising his citizenry duties.
23. DW 4 also said he uses the said access road and suspected that it had been blocked by the plaintiff due to her previous actions on the issue. He denied that the defendants participated in the exercise though the 2nd defendant came much later. He said the access road serves many public facilities and other individual plots in the area. He denied that the land adjudication officer had given alternative access road except the one under dispute. He denied witnessing any one trespass into the plaintiff's land on the material day.
 24. The plaintiff submitted that the trespass is wrongly setting foot, or riding, driving over, taking possession, expelling the person in possession destroying or invading or discharging water, filth or injurious substance into one's land as per *Halsbury's Laws of England* 3rd Ed. Vol. 38 page 739 Paragraph 1205.
 25. Relying on *Willy Kipsongok Morogo vs Albert K. Morogo* (2017) eKLR, the plaintiff submitted that under sections 24, 25 & 26 of the *Land Registration Act*, a registered owner of land is entitled to legal protection by way of permanent injunction hence, given the evidence tendered herein that the alleged access and passed through her land, there was need to restrain interference by intruders, least of all the defendants herein. Reliance was placed on *Gatbenya Ngumi Vs Eric Kotut & 4 Others* (2022) eKLR.
 26. On the other hand, the defendants submitted that the failure to file a reply to their defense amounted to an admission of the facts by dint of order 7 rule 17 of the *Civil Procedure Rules*.
 27. The defendants urged the court to find the plaintiff's sole evidence was not corroborated by any other evidence unlike the defence testimony which challenged the plaintiff's denial of existence of the access road and presence during the alleged trespass. It was submitted that the plaintiff did not give distinct features of the defendants on the material day or produce an Occurrence Book report on any complaint before the police. The defendants submitted in their evidence that they were not at the scene on the material day time was not dislodged by the plaintiff, and which was corroborated by DW 3 & DW4 was not shaken or challenged in cross examination. They urged the court to find their demeanor in court portraying them as honest, veracious and truthful witnesses.
 28. The defendants submitted that the evidence of the plaintiff was scanty and uncorroborated as compared to their evidence. Further it was submitted that the plaintiff failed to produce exhibits and photographs of the alleged destruction and its value.
 29. On the question of permanent injunction, the defendants submitted the that plaintiff failed to establish the ingredients of an injunction more so for the prayers to close the access road which was not pleaded at all, contrary to order 2 rule 6 (11) and (2) *Civil Procedure Rules*.
 30. Additionally, the defendant submitted that the defendant witnesses confirmed the access road had been in existence both on the ground and on the maps since time immemorial, serving over 200 members of public who have no other alternative route, which position the plaintiff ought to respect. The defendants also submitted that their pleadings and testimony were supported by the D. Exh (1), OB reports, D. Exh 2 & 3, photos, D. exh 4 & 5, sketch maps as D. Exh (6) demarcation officer – letters D. Exh (7) and the proceedings as D. Exh (8).
 31. Relying on *Dellian Langata Ltd vs Symon Thuo Mubia, & 4 others* (2014) eKLR, the defendants urged the court to find that a public road is available for use by all members of public without restrictions and the plaintiff could not bar or restrict them from using it to access their homes and public utilities.



- The defendants submitted the plaintiff was not an expert in land planning or survey and her evidence could not be used to prove the position of the subject road.
32. Reliance was placed on *Muiruri Njuru & 5 others vs Esther Muchiri* (2021) eKLR on the need to summon the county planner and surveyor to prove the contents of the map; *Nyanchama Kimaiti vs Samwel Guto Onguso & another* (2014) eKLR, on the need to support the plaintiffs assertion with independent evidence, the registry index map and the legality of the actions of the defendant by opening a public access road, which the court held did not infringe on the plaintiffs proprietary rights; *Kamau Kungu & another vs Francis Kungu Njoroge & another* (2020) eKLR, *Ijait C. Aluku vs Salome Mwanaisha Modaga & 5 others* (2019) eKLR, on the documents she should have produced to support her assertion such as a mutation and the land registrar.
 33. The issues commending themselves for court's determination are: -
 - i. If the plaintiff has proved she owns parcel No. LR 2098 Antuamburi Adjudication Section.
 - ii. If there was trespass into the suitland on 19.10.2016 as alleged or at all.
 - iii. If there was destruction of the aforesaid parcel of land.
 - iv. Whether it is the defendants who trespassed and committed acts of trespass on the material day.
 - v. If there exists a public road of access abutting the plaintiff's and the defendants parcel of land.
 - vi. If the defendants were justified in unblocking the public road of access.
 - vii. If the plaintiff is entitled to the prayers sought.
 34. The primary pleadings to this suit are the plaint dated 28.10.2016 together with the accompanying list of witnesses, list of witness's statements and list of documents and the defendant's statement of defence dated 7.6.2017, list of witness statements and documents dated 20.7.2017.
 35. In the plaint, the plaintiff pleaded she was the registered owner of the suit land which she confirmed by producing P. Exh. No. 1 the consent to sue, P. Exh (2), the confirmation of registration by the DLASO Tigania East District, tracing map as P. Exh (3) and a demand letter to the OCS as P. Exh (4).
 36. Following a court order dated 25.7.2018 and 1.11.2018 and by consent of parties, the Executive Officer of the court and the sub county surveyor visited the locus in quo in the presence of the parties and filed their reports. The two reports were prepared and filed on 29.7.2019 and adopted by consent as exhibits in this suit.
 37. In the report dated 26.7.2019 by the sub county surveyor Meru North, it was stated there is a road which has been in existence for many years serving the church, hospital and also connected to other existing feeder roads. According to the report, the road was created on Parcel No. Tigania/Antuamburi/2098 belonging to the plaintiff. However, as per the registry index map the road was not supposed to pass through the plaintiff's parcel and that structures had been built on the area where the access road was supposed to pass through as marked in red ink. It recommended that the structures should be demolished to pave way for the designated road as per the attached registry index map. The report states the existing road on the plaintiff's land was a short cut of about 35 meters which was not reflected on the registry index map.
 38. According to the Executive Officer's reports, a clear road to the defendants' businesses and for other members of the public exists on the ground but has been blocked by a mabati structure which if opened, could solve the dispute. The two reports support and corroborate the plaintiff's pleadings and oral testimony that there exists no public access road passing through her land.



39. The defendants never objected to the production of P. Exh 3, which is a tracing map by Mr. Langat the land adjudication officer Antuamburi Adjudication Section which traced the plaintiff's parcel of land from Map Sheet No. 108/4/12/7.
40. From the sketch maps the evidence is clear that the defendant's parcels of land are served by access roads on both sides and that they need not pass through the plaintiff's land in order to access their parcels of land. D. Exh No. 1 was not prepared by neither a land surveyor, land adjudication officer nor a physical planner. The maker of the report was not called to come and produce it before court. An Assistant County Commissioner does not possess powers to erect, determine and create public road on private parcels of land. His powers are limited under the National Government and Coordination Act to administrative duties and not land disputes. He had no powers therefore to order for the blocking and unblocking of access road.
41. As regards D. Exh No. 2, it confirms that the 2nd defendant was at the scene between 8.00 Am and 10.35 Am when the plaintiff stated in her testimony that the defendants trespassed into her parcel of land, cut the barbed wire, uprooted the fencing posts and carried them away. The 2nd defendant is the one who booked the two reports after participating in the alleged activity of re-opening the access road under the pretext that it was a public access road. The reports made by the 2nd defendant claimed that the plaintiff had allegedly committed an offence and hence the reason the 2nd defendant even booked the 2nd report and produced the exhibits.
42. If the plaintiff had committed the alleged offence, the 2nd defendant as the complainant was expected to have written a statement with the police and produced witnesses to that effect. It is the 2nd defendant who should have followed up with the police to ensure that investigations were commenced and action taken against the plaintiff for allegedly blocking an access road.
43. The plaintiff filed a further list of documents dated 6.7.2017. Included thereof was a letter dated 15.5.2016 in which she wrote to the land adjudication officer giving a notice to close the illegal access road on her land. She informed the office to notify the members of public. The letter was copied to the DCC Tigania, the 1st defendant, the 2nd defendant and the OCS Mikinduri police station.
44. In her testimony, the plaintiff stated that she was given a go ahead by the Land Adjudication Officer to proceed with the closure of the access road.
45. Eventually after the events of 19.10.2016, the plaintiff reported to the police vide OB No. 27/25/2010/2016. The same was followed up with a letter dated 19.10.2016 to the OCS Mikinduri where she named the 2nd defendant as the person who trespassed on her land, destroyed her fence and posts, chased her away with a panga and carried the exhibits.
46. The defendants did not deny the existence of the said letters and the OB reports. The makers of D. Exh's 6 & 7 were not called to testify and attest to the information therein given that the subcounty surveyors report before this court confirming the registry index map does not include the alleged access road.
47. The defendants are not experts in survey and land adjudication reports and cannot therefore attest to whether the access road is public or not. It was the defendants who pleaded as to the existence of a public access road. The details of the access road were not pleaded as to its width and length.
48. The onus was on the defendants to prove the existence of a public road of access by calling the physical planner, public health officer, public roads engineer and a land surveyor to confirm the facts that there exists a designated public access road on the plaintiff's parcel of land.



49. It was not enough for the defendants to merely state and allege that the access road has been in existence for a long time. It may very well be that defendants were mistaken. To avoid this, it was upon the defendants after the notice was given by the plaintiff to confirm from the relevant government officers if the access road existed as a matter of fact before taking the law into their own hands and arrogating to themselves the duty to open up the access road without calling the said officers who under the [Land Act](#) and the [Public Roads of Access Act](#) (Cap 399) are mandated to safeguard public land.
50. In absence of a compliant and a report by the relevant officers, the defendants cannot be heard to justify the use of force or self-help to enter into and create an access road at the plaintiff's premises. The duty to restore roads of access is not bestowed upon the 2nd defendant or the 1st defendant and the members of public. The defendants in their written statements and evidence appear to be justifying the law of the jungle as opposed to the rule of law. The 2nd defendant as a public officer is bound by the articles 10 and 236 of [the Constitution](#), the national values and principles and those of public service among them the rule of law.
51. The investigative agency is the one to detect and apprehend suspects and collect evidence. The 2nd defendant arrogated to himself the duty of being the complainant, the witness, the investigator and the person who re-opened the access road instead of calling the relevant government agencies in charge of land and public roads to come and re-open the access road, after establishing it exists on the registry index map in the first instance and restoring its boundaries.
52. Under section 9 of the [Public Road and Road of Access Act](#) an application has to be made to the District Road Board for leave to construct a road of access which under Section (10) has to be served upon the owner or occupier of the land the proposed road access has to pass.
53. In *Dellian Luyala Ltd (supra)*, Kiage JA said a road of access is established after a party has made an application for such request while in *John Bosco Muinde Kamali & 5 others vs Sephen Karili & another* (2019) eKLR, Oscar Angote J held that if the most convenient road to the parties properties was Parcel L.R No. 450, then the procedure of creating a public access road ought to be followed under the [Public Roads of Access Act](#) and section 98 of the [Land Registration Act](#), where an owner can voluntarily grant an easement over his land and that the law did not allow the court to compel the owner of a land to create an easement.
54. The defendants have testified that there are no other access roads by the members of public to some public amenities and individual plots. The sketch maps produced by both sides show otherwise. The defendants have not called the land surveyors and land adjudication officers to support that claim. Similarly, the defendants have not produced any complaints from any land owners petitioning the relevant officers for creation of an access road to their properties.
55. As much as the defendants have produced D. Exh 1, such a document does not amount to an application under sections 9 & 10 of The Public Road and Road of Access Act, and section 98 of the [Land Registration Act](#). In the defence the defendants did not plead any public interest or need for access orders.
56. Under section 140 of the [Land Act](#) a person who is land locked may seek for an access order in respect of a land subject to several conditions including reasonable compensation.
57. In their testimony the defendants did not explain the nature and quality of the access, circumstances leading to the need for an access road and the hardship they were experiencing if the road of access was blocked.



58. Further, there was no evidence tendered by the defendants that they did apply to the National Land Commission or the land registrar under sections 143-147 of the Land Act to create a right of way through the plaintiff's land for the benefit of the alleged public institutions and the public at large.,
59. The defendants have asked the court to protect and enforce public access roads. Whereas under section 149 of the Land Act, the court has powers to enforce public rights of way, the court must be satisfied there exists such a public right of way so as to justify entry on any land
60. In Prakash Kantilal Gadani vs Anuj Shah & others (2007) eKLR, the issue was blockage of a road and right of way of the plaintiff from his property through the defendant's property to a main road. The court declared the plaintiff had a right of way or easement through the defendant's premises by a deed of registration binding on the respondent and their successors in title. The court awarded general damages for embarrassment, inconvenience and injury caused to him of Kshs.250,000/=. The court said equity could not remedy a wrong doer.
61. In Katangi Developers Ltd vs AG & another (2019) eKLR the court granted a mandatory injunction compelling the respondents to remove any fence, blockade or objects interfering with access, ingress or egress to or from the petitioner's properties since special and or exceptional circumstances existed for the grant of a mandatory injunction.
62. In Dellian Langat Ltd (supra) the access road was already designated as a public road. There was before the court, approved subdivision plans, the size and extend of the access road was also clear. In this suit, the defendants have brought nothing to dislodge the plaintiff's evidence that her land has no public road passing at the middle of it.
63. The rights of the public have to be established by way of a tangible document of an existence of a designated public road. In this case unlike in the Dellian Langata case supra there exists no clear public interest overriding the plaintiff's private interest.
64. The defendants have not called any public officer or led any evidence to support their assertion that the public good and the greatest happiness for the greatest interest of people is at risk as opposed to the private good of the plaintiff. In Muiruri Njuru case supra unlike in the instant case the applicant had failed to prove the road was private and not public. The land surveyor in this suit has produced credible report which has not been challenged by any rival survey report.
65. The defendants have testified and produced some documents trying to justify the existence of the access road for a long time hence the reason they took the law into their own hands to unblock the same on 19.10.2016.
66. Section 98 (7) of the Land Registration Act provides that no easement and no right in the nature of an easement shall be capable of being acquired by any presumption of a grant from long and uninterrupted use. In Nyanchama Kimaiti (supra) the land registrar had been accused of creating a non-existent road of access on the plaintiff's land. The court held a registry index map carries a lot of weight when what is to be determined is whether a road passes through a particular parcel of land.
67. In this suit the land surveyors report is based on a registry index map unlike D. Exh's 4, 6, 7 & 9. Similarly, in Kamau Kungu & another (supra) & the Ikait Aluki (supra) the plaintiff unlike in the instant case the applicant had not produced a conclusive survey report on the existence of an access road.
68. In Slipet Properties Ltd & another vs Chege Mwaura & another (2017) eKLR, the court was faced by a situation where a party had placed a container on a public lane hence blocking public access. The



court proceeded to direct the removal of the container to unblock the road by way of a mandatory and prohibitory injunction.

69. Guided by the above decisions and in the interest of justice, I find the suit proved to the required standards and allows the same. The court directs the Sub-County Land Surveyor to implement and re-establish the access road as is required of it as per survey report dated 26.7.2019. Any structures on the said access road shall be removed under the supervision of the said land surveyor and the land registrar at the owners cost within 30 days from the date hereof.

70. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 9TH DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

CP Mbaabu for defendants

Anampiu for plaintiffs

HON. C.K. NZILI

ELC JUDGE

