



**Albert & 5 others v Mugwe & another (Environment & Land Case E001 of 2021) [2022] KEELC 15531 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E001 OF 2021  
LN GACHERU, J  
DECEMBER 20, 2022**

**BETWEEN**

**JESSE MUTHIGA ALBERT ..... 1<sup>ST</sup> APPLICANT  
PETER KIIRU GITHU ..... 2<sup>ND</sup> APPLICANT  
PHARISON MWANGI GITACHU ..... 3<sup>RD</sup> APPLICANT  
HENRY MACHARIA GITHINJI ..... 4<sup>TH</sup> APPLICANT  
JOHN GACAGUA GITHINJI ..... 5<sup>TH</sup> APPLICANT  
MUTHARI GITHINJI ..... 6<sup>TH</sup> APPLICANT**

**AND**

**MARGARET MUTHONI MUGWE ..... 1<sup>ST</sup> RESPONDENT  
KAMAU GITHINJI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through an originating summons application dated January 14, 2021, the applicants sought for orders against the Respondents as follows;
  - a. That the applicants are entitled to an easement over a portion of land measuring 58 Meters long and 6 meters wide over land Parcel number Loc.8/kaganda/43 which the Applicants together with their families have openly and peacefully without any interruption used as an access road to and from their land parcels known as Loc.8/kionjoini/675, Loc.8/kionjoini/380, Loc.8/kionjoini/674, Loc.8/kaganda /1727 and Loc.8/kaganda/1666.
  - b. That a declaration be made that Githinji Mugwe (deceased) held title to Land Parcel No.Loc.8/kaganda/43, subject to an easement claimed by the Applicants



- c. That the deceased's title in respect in respect of the said portion measuring 58 Meters long by 6 meters wide in Loc.8/kaganda/43 is extinguished under section 17 of the *Limitation of Actions Act* cap 22.
  - d. That under sections 38 of the *Limitation of Actions Act* the applicants are entitled to be registered as owners of the easement measuring 58 meters long by 6 meters wide over land parcel No. Loc.8/kaganda/43.
  - e. That the costs of the suit be provided for.
2. The Originating Summons is based on grounds set out on the face of the said summons and the supporting affidavits of all the applicants individually sworn on January 14, 2021. It is the Applicants' disposition that the Respondents are known to them and they are the Personal Representatives of the late Githinji Mugwe (Deceased), by virtue of grant of letter of administration issued to them in Murang'a CM Succession Cause 175 of 2019. That land parcel No. Loc.8/kaganda/43, is registered in the name of Githinji Mugwe (deceased). That their claim is to have an easement measuring 58 Meters long by 6 Meters wide, over land parcel no. Loc.8/kaganda/43, which they have used as a road for a period of more than 20 years. That the said road was constructed by the County Government of Muranga in 1982. However, even before then, it was being used as a footpath by the residents of Tambaya, Gituri and Kiharo Villages. That the road over which they claim an easement was constructed on private land and not public land . That the road was constructed in 1982 and has been in use by themselves and the residents of their villages since it was constructed until sometime in March 2019, when the Defendants closed off the said road, denying them access to it. That they had acquired an easement measuring 58 Meters long by 6 meters wide, over land parcel no. Loc.8/kaganda/43, since they had used it as a road for more than 20 years. That a portion measuring 58 Meters long by 6 Meters wide should be excised from land parcel No. Loc.8/kaganda/43, and permanently made a public road for the benefit of the Applicants and other members of the public.
  3. The Originating Summons was opposed by the 1<sup>st</sup> respondent via a replying affidavit sworn on February 26, 2021. It is the 1<sup>st</sup> Respondent's contention that the applicants and herself are residents of Gathaiti Sub- location, in Kionjoini Location, in Kahuro Subcounty, within Muranga County. That land parcel No. Loc.8/kaganda/43, is registered in the name of Githinji Mugwe (deceased) and she resides in a different parcel of land. That land parcel No. Loc.8/kaganda/43 forms part of the estate of the deceased which is pending administration in Muranga CM's Court Succession Cause No. 175 of 2019. That the parcels of lands belonging to the Applicants do not share a boundary with the land of the Deceased and the applicants are mere opportunists. That the Applicants parcels are accessible through another road, but not through the Defendants land as alleged. That in 1982 the said Wilson Mugwe Githinji (deceased) constructed a permanent house and made a path through land parcel No. Loc.8/kaganda/43, for his personal use. That the Applicants have never utilised the said path made on land parcel No. Loc.8/kaganda/43, since there were two gates. That the Applicants are trying to force a subdivision and acquire access to the path made on land parcel No. Loc.8/kaganda/43, while there is another public road existing. That the Applicants are misleading the Court and are not entitled to the prayers sought in the Plaint.
  4. The 2<sup>nd</sup> Respondent also opposed the Originating Summons via Replying Affidavit dated March 8, 2021. He expressly admitted the contents of the Originating Summons and stated that it was based on truths. It is his contention that when he was a small boy, he used to use a foot path going through his father's land and the land through which the foot path traversed was the land of the late Mugwe Githinji (Deceased). That the said footpath was constructed and upgraded to a road, but he did not know who did it That for a long time the members of the public used the road though he did not know



if it had become a public road or it was part of private land. That the said road was used by members of the public from Kaganda, Gathatithi, and Ngonda villages.

5. The Originating Summons was canvased via viva voce evidence and the Applicants called 9 witnesses while the Defendants called 5 witnesses.

### **Plaintiff's Case**

5. PW 1 Jesse Muthiga Albert adopted his Replying Affidavit sworn on 14/1/2021 and his Witness Statement dated 21/5/2021, as part of his evidence in chief. He also produced the documents contained in his List of documents dated 14/1/2021 as P.exhibits 1-11. He further testified that the other Applicants and himself were neighbours in the same village. That he also knew the Defendants and he had known them for about 50 years. That the instant case was about a road that passed through land parcel no. Loc.8/kaganda/43. That together with the other applicants, he wanted the road opened up as they had been using it since 1965 and it was a made a public road in 1982, by the County Council of Muranga.
6. That his land was land parcel no. Loc.8/kaganda/675 and the building material he used to build his house in 1984, was transported through the impugned road. That the 1<sup>st</sup> Defendant blocked the road in March 2019, and disallowed him and others to access it. That Margaret, the 1<sup>st</sup> Respondent, her husband, himself and other villagers had used the impugned road since 1965. That blocking the road meant they had to go round about 7 Kilometres to access the nearest urban centre. That they had acquired easement over the suit land and he urged the Court to grant their claim.
7. On cross examination, he testified that he travels over 5 Kilometres as a result of the road closure. That he had been transporting his farm produce through the impugned road and now he has to go a longer way since closure of the road. That both water pipes and electricity poles serving the area passed through the suit land. That there was no access road leading to his land and the road that was blocked on land parcel no. Loc.8/kaganda/43, was the only access to his land.
8. PW 2 Peter Kiiru Githu, adopted his Affidavit sworn on 14/1/2021 and his Witness Statement dated 27/5/2021 as part of his evidence in chief. He stated that his land is Loc 8/Kaganda/1727. That he has planted coffee and tea bushes on his land and he also kept cattle. That he has been using the closed road since 1977 to transport the farm produce. That with the closure of the road, he was unable to access the tea collection center. That there was another alternative route which was on other peoples parcels of land, who have been restraining them from using them as access roads. That he knew the access road in 1977, when he joined secondary school. That the impugned road was graded in 1982 by Muranga County Council, and he knows this because he lived in Kaganda then. That before the access road was closed, Margaret was still in the area and she was also using it. That all the Applicants herein were using the impugned road before it was closed and blocked by the Respondents
9. On cross examination, he stated that he has one parcel of land being Loc 8/Kaganda/172, and it was about 15km from Loc 8/Kaganda/43. That the blocked road was on Loc 8/Kaganda/43, and it belonged to the Defendants. That the blocked road was graded by the Murang'a County Council, as it was then, and the area councillor was Mr. Chege commonly known as Mackey. That of all the Applicants, none had land bordering Loc 8/Kaganda/43. That he had seen the tracing presented to Court and it showed there was an access road on the left that joined the tarmac. That there was also another road at the bottom of Loc 8/Kaganda/43, where his land was.
10. PW 3 Pharison Mwangi Gitachu adopted his Affidavit sworn on 14/1/2021, and his witness statement dated 27/5/2021, as part of his evidence in chief. He testified that before the impugned access road was graded, it was an access path. That he had used the subject access road since 1958 to go to Gathaiti



market. That the access road was used to transport farm produce, but since it was closed, they were forced to use a longer route to access the tea collection and buying centre and coffee factory. On cross examination, he confirmed that the closed access road was graded in 1982 by the defunct County Council of Muranga.

11. Pw 4 Henry Macharia Githinji adopted his Affidavit sworn on 14/1/2021, and his Witness Statement dated 27/5/2021, as part of his evidence in chief. He testified that his land was Loc 8/Kionjoini/674, and it was neighbouring land parcel No. 43. That the instant case was about a closed access road. That he lived in the area, and he knew the closed road and he had used it since 1939, when he was born. That the closed road was graded in 1982 and before that, it was a foot path. That he while going to school at Gathaithi from 1947, he used this access road.
12. On cross examination, he testified that there was a common access path on the upper part of his land which joined the closed access road. That there was no other road that they could use and the closed road was the only access road to the tarmac road. That since the closure of the road, they had to walk longer distances to access the tarmac road.
13. PW 5 John Gachagua Githinji, adopted his Affidavit sworn on 14/1/202, and his Witness Statement dated 27/5/2021, as part of his evidence in chief. That he was the owner of Loc 8/Kaganda/1407, and he has grown tea, coffee, and kept cattle on it. That he was using the closed road since 1977, to transport farm produce. That with the closure of the road, he was unable to access the tea collection center and/or the market. That he was born in 1956, and he had used the closed road since 1964, when going to school. That he owned a motor vehicle and he always used the closed road to transport his farm produce. That since the impugned access road was closed they are using a longer route or relying on the good will of neighbours to allow them use their land. That the suit land was graded when the 1<sup>st</sup> Defendant was living on the land in 1982. That the said graded road was closed by the Defendants in year 2021, and he is now forced to use other people's land to access the tarmac road and market.
14. PW 6 Muthari Githinji, adopted his Affidavit sworn on 14/1/2021 and his Witness Statement dated 27/5/2021, as part of his evidence in chief. That he was the owner of Loc 8/Kaganda/1666, and he has grown tea, coffee, and kept cattle on it. That he was using the closed road to transport farm produce to the market and take his cattle to the dip. That with the closure of the road he was unable to access the tea collection center and /or the market. That there was another access road, but it was inaccessible because it was hilly and very steep.
15. That he had used the closed road since 195, and it was graded in 1982 by the County Council of Muranga. That the defendant and her husband were aware of the grading as they saw the grading of the said road and they were present on then land parcel No. 43 at that time. That the said graded road was closed by the Defendants in the year 2021, and he is now forced to use other people's land to access the tarmac road and market.
16. On cross examination, he stated that his land was Loc 8/Kaganda /1666, and it did not border land parcel No. 43, as there was a distance of 1.75 km between them. That land Parcel No.43 is occupied by Margaret Kamau Githinji and her homestead is about 30ft from the closed road. That the closed road was graded in 1982, by the County Council of Muranga through Councillor Chege Makay.
17. PW 7 Nelson Njuguna Kiiru, adopted his Written Statement dated 27/5/2021, as part of his evidence in chief. He stated that he live in Gathaithi village in Muraranda and that the Plaintiffs and the Defendants were known to him. That he knew where the impugned road was as it was just near his home area. That the said road connected to the main road going to Muranga.



18. On cross examination, he stated that his land is Loc 8/Kionjoini /338, and his father is called Kiiru Muthiga(deceased). That there are three paths and they are not joined. That the impugned land was graded on 1982 by the area Councillor. That he did not know if the parcel of land the road occupied was government land or private land. That he had used the impugned road from the time he was young, and it had been closed since 2019. That it was closed by Margaret Mugwe and her children. That there were three paths, but the path, in dispute is the one that joined the main road. That since the road was closed, tractors and motor vehicles could not access their village easily.
19. PW 8 David Mwangi Ndirangu, adopted his Affidavit sworn on 14/1/2021 and his Witness Statement dated 27/5/2021, as part of his evidence in chief. That the instant case is about an access road which passes through land parcel 43, owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. That prior to the closing of the said access road, he used to use the said path to deliver his produce to the tea and coffee trading centres and to access the shopping centre since the 1960's. That in 1982 the impugned road was graded through the area Councillor. That the closed road was about 50M from his land.
20. On cross examination, he stated that since the road was closed there was no direct access to the shopping centre and he had to pass through other people's land. That since closure of the road, tacks, vehicles and people have to take a longer route to access the shopping centres. That he has used the impugned road since 1972 when he was going to school.
21. PW 9 Joseph Kiragu, adopted his Affidavit sworn on 14/1/2021, and his Witness Statement dated 27/5/2021, as part of his evidence in chief. He stated that he was 87 years and he knew the path that was the subject of this suit. That he had used that path since 1943, freely to go to Kaganda or Gathaithi markets. That he also used the path to deliver his coffee and tea to the collection centres and access the shopping centre. That the foot path in question was upgraded to an access road in 1982 and he saw it happen That after upgrading, the road remained open until 2019, when the Defendants closed it. That after the road was closed, they were accessing the shopping centre and tea bushes centre through other people's land and sometimes they used to be denied access. That his land was near the Defendants land on the lower side.
22. On cross examination, he stated that his land was land Parcel No. 108, and it was registered in the name of his brother. That he knew the applicants and they were all his neighbours. That he uses electricity in his home and the poles passed through the access road. That the access road was near his homestead. That he had also installed water in his home and the water pipes also passed through the closed access road. That there were other access roads on the upper part of his land and on the bottom side as well. That the impugned road was upgraded in 1982 by Muranga County Council.

#### **Defense Case.**

23. DW 1 Margaret Muthoni Mugwe Githinji, adopted her Witness Statement dated 26/5/2021, and here Replying Affidavit sworn on 26/2/21, as part of her evidence in chief. She testified that her land was parcel No Loc 8/Kaganda/43, and she lived on it with her family. That the 2<sup>nd</sup> Respondent resided on a different parcel of land known as land parcel No. Loc 8/Kaganda/699. That the path complained off by the Applicants on her land was a private path, that she used since she started living on the land in 1961. That the 1<sup>st</sup> Plaintiff's land has access to three feeder roads. The first is the road to Gathaithi, the 2<sup>nd</sup> is the road to Kaganda Shopping Center and the 3<sup>rd</sup> leads to the Tarmac Road. That next to he land, there was no path to the main road and her land had no access road. That the 2<sup>nd</sup> Applicant's land was accessible by a path from Mukuyu side and it led to the tarmac. That all the applicants can access the shopping center through the paths neighbouring the 1<sup>st</sup> Plaintiff's land and they had never used the



- path on her land. That there was no public tractor used to construct or up grade a road on her land. That there was a tractor that was brought, but she did not know under whose instructions.
24. On cross examination, she testified that in the month of March 2019, she blocked a private path on her land. That she blocked it because there used to be theft of her farm produce from her land. That the path she blocked connected to the tarmac road and a very steep path. That she and the Kamau Githinji were administrators of the estate of Githinji Mugwe(Deceased) who is the registered owner of land parcel No.43. That the tractor was brought in 1982 by the area councillor call Mackay. That the Plaintiffs were known to her and they were not her relatives. That there was no hostility between the Plaintiffs and herself prior to filing of this case.
  25. That there was another path that was very steep and a section of it was impassable. That there was also a pedestrian path. That she was present when the tractor was brought to her and it did not dig a road near her house as there was no house then. That the tractor just dug her plot and she did not know it belonged to Muranga County Council. Further, that she knew David Njuguna and he had to cross a river to arrive at his place. That she got married in 1961 and she had never seen the Plaintiffs passing through her land. That land consolidation was done between 1963 and 1965 and before then, there was no path where her land is.
  26. DW 2 David Njuguna Kariu adopted his Witness Statement dated 26/5/21, as part of his evidence in chief. He testified that he knew the Plaintiffs herein as they all came from Kaganda area. That their parcels of land were known to him and they had access to the main road as there were three (3) access paths leading to the main road; the first is the road to Gathaithi, the 2<sup>nd</sup> is the road to Kaganda Shopping Center and the 3<sup>rd</sup> leads to the Tarmac Road. That he also knew the land of Margaret Muthoni and there was no public path passing through it. That he was present during land consolidation and he knew the area well.
  27. On cross examination, he stated that he went to school in Gathuya Primary School and it is still present to date. That his land did not share a boundary with Margaret's land and that Margaret did not block any foot path. That he had not seen any path on land parcel No. 43 and he was present when the grader came in 1982. That the said grader was brought by Wilson Mugure to dig up Margaret's plot. That Margaret had blocked a path on her land.
  28. DW 3 Mary Wanjiku Mugwe adopted her Witness Statement dated 26/5/2021, as part of her evidence in chief. She testified that the 1<sup>st</sup> Defendant was her mother and that Wilson Mugwe Githinj (deceased) is her father. That they lived on Loc 8/Kaganda/43, which is still registered in her father's name. That she knew the Plaintiffs and she knew that there were several paths to access their lands. That there was no public road and/or access road passing through their parcel of land leading to Kaganda Shopping Center. That there was a time that her father had instructed a tractor to clear a foot path on their land. That she saw the said tractor and it was to clear their compound, so they could build a house. That the Path that was cleared was made to enable the tractor reach their compound and it was not a public foot path. That the said path was also used to deliver building materials to their home during construction of their house and it was no longer there.
  29. On cross examination, she testified that the tractor was brought by her father in or about August 1982. That the Plaintiffs were lying to court and there was foot path on land Parcel No. 43. That she had never seen any person passing through land parcel No. 43. That her mother blocked the footpath from the main road to their home and the said foot path was being used by family members only to access the main road. That if one uses the path on their parcel of land, it leads to the main road which is a public access road. That the path was blocked to keep members of the public from passing through



- their compound on their way to the main road. That in 1982, their father brought a tractor to build a road and she did not see it and she also did not know of it belonged to Muranga County Council.
30. DW 4 John Waithaka Mugwe adopted his Witness Statement dated 26/5/2021, as part of his evidence in chief. He testified that he knew the Plaintiffs and their parcels of land. That they had 3 main access roads from their parcels of land. One passing on the southern side to Kaganda, another one passing on the northern side to Mukuyu and to the shopping center and the last one passing straight along land parcel No.43 to the main road. That there was no access road passing through land Parcel No.43.
  31. On cross examination, he stated that he knew the Plaintiffs and they were old men and women. That there was no access road passing through land parcel No. 43. That even before this case was brought to court members of the public were using the access road and it was a public access road. That his mother blocked the access road that was crossing through land parcel No. 43. That in the 1980 and 1990's, members of the public would trespass on land parcel No. 43, using the impugned foot path. That he was present when the tractor came to clear the foot path and he did not know who owned it. That the tractor was hired by his father and he did not know at how much and he had no receipt to prove it. That he knew councillor Chege and he did not know if the tractor belonged to Muranga County Council. That the access road cleared was to their compound and not beyond to the hillside.
  32. DW 5 Kamau Githinji, adopted his Witness Statement dated 31/5/2021 as his evidence in chief. On cross examination, he stated that he passed through land Parcel No. 43 from Githambara using the impugned access land. That from 2019, he stopped using the access road and it was now blocked. That he had started using the access road passing through land parcel No.43 when he was young. That the Plaintiffs also used to use the access road before. That the registered owner of the land Parcel No. 43 is Githinji Mugwe and he did not know when he died. That he used the impugned access road growing up and members of the public also used it to take their cattle to cattle dip and to transport their farm produce. That he had seen motor vehicles using the access road and that members of the public had used the access road on land parcel No.43 for a long time.
  33. On 30/5/2022, the Court directed the parties to file their respective written submissions.
  34. The Applicants filed their written submissions dated June 13, 2022 through the Law Firm of Waiganjo Gichuki & Co Advocates. It is the Applicants' submissions that they had proved their case through cogent evidence. That they had been able to establish the existence of a foot path and had on a balance of probability established that the same had been used by members of the public for over 20 years. That the said foot path was being used by the Public and was graded in 1982, using public resources. The Applicants relied on section 32 of the *Limitation of Actions Act*, and urged this Court to grant the prayers as prayed in the originating summons dated January 14, 2021.
  35. The 1<sup>st</sup> Respondent on other hand also filed her Written Submissions through the Law Firm of L. M. Kinuthia & Associates dated July 8, 2022 and raised 4 issues for determination by this Court. The Respondents submitted that the Applicants' parcels of land are not land locked and they have other access roads they can use.
  36. It is the 1<sup>st</sup> Respondents submissions that the Applicants evidence was not credible and lacked substantive proof hence it could not be sustained by the Court. That the Applicants had failed through evidence to prove the existence of the impugned foot path. The 1<sup>st</sup> Respondent relied on section 32 of the *Limitation of Actions Act* and the case of *Re Ellenborough Park* (1956), where the Court established the four characteristics of easements as follows; There must be a dominant and servient tenement, The right must benefit the dominant land, There must be diversity of ownership or at least occupation and The right must be capable of lying in grant.



37. Further reliance was placed on the case of *Esther Wanjiku Mwangi & others v Wambui Ngarachu* Muranga ELC 422 of 2017 where the Court held that a claim of easement is a claim on use of land rather than possession or ownership.
38. Based on the foregoing the 1<sup>st</sup> Respondent urged this court to dismiss the applicants claim with costs. These are the issues for determination;
- I. Whether the applicants have met the threshold for grant of orders for an easement over Loc 8/ Kaganda/43
- II. Who should bear the costs of the suit?

**i. Whether the Applicants have met the threshold for grant of orders for an easement over Loc 8/ Kaganda/43**

39. The impugned land is registered in the name of Githinji Mugwe (deceased), having been issued with title on the May 26, 1965. The effect of such registration is espoused in section 27(a) of the *Registered Law Act* Cap 300 Laws of Kenya (now repealed ) and later captured in section 24(a) of the *Land Registration Act* 2012, which provides:

“ 24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

40. Additionally, section 28 of cap 300 (repealed) and now repeated in section 25(1) of the *Land Registration Act* provides that a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the said Act.
41. The singular issue for determination in the instant case is whether an easement exists on the Respondent’s land parcel no Loc 8/Kaganda/43, leading to the Applicants’ land parcels and if so whether the Applicants are entitled to the reliefs sought.
42. In the instant case, the Applicants claim that they are entitled to an easement in the nature of an access road over the Respondents’ land. It is the Applicants contention that they have been using as an access road the Respondents land measuring 58 Meters long by 6 Meters wide, for over 20 years and are therefore entitled to an easement over the same.
43. It is not in doubt that the suit land specifically being Loc 9/Kaganda/43, is registered under Githinji Mugwe (deceased) and the Respondents herein are his personal representatives pursuant Letters of Administration intestate dated 7<sup>th</sup> July 2020. It is also not in doubt that both the Applicants and the Respondents are neighbors and they live in the same general area.

*Black’s Law Dictionary* describes easement as follows:

“ An interest in land owned by another person consisting in the right to use and control the land or an area above and below it for a specific limited purpose



In his book *Land law and Conveyancing: Principles and Practice*, pages 184-185 Professor Tom Ojienda defines an easement as follows:

“Easements are common law rights enjoyed by a person over the land of another. They include the right of way, right of light, right of water, profit among others. Whereas easements are nowadays recognized as incorporeal hereditaments, that is objects of property in themselves, initially easements were construed as rights appurtenant to corporeal hereditaments, that is a privilege which could be obtained for the benefit of the corporeal land. For there to be declared an easement, four essential elements must be satisfied; i. There must be a dominant tenement and a servient tenement. That is an easement does not exist in gross but can only be appurtenant to (related to) a dominant tenement. A dominant tenement may be the adjoining land to which an easement (such as a right of way) is sought across another’s land (servient tenement) ... . ii. An easement must confer a benefit on (accommodate) the dominant tenement. The benefit conferred to the dominant tenement is not necessarily analogous to personal advantage to the occupier of the land, the concern is how the easement makes the dominant tenement better and more convenient property by increasing its general utility, conferring access among others. iii. The dominant and servient tenement must not be owned and occupied by the same person. In its very nature easement is a right in the soil of another (in alieno solo). iv. The easement must be capable of forming a grant. Although in practice easement are established by long user, the presumption always is that a grant was once made.”

44. The legal framework for easements is found in section 32 of the *Limitation of Actions Act* which provides as follows:

Section 32 Means by which easements may be acquired

1. Where a) access and use of light or air to and for any building have been enjoyed with the building as an easement; or b) any way or watercourse or the use of any water has been enjoyed as an easement; or c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption for twenty years, the right to such access and use of light. Air or to such way or watercourse or use of water or to such other easement is absolute and indefeasible.
2. The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested”

45. Further section 28 of the *Land Registration Act* No 3 of 2012 categorizes the right of way as an overriding interest. The said section provides that;

“Unless the contrary is expressed in the register, all land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register: a) .... b)...c)rights of way, rights of water and profits subsisting at the time of first registration under this Act. d)natural rights of light, air water and support.”

46. Sections 98 to 100 further provide for the creation of easements and analogous rights by a formal instrument and sets out what is to be contained in the said instrument, cancellation and extinguishment and enjoyment of the easement.



47. The courts have also pronounced themselves on the question of easements and in the case of *Kamau v Kamau* [1984] eKLR the Court of Appeal observed as follows:
- “An easement is a convenience to be exercised by one land owner over the land of a neighbour without participation in the profit of that other land. the tenement to which it is attached it he dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the servient tenement to every person into whose occupation these tenements respectively come.”
48. Based on the foregoing this Court will proceed to investigate whether the Applicants have established a case for the grant of an easement over Loc 8/Kaganda/43.
49. The applicants contend that they have used a portion of Loc 8/Kaganda/43 measuring 58 meters long by 6 meters wide road as an access road for the last over 20 years. It is the Applicants contention that in 1982 the said access road was graded by the County Council of Murang'a using public resources.
50. That their use of the said portion of access road has been uninterrupted by the Defendants until March 2021 when the 1<sup>st</sup> defendant blocked them from accessing the said path. That after the said road was closed by the Defendants, they have been forced to use alternative paths which are longer and or inaccessible. In support of their case the Applicants called 9 witnesses all who confirmed the averments made in the originating summons.
51. The 1<sup>st</sup> Respondent on the other hand denies the allegations made by the Applicants. It is her contention that the access road on land Parcel No. 43, was a private land built by husband at the time he was constructing their house. That the said road had never been a public road and was only used as an access road by family members. That in year 2021, she blocked the access road as a result of insecurity that was caused by trespass into her property by strangers.
52. The 2<sup>nd</sup> Respondent testified in support of the Applicants case. He contended that indeed there was a foot path passing through the Respondents land and the Applicants and other members of the public had used that path for over a period of over 20 years. That the path was closed by the 1<sup>st</sup> Respondent in March 2021, and since then, members of the public including the applicants have to use a longer route to access the main road.
53. This Court has perused the map excerpts on pages 43-46 of the Applicant's bundle of documents. From the said excerpts it is evident that land Parcel No. 43, has an access road passing across it (see page 43) measuring 6 meters wide. This Court notes that the Plaintiff did not call any qualified surveyor and / or expert to produce the said maps and or confirm their contents.
54. Be that as it may, the Court notes that production of the said maps was not objected to and the Respondents did not produce and or rebut them via evidence. This Court therefore has no reasons to doubt the said maps and will rely on the information therein as being a true representation as sworn by the Applicants. This evidence in the map was corroborated by the evidence of all the nine witnesses for the Applicants and the evidence of DW 1-5.
55. The upshot of the above is the Applicants have has established the existence of an access road passing across the Respondents land. It is not enough for the 1<sup>st</sup> Respondent to deny the existence of the access road and then fails to substantiate the said allegations via production of sufficient evidence.
56. Having found that indeed an access road exists, the next issue for determination is whether the legal requirements for granting an easement have been satisfied.



57. An easement is a right annexed to the land either to use (positive easement) or to restrict the use of (negative easement) on the land of another. The term is derived from the French word “aisement” which means something that makes the enjoyment of the land easier. An easement must confer a benefit on land (the dominant tenement) and burden other land (servient tenement).
58. *In Re Ellenborough Park* [1956] Ch 131 the Court set out 4 essential characteristics of an easement;
- a. There must be a dominant and servient tenement.
  - b. The right must benefit the dominant land.
  - c. There must be diversity of ownership or at least occupation.
  - d. The right must be capable of lying in grant.
59. In this case the dominant tenements are land parcels known as Loc.8/kionjoini/675, Loc.8/kionjoini/380, Loc.8/kionjoini /674, Loc.8/kaganda/1727 and Loc.8/kaganda/1666 owned by the Applicants while the servient tenement is land parcel No. Loc8/kaganda/43.
60. From the evidence on record, the Applicants have asserted that they are neighbours of the Respondents herein. However, their parcels of land do not boarder one another. It is the Applicants’ evidence that there were other access roads other than the one that is the subject of this case but the said access road were extremely steep and impassable. That the Applicants had used the impugned access road for a long period of time and in 1982 the said path was graded by the County Council of Muranga.
61. As stated above this Court has looked at the maps produced in Court by the Applicants. It is evident that all the dominant parcels of land are not land locked and they have access paths. The evidence of the Applicants that the alternative access road were impassable was corroborated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who confirmed that indeed there were other access roads but they were very steep and impassable. That the said alternative access paths were only accessible on foot and not by motor vehicles.
62. The Applicants claim for an easement is based on section 32 and 38 of the *Limitation of Actions Act*. The provisions of section 32 of *Limitation of Actions Act* provides that where an easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such easement, is absolute and indefeasible and it is not subject to the existence of other access paths.
63. It is the evidence of the Applicants and the 2<sup>nd</sup> Respondent that they have used and enjoyed the access road through Land Parcel No.43 for over 40 years. That as a result of their continued use of the said access path, it was graded by Muranga County Council in 1982 under the supervision of the area councilor at the time. What is not clear from the evidence before this Court was whether the said use was permissive or nonpermissive. While permission is an important aspect to determine in adverse possession, in the absence of any evidence that entry and use was permissive, this Court cannot assume. Permissive entry was not pleaded and /or referenced to by the Respondent and it is therefore safe to conclude that the Applicants access and use of the path on Land Parcel No.43 was non permissive.
64. The 1<sup>st</sup> Respondent on the other hand denies the access road has been open to the public and claims it was a private road and that it was graded after her husband contracted a tractor to do so. This evidence though corroborated by DW 2,3 and 4 was not supported by any evidence and the Court finds it hard to believe the 1<sup>st</sup> Respondent in the absence of supporting evidence. Further the witness statements of DW 1-DW 4 seemed contradictory in information and the court is unable to tell which of the 4 witnesses was telling the truth. While they alleged that there was no path crossing through Land Parcel



No. 43, they allege that the access road was closed in year 202, as a result of theft and to stop further trespass by members of the public.

65. For purposes of computation of time, various applicants and the 1<sup>st</sup> Respondents claimed to have started using the access road at various time prior to and after 1963. The Court for purposes of computation will however start computing time from the year 1982, as was common in all the statements of PW 1-PW 9 and the Statement of the 2<sup>nd</sup> Respondent. The Applicants had therefore enjoyed the used of the access road passing through Land Parcel No. 43 for a period of about 39 years, when they filed the instant suit.
66. The upshot of the foregoing is that the Applicants have on a balance of probability established a case for the grant of an easement by ways of an access road over Loc 8/Kagand/43 measuring 58 meters long by 6 meters wide. See *Ruth Wamuchi v Monica Mirae Kamau* [1984] eKLR, where it was held as follows:

“Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come”

**(ii) Who should bear costs of the suit**

It is trite that costs shall follow the events, and that the successful party be awarded costs. It is evident that the Applicants are the successful parties and this Court has no reasons not to exercise its discretion in their favour. Having found that the Applicants herein have proved their case on the required standards of balance of probability, the Court finds and holds that the Applicants are entitled to Judgment against the Respondents herein jointly and severally in terms of the prayers No. 1, 2, 3 and 4 of the Originating Summons dated 14<sup>th</sup> January, 2021. The Applicants are also awarded costs of the suit

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online;**

**In the presence of**

**Absent - Plaintiff**

**Kinuthia for the Defendant**

**Joel Njonjo – Court Assistant.**

**L. GACHERU**

**JUDGE**

