



**Kuria (As administrator of the Estate of Elikana Kuria (Deceased)) v
Kiambu County Government & 5 others (Environment & Land Case
1663 of 2007) [2022] KEELC 15647 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1663 OF 2007
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

**MARY NYANGUGI KURIA PLAINTIFF
AS ADMINISTRATOR OF THE ESTATE OF ELIKANA KURIA (DECEASED)**

AND

**KIAMBU COUNTY GOVERNMENT 1ST DEFENDANT
SAMUEL KAMUNYU 2ND DEFENDANT
DAVID NGUGI 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT
NATIONAL LAND COMMISSION 5TH DEFENDANT
LAND REGISTRAR KIAMBU 6TH DEFENDANT**

JUDGMENT

1. This suit was filed years ago on 17.10.2005 and the plaint has been amended severally. By a re-amended plaint dated December 11, 2015, the Plaintiff prays for judgement against the Defendants as follows;
 - a. That the 1st, 2nd and 3rd Defendants do pay general damages to the Plaintiff for the toilet of the Plaintiff they damaged on October 17, 2004.
 - b. That the 4th, 5th and 6th Defendants do cancel the public road existing on the part of the Plaintiff's land Reference No. Dagoretti/Thogoto/1374 and incorporate it in the Plaintiff's Land Reference No. Dagoretti/Thogoto/1373 and they, their agents or employees amend all public records and maps to reflect the fact that the public road on the west of the Plaintiff's Land Reference No. Dagoretti/ Thogoto/ 1374 has ceased to exist.



- c. Interest.
- d. Cost.
2. The 1st Defendant denied the Plaintiff's allegations vide its statement of defence dated February 6, 2006 and amended on 28th April 2017. The 1st defendant denies the claim of the plaintiff particularly the allegations of trespass and damages occasioned unto plaintiff's land.
3. The 2nd defendant did not enter appearance or file a defence in this suit.
4. The 3rd, 4th, 5th and 6th Defendants filed a joint statement of defence dated 16th January 2006, where they made a general denial of the Plaintiff's allegations.
5. The Plaintiff's evidence was led by PW1, William Njoroge Kuria, the Plaintiff's son who adopted his witness statement dated 9th February 2012 as his evidence. He produced documents in the Plaintiff's bundle of documents dated 19th May 2017 and 6th July 2007 as P. Exhibits 1-17.
6. While the dispute herein arose in 2004, PW1 traced the history of the suit land to the 70's. He contends that the land parcel L.R Dagoretti/Thogoto/20 measuring 12.2 acres was owned by Rev. William Njoroge (deceased). William Njoroge was apparently prevailed upon by members of the public at Thogoto, the local administration and Kikuyu County Council to hive for them a road on the lower part of his parcel and in exchange he would be compensated with the existing public road. The reason for this proposal was that the existing public road running on the eastern side of parcel Dagoretti/Thogoto/20 was hilly and impassible.
7. Pw1 avers that Rev William Njoroge obliged to the request made and the Kiambu Land Registrar proceeded to excise a new public road measuring 6 meters wide for use as a public access road. The pre-existing public road was closed to members of the public and became part of parcel L.R Dagoretti/Thogoto/20.
8. The parcel L.R Dagoretti/Thogoto/20 was then subdivided into Dagoretti Thogoto/475-478 of which parcel 475 was later subdivided into LR Dagoretti/Thogoto 1374-1381. Parcel LR Dagoretti/Thogoto/1374 ended up with Elikana Kuria (deceased), father of Pw1. However, the existing public hilly road was not cancelled on the government survey map.
9. On 17.10.2004 the Kikuyu Urban council, the first defendant, its agents, drivers or employee using a tractor registration number KZY 459 and accompanied by the 2nd and 3rd defendants wrongfully trespassed onto LR. Dagoretti/Thogoto/1374 destroyed the family's pit latrine, trees, crops and nappier grass and remade the public road that had been abandoned in 1973. These events triggered the discovery by the family of the plaintiff that the old public road was never officially canceled necessitating the filing of this suit in year 2005.
10. On cross-examination, Pw1 stated that the Plaintiff is his mother but she is mentally unwell. He again recounted how his grandfather, William Njoroge gave out a portion of his land to be used as a public road in lieu of the closure of the existing hilly public road. He contends that the agreement giving rise to the aforementioned processes was verbal. The parcel L.R Dagoretti/Thogoto/20 was subdivided into 7 portions when his grandfather died and titles were issued.
11. He further stated that the survey map shows that a road was hived out on the lower side and this affected the land of Pw1's father. However, the map did not capture the closure of the old road.



12. He also stated that in 2004, Kikuyu County council led by the then area councilor reopened the hilly road that had been closed, destroyed a pit latrine, food crops and cut trees without notifying the Plaintiff claiming that the area was a public road.
13. Pw1 avers that the new road is now tarmacked and is used by everyone and it goes upto Dagoretti Market while the hilly road on the upper part was dug out, graveled and it is only used by his neighbors.
14. On re-examination, Pw1 stated that his grandfather's land was measuring 12¹/₂ acres and that the neighbors sought a road since they had a problem accessing their homes as the existing road was hilly. He pointed out that the neighbours used to park their vehicles at his grandfather's land as they were unable to use the hilly road. The upper existing road was closed in 1972 until a tractor from Kikuyu City Council excavated it in 2004 using force.
15. The defendants did not call any witness.
16. The Plaintiff's submissions are dated 19th August 2022, where they contend that it was unfair for the 1st Defendant to rectify the survey land maps as far as the new road was concerned but deliberately failed to have the then existing public road cancelled and merge the same into Plaintiff's land as had been agreed upon by Rev William, the public and the government administration.
17. The submissions of the 1st defendant are dated October 4, 2022, where they contend that the Plaintiff failed to produce any evidence or documents to support the verbal agreement mentioned by Pw1 and that no witnesses were called to corroborate these claims.
18. It was submitted that the Plaintiff has never had the right to the public road which she claims had been excised by Kikuyu county council and since the Plaintiff admitted that the road closure of the existing road was not registered, the 1st Defendant was acting well within its rights in carrying out its mandate as provided under Section 184 (1) of the Local Government Act (repealed) thus it cannot be said that the 1st Defendant trespassed on the land, and the claim of general damages is therefore unfounded.
19. The 1st Defendant relied on the case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR, *Philip Ayaya v Crispinus Ngayo* [2014] eKLR as well as the case of *Nakuru Industries Limited v SS Mehta & Sons* [2016] eKLR.

Determination

20. The issues arising for determination are:
 - i. Whether the original public road should be formally closed to be incorporated in parcel 1373.
 - ii. Whether the plaintiff is entitled to damages.
21. It is pertinent to note that none of the defendants herein tendered any evidence even though the 1st defendant was represented during the trial. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
22. Thus the plaintiff still has the burden of proving their case. I find that the plaintiff has given an account of how the initial parcel Dagoretti/Thogoto. L.R. 20 was subdivided to yield other parcels. The green card on page 30 of plaintiffs bundle shows that William Njoroge was registered as the owner of the



- said parcel on 5.7.1973. That the said parcel was subdivided into parcels 475-478; Parcel 475 was subsequently subdivided and one of the resultant parcel is no. 1374 which went to Elikana Kuria on 14.1.1997 (see the green card on page 31 of the bundle).
23. There is no evidence as to how the oral agreement was entered into between William Njoroge on one hand and members of the public and the local government on the other hand. However, there are tell tale signs that after 1973, the public road was physically closed. That is why the local government came into the land on a mission to re-open the public road in the year 2004.
 24. The other pointer to the existence of the verbal agreement is the establishment of the new road which is visible in the map availed at page 54A of the bundle. According to PW1 this is the amended Government Survey map which captured the new road.
 25. During cross examination, PW1 had this to say in relation to the new road.

“The road at the down part is now even tarmacked. That road is used by everyone, the tarmacked one and it goes upto Dagoretti market. The upper road is only used by my neighbors from the down part.....”
 26. And during re examination, he again stated that:

“For the road that my grandfather gave out, it is now a major road between Kikuyu and Dagoreti market and it is tarmacked. It is used by everyone. It also goes to the slaughter house....”
 27. With this kind of evidence it becomes clear that injustice was occasioned to the family of the plaintiff by the defendants (read the then Government) who were the people in a position to put the record straight. The situation that has subsisted over the decades is that the issue of rectification of closing the old road remained in limbo, such that William passed on without seeing justice and so did his son Elikana Kuria. Elikana’s wife, the plaintiff lost her memory and she could no longer prosecute the case by herself, hence pw1 had to act as her guardian. By the time of his testimony in court, pw1 stated that he is 75 years old!.
 28. Equity regards as done that which ought to have been done. In this case, a new public road was established on William’s land, but the old public road was never closed, and hence the said road ought to be closed.
 29. This is a situation whereby the defendants have failed to uphold the National values and Principles of good governance set out under Article 10 of *the Constitution* in relation to Equity, social justice, Good Governance, transparency and accountability.
 30. The 1st defendant has not denied that indeed they entered into the land of plaintiff’s family in 2004. Their justification for these actions is that the road remained public land, but they maintained a studious silence on the issue of the new tarmacked road. It is not lost to this court that the 1st defendant attempted to adduce evidence of rebuttal via their submissions. That is however not tenable.
 31. The upshot of the foregoing analysis is that the old road ought to have been closed for good, so as to incorporate the same in the land of the plaintiff. The plaintiff has pleaded that Elikana’s parcel was 1374 but he desires that the old road be incorporated to parcel 1373. There is no clear explanation regarding this proposal and the court is not able to interpret the general lay out of the various subdivisions of parcel L.R No. 20. However, the fact remains that the public road should be closed to be part of the land of plaintiff’s family.



32. Having found that the old road ought to have been closed, it then follows that the entry into the land of plaintiffs family in year 2004 by the local government was uncalled for and amounts to an act of trespass.
33. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000 cited in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, it was stated that;
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.
34. In the case at hand, I find that plaintiff is entitled to damages and I hereby give an award of Ksh. 1,400,000 thereof.
35. I take cognizance of the fact that there was no devolved government in year 2004. However none of the two levels of government tried to mitigate the issue when they were established. I therefore direct that damages shall be paid by the two governments equally.
36. In conclusion, I hereby enter judgment for the plaintiff against the 1st defendant (County Government of Kiambu and 4th defendant (Attorney General representing the National Government) in the following terms:
- i. It is hereby declared that the old public road is now closed and forms part of the plaintiff’s land parcel Dagoretti/ Thogoto/1373.
 - ii. The fourth, fifth and sixth defendants are directed to cancel the said public road existing on the part of the plaintiff’s land reference number Dagoretti/Thogoto/1374 and incorporate it in the plaintiff’s land reference number Dagoretti/Thogoto/1373 and ensure that the public records and maps are amended to reflect the fact that the aforementioned old public road ceases to exist.
 - iii. The plaintiff is awarded General Damages for trespass amounting to ksh. 1,400,000 to be paid equally by 1st defendant ksh. 700,0000 and 4th defendant ksh.700,0000.
 - iv. The 1st and 4th defendants are condemned to pay costs of the suit to be paid equally, Plus interest to be computed from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kinyanjui holding brief for Kinuthia for Plaintiff

M/s Wakarima holding brief for Karuga for 1st Defendant

Court assistant: Eddel

