



**Wamae & another v Kariuki (Environment & Land Case 620 of 2017)
[2022] KEELC 15435 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 620 OF 2017**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

PATRICK J. N. WAMAE 1ST PLAINTIFF

VERONICA NYAMBURA WAMAE 2ND PLAINTIFF

AND

SERAH WANJIKU KARIUKI DEFENDANT

JUDGMENT

1. Vide a plaint dated the 22/6/2017 and filed on the 23/6/2017 the plaintiff's filed suit against the defendant seeking the following orders;
 - a. A declaration do issue that the property known as L R No Limuru/Ngecha 1449 is subject to an encumbrance in favour of a right of way/access for the properties known as LR Limuru/Ngecha 1450 1451 and 1453.
 - b. An order of permanent injunction restraining the defendant her agents servants and or employees from interfering obstructing or in any way refusing and denying the plaintiff's/ applicants right of way to their properties known as 1450, 1451, 1453.
 - c. An order of mandatory injunction compelling the defendant to remove any obstruction to the plaintiff's right of way/access to their properties known as parcel Nos 1450, 1451 and 1453
 - d. Costs of the suit.
2. It is the plaintiffs' case that at all material times relevant to this suit that is to say since 1960's they enjoyed unfettered access to their properties being parcel Nos 1450, 1451 and 1453 through a 9 meter access road beginning on the right side of parcel 1449 belonging to the defendant.



3. They aver that on the 16/2/2017 the defendant *vide* a letter of even date maliciously blocked the access road to the plaintiffs properties for no reason forcing them to use unorthodox access which poses a risk of trespass *inter alia*. They urged the court to restrain the defendant from interfering with their right of access and quiet enjoyment of the said access road.
4. The defendant denied the plaintiffs claim *vide* her statement of defence dated the 18/7/2017 and filed on even date. Similarly, she denied that the plaintiffs have suffered any financial loss to warrant any compensation in damages nor any undue hardship.
5. The 1st plaintiff testified as PW1 (Patrick J N Wamae). He adopted his witness statement dated the 22/6/17 as evidence in chief and produced documents marked as PEX No 1-10. That the defendant is his sister in law while the 2nd plaintiff is his sister. That the original land being parcel 1249 was owned by his mother the late Esther Njoki Wamae who subdivided the mother title in 1992/93 into several parcels to wit; 1449, 1450, 1451 and 1453 and gave her children, the parties herein. That parcel No 1449 belongs to the defendant while parcels 1450 and 1453 belong to the 2nd plaintiff while parcel 1451 belongs to him. That as early as 1960s and after the subdivision in 1992/93, there existed an access road to parcels Nos 1450-1453 via a 9-meter road access beginning from the right side of the defendant's land being 1449 until the same was blocked by the defendant on the 16/2/2017 for no lawful reason. That in the said letter the defendant intimated her intention to change the road from the right to the left side of the property which he states is not tenable for the following reasons; the access road on the left is private road belonging to the owners of parcels 614 and 615; the said access passes through the graves of their parents; their houses are on the right hand side hence proximity to the existing 9 meter road; beacons have been installed on the access road on the right.
6. In cross the witness informed the court that the total land acreage was 4 acres and that the access is through the 9 meter road running that the defendants land to parcel 1453 which has been in use since 1960s. That the access road on the left side is private road and not suitable for the reasons advanced above.
7. PW2 -John Mungai Gatonye relied on his witness statement dated the 9/2/2018 and stated that he was present on the 10/1/2017 when the access road was beacons and marked by Nahashon Mburu a private surveyor from Geomeasure Surveyors Limited when the parties , the District Officer area assistant chief and other invited locals were present. He stated that the road access access has been in existence for many years and has used it himself severally while visiting the parties whom he knows well.
8. In cross the witness stated that the access to the plaintiffs land is on the right and that there is no access road on the left side of the plots.
9. PW3- Veronica Nyambura Wamae stated that she is the 2nd plaintiff and owner of parcels Nos 1450 and 1453 having inherited them from her mother the late Esther Wamae. She led evidence similar to PW1 and relied on her witness statement dated the 22/6/17 and the documents marked PEX 1-10 produced by the plaintiff. She stated that there is only one access road on the right to the properties which exists on the ground and not on the maps. That this access has been in use for a long time. She was emphatic that the 1st surveyor who surveyed the land did not provide for the access road to the plots. That equally their mother did not show them the access to the said plots. That the second surveyor came to the land on 10/1/2017 to locate the beacons on the land.
10. PW4- Stephen Wamae relied on his witness statement dated the 9/2/18 in chief and stated that he is a half brother of the plaintiffs and brother in law to the defendant and knows the full history of the lands in dispute. That the original land belonged to his father who had 3 wives and upon his demise the land was subdivided into parcels 1249, 1250 and 1251 and given to the 3 houses respectively representing



each wife and that he too occupies land that emanated from family land. That he owns parcel 2573 which neighbours 1449 and is aware that the access to the suit lands is through the 9 meter road on the right side of the lands which access existed since the 1960s and subsequently after the subdivision of the mother title into the suit lands. That he was present on the 5/1/2017 when it was agreed that the existing 9 meter access road on the ground be officially included in the map sheet for Limuru - Ngecha region. Also that he attended the meeting on the 10/1/2017 when the beacons were affixed by a private surveyor in the presence of the parties and the local administration. He stated that during the earlier subdivision that yielded 1249, there was no official access road provided in the map but only an informal road existing. Shown the RIM – PEX No 4 he stated the access road on the left side of the suit lands which abuts parcels 614 and 615 is a private road created by the owners of the said parcels and that it is not a public road. That the road on the ground is not official and that explains why the plaintiffs were pushing to have it included in the RIM and recognised as such.

11. PW4- Mordecai Kingori introduced himself as the Kiambu subcounty surveyor in charge of Lari and Limuru Sub counties. That the 1st plaintiff came to his office and requested for help with the dispute relating to trees that had been cut by a neighbour and owner of parcel 1451. That he visited the site and found that the road on the right does not exist on the RIM map but exists on the ground. He stated that he did not attend any meeting to affix beacons on the road access and that he was not aware whether the parties have made any attempts to formalise the access road existing on the ground.
12. DW1 – Serah Wanjiku Kariuki testified and relied on her witness statement dated the 18/7/2017 and produced documents marked as DEX 1-5. She stated that she is the registered owner of parcel 1449 measuring approx 1.0 of an acre. That upon the subdivision of the mother title she settled on her parcel. That in 1998 on request by the 1st plaintiff she granted access for purposes of building materials through her land instead of the existing road on the left but thereafter the plaintiffs have made it a habit of using the road to the extent that they now claim it as of right. That on the 10/1/2017 the plaintiffs in the company of the local administrators and a surveyor came to the land and supervised the creation of the access road on the property. She was of the view that the alleged access road will lead to the demolition of her son's house which is on the area marked as an access road.
13. In cross she stated that the access road existed even before the subdivision and her mother in law allowed the plaintiffs to use it. That during the site visit by the surveyor and the administrators she was asked to leave the site because of the objections she raised. She reiterated that there is no official access on the side that the plaintiffs are claiming one.
14. The plaintiffs filed written submissions *vide* the firm of Kimathi & Associates while those of the defendant were filed by the firm of Muraguri & Muraguri Advocates.
15. As to whether the access road on the right side of the defendant's land exists the plaintiffs submitted in the affirmative on account that ; the access has existed and used since 1960s even before the demarcation and the subdivision of the family lands; unfortunately the surveyor who carried out the subdivisions of mother title No 1249 did not include the subject access road in the mutation form despite its existence on the ground; parties attended a meeting at the District Officers office to formalise the access road; on the 10/1/2017 the parties in the presence of the local administrators witnessed the marking of the access road and beaconing by a private surveyor; The defendant does not deny the existence of the access road; the existence of the road was recognised by the PW4- the surveyor. That on the 16/2/2017 the defendant in a turn of events blocked the plaintiffs from accessing and use of the access road hence the filing of the suit.
16. The plaintiffs submitted that there is no alternative access to their lands as the access road on the left side and which the defendant insists should be used by the plaintiffs is a private road serving parcels 614



- and 615 belonging to third parties. That they have never used the said access road because their parents' graves are located on that side *inter alia*. That the defendant wishes to change the location of the access road in her letter dated the 16/2/2017 to the left side which access is not available as it is a private road.
17. The plaintiffs have argued if the orders are granted the defendant stands to suffer no prejudice but on the other hand it is the plaintiffs who will be blocked from accessing their lands. The plaintiff's as well as the defendant's houses were constructed on the right-hand side due to the proximity of the access which has been used from time immemorial and the left side of the road was used for farming. The plaintiffs who are elderly are now being forced to use panya (unofficial routes) to access their homes. That their vehicles cannot access the homes. They refuted the defendant's claims her sons house shall be demolished as it does not lie on the road access.
 18. Relying on section 27 of the *Land Registration Act*, the plaintiffs have argued that the defendant held title to the land subject to any unregistered rights or interests subsisting on the land to which her mother in law held the mother title. It was their argument that the right of access in favour of the plaintiffs is an overriding interest protected under Section 28 of the *LRA* which does not require it to be registered on the land and that the defendant is estopped from reverting the position. That the defendant has frustrated the process of marking the access road which includes obtaining the consent of the Land Control Board.
 19. Relying on section 140 (4) of the *Land Act*, the plaintiffs submitted and urged the court to grant the access order in favour of the plaintiffs on the basis of the long existence and use by the parties of the access road to obviate suffering of hardship by the said plaintiffs seeing that there is no alternative of access to their land.
 20. The defendant opposed the plaintiffs claim in her submissions. She submitted that during the subdivision an access road was never provided for to access the plaintiffs land through the defendants land but the same is placed on the right hand side however there is an access on the left side as provided for in the sketch map produced by the plaintiffs.
 21. The defendant submitted that there are no rights of access in favour of the plaintiffs and the plaintiffs right to excise a road through her land interferes with her right to absolute ownership of the land in law. That the plaintiffs are seeking to create an easement on the land without following the law which includes agreement of the parties, obtaining land control board consent and executing the mutation forms as the same is a controlled transaction governed by the *Land Control Act*. Further that the plaintiffs are claiming long use of the access road in which event it should have proceeded through the provisions of *Land Adjudication Act* for the court to establish whether to construe an easement based on the evidence led. Further the plaintiffs failed to prove their case as to whether there indeed existed an access road on the defendant's land seeing that their witness admitted that he is not a qualified surveyor.
 22. Having read and considered the pleadings, the evidence led at the trial the written submissions and all the material placed before me the issues that commend themselves for determination are; whether the plaintiffs have proved a right of way running through the defendants land in favour of the plaintiffs; whether the plaintiffs are entitled to the orders sought and who meets the costs of the suit.
 23. The following are not disputed; the parties are related, the plaintiffs are brother and sister while the defendant is their sister in law, the wife of their deceased brother. The land formed part of the original holding by Mr Wamae, the family patriarch who had 3 wives. Upon his demise the holding was subdivided into 3 portions according to his 3 wives that is to say parcels 1249, 1250 and 1251. Esther Njoki Wamae, one of the three wives was allocated 1249. According to the mutation form dated the 17/9/92 the Esther Njoki Wamae subdivided the mother title parcel 1249 into 5 parcels namely 1449, 1450, 1451, 1452 and 1453. It was commonly agreed that the said Esther gave parcels 1449, 1450 &



1453 and 1451 to the 1st plaintiff, the 2nd plaintiff and the defendant respectively. These are further supported by the copies of titles of titles availed by the parties during the trial. The owner of parcel No 1452 has not been disclosed.

24. The plaintiffs case is that there exists an access road passing through the defendant's land parcel 1449 which runs through 1450-1453; that the road has been in use since 1960s and even after the subdivision of the mother title in 1992/93. That in 2017 the defendant blocked the said road occasioning them loss and inconvenience in accessing their homes.
25. The defendant on the other hand has denied the plaintiffs claim stating that the access to the plaintiffs lands is through the access non the right as shown in the RIM.
26. The plaintiffs are duty bound to proof their case to the standard of proof required in civil cases which is proof on a balance of probabilities.
27. Evidence was led by PW1 – PW3 that parties have used the access road for many years since the 1960s and even later after the subdivision of the land in 1992/93. That in 2017 parties in an attempt to formalise the situation attended a meeting before the local District officer and the chief where a resolution was passed to have the access road marked and beacons. That on the 10/1/2017 the exercise of marking the land and affixing of the beacons was carried out in the presence of the parties and the local administrators where a private surveyor from Geomeasure Surveyor Limited carried out the exercise. The defendant led evidence that she was asked to leave the meeting when she expressed her objection to the beaconing of her land. This led to her letter dated the 16/2/2017 which stated as follows;

“ Mrs Serah Wanjiru Kariuki February 16, 2017

Mr John Njenga Wamae

Ms Veronica Nyambura Wamae

Mrs Cecilia Wanjiku Ndigiru

Dear all,

Ref: Access to land nos. 1450, 1451, 1452 and 1453

I refer to the above matter and the preceding events which are well known to you. Please note that while the above parcels of land do not have access, my land No 1449 already has access and therefore I do not require another access to my property.

However, I have no objection to you having access to your properties through my property if the following conditions are observed and met in full.

1. That I will not suffer loss of nay part of my land i.e my land will remain one (1) acre as it is now.
2. The access will be from the side bordering Njuguna's family.
3. All expenses incurred during the mutation exercise will be on you.

I would appreciate if you could respond to this letter within ten (10) days from the date of this letter.

Yours faithfully,

Serah Wanjiru Kariuki



Cc. DO - Limuru district
Chief – Rironi location
Assistant chief – Gatimu sub-location.”

28. On the 18/4/2017 the plaintiffs’ lawyer in his letter addressed to the local administration informed them that the defendant had blocked the access road in blatant disregard to authority and in extreme provocation to the plaintiffs.
29. The defendant has refuted any agreement to that effect and has argued that any excising of a road required consent and a land control board consent as it is a controlled transaction. That her consent was not obtained neither was the consent of the land control board before the plaintiffs in conjunction with the local administration purported to forcefully mark and beacon her land. I agree with the defendant that there were no minutes or resolution of such a meeting presented before the court in support by the plaintiff so much so that it is difficult to understand under whose authority the defendants land was being marked and beacons.
30. PW4, the surveyor denied having marked and or beacons the access road and stated that he went to the land on the 10/1/2017 to resolve a dispute involving cutting of trees on the road reserve on the left hand side of the lands (see the sketch map) between the 1st plaintiff and a neighbour namely Cecilia Wanjiku. His evidence was however key in that he confirmed that there is no access road on the RIM and that where private land owners intend to create an access road there has to be consent of the land owner as well as a land control board consent given that the transaction is a controlled transaction under the *Land Control Act*.
31. I have carefully perused both the RIM for Limuru location, Ngecha Sub location and the mutation executed by the original owner Esther Wamae in 1992 and I find that the road that abuts the plaintiffs and the defendant lands on the left is shown along parcel 614 and 615. The plaintiffs have given reasons for not wanting to use the said access road to their lands as; the reasons are that the road is private; the land near the said road is reserved for their farming; their parents’ graves will be desecrated; their houses are in the proximate location of the unofficial road. I must point out that the plaintiffs failed to prove that the said road is private road. Once a road is delineated in the RIM, it is surrendered to Director of Survey for public use. It would appear in the absence of any evidence to the contrary that the subdivision of 1992 took into account the existence of the road on both the RIM and the mutation that created or recognised an access to the plaintiffs’ lands. Had the Director of Survey deemed it fit to create a road on the right side of the defendants land it could have done so and included it in the RIM. None was created because the lands were already served by an existing road access. I find that the road is public and no evidence has been presented to me to suggest otherwise. Consequently, I find that the plaintiffs lands are not landlocked as they have clear access. The other reason advanced by the plaintiffs appear to me to be conveniences that the plaintiffs desire in accessing their lands.
32. The title of the plaintiff was registered in 1994 and going by section 32 of the *Land Adjudication Act*, the period is 13 years which falls below the 20 years permitted in law to create a right of way by way of prescription.
33. It is to be noted that the affixing of the beacons was done by a private surveyor who was not called to testify and explain to the court under what authority the road access and beacons was carried out. The land of the defendant cannot be alienated and or disposed without her consent and authority and without compensation as the same would be alienated for purposes of a public road.
34. In the end I find that the plaintiffs have not proved their case. It is dismissed with costs to the defendant.



35. Orders accordingly.

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

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Githinji for 1st and 2nd Plaintiff

Muraguri for Defendant

Court Assistant – Phyllis / Kevin

