Koimburi v Mwangi (Environment & Land Case 97 of 2018)
[2022] KEELC 15406 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15406 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 97 OF 2018

FO NYAGAKA, J

DECEMBER 19, 2022

BETWEEN

BONFACE NDURA KOIMBURI ..... PLAINTIFF

AND

DAVID MWANGI ..... DEFENDANT

JUDGMENT

1. In his Amended Plaint dated October 18, 2019, the Plaintiff prays for judgment against the Defendant for:

   (a) An order of permanent injunction restraining the Defendant, whether by himself, his servants, agents and/or any other person(s) acting through the Defendant from entering, remaining, trespassing, wasting, damaging, alienating, charging and/or in whatever other way interfering with the Plaintiff's quiet possession of land Parcel No. Kitale Municipality Block 18/bidii/238.

   (b) Costs and interests.

   (c) Any other relief that this Honorable Court deems fit and just to grant.

2. The suit is defended. The Defendant's Statement of Defence dated November 26, 2019 denied each and every allegation contained in the Plaint. He prayed that the suit be dismissed with costs.

Hearing of the suit

3. Following compliance with the provisions of Order 11 of the *Civil Procedure Rules 2010*, the suit proceeded for hearing.

The Plaintiff

4. The Plaintiff's case is that upon a purchase transaction and conveyance he became the sole registered proprietor of all that parcel of land namely Kitale Municipality Block 18/Bidii/238 measuring 0.3613 hectares on June 23, 2010. It is situate in Bidii location within Trans Nzoia County. For this holding, he produced in evidence the title deed and search certificate dated May 23, 2017 marked P. Exhibit 1 and P. Exhibit 2 respectively. He continued his testimony that he purchased the parcel from one Florence Gesare Onyansa. It was previously owned by Richard Omwansa who had purchased the same from the Government of Kenya.

5. The Plaintiff purchased the suit land when it was used for farming. It had some permanent structures erected thereto. The Plaintiff described the suit land's attributes as a long stretch running along the tarmac road. One of the neighbouring portions that bounders his belongs to the Defendant.

6. Prior to 2015, neighbours around his parcel created a passage or road to access the main road through his land. The said passage, is wide enough to allow the passage of a motor vehicle. They even went to the extent of creating a dumping site on a part of the road. Unhappy with those affairs, the Plaintiff in 2015 notified his neighbours, including the Defendant, that he would erect a perimeter fence to wade off the unauthorized user by way of the access road.

7. The defendant opposed that installation. He told the plaintiff that he possessed ownership rights over the access road from the previous owner. As such, he would not allow the plaintiff to fence off the passage. The Defendant thereafter reported the plaintiff to the assistant chief. A hearing was conducted where the Assistant Chief invited both parties to lay credence to their positions. Ultimately, the Chief agreed with the Plaintiff holding that the Defendant lacked legal authority to pass through the suit land.

8. Following the dispute, the Plaintiff called his workers to fence the plot. However, they were met with melee on that day and some sustained injures. The Defendant's son was found responsible for the attack. He was arrested by the area Chief and taken to Kitale Police Station.

9. The Defendant approached the Plaintiff with a view to amicably resolving the matter. The Defendant's son was released after the Plaintiff settled some expenses. This, however, did not stop the Defendant from continuing to use the Plaintiff's land as passage.

10. Sometime later, the plaintiff was on course to constructing a commercial building. However, the same was stalled by the defendant's continuous threats to the Plaintiff's workers. The plaintiff reported the defendant to the Police Station but such efforts were an exercise in futility.

11. The Plaintiff cited that the actions of the Defendant amounted to unlawfully denying him the right to quiet enjoyment of his property. He urged this Court to find the Defendant guilty of trespass and restrain him by way of injunction from claiming any interest therein.

12. When led by the defendant's counsel to DMFI1, the Plaintiff could not identify the access road referred to on the map. On DMFI2, he observed that two (2) roads pass through his land; one leading to Akwinos School, legally granted while the other illegally excised from his portion by the Defendant.

13. On December 7, 2021, this Court directed the County Surveyor to visit the land and verify the existence or lack thereof of the road of access on the disputed parcel of land. The Surveyor was further directed to compile a report and file it in Court. The directions were complied with. The report dated January 12, 2021 (sic) was filed on January 26, 2022. The Surveyor gave evidence as the Plaintiff's witness, PW2.

14. PW2, Moses Nyaboe, a County Surveyor and the author of the report dated January 12, 2021 which was produced as P. Exhibit 3, testified that on December 21, 2021, he visited the suit land to establish the position. In the presence of both parties, he was informed of the extent of boundaries. He observed that there was an access road on the ground between the tarmac road between Kitale and Kapenguria adjoining parcel No. 564.

15. He continued that from Kitale to Kapenguria, the parcel of land with the access road was situated on the right side. The road boarders one of the parcels and there is an adjacent farm on Block 15 Koitogos farm.

16. Relying on the registered maps, he observed that there was an L.R No. 8816 belonging to Bidii farm, and Plot No. 564, which arose from plot No. 127, boarders plot No. 238.

17. He advised that during the process of subdivision, provision must be given for an access road. The roads of access to each of the subdivided portions from plot No. 127 were given, including that of plot No. 564. He continued that there is a parallel passage between L.R. No. 8816 and plot No. 563 which continues to plot No. 564. He added that there was no access road from the main road to parcel No. 564 meaning the access road was the one provided on the map.

18. According to the records, PW2 testified that plot No. 238 had not been subdivided to create an access road to plot No. 564. PW2's report revealed that there is a road between the main road to other parcels passing across plot No. 238 which leads up to Akwinos School. It is far from plot No. 564. He further observed the presence of a culvert joining the road to the school. Finally, he stated that he did not see any culvert on plot No. 564.

19. When cross examined, PW2 identified that the sketch map attached to his report tallied with the Registry Index Map over parcel No. 564 on DMFI1. That it disclosed that there was an opening on parcel No. 564 to the tarmac road. He maintained that the map did not show the opening to the tarmac road from parcel No. 564 clarifying that the road from the tarmac road to the Defendant's parcel passing through the suit land is not documented. He added that the access created for plot No. 564 had been closed at the part that it accesses the road of access.

The Defendant's Case

20. The Defendant adopted his written statement dated November 26, 2019 as his evidence in chief. It was his position that he was the registered proprietor of all that parcel of land namely Kitale Municipality Block 15/Koitogos/564 measuring 0.101 hectares on March 11, 1994. He produced the title thereto as D. Exhibit 1. His testimony was that his land does not front the main Kitale - Kapenguria road thus he has been using an access road to get to the main road since 1994.

21. He was aware that the Plaintiff became the registered owner of the suit land on June 23, 2010. The said land borders the Kitale - Kapenguria road. He established that the Plaintiff's land and his are adjacent or neighbouring. He added that the access road that he uses passes through the Plaintiff's land dividing it into two (2) portions. He relied on the Registry Index Map (RIM) to demonstrate the subsistence of the access road used before the Plaintiff became the owner of the suit land. He described the access road as that having a culvert. He produced an extract of the Registry Index Map, marked D. Exhibit 2, to show the existence of that access road and Registry Index Map marked D. Exhibit 3 for the area showing parcel No. 238.

22. The Defendant continued that he does not live on the suit land. He has however rented the same to several tenants who use the access road. He denied the allegations framed by the Plaintiff.

23. The Defendant recalled that in one (1) instance, the Plaintiff unlawfully blocked the road without a court order. That move was resisted by him and his agents.

24. When cross examined, he disagreed with the findings of the surveyor. He identified the road on D. Exhibit 3 as the one passing on the side of the land and adjacent to Bidii side. Between his land and the adjacent parcel that boarder Bidii side where a road passes in between, there is a road from his parcel to the Bidii side directly. D. Exhibit 3 showed that across the road, there is a road between parcel No. 717 and 1575. He also acknowledged the existence of a school but unaware of its particulars. From the access road, there is another road from Kitale - Kapenguria which makes a junction. On the map, the other road is not shown to the right of his parcel that faces the tarmac while on the access road, there is a neighbour.

Submissions

25. At the close of the viva voce evidence, parties filed written submissions. By the Plaintiff's submissions dated October 17, 2022 it was submitted that since PW2's report, an expert report was not challenged by the evidence of another expert, the Plaintiff had demonstrated a case against the Defendant. He cited several authorities in support of this submission. He highlighted the testimony of the Defendant during his cross-examination. He paid emphasis on his revelation that when exiting his road and upon getting to the tarmac road, there was no road on the other side of the road. When referred to the Registry Index Map, the Plaintiff argued that the Defendant confirmed that on exiting the road on the map, and after getting to the tarmac, there was a road on the other side running along plot No. 717. He also confirmed that there was a road passing through the Plaintiff's land but wasn't sure if it went to a school. The Plaintiff emphasized that was the road on the Registry Index Map of Koitogs farm running along plot No. 3945 to plot No. 3531.

26. The Defendant's submissions dated October 17, 2022 argued that his right of access to the suit land was protected by Section 32 (1) b of the Law of Limitation Act (sic). He expostulated that it had been in use of the said portion since 1998 bearing in mind the fact that its use was not subject to change of ownership. He computed that from September 14, 1998, the defendant acquired an easement over parcel No. 238 having used the way for twenty (20) prior to the Plaintiff filing the cause of action. He cited several authorities fortifying his submission. He urged that by virtue of that provision, the Plaintiff was barred by the statute of Limitations. For this reason alone, the suit ought to be dismissed.

27. Additionally, he maintained that the access road, as laid out in the Registry Index Map is the one the defendant continues to use. He prayed that the suit be dismissed with costs as the Plaintiff has failed to prove his case on a balance of probabilities.

Analysis and Disposition

28. I have carefully considered the pleadings, the evidence and the submissions relied on by parties. I have also considered the law applicable.

29. It is not disputed that the Plaintiff is the registered proprietor of all that parcel of land namely Kitale Municipality Block 18/Bidii/238 measuring 0.3613. The said parcel of land adjoins that of the Defendant namely Kitale Municipality Block 15/Koitogos/564 measuring 0.101 hectares. The Plaintiff's land further boarders the Kitale - Kapenguria road which Defendant's land does not.

30. It is the plaintiff's case that the defendant has trespassed on his land, and on his own volition created an access road unlawfully. He lamented that all efforts to resolve this issue were met with futility. The

plaintiff in 2015 attempted to block the passage by fencing off that area. This was confirmed by the Defendant who testified that he resisted the Plaintiff's move to seal the access road.

31. The Defendant informed the Court that his parcel does not boarder the road. He is thus compelled to access that road through the Plaintiff's parcel of land that has been divided into two (2) portions following the application of the access road. In fact, the defendant stated that he had been in use of that access road since September 14, 1998. He thus maintained that he had acquired an easement over parcel No. 238 with effect from September 14, 2018 having used the same for twenty (20) years.

32. In his evidence, the Plaintiff testified that there were two (2) access roads created on his parcel of land. He identified one of the access roads as one heading to Akwinos School. This one was created legally. The Plaintiff raised issue with the 2nd access road which was created by the defendant.

33. The Plaintiff's evidence was corroborated by PW2 who testified that when he surveyed the land, he discovered that there were two (2) access roads. He testified that during subdivision of plot No. 127, plot Nos. 509 to 564, morphing from it, received scheme plans and access roads as per the Registry Index Map further referenced to the mutation form. He annexed the sketch map emanating from the Registry Index Map to his report. He noted that there was a road accessed by the Defendant directly from the tarmac road to his plot but does not exist on the attached sketch map. He was informed by the Defendant that he purchased that access road from the original owner before land was sold to the Plaintiff but wasn't implemented on the map. PW2's conclusion was that there was no access road on the part claimed by the Defendant.

34. The Plaintiff heavily relied on the evidence of PW2, an expert witness. He argued that since his evidence had not been rebutted by another expert witness, his evidence was sufficient enough to determine the present dispute. Although the evidence was not rebutted, I am of the view that the expert evidence needs to be looked at holistically without hastening to conclude that the evidence can only be plausible since it was not rebutted. Just like all other evidence, it must be weighed. Experts are neither gods nor angels from on high. Biblically, it is clear that even angels have fallen before, and they are now known as evil ones or demons. Experts can err, be corrupted or for one reason or other mislead in their evidence. Gone are the days when the sons of men were unquestioningly truthful to the oath they took in doing things, including giving testimony. Therefore, wisdom demands that expert evidence be analyzed always and compared well with the existing facts, be looked at with a third eye, before giving it the appropriate weight if the judge ultimately finds it so.

35. In assessing the probative value of PW2, I am guided by the profound wisdom of Mativo J (as he then was) in *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR who laid out the dictates a court has to take into account when weighing the probative value of expert evidence as follows:

> " While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. [11] Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence".[7] It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.[9]

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.[12] A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]

A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minories Finance Ltd. and Another*[13] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

It is my view it's correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[14] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative [15] or manifestly illogical.[16] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence". An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[17]"

36. PW2 in his testimony was quite elaborate and extensive when explaining the subdivision process and the process of creating access roads. Upon subdivision, access roads are granted and recorded in the Registry Index Map. The witnesses identified that the access road created by the Defendant was unlawfully created since it was not captured in the Registry Index Map. When the Defendant's plot

mutated from plot No. 127, it was given the access road indicated in the Registry Index Map and cross referenced in the mutation form.

37. PW2 was emphatic that since the Plaintiff's plot did not undergo a subdivision, any access road within the property was not preserved by the relevant offices. Indeed, the evidence on record points to the fact that there are two access roads; one leading to Akwinos School and the other leading to the Defendant's plot. The one leading to the school was set up by the relevant offices upon subdivision. It was described as having a culvert. It is for this reason that it featured in the Registry Index Map.

38. The other one, glaringly created by the Defendant, is not captured on the Registry Index Map. I find that it gives the Defendant's plot access to the main road but through the Plaintiff's land. Looking at the totality of the evidence, I am persuaded that the Defendant unlawfully trespassed onto the Plaintiff's land by creating his own access road.

39. In his Defence, the Defendant informed the court that he had been using the access road for about twenty (20) years and as a result enjoyed absolute and indefeasible right. The Defendant urged this court to hold that by dint of Section 32 (1) (b) of the *Law of Limitation Act* (sic), his right of way was protected by the law.

40. The *Limitation of Actions Act* at Section 32 (1) provides:

    1. where:

        a. the 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 or air, or to such way or watercourse, or to such other easement, is absolute and indefeasible.

41. Where an easement has been created, the same enjoys protection irrespective of change of ownership of the suit land. This was the holding in *Ruth Wamuchi v Monica Mirae Kamau* [1984] eKLR, it was held:

> " 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".

42. However, it must first be established that the said easement meets their threshold set out in Section 32. In other words, the person claiming the interest must demonstrate that all the conjunctive elements provided in the Section subsist. In any event, the Defendant, realizing that he did not have evidence to support his claim, resorted to acquisition of a right of way by way of prescription. It clearly shows then that he unlawfully entered the Plaintiff's land, began using part thereof as an access road, hoping that the luck would fall on his side that the Court finds that long-term use thereof would grant him legal protection. He failed miserably to prove long term and uninterrupted use.

43. In this case, I find that the Defendant computed that he had been in occupation of his parcel of land since 1998. He furthered that he had been using the access road for twenty (20) years. However, I find that the same was not peaceful as of right and uninterrupted. In any event, he did not adduce evidence that indeed the road of access was in use since that time that he alleged it started existing. He did not

call the previous owner as a witness to that fact. He did not also produce any documentary evidence of purchase of the right of way from the previous owner of the suit land. Such unsubstantiated statement, if taken to be true, would only amount to inadmissible hearsay.

44. The Plaintiff testified that in 2015, he attempted to seal the point of access to his plot but was met with hostility and resistance. He even lodged a complaint with the Assistant Chief thereafter to attempt to resolve this dispute. Even assuming that the Defendant had proved that the road of access was in use since 1989, in my understanding, the 2015 action interrupted the use of the alleged easement. At that point, time stopped running since the Plaintiff fenced off the area albeit met with hostility. The actions of the Plaintiff thus interrupted the period computed under statute. Thereafter, the Plaintiff filed the present suit. I thus find that the Defendant failed to meet the prerequisites set out therein. He is estopped from claiming a right of easement.

45. I find that the Defendant unlawfully trespassed upon the Plaintiff's property. He had no right to do so. He can only be allowed to use the access road that goes up to the School as the one that was lawfully excised from the Plaintiff's property. He cannot purport to create one of his own. Consequently, I find that the Plaintiff's claim is merited having proved his case on a preponderance of the evidence adduced. I hereby enter judgment as follows:

    (a) An order of permanent injunction be and is hereby issued restraining the Defendant whether by himself, his servants, agents and/or any other person(s) acting through the Defendant from entering, remaining, trespassing, wasting, damaging, alienating, charging and/or in whatever other way interfering with the Plaintiff's quiet possession of Land Parcel No. Kitale Municipality Block 18/Bidii/238.

    (b) The Plaintiff is awarded costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC COURT THIS 19TH DAY OF DECEMBER 2022

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE