



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Case 1174 of 2002 (O.S)

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT
CAP 22**

JAMES NGUGI MBUGUA

SAMUEL MUHOHO MBUGUA PLAINTIFFS

VERSUS

GRACE WAIRIMU MWITHIGA..... DEFENDANT

JUDGMENT

The dispute herein is over a four meters wide road passing alongside a common boundary of two parcels of land namely, L.R. NO. KABETE/KIBICHIKO/163 currently under the beneficial ownership of the two Plaintiffs, James Ngugi Mbugua and Samuel Muhoho Mbugua (administrators of the estate of the registered owner, Mbugua Ngugi) and L.R. No. KABETE/KIBICHIKO/162 owned by the Defendant, Grace Wairimu Mwithiga. The suit was commenced by an Originating Summons filed on 11th July 2001.

According to the Claimants, the said road passes from the main road through the Defendant's parcel of land leading and ending in the Plaintiffs' plot. The said road serves as the only access from the main road to the Plaintiffs' parcel of land which is behind the Defendant's parcel in relation to the main road. The Plaintiffs in their Originating Summons seek this Court's determination of the following questions:

- 1. That the estate of the late Mbugua Ngugi (deceased registered owner) is entitled to an easement of 900ft long by 10ft wide by measurement over land parcel No. L.R. No. Kabete/Kibichiko/162 which the said Mbugua Ngugi and his family has openly and peacefully without any interruption used as an access road to and from the late Mbugua Ngugi's land L.R. No. Kabete/Kibichiko/163 since the year 1956 a period of over twelve years preceding presentation of this Originating Summons in Court.**
- 2. That the title of Grace Wairimu Mwithiga in respect of the said portion of 900ft long by 10ft wide in the said piece of land is extinguished under the Limitation of Actions Act Cap 22 Section 17.**
- 3. That the Plaintiffs as the administrators of the Estate of the said late Mbugua are under Section 38 of the Limitation of Actions Act entitled to be registered as the owners of the easement of portion of 900ft long by 10ft wide over Land Reference Kabete/Kibichiko/162.**
- 4. That the cost of this suit be awarded to the Plaintiffs.**

Pursuant to direction given herein with the consent of both parties on 16th October 2003 the 1st Plaintiff appeared before me on 18th May 2005 and testified on behalf of himself and his brother, the 2nd Plaintiff. He produced in evidence the Original Grant of the letters of administration dated 17.08.01 appointing him and the 2nd Plaintiff as administrator of their father's estate. He also produced two extracts of title in respect of L.R. No. Kabete/Kibichiko/163 (marked "EX. P.2") and Kabete/Kibichiko/162 (marked "Ex. P.3") and a survey map compiled by the Survey of Kenya in March 1959 and showing the two plots with the main road to the far end of Kabete/Kibichiko/162, plot Kabete/Kibichiko/171 on one side of the two plots and plot No. Kabete/Kibichiko/118 on the other. At the far end of the plot No. Kabete/Kibichiko/163 passes a river.

The Plaintiff claim that the two plots were demarcated at the same time in 1956 and the same granted to their father and his brother, the deceased husband of the Defendant. He also testified that although the said road was not shown in the survey map the same has been used by the Plaintiff's to access their plot without any interruption by the Defendants for over 12 years and that the same constitutes the sole access to their plot. The Defendant is alleged to be threatening to close the said road on the basis that the same is not on the survey map but the Plaintiff claim to have acquired prescriptive rights over the same.

The Court record shows that on 7th March 2003 pursuant to an application by the Plaintiff this Court made an order restraining the Defendant from blocking the disputed access road and also ordering the removal by the Defendant of a temporary structure which she had erected on the said road. The Defendant did not attend the hearing of this suit despite the date having been taken by consent. Upon my perusal of the file it became apparent that the Defendants Replying affidavit is not on the Court record. However the Court did see and consider a "second Replying Affidavit" filed by one. Francis Mutua Kangethe a neighbour to both parties which only seeks to confirm that there was no access road provided for in the survey map, which is not an issue in dispute herein. He does not challenge the use by the Plaintiff of the access road as pleaded.

The law recognizes a right of way as an affirmative easement authorizing a party to do that which would be or appear to be injurious to the owner of some land. The same is known in law as a right of necessity and an easement by operation of law. Indeed under Section 30 of the Registered Land Act, the same is recognized as an overriding interest. The said provision provides as follows:

"30. Unless the contrary is expressed in the register

all registered land shall be subject to such of the following over-riding interests as may for the time being subsist and affect the same without their being shown on the register –

(a) rights of way, rights of water and profits subsisting at the time of the first registration under this Act."

The Plaintiffs have proven on the balance of probabilities that the said access road was the only means of access to parcel No. L.R. No. KABETE/KIBICHIKO/163 at the time KABETE/KIBICHIKO/162 was registered in the name of Mr. Peter Mwithiga the deceased husband of the Defendant on 28th December 1956. The same situation obtained at the time the Defendant was registered as owner on 30th May 1996.

In law, overriding interests are said and known to "run with the land." In the circumstances the Plaintiffs' right of access cannot be taken away at the whim of the Defendant since it subsists for as long as the necessity for the easement exists. I am of the view that this case being quite similar to that of KAMAU –vs- KAMAU [1984] KLR 539, the Court of Appeal judgment and holdings in that suit supports the Plaintiff's entirely. On the strength thereof and on the basis of the evidence placed before me and in accordance with the law as it relates to easements I find that this suit succeeds. I allow the same and enter judgment for the Plaintiffs in terms of the prayers hereinbefore set out.

Accordingly the restraining order previously issued by this Court is hereby confirmed.

Dated at Nairobi this 24th day of June, 2005

M.G. Mugo

Judge

In the presence of

Wasike for the Plaintiffs

N/A for the Defendant