Damsyl Investment Limited v Director of Physical Planning, Ministry of Lands, Planning and Housing & 8 others; Gichuki & 2 others (Interested Parties) (Environment & Land Case E067 of 2021) [2025] KEELC 4381 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4381 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E067 OF 2021

AA OMOLLO, J

JUNE 5, 2025

BETWEEN

DAMSYL INVESTMENT LIMITED ..... PLAINTIFF

AND

THE DIRECTOR OF PHYSICAL PLANNING, MINISTRY OF LANDS, PLANNING AND HOUSING ..... 1ST DEFENDANT

THE DIRECTOR, URBAN PLANNING, COUNTY GOVERNMENT OF NAIROBI ..... 2ND DEFENDANT

THE COUNTY SURVEYOR , COUNTY GOVERNMENT OF NAIROBI ..... 3RD DEFENDANT

COUNTY GOVERNMENET OF NAIROBI ..... 4TH DEFENDANT

THE LAND REGISTRAR NAIROBI DISTRICT ..... 5TH DEFENDANT

THE DIRECTOR OF SURVEY, KENYA ..... 6TH DEFENDANT

THE HON. ATTORNEY GENERAL ..... 7TH DEFENDANT

LEONARD GITAU GICHUHI ..... 8TH DEFENDANT

J.D. OBEL SURVEYOR T/A GEOMATIC SERVICES ..... 9TH DEFENDANT

AND

JACINTA NJERI GICHUKI ..... INTERESTED PARTY

RAYMOND KABUCHO NJIRIRI ..... INTERESTED PARTY

SHEILA M. RANGE ..... INTERESTED PARTY

JUDGMENT

1. Vide Originating summons dated 22nd February 2021 supported by an affidavit sworn by Nixon W. Mburungo the Plaintiff has sued the 1st -9th Defendants and joined the three (3) Interested Parties while seeking the Court to grant it the following reliefs;

    a. This Court do issue an Order granting the Plaintiff, an Access Order, providing for reasonable access to all that Parcel of Land Known as Title No. Dagoretti/Riruta/6235, which is Landlocked.

    b. In alternative, the Court do issue an Order compelling the Defendants herein collectively and severally, to create a permanent "9 meters" access road to all that Parcels of land namely Title No. Dagoretti/Riruta/6235 and Dagoretti[Riruta/6236, by causing a resurvey from the "18 meters" major road adjoining parcel of land namely no. Dagoretti/Riruta/6081 as per the recommendation of 2nd Defendant dated 20/4/2016 vide letter referenced up/pls/00321/6235, and in line with the Physical Planning Act, Rules and Regulations.

    c. This Court do issue time to confirm compliance with the Order of the Court granted for settlement of the access road to all that parcel of land known as Title No. Dagoretti/Riruta/6235, which is landlocked.

    d. A mandatory injunction do issue to restrain and directing the Interested Parties by themselves, servants, agents, employees, proxies or any other person acting on their behalf to forthwith unblock/remove the stoned fence, steel metal gate, or any barriers whatsoever that shall interfere with the granted access road to all that parcel of land known as Title No. Dagoretti/Riruta/6235.

    e. The Deputy County Commissioner, Dagoretti Sub-County with assistance of the Officer Commanding Kabete Police Station, and the Area Chief -Dagoretti to facilitate the enforcement of the Orders thereto.

    f. Costs of this suit be provided for and such other and/or further reliefs be granted as this Honourable Court might deem fit and/or to grant in the unique circumstances of this matter.

2. The Plaintiff (hereafter interchangeably referred to as It) as the registered owner of Title No. Dagoretti/Riruta/6235 (the "Suit Property"), contends that the Suit Property is landlocked and is deprived of reasonable access, particularly due to the erection of a stone fence and steel gate by the Interested Parties, who own adjacent parcels of land (Title Nos. Dagoretti/Riruta/6236 and 6081) thus obstructing access to the suit property. The Plaintiff wants this court to make an order granting access invoking rights under Section 140 of the *Land Act* and other relevant laws.

3. The Summons challenges the conduct of the Defendants, including various government agencies and individuals responsible for land planning, subdivision, and survey. The Plaintiff asserts that the subdivision scheme involving the original land parcel (Title No. Dagoretti/Riruta/6080) and subsequent amendments to the cadastral map (R.I.M) were carried out without proper adherence to the Physical Planning Act, its regulations, and other relevant laws.

4. The Plaintiff claims that these amendments were faulty and that the subdivision process ignored the legal requirements for creating an access road to the Suit Property amounting to a violation of constitutional and legal duties owed to them by the Defendants. It also referred to a prior court

judgement in ELC Case No. 345 of 2016, which declared the Suit Property as landlocked. The Plaintiff states that despite this judgement, the Defendants' actions have exacerbated the situation by blocking access to its property.

5. The Plaintiff emphasizes that the subdivision plan for the affected land, including the creation of the Cadastral map, was flawed and violated the physical planning laws and regulations. It argues that the planning authorities did not follow due process, and any documents related to the subdivision were fraudulent and should be declared null and void. It further argues that this breach of duty has deprived them of the quiet enjoyment and occupation of their property thus seeks judicial intervention to nullify the subdivision scheme, invalidate the faulty cadastral map, and provide a legal means of accessing the suit land.

6. In the supporting affidavit, Mr Mburugu states that the 8th Defendant was the original registered owner of Title No. Dagoretti/Riruta/4776 and which was subdivided into two parcels, Plot No. 6081 and Plot No. 6080. Parcel no 6080 was further subdivided to create the Suit Property (Plot No. 6235) and Plot No. 6236, which are now central to the dispute.

7. The Plaintiff claims that the subdivision plan, facilitated by the 8th and 9th Defendants in 2012, failed to provide proper access to the Suit Property, leaving it landlocked. That although a "3-meter" private path was established for access to a family cemetery, it is insufficient for use as a road. The Plaintiff stated that they previously used an access route through Plot No. 6236, but this was blocked by the owners of the said land in January 2021.

8. In defence, the 2nd Interested Party who is husband of the 1st Interested Party filed a replying affidavit on their behalf sworn by Raymond Kabucho Njiriri on 27th May 2021. He deposes that they are the registered owners of Title Number Dagoretti/Riruta/6236, while the Plaintiff owns the adjacent property, Title Number Dagoretti/Riruta/6235.

9. He confirms that the Plaintiff purchased the suit property from Wallace Mwaura Muigai in its existing condition and has not raised any complaints about not receiving value for the purchase. The 1st and 2nd Interested Parties highlight that they had faced persistent trespass and damage to their property by the Plaintiff, which led them to file a lawsuit in the Environment and Land Court (Nairobi ELC No. 345 of 2016).

10. That in the said suit they sought declarations to affirm their ownership and peaceful possession of their property, as well as an injunction to prevent further trespass and interference with their property boundaries. That the Plaintiff filed a defense and counterclaim, seeking access rights to through their property and other reliefs but the same was dismissed. The court found that there was no road of access through the Interested Parties' land to the Plaintiff's property. The court further concluded that the Plaintiff failed to prove that the subdivision process had been illegal or fraudulent, and the claims for damages and access rights were not substantiated.

11. The Interested Parties argue that the Plaintiff's current suit, including a request for a permanent access road, is res judicata as it has already been adjudicated and should be struck out as an abuse of the court process. They also aver that the Plaintiff's continued pursuit of this case is unfounded and driven by greed, with no legitimate cause of action against them. They stated that they are in the process of constructing forty apartments on their land, and insist that there is no basis for the Plaintiff to demand any right of access over their property.

The Evidence adduced:

12. Nixon Wanjohi Mburugu, a director of the Plaintiff testified as PW1 and adopted his written witness statement dated 30/11/2022 as evidence in chief. He produced the documents contained in the list dated 30/11/2022 as P Exh 1-25. The documents produced were; copy of title deed Dagoretti/Riruta/6235, copy of the green card for Dagoretti/Riruta/6235, copy of construction permit Invoice dated 14th April, 2014 and unapproved Architectural Plans for Parcel No. Dagoretti/Riruta/6235, copy of the Sale Agreement dated 6/9/2011 between Leonard Gitau Gachuhi and Jacinta Njeri Gichuki & Another, copy of "the complained fraudulent Mutation form" of Sub-division of Dagoretti/Riruta/6080, copy of the 1st and 2nd Interested Patties letter dated 29/03/2016, certified copy of the Surveyor Register dated 24/5/2021, copies of (then) Nairobi City Council Urban Planning Department letter dated 20/04/2016, "fraudulent" notification of approval of development permission entry on 18/4/2016 and the fraudulent Approval of proposed Subdivision of Dagoretti/Riruta/6080 dated 13th September, 2011.

13. Other documents produced include a copy of the Summons to Appear dated 16/01/2017, copy of the Plaintiffs' previous Advocates letter dated 14/1/2021 and an attached official receipt, copy of green card for Dagoretti/Riruta/6236, copy of title deed Dagoretti/Riruta/6236, copy of Judgement in ELC Suit No.345 of 2016, the Amended Plaint and 1st Defendants' Defence Statement and Counter claim in ELC No.345 of 2016, photograph(s) of erected stone wall fence and steel gate, copies of the Plaintiffs' Board Resolution dated 27th January, 2021 and 1st February, 2021 respectively, copies of Notice of withdrawal of Appeal and notice to discontinue the application of stay of execution in ELC suit No.345 of 2016 (both) dated 8th February, 2021, copy of Cadastral map [R.I.M] identifying Plot No. 6081, 6236 and 6235 and extract of the same, copy of the Replying Affidavit sworn by 8th Defendant on 18th July, 2021(in the present suit , the *Land Act*, 2012, the Physical Planning Act, Cap 286, the Physical Planning (Sub-division) Regulations, 1998, the Ministry of Physical Planning Manual, Revised Edition, 2018, the Ministry of Works —Road Depart, Road Design Manual and copy of Ruling of Hon. Justice S. Okongo dated 22nd September, 2022.

14. PW1 contends that PEx5, (a sale agreement dated 6th September 2011 between Leonard as vendor and Jacinta Njeri and Raymond Kabucho) shows what was purchased as Plot 6236 is measuring 0.10 Ha to be curved out of Dagoretti/Riruta/6080.

15. It is the Plaintiff's evidence that after purchasing the Suit Property measuring 0.081 ha in 2013 vide sale agreement dated 20/12/2013, PW1 confirms that the Plaintiff have been using access road via Plot No. 6236 until the owners of the plot blocked the access in 2021. The blocking of the impugned access rendered the Suit Property landlocked leading to the legal action with the Plaintiff now seeking an official access road. Pw1 adduced pex9, which he says is a forged notification of approval of development permission and a letter dated 20/4/2016 from Nairobi city County Urban Planning Department, stating that subdivision of 6080 dated 28th September 2011 facilitating registration of 6235 and 6236 is a forgery and did not originate from their office.

16. Additionally, the Plaintiff contends that the 1st and 2nd Interested Parties had misrepresented facts in their land purchase agreements, causing discrepancies in the reported land size after the subdivision.

17. In a prior suit (ELC Case No. 345 of 2016), the Plaintiff though sued for trespass due also made a counterclaim for a right to access road. That the evidence provided, including certified copies of land records and surveyor registers, highlights discrepancies in the land sizes reported in the titles of the 1st and 2nd Interested Parties. The witness asserts that the subdivision was not only irregular but illegal,

urging the court to intervene and rectify the situation, given the significant impact on their property use and enjoyment.

18. The second witness, Agnes Wambui Ndungu testified in support of the Plaintiff's case pursuant to her written statement dated 30/11/2022. By way of introduction, she is a neighbour to the disputing parties and sister to the 8th Defendant and that she knows the 1st Interested Party because her father and her step mother were siblings.

19. PW2 states she owns LR No. 4778 and 4777 while the 8th Defendant owned 4776. That L.R. 4776 was subdivided into three portions by their mother before she died. That it was one of these subdivisions that was sold to Nixon, 2nd to Jacinta and the third to Sheila, the 3rd Interested Party. PW2 testified that Jacinta had blocked access for Nixon and he asked her to give him access at around 2021-2022.

20. That the 8th Defendant used to live in the middle plot and the plot behind had rental houses. During cross examination she stated that she was given her plot in 1992 and that there was a 6 m road between her plot and 8th Defendant's plot 4776 and the road was lost when the surveyor brought by Jacinta pushed it to her end thus to blame for blocking the road.

21. The 8th Defendant (Leonard Gitau) testified as DW1 by relying in the contents of replying affidavit sworn on 1st July 2021 as evidence in chief. He stated that he received the land as a gift from his parents and sold the first portion to Sheila, the 2nd plot to the 1st Interested party and the last plot to Wallace Mwaura.

22. That when he first subdivided the land, he created access road and would access LR.6080 from main road. During the 2nd subdivision to the 1st Interested party, he extended the road to reach the remainder plot which he subsequently sold. He stated that used a surveyor called J.D Obel from Ngong, who sent his assistant called Kanyi, then an employee of the City Council but works for 9th Defendant on contract to take out the scheme.

23. DW1 stated that he was not aware the road disappeared because he was being informed 13 years later. He deposes that he does not have the mutation form used for the subdivision and that he gave letter of consent from the board. That Jacinta's land, (1st Interested Party) was 0.10 ha as sold as per sale agreement dated 6th September 2011 but, on her title, it reads 0.139 ha.

24. On cross examination, the witness testified that Plot 6080, making up 6235 and 6236 was summing to 0.22 ha inclusive of the road. He stated that he was not aware if there was any planning scheme gaining access to 6236 and that the 1st Interested Party did not join him in the previous suit she had instituted against the Plaintiff.

25. He also stated that when selling title to the 1st Interested Party, he had not processed title for 6235 but Wallace got the title for the land sold in 0.081 ha. He noted that he is the one who paid the surveyor but did not involve government surveyor and knew that the survey process including demarcation of access road had been done as required.

26. DW1 testified that the map produced at page 15 does not show the access road to reach 6235 and the mutation at page 13 prepared by J.D Obel shows the size of 6236 as that on title. However, he denied the signature at page 16 as not his.

27. The 2nd interested Party, Raymond Kabucho gave evidence on his behalf and on behalf of the 1st Interested Party. He adopted his witness statement dated 30/1/2023 as his evidence in chief and produced the bundle of documents dated 6/2/2023 as 1st and 2nd Interested Parties Exhibits 1-6. He averred that he bought their plot 6236 of 0.139 ha from the 8th Defendant at Ksh 8.5 million in 2011

and that the plot sits between 6081 and 6235. His testimony is that he was not aware that the value declared on the green card was not Ksh.8.5 Million.

28. This witness stated that they have constructed on their plot a 6 level floors out of 43 apartments spending approximately Ksh.40-60 million and the Plaintiff has no complete access through this plot because there is a perimeter fence erected around 6236. That they did not have a problem with the previous owner of 6235 but there is no good will between them and the Plaintiff on the issues on the ground.

29. That they engaged on email with the Plaintiff with regard to the missing road leading to 6235 but after the emails, they did not engage more. The witness confirmed that he was not involved in the subdivision which he has no problem with and that when they purchased their plot, the owner of 6235 accessed it using 3M road on the north side. He also confirmed that when they purchased the plot, the subdivision was not complete but it was a condition in the sale agreement that the vendor completes the process.

30. The 1st to 7th Defendants closed their cases without calling any evidence.

Submissions:

31. The Plaintiff filed submissions dated 17th January 2025 while the 1st and 2nd Interested Parties filed submissions dated 31st January 2025.

32. The Plaintiff submitted that this case revolves around the disputed subdivision and mutation of land, which falls under the authority of the Nairobi County Government and which was carried out in violation of the Physical Planning Authority laws, rules, and regulations. Specifically, the subdivision failed to follow due process by neglecting to provide mandatory road widths and proper access roads as required under planning regulations.

33. Further, that a 3-meter road was created on the northern part of Plot No. 6235, but this was deemed insufficient as it did not meet the legal requirement for access roads, which should be at least 12 meters for short distances and 9 meters for longer ones. The Plaintiff submits that the disputed mutation led to a faulty cadastral map, which resulted in a landlocked property and bypassed necessary planning authority processes, including the creation of an access road.

34. The plaintiff argue that the subdivision process was fraudulent, as the necessary physical planning procedures were ignored, and documents relating to the subdivision were pronounced null and void by the planning authority. It further contends that the interested parties, who now hold title to the affected properties, gained their ownership through an irregular process that violated planning laws, rendering the subdivision illegal.

35. Additionally, the subdivision increased the size of the 1st and 2nd Interested parties' land, creating a discrepancy in acreage, which has now caused the plaintiff's property to be landlocked. Despite an attempt to resolve the issue through communication with the adjoining landowners, the access to its property was blocked by the interested parties, and the trespass order was enforced, further hindering the plaintiff's use of the property.

36. In support, It cited the case of Homescope Properties Ltd Ano. [2014] eKLR, where the court found that blocking access roads infringed on the plaintiff's right to use the road to access their property. Also, in the case of Fredrick Otieno Obonyo vs. Gilbert Otieno Nyanjom & Ano. [2018] eKLR, the court ruled in favor of reopening a blocked footpath, emphasizing that the defendant's actions infringed on the plaintiff's proprietary rights.

37. The 2nd, 3rd and 4th Defendants filed submissions dated 28th February 2025 stating that the Plaintiff has sought an access order under Section 140 of the *Land Act* No. 6 of 2012, claiming that the suit property is landlocked and hence requires an easement through Plot No. 6236, owned by the 1st and 2nd Interested Parties.

38. They submitted that the factors for granting an access order are outlined in Section 140(4), including the nature of the landlocked land, the circumstances surrounding the land becoming landlocked, negotiations with adjoining landowners, hardship comparisons, and the purpose for which access is needed.

39. That in the judgement delivered on 22nd September, 2022 the court considered that the Plaintiff acknowledged the existence of a 3-meter access road on the northern side of the suit land, casting doubt on the claim that the land was entirely landlocked. They argue that the Plaintiff had failed to conduct proper due diligence before purchasing the land.

40. In support, they cited the case in Ngere Tea Factory Company Ltd vs Alice Wambui Ndome (2018) and Said v Shume & 2 Others (2024) which reinforced the importance of due diligence in land transactions, suggesting that the Plaintiff could not claim hardship caused by a lack of access when the issue was a result of the Plaintiff's own negligence.

41. The 2nd to 4th Defendants placed reliance to the case of Ezekiel Luyali Kibichi vs Eliiah Ominde Masieba & Another (2013) Eklr, where the applicant's claim for an easement was dismissed because the original owner did not create a provision for a road of access during subdivision. That the Plaintiff, having acquired the land with knowledge of the existing access road, could not subsequently seek to impose a new access road through the 1st and 2nd Interested Parties land.

42. The 1st and 2nd Interested Parties submitted that the Court in the previous case carefully considered the evidence presented by all parties regarding the existence of an access road through their plot to 6235. That the learned Judge concluded that the subdivision of the original parcel was lawful, and no access road was provided through the suit property to plot 6235 and the only road created during the subdivision was for access to the suit property itself.

43. The evidence indicated that after the subdivision, the owner of plot 6235 should have known that no road of access existed through the suit property and ultimately, the Court ruled that the Interested Parties were the rightful owners of the property, and the 1st Defendant had no right to access plot 6235 via the suit property.

44. The 1st and 2nd Interested Parties submit that despite Court dismissing the counterclaim made by the Plaintiff in Nairobi ELC No. 345 of 2016 that there was no evidence to support the existence of a 12-meter access road or any intention to create such a road through the suit property, It went further to file the instant suit seeking orders for the creation of a permanent 9-meter access road to plots 6235 and 6236, in line with the Physical Planning Act.

45. That the court has already ruled on the merits of the dispute herein in the determined Nairobi ELC No. 345 of 2016 in which the legitimacy of the Interested Parties' title and property rights remains in force. They submitted that the issues in this dispute were already adjudicated in Nairobi ELC No. 345 of 2016 thus res judicata citing Section 7 of the *Civil Procedure Act*, which bars re-litigation of matters previously decided between the same parties.

46. The Interested Parties emphasized that the Plaintiff's application for a road of access is without merit, as their property was already secured with an apartment block, and any attempt to grant the Plaintiff access would result in significant loss. They cited the case of Peony Management Company Ltd vs.

Desterio Oyatsi [2020] eKLR to support the notion that granting access to landlocked properties must be balanced against the rights of the property owner, especially when substantial investment in the property has already been made.

47. Additionally, in Ezekiel Luyali Kibichi vs. Elijah Ominde Masieba [2013] eKLR, it was highlighted that access should be sought from the party responsible for the land's subdivision rather than the current property owner who had no role in creating the landlocked situation.

Analysis and Determination:

48. This case is pleaded to be brought under Section 140 of *Land Act* but there are also allegations of fraud on the subdivision process which created the two titles which process the Plaintiff claims breaches the planning laws and regulations. Consequently, the Plaintiff is seeking for an Order providing for reasonable access to plot 6235 which according to them is landlocked. In the alternative an Order do issue compelling the Defendants collectively and severally, to create a permanent "9 meters" access road to plot 6235 and 6236, by causing a resurvey from the "18 meters" major road adjoining Parcel 6081.

49. I have read and considered the parties pleadings, the oral and documentary evidence adduced and the respective submissions filed in support against. Flowing from my considerations, I frame the following issues for determination of the dispute:

    i. Whether the Plaintiff has proved that the suit land is indeed landlocked to invoke the provisions of section 140 of *Land Act*

    ii. Whether or not section 140 grants access without provision for compensation.

    iii. Whether this suit is res judicata ELC 345 of 2016.

    iv. Whether the reliefs sought can be granted.

    v. Who bears the costs of this suit?

50. The Plaintiff pleads that their plot 6235 is landlocked and contend that the subdivision that created the said plot was illegal. The 8th Defendant who is the original owner of the suit plot 6235 gave a narration of the history of this land, stating that the original number was Dagoretti/Riruta/4776 measuring 0.32 ha. He subdivided it into two; plot numbers 6080 measuring 0.22ha while plot number 6081 measured 0.10Ha respectively. It was his evidence that during the subdivision, a 6M road of access was created to serve both plots.

51. L.R No. 6081 was sold to one Kamau who later sold it to the 3rd Interested party herein. The 8th Defendant also explained that he further subdivided L.R. No. 6080 into two portions 6235 and 6236 measuring 0.081 ha and 0.10 ha respectively with the already existing 6 m access road (curved from the initial subdivision of the original parcel number 4776).

52. Subsequently, he sold L.R No. 6236 to the 1st and 2nd Interested party who at the time of purchase were living in the United Kingdom but were represented during the transaction by Njuguna Gichuki and Njenga Gichuhi. Later, the 8th Defendant sold L.R. No 6235 to Mwaura who thereafter sold it to the Plaintiff herein. It is against this background that I proceed to analyse whether the Plaintiff's allegation that its land is landlocked has been proved on a balance of probabilities.

53. In contesting the claim by the Plaintiff that the suit property is landlocked, the 1st and 2nd Interested parties argued that the Plaintiff is able to access its land L.R No. 6235 through the 3M access road on the North side. They also aver that this court (differently constituted) in Nairobi ELC Case No. 345 of 2016 determined the issues being raised making the suit res judicata. Lastly, the Interested Parties

stated that the court declared them as the registered owners of all the land L.R. No. 6236 and also made an order that the Plaintiff herein does not have a right of access road to 6235 through 6236.

54. Section 140 of the *Land Act* which states as follows:

> "(1) An owner of landlocked land may apply in the prescribed form to a Court for an access order, granting reasonable access to that land.
>
> (2) A copy of the application shall be served on-
>
> a) the owners of each piece of land adjourning the landlocked land;
>
> b) any person claiming an interest in any such piece of land of whom the Applicant has actual notice;
>
> c) the local authority having jurisdiction in the area where the landlocked land is located;
>
> d) any other person occupying or having an interest in land which in the opinion of the Court may be affected by the granting of the application.
>
> (3) The Court, after hearing the Applicant and any person served with an application under subsection (2) may make access order in respect of any other piece of land, the owner of which was served with a copy of the application under subsection (2), for the benefit of the landlocked land.
>
> (4) In considering whether to grant an access order, the Court shall consider-
>
> (a) the nature and quality of the access, if any, to the landlocked land when the Applicant first occupied the land;
>
> (b) the circumstances in which the land became landlocked;
>
> (c) the nature and conduct of the negotiations, if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land.
>
> (d) the hardship that may be caused to the Applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making of the order;
>
> (e) the purposes for which access is or may be required; and
>
> (f) any other matter that appears to the Court to be relevant.
>
> (5). An access order may be made subject to any conditions including-
>
> a) the period for which the access order is to be made;
>
> b) the payment of reasonable compensation by the Applicant to any other person;
>
> c) the allocation of the costs of any work necessary to give effect to the order between the Applicant and any other person;

d) the fencing of any land and the upkeep and maintenance of any such fence;

e) the upkeep and maintenance of any land over which the access order has been granted;

f) the execution of any instrument or the completion of any prescribed form or the doing of any other thing necessary to give effect to the order;

g) any conditions set out in subsection (4) which in the opinion of the Court are applicable to an access order; and

h) any other relevant matter.

(6) An access order made under this section shall be deemed to have all the characteristics and incidents of an easement and the land over which it has been granted shall be deemed to be the servient land and landlocked land shall be deemed to be the dominant land in respect of that easement.

Whether the Plaintiff has proved the suit property is landlocked:

55. In order for a party to enjoy the relief under section 140(1) of the *Land Act* cited hereinabove, there must be proof that the suit property is landlocked and probably an explanation of how it became landlocked. The Plaintiff produced copies of titles to L.R. No 6235 and 6236 as well as the green cards to support its claim for an order of the Court to create access. Through PW1, the plaintiff also produced a mutation map of L. R No 6080 (pex 6) used to create the two parcels of land which the Plaintiff describes as fraudulent. But before I venture into whether the mutation form is fraudulent or otherwise, I will consider whether it made provision for access road to L.R. No 6235.

56. In page 2 and 3 of the mutation forms is a sketch drawn presenting how the plots created from L.R. No 6080 looked like. The suit plot is marked as "A" and above it is drawn what is described as an existing road whose size is not indicated. L.R No 6236 is marked "B" and is served by a road created from an existing road passing between L.R Nos 6081 and 4778. It is this road which according to the Plaintiff ought to continue through plot L.R. No 6236 to serve plot 6235.

57. On the face of the mutation form, this road did not go through plot L.R No. 6236 and vide a judgement in ELC 345 of 2016, Justice Okong'o reached such a finding. That leaves the Plaintiff with the road above its plot which road appears to serve the owner of plot L.R. No 4777. What does it say about this road? The Plaintiff says nothing much about this 3-meter road in the written statement of Nixon Mburungo (PW1). In his oral testimony, PW1 said the 3-meter road was not accessible and that if this road was expanded, it would affect other plot owners who were not parties to the subdivision.

58. From this evidence, I conclude that the Plaintiff has an alternative access but which it (plaintiff) deems inadequate because it contravenes the Physical Planning Act. The evidence provided on the inadequacy of this existing road bordering its plot (L.R. No 6235) is Regulation 14(d) of the Physical Planning (Subdivision) Regulations 1998 which states thus;

> " the proposed scheme of subdivision, the boundaries in red and the approximate dimensions of sub-plots and the proposed means of access, road or lane system (if any) with the widths of such streets, roads or lanes clearly indicated appropriately in blue on each plan. Other

colours to be used in the subdivision plan shall be blue for surrender and yellow for demolition."

59. The cited regulation does not state the size of access road to be provided and on the face of the impugned mutation form as presented there is an access road provided on the northern side of the suit plot. The dimensions and boundaries of the two plots were also marked as the Plaintiff is not complaining to not being aware of the size of its plot. Therefore, I donot find proof of any breach of compliance with this particular regulation.

60. The Plaintiff further put reliance on the Ministry of Lands Physical Planning Department handbook which outlined the road networks. Under Urban Roads (paragraph 2.8.2 of this document), provision for access road is made into four clusters;

    a. Cul de sac 9m

    b. Service lanes 6m

    c. Cyclist lanes 3m

    d. Foothpaths 2m

61. The authors of this handbook stated that it was subject to the existing laws. The Plaintiff argues that the impugned mutation form did not comply with this document in terms of size of the road and relied heavily on the evidence of PW1 and PW2 none of whom are surveyors. The impugned survey forms refer to existing roads without giving their sizes.

62. It is difficult to ascertain that even the road the Plaintiff was previously using through parcel 6236 was measuring 9m or 6m or the exact size of the road on the northern side. It is the considered opinion of this court that to prove the existing road did not comply with the size anticipated in Regulations/ Rules, the Plaintiff was under a duty to demonstrate that it measured 3m which is for cyclist lanes.

63. The Plaintiff is specific that it wants this court to make an order for the continuation of the access road (they previously used) through/along plot no 6236. The argument is premised on the fact that the mutation form used for the subdivision of L.R NO 6080 was a forgery. It also wants land measuring 0.039ha excised from L.R. No 6236 to create the said access road (to run from an existing 18m road).

64. In urging this court to make a finding that the mutation form dated 21.12. 2011 is a forgery means the titles arising from the impugned subdivision is automatically cancelled and the land reverts back to parcel number 6080 in the name of the 8th Defendant. It is settled principles of the law that whoever alleges a fact must prove it and, in this instant, the Plaintiff is under a duty to prove the fraud/forgery of the impugned mutation form. The standard of proof for fraud is also higher than the standard of balance of probabilities because fraud borders on criminal liability.

65. In the case of Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 that Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts)

66. In a bid to prove the fraud, the plaintiff relies on the exhibit produced at pages 20-21 of its bundle bearing the words "forgery entered in hand on 18.4.2016." This document at page 20 is titled "notification of approval of development permission and addressed to JOHN P. OHAS of P.O

Box 58710, Nairobi." It was seeking approval for subdivision of Dagoreti/Riruta/6080 with the application submitted on 01.09.2011 and the approval was made on 22.09.2011.

67. Premised on the dates, the document that was presented for approval is different from the current impugned mutation which was prepared by J.D Obel (page 15) on 21st December, 2011. The 8th Defendant in his evidence before this court confirmed that he contracted JD Obel to carry out the subdivision process. The Plaintiff does not state who signed the document as forgery neither does the witness present a mutation form that was purportedly declared a forgery as what is presented is a notification of approval (which must have been made earlier than the complained subdivision).

68. Further, the Plaintiff did not play any part in the subdivision process and the owner of the mother title sued as the 8th Defendant did not provide sufficient evidence that the signature appearing on the impugned mutation form was not his. That signature was not subjected to expert examination and having admitted instructing JD Obel to process the subdivision, I find no proof of the alleged fraud. The document cannot be declared fraudulent merely because the size of land sold in the sale agreement was different from the size appearing on the title of the 1st and 2nd Interested Parties.

69. In any event, the said interested parties have explained that L.R. No 6236 first came out in the name of the 8th Defendant before executed the transfers in their favour. No evidence was brought out to contradict this fact. The 8th Defendant went further to state that the 1st and 2nd Interested Parties were in the United Kingdom at the time of the transaction and so they could not have been part of the fraud if at all.

70. The 8th Defendant not having filed any case against the 1st and 2nd Interested Parties that they got more land than what he sold to them, I find no grounds to reach a finding that 0.039ha of L.R. no 6236 forms the access road to the suit property.

Whether the court can grant access through L.R No. 6236:

71. Taking not that the 1st and 2nd Interested parties are legally registered as the owners of L.R no 6236, they are entitled to use and enjoy their land including fencing as they have done (photos produced at page 56-57 of Plaintiff's bundle). Thus, an access road can only be created on their title as an easement and for such process if the court was to order so must be within the provisions of section 140 already quoted herein above. The 1st and 2nd Interested parties have stated that they are in the process of constructing a storey apartment which is currently at 6th floor and have erected a permanent perimeter fence surrounding 6236 hence no access can pass through their land without causing them immense loss.

72. The Plaintiff did not lay any evidence that it had attempted to negotiate for the access road with the Interested parties and the negotiations collapsed. The Plaintiff produced a letter dated 29th March 2016 by the 2nd Interested Party to the Chief Officer Roads where he accused the Plaintiff of harassment that there is a road serving their plot from 6236. It (the Plaintiff) did not present any letter requesting the Interested Parties to grant access and their readiness to pay compensation. The lack of interest to offer any compensation for the access to continue through plot L.R. No 6236 is also evident from the pleadings and evidence presented in support of this case.

73. Section 140(5) is clear on payment of compensation;

    5. An access order may be made subject to any conditions including-

        a) the period for which the access order is to be made;

        b) the payment of reasonable compensation by the Applicant to any other person

c) the allocation of the costs of any work necessary to give effect to the order between the Applicant and any other person;

d) the fencing of any land and the upkeep and maintenance of any such fence;

74. The 1st and 2nd Interested Parties have explained to court the nature of the development already going on in their plot (storeyed building) and that the creation of such a road through the plot will cause them heavy loss. I am persuaded that the plaintiff not having made any offers to the Interested Parties when it had opportunity to do so but failed. Consequently, with the on-going developments of the 1st and 2nd Interested Parties land, I find no good ground to make an order for access to serve the Plaintiff to be created on L.R. No 6236. There is already an access passing along the boundaries of L.R. No 6081 serving L.R No 6236 and so the orders as sought cannot issue against the 3rd Interested Party.

a. -Res judicata

75. The 1st and 2nd Interested Parties pleaded and averred that this case was Res Judicata ELC 345 of 2016. Section 7 of the of the *Civil Procedure Act* describes res judicata thus:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

76. In the case of John Florence Maritime Services Ltd & Another -v- Cabinet Secretary for Transport & Infrastracture & Others 2015 eKLR, the court explained the rationale of res judicata stated thus:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

77. The 1st and 2nd Interested parties argued that the instant suit is res judicata as the issues raised herein were determined in ELC Case No. 345 of 2016 through the judgement of Hon. Justice S. Okongo dated 17th December 2020. I have read the said judgement and these were the issues determined; whether there is a road access through plot 6236, whether the plaintiffs are entitled to the reliefs sought against the defendants and whether the 1st Defendant therein was entitled to the reliefs sought in the counter-claim.

78. It was the finding of the court that there is no access road through plot 6235 and that the court could not determine whether subdivision of the original parcel was illegal since the owner of the original parcel was not a party to the suit. Hence the issue of the illegality of the subdivision of the original parcel number 6080 creating 6235 and 6236 was not addressed in the judgement in ELC 345 of 2016.

79. The second issue not addressed in the previous suit is the question whether the Plaintiff should be issued with an order creating an access road (easement) to 6235 under the provisions of section 140 of

the *Land Act*. Although the parties at the center of the suit are the same, the issues for determination are different and so the instant suit cannot be struck out for being res judicata.

c. Whether the orders sought should be granted

80. Although section 140 of the *Land Act* provides a channel through which an owner of landlocked land can use to apply for an access road, I find that the Plaintiff did not satisfy the court that the access road on the northern side of L.R. No, 6235 is inadequate. Secondly, the application to have the access pass through L.R. No. 6236 will cause the owners thereof more hardship due to the now constructed storeyed building.

81. There is evidence that the access road can still be created to serve the Plaintiff other than through L.R. No 6236. The Plaintiff did not join owners of the adjoining land on the northern side of L.R. 6235 and having clearly pleaded that it joined the interested parties because the orders may affect them, I will go no further as regards the expansion of the road on the northern side because of the right to be heard of parties who be affected by such an order. The result is that I decline to grant prayer (a) and (b) of the originating summons.

82. For the reasons already stated, I also hold that the Plaintiff failed to establish that the subdivision of parcel 6080 was fraudulently conducted. Hence, all the prayers in the Summons are dismissed for lack of merit.

Costs

83. Section 27 of the *Civil Procedure Act* states that costs follow the events unless the court deems it otherwise. In R. Versus Rosemary Wairimu Munene, Exparte Applicant...Vs...Ihururu Diary Farmers Cooperative Society Ltd Judicial Review No. 6 of 2014, the Court held that:-

> " The issue of costs is the discretion of the court as provided by the law. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case".

84. As observed in the body of this judgement, the Plaintiff approached the issue of access as of right to pass through the 1st and 2nd Interested Parties land. It used the rights' lense and forgot the rights of the 1st and 2nd Interested Parties as the title holders to attempt the negotiation for easement before the said Interested parties started developing their land. Having failed to prove a case which the 1st and 2nd Interested Parties had to defend, I hold that the said Interested Parties are entitled to costs but I award no costs to the Defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2025

A. OMOLLO

JUDGE