



Bukachi v Diani Beachalets [2003] Limited (Environment & Land Case E004 of 2021) [2024] KEELC 5017 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEELC 5017 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E004 OF 2021**

AE DENA, J

FEBRUARY 2, 2024

BETWEEN

DIANA BUKACHI PLAINTIFF

AND

DIANI BEACHALET'S [2003] LIMITED DEFENDANT

JUDGMENT

- 1 Diana Bukachi, the Plaintiff in this suit filed on 15/10/21 avers that she is the registered owner of Land Parcel No Kwale/Diani Beach Block/1813 (herein the suit property) which she purchased from the Defendant after subdivision of the Defendants parcel Kwale/Diani Beach Block/1554. That clause 3.6 of the sale agreement dated 23/9/2011 provided that the Applicant would be granted beach access footpath (easement) which was to be registered against the land register of the adjacent properties Kwale/Diani Beach Block 1814 and Kwale/Diani Beach Block/1815. That the deed of easement was prepared by the Plaintiff's lawyers, executed by both parties but were misplaced at the Land Registry while awaiting registration. Another set of the documents was prepared on the advice of the Registrar however the Defendant despite numerous demands refused to execute the deed of easement and facilitate registration of the same. That despite the non-registration the Defendant complied with the terms by providing access to the beach until May 2020 when it blocked the beach access preventing the Plaintiff from accessing the beach.
2. The Plaintiff avers that her efforts to have the beach access opened have been futile forcing her to seek alternative access thereto. That she has been deprived of her right to quiet and peaceful enjoyment of her property and that she has suffered loss and continues to suffer loss which cannot be adequately compensated by damages. She wants and order of permanent injunction and specific performance. The verbatim orders are listed elsewhere in this judgment.
3. The Defendant filed a Defence on 25/11/21. The Defendant admits she entered into the sale agreement herein and signed the easement to provide the said beach access. It is averred



that the right granted to the Plaintiff was non-exclusive terminable in case of any breach of the terms and conditions contained in the easement and which was never registered. The Defendant further states that for most of the period from 2015 – 2020 the Plaintiff had rented the premises and being not sure of whether she had an easement directed the tenant to make private arrangements on the same with the Defendants for access to the beach. The Defendant avers that it is the Plaintiff who is in breach of the terms and conditions of the easement. That several meetings had been held between the parties where in the year 2014 the Defendant made it clear that the beach access was for residential use and the Plaintiff was to ensure the occupiers of her parcel complied with the terms.

4. The Defendant states further that sometime in 2016 the Plaintiff advertised Kiani Cottages against terms that had initially been agreed upon. That through its advocates inquiries were made as to the registration of the easement and the defendant was only informed of the loss of the documents in 2017 and demanded that the Plaintiff should bear the costs for preparation of another easement. That the Plaintiff did not revert on this to the date of filing this suit. Further that owing to the breach of the terms by the Plaintiff, the Defendants property was being used an access which it is not, causing security breaches such as theft.

Evidence

The case was heard on 14/2/23, 29/5/23 and 25/07/23.

Plaintiffs Case

5. PW1 is the Plaintiff Diana Bukachi. She adopted her witness statement dated 13/10/21 as her evidence in chief. She reiterated the averments in the plaint an earlier narrated. That when the easement got lost at the Land Registry Kwale she through her lawyers wrote several letters requesting the defendant to re- sign the easement which did not elicit any response. That the incidences of insecurity were never brought to her attention. That she had never experienced any incidences in the Plaintiffs premises. That they tried to settle the issue amicably but the Defendant introduced new conditions that would only allow her access from 6am to 6pm which PW1 did not agree with because she preferred access from dawn to dusk. Other conditions introduced were to limit access to 20 people and automatic closure upon breach which did not give room for discussions. That there was an attempt to revise the number downwards. The Plaintiff stated all these conditions contravened the agreement and never existed.
6. PW1 produced the documents in the list of documents dated 13/10/21 (PEX 1-12) being; -
 1. Agreement for sale for a portion on plot no. Kwale/diani Beach Block/1554
 2. Letter dated 24th March 2014 from the firm of A.B Patel and Patel Co. Advocates, Mikidira & Co. Advocates.
 3. Letter dated 28th March 2014 from Mikidira & Co. Advocates to A.B Patel & Patel Co. Advocates.
 4. Letter dated 6th August 2014 to A.B Patel & Patel Co. Advocates.
 5. Letter dated 22nd July 2014 from Mikidira & Co. Advocates to A.B Patel & Patel Advocates.
 6. Sketch map for the beach access and the adjacent plots.
 7. Certificate of lease dated 6th June 2014 for KWale/diani Beach Block/181
 8. Letter dated 17th August 2020 to the Defendant.



9. E-mail correspondence from the Defendant to the firm of Mungai Kamau & Co. Advocates dated 21st August 2020 and the response thereto dated the same day.
 10. E-mail correspondence from the Defendant to the firm of Mungai Kamau & Co. Advocates dated 27th August 2020 and the response by e-mail dated 28th August.
 11. Copy of white card with the entry of the registration of easement.
 12. WhatsApp message by the Defendant to the plaintiff on 6th September 2021
7. On cross examination PW1 stated that the easement was prepared by her lawyers. That she recalled vaguely an email indicating she would have to bear the cost of reissuance of the easement. That she had read the easement and agreed that the footpath was residential and she had complied with this as it was for people residing in the suit property. That the place is very safe. She was had no prior notice of the closure including the reason thereof and which she does not know to date. That during the period between 2015 and 2020 she used to come and go and when away she would rent the premises and no complaints were raised. That the tenants used the access until the time they vacated the premises. That she and the Defendants never discussed the limitation of 20 people and which she had no capacity to accommodate. She testified she needed flexibility on the hours to allow for fireworks for the New Year, her morning walks before sun rise and including the fact that the sun set depends with the time of the year. That she was amenable to discussions but reiterated it was wrong for the Defendant to have closed the access without prior notice.
 8. On reexamination PW1 stated she had a key to the access gate before closure. That she never sold the property but conceded to advertising the same for sale. That she never considered herself to be in breach. At this juncture the plaintiff's case was closed.
 9. DW1 is John Curson a director of the Defendant adopting his witness statement dated 2/6/22 as his evidence in chief, the witness stated they had an easement which they signed granting the Plaintiff access. That it had been agreed the Plaintiff occupation would be domestic /residential and she would not get into competing business against the Defendants. She later set up a business and started advertising herself as Kijani cottages. That prior to the year 2015 the Plaintiff resided in the premises but subsequently her stay became intermittent. The Defendants had to close the access for security reasons since the Plaintiff used to allow access to her tenants who were from her other businesses. That the Plaintiff was notified of the closure of the beach access via WhatsApp.
 10. DW1 told that court that prior to the year 2020 they had private arrangement allowing access to the Plaintiffs tenant who had let the suit premises and who had been advised by the Plaintiff there would be no beach access. That efforts to resolve the issue amicably did not succeed as the Plaintiffs wanted an arbitration clause which did not make sense since only the Plaintiff was capable of breaching the access conditions. That the timelines for access were informed by security considerations as most thefts on the beach were prevalent between 6 and 7 pm. It was the Defendant who requested for access of 20 people at any one time. This was surprising since the Plaintiffs premises could not accommodate such numbers. The Defendants heard nothing about the easement until the year 2017 when they were notified it was lost and they were willing to sign a fresh set provided this would be at the Plaintiffs cost. That after the closure of the access they were served with a demand notice from the Plaintiff lawyers.
 11. DW1 further stated they were ready to give access subject to implementation of a sign in and out book at the gate as per the tourist regulations. However the timings remained a concern. As far as the witness was concerned the court should focus on the security concerns.



12. The witness produced Face Book Advertisement, Letter dated 16/8/2018 from Adam Tuller a tenant of the Plaintiff and Email dated 13/10/2017 as their exhibits as per the list of documents dated 23/11/21.
13. On cross examination DW1 reiterated by the time of the sale of the suit property he was director of the Defendant though he did not have the proof before court. That he was not a witness to the sale agreement. That clause 3.6 thereof did not provide any conditions on the access and which is the reason the easement was negotiated. The witness denied the Defendant was in breach of clause 3.6 of the sale agreement since the Plaintiff had access upto the time the same was closed. He denied the Defendant was in breach from the year 2020 todate. That the access was closed because of the Plaintiff's breach. According to him both parties signed the easement because it could not have been lodged unsigned. Though he blamed the Plaintiff tenants for leaving the access open leading to the entry of beach boys who stole clothes from the Defendants guests he had not reported the incident to the police. He could not go the police every time clothes were stolen though the Plaintiff was informed. He indicated that they made provision for the access with the knowledge that the Plaintiff would be running a B&B business. The access was to serve the Plaintiff and her guests. He was not sure the Plaintiff used the access past 6pm prior to the year 2020. He denied they gave the conditions to frustrate the Plaintiff business. On whether the Defendant was ready to sign a new set of easement he stated that he required the approval of the other directors which he had not consulted on when coming to give evidence in court.
14. DW1 clarified in reexamination that he was the one giving evidence because his mother was old (74 years). He did not report to the police because the guest deemed the value negligible but to the Defendant this was a security concern that could affect their business in future. He reiterated they did not close the access because of competition. That a director's decision is required for the company to sign the easement.
15. DW2 is Adam Tuller also known as Adam George Henry Tuller. He adopted his witness statement dated 2/6/23 as his evidence in chief. He informed the court he was familiar with the dispute the main borne of contention being the access to the beach. That the Plaintiff was his landlord. That the Plaintiff had informed him she didn't have beach access and he would have to approach Ms. Dorothy Curson which he did. That he needed the access because no one was allowed to use it yet he intended to stay in the suit property for 1-2 years. Ms. Curson asked for a written request for her considered which he submitted and access was allowed. They were given a key to the gate with conditions that they ensure the same is closed upon entry and exit. They did not have any problems with the access for the time they stayed there and no insecurity incidences. The Plaintiff had informed him, she was selling the property and brought in people to view the same. He protested as the lease required a weeks' notice for such visitation. The property was up for sale during the witness occupation.
16. On cross examination the witness testified that; he moved into the Plaintiffs property sometime in the year 2018 and could not comment about the beach access before this and after he left. He was not shown the sale agreement between the Plaintiff and Defendant. At the time he stayed on the property there were no incidents of insecurity and that the access was in control of the Defendants security staff. Incase of any incidence he would blame the security staff. Only him and his family could access but during dawn to dusk as required by the defendants. He rented the entire place comprising 3 bungalows and his family comprised himself, his daughter and mother inlaw. They left the premises on being served with notice in accordance with the lease. He intended to challenge the same as it was during the covid pandemic and it was difficult to get alternative premises. He was not in good relationship with the Plaintiff due to harassment and it was a relief to leave though he was not bitter.



17. DW2 clarified in reexamination that the sale agreement was not important for his tenancy. Dust to dawn was between 6.30 am and 6.30 pm. That his concern was that they had to leave abruptly during a pandemic and they had desired to leave at the expiry of the lease. He was totally impartial in making his statement.
18. With the above evidence the defendant closed its case.

Submissions

19. Parties filed and exchanged submissions in support of their cases.

Plaintiffs Submissions

20. The Plaintiff in its submissions dated 8/9/23 and filed on 11/9/23 identified three issues for determination. Whether the Defendant was in breach of the terms of the agreement for sale dated 23/09/2011; Whether the Plaintiff is entitled to the orders of permanent injunction and specific performance. Quoting the provisions of clause 3.6 of the agreement of sale it was submitted that parties had per the said agreement agreed that the Defendant would provide the Plaintiff with access to the beach pursuant to which they signed the a deed of easement. Though the easement was not registered following misplacement at the Land Registry this was not an issue as the Plaintiff continued to use the footpath until May 2020 when the Defendant denied the Plaintiff access to the beach thus breaching the said clause 3.6. The sale agreement did not contain any conditions attached to the grant of the access to the beach both in terms of time and number of persons. It is contended that parties to a contract are bound by the terms and conditions and it is not the place of the court to re-write such contracts. That an express term of contract cannot be made subservient to an alleged implied term.
21. On whether the orders of permanent injunction should issue it is submitted that the court has the powers to grant the said orders pursuant to section 1A and 3B of the *Civil Procedure Act*. Citing the provisions of Section 26 (1) of the *Land Registration Act* on proof of certificate of title and its indefeasibility, the cases *Nguruman Ltd Vs Jan Bonde Nielson & 2 Others* (2014) eKLR and *Mrao Ltd Vs. American Bank of Kenya Ltd* (2003) eKLR, it is submitted that the Plaintiffs proof of ownership which had not been contested by the Defendant, the Plaintiff has established a prima facie case. Further that the Plaintiff having proved she was in actual physical possession, had been using the footpath to access the beach, the Defendant's action had denied her the right to peaceful enjoyment of her property. That should the orders not be granted she will suffer irreparable loss that is incapable of compensation by way of award of damages. The court is referred to *Waithaka Vs Industrial and Commercial Development Cooperation* (2001) eKLR where the court suggested that where the adversary has been shown to be high handed or oppressive in its dealings with the applicant then this will move a court of equity to disregard that the loss can be remedied by damages.

Defendants Submissions

22. The Defendants submissions are dated 15/9/23 and filed on 18/9/23 and identify the same issues as the Plaintiffs. On whether the Defendant was in breach of the terms of the agreement for sale dated 23/9/2011. It is submitted that an easement was executed by the parties and was presented to the lands office for registration and therefore the Defendant was not in breach of the contract since it executed the easement document. That the Plaintiff refused to have the second set of easement to be prepared at her cost and it was therefore wrong for them to approach on the court with claims that the Defendant had refused to execute the same for registration. It is contended that the Plaintiff is the one in breach of the easement. That though granted for residential use the Plaintiff allowed access to whomever she wanted including outsiders. As a result the gate was left open in breach of clause 3 of the easement.



23. It is submitted that the Plaintiff has constructed two one bedroomed residential units and four bedroomed residential units contrary to clause 4 of the lease which entitles immediate termination of the easement. Further that the Plaintiff tried to sell the suit property's including the beach access which right does not pass on sale of the property. It is submitted that the Plaintiff was for 5 years not in occupation of the suit property during which time she had leased the same and only took possession in 2020 when she started following up on the footpath. It is stated that the Plaintiff failed to discharge the burden of proof that the Defendant was in breach as required under Section 107 of the [Evidence Act](#).
24. Citing the case of Kenleb Cons Ltd Vs. New Gatitu Service Ltd where it was held that to succeed in an application for injunction the Applicant must make a full and frank disclosure. On grant of orders of permanent injunction, it is submitted that the Plaintiff has failed to disclose that she was requested by the defendant to cater for legal fees and has not approached equity with clean hands. Citing Nguruman Ltd Vs Jan Bonde Nielson & 2 Others (supra) it is further submitted that the Plaintiff has an alternative access route and will not suffer any irreparable loss. That balance of convenience titles in favor of the Defendant whose security is compromised due to neglect on the part of the Plaintiff.
25. As to whether the Plaintiff is entitled to orders of specific performance it is submitted that the relief of specific performance of a contract can only be granted when the party claiming such relief shows its readiness and willingness to perform its obligations under the contract. It is averred that the Defendant has always been willing to execute the easement but the Plaintiff was not willing to cater for the legal costs for preparation and registration thereof. Further that specific performance is an extraordinary remedy awarded at the courts discretion and is not of right. The court is referred to principles for granting specific performance as set out by Maraga J in Reliable Electricals Engineers Ltd Vs. Mantrac Kenya Limited (2006) eKLR.

Analysis And Determination

26. The court has considered the pleadings, the evidence adduced by the parties, the submissions herein. The court agrees with the issues as identified by the parties and will not reinvent the wheel.
- Whether the Defendant was in breach of the terms of the agreement for sale dated 23/09/2011.
27. Before I delve into the issues raised I find it necessary to lay out the undisputed facts. It is not in dispute that the Plaintiff and the Defendant entered into a sale agreement dated 23/9/11 for sale of a portion of the Defendants land Kwale/Diani Beach Block/1554. The said land was successfully subdivided to hive off the said portion and the Plaintiff was successfully registered as proprietor of Kwale/Diani Beach Block/1813 arising from the said subdivision. It is also not in dispute that the parties had agreed that the vendor who is the Defendant herein would upon successful subdivision provide an easement in form of a footpath to the beach.
28. The Plaintiffs case is that that the foot path beach access was provided by the Defendant as agreed in the sale agreement until May 2020, when without notice and any justification, the Defendant blocked the same. The Plaintiff also states at paragraph seven (7) of the Plaint that the Defendants have intentionally and without any explanation refused to execute the necessary deed of easement for registration. That this was in breach of clause 3.6 of the sale agreement entered into by the parties.
29. The following provisions of the [Evidence Act](#) chapter 80 of the Laws of Kenya are relevant on burden of proof;



Section 107(1) places the burden of proof on the Plaintiff and stipulates

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 further provides:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 stipulates:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

30. PW1 produced as part of her bundle of documents a copy of the sale agreement dated 23rd September 2011. It shows that it is between the Diani Beachlets (2003) Limited the Defendant and Diana Bukachi, the Plaintiff. Clause 3.6 which is on the balance of the purchase price provides as follows; -

“The balance of the purchase price after paying the chargee Bank as per clause 3.3 shall be paid by the purchaser to the vendors advocates on the completion date and upon successful subdivision of the property and provision of a beach footpath by the vendor by way of an access easement on Land Reference Number Kwale Diani Beach Block/1154 as per the annexed schedule marked as ‘Easement’.

31. It is clear that the easement was to be an access footpath over the said Kwale/Diani Beach Block/1554 belonging to the Defendant. A rough sketch of the same and its location is also attached to the sale agreement. Firstly I note that it is not in dispute that the foot path access was availed by the Defendant. The Plaintiff admits this at paragraph 7 of the Plaint that ‘Despite the non-registration of the deed of easement the Defendant allowed me to access the beach through the footpath as per the terms of agreement for sale.’ PW1 also clarified in reexamination she had a key to the access gate before the same was closed by the defendant sometime in the year 2020.

32. The Plaintiffs further case is that though the deed of easement was executed by both parties it was not registered since it was misplaced at the lands office and the Defendant has completely refused to execute another set for registration. Further the access was later closed. According to the Plaint the Defendants refusal to sign another set of deed of easement and the closure both constitute a breach of clause 3.6. DW1 denied the Defendant was in breach of clause 3.6 of the sale agreement since the Plaintiff had access upto the time the same was closed.

33. I will first interrogate the Plaintiffs contention that the alleged refusal by the Defendant to sign a new set of deed of easement for registration constituted a breach of clause 3.6 of the Sale agreement herein. DW1 testified in cross examination that clause 3.6 of the sale agreement did not provide any conditions on the access and which is the reason the easement was negotiated. The court finds this observation to be correct to the extent that clause 3.6 only provided the access would be a footpath and attaches the sketch map of the easement and nothing more. The vendor who is the Defendant herein was only obligated to provide a foot path whose specifications and outlay were given as per the drawing that was attached labelled ‘Easement.’ It does not provide for the registration of a deed of easement either



as condition precedent or subsequent. It does not include the conditions attached to the easement as being part of the agreement.

- 34 . I will add that indeed an easement is a right to do a thing on another's land. Addressing easements the Court of Appeal had this to say in *Kamau v Kamau* (1984) eKLR

“the land of a neighbour without participation in the profit of that other land. the tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the servient tenement to every person into whose occupation these tenements respectively come.”

- 35 . For me as long as the sale agreement herein was silent on any further conditions as to the easement it would be illegal to import any other conditions into the sale agreement. In this regard the court is guided by the Court of Appeal decision in the case of *National Bank of Kenya Limited Vs. PipePlastic Samkolit (k) Ltd* (2002) EA 503, where the court stated this; -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.

- 36 . Drawing from the above therefore the non-registration or the alleged refusal by the Defendant to sign a fresh set of the deed of easement cannot be a breach of the sale agreement and specifically clause 3.6. In any case the foothpath was provided and by dint of section 28 of the [Land Registration Act](#), it had already become an overriding interest.

- 37 . Assuming this court were wrong on the above, I'm not convinced that the Defendant completely refused to sign the fresh set of deed of easement for registration. It is clear from the letters dated 6/8/2014 and 22/7/2014 from the Purchasers (the Plaintiff) lawyer M/s Midikira & Co. Advocates to the Vendors lawyers M/s A. B. Patel, the Plaintiff was undertaking the process of registration of the easement. Clearly the failure to formalize the lease cannot be attributed to the Defendant upto this point. PW1 testified that the Defendant did not refuse to sign a new set of documents except it was to be conditional. DW1 produced email correspondence dated 13/10/17 where in response to Mr. Midikira the Defendant responded through Dorothy thus;-

If you require for the easement documents to be reissued your client will have to pay the fees, we will be unwilling to pay to get these issued again as we paid for the first set to be done. Please advise your client and let us know accordingly.

- 38 . There was no denial on the part of the Plaintiffs that this email was not received or any evidence led by the Plaintiff that this was not the email address of the firm of Midikira who were acting for the Plaintiff. Infact all PW1 could state in cross examination was she recalled vaguely an email indicating she would have to bear the cost of reissuance of the easement and which to me sounds fair enough since is not in dispute that the Defendant had already paid for the first set. The Plaintiff also did not produce any documentary proof on what their response was to the above email. DW1 told the court the Plaintiff never availed the fresh set of documents. This evidence was not rebutted by the Plaintiff. PW1 did not produce any proof that the new set of documents was prepared and forwarded to the Defendant for execution with the requisite undertaking that the costs of registration would be borne by the Plaintiff. For this reason, the court is not persuaded that the Defendant has completely refused to sign the agreement and find that the Plaintiff has failed to discharge the burden of proof in this regard to the required standard.



39. But having stated the above I think the main issue for purposes of breach of clause 3.6 is the closure of the footpath to the beach and which is the easement. Its closure would mean that the same is no longer available to the Plaintiff contrary to the said clause. The second limb of the Plaintiff's case is that the closure of the access gate by the Defendant was a breach of clause 3.6 because it denied her access to the beach. The provisions of clause 3.6 have already been quoted herein above verbatim and discussed by this court. DW1 admitted in his testimony before court that the Defendant indeed closed the access gate. It is contended that the Plaintiff is the one in breach of the easement.
40. The Defendant states at paragraph 5 of its Defence that the easement granted to the Plaintiff was a non-exclusive right of way subject to termination in case of breach of any condition contained in the draft easement. DW1 reiterated in his evidence in chief it had been agreed the Plaintiff's occupation would be domestic /residential and she would not get into competing business against the Defendants which PW1 breached.
41. The burden lay on the Defendant to prove that the Plaintiff was in breach of the conditions of the easement as contained in the deed of easement that was executed by the parties. The Plaintiff in cross examination referred to an annexure 'D.B3' in her Supporting Affidavit to the application dated 13/10/2021 and which is the draft Deed of easement. It is not signed but both parties have admitted to signing the initial deed of easement. DW1 agreed in cross examination that the Defendant signed the deed of easement and stated it could not have been presented for registration if the same had not been executed by both parties. It is submitted by the Defendant that the parties had set terms and conditions to be followed in the easement. That clause 4 provided for immediate termination in case of disposition by way of sell, assigning or lease for more than 5 years.
42. Clause 4 of the deed of easement states as follows;-
- “It is agreed that this agreement and the accompanying right of way shall terminate immediately if 1) Diana Constructs more than two one bed roomed residential unit 2) Plot Number 1813 ceases to exist following subdivision or consolidation(sic) with another title; 3) If Diana sells, assigns, disposes, transfers or leases of the whole plot for a period of (5) years or more and 3) Diana is in material breach of this Agreement and fails to remedy the same within a reasonable time period.”
43. DW1 produced email correspondence dated between December 2020 – December 2021 between the Plaintiff and one Allan which reveal the property was to be advertised for sale to show that the Plaintiff had tried to sell the property. PW1 confirmed in cross examination that she never sold the property and I take it that the intention to sell did not crystallize. As to leasing DW2 confirmed he was a tenant of the Plaintiff. The witness stated he intended to stay there for 1 -2 years. He stated in cross examination that he moved into the premises between August 2018 and left after around one and three quarter years. This means he did not complete the 2 years which was below the 5 years stipulated in clause 4.
44. It is also submitted that clause three was breached because the gate was left open. Clause 3 provides thus;-
- Parties agree that the gates of the Footpath shall be kept locked at all times and that DBL is not in any way liable to Diana or other users of the Footpath for any injury or death suffered by any person or loss or any loss or damage to property while using the Footpath. Each party shall be responsible for its own security while using the Footpath.
45. PW1 indicated on cross examination that the footpath was residential and she had complied with this as it was for people residing in the suit property. I could say this is corroborated by DW1 who indicated in



cross examination that they made provision for the access with the knowledge that the Plaintiff would be running a bed and breakfast business (B&B) and that access was to serve the Plaintiff and her guests. I noted that indeed the Defendants had no problem with the tenants because DW2 was allowed access. The only problem was with the outsiders who were allegedly a security concern.

- 46 . It was upon the Defendants to prove that the Plaintiff was indeed responsible for leaving the gate open and which led to the security breaches where the Defendants customers lost some personal items. On cross examination DW1 stated that he did not report the matter to the police because it was petty theft, yet it was the Defendants case this could affect its business. DW2 testified in cross examination that at the time he was a tenant the Defendants security personnel were the ones in control of the beach access gate. He conceded that in the event of security breach then the said security would be the ones to blame. This is compounded by the fact that there was no evidence placed before this court to prove that the gate used to be left open and by people wrongly permitted by the Plaintiff or her agents to use the footpath and that as a result thereof there were incidents of theft in the Defendants premises. To me there was nothing linking the Plaintiff to these allegations to warrant a finding that the Plaintiff was in breach of clauses 3 and 4 of the deed of easement and which merited the closure of the access or immediate termination. DW2 further added in cross examination that the beach was a public beach indicating to possibility of intruders from the public beach. It is my finding that the Defendant did not prove to the required standard that the Plaintiff was in breach of the easement and therefore the closure was unjustified.
- 47 . The upshot of the foregoing is that the Plaintiff has proved to the required standard that the Defendant is in breach of the sale agreement by retracting its obligations under clause 3.6 of the sale agreement to make available an easement as contracted under the sale agreement. Instead the Plaintiff retracted from its obligation by closing the access.
- 48 . The above takes me to the question whether the Plaintiff is entitled to the prayers sought. The Plaintiff craves the following orders;
- a. . Permanent orders of injunction against the Defendant restraining themselves, agents, servants, or anyone acting on their behalf in any way restrained be restrained from blocking the beach access, putting any barrier or structure or otherwise dealing in any manner likely to hinder, limit the Plaintiff and or her agents, employees or anyone acting on her behalf from accessing the beach using the footpath created on the road for land reference No. No Kwale/Diani Beach Block/1813; No Kwale/Diani Beach Block/1814 and No Kwale/Diani Beach Block/1815.
 - b. . Orders of specific performance by the defendant with the terms of clause 3.6 of the agreement for sale dated 23rd September 2011.
 - c. . Orders of specific performance by the defendant to execute the deed of easement for registration of the easement against the register of all those parcels of land registered as Kwale/Diani Beach Block/1813; No Kwale/Diani Beach Block/1814 and No Kwale/Diani Beach Block/1815.
 - d. . In default of the Defendant executing the deed of easement as per prayer (b) above the Deputy Registrar of the High Court- Mombasa Law Courts to execute the deed of easement of easement and the Land Registrar Kwale Lands Registry to register the deed of easement as an encumbrance on Land Register for all those parcels of Land registered as Kwale/Diani Beach Block/1813; No Kwale/Diani Beach Block/1814 and No Kwale/Diani Beach Block/1815.
 - e. . Costs and incidentals to the suit
 - f. . Any other Order that this court may deem necessary.



49. I have considered the above prayers vis a vis the facts of this case. Every case is decided upon its own set of facts and circumstances. Starting with the prayers for permanent injunction and guided by the principles set out in the case of *Giella Vs. Cassman Brown* (1978) EA, it is evident that the Plaintiff has established a prima facie case being the owner of the adjoining property that is being served by the easement. However it is the balance of convenience that I want to focus on given the circumstances of this case. Allowing a permanent injunction as prayed will not serve justice. Equity proceeds in the principle that a right or liability should as far as possible be equalized among all interested. Justice Ogotu Mboya while considering this balance in the case of *Toshike Construction Company Limited v Harambee Co-operative Savings and Credit Society Limited* [2021] eKLR had this to say; -

“By Article 10(2) (b) of *the Constitution* of Kenya, equity is one of the national values (emphasis supplied) which builds the courts in interpreting any law (Article 10(1)(b). Further, by Article 159(2)(e), the courts in exercising of judicial authority are required to protect and promote the purpose and principles of *the constitution...*”

50. It is DW1 evidence that while clause 3.6 did not set out conditions parties went ahead to negotiate terms to regulate the use of the easement. It is not in dispute they even executed the same except for the registration. One key condition I spotted is that the gate to the footpath is to always remain closed. The Defendant whose land is burdened desires the court looks into security considerations and which is not unreasonable in view of the fact that the beach is a public beach as stated by DW2. The court cannot shut its eyes to security concerns and in any case they are to the benefit of both the parties.

51. The Defendant is amenable to having the easement registered and the only inhibition is the payment to facilitate the registration. It is unfortunate that the documents were misplaced at the lands office. Be that as it may the willingness by both parties to have the registration perfected is commendable. It is not in dispute the Defendant had initially catered for the said registration. I do not see any prejudice in the Plaintiff paying for the registration this time round. In any event their prayer is for the Defendant to execute the deed of easement for registration and is silent on who will meet the ensuing costs of registration.

52. It is apparent that both parties had taken steps towards the implementation and/or execution of the deed of easement and thus it becomes evident that the terms of the initial deed can be complied with and or adhered to by the Plaintiff though with some modifications.

53. Arising from the above considerations the orders of specific performance will be the most appropriate. In a bid to avert more hostility between the parties herein and the need to balance the interests of both the parties who are neighbors and to me this where the balance of convenience lies. PW1 recognized in cross examination the importance of good neighborliness.

54. It is noteworthy on 14/3//23 I caused the matter to be fixed for mention where I invited the parties to go into mediation since my view was that the matter was capable of amicable resolution. Ms. Mkabane holding the brief of Mr. Mungai for the Plaintiff informed the court that all efforts to settle the matter had failed. Ms. Njogu for the Defendant indicated that her clients were leaving the matter to the court. A copy of the alleged proposed consent was attached to the Defendants submissions. First let me state that submissions cannot take the place of evidence see *Daniel Toroitich Vs Mwangi Stephen Muereithi* (2014) eKLR. I therefore did not consider the said draft. However the issue of these discussions featured during the hearing.

55. PW1 told the court that they tried to settle the issue amicably but the Defendant introduced new conditions that would only allow her access from 6am to 6pm which she did not agree with because she preferred access from dawn to dusk. DW1 stated they were ready to give access subject to



implementation of a sign in and out book at the gate as per the tourist regulations. He stated the timings remained a concern. The deed already contains a clause to the effect that the gate shall remain closed at all times. While I note that the outstanding issue is the timelines, this issue in my view can be resolved by ensuring that the access gate remains closed at all times immediately upon entry into the footpath and exit therefrom. DW2 informed the court he enjoyed access from dawn to dusk provided that the gate remained closed. This is what any reasonable man is expected to appreciate in view of the circumstances of this case. The court does not see necessity for timelines.

56. The upshot of the above is that the Plaintiff has proved her case on a balance of probabilities. Dispensation of justice which is a core mandate of this court, dictates that in certain instances the court is to provide tailor made solutions to meet the ends of justice.
57. For the reasons foregoing judgement is entered for the Plaintiff against the Defendant for;-
- a.. Orders of specific performance by the Defendant with the terms of clause 3.6 of the agreement for sale dated 23rd September 2011.
 - b. . Orders of specific performance by the defendant to execute the deed of easement for registration of the easement against the register of all those parcels of land registered as Kwale/Diani Beach Block/1813, No Kwale/Diani Beach Block/1814 and No Kwale/Diani Beach Block/1815.
 - c. That before execution of the deed, the deed shall be amended to include a provision that shall provide for compliance to any Tourism Regulations on safety in force by ensuring that all the Plaintiffs authorized guests accessing the beach through the easement shall be registered both during entry into the footpath and exit therefrom.
 - d. In default of the Defendant executing the deed of easement as per prayer (a) and (b) above the Deputy Registrar of the Environment and Land Court - Kwale Law Courts to execute the deed of easement with the aforesaid amendment and the Land Registrar Kwale Land Registry to register the deed of easement as an encumbrance on Land Register for all those parcels of Land registered as Kwale/Diani Beach Block/1813, No Kwale/Diani Beach Block/1814 and No Kwale/Diani Beach Block/1815.
 - e. The Plaintiff shall solely cater for registration of the easement and all costs and incidentals related to the same.
 - f. Each party to bear its own costs of this suit.

DELIVERED AND DATED AT KWALE THIS 2ND DAY OF FEBRUARY 2024.

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A.E DENA

JUDGE

Judgment delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mukabane holding brief for Mr. Mungai for the Plaintiff

Ms. Njogu for the Defendant

Archibald Kimbada – Court Assistant.

