



**Siror (Suing as the Administrator of the Estate of the Late Chepsiror Arap Sang) & another v Cheruiyot & 3 others (Environment & Land Case E036 of 2022) [2024] KEELC 3650 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E036 OF 2022**

**MN MWANYALE, J**

**MAY 2, 2024**

**BETWEEN**

**BENJAMIN KIPLAGAT SIROR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE CHEPSIROR ARAP SANG) ..... 1<sup>ST</sup> APPLICANT**

**SAMWEL KIPCHIRCHIR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE CHEPSIROR ARAP SANG) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LEONARD CHERUIYOT ..... 1<sup>ST</sup> DEFENDANT**

**RICHARD KIPKEMBOI CHUMBA ..... 2<sup>ND</sup> DEFENDANT**

**JOSIAH LANGANT (SUED AS CHAIRMAN, SECRETARY, AND TREASURER OF OLANGATA RIMIS ROAD COMMITTEE MEMBERS) ..... 3<sup>RD</sup> DEFENDANT**

**PAUL MOSBEITHE ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide their Amended Complaint dated 25<sup>th</sup> November 2022, the Plaintiffs Benjamin Kiplagat Siror and Samuel Kipchirchir sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, Leonard Cheruiyot, Richard Kipkemboi Metto and Josiah Langat as the Chairman, Secretary and Treasurer of Olangata Irimis Road Committee and the 4<sup>th</sup> Defendant, seeking judgment against them for;
  - a. Declaration that Land parcel number Nandi/Kipsigak/38 belongs to Chepsiror Arap Sang and the Respondents, Olangata Community and their agents have no interest on the same.
  - b. A declaration that the Respondents having failed to honour the terms of the Sale Agreement relating to land parcel Nandi/Kipsigak/38 the same is null and void abintio.



- c. That the Respondents actions to forcibly demarcate and/or open a road on that parcel of land known as Nandi/Kipsigak/38 amounts to trespass.
- d. A permanent injunction restraining the Respondents, their agents, servants the general public and/or the said Olangata Community trespassing, entering or using as road any portion of that parcel of land known as Nandi/Kipsigak/38 owed by the late Chepsiror Arap Sang.
- e. The Officer Commanding Kapsabet Police Station to ensure compliance with this judgment
- f. Costs of the suit be provided by the Defendant
- g. Any other relief this Honourable Court may deem fit to grant.

**Plaintiff's Case: -**

2. It is the Plaintiff's case is that parcel number Nandi/Kipsigak/38 measuring approximately 6.4 Ha belonged to the late Chepsiror Arap Sang and it was subject to Eldoret High Court P & A No. 12/2020 in the Estate Chepsiror Arap Sang, where the Plaintiffs were administrators that the Defendants had approached the family of Chepsiror Arap Sang to purchase an access road and they had agreed to purchase pending conclusion of the Succession Cause.
3. By an agreement dated 6/9/2021 The Defendants as representatives of the Olangata Irimis Rad Committee had entered into a Sale Agreement with the Plaintiffs to purchase 0.8 acres to be used as a connection road at Kshs 7,200,000/=.
4. That notwithstanding nonpayment of the agreed purchase price, the Defendants mobilized the community to forcefully demarcate and trespass and the community was extreme violent.
5. On the strength of the above the Plaintiffs sought for the prayers set out at paragraph 1 of this judgment, and they took out a Notice of Motion seeking injunctive reliefs.
6. A ruling in respect of the injunction application was delivered on 28<sup>th</sup> March 2023 dismissing the application; where after parties were directed to comply with Order 11 and the suit was set down for hearing. After the testimony of PW1, parties requested the matter to be referred to the Court Annexed Mediation for possible settlement and a partial mediation settlement agreement was recorded in Court in terms that; -
  - a. The Plaintiffs as Administrators of Estate of Chepsiror arap Sang had agreed to offer part of their parcel no. Nandi/Kipsigak/38 as a Community road.
  - b. The Defendants Leonard Cheruiyot Richard Kemboi, Josiah Lagat as committee of Olangata Irimis Road Committee to engage a surveyor at their cost to curve out the said road measuring 6 metres wide on land parcel Nandi/Kipsigak/38.
  - c. The Defendants Leonard Cheruiyot, Richard Kemboi and Josiah Langat will withdraw their objection filed at the Eldoret High Court Succession No. 12/2020 in order for the Administrators to a portion the said portion as community access road.
  - d. The said portion was agreed to be valued at kshs. 3,000,000/= plus costs.
7. Having not agreed on the other aspects of the dispute especially as to who would pay for the portion the matter was referred back to Court, the Court heard the same.



**Plaintiff's Evidence: -**

8. PW1, Samwel Kipchirchir testified and adopted his witness statement dated 9/6/2023 as part of his evidence in chief, and he stated that in 2002, the Local community vide their then Councilor has sought a right of way in their property so that the community would easily access Kipture Olangata to Irimis, the access road Nandi/Kipsigak/38. The witness produced a copy of title for Nandi/Kipsigak/38 and a search as P Exhibit 1 and 2.
9. The initial agreement was 6 feet wide which the parties had agreed at kshs. 90,000 and the length was 200 metres, an initial payment of kshs 22,000/= was made and the witness was not sure whether the balance was paid.
10. Once the Councilors term lapsed the implementation was left to the committee. There were on and off disagreements and there was a request for the road with to be increased to 9 metres and the proposed increased was to be paid by the NG CDF and the proposal was reached in an Agreement dated 4/9/2021 and the increased with was to be procured at a cost of kshs 7.2 Million, and the same was contained in the Agreement dated 6/9/2021 which he produced as P Exhibit 6, the same was to be paid by Emgwen CDF. The said money was not paid while the people were using the road.
11. The road was thus not a public road since it had not been paid for fully and the witness sought closure of the road.
12. On cross – examination by Mr. Korir the witness in relation to DMFI 1, stated that they had agreed to sale about 4 points and kshs 22,000/= was paid to Shadrack Chepsiror, on DMFI, 2 the witness stated the same had his sister – in -law's name Selina Jepkoech, but the witness was not sure whether Selina Jepkoech Kipkwambok his sister in law had been paid the balance. It was his answer in further cross – examination that after execution of the Agreement and payment made an 2/3/2002, they allowed the community to use the road. The road had been used for 19 years before the Notice of closure was issued in 2021.
13. The Agreement made on 6/9/2021 (P Exhibit No. 6), it was indicated that they had sold 0.8 acres, whilst in 2002 they had sold 0.5 acres.
14. There was representation by Government on the purchase of 9 members from 5 members with. He was adamant that they had not sold the property twice as the 2002 agreement was not honored. They had reached an agreement with the committee.
15. PW2 Benjamin Kiplagat Siror testified. He confirmed having agreed to refer the matter to the Court Annexed Mediation. They had agreed to give 6 metres and the Surveyors were to curve out the same, and the value of the same was to be kshs. 3,000,000/= and the Defendants were to pay the amount without the Plaintiff's involvement.
16. On cross – examination, the witness stated that in 2002, there was an agreement for sale of a portion of the property to the community and that his biological parents Shadrack Chepsiror (now deceased) and Selina Jepkoech Kipkwambok were involved in the transaction dated 2<sup>nd</sup> March 2002, and the money paid in 2002 was for the road reserve.
17. On re-examination, the witness stated that they had agreed to sale the property in the mediation for kshs. 3,000,000/=
18. With the testimony of the two Plaintiff's witnesses the Plaintiffs closed their case.



### **Defendants Case and Evidence: -**

19. Vide their joint statement of defence dated 2th April 2023 the Defendant denied having agreed to purchase 0.8 acres from the Plaintiff's at kshs 7,200,000/= but averred that they have had access of 0.5 acres in Nandi/Kipsigak/38 having purchased the same in the year 2002 and paid full consideration.
20. The Defendants prayed for the suit to be dismissed with costs. Leonard Cheruiyot, tested as P.W.1 and he adopted his witness statement dated 20/4/2023 as part of his evidence in chief and produced D Exhibits 1 to 5 the documents listed in the list of documents dated 20/4/2023. It was his further testimony that there was a partial settlement reached at the mediation, but were not able to agree fully since the mediator had insisted that there was a balance, but the Defendants had declined since they had fully paid for the road at kshs 90,000/=. Leonard Cheruiyot, testified as PW1 and he adopted his witness statement dated 20/4/2023 as part of his evidence in chief and produced D Exhibits 1 to 5 the documents listed in the list of documents dated 20/4/2023. It was his further testimony that there was a partial settlement reached at the mediation, but were not able to agree fully since the mediator had insisted that there was a balance but the Defendants had declined since they had fully paid for the road at kshs 90,000/=
21. On cross – examination by Mr. Songok the witness confirmed that he was the Chairman of Olongata – Irimis road Committee, whose Secretary was Richard Kemboi and Treasurer was Josiah Langat; the witness insisted that the committee had fully paid kshs, 90,000/= for the road and that the mediator had told them that the Court will order the County Government or the NG DCF to pay kshs 3,000,000/= but as far as the committee was concern they had fully paid for the rad for kshs 90,000/=.
22. On re-examination, the witness stated that it is the Mediator who had told them (Defendants) to agree to pay kshs. 3,000,000/= as the Court had powers to order the County Government or the NGDCF to pay on their part, they had fully paid.
23. DW2, was Richard Kipkemboi Metto who adapted his witness statement dated 20/4/2023 as part of his evidence in chief. It was his testimony that the issue of the road had been cleared at total of kshs 90,200/= and that balance of the payment of kshs 14,900/= had been given to Selina Kipkwambok and the road had been in existence for about 20 years.
24. In cross – examination, the witness state that the committee had approached the family for an access road which was sold to them at kshs 90,200/- and which was fully paid for.
25. That D Exhibit 1 and 2 show that payment was made leaving a balance of kshs 14,200/=. The family demanded extra money since it was going to give them 9 metres with instead of 5 metres with as per survey report. Family had demanded kshs 7.2 million, and a proposal was to be made to Emgwen NGCDF and the mediator had told them to the extra funds needed would be paid by the County Government or the NG CDF and as a condition the objection in the succession cause at Eldoret was to be withdrawn and the issue of the kshs 3,000,000/= was imposed on them by the mediator. The witness stated that they would be requesting for the 6 metres already bought, on the payment he stated that they had paid for 6 metres width and that is what they wanted.
26. On re-examination, the witness stated that they had no debt to the family and did not agree to facilitate the family to get kshs 3 million. They had filed an objection since they were not included as beneficiaries in the estate yet they had bought a portion measuring 6 metres wide and had fully paid for it.
27. Paul Kipkemboi Mosbei testified as DW3 and adopted his witness statement dated 20/4/2023 as part of his evidence in chief.



28. It was his evidence that he had prepared and signed D Exhibit 3, the community had bought a portion measuring 5 metres width and paid in full.
29. The witness stated that the issue of the kshs 3 million was introduced by the mediator and did not agree with it.
30. On cross – examination by Mr. Songok the witness stated that he had attended the mediation but did not sign the attendance sheet. He stated that he was not part of the committee and they had agreed on 6 metres width.
31. The agreement had been prepared by Erick Sugut who was the then Secretary but was deceased; and the consideration was kshs 90,200/=. The witness was not aware of the events of 2021, which events had not been narrated to the mediation and the witness was also not aware for the agreement for kshs 7.2 Million prepared by Mr. Joshua Lagat Advocate.
32. The last witness for the Defence DW4, was Augustine Kipkemboi Beren who adopted his witness statement dated 12/2/2014 as part of his evidence in chief.
33. He stated in cross – examination that he knew the Defendants who were the committee members of Olangata – Irimis Road, the first Defendant was the chairman while the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant were the Secretary and Treasurer respectively. The committee had approached the family of Chepsiror and agreed to purchase 6 metres width at kshs. 90,000/=. He did not know how much acreage that was. He had witnessed an installment of kshs 20,250 being the last and final installment being paid as earlier payments had been made although the witness stated he had not seen the other payments.
34. He had lent the committee kshs 14,000/= earlier on, which was paid to the family of Chepsiror through Selina Chepwambok for payment. He had been refunded the money by the then area Councilor John Maru, who had borrowed the money on behalf of the committees. He gave the money to Selina Chepwambok in the presence of Paul Singoei Korir a village elder.
35. The family had complaints about none payment, they had not gone to the Land control Board to have the portion of the land they had bought and used as a road transferred. A number of meetings had been held to resolve the issue and minutes had been taken, the witness remembered signing some minutes but did not recall the minutes. The witness did recall P Exhibit 5 being a proposal by the Committee he was present during the meeting but did not attend the office of Joshua Lagat Advocate.
36. The witness confirmed that his identity card had been captured in the minutes but stated that he had not gone to the offices of Joshua Lagat Advocate. The witness remembered that the committee was to source funds. The witness stated that he was present during the mediation and that the mediation partial settlement agreement had been adopted as a judgment of the Court. That the road was a public road and family had already been paid.
37. On re-examination, the witness stated that he was a witness to the agreement dated 13/4/2002 (D Exhibit 2) on the said Agreement the committee was buying 0.5 acres and the proposal dated 4/9/2021, the committee proposed to buy 0.8 acres. The agreement prepared by Joshua Lagat Advocate was also for 0.8 acres.
38. The witness stated that he had paid kshs 14,000/= to Celine Chepwambok so as to take her daughter to school and the 1<sup>st</sup> Plaintiff was present when the money was paid to his mother; on behalf of the committee which later refunded him.



39. The witness stated that he was present doing the mediation and the committee did not propose the payment; the payment proposal came from the mediator who advised the committee to approach the Governor Nandi County or the NG CDF to make payment. The witness was not sure whether payment had been made.
40. The defence closed their case after the testimony of the 4 witnesses and the Court directed the parties to file written submissions.
41. By 13/3/2024 only the Plaintiffs had filed their submissions and the Court granted the Defendants additional 7 days and the Defendants filed their submissions dated 19<sup>th</sup> March 2024 and the matter was reserved for judgment.

**Plaintiff's Submissions: -**

42. The Plaintiff has framed and submitted on two main issues to wit;
  - a. How easements are created and/or acquired?
  - b. Whether the Defendants have acquired the right of easement as alleged.
43. The Plaintiff in his submission in respect of issue number 1 has placed reliance on the passage authored by Professor Tom Ojienda in his book Land Law and conveyance; Principles and Practices pages 184 – 185 and also on Section 28 of Land Registration Act, as well as Section 32 of the Limitation of Actions Act. The above provisions of the law point to the acquisition of easements.
44. The Plaintiff further places reliance in the decision in Kamau Kamau (1984) eKLR, as well as the decision in Esther Wanjiku Mwangi & 3 others vs Wambui Ngarachu (sued as the legal representative of the Estate of Ngarachu Chege – deceased) 2019 eKLR. where the Court in relation to Section 32 of the Limitation of Actions Act observed as follows..... “the above Section provides for the various measures which easements may be acquired and submitted that an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceful open and uninterrupted enjoyment of the same...”
45. On issue number 2, the Plaintiffs submits that the Defendants are under an obligation to demonstrate that they had entered into an Easement Agreement and had used the same for a period of over twenty years.
46. The Plaintiff thus that they were entitled to revoke the Easement Agreement as the Defendant were in breach of the same, and the Plaintiffs urges the Court to find that the Easement Agreement was revoked for breach on the part of the Defendants and to allow the suit prayers sought.

**Defendant's Submissions: -**

47. The Defendants have framed and submitted on three issues for determination, to wit,
  - a. Whether the Plaintiffs have proved their case on balance of probabilities to warrant the prayers sought being granted.
  - b. Whether the Defendants have acquired the right of easements over the suit land.
  - c. Who should pay costs?
48. On issue number 1 the Defendants submit that the Plaintiff has not proven their case on a balance of probability as they had pleaded disposal of 0.5 acres to be used as an access road within Nandi/ Kipsigak/38.



49. On issue number 2, the Defendants submits that they have acquired an easement interest in the 0.5 acres that they have occupied and have been in possession of from the year 2002.
50. On costs the Defendants place reliance on Section 27 of the *Civil Procedure Act* 2010 and submit that costs follow the vent, surprisingly they pray that costs be borne by them.

**Issues For Determination: -**

51. Before framing the issues for determination, a few uncontested facts were settled during the course of the hearing. The same are as follows; -
  - i. Nandi/Kipsigak/38 measuring about 6.4 hectares is registered in the name of chepsiror Arap Sang (now deceased) and is subject of succession cause No. Eldoret High Court P & A No. 12/2020 in the matter of the Estate of Chepsiror Arap Sang.
  - ii. The Plaintiffs are Administrators of the Estate of Chepsiror Arap Sang while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are committee members of Olangata – Irimis Road.
  - iii. That a partial settlement agreement was recorded and adopted as part of the Court’s judgment
  - iv. It is also common ground that an agreement for sale dated 2<sup>nd</sup> March 2002, and 13<sup>th</sup> April 2002 were executed between the committee members and as well as a Sale Agreement dated 6/9/2021 executed between the Plaintiffs and Defendants.
52. Having analyzed the pleadings, the evidence and submissions of parties the Court frames the following as issues for determination.
  - i. What was the import of the Agreement for Sale dated 2/3/2002 and 13<sup>th</sup> April 2002 as well as 6/9/2021, were they for acquisition by the community an easement in Nandi/Kipsigak/38?
  - ii. Was there performance of the obligations under the agreements?
  - iii. Did the Defendants acquire an easement in Nandi/Kipsigak/38?
  - iv. Have the Plaintiffs proved their case?
  - v. What is the import of the partial settlement agreement?
  - vi. What reliefs ought to issue?
  - vii. Who bears the costs of the case?

**Analysis And Determination: -**

53. In their Amended Plaint the Plaintiffs did not plead the existence of the agreements dated 2/3/2002 and 13/4/2002, in his witness before Court PW1 conceded that a Mr. John Maru who was then a Councilor had sought a right of way in their property so that people could access Kipture Olongata to Irimis. The access road was to be created within the Suit property, Nandi/Kipsigak/38.
54. It was his evidence that the property to be sold and used as an access road was to measure 6 metres wide by approximately 2000 metres length and the price agreed was kshs 90,000/=.
55. The area sold was where his late brother Shadrack Chepsiror was to inherit in his fathers Estate. The witness was aware that only kshs 22,000/= had been paid leaving a balance of kshs 58,000/= and when shown the agreement dated 13/4/2002, the witness stated that a balance of kshs 12,750/= was outstanding necessitating the closure of the road in 2021; which resulted into negotiations that



- culminated the proposal made on 4<sup>th</sup> September 2021, which proposal was for payment of kshs 7, 200,000/= and was reduced into the Agreement dated 4/9/2021, which sums were to be paid by Emgwen NG CDF.
56. The witness stated that the property sold in 2002 was 0.5 acres whilst in the agreement dated 4/9/2021 it was indicated to have been 0.8 acres.
  57. The defence witnesses on their part, testified that they had paid kshs 90,200/= for the 0.5 acres road access and that there was no balance whatsoever.
  58. I have perused the Agreement dated 2/3/2002 as well as the Agreement dated 13/4/202, the two agreements were for a purchase of land to be used a public road reserve within Nandi/Kipsigak/38. The acreage sold was 0.5 acres at a cost of kshs 22,000/= per point. There was an ex-gracious offer of 1 metre stretch in length that was granted by the family of Chepsiror and in terms of dimension, the stretch sold measured 5 metres by 328 metres.
  59. The agreement dated 13/4/2002, was an acknowledgement of payments made till 7<sup>th</sup> February 2003 where a balance of kshs 12,750 is recorded as having been outstanding.
  60. The recipient of the money was Selina Jepkoech Kipwambok the widow of Shadrack Chepsiror, who was to be the beneficiary of the area upon succession and transmission where the road reserve was to be hived.
  61. DW4, Mr. Augustine Kipkemboi Beren testified that he had witnessed the payment of the last installment of kshs 20,750/= which was made to Selina Jepkoech, having lent the committee kshs 14,000/= towards the last instalment.
  62. In respect of the agreement dated 6/9/2021, the same was meant for the sale of 0.8 acres within Nandi/Kipsigak/38 at a cost of kshs 7,200,000/= so as to facilitate a road passage linking Olongata and Irimis Village. The said agreement had a completion of 90 days.
  63. What then is the import of these agreement? The Court finds the import of the agreement from the text to be agreement for acquisition of easements by the committee members of Olongata- Irimis road so as to create a public road within Nandi/Kipsigak/38.
  64. In their submissions before Court the Plaintiff rightly submitted on the modes of acquisition of an easement and cited the provisions of Section 28 of Land Registration Act, as well as Section 32 of the Limitation of Action Act as way of acquisition of an easement. The Plaintiff further submit that Sections 98 to 100 of the Land Registration Act equally provides for creation of easements.
  65. The easement created in the circumstances of this case was an access road, hence a right of way, and having sold the strip/path measuring 5 metre by 378 metres in 2002 and the payment of kshs 90,200/= having been made, the Estate of Chepsiror ceased to have an interest on the said portion which formed the easement.
  66. The import of the agreement dated 4/9/2021, was to vary the acreage of the easement to 0.8 acres from 0.5 acres, by increasing the width to 9 metres from the 5 metres width purchased earlier in 2002, and the said increase is to cost the community kshs 3 million, a figure that the committee disputes as having imposed on them by the Mediator.
  67. In arriving at the finding that the agreements dated 2/3/2002 and 14/3/2002 created an easement the Court is guided by the decision by the Court of Appeal in Kamau vs Kamau (1984) eKLR, which decision has been cited by the Plaintiff in the said case the Court observed as follows “how are they created? At common law only by a deed or will..... At equity however, if there is an Agreement



(whether under seal or not) to grant an easement for valuable consideration equity considers it as granted as between the parties and the person taking with Notice, and will enter decree a legal right or restrain a disturbance by injunction.”

68. Thus, in answer to issue number 1, the Agreement dated 2/3/2002,14/4/2002 and 16/9/2021 were agreements for acquisition of a right of way within Nandi/Kipsigak/38.
69. On issue number 2, was there performance of the agreements? The Plaintiff in his plaint pleads nonperformance of the agreement dated 14/9/2021 and based on the said non – performance has prayed for cancelation of the easements. In respect of the agreement dated 14/9/2021, there was nonperformance, and the Plaintiff would have been right to seek cancellation if this was the only agreement giving the Defendants and the community, the right of way in Nandi/Kipsigak/38.
70. As observed in the preceding paragraphs the Court has found that the import of Agreement dated 2/3/2022 and 14/4/2002 as having created an easement by way of right of way in Nandi/Kipsigak/38, the said easement accrued to the Defendants and community at large irrespective of the agreement dated 14/9/2002, and the right of way, as per the agreement was a strip measuring 5 metres by 378 and about ½ acre in terms of acreage.
71. The Plaintiff did not plead the existence of the agreements dated 4/3/2002 and 14/3/2002 hence the issue of non-performance of these agreements does not arise.
72. In arriving at the said finding, I am guided by the decision of the Court of Appeal in IEBC vs Stephen Mule on the principles that parties are bound by their pleadings in the said case the Court observed as follows quoting the Supreme Court of Nigeria decision in Adefound Uladejited vs Nigeria Breweries, where it was held “it was now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put on the other way, which is at variance with the pleadings goes to no issue and must be disregarded.”
73. In any event, there was evidence by the 4 defence witnesses who indicated that the full payment had been made, and PW1 indicated having no knowledge of whether Selina Jepkoech Kipkwambok his sister in law had been paid and the said Selina was not called as a witness.
74. The Defence witness stated that the road had been in use since 2002 till 2021 when it was closed and that the former area Councilor had built culverts on the said access road points to performance of the agreements dated 4/3/2002 and 14/4/2002 and the right of way to the community represented had crystallized on the specified acreage that they had bought irrespective of the non-performance of the agreement dated 14/9/2021.
75. The Court finds that the agreement dated 2/3/2002 and 14/3/2002 were performed.
76. On issue number 3, from the analysis and findings above, the court finds that the Defendant and the community at large vide the agreements for sale acquired an easement by way of right of way of Nandi/Kipsigak/38, having acquired the same by way of a deed, although not yet registered against the title, the provisions of Section 32 of the Limitations of Actions Act acquiring usage of 20 years would not apply in the circumstance of this case as;
  - i. The right of way (easement herein) was not acquired by way of prescriptive rights under Section 28 of the [Land Registration Act](#) by was acquired by purchase.
  - ii. Having purchased the community owns the strip of land, the Estate of Chepsiror having no interest in the strip/stretch that they had sold.



77. On issue number 4, the Court finds that the Plaintiff has not proved its case on a balance of probabilities, in view of the existence of previous agreements for sale, that had sold 0.5 acres in Nandi/Kipsigak/38 to the community represented by the officials the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and the agreement dated 14//9/2021 was inconsequential, as the right of way had already crystallized.
78. A partial settlement agreement was reached at the Court Annexed Mediation and adopted as part of the judgment of the Court. The Defence witnesses did indicate that the figures of kshs 3,000,000/= reached as part of the settlement agreement was imposed on them by the mediator who had indicated that the same would be paid by the County Government of Nandi or the NG CDF once the Court adopts the same. Having found that the right of way had been purchased by a deed in 20002 measuring 0.5 acres it would be unconsialbe for the Plaintiffs to demand a payment of kshs 3,000,000/= in respect of the same parcel that the Defendants had already purchased same for the additional strip of 0.3 acres included.
79. It would still be unconsialbe illegal to lay burden of this payment to the Defendants and/or the County Government of Nandi who were not parties to the negotiations or the Emgwen NG CDF, on this account and still the Defendants had purchased about 0.5 acres measuring 5 by 378 metres, and having fully paid for it. The Court based on this unconsiability and illegality sets aside the partial settlement agreement valuing the parcel at kshs 3,00,000/= reached at the Court Annexed Mediation.

**Disposition:**

80. The upshot is that the Plaintiffs have on a balance of probabilities failed to prove their case and the same is dismissed with costs.
81. Having proven purchase of the right of way in Nandi/Kipsigak/38, the Defendants and the said community are entitled to use 5 metres by 378 metres as purchased and this easement shall henceforth be curved and noted in the register of Nandi/Kipsigak/38 as a right of way belonging to the Olangata – Irimis Community.
82. The Olangata – Irimis Community shall be restricted to the said measurements unless they agree with the owners to vary the measurements.
83. The Plaintiffs shall bear the costs of this suit.
84. Judgment accordingly.

**JUDGEMENT DELIVERED AND DATED AT KAPSABET THIS 2<sup>ND</sup> DAY OF MAY 2024.**

**Hon. M. N. Mwanyale**

**JUDGE**

**In the presence of;**

1. Mr. Songok for the Plaintiff
2. Mr. Korir for the Defendant

