



Buruburu Farmers Co. Ltd v Nairobi City County & another (Environment & Land Case 439 of 2014) [2022] KEELC 2268 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 439 OF 2014**

EK WABWOTO, J

JULY 7, 2022

BETWEEN

BURUBURU FARMERS CO. LTD PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit on 9th April 2014 against the Defendants, Nairobi City County and National Land Commission. Through their plaint, the Plaintiff sought the following prayers against the Defendants:
 - a. An order compelling the 1st Defendant to instruct a County Surveyor to identify and demarcate the access road for Nairobi Block 102 from Kangudo Road so as to enable the Plaintiff proceed to construct and maintain the same.
 - b. An order directed at the 2nd Defendant to declare the access road from the property known as Nairobi Block 102 to Kangudo Road as a public access road.
 - c. Costs of this suit.
 - d. Interest on (c) above.
 - e. Any other relief or alternative this Honourable Court may deem fit to grant.
2. The Plaintiff's case is contained in their plaint dated 7th April 2014, witness statement sworn by Washington Thuthi on 16th April 2019, the list and bundle of documents dated 7th April 2014 and the written submissions filed by Mungai Kalande & Co. Advocates dated 18th March 2022.



3. The Plaintiff is the registered owner of Land known as Nairobi Block 102, situated at Ruai, Embakasi. The Plaintiff contended that the property has a public access road from the property joining into Kangundo Road.
4. It was further contended that the Plaintiff has been unable to access the said road situated on the said property to Kangundo Road due to the 1st Defendant failing, refusing and or ignoring to point out the exact location of the road to the Plaintiff.

Plaintiff's evidence.

5. The suit was heard on 16/02/2022. Washington Gatharu Thuthi testified as PW1. He was the sole Plaintiff's witness. He testified that he was the current chairman of the Plaintiff company herein and that the Plaintiff is the registered owner of Nairobi Block 102 situated at Ruai, Embakasi.
6. He further stated that the property has a public access road joining into Kangundo Road as per the map showing Nairobi Block 102. It was also his testimony that the Plaintiff has been unable to locate the said access road situated on the said property to Kangundo Road due to the 1st Defendant failing to point out the exact location of the road to the Plaintiff.
7. During the hearing, he also produced the Plaintiff's bundle of documents which was marked as Plaintiff's Exhibits 1-6 and further list of documents which was produced as Plaintiff's Exhibits 7-12. He urged the court to adopt and consider the same as part of his testimony.
8. He concluded his evidence in chief by stating that, he wanted the court to grant them the prayers sought in the plaint so that they can be able to construct and maintain the access road once it is shown to them.
9. In cross-examination by Counsel for the 1st Defendant, PW1 stated that they bought the land in 1970 from a foreigner and that land had a map which showed that the land belonged to them, though they did not have the said map in court. He also stated in his cross-examination that the subdivision scheme approval was issued by the Land's Office. He also conceded that the same did not have a rubber stamp and neither did it have a signature and it was also not dated.
10. In further cross-examination, he also conceded that even though they had made payments indicated in the subdivision, they did not have the payment receipts and none was produced in court. He also conceded that he had not produced a title document to the court showing that the land belongs to them even though he had availed a copy to his Advocate.
11. In re-examination, he stated that the entire block 102 does not have a title because it was subdivided into other plots which have separate titles. He also stated that Nairobi/block 102/305 belong to a school.

Defendant's case

12. The 1st and 2nd Defendant never filed any statement of defence and neither did they call any witness during the hearing of the suit. However, it is worth noting that the 1st Defendant had attempted to file a "defence" which was not properly on record and as such the court could not rely on the same.

Plaintiff's submissions

13. The Plaintiff filed written submissions dated 18th March 2022 through the firm of Mungai Kalande & Co. Advocates. In the said submissions, Counsel for the Plaintiff reiterated the facts as pleaded and adduced in evidence. Counsel relied on the case of *Fairview Estate Limited-vs- Ann Wangari Kirima*



§ 2 others (2016) eKLR where Okong'o J. observed as follows while confirming the sketch map as a clear confirmation of the access road: -

“I have carefully considered all the material placed before the court by the parties and the arguments that were made before me. From the material on record, there is uncontroverted evidence that there existed a road of access traversing Plot No. 4776, the former Plot No. 79/2 and Plot No. 4897, and Plot No. 79/1 to Kiambu road. The history of this access road goes back to 1924. There is a mention of this road in the indenture dated 9th February 1924 annexed to the affidavit of Leonard Oliver Kibinge sworn on 26th May, 2016 as annexure “LOK8”. A clear illustration of this access road is given in annexure “LOK 11” to the said affidavit. The road is clearly marked in the sketch map at page 8 of the said annexure. The owners of Plot No. 4776, Plot No. 79/2, Plot No. 4887 and Plot No. 79/1 had infact agreed on how to maintain the said access road in 1967. The late Gerishon Kirima who was the owner of Plot No. 79/1 is one of the persons who entered into this agreement. All these facts are not disputed. It is therefore not in dispute that there was an access road from the parcels of land formerly known as Plot No. 79/2 and Plot No. 4897/1 through Plot No. 79/1 owned by the late Kirima to Kiambu road. The plaintiff has contended that when it purchased Plot No. 79/2 and Plot No. 4897/1 in the year 1978, the said access road was in place and it used the same during the lifetime of the late Kirima and after his death until the night of 23rd April 2016 when the Defendants erected poles and barricaded the said road. The Plaintiff has contended that as at the time when the Defendants blocked this road, the Plaintiff had used the same to access Kiambu road for over 38 years. The Plaintiff has placed evidence in the form of Google Maps and topographical maps which clearly show the existence of this road of access. I am satisfied on the material before me that an access road existed through Plot No. 79/1 owned by the late Kirima to Kiambu road and that the same was being used by the Plaintiff to access Kiambu road. When the late Kirima decided to sub-divide plot No. 79/1 in the year 1983, he provided for this access road in the sub-division scheme. Similarly, when the Plaintiff sub-divided Plot No. 79/2 and Plot No. 4897 in the year 2010 its sub-division scheme took into account the said access road and was approved on the basis that the road existed”.

14. Similarly, the Plaintiff in their submissions stated that the Plaintiff has supplied a duly endorsed survey plan map from the survey of Kenya. The map is at page 6 of the Plaintiffs bundle of documents. The Defendants had failed to take action in respect to pointing out to them the public access road.
15. Counsel also submitted that on the issue of whether or not the Plaintiff had not presented payment receipts for stamp duty and subdivision, that the same had been raised very late in the day and was a mere technicality which could be amended. Counsel further submitted that the 1st Defendant had never raised any concern on the said issue but they had failed on their part to perform their statutory duty to avail the county surveyor for purposes of demarcating the road.
16. Counsel also submitted that there exists a public road and that this court should find that the 1st Defendant is indeed legally obligated to avail the County Surveyor to demarcate the said road and point out at the beacons in order to enable the Plaintiff to construct and maintain it.
17. It was also submitted that pursuant to section 5 of the National Land Commission Act No 5 of 2012, the 2nd Defendant is legally mandated to declare the said access road a public access road.



18. The 1st and 2nd Defendants never filed any written submissions despite being granted an opportunity to do so within stipulated time frame. However, the court is still obligated to consider the evidence and pleadings on record and make an informed decision based on the law and facts as presented.

Analysis and Determination

19. I have considered the Plaintiff's pleadings, the evidence adduced and the written submissions filed by the Plaintiff and the three main issue for determination may be isolated and framed as follows; -
- i. Whether the Plaintiff is the registered owners of Nairobi/block 102
 - ii. Whether the Plaintiff has demonstrated compliance in respect to the applicable laws on demarcation and declaration of a public access road.
 - iii. Whether the Plaintiff is entitled to the orders sought.

Issue No 1

Whether the Plaintiff is the registered owners of Nairobi/block 102(the suit property)

20. The Plaintiff pleaded that they are the registered proprietor of the suit property which had a public access road joining Kangundo Road which has not been clearly identified and determined.
21. During the hearing of the suit, the Plaintiff witness conceded in cross-examination that he did not have the title to the suit property because the same had been subdivided into other plots which had separate titles.
22. In their submissions, Counsel for the Plaintiff submitted that the issue of ownership of the suit property was not a contested issue for consideration before the court. However, looking at the nature of the orders being sought by the Plaintiff which orders if granted are to the effect of demarcation and declaration of an access road for the benefit of the public, it is important that ownership in respect to the suit property be established.
23. In the instant case, the court was not furnished with any title documents confirming such ownership of the suit property to the Plaintiff and even during the hearing of the suit, the Plaintiff's witness conceded that the same does not exist. In view of the foregoing, it is the finding of this court that the Plaintiff has not adequately proved ownership of the suit property Nairobi Block 102. The purported documents did not bear any signature and neither were any receipts produced confirming any payment in respect to the same.

Issue No II

Whether the Plaintiff has demonstrated compliance in respect to the applicable laws on demarcation and declaration of a public access road.

24. It was the Plaintiff's case that a road of access or public road exists on the suit property and they have been unable to locate the access road situated on the suit property to Kangundo Road due to the 1st Defendant failing to point out the exact location of the road to the Plaintiff. Owing to this inaction they moved to this court seeking for an order compelling the 1st Defendant to instruct a County Surveyor to identify and demarcate the access road for Nairobi Block 102 from Kangundo Road.
25. During the hearing of the Plaintiff's case, the Plaintiff produced two letters dated 12th March 2014 and 21st March 2014 addressed to the Interim County Secretary whose contents indicated that they



had been requested the Nairobi City County to avail a surveyor for the purposes of pointing out and demarcating the public access road from the suit property to Kangundo Road.

26. The legal framework on public roads and roads of access is contained in the *Public Roads and Roads of Access Act*, Chapter 399 of the Laws of Kenya. This statute was enacted in 1920 and came into all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise force on 10/8/1920. The Act has been amended severally to address emerging issues. Under Section 2 of the Act, “a public road” is defined as:

- a. “any road which the public had a right to use immediately before the commencement of this Act held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap 280) at any time before the commencement of this Act
- b. all roads and thoroughfares hereafter reserved for public use.”

27. Although the Act does not expressly define a road of access, it provides a framework on how a road of access is created. Section 9(1) provides thus:

“Where an owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act:

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.”

27. In the instant case, it was not clear whether the Plaintiff’s claim was in respect to a public road or road of access within the meaning of the *Public Roads and Roads of Access Act*.

28. Section 8 (1) and (2) of the *Public Roads and Roads of Access Act* provide for conversion of road of access to public by application to the Minister. Section 9 of the Act provides for an owner who has no reasonable access to a public road or to a railway station or halt to apply to the board to construct a road of access to link him to the public road, railway station or halt.

29. Having regard to the provisions of the *Public Roads and Roads of Access Act* the court is persuaded there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. Limitation as to use may be as to the nature or type of vehicles that may not use such a road. On the other hand, road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. The *Public Roads and Roads of Access Act* makes a distinction between a road of access and a public road.



30. This distinction was explained by the Court of Appeal in the case of *Dellian Langata Limited vs. Symon Thuo Mubia & 4 others*, Nairobi CA No. 144 of 2014 (2018) eKLR, as follows: -

“...having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt”.

31. Be it as it may, whether public or access road, In the instant case, the Plaintiff did not call a surveyor to prove that indeed there exists a public access road in the map. The Plaintiff had a duty to do so by way of ensuring that their case is proven to the required standard. There was no evidence or any reference that indeed the Plaintiff had complied with the applicable provisions of the Public Roads and Roads Access Act cap 399 of the Laws of Kenya.

32. A court of law cannot overlook the existing provisions of the laws of the land. While the Plaintiff's action or suit may be deemed for the grater good since the road is for the benefit of the public, they equally ought to have demonstrated that they had undertaken all the necessary steps in complying with the provisions of the Public Roads and Roads Access Act cap 399 of the Laws of Kenya. Regrettably, the Plaintiff did not deem it necessary to utilize the redress mechanism laid down in Section 8 and 9 of the Public Roads and Roads Access Act. Instead they elected to directly sue the 1st and 2nd Defendants herein.

Issue No. III

Whether the Plaintiff is entitled to the orders sought.

33. The Plaintiff sought for orders compelling the 1st Defendant to instruct a County Surveyor to identify and demarcate the access road for Nairobi Block 102 from Kangundo so as to enable the Plaintiff proceed to construct and maintain the same. They also sought for an order directed to the 2nd Defendant to declare the access road from the property known as Nairobi Block 102 to Kangundo Road as a public access road.

34. However as stated in this judgment, the legal framework on public roads and roads of access is contained in the *Public Roads and Roads of Access Act*, Chapter 399 of the Laws of Kenya. From the evidence that was adduced, there was no demonstration of any compliance with the said Act neither did the Plaintiff sought to seek the redress mechanism provided under the said Act before filing the instant case. Courts have stated umpteen times in a myriad of decisions that where Parliament has provided a clear procedure of redress against any grievance, that procedure should be utilized exhaustively before court action is contemplated. Regrettably, the Plaintiff did not deem it necessary to utilize the redress mechanism provided under the *Public Roads and Roads of Access Act*. They instead moved to court seeking orders against the Defendants in total disregard of the above framework and in the circumstances, the court is unable to grant the orders sought herein.

Conclusion

35. The upshot of the above finding is that the Plaintiff's case has not been proved to the required standard and in the circumstances the Plaintiff's suit is dismissed with no orders as to costs.



36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JULY 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Masinde holding brief for Mr. Mungai for the Plaintiff

N/A for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

