



REPUBLIC OF KENYA



**Koskei & another v Kipkato (Environment & Land Case 66 of 2015)  
[2024] KEHC 11094 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
ENVIRONMENT & LAND CASE 66 OF 2015  
MC OUNDO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**SAMUEL KIPNGETICH KOSKEI ..... 1<sup>ST</sup> PLAINTIFF**

**NANCY CHEPKURUI KOSKEI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WILSON KIPKORIR KIPKATO ..... DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 18<sup>th</sup> November, 2015, the Plaintiff herein sought for the following orders;
  - i. An order that the Defendant demolish the wall that is built across Kericho/Municipality Block 4/448.
  - ii. An order that the Defendant do demolish the wall that is on the access road to allow the Plaintiff to access their property.
  - iii. The OCS Kericho does assist in the said demolitions of the wall.
  - iv. In default of the Defendant demolishing the said structure, the Plaintiffs with the assistance of the OCS Kericho demolish the wall and the costs be borne by the Defendant.
  - v. General Damages for inconvenience together with interest at Court rates.
  - vi. Special Damages in the sum of Kshs. 1,310,000/= together with interest thereon at Court rates from the date of the suit until payment in full.
  - vii. Costs of the suit together with interest at court rates.
  - viii. Such further or other relief as the court may deem fit and just to grant.



2. In his undated Statement of Defence filed on the 22<sup>nd</sup> December 2015 and amended on 15<sup>th</sup> May, 2019 the Defendant denied the contents of the Plaint putting the Plaintiff to strict proof thereof. His counterclaim was that the Plaintiffs were the registered proprietors of land parcels No. L.R No. Kericho/Municipality Block 4/453, 4/452 and 4/448 while he was the proprietor of land parcel No. L.R No. Kericho/Municipality Block 4/449 and 4/450. That the parcels of land were separated by an access road.
3. That the Plaintiffs had erected a gate and constructed a toilet and Stores between plot Nos 4/453 and 4/454 and further built a raised water tank in the midst of the access road blocking access to his land parcel No. 4/449 and the Plaintiff own land parcel No. 4/448.
4. That between parcel Nos 4/453 and 4/450, the Plaintiffs had also erected a gate thus blocking access to his land parcel No. 4/450. That the Plaintiffs' action has cause the Defendant to use a neighbour's land parcel L.R No. Kericho/Municipality Block 4/451 to gain access to his plot. He thus sought for judgement against the Plaintiffs (now Defendants) jointly and severally for;
  - i. An order that the Plaintiff do demolish/remove the toilets, stores, the water tank and gates erected blocking the Defendant's (now Plaintiff) access to his property land parcel L.R Nos. Kericho/Municipality Block 4/450 and 499 failure of which the O.C.S Kericho Central Police Station do provide security for demolition by the Defendant.
  - ii. Costs of the suit.
  - iii. Such further or other relief as the court may deem fit.
5. The Defence and Counterclaim, was denied to the effect that the gate did not block the Defendant's access road. That on the other hand, the water tank had not been built in the midst of the access road but adjacent to land parcel No. L.R Kericho/Municipality Block 4/304 and therefore was not an obstruction to access the Defendant's parcels of land. They sought that the Defendant's Defence and Counter-Claim be dismissed with costs together with interest thereon.
6. The court visited the scene before the matter proceeded for hearing wherein PW1 Samwel Kipngetich Koskei, the 1<sup>st</sup> Plaintiff herein adopted his Witness Statement dated 18<sup>th</sup> May, 2020 as his evidence in chief as well as the List of documents dated 18<sup>th</sup> November, 2015 and a Supporting list dated 3<sup>rd</sup> October 2019 before testifying that he was a business person and had bought parcel No. Kericho/Municipality/block 452 in the year 2006 from one Mrs. Mberia. That in the year 2012, he bought parcel No. Kericho/Municipality Block 4/453 and disposed it off in the year 2022 wherein in the year 2014 he acquired property Nos. Kericho/Municipality Block 4/303 and Kericho/Municipality Block 4/448.
7. He produced the official searches for land parcel No. Kericho/Municipality Block 4/452 and 448 as Pf exh 1(a & b) and proceeded to testify that at the time, there had been buildings erected on properties title Nos. Kericho/Municipality Block 4/303 and 448. That Plot No. 303 had a single storied building which they used as a guest house while the lower side of the said plot had a bungalow which was part of the guest house.
8. That further, there was high rise water tank and an underground water tank on land parcel No. Kericho/Municipality Block 4/303. That since the said plot had not been connected to the sewer tank system, they had an underground sewer tank. That there was also an external abolition on the said plot for workers and visitors. That there was also a guard house on the lower side of the abolition block. That there were two entrances that accessed plot No. Kericho/Municipality Block 4/303 at the upper part and the lower part just below the abolition block.



9. That land parcel No. Kericho/Municipality Block 4/448 on the other hand had a stand-by generator, a laundry and 3 other single rooms, and a CCTV control room which were all part of the business.
10. His evidence was that there was a single storied building which served as part of the business on plot No. Kericho/Municipality Block 4/452 but which could not be accessed from Land Parcel Nos. 4/303 or 458.
11. That before he had purchased land parcel Nos. Kericho/Municipality Block 4/303 and 458, he had studied the map and noted that there had been a road linking the two properties. That the previous owner had promised to speak to the Defendant who was the owner of land parcel No. Kericho/Municipality Block 4/449 to open up the road linking plot Nos. Kericho/Municipality Block 4/452 to 458 or 303. That having failed to get a grant from the Defendant herein, they had opted to file the instant suit. He produced an official search to parcel No. Kericho/Municipality Block 4/449 as Pf exh 2.
12. That he could access his property by detouring from land parcel No. 4/303 through the main public road into parcel No. 4/452 which was unsafe for their business during night travel, in extreme weather, security and cost. That the access roads to his property had been blocked by two masonry walls and a green house in between the said walls all put up by the Defendant.
13. He produced photographs of an aerial view of parcels of land Nos. 4/448 and 449 and the access road as Pf exh 3(a – e) and denied that he had not erected any toilet and stores on plot Nos. Kericho/Municipality Block/453 and 454 which plots were in the same state as when he had bought them save for the external septic tank which he had reconstructed after it had collapsed over the time.
14. He confirmed that the water tank on plot No. Kericho/Municipality Block 4/452 was on his property. That the gate between plot Nos. Kericho/Municipality Block 4/453 and 450 had been there when he bought the properties and was an access gate to his properties but was not meant to block anybody trying to access the facility. That the Defendant had never requested to use the said gate. He denied having erected anything to hinder the Defendant's access to his own property.
15. His evidence was that the perimeter wall that had been erected by the Defendant cut through the access road wherein he had recently erected a gate to the green house.
16. He produced a survey plan for Kericho /Municipality block 4 as Pf exh 4 and proceeded to testify that he jointly owned properties Nos. Kericho/Municipality Block 4/303, 448, 542 & 453 with his wife the 2<sup>nd</sup> Plaintiff herein and sought to be granted full access to plot Nos. Kericho/Municipality Block 4/452 and 448 as well as the other prayers as stated in his Plaint.
17. When cross-examined, he confirmed that the hotel was built on plot Nos. Kericho/Municipality Block 4/303, 448 and 452, wherein the water tank was on Plot No. 452, and the generator room, a CCTV control room and 2 guest rooms, which were part of the hotel were on plot No. Kericho/Municipality Block 4/448. That whereas there were 2 access gates to plot No. 4/303, yet whilst on Plot No.4/452 one could not access plot No. 4/303.
18. He acknowledged that he had neither produced any evidence to confirm that he had incurred Kshs. 1,000,000/= as an expense in travelling and neither was there evidence to show the expenditure he had incurred in security. That no exhibit had been produced to show that what he was describing as a hotel was actually a hotel.
19. He reiterated that the water tank was constructed on plot No. 4/452 thus the map by the surveyor showing that it had been built on the access road to plot Nos. 4/448 and 449 was not correct. That it



- had been the Defendant who had constructed a gate on plot No. 4/449 and he had not blocked the access road.
20. That he had bought plot No. 4/448 after the Defendant had bought plot No. 4/ 449 wherein he had found the wall on plot No. 4/449 in existence. He thus could not tell if the same had been build by the previous owners.
  21. He explained that to access the Defendant's plot No. 4/449 and 450, one had to pass through a gate between plot Nos. 453 and 452 which gates could be accessed by anybody and which gate had been existing when he acquired the properties. That he had just been maintaining the said gate and would not object were the court to order that it be pulled down.
  22. When he was referred to Pf exh 4, he confirmed that there was a road between plot Nos. Kericho/ Municipality Block 4/453 and 454 and further that whereas plot No. Kericho/Municipality Block 4/453 had been his, he had disposed it in the pendency of the instant suit. He however acknowledged that there was a gate between plot Nos. Kericho/Municipality Block 4/453 and 454 as well as a septic tank in plot No. Kericho/Municipality Block 4/452.
  23. He also confirmed that whereas the building had been put up in the year 1973, he had only re-constructed the septic tank after it had collapsed. That nevertheless were it to be found that the septic and water tanks were on a public road, he was willing to pull it out so that the Defendant could have an access road.
  24. When he was re-examined, he confirmed that the septic tank was on plot No. 4/452 but there was no documentation showing that the said septic tank was on the access road. He reiterated that the septic tank had been there when he bought the property and that he had only re-constructed it after it had collapsed. He confirmed that the gate to plot No. 4/453 was on the access road and had been in existence when he bought the said plot but that he had never denied anybody access.
  25. PW2, one Patrick Opiyo Adero testified that he was a land surveyor by training and held license No. 174. That he had been instructed by the Plaintiff to carry out a survey in respect of parcels No. Kericho/ Municipality Block 4/448, 449,450,451 452, 453, 303 and 304 wherein he had prepared a report to that effect. That whilst the Plaintiff was desirous of operating his business on plot Nos. Kericho/ Municipality Block 4/448 and 452 as one, to gain access, he had to go around them. That whereas there existed an access road on the map, the owner of plot No. Kericho/Municipality Block 4/449 had blocked the same.
  26. That in his report, he had concluded that the "red portion" on the map was a road reserve. That plot No. Kericho/ Municipality Block 4/452 was surrounded by a wall. That like the report of the land surveyor, the disputed portion accessed plot Nos. Kericho/Municipality Block 4/448, 449 and 304 where there had been an encroachment by the Defendant into the Plaintiffs' parcel of land No. Kericho/Municipality Block 4/448.
  27. That line kb6 and kb7 on the sketch plan was the legal boundary between plot No. Kericho/ Municipality Block 4/448 and 449 but the red line parallel to the said line was a wall on the ground which had not reflected on the District surveyor's plan. He produced his Report and Map as Pf exh 5(a) & (b).
  28. He made a correction that line kb9 on the map was a typo and should be cancelled. That between kb7 and kb9 was kb18. That the line in the lower kb9 should move up to the top of kb9 which amendments were reflected in the District Surveyor's report.



29. He explained the difference between a road reserve, access and public road to the effect that all roads were public roads as long as rates were not paid while road reserve was a marked road and that the carriage way could be within the road reserve. That an access road on the other hand was for access to a property. That in the instant suit, whereas the road in dispute was an access road to plot Nos. 4/448 and 449, it was also a public road. He asserted that his finding was within the instructions that had been given by the Plaintiff.
30. He further testified that in the process of establishing whether there was the access road, he had also established the boundary, that the access road between plot Nos. 4/453 and 450 had been blocked, that plot No. 4/448 could not be accessed because of the wall and that a water tank had been constructed within the access road. That it was not his findings that the water tank was constructed in plot No. Kericho/Municipality Block 4/452.
31. That there was a gate between kb 23 and kb 24 which if closed, plot Nos. Kericho/Municipality Block 4/448 and 449 could not be accessed. That the aforementioned gate was could be opened while the septic tank was part of a sewer line which had been put on a road reserve. That further, the septic tank being underground, the road could be used if graded as a motor vehicle could easily run over it and the same would remain intact. That nonetheless, the Defendant could access his plot No. 4/449 along the wall touching on the access road if the gate was opened.
32. Kibet Isaac, a neutral witness testified to the effect that he was the County Surveyor Kericho County. That had come with his colleague Mr. Erick Langat in response to the summons. That on 28<sup>th</sup> January, 2019 in the presence of the Plaintiffs and the Defendant, they had visited LR No. Kericho/Municipality Block 4/448 and 449 to establish whether there had been an access road, whether the same had been blocked and by whom.
33. That they had found that there existed an access road, that there had been a wall between kb 10 and point A inside the enclosure. That there was also a greenhouse that belonged to the Defendant. That there had also been a wall along the line from kb 25 to kb 10 to point A, which wall the Defendant claimed had been erected by himself and Miss Mberia. That there was also a wall that had been erected between kb 7 and kb 9 claimed to have been built by Mr. Siele the former owner of plot L .R No. Kericho/Municipality Block 4/448.
34. That there were two gates, one at the main road at point A and B and another one at point kb 24 and kb 23 both erected by the Plaintiff as claimed by the Defendant. That where there was an abbreviation "GH" was the green house owned by the Defendant and at point T1, there was a raised water tank that had been built by the Plaintiff. That at point 'B' in parcel No. Kericho/Municipality Block 4/448, there was a power house denoted as 'B'
35. That the report had been prepared by E. Langat and confirmed by himself. He produced the report as his exhibit and made a correction sting that the repetition of parcel No. Kericho/Municipality Block 4/453 ought to be Kericho/Municipality Block 4/452.
36. When he was examined by the Counsel for the Plaintiff, he confirmed that there was an access road which had been blocked along kb 10 and point A by a wall constructed by the Defendant and Miss Mberia. That the water tank and the gate were other blockages.
37. That as per the information given by both the Plaintiff and the Defendant, there had been a wall that had been erected by Mr. Siele where the road terminates to plot No. Kericho/Municipality Block 4/448. That the green house was behind the wall between kb 24 and kb 10 and that Point A separating plot No. Kericho/Municipality Block 4/448 and 449 belonged to the Defendant while the power house fell in block 448.



38. His evidence when he was examined by the Counsel for the Defendant was that there was a wall that demarcated plot No. Kericho/Municipality Block 4/ 448 on the lower end which wall had been erected by the former owner of the said plot. That however, the wall showing kb 25 – kb 10 to point A had been erected by the Defendant and Miss Mberia. That they did not go to the extent of looking for a septic tank. His further testimony was that the width of the access road was 5 meters instead of 6 meters that had been reserved. That whereas they did not determine the width of plot No. Kericho/Municipality Block 4/448, as per the survey plan, the same had been indicated as 7 meters.
39. That whilst the power house in plot No. Kericho/Municipality Block 4/448 did not block the access road, plots Nos. Kericho/Municipality Block 4/448 and 449 could not be accessed without the removal of the water tank.
40. Nancy Chepkurui Koskei, the 2<sup>nd</sup> Plaintiff herein testified as PW3 to the effect that she was a business lady. She adopted her Witness Statement dated 18<sup>th</sup> May, 2020 as her evidence in chief before testifying that her and the 1<sup>st</sup> Plaintiff were co-owners of land parcel Nos. Kericho/Municipality Block 4/303, 448, 452 and 453 which were business premises with a hotel erected therein. That it was difficult to access plot No. Kericho/Municipality Block 4/452 from No. Kericho/Municipality Block 4/448 because there were two walls erected between them by the Defendant.
41. On cross examination, she testified that there was a 3 bedroomed single storied residential building on plot No. Kericho/Municipality Block 4/452 wherein they applied for it to be changed to a commercial business.
42. That they wanted the properties to be commercialized so that they could merge plot Nos. Kericho/Municipality Block 4/303, 448 and 452. That the merger would not affect the Defendant who had an access road to his properties.
43. Her evidence was that they purchased the properties after the Defendant had already bought his property and had access to the same. That at the time there had been a wall on their side to plot No. Kericho/Municipality Block 4/448. That they had seen walls coming up during their subsistence. That their prayer was not to demolish the wall but to get access and that they would be guided by the outcome of the court's verdict.
- The Plaintiffs thus closed their case.
44. The Defence case opened with the testimony of DW 1 Wilson Kipkorir Kipkapto, the Defendant herein who adopted his Witness Statement dated 14<sup>th</sup> May, 2019 as his evidence in chief and proceeded to testify that he had not built any wall to block plot L.R No. Kericho/Municipality Block 4/448. That at the time he started building his house, the previous owner of the said plot had already erected the wall hence he could not demolish it. That the Plaintiffs' herein being the current owners of the aforementioned plot, could demolish the said wall if they so wished.
45. His testimony was that there was no building on plot L.R No. Kericho/Municipality Block 4/448 and that the Guest House alluded to by the Plaintiffs was sitting on plot Nos. L.R No. Kericho/Municipality Block 4/446 and 303. That plot 4/448 measured only 0.0195 hectares which was just enough to build a wall.
46. His testimony was that the claim for Special Damages contained in the Plaintiffs' Complaint had not been supported by any evidence nor confirmed. That further, the Plaintiffs had found him on his land and that there had never been any business or activity on plot Nos. 4/448 and 452 but on Plot Nos. 4/446 and 303 which were accessible on both sides as well as from the highway because it was a corner plot.



47. His counterclaim was that he was unable to access his plots No. 4/450 and 449 because there had been a gate erected on plot No. 4/450 and 433 and another gate erected on plot No. /453 and 454 wherein there was a toilet, store and sewer line. That further, he could not access plot Nos. 4/49 and 450 because there was a water tank and a sewer line on the access road which had been erected by the Plaintiffs.
48. That he had been accessing his plots through plot No. 4/451 owned by Jennifer Mbaria who was the former owner of all the suit parcels of land.
49. He sought that the gate between plot No. 4/450 and 453 and the one between plot No. Block 4/453 and 454 that had been erected by the Plaintiff be removed.
50. He adopted the surveyors report as his evidence and sought for damages that he had incurred for about 9 years because of the inability to access his land, costs of his counterclaim and that the Plaintiffs' suit be dismissed.
51. On cross examination, he was referred to the amended witness statement to defence and counterclaim where he acknowledged that he had sought for damages pursuant to the blockage that had been caused by the Plaintiffs. That whilst he could not remember the exact year he had bought his parcels of land, he had first bought plot No. 4/449 and later plot No. 4/450 and that he used to access the said plots through plot Nos 4/451 and 450 belonging to Jennifer Mbaria. He explained that the green gate was in plot No. 4/450 with a portion of the said gate locked from the inside.
52. That he started accessing his plots through plot No. 4/451 sometimes in the years 2016-2017 after he had erected the green gate wherein the Plaintiffs had then erected a gate between plot Nos. 4/450 and 453 thus rendering his green gate useless. That further, the Plaintiffs then erected another gate between plot No. 4/453 and 454 thus he could not access his plots of land when the Plaintiffs' two gates were locked.
53. He confirmed that he had an opportunity to look at the Surveyor's report and that the water tank was sitting on the access road. He also confirmed that he had erected a Green House within his portion of land hence were he to be given access to plot No. 4/449, the said Green House would be on the road. That whereas he did not construct a wall between the year 2022 and 2023, there had been a wall that had collapsed due to heavy rains but the same was not part of the constructed area.
54. In re-examination he confirmed that he had claimed general damages, removal of the gates and the water tank. That he could not access plot No. 4/449 because the water tank was constructed on the road reserve.
55. The Defendant closed his case and parties were directed to file their written submissions wherein the Plaintiffs' framed their issues for determination as follows:
  - i. Whether there exists an access road between Kericho/Municipality Block 4/448 and Kericho/Municipality 4/449 and if so, had the Defendant encroached and/or blocked access of the said road.
  - ii. Are the Plaintiffs entitled to general damages for inconvenience caused by the Defendant?
  - iii. Whether the Plaintiffs had blocked any access leading to the Defendant's property that is Kericho/Municipality Block 4/450 and Kericho/Municipality Block 4/449.
56. On the first and second issues for determination, the Plaintiffs submitted that a cursory perusal of the two reports prepared by the District Surveyor and Mr. Opiyo showed that there existed an access road between Plot Nos. Kericho/Municipality Block 4/448 and 449 which access road had been blocked



- by the construction of a perimeter wall. That further, the Defendant had blocked the said access road by erecting a greenhouse making it impossible for the Plaintiff to demolish the existing wall in order to use the access road.
57. That during the site visit it had also been noted that in erecting the green house and the perimeter wall along point kb6 and kb7, the Defendant had not only blocked the access road but had also encroached into the Plaintiffs parcel of land No. Kericho/Municipality Block 4/448 in total disregard to the existing map boundary as per the Surveyor's Report Plan that had been attached in Mr. Opiyo's Report. That subsequently, the said Surveyor had in his Report recommended that the small area of access enclosed by parcel No. Kericho/Municipality Block 4/449 restricting the access of parcel No. Kericho/Municipality Block 4/448 should be opened to enable access. That he had further recommended that a re-survey of the existing boundaries be done to correct the survey plan FR. 474/78 so that the boundaries were true in conforming to the existing developments which had been clearly defined in the discrepancy in the existing fence compared to the boundaries defined by the Survey plan.
58. They placed reliance on the Halsbury's Law of England, Volume 21, Fourth Edition Reissue at page 84 to submit that based on the documentary evidence and the testimonies adduced before the court, it was evident that there existed an access road that had been blocked by the perimeter wall enclosing land parcel Nos. Kericho/Municipality Block 4/449, Kericho/Municipality Block 4/450 and Kericho/Municipality Block 4/451. That the Defendant's action in erecting the said perimeter wall as well as building the green-house where the access road was and further having the perimeter wall at point kb6 and kb7 encroaching into the Plaintiff's parcel of land had amounted to wrongful interference with the Plaintiffs' private right to access the said road.
59. They thus submitted that the aforesaid wrongful interference had indeed caused the Plaintiffs unnecessary inconveniences as had been noted by PW1 and PW3 in their respective testimonies. Subsequently, they prayed for the demolition of the wall encroaching land parcel No. Kericho/Municipality Block 4/449, opening of the access road and general damages of Kshs. 1,000,000/= for the unnecessary inconveniences caused to the Plaintiffs by the Defendant.
60. On the third issue for determination as to whether they had blocked any access leading to the Defendant's property being Kericho/Municipality Block 4/450 and 449, the Plaintiffs submitted that the Defendant's Counter-claim had not been proved on a balance of probabilities. That based on the testimony adduced in court by PW1, there had been no evidence of any interference by Plaintiffs hence the Defendant's Counter-claim against them should be dismissed with costs. They also prayed that the Plaintiffs' suit be allowed as prayed.
61. The Defendant on the other hand formulated his issues for determination as follows:
- i. Whether the Defendant had constructed a wall between plot No. Kericho/Municipality Block 4/448 and 449 thus blocking the Plaintiffs' access to their plot No. Kericho/Municipality Block 4/448.
  - ii. Whether the Plaintiffs proved general and special damages as claimed in the Plaintiff.
    - i. Whether the Plaintiff has blocked access to plot No. Kericho/Municipality Block 4/449 by installation of raised tank and (toilet/sewage manhole) in the middle of access road.
    - ii. Whether the Plaintiff had blocked access to plot No. Kericho/Municipality Block 4/449 by placing steel gate between plot Nos. Kericho/Municipality Block 4/453 and 454 that is point kb24 and kb23.



- iii. Whether the Plaintiff had blocked access to Defendant's plot No. Kericho/Municipality Block 4/450 by placing a steal gate between plot Nos. Kericho/Municipality Block 4/451 and 453 that is point a and b.
62. The Defendant's submission on the other hand was that whereas the Plaintiffs had demonstrated that the access road to plot No. Kericho/Municipality Block 4/448 was blocked by a wall between plots Nos. Kericho/Municipality Block 4/448 (kb9) and 449 (kn8), they had failed to prove who had constructed the said wall. That the uncontroverted evidence by the Defendant was that the wall had been constructed by the previous owner hence the Defendant had no legal obligation to demolish the same. Further, that he did not have any objection to the demolition of the said wall by the Plaintiffs to enable them access their plot No. Kericho/Municipality Block 4/448. He also submitted that the Plaintiff neither adduced evidence of the general damages suffered nor specifically proved claim for special damages thus the same should fail.
  63. That conversely, the Defendant in his counter-claim was able to demonstrate to the court that access to plot No. Kericho/Municipality Block 4/449 was not possible as the Plaintiff had installed raised water tank at point T1 and toilet (sewage/man-hole) in the middle of the access road leading to the said plot. That further the access to the said plot had been blocked by a steel gate installed by the Plaintiffs between Plot Nos. Kericho/Municipality Block 4/453 and 454 at point kb24 and kb23. That the Defendant had also proved that access to his plot No. Kericho/Municipality Block 4/450 had been blocked by the Plaintiff installed steel gate between point a and b.
  64. His submission was that in view of the evidence that had been tendered in court and in consideration of the evidence and report of the Kericho District Surveyor who was a neutral expert, as well as the Survey map that had been produced by the Defendant, the court should enter judgment as follows:
    - i. The Plaintiff do demolish the wall between kb8 and kb9 erected by the previous owner a Mr. Siele so as to access their plot No. Kericho/Municipality Block 4/448.
    - ii. Claim for general and special damages be dismissed with costs
    - iii. The Plaintiff be ordered to demolish/remove the raised tank at point T1 and toilet (man-hole) constructed at the middle of the access road so as to enable the Defendant access plot No. Kericho/Municipality Block 4/449.
    - iv. That Plaintiff be ordered to remove gates erected between point a and b to enable the Defendant access plot No. Kericho/Municipality Block 4/450.
    - v. The Plaintiff be ordered to remove gate erected between plot No. Kericho/Municipality Block 4/453 and 454 at point kb24 and kb23 to enable the Defendant access plot No. Kericho/Municipality Block 4/450.
    - vi. The court do grant 90 days to comply in default the innocent party be at liberty to enforce court decree and the OCS Kericho Police Station do offer security.
    - vii. All incidental costs and expenses incurred by enforcing courts decree be borne and enforced against the offending party.
  65. He also submitted that costs of the Plaintiffs' suit and the Defendant's counter-claim be borne by the Plaintiffs for engaging in frivolous and vexation litigation since despite numerous requests by the Defendant, the Plaintiffs had rejected to resolve the dispute amicably.



66. In response to the Plaintiffs' Submission, he submitted that the Plaintiffs had introduced a new issue that was neither pleaded nor prayed for by the parties in respect of the boundary between plot Nos. Kericho/Municipality Block 4/448 and 449 based on their partisan. That based on PW2's recommendation that the existing boundaries be done to correct the survey Plan FR 474/79, the Plaintiffs had in their submission prayed for the demolition of the Defendant's green house.
67. His submission was that the said green house was constructed on his plot No. Kericho/Municipality Block 4/449 hence an order for the demolition of the same, which was not the dispute pleaded by the Plaintiffs, would fundamentally change the boundary between plot Nos. Kericho/Municipality Block 4/448 and 449 to his disadvantage. That subsequently, the court should reject the Plaintiffs' prayer for an order to demolish the Defendant's green house.
68. His further submission was that the Plaintiffs were not entitled to claim for general damages since the wall between plot Nos. Kericho/Municipality Block 4/448 (kb8) and 449(kb9) had been constructed by Mr. Siele, the previous owner and the Defendant had never objected to the demolition of the same thus the Defendant should not be burdened with costs to demolish it. That as it had been noted during the site visit, plot No. Kericho/Municipality Block 4/448 was a tiny vacant plot with no business activity in place and that it adjoined plot No. Kericho/Municipality Block 4/303 which was owned by the Plaintiffs and developed with a hotel that was accessible by two main roads.

#### **Determination.**

69. I have considered both the oral and documentary evidence herein adduced in court, the Plaintiffs claim against the Defendant and the Defendant's counterclaim against the Plaintiffs herein.
70. The Plaintiffs claim is that they were co-owners of land parcel Nos. Kericho/Municipality Block 4/303, 448, 452 and 453 which were business premises with a hotel erected therein. That it was difficult to access plot No. Kericho/Municipality Block 4/452 from No. Kericho/Municipality Block 4/448 because there were two walls erected between them by the Defendant. That efforts to have the Defendant, who was the owner of land parcel No. Kericho/Municipality Block 4/449 to open up the road linking plot Nos. Kericho/Municipality Block 4/452 to 458 or 303 had failed. They thus sought that the Defendant be ordered to demolish the wall built across Kericho/Municipality Block 4/448 and for both general and special damages accrued to them as a result of the denial of access.
71. The Defendant's defence was that he had not built any wall to block plot L.R No. Kericho/Municipality Block 4/448 as the same was in existence when he built his house, having been erected by the previous owner of the said plot. That the claim for Special Damages contained in the Plaintiffs' Plaint had not been supported by any evidence nor confirmed as the Plaintiffs had found him on his land and that there had never been any business or activity on plot Nos. 4/448 and 452 but on Plot Nos. 4/446 and 303 which were accessible on both sides as well as from the highway because it was a corner plot.
72. His counterclaim was that he was unable to access his plot No. 4/449 because the Plaintiffs had erected a gate and constructed a toilet and Stores between plot Nos 4/453 and 4/454 and further built a raised water tank in the midst of the access road blocking access to the said land and the Plaintiffs own land parcel No. 4/448. That between parcel Nos 4/453 and 4/450, the Plaintiffs had also erected a gate thus blocking access to his land parcel No. 4/450 for which he had to access it using a neighbour's land parcel L.R No. Kericho/Municipality Block 4/451. He thus sought that the Plaintiffs remove and/or demolishes the toilets, stores, the water tank and gates erected so as to provide access to his property.



73. Having laid the background of the matter in issue, it is not in dispute that whereas the Plaintiffs are the registered proprietors of land parcels L.R No. Kericho/Municipality Block 4/303, 448, 452 and 453, the Defendant on the other hand is the proprietor of land parcels No. L.R No. Kericho/Municipality Block 4/449 and 4/450. It is further not in dispute that the matter herein revolves around the claim and counterclaim of denial of access to the parties' respective parcels of land.
74. The common issue for determination therefore is;
- i. Whether there has been blockage of access to the parties' respective properties.
  - ii. Whether the prayers for a permanent injunction as well as the removal of the barricades are merited.
75. In order to determine these issues, the court visited the parcels of land on the 24<sup>th</sup> October 2022 and received both oral and documentary evidence from two expert witnesses being PW2 a land surveyor contracted by the Plaintiff and the County land Surveyor who testified as a natural witness wherein a common finding was that in order to operate business on plot Nos. Kericho/Municipality Block 4/448 and 452 the Plaintiffs had to go around them to gain access. That whereas there existed an access road on the map, between plot Nos. 4/453 and 450, the same had been blocked by the owner of plot No. Kericho/Municipality Block 4/449 (the Defendant and Miss Mberia) who had constructed a wall. That there had also been a water tank that had been constructed (by the Plaintiffs) within the access road on plot No. Kericho/Municipality Block 4/452 and therefore plots Nos. Kericho/Municipality Block 4/448 and 449 could not be accessed without the removal of the said water tank.
76. That there had also been erected a gate which if closed, plot Nos. Kericho/Municipality Block 4/448 and 449 could not be accessed but if it were to be opened, Defendant could access his plot No. 4/449 along the wall touching on the access road. That there was another gate between plot Nos. Kericho/Municipality Block 4/453 and 454. That a septic tank which was part of a sewer line had also been constructed underground on the road reserve but the same would had no effect were the road to be graded.
77. To me, it is immaterial whether the offensive barriers were built by the previous owners, what is material is that there has been constructed upon on an area that ought to be firstly a road reserve, secondly an access to another's parcel of land and lastly on whose land the offending structure has been constructed. One cannot build a water tank on road reserve then hope to get away with it because the previous owner of the adjacent plot had constructed a wall and or vice versa. Secondly, the very fact that the previous owner to land parcel No. No. Kericho/Municipality Block 4/449 had built a wall did not give the Plaintiff the permission to extend his boundaries into the road and thereafter proceed to construct two gates as an alternative access to his land thus flouting access to the Defendant's parcels of land.
78. The Plaintiff has sought for special damages in the sum of Kshs. 1,310,000/= as monies incurred for travelling allowance, loss of business and additional security as a result of the wall build by the Defendant on his parcel of land No. 4/449. It is trite that the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings must be specifically pleaded.
79. In *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal observed that:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and



may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

80. In the absence of proof of the amount claimed, I am afraid the award claimed cannot issue and therefore this limb fails.
81. In the end I direct that within 60 (sixty) days, of delivery of this judgment;
- i. The Defendant shall pull down the offending wall.
  - ii. The Plaintiffs shall also remove the water tank constructed within the access road and also remove the offending gates.
  - iii. If either of the parties defaults, the other party shall proceed to pull down the offending structure at the cost of the defaulting party.
  - iv. This exercise shall be conducted under the supervision of the OCS Kericho
  - v. Each part shall bear its own cost.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

