REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HIGH COURT ELC 77 OF 2017

(FORMERLY NAKURU ELC 142 OF 2013)

SAMUEL GIKONYO NJAU……..……..1st PLAINTIFF

RAPHAEL LABAN MATEO.....2nd PLAINTIFF

VERSUS

JOSEPH NDERITU.....DEFENDENT

JUDGEMENT

1. By plaint dated the 7th February 2013 the Plaintiffs herein instituted this suit against the Defendant seeking the following orders;

a) An eviction order compelling the Defendant to vacate and or cede to the Plaintiffs that portion of land invaded by him situate on parcels of land namely Nyandarua/Ol joro orok west/340 measuring approximately 7.2 Ha and Nyandarua/Ol joro orok west/344 measuring approximately 1.5 acres respectively.

b) A permanent injunction restraining the Defendant whether b himself, his agents and or representatives from dealing with and or in any other way interfering with the plaintiff's parcels of land known as Nyandarua/Ol joro orok west/340 and Nyandarua/Ol joro orok west/344 respectively.

c) Costs of this suit and interest.

2. Together with the plaint, the Plaintiffs had filed an application dated 7th February 2013 wherein they had sought for an injunction restraining the Defendant from destroying by cutting down indigenous trees on Nyandarua/Oljor Orok West/340 and Nyandarua/Oljoro Orok West /344.

3. On the 20th February 2013 parties recorded a consent to the effect that, pending the hearing and determination of the suit, both the Plaintiffs and Defendant their agents and servants will not cut down trees or any other flora on or along the cattle path subject matter of this suit. They also agreed to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days.

4. On the 20th March 2013 leave was granted to the Plaintiffs to amend their plaint and corresponding leave was also granted to Defendant to make any replies, however on the 7th May 2013, the Plaintiffs informed the court that they would prove their case on the plaint as it was. The matter was subsequently confirmed for hearing on the 9th June 2014 and transferred to this court upon its established wherein the same proceeded for hearing on the 19th September 2017.

The Plaintiff's case.

5. Evidence was tendered by the 1st Plaintiff, Mr. Samuel Gikonyo Njau who testified that he knew Joseph Nderitu the Defendant herein as a farmer and neighbor. He further testified that his farm was known as No. 340 Oljoro orok west measuring 7.2 hectares. That he had the title deed to the same which he produced as Pf exhibit 1. The court compared the original title with the copy of the same wherein it received the copy and returned the Original copy to the Plaintiff for safe keeping.

6. The Plaintiff testified that he had filed the case against the Defendant Joseph Nderitu for trespassing into his land by about 10 meters within and 30 meters length. He testified that he had lived on the land since 1965 after having inherited it from his father. That further, since the said inheritance and the procurement of the title later, there had been no change on the position of the land and neither had there been a road thereon. He stated that the Defendant had trespassed on his land since 1974.

7. He testified that this issue had been reported to the chief and the District Officer wherein the Defendant had been asked to stop trespassing on the Plaintiff's land to no avail.

8. The Witness produced an original scheme map for Oljoro orok West Settlement Scheme dated the 1st August 1989, which was marked for identification 2, showing that there was no road on the same. He further testified that they had not subdivided the land as no surveyor has been on the same.

9. The Plaintiff gave a descriptive of the land to the effect that there was a small road thereon where everybody uses and which cattle also use to go to drink water from a public seasonal dam. That he had also planted trees on the farm trees which the Defendant lay claim to.

10. The Plaintiff testified that since there were deed plans and beacons regarding the suit land, that the court should issue orders that the land remains the way it had been divided. He prayed for orders compelling the Defendant- Joseph to pay for the trees he had been destroying, a matter which had also been reported to the police, although he had forgotten the occurrence book (OB) at home (sic). He testified that he would like the court to ask the Defendant to stop trespassing on his land as the same was not a road.

11. On Cross examination, the Plaintiff confirmed that the suit land had been allocated to his parents by the government but that he had lost the allotment letter. That the Defendant had also been given his own land.

12. At this juncture, the defence Counsel refered to an allotment letter dated 3rd June 1965 and reads page 3, paragraph 2 which read as follows:

> *"……..that the government had the power to make a road for people and animals to reach water/drinking point…..'*

13. To which the Plaintiff responded that he did not understand the letter. That the Defendant had made the road himself. That the settlement officer was not a surveyor.

14. The defence Counsel then referred him to a letter dated 21st August 1974 addressed to both the Defendant's father and the fathers to the 1st Plaintiff and 2nd Plaintiff's respectively wherein he read out the said section which read as follows;

> *"…… 5 meters have been demarcated from plot No. 340 from the top and below and 2 meters from plot No. 344. Plot holder 341 must do all fencing because the cattle path foot was for his interest."*

15. The Plaintiff responded that it was not the settlement officer who had demarcated the road, rather it had been the Defendant. That after the said letter had been written, they had also written a responsive letter rejecting the said demarcation.

16. That although they had put up the fence as directed by the Settlement, yet the Defendant had not put up his own part of the fence. He was categorical that the government had given them the land upon which they had planted blue gum trees in 1974, trees which the Defendant had cut.

17. He stated that he did not know anything concerning the letters he had been shown. All he knew was about the boundaries of the suit land. He also denied any knowledge of the existence of another map after the initial one.

18. The defence Counsel referred him to a letter dated 28th January 2013 written by the District Settlement Officer Nyandarua North and addressed to the Assistant Chief with copies to the fathers of the parties, wherein the Plaintiff stated that there was no road within his land and that the only road thereon was the one leading to the water point which was used by everybody. He further confirmed that he did not know that the law provided that no one could be denied access to water

19. When re-examined, the Plaintiff confirmed that the scheme had a road that led to the watering point at the dam, a road which was used by all of them.

20. When examined by the Court, the Plaintiff stated that the road through their farm was excised by the Defendant in 1974. But the other road that the government had constructed for them was still in existence.

21. The Second witness was Pw 2, Raphael Laban the 2nd Plaintiff herein who also stated that he knew Joseph Nderitu the Defendant herein to the effect that he was his neighbor. PW2 testified that his land was known as No.344 measuring about 1.5 acres although he did not know its full acreage.

22. He further testified that although land No. 344 was subdivided to his brothers, the same was still registered in his name and that there is no title deed to the same. That the land was subject to confirmation of a grant, a copy which he produced as Pf exhibit 3.

23. The 2nd Plaintiff testified that he had sued the Defendant because he had trespassed into his land by hiving off a 5 meters width by 30 meters length, without seeking for permission to do so.

24. He confirmed that there was a seasonal river that passed through their land and that the Defendant had demarcated his (2nd Plaintiff's) piece of land to use as a road and had even gone ahead and had fenced the same. That he had lived on that land since 1965 wherein there had been no road on that land at the time. That it was not true that the government had given the Defendant an access road although in 1974, the

Defendant had gone ahead and uprooted their trees and constructed the road, but after he had uprooted the trees, they had planted fresh ones.

25. The 2nd Plaintiff testified that the government had constructed a road for everybody to use when taking their animals to drink water at the dam. That the Defendant did not ask for permission, but just hived off part of his land to construct the road with the resultant there were many cases filed with the chief and at the District Officer's office. That following the Defendant's conduct, they had written letters to him asking him to refrain from entering upon their land and it had been after they had failed to get results from both the chief and District Officer, that they had filed this suit.

26. The 2nd Plaintiff informed the court that he alongside the 1st plaintiff were neighbors who had a common complaint. He thus sought orders from the court to direct the Defendant to stop interfering with their land and also to compensate them for the trees he had cut. He further sought for orders directing the Defendant to cater for the cost of the suit.

27. On Cross examination, the 2nd Plaintiff confirmed his earlier evidence by reiterating that the Defendant had constructed the road through their land without their permission.

28. When he was referred to a letter dated 18th September 1974 addresses to the parties' father from the assistant director of settlement, he confirmed that the same had indicated that the settlement had the right to get and or make a road and that it was not necessary for them to seek permission.

29. He further stated that it was not true that the allotment letter had a provision that provided that the road could be hived from their land. When he was shown the allotment letter, he responded that his father had an allotment letter too although he did not have it. He further confirmed that he did not know the conditions put on the land by the said allotment letter.

30. When he was referred to a letter dated 21st August 1974, he stated that he had seen such a letter. That the original owner of the land, who was his father had the title to the land.

31. When, he was further shown a letter dated the 18th September 1974, he responded that letters written in 1974 were all fraudulent as the incident complained of happened after 1974.

32. In re- examination the 2nd Plaintiff reiterated that the government did not hive off part of their land to create a road, but that it had been the Defendant who had hived off part of their land to which they had not been compensated. That the letters shown to them by the defence had been written later. Finally that in the year 1974, there were no titles to the land. He also confirmed that his parents are deceased.

33. The Plaintiff's witness Pw3, Michael Kinyua's testimony was to the effect that he worked at the District Land's office Nyahururu as a land surveyor having reported there in the year 2017. That he had worked as a surveyor since the year 2007 although he had worked in other stations.

34. When referred to the map relating to Oljoro Orok West settlement schemes – sheet No 4, he testified that that although there had been an earlier edition of the map, yet he had the current edition which contained many amendments and contained 4 separate sheets of paper.

35. While referring to the said map, he confirmed that he could identify the suit parcels of land. That there were no physical features on the map as the same are normally shown on the ground. That an easement was not indicated on the map but if the same were to be seen on the map, then there ought to have been a cross reference with the registrar's office where the same is normally registered in the green card and on the title.

36. He also confirmed that if the easement had followed the right amendment, it could have been shown on the map only upon cross reference. That the map was the last resort. That normally the land registrar forwarded any amendments to them as surveyors. That on the present map, there was only a space between plots No. 344 and Plot No. 340 which he could not tell whether it was an easement or not.

37. He also stated that it seemed that there had been an amendment done on the map although he had not received a signal documentation that would have necessitated the amendment on the map. That to amend a map once published, one required some documents for example the consent from the authority being either the land control board or law courts.

38. He further testified that he did not get the approved subdivision scheme plan, and a mutation form. Further that when one was intent on amending the map, then one ought to change the registration numbers of the parcel.

39. He however confirmed that the map presented was accurate as it represented several parcels on the block. However for the section that concerned the matter in court, he did not get any documents that warranted the amendment to the map. That on the original map, the area was circled which meant that there must have been queries regarding the same which query could be seen from the blue print. He did not know however what the query was about.

40. He testified that an access road was normally linked to other networks unlike in the current scenario where there was a space which was hanging. That from the map, plot No. 340 and No.344 had an access road. That every parcel of land had an access road. He produced sheet No. 4 – 118th the latest edition, as Pf exhibit 4.

41. On Cross examination, the witness responded that there were 4 registries in the land Registry which included;

i. lands office

ii. surveyor office

iii. physical planning

iv. land adjudication and settlement department

42. He reiterated that he did not see any documents that necessitated the amendment on this parcel of land.

43. When referred to a letter dated the 31st March 2013 addressed to the District Land Adjudication Settlement officers Nyahururu from the director land adjudication and settlement department, 2nd paragraph read as follows;

"Authority for you to proceed with your proposal of raising a mutation for registry index map amendment has been granted....."

44. The witness testified that the letter was not an authority to amend the map. That according to the letter, it was a proposal for granting of mutation. That from the map, all parcels had access roads. That for plot No. 340 and Plot No. 341 there was an access road. He stated that the Physical Planning Act was to the effect that all parcels of land must have an access road. That further, a map had digits and spaces so it was not easy to pick out an easement from this particular map.

45. The witness also testified that he did not know how one could access somebody's land to create an easement without consent.

46. That the allotment was a process that was carried out by the Land and Settlement through the director and that apart from what the Act stipulated, he was not aware of other rules.

47. The witness was referred to paragraph 2(b) of the allotment letter for plot No. 341 issued to Gitahi that stipulated;

'……the right to provide such ways of access as may be necessary for and incidental to such matters as aforesaid and the access.…..'

48. In response to the said passage he testified that to create an easement on another person's land, one needed to deal with the land registrar. That the circle on the map must have raised queries. That all maps of Nyandarua County were amended in Nyeri so this circle on the map must have been amended in Nyeri although he did not know why it was circled or who circled the same.

49. The Plaintiffs thus closed their case.

Defendant's case.

50. On the 26th February 2018 the defence testified through Dw 1, Joseph Nderitu Gitahi the Defendant herein that he was a farmer who lived in Oljoro orok West Scheme. That concerning the matter before court, he was the administrator of his father's estate. That his father was known as Eliud Gitahi Kababu alias Gitahi Kababu. He confirmed that he had the original certificate of confirmation of granted dated 23rd November 2012 which he wished to produce in court as an exhibit. The court upon comparing the original certificate of confirmation to the copy accepted the copy as Df Exh 1 and returned the original to the Defendant.

51. The Defendant testified that his father was given the suit land in 1965 by the land settlement scheme. He produced the allotment letter dated 3rd June 1965 as Df MFI 2.

52. That he was sued by the Plaintiffs in this matter wherein they had alleged that he had constructed a road on their land. That indeed there was a road which had been constructed on plot No. 340 by the land settlement. He relied on a letter dated the 27th June 1974 written by Settlement Officer 1 and addressed to his father and the 1st Plaintiff's father which he wished to be marked for identification (Df MFI 3)

53. That further, before the road was constructed, parties were summoned vide a letter dated 18th July 1974 referenced as "the road to watering point". Herein marked for identification- Df MFI 4.

54. That the parties had met at the meeting point where everybody had witnessed the construction of the road pursuant to a letter dated 18th September 1974 herein marked as Df MFI 5, and written by the Assistant Director of Settlement and addressed to both the Plaintiffs' fathers, the reference being 'road to access plot No. 341 Oljoro Orok West Scheme'.

55. That the road was subsequently constructed and parties were satisfied. From plot No. 344, 2 meters were excised from the top and below. In plot No. 340, 5 meters were excised. The witness marked a letter dated 21st August 1974 referenced as 'cattle path foot' and addressed to all parties as DF MFI 6, to support his evidence.

56. That in the year 2003 the said path was amended to the map as evidenced vide a letter dated 31st March 2003 herein marked as DF MFI 7. The said letter was written by the Director of Lands Adjudication and Settlement and addressed to the District Land adjudication and Settlement Officer Nyahururu. The Reference of the letter was 'road of access to plot No. 341 Oljoro orok settlement scheme'.

57. On the 28th January 2013 there was another letter written by the District Land Adjudication Settlement Officer Nyandarua North addressed to the Assistant chief to the effect that after the plots were visited, the road still existed as shown on the map.

58. The Defendant testified that the road that the Settlement had constructed still existed and that he did not construct the same. He also testified that he had planted the trees in 1974 inside his fence. That in the years 2009 and 2011, he had sold the said trees and that was when the Plaintiff's reported him to the land registrar who had visited the ground in the year 2012. At the time the land registrar was called Njoroge who confirmed to the Plaintiffs that the road was included in the government map.

59. That this incidence happened a second time wherein another land registrar had visited the suit land on the 24th October 2012. That subsequently the parties had been summoned to the office of the land registrar Nyahururu on 31st October 2012 wherein they responded and while he gave out his copy of the letters from the Settlement office, the Plaintiffs did had no letters.

60. The Land Registrar had informed the Plaintiffs that the access road had been constructed by the government. The Plaintiffs were then asked to go to court and file suit against the settlement and not against the Defendant. He testified that the said road still existed and people still use it. That from the year 2012, the trees were still where they fell. The Defendant sought for the case to be dismissed and he be paid costs stating that the Plaintiff had used falsehood before the court.

61. On Cross examination, the Defendant testified that he was the administrator of plot No. 344 wherein he had inherited 2 acres. That his piece of land was adjacent to the suit lands. He confirmed that the whole suit land belonged to his father and that the road was constructed in 1974.

62. He confirmed that he was born in the year 1944 and disputed the fact that there were meetings held at the site. That he had heard the evidence by the surveyor and did not know that there were proceedings before the government constructed the road. He also confirmed that the plots belonged to the settlement and that the road was from the main road to plot No. 340. That the road to the river was used by occupiers of plot No. 341, further that the road was from their plot to the river.

63. In re-examination, the witness reiterated that the letters he had produced emanated from the Land and Settlement office. That he never attended any meetings. That when the road was being constructed, all parties were all present. He further confirmed that he did not know the procedures that were to be taken before a road could be constructed. He stated that the road was constructed for easy access of water and that it was not necessary for the owner of the land to be reimbursed any money for the construction of the road.

64. The next defence witness was DW 2, John Welangai, an officer in charge of the Land Adjudication and Settlement Department Nyandarua North who testified that he had been in the Nyandarua office for the last 7 years. He further testified that he was aware of the matter in court touching on Plot No. 340 and Plot No. 344 Oljoro orok West Settlement scheme. That the parcels of land were allocated through balloting wherein successful candidates paid 10% of the value of the land totaling to Ksh. 325/= as land deposit. That upon the payment, a letter of allotment was issued.

65. He confirmed that DFMFI 2 was one of the said letters which emanated from their office to which he produced as DF Exhibit 2.

66. That the settlement reserved the right to provide access roads to rivers for persons and cattle. That he was aware that an access road had been created between parcels of land Plot numbers 340,341 and 344.

67. When the witness was shown the letter marked as MFI 3, he testified that this letter, dated 27th June 1974 originated from their office and concerned a road dispute between owners of Plot No. 340 and No. 341. He produced it as DF exhibit 4.

68. When he was referred to a letter dated the 18th September 1974 herein marked as DF MFI 5, the witness testified that it also originated from their office and further that the path was demarcated to allow the owner of Plot No. 341 to have access to the watering point. By the said letter which he produced as exhibit 5, he confirmed that a demarcation of the road was done.

69. In reference to the letter dated 21st August 1974, the witness testified that the subject matter was the cattle path between Plot No. 340 and Plot No. 344. That 5 meters had been excised from plot No. 340 from the top and 2 meters from below from Plot No. 344. Further that owners of plot No.341 were asked to erect a fence on both sides. He produced the letter dated 21st August 1974 as Df exhibit 6.

70. The witness further confirmed that Df MFI 7 being a letter dated the 31st March 2003 and addressed to the Settlement Officer Nyahururu was an authority to proceed to raise a mutation for the Registry Index Map amendment which in fact gave authority to raise a mutation regarding cattle foot path. He produced the letter as Df Exhibit 7.

71. When referred to Df MFI 8, the witness testified that the letter dated 28th January 2013 was addressed to the Assistant Chief Oljoro orok. The subject matter was in reference to plots No. 340,341 and 344. The said letter confirmed that there was a road that existed both on the ground and on the map. He produced the letter as Df exhibit 8 and further confirmed that the road still existed. He also testified that all the letters he had produced as evidence in court had emanated from their officer and the demarcation had been done with authority from their office.

72. On re- examination, the witness testified that he had not carried any identification card and that he had not been asked to carry the records for the suit Plots from their office but was categorical that the letters originated from their our office. He noted that DF exhibit 7 had not been signed because it was a copy.

73. He further confirmed that their office had given authority for the demarcation of the foot path. That although he had not seen the map

showing the demarcation of the said road, yet he was aware of the law giving access and easements to people's land. He confirmed that there were correspondences calling the parties to the meetings.

74. The witness testified that as the Settlement Scheme, they did not require consent from the land control board. That further in 1974 there were no titles. Titles deeds were issued recently. That for an access road to be demarcated they needed permission from the director of settlement. Demarcation in this case was done in 2003.

75. In re-examination, the witness testified that when the land was demarcated they had used the letter from the Director of Settlement which was the practice at the time. He further stated that the fact that he had not seen the map did not mean that the road was not there.

76. The Defence closed its case.

77. Parties filed their written submissions whereby by consent parties took dates for highlighting of the same. However on the date when the highlighting was scheduled for hearing, counsel for the Defence decided to attend to matters before the sub ordinate court. The court notwithstanding her absence proceeded to receive the highlighted submission from the Plaintiff's counsel.

78. Briefly, Miss Wanjiku, Counsel for the Plaintiff submitted as follows :-

That this was a case where the Plaintiffs sought to evict the Defendant from their parcels of land alleging that he had trespassed thereto. They asked that the court considers three issues being:

(i) the law regarding trespass onto another land

ii) the law regarding creation of easement

iii) the evidence that was tendered in court

79. The Plaintiffs asked that the court takes into consideration the evidence tendered by the surveyor vis a vis the evidence tendered by the Defendant in their defence and also to take note of Section 16 of the Land Registration Act 2012 on the issue of boundary alterations.

80. That the Defendants had brought in the issue of trespassing into the Plaintiff's land by way of an alleged right created by easement by nature of a cattle path.

81. That there was no easement as denied by the Plaintiffs and further that there was no statute to create the easement. They relied on the decided case of **Brooke Bond (K) Ltd vs. James Bii (2013) |eKLR** to submit that an easement created by equity was not tenable. That the Defendant's defence was a mere denial and the issue of easement was not specifically pleaded. Further that there had not been a counter claim filed. That the Defendant had relied on hearsay evidence in their claim which was contrary to the provisions of Sections 63 and 67 of the Evidence Act.

82. That Section 32 of the Limitation Act which the Defendant had relied upon was not applicable in the circumstances as the same was not pleaded. Further that the authorities the Defendant had relied upon were also not helpful in this matter. That one of the authorities cited being **Aquila Properties Limited versus Bhupendra Patel (2017) eKLR** was not binding to this court as it was merely persuasive in nature. That the 2nd authority further supported the Plaintiff's case more than it supported the Defendant's case. The Plaintiff thus urged the court to find that the Plaintiffs had proved their case and to accordingly grant the prayers sought in the plaint thereby dismissing the Defendant's case.

83. The Counsel holding brief on behalf of the Defendant's counsel submitted that they wished to rely entirely on their filed submissions as well as on their authorities, and asked the court to rely on the same to render its judgment.

84. I have considered the evidence adduced in court herewith, the exhibits adduced as well as the written submissions and authorities cited by the parties in this matter. I note that the Plaintiffs' claim against the Defendant is that he had trespassed on their respective parcels of land being land parcels No. Nyandarua/Ol joro Orok west/340 and Nyandarua/Ol joro Orok West/344 respectively by hiving off about 10 meters within and 30 meters length and 5 meters width by 30 meters length respectively. That this trespass had been going on since the year 1974 when it first occurred. The Plaintiffs also sought for damages to the trees felled by the Defendant apparently when he trespassed on their respective parcels of land while creating the path.

85. The Defendant on the other hand has raised the issue that he did not trespass on the Plaintiffs respective parcels of land because in the actual sense, there had been an easement created, when the land was demarcated in 1974, for the purpose of the construction of a path to allow cattle access the watering point. That the said path has been in existence since the year 1974 to date and that the filing of the present suit in the year 2013, about 40 years later was therefore barred by the statute.

86. From the evidence adduced in court, there is no doubt that the parties in this matter are all neighbors. That the suit lands herein were allocated to their fathers by the settlement scheme. That the parties thus inherited the parcels of land from their fathers. There was also evidence adduced to the effect that there was a road demarcated in 1974 to enable the cattle access drinking water thus forming an easement on the suit land. That the said demarcation was conducted when the suit lands were in possession of the parties' fathers who had accented to the said demarcation because they had been involved in the consultations.

87. I find matters for determination as being:

i. Whether there was trespass on the Plaintiffs' land by the Defendant.

ii. Whether there was an easement created on the Plaintiffs' parcel of land.

iii. Whether the present suit is barred by virtue of the Limitation of Actions Act.

88. On the first issue as to whether there was trespass on the Plaintiffs' land by the Defendant. It was the Plaintiffs' claims that the Defendant encroached upon their respective suit lands and constructed a road thereby hiving off about 10 meters within and 30 meters length from the 1st Plaintiff's parcel No. Nyandarua/Ol joro Orok west/340 and 5 meters width by 30 meters length from land parcel No. Nyandarua/Ol joro Orok West/344 respectively, without the consent of the Plaintiffs. That in the process of creating the road the Defendant cut down the gum trees that they had planted in the year 1974.

89. In support of his evidence, the 1st Plaintiff produced the title deed issued on 21st November 2013 as exhibit 1, to land parcel No. Nyandarua/Ol joro Orok west/340 proving that he was the registered proprietor. The 2nd Plaintiff testified that although land No. 344 was subdivided to his brothers, the parcel of land was still registered in his name. That there is no title deed to the same because the land was subject to confirmation of a grant, a copy of the grant which he produced as Pf exhibit 2.

90. The Plaintiffs called Pw3, a surveyor who testified that he had the current map to all the three suit lands. That from the said map, sheet No. 4 – 118th edition- Pf exh 4, he could not see any easement created on the suit lands but if the same were to be seen on the map, then there ought to be a cross reference with the registrar's office where it is registered in the green card and on the title. That this was not the case in the present suit. What he could only see from the map was that Plots No. 340 and No.344 had an access road.

91. That normally the land registrar would forward any amendments to them as surveyors. That on the present map, there was only a space between plots No. 344 and Plot No. 340 which space he could not tell whether it was an easement or not.

92. The Defendant on the other hand denied each and every allegation contained in the Plaint and testified that he was sued as the legal representative of the deceased his father Mr. Eliud Gitahi Kababu alias Gitahi Kababu who was the proprietor of plot No. 341 Oljoro Orok West Scheme. That in year 1974, the Ministry of Lands and Settlement decided to demarcate a road/path between the common boundaries of the suit plots so that his father could have access to the water for his animals. That the said road was subsequently constructed wherein from plot No. 344, 2 meters were excised from the top and below whereas in plot No. 340, 5 meters were excised. He produced documents in his defence which were marked as exhibits numbers 4, 5, 6 and 7 to support his evidence.

93. There was further evidence from DW2, the officer in charge of the Land Adjudication and Settlement Department Nyandarua North who testified that indeed when the suit plots were allocated to their respective owners, the settlement reserved the right to provide access roads to rivers for persons and cattle. A clause which was contained in the allotment letter as Clause 2(b).

94. A look at the documents that were produced by the Defence witness, there is no doubt that when the Ministry of Settlement decided to demarcate the path, the Plaintiffs' fathers raised an objection with the Ministry whereby vide a letter dated the 18th September 1974 produced as Df Exh 5, they were referred to a clause in their allotment letters that stipulated that the Department of Settlement could change the Settlement plans as and when necessary and only in rare situations without consulting the plot holder.

95. A demarcation was subsequently done creating an easement between parcels of land Plot numbers 340,341 and 344 to allow the owner of Plot No. 341 to have access to the watering point, a path which exists to date. That by the time the parties inherited their respective properties, the easement in the form of the cattle path was in existence.

96. Trespass to land is the unlawful intrusion of an individual to another's land voluntarily. Involuntary intrusion does not amount to trespass. Maxim "*cui us est solum, eius est usque ad coelum et ad infernos*" –whoever owns the land, owns it all the way to the heavens and to hell.

97. According to the Black's Law Dictionary 6th Edition trespass *is described as follows;*

"An unlawful interference with one's person property or right.

At common law trespass was a form of action brought to recover damages for any injury to one's person on property or relationship with another…..

Any unauthorized intrusion or invasion of private premises on land of another"

98. In the present case I do not find evidence that the Defendant had unauthorized intrusion or invasion into the Plaintiff's suit lands. Indeed one of the conditions in clause 2(b) of the letter of allotment produced as Df exh 2 stipulated as follows:

'… the right to provide such ways of access as may be necessary for and incidental to such matter as aforesaid and he access thereto and to rivers by persons and cattle from adjoining and neighboring pieces of land..''

99. The evidence adduced is to the effect that the cattle path was created by the Settlement Fund Trustees so as to provide a path for the Defendant's father to have passage for his animals have access to the dam to drink water. This in effect created an easement over the Plaintiff's parcels of land. I therefore find that the entry onto the Plaintiff's land was not an **unauthorized intrusion or invasion of private**

premises.

100. An easement may be binding either as a "legal" or "equitable" easement. A legal easement, which is the most common, is one that is registered on the legal title to the property over which the easement has effect. If an easement is not registered in this way, it is an equitable easement.

101. In the present case, there is no doubt that in 1974 a cattle path was demarcated on plots No. 340-344, by the Settlement Fund Trustees, to enable the cattle access to drinking water. That the owner of plot No. 341 was to fence both sides because the cattle path was for his benefit. That this demarcation was done thus forming an easement on the said suit lands which were then in possession of the parties fathers. That in the year 2003, vide a letter produced as Df exhibit 7, there had been authority granted to the District land adjudication and Settlement officer to proceed with his proposal of raising a Mutation for the Registry Index Map amendment wherein he was to liaise with the surveyor and the District Land Registrar for implementation. This was not done which gave rise to the present confusion.

192. In the year 2013 vide a letter produced as exhibit 8 there was confirmation that the road between plots 340,341 and 344 leading to the water point still existed both on the ground and on the map.

103. There having been no evidence adduced to the effect that this easement was registered, I find that the same was an equitable easement.

104. In the case of **Ruth Wamuchi Kamau versus Monica Mirae Kamau [1984] eKLR** the Court held that;

> *How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the licensor or licensee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties.*
>
> *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 persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. Dalton v Angus (1881), 6 App Cas 765, 782.*

105. **Section 32** of the **Limitation of Actions Act provides as follows:**

> (*1) Where—*
>
> *(a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or*
>
> *(b) any way or watercourse, or the use of any water, has been enjoyed as an easement; or*
>
> *(c) any other easement has been enjoyed,*
>
> *peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.*
>
> *(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.*

106. From the evidence adduced in court, there is no doubt that the easement was created in the year 1974 wherein the Defendant has been enjoying the same to date, more than 40 years later. By virtue of Section **32** of the **Limitation of Actions Act,** an easement was created.

107. Section 3A of the Civil Procedure Act stipulate as follows;

> *Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

108. The Plaintiff's claim against the Defendant is based on the encroachment of their property which is a claim on trespass. **Section 4(2) of the Limitation of Actions Act**, classifies trespass as a *tort wich may not be brought after the end of three years from the date on which the cause of action accrued.*

109. Further **Section 7** of the said Act provides that;

> ***"An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person"***

110. I note that it is not in dispute that the cause of action in this matter started in the year 1974 when the cattle path was constructed. This matter was filed in the year 2013. There is no doubt that the period of about thirty nine (39) years have lapsed from the date when the cause of action occurred. No leave for extension of time to file the suit outside the prescribed period was exhibited before this court.

111. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.

112. In the case of ***Bosire Ongero vs Royal Media Services [2015] eKLR*** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

113. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:

> *In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.*

114. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step.

115. The upshot of this is that the Plaintiffs have not proved their case on a balance of probability. The suit is herein dismissed with costs to Defendant.

Dated and delivered at Nyahururu this 1st day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE