



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 79 OF 2020**

**PEONY MANAGEMENT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**DESTERIO OYATSI.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff, a management company incorporated to manage the affairs of Peony Estate located along Hatheru Road within Lavington area of Nairobi County, filed the Amended Plaint dated 29/7/2020 against the Defendant seeking various reliefs. The Plaintiff averred that GAO YU International Company Limited developed Peony Estate comprising apartments on land reference numbers (L.R. No.) 330/1348 and 1349 and sold the apartments to various persons in 2012. The Plaintiff averred that at the time the homeowners purchased the apartments, access to Peony Estate was through Hatheru Road. The Plaintiff and the Defendant share a common boundary and have been accessing their premises through a common road leading into Hatheru Road.

2. The Plaintiff claimed that on or about 6/11/2019 the Defendant started erecting an additional gate along the common road approximately 50 metres from his residential gate. The Plaintiff engaged in negotiations with the Defendant to halt the construction, and various correspondence was exchanged between the parties. The Plaintiff contended that the Defendant's action of erecting an additional gate along the common road was unreasonable, unlawful, high handed and intended to inconvenience the residents of Peony Estate by denying them access to their homes.

3. The Plaintiff sought an injunction to restrain the Defendant or his agents from constructing, barricading, obstructing or denying the Plaintiff, its agents or visitors and their vehicles access to the estate from Hatheru Road based on the apprehension that if the Defendant proceeded with the construction, or barricaded the common access the Plaintiff would be landlocked. The Plaintiff contended that it engaged the Defendant in negotiations to avert the risk of being landlocked and obtain an easement by necessity but the Defendant refused to consider the Plaintiff's proposal to maintain the *status quo* and insisted on continuing with the construction.

4. The Plaintiff claimed that it was entitled to an easement of necessity over L.R. No. 330/561 which its employees, agents and visitors have openly and peacefully used without any interruption as an access road to and from the Plaintiff's parcel of land being L.R. No. 2330/1349. It sought a permanent injunction to restrain the Defendant or its agents from erecting any building, structure or development on the access road situated along Hatheru Road. It also prayed for a mandatory injunction to compel the Defendant to remove any structures and gate that were erected on the portion of the access road situated along Hatheru Road.

5. Further, it sought a declaration that it was entitled to the access road the entrance having been in existence for more than 20 years and that the Defendant had through his own conduct acquiesced to the use of that access or entrance to the Plaintiff's development. In the alternative, the Plaintiff sought a declaration that it was entitled to access its premises through Hatheru Road and urged that the portion of the access road should be surveyed by the Ministry of Road Transport and Development to assess the reasonable compensation to be paid to the Defendant.

6. The Defendant filed a defence and counterclaim dated 3/6/2020. He averred that he was the registered proprietor of L.R. No. 330/561 and that as proprietor of the land and in terms of Section 24 (a) of the Land Registration Act, he enjoyed absolute ownership of the land together with all the rights appertaining to it. He also relied on Articles 40 and 64 of the Constitution on the protection afforded to him to own and enjoy his property. The Defendant stated that his land was separately delineated on a cadastral map which was registered in the land registry and that the Plaintiff's land was equally delineated and registered as a parcel of land.

7. The Defendant urged that under Section 20 of the Land Registration Act, every proprietor of land is enjoined to maintain and respect the beacons and other features that demarcate the boundaries of his land with the adjoining properties. The Defendant averred that the Plaintiff breached the legal provisions and impaired the boundary features which demarcated the boundaries of his land and that of the Plaintiff. He added that the Plaintiff wrongfully entered his parcel of land, took a portion of it and constructed illegal structures on his land and was still trespassing on it with the aim of depriving him of his property. He claimed that he had been deprived of the use and enjoyment of his portion of land because the Plaintiff was unlawfully occupying and enjoying his property without paying any consideration for it. He urged the court to dismiss the Plaintiff's claim and sought damages of Kshs. 200,000/= being the surveyor's charges which he counterclaimed together with the cost of removal of the illegal structure constructed on his land. He also sought damages and mesne profits at the rate of Kshs. 50,000/=

per month from January 2012 until possession is delivered up to him or the Plaintiff ceased to use his land unlawfully.

8. In its Reply to the Defence and Counterclaim, the Plaintiff averred that if the Defendant had suffered any loss, then he had acquiesced to the construction of the structures on the land. It denied any breach of the Constitution or other laws. It averred that through the Defendant's acts of commission or omission the Plaintiff or the previous occupants of the dominant property had utilised the access road for more than 25 years and had gained legal rights to that land through the doctrine of prescription.

9. Due to the prevailing Covid-19 conditions in the country which have made it hard to conduct a trial in open court, parties agreed to admit the documents and witness statements they had filed in court based on which the court would proceed to determine the dispute. They also agreed that the court would do a site visit following which they would file their written submissions.

10. Furaha Marwa, the Chairman of Peony Residents Association stated in his witness statement that Peony Estate consisted of 180 houses and was divided into two plots being L.R. No. 330/1348 whose residents accessed the main road through Rusinga School while the residents of L.R. No. 330/1349 accessed the main road through Hatheru Road. He stated that the Plaintiff received a letter from the Defendant requesting to move his gate to a section of Hatheru Road due to security concerns. The Plaintiff while appreciating that this was a public utility road rejected the Defendant's request. The Defendant began construction on 6/11/2019 which the Defendant rejected on the ground that that stretch acted as a jogging track.

11. Mr. Marwa averred that on 15/11/2019 the Defendant wrote a letter to the Plaintiff indicating that he had made an error on his request and that the land actually belonged to him. He laid claim to the entire access road and further claimed that the Plaintiff had encroached onto his private property. The Defendant stopped construction of the wall after the Plaintiff's committee went to the site with the Chairman of Hatheru Road Residents Association who all knew that that part was indeed a public road Hatheru Road having come into existence almost 70 years ago. They agreed to take a surveyor to the ground. He stated that the stretch of land which the Defendant lays claim to was where their generator room, KPLC power step-down equipment, main gate, parking space and a swimming pool were situated. Mr. Marwa pointed out that the survey maps issued by the Defendant's surveyor were not verified by the Nairobi County and the Ministry of Lands. He claimed that the Defendant had equally encroached on the Plaintiff's land behind the swimming pool and added that it was important for both pieces of land to be surveyed further so that fresh beacons could be placed on the land. The Plaintiff produced a site location plan, evidence of payment of land rates in 2019 for L.R. No. 330/1348 and 1349, photographs, correspondence exchanged and minutes of the meeting held by members of the Plaintiff on 8/2/2020.

12. The Defendant filed a replying affidavit in which he confirmed that he owned L.R. No. 330/561. He had never stayed on the land since acquiring it in 2002 and had always rented it out. His property shared a common boundary with the Plaintiff. He stated that the Plaintiff took advantage of his absence and encroached on his property by building a boundary wall on his land. He maintained that the Plaintiff owed him compensation for the unlawful use of his property. He added that the boundaries of his property were demarcated on the survey plan and the beacons indicated the location of the boundaries of his land. The survey plan also showed the access to his property and that of the Plaintiff.

13. He averred that when the boundary issue arose in November 2019, he agreed with the Plaintiff to refer the matter to surveyors to read the survey map and locate the beacons on the ground. The exercise took place from 26<sup>th</sup> to 28<sup>th</sup> November 2019. The surveyors prepared a report which they gave to the parties. They also prepared a sketch plan indicating the correct boundaries of the two properties and the Plaintiff's encroachment on his land. He wrote to the Plaintiff on 11/12/2019 informing it of the outcome of the demarcation exercise which showed that the Plaintiff had trespassed on his land and unlawfully constructed a boundary wall.

14. He stated that from the surveyor's report it was evident that the Plaintiff had blocked its lawful entrance to Hatheru Road and instead constructed an entrance to its estate through the Defendant's property. The Defendant gave the Plaintiff 30 days to demolish the illegal structures and to use the proper access through Hatheru Road. He urged that he had given the Plaintiff time to stop the trespass on his land but the Plaintiff refused to obey the law and continued to trespass on his property. He produced copies of the sketch plan, the correspondence exchanged, beacon search and reestablishment of his land, a copy of the survey plan, copies of the correspondence exchanged together with a copy of the survey plan.

15. Parties filed and exchanged written submissions which the court has considered. The Plaintiff submitted that its claim was based on an overriding interest pursuant to Section 28 of the Land Registration Act which stipulates that registered land was held subject to subsisting overriding interests without them being noted in the register. These include rights of way, rights of water and profits subsisting at the time of first registration under the Act, and rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of action or by prescription.

16. It also relied on the decision in **Kamau v Kamau [1984] eKLR** in which the Court of Appeal defined an easement. The court observed that once an easement was validly created, it was annexed to the land so that its benefit passed with the dominant tenement and its burden passed with the servient tenement to every person into whose occupation the tenements respectively came. It claimed that Section 32 of the Law of Limitation of Actions Act spelt out how a particular right of easement was acquired and it stated that where a way or water course had been enjoyed as an easement peaceably and openly as of right without interruption for 20 years the right to such access was absolute and indefeasible. The Plaintiff submitted that since the erection of the gate 23 years ago it had acquired an easement by way of prescription based on the Court of Appeal decision. It relied on other decisions on the grant by an owner of a tenement and the fact that the law relating to prescription affected present title holders and their predecessors. (See **Aquila Properties Limited v Bhubendra Patel [2017] eKLR** and **Peter Thuo Kairu v Kuria Gacheru [1988] 2KLR**).

17. The Plaintiff maintained that once an easement was created it was annexed to the land and its benefit passed with the dominant tenement to every person into whose occupation the tenement came. Further that the easement attached to the current holders of title as well as their predecessor and was not defeated merely because the land was subdivided or the parcel number changed.

18. The Plaintiff further submitted that the Defendant having purchased the adjoining land in 2002 with the knowledge that the Plaintiff's gate or entrance was at the position where it stands today and with the knowledge that it was on his land, the Defendant had acquiesced and

was estopped from prohibiting the Plaintiff from using that entrance. The Plaintiff referred to the decision in **Dalton v Henry August & Company [1881] 6 App 86** which Judge Kemei referred to her in decision in **Esther Wanjiku Mwangi & 3 Others v Wambui Ngarachu Chege [2019] eKLR** where the court gave the ingredients of acquiescence as the doing of an act in another person's land without the right to do that act with the knowledge of the owner of the land who had power to act and prevent the act but elected not to in which case he was estopped from stopping what had been done.

19. The Plaintiff maintained that the area which the Defendant proposed that it ought to use to access Hatheru Road had substantial developments erected on it which if brought down would interfere with the architectural design of some of the apartments and cause inconveniences to the users of Hatheru Road. It maintained that the right to property protected under the Constitution was not absolute and was subject to overriding interests and limitations on its enjoyment.

20. The Plaintiff relied on Section 18 (2) of the Land Registration Act in urging that this court did not have jurisdiction to entertain the Defendant's claim regarding the boundary dispute. The Plaintiff faulted the Defendant for not denying the existence of the disputed boundary wall at the time he purchased the land and for taking more than 23 years to raise the issue about the boundary. It also relied on Section 7 of the Limitation of Actions Act in urging that it had acquired rights over the Defendant's land through adverse possession. It submitted that the Defendant was not entitled to the mesne profits that he seeks since 2012 owing to the fact that the relationship of landlord and tenant did not exist between the parties.

21. The Defendant submitted that the survey plans clearly showed the boundaries of his land and that of the Plaintiff. They also showed the location of the beacons and that the Plaintiff's land abutted Hatheru Road. He denied that he had blocked the Plaintiff's access to Hatheru Road or that the Plaintiff would be landlocked if he constructed his gate at the border of his land and Hatheru Road. On the Plaintiff's claim that it was entitled to use the access road based on the contention that the road had been in existence for more than 20 years, the Defendant urged that the documents relied on by the Plaintiff showed that its title came into existence seven years ago in 2013 and in any event the Plaintiff was incorporated on 4/4/2012.

22. The Defendant submitted that the Plaintiff had failed to prove its claim to use the Defendant's land as a right of way pursuant to Section 28 of the Land Registration Act. He urged that the Plaintiff's claim to this right was misconceived and not based on any law. He argued that although Section 28 of the Land Registration Act made provision for overriding interests, the procedure for acquiring an easement was specifically set out in Section 140 of the Land Act. He submitted that the law regarding acquisition of a right of way on private land was Sections 139 and 140 of the Land Act and would only benefit an owner of landlocked land, of which the Plaintiff was not. He added that the Plaintiff's claim to an easement over his land was equally misconceived.

23. The Defendant relied on **Re Ellenborough Park, Re Davies (deceased), Powell and Others v Maddison and Another [1955] 3 All ER 667** on the fundamental principle concerning easements being that they must not only be appurtenant to a dominant tenement but must also be connected with the normal enjoyment of the dominant tenement. The court expanded that principle by stating that a right enjoyed by one over the land of another only possessed the status of an easement if it accommodated and served the dominant tenement and was reasonably necessary for the enjoyment of that tenement. The court added that if it had no necessary connection to it despite conferring an advantage to the owner by making his ownership more valuable it was not an easement but a mere contractual right enforceable between the two contracting parties. The Defendant submitted that there was no relationship of a dominant and servient tenement between the Plaintiff's land and his; his land did not serve the Plaintiff's land or provide a right of way for the Plaintiff's land to Hatheru Road and that there was no connection between his land and the Plaintiff's land in relation to the Plaintiff's access to Hatheru Road.

24. The Defendant pointed out that there was a distinction between a claim by prescription and the right acquired through adverse possession. The Defendant submitted that the evidence adduced in this case demonstrated that the Plaintiff was a trespasser on a portion of his land over and above the alleged access road which it had converted to its own use and thereby deprived the Defendant of his right to own property. He urged the court to take into account the surveyor's assessment of the land the Plaintiff had encroached on which measured 0.02 hectares. He added that the Plaintiff was enjoined by the law to construct its perimeter wall along the boundary of its land and not encroach onto his land. He maintained that he genuinely believed and legitimately expected the Plaintiff to comply with the law when it constructed the boundary wall. It was not until 2019 when the survey report was prepared that he got to learn of the Plaintiff's unlawful activities on his land. In his view, time for purposes of the limitation period started running in 2019. He added that the Plaintiff's trespass on his land was a continuous cause of action and occurred afresh each day. He contended that the law of limitation would only apply to the trespass which occurred outside the six year period.

25. The court made a site visit to the land on 21/8/2020 in the presence of a representative of the Plaintiff, the Defendant, his surveyor and advocates for both parties. The Defendant's surveyor pointed out the beacons demarcating the boundary of the Plaintiff's and Defendant's parcels of land. The court noted that some of the beacons were right inside the boundary wall of Peony Estate. Another beacon was visible on the boundary at the far end of the Plaintiff's land.

26. The issue for determination in this suit is whether the court should grant the orders sought by the Plaintiff in the Amended Plaint or those sought by the Defendant in the Counterclaim.

27. It was evident from survey plan number 88/83 prepared in 1959 that L.R. No. 330/275 which was amalgamated with other parcels of land to create the Plaintiff's land abutted Hatheru Road. The end of Hatheru Road was demarcated in that plan which showed that L.R. No. 330/42/R ran across the land adjoining the Defendant's land. The narrow strip of land which is at the heart of this dispute and which the Plaintiff has been using to access the Estate is shown on that map as forming part of L.R. No. 330/277 from which the Defendant's land was created. Folio Register number 60/6 also confirms that L.R. No. 330/275 which forms part of the Plaintiff's land abutted and had direct access to Hatheru Road and the narrow strip of land which the Plaintiff is using to access the estate formed part of L.R. No. 330/277 was never part of Hatheru Road.

28. From the survey plan of which only number 538 is visible, it is clear that the Plaintiff's land had direct access to the end of Hatheru Road and the Plaintiff had no basis to use the Defendant's land to access Hatheru Road. The Plaintiff's land abuts Hatheru Road and ends at a point which ideally would have been its entrance to the Estate without having to use the Defendant's land. It was apparent that the Plaintiff

had encroached onto the Defendant's land. The court notes that the survey plan was prepared in 2013 and is indicated to have been for the change of user of the Plaintiff's land.

29. There is no doubt that Article 40 of the Constitution protects the right to property and guarantees every property owner the right to use and enjoy his/her property without unreasonable interference by others. From the evidence adduced in this case, the Plaintiff has used a portion of the Defendant's property to access Hatheru Road for almost 8 years openly, without hostility, or any complaint from the Defendant. The Defendant learned of the encroachment on his land in November 2019. He informed the Plaintiff in his letter dated 15/11/2019 that he had made an error in his previous request and clarified that the disputed piece of land actually belonged to him. Had the Defendant been more vigilant and taken up the issue of his land being encroached on when Peony Estate was constructed and its boundary wall erected, this dispute would not have arisen. His claim for mesne profits fails.

30. The Plaintiff argued that the Defendant had acquiesced and allowed the Plaintiff to use his land as an access road for 23 years without leading any evidence on how it arrived at the 23 years. The statutory period for the creation of an easement under Section 32 of the Limitation of Actions Act is 20 years. The Plaintiff pleaded that the homeowners in Peony Estate bought the apartments in 2012, which was eight before this dispute arose. The Plaintiff's claim to a right of easement or adverse possession over the Defendant's land brought under the Limitation of Actions Act fails.

31. The court agrees with the Plaintiff that the Defendant acquiesced and slept on his rights when he allowed the Plaintiff to use his land to access Hatheru Road from the time Peony Estate in 2012 was constructed up to now. The Defendant by his conduct acted in a manner that may fairly be regarded as a waiver of his claim to the portion of his land that the Plaintiff's development encroached on. Until November 2019, he neglected to ascertain where the beacons of his land were. The Defendant who acquired his own land in 2002 must have known about the development of Peony Estate next to his property. It would be unreasonable for the Defendant to demand to have part of the Plaintiff's development demolished so that the Plaintiff can create an access from its land directly to Hatheru Road for its use. The Defendant's delay in asserting his remedy and lapse of time militate against the Defendant being granted the orders he sought in the counterclaim. In light of the nature of the Plaintiff's development on the land, and without any other access to Hatheru Road, it would not be fair to grant the reliefs the Defendant sought.

32. The order that commends itself to the court is for the parties to have an easement created in favour of the Plaintiff for the portion of the Defendant's land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the Land Registration Act. The Plaintiff will pay consideration for the creation of the easement.

33. For the portion of the Defendant's land that the Plaintiff's development has encroached on, parties are directed to undertake a valuation of the land affected within 60 days of the date of this judgement, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If parties do not agree on the value of the portion affected within this timeframe, they will file submissions for the court to determine the reasonable compensation payable to the Defendant.

34. The Defendant is awarded the costs of the suit. The Plaintiff will also meet the costs for the valuation and for the preparation and registration of the easement.

Delivered virtually at Nairobi this 30<sup>th</sup> day of November 2020.

**K. BOR**

**JUDGE**

**In the presence of:-**

Mr. Muma Nyagaka for the Plaintiff

Ms. Eunice Akello for the Defendant

Mr. V. Owuor- Court Assistant