



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO. 514 OF 2010

CONSOLIDATED WITH ELC CIVIL SUIT NUMBER 251 OF 2010

PATRICIA LOIS MUCHIRI.....1ST PLAINTIFF
JULIA WACERA MAGONDU.....2ND PLAINTIFF
MARGARET WANGUI MWAURA.....3RD PLAINTIFF
LYDIA GATHONI WAMBUGU.....4TH PLAINTIFF
DAVID KAMAU WAMATHU.....5TH PLAINTIFF
DAVID KARIUKI WABANDE.....6TH PLAINTIFF
METROPOLITAN HEALTH SERVICES LTD.....7TH PLAINTIFF

VERSUS

THE BOARD OF MANAGEMENT,

BURUBURU GIRLS SECONDARY SCHOOL.....1ST DEFENDANT
NAIROBI CITY COUNTY.....2ND DEFENDANT
NATIONAL LAND COMMISSION.....3RD DEFENDANT
ATTORNEY GENERAL.....4TH DEFENDANT
DIRECTOR OF SURVEYS.....5TH DEFENDANT

JUDGEMENT

1. In the Further Amended Plaint dated 16/12/2015, the Plaintiffs seek a permanent injunction to restrain the Defendants or their agents from interfering with the Plaintiffs' rights or use of the land known as L.R. No. 76/972 registered in the name of the Permanent Secretary to the Treasury, which at the time of filing this suit was unsurveyed and unalienated government land known as Nairobi Block 76/581, and which forms the access to the Plaintiffs' premises from Rabai Road and terminates at the 1st Defendant's entrance. The Plaintiffs seek an order to prohibit the Defendants from erecting any gate or barrier on that piece of land that may interfere with or deter the Plaintiffs' right to use L.R. No. 76/972. The Plaintiffs further seek a declaration that the letter of allotment issued to the 1st Defendant on 17/1/2011 together with the certificate of lease issued to the Permanent Secretary, Treasury for L.R. No. 76/972, and the amendment to the Registry Index Map (RIM) is illegal and in violation of the Physical Planning Act and the Survey Act. The Plaintiffs also seek an order cancelling the letter of allotment, certificate of lease and the amendments to the RIM for L.R. No. 76/972. In addition, the Plaintiffs seek a declaration that they are entitled to a right of way through L.R. No. 76/972 which previously formed part of Nairobi Block 76/581 and an order directing the 1st 3rd and 4th Defendants to excise a right of way for the Plaintiffs on L.R. No. 76/972 now registered in the name of the Permanent Secretary, Treasury and to reserve a right of way in accordance with the survey carried out and registered in 1978 which designated the portion in dispute as a public access and road.

2. The 1st to 6th Plaintiffs are the registered owners of parcel numbers Nairobi/Block 76/940, 962, 947, 939, 956 and 954 situated along

Rabai Road in Buruburu Estate, Nairobi, which are residential units commonly referred to as Metro Villas Estate. The estate was developed by the 7th Plaintiff. The Plaintiffs brought this suit on behalf of the registered owners of homes within Metro Villas Estate. The Plaintiffs claim that they purchased their homes from the 7th Plaintiff between 2008 and 2009. Their houses were constructed on the land created from the subdivision of L.R. No. 76/895. The Plaintiffs claim that the access to their estate is through L.R. No. Nairobi Block 76/972 (“the Suit Property”). They claim that part of the Suit Property is occupied by the 1st Defendant and the other part forms a common access for the Plaintiffs and the 1st Defendant.

3. The Plaintiffs claim that the 1st Defendant irregularly obtained a certificate of lease over the Suit Property and that the survey of the Suit Property was done in breach of the Physical Planning Act since no part development plan was prepared for the land prior to the issuance of the certificate of lease to the 1st Defendant. The 1st Defendant blocked the access to the Plaintiffs’ premises on or about 23/10/2010 thereby denying them access or entry into their homes.

4. The Plaintiffs maintain that the subdivision scheme of L.R. No. Nairobi Block 76/895 which created the 1st to 6th Plaintiffs’ parcels of land was duly approved by the Director of Physical Planning, Nairobi City Council, the Commissioner of Lands, Director of Surveys, the National Environmental Management Authority and the Nairobi Water Sewerage Company Ltd. They maintain that none of the Defendants objected to the Plaintiffs accessing their homes through part of the Suit Property which by then was unalienated public land and which was used as a public road. The Plaintiffs maintain that the Suit Property was surveyed in 1978 and designated as a public road reserve before the 1st Defendant came into existence. They urged that the survey of the land and issuance of the certificate of lease to the 1st Defendant was carried out when the Plaintiffs were in occupation of their homes with the intention of depriving them the right to use a portion of the land that was formerly unalienated to access their homes. They contended that the 1st Defendant intends to illegally convert a public road of access into private land.

5. The Plaintiffs claim that while this suit was pending the 3rd Defendant purported to allot the Suit Property to the Permanent Secretary to the Treasury on 17/1/2011 yet the Defendants ought to have known that the Plaintiffs had a right of way through the Suit Property.

6. The 1st 3rd and 4th Defendants filed their defence on 24/3/2017 denying the Plaintiffs’ claim. They denied that there was such a road of access on the 1st Defendant’s land based on the 1st Defendant’s records. The 1st 3rd and 4th Defendants averred that the Plaintiffs could only claim a legal right of a road of access if these were created by the 3rd Defendant. They urged that the land had been surveyed and rightfully allotted to the 1st Defendant which is a government school. They also contended that the access road to the Plaintiffs’ parcels of land should be on Rabai Road and not on the entrance to the 1st Defendant’s public Girls School. The 1st 3rd and 4th Defendants maintained that the barrier at the 1st Defendant’s land was erected to ensure the safety and security of the school and the students who are girls.

7. Further, the 1st 3rd and 4th urged that due to land grabbing of public school land by private developers, the government allocated the whole parcel of land where the school is situated to the Permanent Secretary to the Treasury on behalf of the 1st Defendant for 99 years with effect from 1/1/2011. The 1st 3rd and 4th Defendants denied that the Plaintiffs had suffered any loss as they have a long frontage to Rabai Road unlike the 1st Defendant and that the Plaintiffs should have made provision for a gate and an access road within their own estate compound.

8. The 2nd Defendant filed its defence on 28/7/2011. It admitted that Nairobi Block 76/895 measuring 1.21 ha approximately was for hospital use but approval for its subdivision into 34 residential plots was given by the 2nd Defendant and the Commissioner of Lands on 19/10/2008. The 2nd Defendant admitted that the subdivision was permitted with a common access to the 34 residential plots from the 80 metres section of 25 metres access road. The 2nd Defendant stated that no part development plan was prepared for the Suit Property and that the land which the 1st Defendant was allocated had not been surveyed.

9. The 5th Plaintiff gave evidence. He owns L.R. No. Nairobi Block 76/956 on which his home is situated. The 1st to 6th Plaintiffs reside in his neighbourhood within the estate known as Metro Villas Estate which was developed by the 7th Plaintiff. The Plaintiffs entered into agreements for the purchase of the portions created from the subdivision of Nairobi Block 76/895. He produced copies of the sale agreement dated 19/3/2009 and the certificate of lease issued in his name on 7/8/2015. The lease states that it is for 99 years with effect from 1/7/1978.

10. The 5th Plaintiff claimed that the access to the Plaintiffs’ homes is through a portion of an unsurveyed and unalienated government land known as Nairobi Block 76/581 part of which is occupied by the 1st Defendant and another part forms a mass transit way connecting Rabai Road to Mumias South Road. He further stated that a public tarmac road has been constructed on the portion that connects Rabai Road to Mumias South Road. He maintained that the 1st Defendant had no title to the unsurveyed and unalienated government land and that on or about 23/10/2010 the 1st Defendant attempted to block the Plaintiffs’ access to their houses.

11. The 5th Plaintiff claimed that during the construction of Metro Villas Estate, the subdivision scheme for L.R. No. Nairobi Block 76/895 to create the portions now owned by the Plaintiffs was duly approved by the relevant government authorities and that the 1st Defendant had no objection to the development. He stated that since the purchase of his house and on being granted possession in 2010 the residents of the Estate had always used the unsurveyed and the unalienated government land to access their premises. While this suit was pending the 3rd Defendant allotted the unsurveyed and the unalienated government land to the Permanent Secretary, Treasury on 17/1/2011 knowing very well that the Plaintiffs had a right of way on a portion of the unsurveyed and unalienated government land.

12. The Plaintiffs maintain that the letter of allotment and transfer of the Suit Property to the 1st Defendant is illegal since it was issued after the Plaintiffs’ development had been approved and while this case was pending. He challenged the allocation to the 1st Defendant on the grounds that the land has never been surveyed; no part development plan was prepared and gazetted; the planning process was never advertised to enable the affected parties like the Plaintiffs to make representations or object to the planning; and lastly, that the 2nd Defendant has stated that the Plaintiffs cannot be granted planning approval to access Rabai Road directly as the road is a highway.

13. The Plaintiffs also challenged the 2nd Defendant's purported approval granted to the 1st Defendant to construct a barrier urging that it contradicted the approvals granted to the Plaintiffs by the 2nd Defendant. The witness termed the 1st Defendant as a busy body with no discernible proprietary interest in the portion of the unsurveyed and unalienated government forming the access to the Plaintiffs' premises.

14. The witness conceded that the 7th Plaintiff was required to show the Plaintiffs access to their properties. He stated that when they were allocated the plots by the 7th Plaintiff they were informed that the Suit Property was a public road. He conceded that the developer had a responsibility to provide access to the owners of the houses in the estate. He purchased his house in 2009.

15. The Plaintiffs also called Professor Isaac K. Mwangi, a certified Planner to give evidence. He was instructed by the 7th Plaintiff on 16/2/2015 to undertake an independent evaluation of the 25 metres wide and 76.3 metres long road reserve which is the subject matter of dispute between the Plaintiffs and the 1st Defendant. His finding was that the disputed road reserve is a remaining section of a traffic distributor road that was to function as a through road for traffic to and from Rabai Road junction. He stated that the construction for the 1st Defendant and the SOS technical school has made the construction of the road impossible. He also found that the disputed road reserve had acted as the joint access road for the 1st Defendant's school and the 7th Plaintiffs since 2009 and maintained that it is a public road reserve and not intended for the exclusive use of the 1st Defendant. He stated that the length of the road of 76.30 metres by 25 metres width demonstrates that it is reserved for a major road meant to serve areas beyond the 1st Defendant.

16. He also stated that the approvals granted during construction of the 1st to 6th Plaintiffs houses did not permit direct access of houses to Rabai Road and referred to the relevant offices of the Nairobi City Council, Director of Surveys, the Commissioner of Lands, NEMA and Nairobi Water and Sewerage Company Ltd to show that the subdivision scheme was approved by these offices.

17. He produced a copy of his report prepared in May, 2015 which the court has considered. On cross examination he confirmed that he relied on the documents which he came across while preparing his report and did not get documents from the relevant road agencies or write to the Director of Physical Planning to confirm whether a part development plan was prepared for the 1st Defendant. He confirmed that the 7th Plaintiff did not have a development plan.

18. Dr. Kanyenje Gakombe Karangaita, the 7th Plaintiff's Managing Director gave evidence. He confirmed that the 7th Plaintiff previously owned Nairobi Block 76/895 on which it developed Metro Villas Estate that it sold to the 1st to 6th Plaintiffs and other residents of Metro Villas Estate. He stated that the access to the 1st and 6th Plaintiffs premises is through a portion of an unsurveyed and unalienated government land known as Nairobi Block 76/581 part of which is used by the 1st Defendant and the Plaintiffs as an access road. He stated that part of the same land now forms a mass transit way on which a road known as Sonko Road has been constructed. He stated that the road of access was created by an excision of part of the 7th Plaintiff's land to create a common road of access for use by the Plaintiffs and the 1st Defendants. He did not produce evidence of this.

19. The witness maintained that prior to the subdivision and development of the Metro Villas Estate, the 7th Defendant sought and obtained the approvals from the 2nd, 3rd, 4th and 5th Defendants authorising access through the unsurveyed and unalienated government land to access the 7th Plaintiffs land which was then known as Nairobi Block 76/895. At that time the 1st Defendant did not have a title to the land. He maintained that the relevant government agencies gave approval for the subdivision scheme in respect of the 7th Plaintiff's land. He maintained that the Plaintiffs had always used the Suit Property to access their homes from 2010 when they were given possession of their houses by the 7th Plaintiff. He faulted the 3rd Defendant for allotting the Suit Property to the Permanent Secretary, Treasury and alienating Nairobi Block 76/581 to the 1st Defendant which basically defeated the Plaintiffs' rights to use the access road. The witness tabulated costs in the sum of Kshs. 19,667,070.60 as the loss and damage the 7th Plaintiff had suffered for which it seeks compensation. These costs include the Quantity Surveyor's charges, the hire of security guards, purchase and photocopy of survey maps, caretaker charges, land rates, land rent, street light costs and some charges.

20. The 7th Plaintiff director produced a copy of the subdivision certificate in respect of Nairobi Block 76/895 and the notification of approval of development permission. Form PPA2 issued by the City Council of Nairobi under the Physical Planning Act which gave approval of development permission to the Plaintiff for the subdivision of L.R. No. 76/895 set out several conditions. The approval was given pursuant to the application submitted on 12/3/2006. One of the conditions referred to the proposed cul-de-sac/road serving the developing that was to be constructed to adoptive standards including surface water drainage and street lighting. A 12.5 meter by 12.5 metre truncation was to be provided at the junction of Rabai Road and the area of land coloured blue on the plan deposited and was to be surrendered to the government free of cost. No evidence of this surrender was given. The permission was subject to the plot not constituting part of the disputed public utility land. He produced a copy of the approval for the proposed subdivision of that land. He also produced copies of letters from the Ministry of Lands stating that they had objection to the subdivision of L. R. No. 76/895. The approval dated 4/2/2008 given by the City Council of Nairobi to the 7th Plaintiff was also subject to the plot not constituting part of any disputed private or public utility land. The witness produced a copy of NEMA's condition for approval for the proposed development of Metro Villas off Rabai Road in Buruburu. He also produced the letter from the City Council addressed to the Principal Buruburu Girls School dated 29/4/2010 which recommended that the access road which was about 25 meters wide was to be divided into two so as to provide separate accesses to the school and the Metro Villas Estate. The letter stated that the access road was to serve the school and the hospital premises.

21. The witness produced a copy of the letter dated 17/1/1011 addressed to the Permanent Secretary to the Treasury in respect to the existing site for Buruburu School, Block 76/581. The letter allocated this parcel of land measuring approximately 5.9 ha for a term of 99 years from 1/1/2011 to the Permanent Secretary, Treasury. There were special conditions attached to the letter of allotment including clause 5 which stated that the land and buildings shall only be used for educational purposes.

22. The witness also produced a copy of the letter dated 9/2/2011 from the 1st Defendant's Chairman informing the Plaintiff's advocate that L.R. No. Nairobi Block 76/581 which includes a portion that the Plaintiffs had been calling a public road had been allocated for the exclusive

use of the school. The witness produced a copy of the letter from the City Council of Nairobi addressed to the Principal of the 1st Defendant on the erection of a barrier of the access road to Buruburu Girls High School. That authority to erect a barrier was withdrawn vide the letter dated 18/2/2011 from the City Council of Nairobi based on the existence of a court order. The witness also produced a copy of the order given in **ELC No. 111 of 2015** which was an application for judicial review orders. The court granted an order staying the authorization for the removal of the Plaintiff's gate and access by eth applicants to their homes.

23. The 7th Plaintiff's Director also produced copies of receipts confirming payment of land rent for the subdivided portions together with agreements entered into by the 7th Plaintiff and purchasers of houses within Metro Villas Estate. He confirmed that approvals to develop Metro Villas was given in 2006 to the 7th Plaintiffs and that it developed the estate in 2009. He confirmed that the school was in existence when the Estate was put up and that the school has been running from there since 1980. He did not have any evidence to show that the disputed access was excised from the 7th Plaintiff's land. He conceded that the final approval from the Commissioner of Lands for the subdivision of L.R. No. 76/895 was given on 20/3/2012 after the estate had been constructed. Provisional approval was given on 19/10/2006. The witness was a member of the Board of Governors of the 1st Defendant where he served for about 10 years. He resigned when this dispute started.

24. On cross-examination, he stated that there was no other access road for the estate and that perhaps one could only access the estate through the hospital in which case two houses would have to be demolished and approvals sought from the County Government. He reiterated that there was no land reserved to provide an alternative access road to the estate since the two houses that may have to be demolished are owned by different people.

25. Engineer Austin Salmon Kitololo gave evidence for the defence. He was the Chairman of the 1st Defendant. He stated that Buruburu Girls High School is government secondary school with a population of 800 girls who were boarding. He confirmed that Buruburu Girls High School paid Kshs. 6,352/= to the Commissioner of Lands on 1/2/2011 being stand premium, conveyancing fees and registration fees for the allocation of the suit land. He stated that Buruburu Girls Secondary School occupies L.R. No. Nairobi Block 76/972 which had been surveyed and an allotment letter issued to the school. The land was formerly known as Nairobi Block 76/581. He stated that the school had developed a drive way starting from Rabai Road which runs to the school administration block. The school land is adjacent to the 7th Plaintiff's property.

26. The witness made reference to the site visit by Justice Muchelule and the observations the Judge made regarding the dispute. The witness maintained that there is no evidence of the existence of the access road by the Plaintiffs through the 1st Defendant's land. The witness made reference to the fact that the Hospital which was owned by the 7th Plaintiff had paved its road of access to Rabai Road and put up a barrier. The witness urged that the suit lacked substance as the court has no power to create a road of access on the 1st Defendant's land based on information provided by the Plaintiffs. He further stated that this being surveyed government land allotted to government school, it was only the Ministry of Lands and Physical Planning which could create a road of access through the legal process otherwise the Plaintiffs had no right of access. Further, he stated that only the government could compulsorily acquire land and create a road of access on the 1st Defendant's land. He indicated that the Plaintiffs have a long frontage along Rabai Road unlike the 1st Defendant and they could therefore provide for a gate and access road within their compound. He urged the court to dismiss the suit on public interest.

27. He produced a copy of the certificate of lease in respect of Nairobi Block 76/972 issued to the Permanent Secretary to the Treasury for a term of 99 years from 1/1/2011 which gives the approximate area as 5.795 ha. The lease names the Permanent Secretary as Trustee for Buruburu Secondary School. He also produced a copy of the lease issued by the President of the Republic of Kenya on behalf of the Government of Kenya to Permanent Secretary to the Treasury as Trustee for Buruburu Secondary School. He produced a copy of survey plan number F/R 512/52 in respect of parcel number 972 which shows that the disputed road of access forms part of this land. The witness also produced a copy of the ruling delivered by Muchelule J. on 18/10/2010 in which he dismissed the Plaintiffs' application for injunction. The witness confirmed that prior to 2011, the school had not been issued a title over the land it occupies. He maintained that providing an access road is part of planning requirement. He admitted that the Buruburu Girls Secondary School wanted to buy a house in Metro Villas Estate but the contract to buy the house was terminated. He stated that the survey plan prepared for parcel number 972 was in respect of the land the school had always occupied since it was established in 1980s. He confirmed that the school was developed on government land and that the land is still government land. He maintained that the disputed land is not a road reserve but is part of the school land. He stated that the school has been in existence on that land for over 30 years and it has been using the road all this time.

28. The Principal of Buruburu Girls High School, Consolata Muthoni Kimuya gave evidence. She stated that the school had used considerable sums of money to tarmac the driveway solely for the school's use, which this was done before Metro Villas were constructed. She stated that the developers of Metropolitan Villas ought to use a different route since the use by their tenants of the schools' driveway amounts to trespass. She also stated that the tenants in Metro Villas Estate sometimes block the driveway with their vehicles when they have functions making the school inaccessible. She stated that the school had over 1000 students as at 2017 and the Plaintiff's use of the driveway causes the school considerable inconvenience. She confirmed that the school entered into an agreement with the 7th Plaintiff to purchase a house and that she was also buying a house in the Metro Villas Estate. When this dispute arose, the 7th Plaintiff refunded the deposit the School and the Principal had paid. The refund was made when the school was requested by the Managing Director of the 7th Plaintiff, who was a Board member of the 1st Defendant, to allow Metro Villas Estate to use the access road and the school declined. She stated that the other members of the Board objected when the 7th Plaintiff's Managing Director stated that he wanted to use the access road for the Estate. She stated that the school requested the Ministry of Lands to process a title when it realised that the land could easily be grabbed. She stated that the school did not object to the development because they believed the 7th Plaintiff was developing its land and that the school had no reason to object.

29. The court asked how the building materials were delivered for the development of the estate. The School Principal explained that building materials were brought through the hospital gate without using the school entry and that the gate to the Estate was only opened up when the houses in the estate had been completed.

30. Parties filed submissions which the court has considered. The main issue for determination is whether the Suit Property forms a road of access for the Plaintiffs to Rabai Road. The court has looked at survey plan number F/R No. 361/72 in respect of the subdivision of Nairobi/Block 76 (Buruburu)/895 which was owned by the 7th Plaintiff to create parcel numbers 937 to 971. The hospital currently sits on parcel number 971 while plot numbers 937 to 970 is where Metro Villa Estate is. The survey plan does not show that there is a road abutting parcel numbers 937 and 949 to 954. Parcel numbers 937 to 948 abut Rabai Road. The survey plan was drawn in March 2010 when the school was already using the disputed access road. It is clear from this survey plan that the Hospital which is on parcel number 971 is not accessed from the access road that is in dispute.

31. The procedure for establishing roads is governed by the Public Roads and Roads of Access Act and the Physical Planning Act. Section 2 of the Public Roads and Roads of Access Act defines a public road as a road which the public had a right to use prior to 1920; proclaimed or reserved roads or thoroughfares existing under the East African Regulations or the Government Lands Act; and roads or thoroughfares reserved under the Public Roads and Roads of Access Act for public use. An owner of land whose land is situated next to a public road which is passable to vehicular traffic may make an application for leave to the District Board to construct a road of access over any land lying between his land and the public road pursuant to Section 9 of the Act. The landowner over whose land the proposed road of access is to pass must be notified by the board under Section 10 of the Act. After hearing the parties concerned, the Board may grant the applicant leave to enter upon the land and construct a road whose dimensions the board determines. The board then forwards its order to the Registrar of Titles who causes the order to be registered against the land affected by the order. Under the Act, the applicant has leave to use the road of access at all times when the road of access has been granted and constructed.

32. The Plaintiffs neither led any evidence to show that the 7th Plaintiff applied for the creation of an access road through the land occupied by the 1st Defendant, nor did it demonstrate that the procedure set out in the Public Roads and Roads of Access Act was followed in granting it access through the land occupied by the 1st Defendant to Rabai Road.

33. The 7th Plaintiff maintained that the 2nd Defendant and other authorities had given approval for the subdivision of its land being Nairobi/Block 76/895 and given approval for it to develop the houses on the subdivided plots created from the subdivision of Nairobi/Block 76/895. The 2nd Defendant could only have given permission for the 7th Plaintiff's development under the provisions of the Physical Planning Act, Section 29 of which empowers local authorities to control or prohibit the subdivision of land or plots into smaller areas.

34. Under Section 24 of the Physical Planning Act, the Director of the 2nd Defendant is required to prepare a local development plan with reference to any government, trust or public land within the city and may prepare a local physical development plan for purposes of guiding and coordinating the development of infrastructural facilities and services for the area. Section 25 of the Physical Planning Act gives the contents of a local physical development plan as a survey in respect of the area the plan relates to carried out in the prescribed manner, and maps necessary to indicate the manner in which the land in the area may be used having regard to the requirements set out in the Third Schedule. One of the contents of the long term plan under the Third Schedule is communication and services which includes historical pattern and the condition of communication networks such as roads, footpaths, cycle ways, railway lines, depots, waterways, and docks among others.

35. The 2nd Defendant who supported the Plaintiffs' claim in urging that the issuance of the lease to the Permanent Secretary as Trustee for the 1st Defendant was unprocedural for want of a part development plan did not produce evidence that the 7th Plaintiff had obtained a part development plan before subdividing its land known as Nairobi/Block 76/895. The 2nd Defendant did not produce the local physical plan contemplated by Section 24 of the Physical Planning Act for the Buruburu area where the 7th Plaintiff and 1st Defendant's land are situated which would have confirmed that part of the land occupied by Buruburu Girls Secondary School was an access or public road.

36. Permission to develop land must be granted by a local authority under Section 30 of the Physical Planning Act. When making the application to the 2nd Defendant for development permission, the 7th Plaintiff's application for permission should have been accompanied by plans to indicate the purpose of the development; the proposed use and density, and the land which the 7th Plaintiff intended to surrender for purposes of principal and secondary means of access to any subdivisions as required by Section 31 of that Act. The plans it submitted ought to have shown the land being surrendered for public purposes consequent upon its proposed development. The 7th Plaintiff and the 2nd Defendant did not lead any evidence to show the land the 7th Plaintiff surrendered for purposes of access to the Estate it proposed to develop on its land.

37. The 2nd Defendant was required to consult other government offices and authorities under Section 32 of the Physical Planning Act while considering the 7th Plaintiff's application for development permission. One of the offices to be consulted is the Chief Engineer of Roads. There is no evidence that the Chief Engineer of Roads was consulted, which would have enabled the 2nd Defendant determine if indeed the access road used by Buruburu Girls Secondary School was a public road which could be used to access the housing estate that the 7th Plaintiff proposed to develop. The 7th Plaintiff did not lead any evidence to show that the 2nd Defendant granted it approval to access the estate using the disputed access. It has not been shown that the 2nd Defendant had power under the law to create a road from public land occupied by a public institution.

38. During the site visit on 28/9/2018, this court noted that the hospital which is on the adjoining parcel number 971, is accessed through Rabai Road. At the time when parcel number 895 was subdivided to create the plots that form the estate, provision should have been made for access to the estate. No valid or legal reason has been given as to why provision was not made for an access road to the estate to Rabai Road without using the disputed access road. It has not been demonstrated that at any time Nairobi/Block 76/895 was being accessed through the disputed access road. The evidence led was that Buruburu Girls School was solely using the disputed access road until 2010 when the 7th Plaintiff opened the gate for the Plaintiffs to use the disputed access road. It is not in doubt that the 7th Plaintiff did not use the disputed access road while developing the estate in which the Plaintiffs live.

39. The Plaintiffs urged that the access road used by the 1st Defendant was unalienated government land and a public road. Section 2 of the

repealed Government Lands Act defined unalienated government land as government land which had not been leased to any person or in respect of which the Commissioner of Lands had not issued any letter of allotment. Going by this argument and Section 3 of the Government Lands Act which gave the Commissioner of Lands power to deal with unalienated government land, then it was proper for the Commissioner of Lands to issue a letter of allotment to the Permanent Secretary to the Treasury on 17/1/2011 and issue a lease to the Permanent Secretary to the Treasury in respect of Nairobi/ Block 76/972.

40. The Buruburu Structure Plan dated January 1980 only shows Buruburu Secondary School but does not show the 7th Plaintiff's land or the access road in dispute. Survey plan number F/R number 512/52 in respect of parcel number 972 prepared in March 2011 shows the boundaries of the school land. There is no road on that plan. The land measuring 5.795 ha is almost square in shape with a thin strip at the top left which is what the Plaintiffs claim is a public road. The RIM for Nairobi Block 76 (Buruburu) which was amended on 14/4/2011 does not show the existence of a road next to the Metro Villas Estate. It only shows that parcel number 972 has a narrow strip on the top left that opens into Rabai Road. On this RIM, parcel number 972 abuts a road that runs from Rabai Road and next to parcel number 971, which must be the road that was renamed Sonko Road. This road can be seen on the amended RIM and the boundaries of parcel number 972 on which Buruburu Girls sits do not include this road.

41. The court notes that there are other plots on the RIM adjoining Rabai Road which cannot possibly be accessed other than directly from Rabai Road. The previous RIM which showed the land on which Buruburu Girls sits as parcel number 581 does not show the existence of an access road to the Plaintiffs' land. It only shows that parcel number 581 was a big plot with three narrow strips two of which run from Rabai road while the third strip runs from the school land to the extreme right.

42. No evidence was produced to prove that part of the 7th Defendant's land was hived off in 1980 to create an access road as the 7th Plaintiff urged. There is no evidence to support the assertion that the disputed access road was designated after 1978 as a road reserve. The approvals the Plaintiffs relied on from the relevant government agencies which stated that they had no objection did not address the issue of the access road as the Plaintiffs claim. They related to the grant of approval to subdivide parcel number 895 owned by the 7th Plaintiff.

43. From the evidence adduced, it has not been proved on a balance of probabilities that part of Nairobi Block 76/972 forms the access to the Plaintiffs' premises from Rabai Road.

44. The Plaintiffs in ELC No. 514 of 2010 have failed to prove their claim set out in the Further Amended Plaint dated 16/12/2015, it is dismissed with costs to the 1st Defendant. The court declines to award costs to the 2nd to 5th Defendants because these statutory bodies gave approval for the subdivision of the Nairobi/Block 76/895 without ensuring that there was provision of an access road for plot numbers 937 to 970, which is where Metro Villas Estate is, to Rabai Road in the proposed subdivision scheme for Nairobi/ Block 76/895.

45. The Plaintiff in ELC No. 251 of 2010 has failed to prove its claim in the Amended Plaint dated 13/4/2017 on a balance of probabilities, it is dismissed with costs to the 1st Defendant.

46. The Defendant in ELC No. 251 of 2010 failed to prove its counterclaim against the Plaintiff in that suit, the counterclaim is dismissed with costs to the Plaintiff in that case.

Dated and delivered at Nairobi this 6th day of March 2019.

K. BOR

JUDGE

In the presence of: -

Mr. M. Nderitu for the 1st to 6th Plaintiffs

Mr. M. Nderitu holding brief for Mr. Mari for the 7th Plaintiff

Mr. A. Kamau for 1st, 4th and 5th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Defendant