REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 422 OF 2017(O.S)

ESTHER WANJIKU MWANGI.....1ST PLAINTIFF

JAMES NGARACHU CHEGE.....2ND PLAINTIFF

WILSON GITONGA NGARACHU.....3RD PLAINTIFF

JOHN KAMAU NGARACHU.....4TH PLAINTIFF

VS

WAMBUI NGARACHU (sued as the legal representative of the estate

OF NGARACHU CHEGE - DECEASED).....DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit by way of Originating Summons on the 17/7/17 and sought the determination of the following questions;

a. That the Applicants are entitled to an easement measuring 58m long and 3m wide over land parcel Number LOC8/KAGANDA/73 which together with their families have openly and peacefully without any interruption used as an access road to and from their lands LOC8/KIGANDA/1654, 1655 and 1657 respectively, since the year 1963, a period of over 51 years preceding the presentation of this Originating Summons to Court.

b. That a declaration be made that Ngarachu Chege (deceased), who is the registered proprietor of land parcel No LOC 8/KIGANDA/73 (the suit property), held the property subject of the easement in trust for the Applicants.

c. That the deceased's title in respect of the said portion of 58m long by 3m wide in LOC8/KIGANDA/73 is extinguished under section 17 of the Limitations of Actions Act, Cap 22.

d. That under section 38 of the Limitations of Actions Act, the Applicants are entitled to be registered as the owners of the easement measuring 58m long by 3m wide over land parcel No LOC8/KIGANDA/73.

e. That the costs of this suit be awarded to the Applicants.

2. The suit is grounded on; the Plaintiffs are the registered owners of LOC8/KAGANDA/1654-1657 respectively, which parcels are resultant subdivisions of LOC8/KAGANDA/77, originally registered in the name of their late father; the Plaintiffs have acquired proprietary rights over the said land by operation of law; Ngarachu Chege deceased had granted the Applicants father access road in exchange for a portion equal in measurement to the access road of out LOC8/KAGANDA/77. That the deceased executed the documents, which facilitated the amendment of the Registry Index Map.

3. The Plaintiffs state that Ngarachu Chege died in 2002 and the Plaintiffs continued to use the access road without interference from the Defendant until 2014 when she blocked the access and diverted water pipes, which had been laid along the road thus denying the Plaintiffs water. That this blockade has occasioned difficulties in access to schooling medical centres and the river as they are now forced to take a longer route to access them.

4. The Defendant denied the Plaintiffs claim and stated the Plaintiffs' parcels of land are accessible to the main road through the road below their land. She admitted that her husband and the Plaintiffs' father had allowed each other cross paths on their respective parcels for access which paths existed until when the Plaintiffs closed the access on their end prompting her to block access on her side of the land. The clan has arbitrated the dispute and the local administration, which instructed that the access be kept, blocked for the sake of peace. She denied the

claim that her husband had excised a portion of the land for the access during his lifetime arguing that if any was done then it was a forgery as her husband being illiterate could only thumbprint documents and not sign as shown in the mutation form. That by 2014 her husband was elderly and sickly and could not have signed the mutation forms. That the District Land Surveyor was stopped by an order of the Court from excising her land to create the access road, which she claims, was being done without her consent participation and authority.

5. At the hearing PW1 – James Ngarachu Chege stated that parcels LOC8/KAGANDA/73 and 77 border each other. The Plaintiffs are currently using the access road on parcel LOC8/KAGANDA/73 to access the road, which they have been since 1963. That the access road was demarcated in 1994 and entered in the Registry Index Map in 2016. He informed the Court that there is another alternative access to the road but it is longer than the one accessed through parcel LOC8/KAGANDA/73.

6. Admitting that the two owners of parcels LOC8/KAGANDA/73 and 77 permitted each other to access the main road-using parcel LOC8/KAGANDA/73. Owners of parcel LOC8/KAGANDA/73 used parcel LOC8/KAGANDA/77 to access the river and vice versa. He informed the Court that he was unaware whether the two owners executed any agreements in respect to the mutual right of way. He was unaware whether there was any compensation paid for the access however; the said access road had been surveyed. When the owner of parcel LOC8/KAGANDA/73 was alive, there was no dispute and that problems started after his death when the Defendant blocked the access road. Whilst the access road on parcel LOC8/KAGANDA/77 is a footpath leading to the river, the one on parcel LOC8/KAGANDA/73 is 10 feet wide leading to the main road. He denied the Plaintiffs claim that he blocked the access to the river arguing that it is open and in use by members of the public.

7. Further, he claimed that the subdivision of Parcel LOC8/KAGANDA/ 73 to provide for access road was done in 1994 and 3 persons, he being amongst them, signed the mutation. That the Defendant was not involved in the subdivision save for her husband when he was alive.

8. The Defendant adduced evidence through herself and 4 other witnesses. She stated that she is not aware of any excision of her land to provide for the road access because she was not consulted neither did she see any surveyor officially survey the land. When shown the mutation forms dated the 5/6/96 she stated that her husband could not have signed them as he was illiterate and only thumb printed documents. That in retaliation of the Plaintiffs refusing her use of the access road on LOC8/KAGANDA/77 she blocked the access on parcel LOC8/KAGANDA/73. That she accesses the river through an alternative route.

9. James Gatebe Gachuka- DW2 stated that parcel nos. LOC8/KAGANDA/73 and 77 enjoyed mutual access from the main road through to the river. That the access was temporary and was used by the two families as well as the members of the public. He informed the Court that these accesses were private as it affected the two parcels of land. That each of the parcels enjoy official access to the main road and none of the lands is landlocked.

10. Japheth Mwangi Muihia, DW3, reiterated the evidence as given by DW2 and stated that the access road was with the permission of the two owners of land. He stated that the access to the river through parcel LOC8/KAGANDA/77 was blocked infuriating the Defendant who also denied access to the Plaintiffs through her land.

11. Maina Mwangi DW4 - confirmed that there was a footpath from the parcel LOC8/KAGANDA/73 through to LOC8/KAGANDA/77, which accessed the road on the upper end and the river at the bottom of parcel No LOC8/KAGANDA/77. That in 2016 the Defendant was denied access to the river by the Plaintiffs and in retaliation the Defendant blocked the access to the road through parcel LOC8/KAGANDA/73.

12. Julius Mwangi Nduthu stated that he is the registered owner of parcel LOC8/KAGANDA/76 and denied signing the mutation forms in relation to the subdivision of parcel LOC8/KAGANDA/73. He stated that the road situate below parcel LOC8/KAGANDA/77 is the shortest route to access the main road by the Plaintiffs. He reiterated the evidence that none of the parcels is landlocked as both are served with access to the main road.

13. Parties filed Written Submissions, which I have read and considered.

14. The Plaintiff submitted that the owners of the two parcels in 1963 entered into an arrangement where the Plaintiffs' father granted the Defendant's husband a portion of his land parcel LOC8/KAGANDA/77 measuring 58m by 3 m wide and in turn, the Plaintiffs father got a similar portion in the parcel LOC8/KAGANDA/73 belonging to the Defendants' husband. The intention by the two owners was to access both the main road and the river. The Plaintiffs' father died in 1980 and the Defendant's husband who died in 2002 did not challenge the right of way accessible to the Plaintiffs. The access road continued to be used by the Plaintiffs until 2014 when the Defendant blocked it on allegations that she had been stopped by the Plaintiffs to access parcel No LOC8/KAGANDA/77.

15. The Plaintiffs argued that they are entitled to the right of way over parcel No LOC8/KAGANDA/73 because of long use since 1963, which they have used openly peacefully, and without interruption and therefore have acquired a right of prescription. Relying on the case of **R Vs Oxfordshire County Council & Anor exparte Sunningwell Parish Council (1999) 3 ALL ER 385** the Plaintiffs argued that they have acquired the right of way as of right even though they have not demonstrated any legal title to the access road. They relied on the survey map marked PEX 2(b) that they claim confirmed the position of the easement. Their right of way did accrue to them way back which they have continued to use without any interruption by the Defendant and or her late husband until the Defendant brought it to an abrupt close in 2014. That there is evidence that they both acquiesced to their use of the access road over the years notwithstanding the fact that they had knowledge and could have prevented them but took no steps to do so.

16. The Plaintiffs further submitted that the ingredients of acquiescence leading to the creation of a right of way were considered in the case of **Dalton Vs Henry Angus & Co Cas. 740 at 7(1881)6 App 86** which include; the doing of an act by a person on another person's land, in the absence of any right to do that act and with the knowledge of the owner of the land who has the power to act and prevent the act but elects not to prevent; the person then is estopped from stopping that which has been done.

17. The Plaintiffs submitted that they have enjoyed the right of way for a period of over 20 years as provided for under section 32 of the

Limitations of Actions Act and therefore are entitled to the right of way.

18. Further that the Defendant's husband held the title of parcel LOC8/KAGANDA/73 subject to an easement in trust for the Plaintiffs. The rights of way, they submitted are overriding interest that need not be noted on the register which overriding interests were provided for under section 28 and 30 of the Registration of Land Act Cap 300 (repealed) and the current Registered Land Act section 28 © and (h).

19. The Defendants on the other hand submitted that the Plaintiff's case is hinged on an easement over the Defendants land. That there is no evidence led by the Plaintiffs to point to a right of way since 1963 or for such period as permitted under section 32 of the Limitations of Actions Act. That the Plaintiffs cannot call in aid the doctrine of necessity as they have pleaded in their suit that there is an alternative route. The doctrine of necessity is applicable if the land is landlocked for which the Plaintiffs land does not fall in that category.

20. To rebut the claim of the Plaintiffs that they have become entitled to the easement by prescription, the Defendants referred the Court to the evidence of the Plaintiffs that the fathers of the parties had permission and therefore the Plaintiffs had access of the right of way under licence. The permission and or licence for use of the right of way by both original owners of the two parcels of land disproves an easement created by way of prescription. The evidence on record supports a licence of cross paths in the two parcels of land firstly to access the road and secondly the river as opposed to creation of an easement.

21. Further, the Defendant submitted that the Plaintiffs have not demonstrated that they have created a corresponding easement on their land parcel LOC8/KAGANDA/77 to serve the Defendant's land in line with the agreement that the original owners had. No compensating corresponding easement has been shown to have been created by the Plaintiffs on their land.

22. Respecting the mutation forms presented in Court, the Defendant submitted that this mutation was a mere forgery as stated by DW1, DW3 and DW5. The Defendant led evidence that her late husband did not sign the mutation form. That he was illiterate and could not write and in any event, it was his custom to thumbprint documents. DW5, the owner of parcel LOC8/KAGANDA/76 categorically denied signing the mutation form at all. While DW3 stated that, he did not see the late Ngarachu sign, any documents.

23. Having reviewed the pleadings, the evidence adduced at the hearing, the submissions and the totality of the materials placed before the Court, the issues that fall for determination are; firstly, whether the Plaintiffs are entitled to an easement by way of prescription over the Defendants land; Secondly is whether the Plaintiffs are entitled to be registered as the owners of an easement over all that land measuring 58m by 3 m under section 38 of the Limitations of Actions Act; Thirdly, who meets the cost of the suit.

24. To start with, I will highlight the legal underpinnings of an easement. Section 32 of the Limitations of Actions Act Chapter 22 of the Laws of Kenya as follows:-

> **"Means by which easements may be acquired**
>
> **(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) ……..**
>
> **(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".**

25. The above section provides for the various measures through which easements may be acquired and submitted that an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceable, open and uninterrupted enjoyment of the same.

26. Section 28 of the Land Registration Act No. 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, section 28(c) and (h) of the same Act provides;

> **"Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -**
>
> **(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.**
>
> **(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;**
>
> **(j) any other rights provided under any written law."**

27. Sections 98-100 of the Land Registration Act provides for a framework for creation of easements through formal instruments and would like to point out that the easement pleaded by the Plaintiffs herein is not the type acquired through a formal registrable instrument. Similar provisions are contained in the Land Act at sections 136-141.

28. In the Court of Appeal in the case of **Kamau –Vs- Kamau (1984) eKLR the Court observed as follows;**

> **"**An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come. So, also in equity, do restrictive covenants because they are in the nature of negative easements.
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> A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A licence not coupled with an interest in land is revocable unless the contract for it contains a term express or implied that it shall not be revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts, which are injurious to another and can be the subject of an action if their enjoyment is obstructed.
>
> 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."**

29. By way of background, the parties in this case are related. The father of the Plaintiffs was the stepbrother of the Defendant's husband. Each were the registered owners of parcels LOC8/KAGANDA/77 and 73 respectively. Later parcel LOC8/KAGANDA/77 was subdivided to yield 4 parcels Nos 1654-1657 after the demise of their father and registered in the names of the Plaintiffs. It is commonly accepted by the parties that the original owners allowed each other cross paths of access on their respective lands for purposes of access to the main road and to the river. None of the parcels LOC8/KAGANDA/ 73 and 77 is landlocked. They both have access to the main roads.

30. It is not in dispute that the Plaintiffs have been using the access road together with members of the public until the same was closed in 2014 by the Defendant. Both parties have blamed each other for triggering the closure of the access. The Plaintiffs' father died in 1980 while the Defendant's husband died in 2002.

31. An easement is a right annexed to the land either to use (positive easement) or to restrict the use of (negative easement) on the land of another. The term is derived from the French word "aisement" which means something that makes the enjoyment of the land easier. An easement must confer a benefit on land (the dominant tenement) and burden other land (servient tenement).

32. In **Re Ellenborough Park (1956) Ch 131** the Court set out 4 essential characteristics of an easement;

a. There must be a dominant and servient tenement.

b. The right must benefit the dominant land.

c. There must be diversity of ownership or at least occupation.

d. The right must be capable of lying in grant.

33. In this case the dominant tenement is parcel LOC8/KAGANDA/77 while the servient tenement is parcel LOC8/KAGANDA/73.

34. From the evidence on record, the Plaintiffs have asserted that the two parcels are neighbouring so much so that they border each other. Pex 2a and b shows the parcels indeed border each other. However, it is on record and pleaded by the Plaintiffs that the parcel LOC8/KAGANDA/77 was subdivided after the death of their father and 4 new titles were issued in the names of the Plaintiffs. Copies of certificates of dated the 8/5/17 show that the Plaintiffs became registered as such in 2016. The Plaintiffs failed to produce to the Court a survey map to show whether the 4 parcels neighbour or border the servient tenement parcel no LOC8/KAGANDA/73. In any event, the dominant tenement no longer exists and it is doubtful whether the 1st characteristic of an easement is met. The Court holds and finds that the existence of the dominant tenement has not been proved.

35. On the second limb relating to the benefit or dependence of the dominant tenement on the servient tenement, it is in evidence that there are alternative routes or access roads for the dominant tenement. This evidence was led by the Plaintiffs and the defence witnesses. I have perused both survey plans marked PEX2 a) and b) and indeed, there is a road below the original parcel LOC8/KAGANDA/77. None of the parcels is landlocked and therefore the need for benefit or dependency falls off. It would appear that the Plaintiffs are seeking an easement for purposes of convenience rather than benefit of a right of way.

36. The Plaintiffs under para 1 d of the Originating Summons have invited the Court to determine that they have become entitled to an easement for which they should be registered under section 38 (3) of the Limitations of Actions Act. The said section states as follows;

> "A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before."

37. The provisions of section 32 of Limitation of Actions Act provides that where an easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such easement, is absolute and indefeasible**.** It is in evidence that the owner of the dominant and servient tenements allowed each other cross paths across their two parcels. It is the Plaintiffs claim that they have used the access road for over 51 years. According to the evidence of the parties, the owner of the servient tenement died in 2002. I concur with the submission of the Defendant that in the presence of permission a claim of adverse possession arising from long use cannot be said to have accrued. The licence with which the Plaintiffs enjoyed the right of access on the servient tenement therefore lapsed with the death of the original owner. The Plaintiffs have claimed a right of way as of right meaning that it has accrued to them. Time started running therefore for purposes of calculating the 20-year statutory limit in 2002 and therefore 20 years would be 2022. It therefore follows that the suit was filed 5 years earlier. The claim is therefore prematurely urged before the Court. The long and short of the relationship between the two original owners was their mutual arrangement to create a cross path to serve both lands for their mutual convenience. There is no evidence that there was an intention to create a right of way. The Court holds that the Plaintiffs have failed to establish any right of easement arising from long use.

38. The Plaintiffs have inter-alia urged this Court to find that it has established an easement by way of prescription. That is to say, section 28 c and h of the Land Registration Act. Prescription relates to easement acquired by presumed grant that is to say where the law presumes from long enjoyment that the right had its lawful origin in a grant. This is so even though there is no actual evidence whatsoever of any grant having occurred. A prescriptive right may be acquired either in common law or by a contract. A right of easement created as of right denotes a scenario where the easement is created nec vi, nec clam, nec pricario that is to say, not be force or contentiously, not secretly or by stealth and not precariously or permission. See the case of L**oveluck-Edwards Vs Ideal Developments Ltd. (2012 EWHC 716)**. To support a claim to have acquired an easement by prescription entails assertion appearance and acquiescence. The claim that the Defendant's husband acquiesced is not tenable. The Plaintiffs used the land with the permission of the owner.

39. I have already determined that in this case, there was permission and this negates the doctrine of prescription.

40. I have noted that the Plaintiffs are claiming an easement over land measuring 58m by 3 meters, which they claim, was excised by the Defendant's husband in his lifetime and have urged to be registered as owners of the said land. A claim of easement is a claim on use of land rather than possession or ownership. An easement on one-hand benefits and on the other burdens. If it was to be allowed that the easement holder is registered as an owner of the space over which he enjoys an easement then land which is a factor of production would be unnecessarily burdened thus limiting its tradability as a commodity.

41. It is possible for a number of rights to be created on land. An easement is geared towards creating interaction among neighbours of social and commercial nature. Rights of access are social and commercial in that respect. The claim as urged by the Plaintiffs is therefore untenable and I see no reason to look into the issues of the probity of the mutation forms. If the land were to be registered in their names, it would amount to a total ouster of the owner of the servient land, which is against the very nature of a right to an easement. An easement dissipates/dissolves once there is unity of the servient and dominant tenements. The owner of the servient tenement continues to retain exclusive control and ownership of the land. The easement being an overriding interest may or may not be registered on the title. It moves with the land. It is a right that binds the land and not the holder of the easement.

42. Curiously, the Plaintiffs accept the mutual arrangement between the original owners of the two lands but there is no evidence that they provided for corresponding easement on their land during their subdivision.

43. On the doctrine of necessity, the Court holds and finds that it does not apply for the simple reason that none of the lands is landlocked. There is no injustice or hardship to warrant the application of the doctrine of necessity in this case.

44. In the end, the Court finds that the Plaintiffs claim fails. It is dismissed.

45. I order that the Plaintiffs jointly and severally meet the costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANGA THIS 25TH DAY APRIL 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Mbumbuya for the 1st – 4th Plaintiffs.

Ndegwa for the Defendant.

Kuiyaki and Njeri, Court Assistants