REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 11 OF 2022

1. MARY ANDEYO WANYONYI CHEBUKATI

2. WANYONYI WAFULA CHEBUKATI.....PLAINTIFFS

-VERSUS-

NEDDY E.M. AMBWAYAH.....

....DEFENDANT

JUDGMENT

Introduction

1. Through a plaint dated **01/04/2022**, the Plaintiffs jointly sued the Defendant seeking the following reliefs:

(a) A declaration that the defendant's blockage and/or closures of the access road serving parcel numbers 8994/36 and 89994/37 South West Kitale Municipality is illegal, null and void ab initio;

(b) An order directing the defendant to open up the access road serving parcel numbers 8994/36 and 89994/37 South West Kitale Municipality and remove all fences, crops or any blockage placed thereon within fourteen (14) days in default of which the plaintiffs shall be at liberty

to unblock and clear the access road at the defendant's cost;

(c) An order of injunction restraining the defendant from blocking or interfering in any way with the plaintiffs' use of the access road serving parcels of land numbers 8994/36 and 89994/37 South West Kitale Municipality;

(d) Costs of and/or incidental to the suit.

2. The Defendant entered appearance on **16/05/2022**. She filed a statement of Defence and Counterclaim dated **27/05/2022**. Praying in the Defence that the plaintiffs' case be dismissed with costs, she sought the following reliefs in his Counterclaim:

a) A declaration that the designated road on the survey map folio 568/6 passes through a natural spring on plot no. L.R. No. 8994/35;

b) A declaration that the designated road on the survey map folio 568/6 will destroy the natural spring on plot no. L.R. No. 894/35;

c) A declaration that preserving the environment in the present state by maintaining the natural spring on plot L.R. No. 8994/35 serves a greater good to the public and the parties in this suit, rather than destroying it by creation of the designated road on the survey map folio 568/6;

d) An order expunging the designated road on the survey map folio 568/6 from the records held by the director of surveys;

e) **An order that the re-planning and resurveying costs be shared equally between the parties;**
f) **An order allowing the re-planning and resurvey of parcels L.R. NO. 8994/34, 8994/35, 8994/36 and 8994/37 to establish a similar 6 metre access road to parcels 8994/36 and 8994/37;**
g) **In the alternative:**
   i. **An order of injunction restraining the plaintiffs from opening up the access road designated on survey map 568/6 beyond parcels 8994/37 and 8994/36;**
   ii. **An order nullifying the creation of the designated road on survey map folio 568/6 extending past parcel 8994/37 and 8994/36 from the records held by the director of survey;**
h) **Any other relief that this court may deem fit to grant;**
i) **Costs of and incidental to the suit.**

3. In response, the Plaintiffs filed a joint Reply to Defence and Defence to Counterclaim dated **13/06/2022**. They joined issue with the contents in the plaint and prayed that the Counterclaim be dismissed with costs.

<u>The Plaintiffs' case</u>

4. The Plaintiffs called **PW1,** one Protus Wanyonyi Muindi, the national Surveyor in charge of Trans Nzoia County took the

witness stand on the part of the Plaintiffs. As custodian of all survey records in the County, he testified that he was asked by the Plaintiffs to establish whether a public road existed on the area in issue. The step was on the strength of the plaintiffs' complaint that they had been denied access to their parcels of land.

5. On visiting the ground, **PW1**'s findings were that the there was a public access road that was closed. He prepared a report dated **14/10/2022** that was produced and marked **PExh9**. From the report, once survey was done and transfer of resultant parcels to individual owners concluded, any road created and registered became public or government property. Any changes of the road could only happen before or during the actual survey. Once it is completed and put in the records it remains public. He disagreed with Mr. Ben Situma's report, another surveyor's report, and stated that the ground was stable without a stream. He added that even if the report were true, the area occupied by the road was already public land.

6. Penultimately, **PW1**'s report stated that Mr. Ben Situma ought to have advised his clients to seek assistance from the offices of the Director of Surveys and the Chief Land Registrar instead of embarking on a report that wasn't solution oriented. He stated that the reasons advanced for changes to the road and the attached sketches proposing the new positions were misplaced as they aimed at reducing the area of the road and terminating it before reaching its destination. Finally, he stated that he visited the ground a few months before his testimony and re-established the road.

7. In his evidence at trial, he confirmed that the road is a public road appearing on the survey plan **FR No. 568/6** and marked as 'DEF' in his report. Giving a description of its locality, he stated that he was uncertain as to whether any water from the trenches that drains from the Kitale-Webuye road did so into a nearby downstream river. **PW1** recalled writing a letter dated **21/09/2020** to the plaintiffs. It was copied to the defendant and area chief. He also wrote another letter dated **29/10/2020** to the plaintiffs.

8. He added that the re-establishment of the road was captured in his report and was or as was on the survey plan. The exercise took place in the presence of the parties herein. That was when it was discovered that the road had been blocked. **PW1** confirmed in the affirmative the existence of the letters dated **05/11/2020** (in which he testified that his office did not approve of the request) and **13/12/2020**.

9. **PW1** clarified that a topographical survey was not necessary during this exercise. He stated that when surveying an area, a Subdivision Scheme ought to be done first by the Physical Planning Department. If he wished, the surveyor could go to the ground and collect the data to augment the physical planning data when planning was taking place. Where there is a stream, a road would not be recommended on its passage way. Accordingly, natural features are given priority in comparison to man-made features such as a road. When shown to him in the dock, **PW1** denied knowledge of the letters dated **10/12/2020** which was an Internal Memo not copied to him, and another one

dated **21/04/2020** as it was, in his own words, strangely not copied to their offices.

10. He regurgitated that there was no stream in his report as it did not exist. He also denied knowledge of the letter dated **15/12/2020**. He emphasized that it was not mandatory for the Court to rely on the map attached to the Defendant's survey report that was to be adduced in evidence. He noted that it disclosed that there were streams and a river affecting parcel no. **8994/35**.

11. **PW1** continued that when property is already surveyed, the issues of re-planning and changes of the plans ought not to arise. That once a road is surveyed, a re-plan can be done legally. He stated that he had not received any request for a resurvey of the public road in issue. He added that the road could not be resurveyed without his office being involved. **PW1** explained that Mr. Ben Situma was not an expert in water or swamp management. There was no provision he had done on the road, yet the road marked 'DEF' served four parcels of land. It was created by the Physical Planning Department. He stated

that his role was to confirm what was created by the Physical Planning Department.

12. PW2, the **1st** Plaintiff, testified that the **2nd** plaintiff is her husband. Accordingly, she had the authority to testify on his behalf and on her own behalf as per the written Authority to Plead dated **01/04/2022**. She stated that she sued the Defendant on account of an access road leading to properties, namely LR No. **8994/36** and L.R. No. **89994/37** South West Kitale Municipality, registered jointly in her name and that of her husband.

13. Adopting her written Witness Statement as her evidence in chief, **PW2** testified that on **3rd** August **2018**, together with the **2nd** plaintiff, they entered into a sale agreement for the purchase of all that parcel of land namely L.R. No. **8994/36** (original no. **8994/18**) measuring ten (**10**) acres situate in South West Kitale Municipality in Trans Nzoia County. Subsequently, the land was transferred and duly registered in their names as joint owners. A title deed was issued in their favor. It is in close proximity to the Matunda-Sabata road.

14. Antecedently, the plaintiffs purchased all that parcel of land namely L.R. No. **8994/37** after which the defendant transferred the property in their favor in **2014**. There were no trenches at the time of its purchase. A title deed was issues subsequently. She confirmed that it had napier grass growing on it that she used to feed her cattle as at the time of her testimony. The plaintiffs subsequently constructed a house thereon.

15. **PW2** testified further that at the time of the purchase of their parcels there existed a twelve (**12**) metre public access road separating their two parcels on one part and the defendant's parcel namely L.R. No. **8994/34** and L.R. No. **8994/35** on the other part. She pointed it out from the defendant's attached map to its list of documents from point 'F', where she set up a culvert, and she showed that it ran to point 'E'.

16. On acquisition of their parcels of land, the Plaintiffs requested the Defendant to open up the access road separating their parcels and those belonging to the defendant but she declined alleging that no such access road existed. Thus, the plaintiffs wrote a letter in **2020** and also visited the county survey

department. It was here that they confirmed that the Survey Plan and map for the area clearly showed that there was provision for an access road serving the parcels of land. Additionally, the road had been illegally blocked by the defendant.

17. PW2 lamented that the continued blockage of and interreference with the access road caused immense inconvenience and loss since the Plaintiffs could not access part of their land downstream. This resultantly frustrated them from properly utilizing a substantial portion of their parcel of land namely L.R. No. **8994/36** for lack of access. They added that any motorized transport in the form of trucks and tractors could not navigate into their property owing to the live fence and crops planted on the access road by the Defendant.

18. PW2 added that following that blockage, the run off and storm water could not drain downstream and was directed right into their home and compound. This would often cause immense inconvenience due to constant flooding in their homestead. That the planting of trees, crops and a fence on the access road

blocked the natural water ways and drainage that would flow along the access road towards the stream. **PW2** contended that the defendant's actions were unlawful hence the suit. She prayed that the suit be allowed and that the counterclaim be dismissed.

19. In support of her evidence, **PW2** produced the following documents: **survey plan** no. **TN/1686** of **09/07/2024** marked **PExh1**; **deed plan** dated **24/09/2014** marked **PExh2**; **sale agreement** dated **03/08/2018** marked **PExh3**; **letter** dated **31/01/2022** marked **PExh4**; **letter** dated **14/02/2022** marked **PExh5**; **letter** dated **22/02/2022** marked **PExh6**; **letter** dated **28/02/2022** marked **PExh7**; and **letter** dated **28/02/2022** marked **PExh8**.

20. **PW2** admitted that she was not averse to the road being surveyed. All she wanted was access to her properties. She observed that along the Matunda-Sabata road, there were trenches serving as a drainage system on both sides of the road. That from the points GFA, as set out in the Map, a downslope

ended in a river but could not estimate the distance. She clarified that there were drainages on the road to be opened.

21. PW2 recalled that neighbours had made proposals to deal with the storm water. However, the suggestions were untenable. She spoke to her coffee farmers who advised to leave sandbags up along the perimeter wall. She could not recall the letter dated **21/09/2020** and couldn't confirm the letter dated **10/12/2020**. She recalled that when she worked in the Ministry of Lands, the Department collaborated with National Environmental Management Authority (NEMA) and Physical Planning Department offices.

22. PW2 testified that in an attempt to resolve the issue their counsel wrote to the Defendant vide a letter dated **11/05/2020**. It was proposed that the road be shared and fresh sub-divisions be conducted. The defendant did not object to it. She confirmed that her advocates confirmed the proposals captured in the letter of **27/07/2021** as per the letter dated **31/07/2021**.

23. PW2 observed that on visiting the site, during the negotiations period when parties engaged outside of court

discussions, she noticed that subdivision was not evenly done. That was why the negotiations collapsed in her view. The report dated **17/09/2021** did not capture that inequity. She was also not aware of proposals set out by the defendant. **PW2** testified that she was not aware of a letter from the defendant's counsel dated **14/02/2022**. However, she was not agreeable to the proposal as it was contrary to the official survey map in creation of the access road. She added that their fence as moved was not in consonance with paragraph (**d**) of the letter dated **22/02/2022**.

24. **PW2** was not aware of the letter dated **28/02/2022** and the email from the defendant. The plaintiffs proposed **4.5** metres sharing translating to **9** metres wide and not **8** metres as per the letter of **22/02/2022**. She was not aware that the defendant's surveyor stated that the road measured **6** metres as per his report dated **30/08/2022**. She was also not aware of an approved re-survey as set out in the letter dated **21/04/2022** by the Director of Survey to the Defendant. It was not copied to her and she did not therefore raise any objections.

25. **PW2** continued that the riparian land has a road and there is a beacon that demarcates the two properties. That there is a road that goes all the way to the river ending at point 'E'. She testified that there was a spring on parcel no. **L.R. No. 8994/34** that was not on the public road. She remembered that in **2020**, proposals were made to a trench and divert the water at the end of the plot to a neighbour's side. Other issues addressed were the flooding in her compound proposed to be drained into the well.

The Defendant's case

26. The defendant called **DW1**, one Ben Wanyama Situma, a licenced surveyor, took the witness stand. His evidence was that his services were retained by the Defendant's Advocates to carry out a topographical survey over L.R. No. **8994/34** and L.R. No. **8994/35**. The survey was necessitated by a subdivision of L.R. No. **8994/18** into the following properties in **2014**: L.R. No. **8994/34**, **8994/35**, **8994/36** and **8994/37**. He testified that the subdivision scheme was carried out by a physical planner.

27. **DW1** explained that normally the physical features of the land were not considered by surveyors. However, surveyors pick features of the land by use of a theodolite or in a current technology called the RTK. It is the use of this mechanism that is referred to as topographic survey. So crucial is the survey that absent it, physical planers will be unable to ascertain the features that exist on the properties.

28. **DW1** discharged his mandate by visiting the property. He found that parcels no. **8994/34** and **8994/35** on one part bordered **8994/36** and **8994/37** on the other part. Beacons were identified marking the particular boundaries. Particularly beacon **N5** was identified on the map and on the ground. He converted the original coordinates on the ground to the Universal Transverse Mercator (UTM) coordinate system. **N5** was used to introduce coordinates entirely to pick the finer details of the topographical survey. The following were his findings:

a) There are streams flowing within parcels no. **8994/34** and **8994/35** joining with one stream flowing into the river downstream;

b) There are three natural springs that he marked on his sketched map as 'X' in parcel no. **8994/34** while 'Y' and 'Z' fall in parcel no. **8994/35**;

c) The water from the springs is used for domestic purposes;

d) L.R. No. **8994/35** is approximately **70%** swampy with some part of it extending to parcel no. **8994/34**;

e) On the map, there exists a surveyed road measuring 6 metres wide. It runs from point 'D' to 'F' through 'E' as shown on the map he drew.

f) That it traverses from point 'E' to 'D' through a swamp and hence it is not practical on the ground. He opined that if the road were allowed to exist, it would be hazardous to water bringing pollution by destroying the natural springs and streams. Additionally, he formed the opinion that it would be expensive to construct and maintain since it lay on a swampy area;

g) Parcels no. **8994/34** and **8994/35** slope towards the south east from the north west direction. It is a swampy area;

h) Parcels no. **8994/34** and **8994/35** had ridges to control soil erosion.

29. Following those findings, **DW1** gave the following recommendations:

i. The surveyed road be rerouted from point 'E-F' to point 'A-B' as the map shows so that it saves the streams. That would avoid destruction of parcel no. **8994/35** which is already swampy;

ii. Upon rerouting of the roads, the same area affected by the road 'A-B' should be compensated as shown with the strip marked 'E-F' on the map;

iii. The Water Resource Management Authority and NEMA to advise on the ways of conserving the water catchment on the two parcels of land.

30. The report, dated **30/08/2022**, with an attached sketch map and a copy of the official survey map, was produced and marked **DExh26**. He observed further that during the process, the road narrowed towards the stream to **3.7** metres at point 'D'. He explained that the original map not showing the springs only concerned the size of the parcels. He added that he advised NEMA and the Water Resource Management Authority to intervene as he was not an expert on conserving water.

31. **DW1** testified further that the size of the road limited its use. That it was not designed for heavy consumption but only for local use. That it did not have shoulders for holding water for drainage. Regarding **PExh9**, **DW1** stated that the author could not dismiss that he lacked authority to prepare it as it was not automatic that any road created translated to public property. This is due to the fact that when one applied for subdivision of his property, the road created has purpose.

32. **DW1** narrated that there is a section of the Physical Planning Act that provides for subdivision and amalgamation. This arises in situations where one subdivides the land and realizes that the purpose for its subdivision has not been met. In this instance, the person/ owner is entitled to request for amalgamation and re-parcellation. Neighbours are called for public participation to replan their land. He made reference to Kenya Gazette Supplement No. **202** of **2021** dated **26/11/2021** under legislative supplement no. **100** in part **4**. Finally, the Defendant ought to be compensated because it was his land that would be hived off to create the road.

33. **DW1** testified that the (closed) road wasn't being used comfortably and had beacons. It had vegetation less than **2** feet. The road finishes or ends into a swamp. He recalled that the Defendant's properties were used to grow sugarcane and coffee. He added that to change a road required public participation.

34. That if the owner provided a road map to 'E' or 'D', the plan would have been approved. There was no road from the river to 'D'. If the road to 'D' was blocked, the Plaintiffs were to provide

property. The road 'DF' had never been utilized as at the time he visited the site. He confirmed that closing a public road is an offence in law. **DW1** added that the water flows towards 'C' and not from 'E' to 'D'. Finally, he stated that it was not a must that all roads or paths lead to or end at the river. The swamp is a water catchment area because it held water.

35. **DW2** was the Defendant. She confirmed that Plaintiffs purchased the parcels of land from her in **2014** and **2018**. The **title deed** for L.R. No. **8994/18**, **survey plan folio 568/6** dated **09/07/2014** and **entries on the title deed** were produced and marked **DExh1, DExh2** and **DExh3** respectively showing a transfer of the parcels originally hers to the plaintiffs as well as her retained properties.

36. She pointed out that she was aware of the dispute: the issue revolved around an access road marked FED on the sketch map. She recalled that **PW1** wrote to the parties her of his intention to establish the road on the ground. He also mentioned of a rectification of the position as per the **letters** dated **21/09/2020** produced as **DExh4** and another dated **29/10/2020** produced as

DExh5. She explained that she did not understand what the problem was regarding the documents.

37. Later **DW2** stated that she wrote informing that she did not object to access roading being done on the plots bought by the plaintiffs. She advised them to consider that the area was sloppy and swamp as per her **letters** dated **05/11/2020** produced as **DExh6** and another one dated **13/12/2020** produced as **DExh7**.

38. Saliently, **DW2** firstly expressed that she wanted to amalgamate her two properties and therefore did not want to have access to L.R. No. **8994/34**. Secondly, she pointed out that the data captured by the surveyors was erroneous as it did not conform to what was on the ground. Thirdly, since a topography of the area was not conducted, it was to be noted that's there was a steep slope from the main road towards the river. She was apprehensive that the area was vulnerable to soil erosion and if the road is created therein, the permanent springs would be destroyed. She urged the surveyor to take her sentiments into account in giving access to the plaintiffs' plots. There were no responses.

39. DW2 thereafter thus sought the advice of the Water Resources Management Authority (WARMA) where she received a **memo** and a **letter** from the offices dated **10/12/2020** produced as **DExh8** and the other dated **15/12/2020** produced as **DExh9** respectively. From those documents, it was disclosed that the designated road passed through a spring potentially destroying it yet it was domestically used and for fish farming. However, the defendant was willing to provide an alternative site on her land for rerouting of the road to save the spring. The office therefore recommended and wrote to the Registrar of Lands, directing that the access road be rerouted and the spring be conserved by planting indigenous trees. This was in order to save the spring rom destruction in line with its mandate under the Water Act.

40. DW2 talked to the Plaintiffs about the issue, though their counsel as per the **letters** dated **11/05/2020** produced as **DExh10**, the other dated **27/07/2021** produced as **DExh11** and the last one dated **31/07/2021** produced as **DExh12**. From the correspondence, parties mutually agreed to create an access

road by equally sharing 4 ½ metres of the designated access road hived off from their properties. In fact, this was the plaintiffs' original proposal. Thus, a survey was to be done to repost the beacons and fresh subdivision as well as adjust the necessary documentation.

41. **DW2** recalled that thereafter the plaintiffs obtained a surveyor who confirmed the agreement the parties arrived at. A survey was conducted culminating into the **survey report** dated **17/09/2021** marked **DExh13** by the county surveyor together with **photographs** produced and marked as **DExh14**. Both parties were ably represented. The report stated that the mandate was to temporarily divide the road between the parcels into two equal portions. The findings were that the total acreage of the road was **0.27Ha** dividing into two equal portions of **0.13Ha**. It was recorded that both parties were satisfied and boundaries pointed on a temporary basis.

42. Later, she was informed by her counsel that the Plaintiffs rejected the agreement. Accordingly, their **letter** dated **28/09/2021** produced as **DExh15** and an **email** dated

29/11/2021 produced as **DExh16** were not responded to. A **proposal** by surveyor Mwanyungu was also produced and marked **DExh17** revealed how the subdivision would best be achieved in creation of the access road. It was shared to the plaintiffs' counsel by email on **01/11/2021**.

43. She testified that by **letters** dated **31/01/2022** produced as **DExh18** and **22/02/2022** produced as **DExh20**, the plaintiffs accused her of acting in bad faith by giving a smaller access road than what was initially agreed upon. That it was not tenable to them. Instead, the plaintiffs demanded that the road be created between 'E' and 'D'. In response, the defendant's advocate wrote **letters** dated **31/01/2022** produced as **DExh19** and **22/02/2022** produced as **DExh21** expressing shock in the turn around by the plaintiffs four months later. **DW2** attempted to resolve the matter out of court but the plaintiffs' counsel's letter dated **28/02/2022** produced as **DExh22** stated that they wanted to move to court.

44. **DW2** wrote an **email** dated **28/02/2022,** produced as **DExh23**, in response to the plaintiffs' last letter. She also

addressed the Director of Survey on **02/03/2022** produced as **DExh24** to reroute the area for the reasons set out by WARMA. It was responded to in the affirmative vide a letter dated **21/04/2022** produced as **DExh25**. In discharge of the said mandate, the surveyor came to the ground and authored the report produced and marked as **DExh26**.

45. Regarding the run of water **DW2** testified that each owner of the parcels of land where the road passes had a trench. Each person is also responsible for clearing their rubbish. They were assisted by the Ministry of Agriculture to erect trenches. She posited that if the plaintiffs' reliefs are granted, the runoff water would silt the springs and block them.

46. **DW2** recalled that when the earlier sketch was done, they were unaware that the road would a pass through it the springs. That there was a mistake that had been done since a topographical survey was not done. That would have put the access road on a different part of the sketch. She stated that it may have been changed her decision to sell what portion of her property. She maintained that the access road 'F-E' was not

closed. **DW2** urged this court to dismiss the plaint and allow the counterclaim using **DW1**'s survey.

47. **DW2** further testified that at the time of selling the parcels of land, subdivision had already been carried out and the access road was provided for on the map. However, she added that, to her, it is not a public road but accessed as between the parties. She clarified that the surveyor proposed that the road 'E-F' be closed to open road 'A-B' by way of replanning and resurveying. In fact, there may not be much storm water flowing. Thereafter the 'D-E' access road be closed in order to amalgamate her property. She added that if the storm water flows to 'E' from 'F', 'E' would flood.

48. That the water flowing along 'A-B' would flow more onto the neighbouring parcels no. **36** and **37**. If the storm water reaches at 'B', a trench would need to be done to take it down. It may divert to his parcel. That if 'E-D' part shown as a road is public land, then she would have to advise on compensation to be to whoever it is due.

49. **DW3** Erick Aminio Odiedo, a surface water technologist and an employee at the Water Resources Authority, testified that on **10/12/2020** produced as **DExh8** and **15/12/2020** produced as **Dexh9**, its employer wrote a Memo and a letter respectively on those dates. This was on the premise of a verbal complaint lodged by the defendant's representative. The complaint concerned a proposed road to past though her land affecting a spring on her property. He therefore visited the property to establish whether the road would have any impact on the environment.

50. Upon visiting the property, **DW3**'s conclusion was that the road would affect the spring water and impact negatively on the spring catchment. This is because the surface run off would flow down onto the springs and contaminate them. He recommended that the road be rerouted as proposed by the defendant. Further, that the indigenous tress be planted on the spring catchment in order to improve the water quality and quantity. He also visited the adjacent properties and did not see any springs on those parcels of land. There was also riparian land because of the

presence of a river. However, to him, the springs were not on the riparian land.

51. DW3 acknowledged that on visiting the parcel of land, it existed as an approved road on the official survey map. It only served a limited number of beneficiaries but did not exist when he visited the property. In creating a road, the Physical Planners are required to consult necessary stakeholders. He did not consult the surveyor or the physical planning department to ascertain whether there was an approval from the Department of Water before the road was created. He added that if the road is properly designed and managed, the water flowing uphill would be managed to flow into the river without affecting the springs.

Submissions

52. At the close of viva voce evidence, parties impressed me with their dichotomous written submissions. The plaintiffs filed written submissions dated **16/12/2024**. They abridged the evidence at trial to frame five issues for determination as follows: whether the plaintiffs were entitled to unhindered use and access of the road; whether the defendant's blockage of the

access road amounts to a breach of the plaintiffs' right to use and enjoyment of the designated public access road; whether the defendant has proved that the use of the public access road would result in any substantial environmental damage or degradation costs; whether the defendant is entitled to the reliefs sought in the counterclaim; and costs.

53. On the first issue, the plaintiffs submitted that there existed a duly designated public access road intended to serve the parcels of land owned by the parties. That road was demarcated when the defendant's parcel of land was subdivided before selling to the plaintiffs. The plaintiffs defined a public road as set out in the **Public Roads and Roads of Access Act**. They cited the decisions in **Buruburu Farmers Co. Ltd vs. Nairobi City County & another [2022] eKLR** and **Karanu & another vs. Kimemia & 3 others [2024] eKLR** to augment their case on the place and use of public access roads.

54. On the second issue, the plaintiffs submitted that the defendants unilaterally and without any color of right blocked the access road. That amounted to a breach of their right to use

and enjoyment of the designated public access road. They further complained that their actions were not sanctioned by any parastatal or body responsible and done surreptitiously. They urged this court to adopt the findings in **Hopf vs. Director of Survey & 2 others [2022] eKLR**; **Jayendra Raichand Shah vs. Clara Esha Bebora [2013] eKLR; Fredrick Otieno Obonyo vs. Gilbert Otieno Nyanjom & another [2018] eKLR** and **Silipet Properties Limited & another vs. Chege Mwaura & another [2017] eKLR**.

55. The plaintiffs then submitted that the defendant did not ably demonstrate that the use of the public road would result in any substantial environmental damages or degradation costs. She denied that the defendant approached them to explain why she opted to close a public road yet it was willfully surrendered during the subdivision process. They opined that she needed leave from the Land Registrar and Director of Survey in order to commence her amalgamation process. They submitted that no expert opinion substantiated her allegations of a negative environmental impact. For this submission, they cited the

decision in **Republic vs. County Government of Mombasa & another** [2022] eKLR.

56. On the fourth issue, the plaintiffs advanced that the defendant had not proved her counterclaim on a balance of probabilities. It was therefore for dismissal. They cast doubt on her expertise in survey and land planning advancing that she could not fault the initial survey to lay a basis on her counterclaim. In their view, the Defendant was the author of her own misfortune and had to live with her mistake for failing to furnish the proper information during the initial survey.

57. Finally, on costs, the plaintiffs prayed that their suit be allowed with costs. They also prayed for damages in the sum of Kshs. **2,000,000.00,** and that the counterclaim be dismissed with costs in line with Section **26** (*sic*) of the **Civil Procedure Act**.

58. The Defendant filed written submissions dated **27/03/2025**. Summarizing the evidence at trial, she found the following issues germane for determination: whether the defendant blocked, fenced off or closed the access road serving the plaintiffs'

parcels of land; whether the preservation of the environment (springs/riparian land) outweighs the use of the designated road as an access road/drainage; whether an orders for replanning and resurveying of the suit parcels of land should issue in the absence of the directors of survey as a party to provide an access road to parcels nos. **36** and **37** and; whether in the alternative, an order of injunction be issued against the plaintiffs from opening the access road beyond parcels nos. **36** and **37** and order the nullification of the road beyond those parcels from the records held by the director of survey.

59. On the first issue, the defendant submitted that before subdivision of **L.R. No. 8994/18**, she accessed her property via the main Matunda-Sabata road. It is only on subdivision into the four parcels that an access road was created designated for parcels nos. **35**, **36** and **37**. Summarizing the evidence of the **PW1**, **PW2**, **DW1** and **DW2**, the defendant's conclusion was that the access to parcels nos. **36** and **37** had not been blocked or closed off by the defendant. She contended that in fact, they had access to their properties to date but have declined to use

them. She urged this court not to grant the prayers sought in the plaint.

60. On the second issue, the defendant summarized her evidence together with that of **PW1**, **PW2**, **DW3** and **DW1** to argue that the right to a clean and healthy environment is guaranteed under Article **42** of the Constitution. She further submitted that Article **69** of the Constitution placed a duty on the state and individuals to protect the environment eliminating processes and activities likely to endanger the environment. She cited the decisions in **John Muthui & 19 others vs. County Government of Kitui and 7 others** [2020] eKLR and **Joseph Leboo & 2 others vs. Director Kenya Forest Services & another** [2013] KEELC 41 (KLR) to persuade this court to find in the proposed alternative access as set out by the defendant.

61. Turning to the third issue, the defendant once again summarized the evidence of all parties to argue that this court ought to order for replanning and resurvey despite the absence of the director as a party to the proceedings. this is because of the provisions of Article **70** of the Constitution, principle **1**, **4** &

15 of the Rio Declaration on Environment & Development (**1992**) as well as the decision in **John Muthui & 19 others vs. County Government of Kitui and 7 others** (supra).

62. She further argued that the director had previously exercised their statutory mandate by approving the re-planning and survey. The defendant continued that the prior approval signified the director's consent and involvement in the matter thereby obviating his necessity as a party. In any event, those orders would not prejudice the director as the re-plan had been consented to them. Lastly, it was her considered view that the orders would in effect implement an already existing administrative decision.

63. Finally, on the last issue, the defendant submitted that she had established a face for an injunctive order since the presence of springs and streams is not disputed. That the plaintiffs stood to suffer no loss if the orders sought were granted. However, the orders sought by the plaintiffs were untenable. She argued that from the plaintiffs' evidence, their only concern was access to their properties which they have had. As such, there was no

legitimate grievance against her. She prayed that the plaintiffs' suit be dismissed, including the claim for damages in the sum of Kshs. 2,000,000.00 and her claim be allowed.

Analysis and determination

64. It is not in dispute that the plaintiffs are the registered owners of all that parcel of land namely L.R. No. **8994/36** measuring ten (**10**) acres. The same was purchased from the Defendant on **03/08/2018**. They had also purchased L.R. No. **8994/37** in **2014**. These properties are adjacent, and in close proximity, to the Defendant's parcels of land namely **L.R. No. 8994/34** and **L.R No. 8994/35**.

65. At the time of their purchase, there existed (on the map) a road separating the plaintiffs' two parcels on one part and the defendant's parcels on the other part. This is also apparent from the sketch Map as shown from point 'F to point 'E'. That said, the plaintiffs contended that the defendant had since closed up the said road and declined to have it opened. They complained that following the blockage of the road, they could not access part of their land downstream and were unable to utilize a substantial

portion of L.R. No. **8994/36**. Withal, the Defendant had planted crops thereon (on the road). This caused blockage of the flow of storm water that could not drain downstream. Resultantly, the water flowed directly into their home and compound causing flooding.

66. Conceding that the dispute revolved around the road on the sketch marked FED, the defendant had a contrary opinion. She opined that due to the existential springs on her parcel of land, the road be created elsewhere to the benefit of the plaintiffs, herself and the environment. She also intended to amalgamate her two properties hence the proposition. Against that background, the main issues that fall for determination are as follows:

a) whether the plaintiff's claim is merited;

b) whether the defendant's counterclaim is merited;

c) the minor issue is as to who bear the costs, if any, of the suit and counterclaim respectively.

67. In determining the two main questions of the merits as stated above, this court is also cognizant of the alleged existence of the

springs on the defendant's parcel of land. This Court then has to grapple with an immediate and important question: would this land where it is alleged streams exist on be or qualify to be declared to be riparian land? Further, what would be the cause and effect of such a declaration?

a) Whether the plaintiffs' claim is merited

68. This against the Defendant's own pleading and testimony and that of her two witnesses, **DW1** and **DW3**, that there exist springs of water on the land parcel **Nos. 8994/34** and **8994/35**. The Defendant's evidence and that of the witnesses is that if the access road is opened the storm water would drain to the streams and contaminate them or spoil the water catchment of the area. She submitted that it would be better for the road to be replanned and redesigned and located elsewhere for the benefit of the Plaintiffs. The Defendant and the environment. Actually, DW1 testified that the WARMA and NEMA should step in to reroute the road so as to save the springs.

69. That being the issue, the question is: is the land on which the springs are riparian or private land?

70. In an attempt to define riparian land, the court in **Superior Homes (Kenya) PLC vs. Water Resources Authority (WRA); Gems Management Limited & 9 others (Interested Parties)** [2019] KEELC 819 (KLR) held as follows:

> **"77. According to encyclopedia.com, the environmental encyclopedia, Riparian land refers to terrain that is adjacent to rivers and streams and is subject to periodic or occasional flooding. According to Wikipedia, A riparian zone or riparian area is the interface between land and a river or stream.**
> **78. Webster's Ninth New Collegiate Dictionary defines riparian as "relating to or living or located on the bank of a natural watercourse (as a river) or sometimes of a lake or a tidewater." The terms "streamside areas,"**
> **"streambanks," and "bottomlands" are frequently used interchangeably with "riparian areas." The Black's Law Dictionary has defined riparian to mean of relating to, or located on the bank of a river or stream."**
> **79. It has been argued that there is no clear-cut definition of what riparian land is. In an Article titled "Riparian Areas: Functions and Strategies for Management," the Committee on Riparian Zone Functioning and Strategies for Management, National Research Council,**

National Academy Press, Washington DC, wrote as follows:

“As one might expect, the simple dictionary definition has been expanded or altered innumerable times by scientists and others, frequently for specific purposes or to reflect certain disciplinary preferences. Hydrology is the primary emphasis of most definitions of wetlands and is also used to define riparian areas. The lack of a consistent definition for “riparian” has been identified as a major problem of federal and state programs that might manage and protect these areas (Steiner et al., 1994). Riparian areas generally do not satisfy regulatory and other definitions of “wetland,” and thus are not encompassed by regulatory programs for wetland protection.”

80. The Article attempted to define a riparian area as follows:

“Riparian areas are transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect waterbodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence). Riparian areas are adjacent to perennial, intermittent, and

ephemeral streams, lakes, and estuarine–marine shorelines."

71. In extrapolating what constitutes riparian land, this court in **Njambi vs. Muturi** [2025] KEELC 8118 (KLR) held as follows:

> **"106. The question of what constitutes riparian land and the extent of a riparian reserve is governed by several statutory and regulatory instruments enacted for the protection of water courses and adjoining ecosystems. Collectively, these provisions underscore that riparian zones serve both environmental and public purposes and impose land-use controls rather than conferring private proprietary rights.**
> **107. Part IX of the Water Resources Management Rules, 2007 provides the primary framework for determining the width of riparian land. Rule 116(2) stipulates that, unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse is defined as a minimum of six metres or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank.**
> **108. Sub-rule (4) further directs that this width be measured from the top edge of the bank and applies to both seasonal and perennial watercourses. The Rule therefore establishes a measurable buffer from the natural limits of a water body within which development activities are restricted.**

109. The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shores) Regulations, 2009, complement this framework by defining a river bank as the rising ground from the highest normal water mark bordering or adjacent to a river, whether rock, mud, gravel or sand, and, in cases of flood plains, extending to the point where the water surface touches the land, but excluding the bed of the river. This definition ties the protection zone to the river's natural hydrological behavior and its historical flood limits.

110. Similarly, while the Environmental Management and Co-ordination (Water Quality) Regulations, 2006 do not expressly define riparian land, they prohibit development within a minimum of six metres and a maximum of thirty metres from the highest ever recorded flood level on either side of a river or stream. This provision reinforces the same protective corridor envisaged under the 2007 Rules, thereby harmonizing water resource protection with environmental quality regulation.

111. Section 12(2)(c) of the Land Act, 2012 places riparian zones within the category of public land held by the national government. The section expressly recognizes riparian reserves as lands that cannot be alienated for private ownership but may be subject to

management controls for conservation and public use. In law, therefore, riparian land does not confer individual title; it remains public property over which only limited, regulated use may be permitted.

72. Looking at the above decisions, this court finds that the issue of whether or not the area of land in issue on which the existential springs are is riparian or not cannot be ably determined before this court with the scanty evidence of the parties. That does not mean that the whole of the parcel of land in issue is private since it houses a feature, being springs of water, which the above legal definitions recognize qualifying to make it riparian land. Suffice it to say that the specific piece on earth where the springs exist and flow on to join the main stream or rivers that is riparian land. Only the extent is what the parties herein, particularly, the Defendant have failed to demonstrate what it is.

73. Regrettably, no expert evidence was adduced for the benefit of this court. The two experts that the Defendant called to testify fell short of adducing helpful evidence to this Court: DW1 not only failed to give the extent of the land that was covered by the

springs he stated in his report as existing and the extent of the swampy or wet areas arising from their existence but also how close they would be to the road existing on the map as planned. This was crucial for the court to determine whether indeed the road, if opened, would in any way damage the springs. Be that as it may, his evidence pointed to the land being riparian land as defined above.

74. As for the evidence of DW3, it also did not in anyway assist this court since it too did not establish the extent of the land the water table ran in proximity to the access road closed, and whether indeed the water table of the streams was close to the surface and if it ever crossed our would be crossed or cut out by the opening of the road. I find that this evidence was, at best designed to mislead the court that the opening of the road would interfere with springs or the water catchment area.

75. Of importance is the finding of DW1 and his 3rd Recommendation (recommendation 3) of his report dated 30th August 2022 that the two parcels of land are already swampy. He recommends that the NEMA and WARMA come in to advise on

ways of conserving the water catchment on the two parcels of land. This clearly means that the swampy area on the two parcels of land and the adjoining portions of the lands are riparian lands subject to the control, conservation and use as would be directed by the NEMA and WARMA as the witness proposes. It means further that the Defendant has no reason and basis to control what happens to the said portions: only the government agencies could and should do so.

76. What is certainly apparent from the evidence of the two defence witnesses though is that had the parties called proper expert evidence to establish the extent of the riparian land as envisioned by the law, the private rights of the defendant over that portion of the land would have automatically been identified and confirmed to have been legally extinguished unless otherwise obtained by the Defendant through other means such as a lease since it is public land. This is what the Defendant carefully did not want to do. Rather she testified about amalgamation of the parcels that she owned.

77. It is apparent that the subject road was placed in the survey map for use by potential land owners within the area. It was the evidence of PW1 and DW1 that indeed there existed a road which was created at the time of the survey of the parcels of land and creation of the titles to the parcels in issue herein. Even both the PW2 and DW2 agreed to the existence of the road on the map. The point of departure between the Plaintiffs and the Defendant is that the latter argues that she has not closed the road of access.

78. This Court found the Defendants' submissions on the fact that she has not closed the access road strange. This was because on the one hand she acknowledged in evidence that indeed there existed an access road on the map, and that indeed it was closed. Her own witnesses, particularly, DW1 testified as much and added that should the road be opened it would contaminate the streams. That was the similar evidence of DW3. Further, she argued that she intended to amalgamate her parcels of land Nos. **8994/34** and **8994/35**. While amalgamation of parcels of land is provided for by law, it does not and cannot be done to 'consume'

or do away with an access road, unless it was a private one. The instant one was not a private one. Thus, for the Defendant to argue that she has not closed the access road it was an absurdity.

79. Accordingly, the defendant was not at liberty to unilaterally decide to change the location of the parcel of land and she so wished in these proceedings. It was incumbent on the defendant to make the necessary application under the **Public Roads and Roads of Access Act** while giving sufficient reasons why the public road ought to have been moved from the location on the map to another location. In line with **Article 47** of the Constitution, this would have called for the submissions and opinion of the plaintiffs' views and those of other members of the public before a decision could be arrived at in changing the road.

80. The expert testimonies of **PW1** and **DW1** surveyors all confirmed that following the subdivision of L.R. No. **8994/18** into L.R. No. **8994/34**, **8994/35**, **8994/36** and **8994/37**, a road was created. This was before the plaintiffs purchased the property.

According to **DW1**, whose services were retained by the defendant, on the map, there existed a surveyed road measuring 6 metres wide running from point 'D' to 'F' through 'E' as shown on the map he drew. He observed that the road traversed from point 'E' to 'D' through a swamp. It narrowed towards the stream to **3.7** metres at point 'D'. **PW1** on his part, was retained by the plaintiffs. On visiting the properties, his findings were that the there was a public access road that was closed. His contrasting opinion however, in comparison to that of **DW1** was that it was public road appearing on the survey plan **FR No. 568/6** marked 'DEF'.

81. In my humble view, the defendant was not at liberty to operate the manner in which it did, which was to unilaterally close the access road, and even plant crops on it. She ought to have made the necessary consultations within the law, including the provisions of the **Public Roads and Roads of Access Act**, and obtained express permission for it to be so. I therefore find her actions in contrast and contrary to the law. Accordingly, her claim sought in the counterclaim lacks merit and is hereby

dismissed with costs to the plaintiffs. This therefore means that the plaintiffs' claim must succeed and it is therefore merited. After all, the defendant did admit that she had every intention of changing the road as she so proposed. Well, be that as it may, she can only do so in accordance with the law and not as per the actions complained of by the plaintiffs herein.

82. The Defendant raised a Counterclaim which, from the analysis of the facts, pleadings, the law and the submissions above this court finds not merited. I dismiss it but with no order as to costs.

83. This Court has one important parting shot though. The Plaintiffs' claim was defended by the Defendant mainly on the theme and argument that the land where the access road is to be opened and constructed on has springs which ought to be conserved. This Court wonders aloud why and how a private citizen acting for her own interests could purport to enforce and protect the public interest from that perspective. This was an act of a private individual trying to hide under the state or public interest before for private benefit. One wonders why the Defendant, if indeed she was genuine, did not enjoin WARMA

and NEMA as interested parties in this matter since that which she purports to urge is their mandate and not hers as a private citizen.

84. The above is a result of government not coming out clear through its agencies such as the NEMA and WARMA in conjunction with the National Land Commission (NLC) in identifying, mapping out, zoning and or demarcating and documenting such parcels of land and areas which would form riparian land. This country needs to maintain a data base of all riparian lands. This court hereby advises, and it is now time that, the relevant state agencies and Parliament do urgently establish a legal framework and policies for doing all the things this court has stated in the paragraph above, that is, to identify, map out, zone and or demarcate and document all riparian lands or areas in the country, so as to protect them from our good citizens whose desire for land grows by the moment. In this era of climate change, riparian lands are being invaded and occupied by many people whose properties neighbor or are adjacent to them upon waters receding or rivers shrinking or drying up and

thereby creating temptations for such people to apply for rectifications of titles. It is creating an indirect way of government losing land not by way of allotment but rectifications of titles, which is illegal. Such "*dry or drying riparian lands*" would be retained by government and used for conservation purposes since they are and remain public land.

85. The Deputy Registrar is directed to forward forthwith this judgment to the NEMA and WARMA head offices and legal departments for consideration of the advice herein and further advice to the relevant offices.

86. Finally, the Plaintiffs having proved their case on a balance of probabilities, the following are my orders in their favor:

a. **A declaration is hereby issued that the defendant's blockage and/or closures of the access road serving parcel numbers 8994/36 and 89994/37 South West Kitale Municipality is illegal, null and void ab initio;**

b. **An order be and is hereby issued directing the defendant to open up the access road serving**

parcel numbers 8994/36 and 89994/37 South West Kitale Municipality and remove all fences, crops or any blockage placed thereon within fourteen (14) days in default of which the plaintiffs shall be at liberty to unblock and clear the access, road at the defendant's cost (at the market price, which will have to be ascertained by the professionals);

c. **An order of injunction be and is hereby issued restraining the defendant from blocking or interfering in any way with the plaintiffs' use of the access road serving parcels of land numbers 8994/36 and 89994/37 South West Kitale Municipality;**
d. **The plaintiffs shall have the costs of this the suit.**
e. **The defendant's counterclaim is dismissed with no order as to costs.**

87. Orders accordingly.

Judgment **dated, signed and delivered virtually via electronic mail through the Teams Platform this 1st day of December 2025.**

HON. DR. *IUR* NYAGAKA
JUDGE

In the presence of,

Mr. Muye Advocate holding brief for Mutubia for the Plaintiffs

Ms. Mango Advocate for the Defendant