IN THE COURT OF APPEAL AT NAKURU
(CORAM: WARSAME, JOEL NGUGI & ODUNGA JJ.A.) CIVIL APPEAL NO. E042 OF 2020

BETWEEN

SAMUEL GIKONYO NJAU…… 1ST APPELLANT
RAPHAEL LABAN MATEO……2ND APPELLANT

AND

JOSEPH NDERITU……RESPONDENT

(Being an appeal against the judgement of the ELC Court at Nyahururu ***(M. C. Oundo, J.)****, delivered on 1st November 2018*
in
ELC Suit No. 77 of 2017)
****

JUDGEMENT OF THE COURT

1. By plaint dated the 7th February 2013, the appellants sought: an eviction order compelling the respondent to vacate and or cede to the appellants portions of land namely Nyandarua/Ol joro orok west/340 measuring approximately 7.2 Ha and Nyandarua/Ol joro orok west/344 measuring approximately 1.5 acres respectively (the suit properties); a permanent injunction restraining the respondent whether by himself, his agents and or representatives from dealing with and or in any other way interfering with the suit properties; and an order for the costs of the suit and interest.

2. The 1st appellants' case, as presented by the evidence tendered by himself, was: that the respondent, a farmer, was his neighbour; that he was the registered owner of land No. 340 Oljoro Orok west; that in 1974, the respondent trespassed into his land by about 10 meters width and 30 meters length; that he had lived on the land since 1965 after having inherited it from his father; that there has never been a change on the position of the land or a road thereon; and that he reported the matter to the chief and the District Officer and the respondent was asked to stop trespassing on the his land but to no avail.
3. In support of his evidence that there was no road on the said property, he referred to an original scheme map for Oljoro Orok West Settlement Scheme dated the 1st August 1989, and testified that the land remained intact without subdivision. There was, however, a small road thereon which was being used by the people and the cattle to access a public seasonal dam. Since there were deed plans and beacons on the suit land, he urged the court to order that the land remains the way it was and sought orders compelling the respondent to pay for the trees he had destroyed and to restrain him from trespassing on his land as the same was not a road.

4. Referred to the allotment letter from the Government to his parents in respect of the suit land, dated 3rd June 1965 which gave the Government the power to make a road for people and animals to reach water/drinking point, the witness stated that he did not understand the letter but insisted that the *r*espondent had made the road himself as the same was not made by the Settlement Officer. It was his evidence that while they had put up the fence as directed by the Settlement Officer, the respondent had not put up his own part of the fence. It was his evidence that apart from the initial map, there was no other map.

5. The 2nd appellant, testifying as PW2, stated that his land was plot No.344 measuring about 1.5 acres and confirmed that the 1st respondent was his neighbour; that although his land, which was a subject of a confirmed grant, was subdivided to his brothers; that the land was still registered in his name but he was yet to be issued with its title deed; that he sued the respondent because the latter had trespassed onto his land by hiving off a 5 meters width by 30 meters length, without seeking his permission; that the respondent demarcated his (2nd appellant's) land for use as a road and had fenced the

same; that since he started living on his land in 1965, there was no road thereon; and that the government had

not given the respondent an access road although in 1974, the respondent uprooted their trees and constructed the road.

6. The 2nd appellant further testified that the Government constructed a road for everybody to use for the purposes of accessing the dam water for their animals; that as a result of the respondent's action, complaints were lodged with the local administration and although the respondent was asked to refrain from his actions, he ignored the same giving rise to the suit.

7. Referred to the letter dated 18th September 1974 aforesaid, he confirmed that it was indicated that the Settlement Officer had the right to enter the land and make a road thereon without necessarily seeking their permission. He however, denied that the letter of allotment made provision for the hiving off the road from their land. He was however not aware of the conditions indicated in the letter of allotment. The witness however, denied seeing the letter dated 21st August 1974. In his evidence, all the letters written in 1974 were fraudulent.

8. PW3, Michael Kinyua's, who testified in support of the appellants' case stated: that he worked at the District Land's office, Nyahururu as a land surveyor in 2007; that he had the

current edition of the map relating to Oljoro Orok West Settlement

Schemes; that from the map, he could not identify the suit parcels of land; that there were no physical features on the map as the same are normally shown on the ground; that an easement was not indicated on the map but in order to determine if it existed, it was necessary to cross-reference with the registrar's office where the same is normally registered in the green card and on the title; that on the said map, there was a space between plots No. 344 and Plot No. 340 but he could not tell whether it was an easement or not; that it seemed that there had been an amendment done on the map although he had not received a signal documentation that would have necessitated the amendment on the map; that from the map, plot No. 340 and No.344 had an access road since every parcel of land had an access road.

9. The respondent, in his evidence, stated: that he was the administrator of the estate of his father, Eliud Gitahi Kababu alias Gitahi Kababu from whom he inherited plot 344 measuring 2 acres which was adjacent to the appellants' plots; that his father was given the suit land in 1965 by the land settlement scheme; that, by a letter dated the 27th June 1974 written by Settlement Officer 1 and addressed to his father and the 1st

Plaintiff’s father, it was indicated that there was a road which had been constructed on

plot No. 340 by the land settlement; that before the construction of the road, the parties were summoned vide letters dated 18th July 1974 and 18th September 1974 by the Assistant Director of Settlement to witness the construction of the road; that the road was subsequently constructed and parties were satisfied; that from plot No. 344, 2 meters were excised from the top and below while on plot No. 340, 5 meters were excised; that in the year 2003 the said path was amended on the map as evidenced vide a letter dated 31st March 2003 by the Director of Lands Adjudication and Settlement and addressed to the District Land adjudication and Settlement Officer, Nyahururu ; and that on the 28th January 2013 there was another letter written by the District Land Adjudication Settlement Officer, Nyandarua North addressed to the Assistant Chief to the effect that after the plots were visited, the road still existed as shown on the map.

10. According to the respondent, the road that the Settlement had constructed still existed and that he did not construct the same. It was his evidence that he had planted the trees in 1974 inside his fence and that it was when he sold the said trees in 2009 and 2011, that the appellants reported him to the Land

Registrar. The Land Registrar visited the ground in the year 2012 and confirmed

that the road was included in the Government map. He testified that on 31st October 2012, the parties were summoned to the office of the land registrar Nyahururu when he produced copies of the letters from the Settlement office and the Land Registrar informed the appellants that the access road had been constructed by the Government. The appellants were then advised to go to court and file suit against the Settlement Officer but not against the respondent. It was his position that the said road still existed and was in use by the people. The respondent sought for the dismissal of the case with costs.

11. DW2, John Welangai, an officer in charge of the Land Adjudication and Settlement Department Nyandarua North, testified that he had been in the Nyandarua office for the last 7 years. According to him, Plots No. 340 and Plot No. 344 Oljoro orok West Settlement scheme, were allocated through balloting. The confirmed that the letters referred to by the respondent emanated from their office and that the settlement reserved the right to provide access roads to the rivers for the people and cattle. He stated that an access road had been created between parcels of land plot numbers 340,341 and 344 and added that the path was demarcated to allow the owner of

plot No. 341 have access to the watering point. His

evidence was that 5 meters had been excised from plot No. 340 from the top and 2 meters from below from Plot No. 344 and that owners of plot No.341 were asked to erect a fence on both sides. He confirmed that there were correspondences calling the parties to the meetings.

12. In her judgement, the learned Judge found that the parties were all neighbours and the suit lands herein were allocated to their fathers by the Settlement Scheme; that parties inherited the parcels of land from their fathers; that there was a road demarcated in 1974 to enable the cattle access drinking water thus forming an easement on the suit land after consultations between the parties' fathers; that when the Ministry of Settlement decided to demarcate the path, the appellants' fathers raised an objection with the Ministry whereby vide a letter dated the 18th September 1974 they were referred to a clause in their allotment letters that stipulated that the Department of Settlement could change the Settlement plans as and when necessary and only in rare situations without consulting the plot holder; that a demarcation was subsequently done creating an easement between parcels of land Plot numbers 340,341 and 344 to allow the owner of Plot

No. 341 to have access to the watering point, a

path which exists to date; and that by the time the parties inherited their respective properties, the easement in the form of the cattle path was in existence.

13. It was the finding of the learned Judge: that there was no evidence that the respondent had unauthorized intrusion or invasion into the appellants' lands; that the cattle path was created by the Settlement Fund Trustees so as to provide a path for the respondent 's father to have passage for his animals to access the dam; that the effect was to create an easement over the appellants' parcels of land; that therefore the entry onto the appellants' land was not an unauthorized intrusion or invasion of private premises; that in 1974 a cattle path was demarcated on plots No. 340-344, by the Settlement Fund Trustees, to enable the cattle access to drinking water and to that end, the owner of plot No. 341 was to fence both sides because the cattle path was for his benefit; that this demarcation created an easement on the said suit lands which were then in possession of the parties fathers; that in the year 2003, authority was granted to the District land Adjudication and Settlement Officer to proceed with his proposal of raising a Mutation for the Registry Index Map amendment wherein he

was to liaise with the surveyor and the District Land Registrar for

implementation; that there was confirmation that the road between plots 340,341 and 344 leading to the water point still existed both on the ground and on the map; that due to the fact that there was no registration, of the easement, it was an equitable easement, in accordance with the decision in the case of ***Ruth Wamuchi Kamau v Monica Mirae Kamau [1984] eKLR*** as read with ***Section 32*** of the ***Limitation of Actions Act.***

14. The learned Judge, based on ***Sections 4(2) and 7*** of the ***Limitation of Actions Act***, (the Act) found that since the cause of action started in the year 1974 when the cattle path was constructed, and the suit was filed in 2013, a period of about thirty nine (39) years had lapsed from the date when the cause of action occurred. Without the leave to file the suit out of time being sought and obtained, she held that the suit was filed outside the prescribed period. Based on the case of ***Bosire Ongero v Royal Media Services [2015] eKLR*** the learned Judge found that the court lacked jurisdiction and that the appellants failed to prove their case on a balance of probability. The suit was, accordingly, dismissed with costs to respondent.

15. Dissatisfied with the judgement, the appellants filed this appeal, and on 14th October 2025 when the same came up for plenary

hearing, learned counsel, ***Ms Wanjiku Wamae***, appeared for the appellant while learned counsel, ***Ms Barbara Wanga***i, held brief for ***Mr Ngure*** for the respondent. Both learned counsel relied on their written submissions.

16. The appeal, according to the submissions filed by the appellant revolves around two issues: whether the claim was time barred and whether there exists an easement. It was submitted by the appellants: that, on the authority of this Court's decision in ***Isaack Ben Mulwa v Jonathan Mutunga Mweke*** ***[2015] eKLR***, a claim of trespass cannot be classified as falling under section 4(2) of the Act because each action of trespass constitutes a fresh and direct cause of action; that as was held in ***Isaack Ben Mulwa v Jonathan Mutunga Mweke*** ***[2015] eKLR*** and ***Gladys Kiskey v Benjamin Mutai*** ***(2017) eKLR***, where trespass is continuous, the Act does not come into play; that trespass consists of series of acts done consecutively from day to day so that the acts in the aggregate form one indivisible harm; that the continues occupation of the respondent remains a continuous trespass and does not fall amongst the torts under ***Sections 4(2) and 7*** of the Act as long as the respondent continues with the

occupation of the

appellants' land; and that the appellants were not statutorily barred hence the court had jurisdiction to determine the suit.

17. Regarding the issue whether there exists an easement between plots number 341, 340 and 344, it was submitted: that that the appellants' evidence as supported by PW3's evidence was that there was no evidence of the existence of a road between the said plots; that the procedure for the creation of a road stipulated in sections 98 to 199 of the ***Land Registration Act*** was not followed and the titles did not reflect any changes; that ***Section 28*** of the Act does not create or categorise the right of way as an overriding interest; that the condition in the allotment letter only applied where there was a necessity and since the respondent had an alternative existing road, the creation of the alleged easement and/or cattle path was a violation of the appellants' right to property under Article 40 of the Constitution; that the case of ***Shoen v Zacarias [2015] WL 245*** explained that in order for an equitable easement to be inferred, the trespass must be innocent as opposed to wilful or negligent one. Further, there must be absence of irreparable injury and the hardship to the trespasser must greater than the one caused to the land owner.

18. It was contended: that in determining whether to grant an equitable interest, the focus must be on the said elements rather than “a more open-ended and free-floating inquiry”; that since the trespasser is technically a wrong doer, doubtful cases should be decided in favour of the property owner with the legal title; that the respondent had knowledge that he was trespassing and was aware of the appellants’ had legal title hence was not an innocent party; that since the respondent acknowledged that there was a public road leading to the dam, by closing the easement, the public will not be irreparably injured; that the encroachment on the land has depreciated the value of the land; that this Court should not be guided by the respondent’s convenience when he has an alternative that exists; and that the Court should allow the appeal with costs.
19. On behalf of the respondent, it was submitted: that the court cannot disregard an issue of law going to jurisdiction merely because it was not pleaded; that the appellants were given the opportunity to address the court on limitation and they did so; that the respondent adduced evidence showing that the Director of Settlement created the footpath in 1974 and that the allotment letters issued by him had a condition allowing

him to create access

to water paths without the necessity of seeking a consent from the land owners; that the path was created with notice to the interested parties and after its creation, trees were planted alongside to mark the boundary; that the path was in use by the respondent and members of the public and documents were produced evidencing an intention to formalise the amendment of the map to reflect the path as an easement but there was no evidence that the intention was actualised; that the court arrived at the correct conclusion that the respondent was not a trespasser as the Director had created the easement despite lack of proof of its registration hence its equitable nature.

20. We have considered the record of appeal, the grounds of appeal, the rival submissions and the applicable law. We recognize that in a first the Court is required to re-appraise the evidence and arrive at its own independent conclusions. (See ***Rule 31(1)(a)*** of the ***Rules*** of this Court). However, the trial court being the adjudicator of fact, its findings on matters of fact should be accorded a high degree of deference. An appellate court will only overturn a conclusion of fact if the trier of facts decision was clearly erroneous. This is to be contrasted

with a conclusion of law, which

will receive higher scrutiny. (See ***Kenya Ports Authority v Kustron (Kenya) Limited [2009] 2 EA 212***).

21. The issues that fall for our determination in this appeal are: whether the claim was time barred and whether there exists an easement.

22. ***Section 3(1)*** of the ***Trespass Act*** provides that:

> ***"Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence..."***

23. Trespass is defined by ***Black's Law Dictionary*** in the following terms:

> ***"One who has committed trespass; one who unlawfully intrudes upon another's land and forcibly takes another's persona; property"***

24. The same dictionary discusses the nature of a 'continuing trespass' as:

> ***"A trespass in the nature of a permanent invasion on another's rights".***

25. ***Clerk & Lindsell on Torts 16th Edition para. 23- 01*** addressed the continuing trespass thus:

> ***"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".***

26. ***Salmond on Torts, 15th ed., at p. 791,*** elaborated on the cause of action in relation to a continuing tort in the following terms;

> ***"When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action."***

27. Courts generally view the unlawful possession as a continuing trespass for which an action lies for each day that passes and the trespass continues. See ***Konskier vs Goodman Ltd [1928] 1 KB 421***. This Court in the case of ***Muthiora vs Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR)*** expressed itself on the issue as follows:

"…it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant's continued occupation of the said property from the first date of entry in so far as it is unauthorized by the respondent

> ***amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred."***

See also ***Challo vs City Chicken and Eggs Dealers Co-operative Society Limited & another [2023] KECA 244 (KLR).***

28. In this case, since the alleged possession was a continuous trespass, the learned Judge erred in finding that the cause of action was time barred.

29. As regards easement, this Court, while dealing with a situation not so dissimilar to the instant one, in ***Mwangi & 3 others v Ngarachu (Sued as the Legal Representative of the Estate of Ngarachu Chege - Deceased) [2025] KECA 555 (KLR)*** defined "easement" as:

> ***"…the right of one landowner to make use of another nearby parcel of land for the benefit of his own land. An easement may take many forms; however, the most commonly encountered easements are a right of way; a right to light and a right of support."***

30. ***Section 32*** of the ***Limitation of Actions Act*** stipulates the means by which easement may be acquired by stating it to arise:

> ***Where:***

a. Access and use of light or air to and for any building have been enjoyed with the building as an easement or

b. Any way or watercourse or the use of any water has been enjoyed as an easement or

c. Any other easement has been enjoyed, peaceably and openly as of right and without interruption for twenty years, the right to such access and use of light, Air, or to such way or watercourse or use of water or to such other easement is absolute and indefeasible.

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."

31. As the above provision suggests, the law of the acquisition of easements and profits is founded on a presumption; namely that when a right has been enjoyed for over two decades, such right is recognized by the law. Easement, which is essentially a right to cross or otherwise use another's land for special purposes, is to be so used but not for leisure. Further an easement holder can make only such use of an easement as is reasonably necessary to accomplish the purpose for which the easement is granted. This Court (per Kneller, JA) in ***Ruth Wamuchi Kamau v Monica Mirae Kamau [1976-1980] EA 147; [1984] KLR 539*** explained the essence of easement 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. 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. At common law, they were created only by deed or will. Writing under hand or parole grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the license or licensee coupled with 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…A right of way is an obvious example of an easement."

32. A distinction was, however, made between public right of way and an easement in the case of ***Ngambo Estate and Saw Mills Ltd v Sikh Saw Mills (Tanganyika) Ltd [1957] EA 537*** in which the predecessor to this Court held that:

> ***"Section 26 of the Limitation of Actions Act which provides for acquisition of rights of enjoyment of right of way after enjoying the same for more than 20 years has no application to public right of way since it only applies to easements and a public right of way is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and re-passing and it is quite clear that it is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement. A public right of way cannot be acquired by prescription under***

section

26. Moreover, the wording of the section is

inconsistent with the acquisition of a prescriptive right by the public since the claimant must establish that he has enjoyed a right of way for 20 years. It is settled law that a presumption of dedication may arise from evidence of long and uninterrupted user. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate – there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment. But where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was. It is therefore never practically necessary to rely on prescription to establish a public way. Though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred, it is not any definite time, and a very short period of usurpation will often be satisfactory."

33. The classic case of ***Re Ellenborough Park [1955] 3 All ER 667***, ***[1956] Ch. 131*** sets out the four essential characteristics of an easement as follows:

> ***a. there must be a dominant (land which benefits from the easement) and a servient (land over which the easement is exercised) tenement;***
> ***b. it must be capable of forming the subject matter of the grant of an easement;***

c. the easement must accommodate the dominant land.
d. the owners of the dominant and servient land

> ***must be different people. The general rule is that a person cannot have an easement over their own land. An exception to this rule is where an owner of two parcels of land grants an easement over one parcel to the tenant of the other.***

34. Therefore, a party claiming a prescriptive right will be required to call evidence that he has been in use for 20 years and that such use has been open to bring home to a reasonable owner of the servient tenement that a right is being asserted. If these facts are proved to the satisfaction of the court, the claim will succeed. It must however be kept in mind that these evidential presumptions are rebuttable and, where facts are open to two explanations, the burden remains on the claimant to establish the explanation which is consistent with the use being as of right.
35. In our determination, the fate of this appeal rests on the evidence of the two independent witnesses, PW3 and DW2. PW'3's evidence was, however, inconclusive. According to him, it was not possible to state whether or not there was an easement since that fact would not ordinarily appear on the map. To conclusively determine the existence of an easement, he was of the view that reference to the records held by the Land Registrar was necessary and that the physical features

alluded to would only be discernible on the ground. He was even unable to identify the suit parcels of land

from the map he was referred to. He nevertheless noted that on the said map, there was a space between plots Nos. 344 and 340 but he could not tell whether it was an easement or not.

36. On the other hand, PW2 confirmed the letters which the respond et relied on as having emanated from their office, the Land Adjudication and Settlement Office. He was emphatic that the right to provide access road between parcels of land plot numbers 340,341 and 344 was reserved in the letters of allotment in order to provide access roads to the rivers for the people and cattle and confirmed that there were correspondences calling the parties to the meetings referred to by the respondent.

37. From the above evidence, what comes out is that the road reserve was catered for in the letter of allotment and that although the map had not been amended to reflect the creation of the access road, the same was in fact created. However, on the authority of the case of ***Ngambo Estate and Saw Mills Ltd v Sikh Saw Mills (Tanganyika) Ltd*** (supra) the provision for access road, having been reserved for the benefit of the public, it did not amount to an easement.

38. Nevertheless, the appellants failed to prove that the respondent trespassed onto their plots as alleged and ultimately, the finding

by the learned Judge cannot be faulted on this score. In the result, this appeal fails and is dismissed but in light of our finding on limitation, we make no order as to the costs of this appeal.

39. It is so ordered.

Dated and delivered at Nakuru this 10th day of December, 2025.

M. WARSAME

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JUDGE OF

APPEAL JOEL

NGUGI

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR