REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. E033 OF 2021

KIPSIRGOI INVESTMENTS LIMITED ..... PETITIONER

VERSUS

LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTESS ..... RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... INTERESTED PARTY

JUDGMENT

Introduction

1. This dispute concerns the existence, nature and enforceability of an alleged easement over land, an issue that lies at the intersection of registered proprietorship and long-standing land use. This court is therefore called to determine whether, *inter alia*, an easement exists, and whether such easement, if established, binds the servient land.

The Petitioner's case

2. By a Petition dated 13th September 2021, the Petitioner sought judgment against the Respondent and prayed for the following orders:

i. ***A declaration that the Respondent's unauthorized forceful and violent invasion, fiddling and destruction of the Petitioner's indigenous trees, excavations and all threatened or proposed commencement of road works or upgrading of the three-meter-wide country road on the suit property to a ten meter wide road on the Petitioner's suit property known as LR number 13065 (original number 6939/ 1 and 5830/ 9) in Ololua Ridge- Karen in Nairobi without prior notice to, consent, consultation with the Petitioner or due compensation to the Petitioner and or compliance with mandatory provisions of the Fair Administrative Actions Act, the Land Act, the Land Registration Act, Part VI of the Environmental Management and Coordination Act and Articles 10, 27, 40, 42, 47, 69 and 70 of the Constitution of Kenya is illegal, unlawful, unconstitutional, null and void.***

ii. ***An Environment Restoration Order compelling and directing the Respondent whether by itself, servants, agents, officers and or anyone claiming under it to undertake and carry out all necessary measures to restore status quo ante prevailing before 8th September 2021 as far as practicable and more particularly restoration of the three-***

metre wide access/ country road on the Petitioner's suit property known as LR number 13065 (original number 6939/ 1 and 5830/ 9) to the immediate condition prior to the damage on 8/09/2021 and replant the indigenous trees unlawfully destroyed by the Respondent with similar species.

iii. An order cancelling and removing the easement registered on the grant number IR number 26024 for the Petitioner's property known as LR number 13065 (original number 6939/ 1 and 5830/ 9) situate in Ololua Ridge-Karen in Nairobi in favour of and for the dominant land known as LR number 6930/ 2 situate in Ololua Ridge-Karen within the city county of Nairobi.

iv. A Conservatory order of injunction to forthwith prevent, stop, discontinue or restrain the Respondent whether by itself, servants, agents, officers and or anyone claiming under it from entering, trespassing onto and or carrying out deleterious activities particularly cutting down, wasting away and destroying trees or any property, excavating or carrying out construction or road works including but not limited to purported upgrading or constructing a 10-meter wide road on the Petitioner's property known as

LR number 13065 (original No. 6939/1 and 5830/9) situate in Ololua Ridge-Karen in Nairobi without prior compliance with Articles 40, 42 and 69 of the Constitution of Kenya.

v. ***Compensation to the Petitioner by the Respondent for destruction of property and purported excavation works on the Petitioner's property known as LR number 13065 (Original No. 6939/1 and 5830/9) situate in Ololua Ridge-Karen in violation of the law as pleaded or set out in the Petition.***

vi. ***Costs of the Petition.***

vii. ***Any other relief that the court may deem fit to grant in the circumstances of the Petition.***

3. The Petition is premised on the facts deponed in the Supporting Affidavit of Maureen Cheptoo Leting, a Director and Shareholder of the Petitioner, who deposed that the Petitioner is the registered proprietor of LR No. 13065, formerly LR Nos. 6939/1 and 5830/9, measuring approximately 8.4 hectares, situated at Ololua Ridge, Karen, Nairobi, while the Respondent owns the adjoining property, LR No. 6939/2, measuring about 20 acres and lying to the southwestern side of the suit property.

4. It was deponed that in 1975, the original proprietor of the suit property granted a private easement measuring

approximately 3.5 kilometres in length and about 3 metres in width across the suit property, to serve two single-family dwelling houses erected on LR No. 6939/2. The easement was intended to provide access to Ololua Ridge Road and thereafter to Ngong Road. At the time, the proprietors of the two parcels were related by blood.

5. According to the Petitioner, land use and development within Karen is regulated by the Nairobi City County Government Guide of Nairobi City Development Ordinances and Codes made pursuant to the **Physical and Land Use Planning Act**, under which the area is zoned for low density residential use, permitting one single family dwelling per 0.2 hectares. The easement was, therefore, granted exclusively to serve two single family residences as existed on the dominant land at the time.

6. The Petitioner averred that in or about 2017, the Respondent obtained approvals to develop over 30 residential units on the dominant land.

7. It was contended that the Respondent neither sought nor obtained the consent of the Petitioner to vary the easement or to alter its user in tandem with the intensified development on the dominant land. The Petitioner maintained that it had never consented to the widening, upgrading or change of user of the private murram access road, and had consistently maintained indigenous trees along the easement corridor.

8. The Petitioner's Director further deponed that on 8th September 2021, servants and contractors of the Respondent, without notice or consent, entered the suit property with excavators and tree felling machinery, cut down indigenous trees and commenced excavation works with the apparent intention of widening the access road to approximately 12 metres, to serve more than 90 vehicles accessing the Respondent's development.

9. The deponent stated that on 8th September 2021, when she protested the activities, she was threatened by the Respondent's servants. She further alleged that a contractor associated with Alexandra Lloyd Limited informed her that the works would proceed regardless and issued threats which she reported to the police.

10. The Respondent's agents allegedly displayed a Tree Cutting Certificate dated 2nd September 2021 and a Renovation Permit issued by the Nairobi City County Government authorizing cabro works on LR No. 6939/2. The Petitioner contended that these approvals did not authorise entry onto the suit property, the felling of its indigenous trees, or road works along the private easement.

11. It was further alleged that the Respondent closed the entry points to the access road and erected a signpost restricting access, and on 10th September 2021 commenced preparatory

works including marking the road and offloading construction materials.

12. The Petitioner contended that the Respondent's actions violated its constitutional rights under **Articles 40, 42** and **47** of the **Constitution**, and were undertaken in disregard of **Articles 10, 69** and **70** thereof, as well as the **Fair Administrative Action Act** and the **Environmental Management and Coordination Act**.

13. It was alleged that the Respondent failed to issue prior notice, consult the Petitioner, obtain consent, undertake public participation, or carry out the requisite environmental impact assessment procedures under **Part VI** of **EMCA**, including **Section 58,** before commencing the impugned activities.

14. According to the Petitioner, the felling of indigenous trees, excavation works and road expansion within close proximity to Ololua Forest constituted environmentally harmful activities requiring prior regulatory approval, and the failure to comply with these statutory and constitutional safeguards amounted to unlawful expropriation, arbitrary deprivation of property, and an ongoing threat to environmental integrity, security, dignity, and the peaceful enjoyment of the suit property.

15. The Petitioner contended that the proposed works fall within both low and high risk developments under the **Second**

Schedule to **EMCA**, including construction or rehabilitation of access roads, transport infrastructure projects, activities out of character with the surrounding area, and activities within environmentally sensitive areas given the proximity of the suit property to Ololua Forest.

16. The Petitioner maintained that the dominant land was not landlocked, being adequately served by Forest Lane Road, which adjoins the property on the southern side and links it to Ngong Road and Ushirika Road, both public roads. In those circumstances, the Petitioner contended that the Respondent's reliance on the easement was unnecessary and had resulted in nuisance, environmental degradation, and diminution of the value and utility of the suit property.

17. It was further contended that the intensified use of the easement, from serving two single-family households to serving over 30 residential units, amounted to a fundamental departure from the terms and user of the easement. On that basis, the Petitioner sought cancellation of the easement, maintaining that the dominant land could reasonably be served by the existing public road network.

18. The Petitioner asserted that unless restrained, the Respondent's actions would occasion irreparable harm, and environmental degradation, thereby resulting in a miscarriage of justice and violating the constitutional protections afforded to present and future generations.

The Respondent's Response

19. The Respondent opposed the Petition through a Replying Affidavit sworn by Joseph Kipkoech Toco, Director in charge of Strategy, Finance and Investments for the Administrator of Local Authority Pension Trust Registered Trustees. He deponed that both the Petitioner's and Respondent's properties originated from a larger parcel measuring approximately 60 acres known as LR No. 6939, situated in Ololua Ridge, Karen.

20. It was deponed on behalf of the Respondent that on 16th October 1970, the said parcel was subdivided into three portions of approximately 20 acres each, namely LR No. 6939/2, LR No. 6939/1 (later registered as LR No. 13065), and LR No. 6939/3. The subdivision was approved subject to conditions, including the registration of a right of way in favour of LR Nos. 6939/2 and 6939/3 over LR No. 6939/1, as well as the provision of a three-metre drainage wayleave. These conditions were accepted without reservation by the then proprietor through its advocates, Daly Figgis Advocates**.**

21. Following the acceptance of the conditions, Survey Plan F/R No. 122/9 dated 5th July 1971 was prepared and approved. The survey plan expressly depicted the right of way serving LR Nos. 6939/2 and 6939/3. The survey documentation

further advised that the transferee, together with successors in title, was to entitled to enjoy access over the road shown on the registered plan.

22. It was further deponed that since the provision of a 380-metre by 12-metre wayleave would encroach into LR No. 6939/1, the original owner compensated that parcel by purchasing LR No. 5830/9 measuring approximately one acre, which was subsequently consolidated with LR No. 6939/1 to maintain the acreage at approximately 20 acres. Upon amalgamation, the consolidated parcel was registered as LR No. 13065.

23. The Respondent averred that it acquired LR No. 6939/2 in April 2012 and was at all material times the registered proprietor thereof, and that prior to commencing development it undertook the requisite Environmental Impact Assessment and obtained all necessary approvals. It was deponed that the Respondent also obtained approval from the relevant county authorities before upgrading the access road forming the easement and removing trees within the road corridor.

24. The Respondent denied trespassing onto the Petitioner's land, maintaining that it had at all times operated strictly within the easement as delineated in Survey Plan F/R No. 122/9, and asserted that no further environmental approvals were required for the upgrading works. In those

circumstances, the Respondent maintained that it acted lawfully and in good faith, and denied all allegations of trespass or illegality.

25. The Respondent contended that the parties coexisted peacefully until 2018 when the Respondent commenced construction of its residential project valued at approximately Kshs. 1.5 billion, at which point the Petitioner allegedly became hostile.

26. It was deponed that the Petitioner, through its agents, repeatedly harassed and obstructed the Respondent's contractors; that in September 2018, a director of the Petitioner allegedly blocked access to the site and summoned police officers and that upon review of the survey documents, the police confirmed the Respondent's lawful use of the easement and permitted the works to proceed.

27. In another incident, the same director allegedly accused the Respondent's agents of unlawfully cutting trees, despite being shown the requisite permits and that 0fficers from the Kenya Forest Service visited the site and confirmed that the trees were not within a gazetted forest, following which works resumed.

28. It was further deponed that the Petitioner initially proposed a rerouting of the easement to a longer corridor in exchange for compensation and that although the Respondent agreed and paid the sum of Kshs. 31,162,500, the Petitioner later

unilaterally cancelled the arrangement and refunded the amount, notwithstanding expenses already incurred by the Respondent.

29. Owing to the continued disputes, it was deposed, the parties agreed in September 2021 to a joint survey, the report of which, dated 7th September 2021, confirmed that the easement measured 12 metres in width. The Respondent maintained that, although entitled to a 12-metre easement, it had elected to utilise only about 9 metres in order to preserve trees and boundary fencing.

30. It was further asserted that the area affected by the easement had already been compensated through the consolidation of LR No. 5830/9 with LR No. 6939/1 to form LR No. 13065, and that the Petitioner had no lawful claim over the registered easement; that the assertion that the easement is only three metres wide was unsupported by evidence and contradicted by survey records, including the Petitioner's own surveyor's report, and that having existed for over four decades, the easement could not lawfully be challenged as to its validity or width.

31. It was contended that the Petitioner disregarded not only the joint survey report, but also advice from law enforcement and forestry authorities, and instead rushed to court with the intention of frustrating the Respondent's lawful enjoyment of its property.

32. It was further contended that any grievance relating to environmental approvals ought to have been pursued before the National Environmental Tribunal, and that the Petition was incompetent for want of jurisdiction.

33. The Respondent argued that if the Petitioner genuinely believed there had been a breach of forestry laws, the appropriate authority, the Kenya Forest Service ought to have been joined to the proceedings.

34. The Respondent maintained that property rights under **Article 40** of the **Constitution** were not absolute, and are subject to registered and overriding interests, including easements duly created and annexed to land; that an easement runs with the land, binds successors in title, and exists for the benefit of the Respondent's parcel as the dominant tenement and that the Petitioner having acquired the land with knowledge of the easement, was bound by it.

35. The Respondent denied the claim that the easement was limited to serving two single dwelling units, asserting that easements provide access to land, not to a defined number of households; that its development complies with zoning requirements, as set out in the undated Nairobi City County Government Guide of Nairobi City Development Ordinances and Zones as each unit occupied land exceeding the minimum acreage prescribed as 0.2 hectares, and that all

necessary approvals were duly granted by the County Government.

36. The Respondent asserted that improved access enhanced, rather than diminished, property values, and that allegations of insecurity and environmental degradation are unfounded; that the easement provided the most viable and secure access to the development, and that any alteration at this stage would be prejudicial and expose it to claims from purchasers.

37. The Respondent denied that it had surrendered its rights over the easement, noting that temporary use of alternative routes during construction was purely accommodative; that Forest Lane traverses a forested area and an informal settlement near Bulbul Centre, thereby raising legitimate security concerns for its users, particularly at night and that the access route through the registered easement at the Kephis Junction provides a direct and considerably shorter connection to Ngong Road, measuring approximately 1.4 kilometres, as compared to the Forest Lane route which is about 10 kilometres. For these reasons, it was contended that the easement constitutes the safer and more practical access to the Respondent's property.

38. It was further contended that the Petitioner had failed to demonstrate any violation of constitutional rights or environmental harm arising from the Respondent's

development and that the Petition is devoid of merit, is malicious and an abuse of the court process, and ought to be dismissed with costs.

The Petitioner's Supplementary Affidavit

39. In a Supplementary Affidavit sworn on 7th October 2021, Maureen Cheptoo Leting, a director of the Petitioner, deponed that the Environmental Impact Assessment licenses exhibited by the Respondent authorised development on LR No. 6939/2 only and did not extend to works on the Petitioner's land or on the easement passing thereon. It was averred that the alleged extension of those licenses to the easement was neither indicated nor contemplated and was therefore unlawful.

40. It was further deponed that the EIA license issued on 31st July 2014 was valid for twenty-four months and, upon extension on 13th December 2017, lapsed on 13th December 2018. Despite this, the Respondent allegedly continued with development works until August 2020, when a certificate of practical completion was issued.

41. The deponent averred that although the Respondent produced a renovation permit dated 27th July 2021, the permit authorised works only on the Respondent's land and for a limited period of thirty days, and that any works undertaken thereafter, or on the easement situated on the Petitioner's property, were unauthorized and contrary to the

Physical and Land Use Planning Act as well as **Articles 42** and **69** of the **Constitution**.

42. It was asserted that approval for the cutting of trees could only lawfully apply to public roads under the control of the County Government and could not extend to private land and that no consultation or compensation was accorded to the Petitioner prior to the issuance of such approval, rendering the same unconstitutional.

43. The Petitioner asserted that the activities undertaken on the easement required an EIA licence and that the absence of such licence constituted a threatened violation of the Petitioner's right to a clean and healthy environment, warranting intervention by this Court under **Article 70** of the **Constitution**.

44. It was contended that the argument that the Petitioner ought to have appealed to the National Environment Tribunal was misconceived, as no EIA licence was issued in respect of the impugned activities and the Tribunal lacked jurisdiction to determine alleged violations of fundamental rights.

45. The Petitioner denied that the easement was 12 metres wide and contended that it has never been a public road nor compulsorily acquired; that the alleged purchase of the easement by the Respondent was unfounded and that the Respondent obtained a change of user from agricultural to residential in 2014, which fundamentally altered the nature

of the dominant land. It was contended that any intensification of use, including construction of thirty townhouses, required fresh approvals in respect of the easement.

46. It was further contended that the change of user and subsequent developments extinguished the easement under **Section 99(3)(b)** of the **Land Registration Act** and that the Court ought to decline to sanction the continued existence or use. The Petitioner asserted that the statutory provisions relied upon by the Respondent, **Section 142** of the **Land Act**, is no longer in force, and maintained that it was entitled to resist unlawful use of the easement.

47. It was deponed that the Respondent's contractor, Alexander Lloyds, had undertaken, through correspondence dated 27th August 2014 to Karen Langata District Association, to utilize Forest Lane Road during construction and other designated public roads upon occupation, and not Ololua Ridge Road, which undertaking was allegedly breached.

48. The Petitioner denied that the Kenya Forest Service lawfully authorised the cutting of indigenous trees on its land, asserting that no public participation, notice or compensation was accorded and that negotiations for re-routing the easement collapsed due to protests from tenants and neighbouring land users, leading to rescission of the agreement and refund of the deposit paid by the Respondent.

49. It was contended that the survey reports relied upon by the Respondent were prepared by surveyors engaged solely by the Respondent, without the Petitioner's participation or concurrence and that the Petitioner was not involved in any joint exercise prior to the Respondent's activities.

The Interested Party's Response

50. The Interested Party, through a Replying Affidavit sworn by Marrian Kioko, a Senior Principal Environment Officer confirmed that it issued an EIA licence for development on LR No. 6939/2 after reviewing the Respondent's project report and satisfying itself that the project met statutory requirements.

51. It was deponed that the EIA licence was issued on 4th August 2014, later varied in 2017 following receipt of a no objection letter from the residents' association, and extended for a further twenty-four months. The Interested Party maintained that it acted lawfully and within its mandate, and that any aggrieved party was at liberty to lodge a complaint with the Authority or to appeal to the National Environment Tribunal.

Hearing and Evidence

The Petitioner's witness

52. PW1, Maureen Cheptoo Leting, a Director of the Petitioner, testified that she is an Advocate of the High Court of Kenya. She relied on her witness statement dated 11th September

2023. She deponed that the Petitioner is the registered owner of the property known as LR No. 13065 (Original No. 6939/1 and 5830/9) measuring 8.4 hectares, the suit property.

53. It was her evidence that the Respondent is the registered proprietor of LR No. 6939/2, measuring about 20 acres, situate in Ololua Ridge, Karen, and adjoining the suit property on the south-western side.

54. PW1 stated that the two parcels originated from the mother title LR No. 6939, which was subdivided into three portions, being LR Nos. 6939/1, 6939/2 and 6939/3, previously identified as plots B, A and C, respectively. She further testified that LR No. 5830/9 was later amalgamated with LR No. 6939/1, culminating in the registration of LR No. 13065.

55. PW1 testified that the right of way created upon subdivision of the mother title was intended to serve two single-family dwelling houses on LR No. 6939/2, at a time when the land use in the area was agricultural and later regulated for low-density residential development.

56. She maintained that the easement was never intended to serve the volume of traffic generated by the Respondent's townhouse development and that, at most, the Petitioner was willing to revert to the status quo by allowing access to only one dwelling unit, with the remainder accessing through Embulbul. She further contended that the Respondent's land

was no longer landlocked and that, in light of available alternative access routes and the Respondent's undertakings, the easement ought to be cancelled.

57. It was PW1's evidence that in 2014, the Respondent obtained a change of user from agricultural to residential townhouses and intended to construct thirty residential units. She asserted that the Respondent did not seek approvals relating to change of user or upgrading of the easement, and that the NEMA approvals obtained in 2014 related to the dominant land only.

58. PW1 testified that the Respondent obtained "no objection" letters from the Karen Lang'ata District Association and the Ololua Ridge Residents Association on the basis of undertakings that construction access would be through Forest Lane Road and, upon occupation, which is a road approved by KURA, and that Ololua Ridge Road would not be used unless agreed upon by the parties.

59. PW1 stated that any use or upgrading of the easement linking the Respondent's land to Ololua Ridge Road required consultation and agreement with the Petitioner, and referred to a letter dated 27th August 2014 from the Respondent's project manager, Alexander Lloyds Limited, confirming that Ololua Ridge Road would not be used as an access route.

60. PW1 acknowledged that the Petitioner did not challenge the approvals relating to development on the Respondent's land,

and relied on the correspondence indicating that access would be via Ngong View Road and Forest Lane Road, although she was uncertain as to the extent of development along Ngong View Road.

61. She testified that in September 2018, she discovered that, contrary to the undertakings, the Respondent had commenced using the easement for heavy trucks and numerous vehicles. She stated that she confronted the Respondent's officers on site and, when they insisted on proceeding, she dug a trench across the easement to prevent further passage through the suit property.

62. PW1 further testified that she and her sister called the police, who visited the site and directed the parties to report to Karen Police Station the following day; that the OCS advised the parties to agree on a way forward to avoid breach of the peace and that the parties explored an alternative route, but the Petitioner abandoned that proposal upon discovering that it would interfere with access to the river and lead to destruction of many trees.

63. PW1 maintained that there was no evidence of approval from NEMA or the County Government for the upgrading or change of user of the easement, and that no valid EIA licence existed for the impugned activities in 2021. PW1 further testified that, in September 2021, the Respondent commenced cutting indigenous trees and undertaking cabro

works on the easement without notice, relying on approvals issued in respect of LR No. 6939/2, which, in her view, did not authorise works on the Petitioner's land or along the easement.

64. She further testified that the Petitioner has not been compensated for the felled trees and that the Respondent continued working despite court orders, and only stopped after contempt proceedings were commenced.

65. PW1 denied that there was a joint survey or joint recommendations confirming the easement's extent. She stated that although a joint exercise was proposed, the Petitioner did not retain an independent surveyor and gave no instructions for such a survey. She contended that in light of the Respondent's undertakings and the availability of alternative access routes, the easement ought to be cancelled, as the Respondent's land was no longer landlocked.

66. In cross-examination, PW1 acknowledged that the Petitioner's title and deed plan depicted the easement, although she was unsure of its precise measurements, and conceded that the subdivision conditions required access to prevent landlocking the affected parcels. She maintained, however, that the access was intended for the occupier or occupiers of the dominant land, while conceding that heirs and successors could be more than two.

67. She testified that Ololua Ridge Road is a designated public road and distinguished it from the easement road. She further referred to an approval dated 2nd September 2021 permitting cutting of trees, whose applicant was indicated as LAPTrust with the address of LR No. 6939/2. She stated that thirteen indigenous trees were cut along the easement and contended that they were not leaning dangerously as alleged.

The Respondent's witnesses

68. DW1, Peter Wasilwa, adopted his witness statement dated 20th June 2023 and relied on the Respondent's bundles dated 20th June 2023 and 13th May 2025. He testified that he is an architect and the project manager for the Respondent's residential development on LR No. 6939/2, Ololua Ridge, Karen.

69. DW1 testified that in 2013, his firm presented an unsolicited development proposal to LAPTRUST, initially proposing forty units, which was later revised to thirty units to comply with zoning requirements. He stated that the Respondent engaged registered professionals and that the LAPTRUST Board granted conditional approval, following which an MoU and later a development contract was executed in March 2017.

70. According to DW1, construction works on LR No. 6939/2 commenced in June 2018 and was completed in March 2020, with certificates of practical completion and occupation

issued by the project architect and the County Government respectively. He testified that the Respondent obtained change of user approval, NEMA approvals, County approvals, conducted public participation, and obtained no objection from the residents' associations.

71. DW1 stated that access to LR No. 6939/2 is through a registered easement on LR No. 6939/1, arising from subdivision of the mother title LR No. 6939. He testified that during construction, heavy vehicles primarily accessed the site through Forest Lane Road to minimise disturbance, but that the Petitioner blocked the easement in 2018 by digging a trench, prompting police intervention and advice to restore access and seek legal redress.

72. He further testified that the parties agreed to a joint survey to confirm lawful access, and thereafter negotiated an alternative access route requiring additional land. It was his testimony that although the Respondent paid compensation, the agreement collapsed following objections raised by the Petitioner's tenant, and the monies were refunded, after which the Respondent reverted to using the registered easement.

73. DW1 testified that some trees were cut with County approval, and that the Respondent subsequently planted about five thousand trees and shrubs. He stated that when the Petitioner reported the matter to the Kenya Forest

Service, it indicated its mandate was limited to gazetted forests.

74. DW1 stated that improvement works on the easement, including upgrading to cabro standard, were part of the approved project but were halted by court orders. He testified that the Respondent has since been compelled to use Forest Lane Road, which he described as insecure and inconvenient, leading to financial losses, withdrawal of purchasers, and incomplete project delivery.

75. In cross examination, DW1 conceded that he had no documentary proof of insecurity along Forest Lane Road or of purchaser cancellations, but maintained that the easement is a private access serving the Respondent's land and that works on the access were stopped by court orders.

76. DW2, Oguttu Leonard Odhiambo, a licensed land surveyor, adopted his statement dated 20th June 2023 and relied on documents in DEXB1. He testified that he was first engaged in 2013 to establish the boundaries, features, and access to LR No. 6939/2, and confirmed that the parcel originated from subdivision of LR No. 6939.

77. On the access, DW2 testified that the easement lies within the existing fenced corridor and measures approximately 12 meters by 380 meters. He stated that subdivision approval required a right of way through the Petitioner's land to serve LR Nos. 6939/2 and 6939/3, and referred to correspondence

from the Commissioner of Lands, acceptance by Daly & Figgis Advocates, and Survey Plan F/R No. 122/9 dated 5th July 1971, which clearly depicts the right of way.

78. Based on survey records, DW2 stated that the registered easement measures approximately 12 metres by 380 metres, and that the portion encroaching on LR No. 6939/1 was compensated through amalgamation of LR No. 5830/9 to form LR No. 13065. He testified that the benefit of the easement runs with the dominant land.

79. DW2 stated that the access road has never been separately surveyed on the ground, which is why it appears as a dotted line in survey records. DW2 further testified that following the dispute in 2018, a joint survey was conducted in 2021 by himself and Wycliffe Abiero, identified as the Petitioner's surveyor, and that a survey confirmed the easement corridor and recommended that upgrading be confined to a 9-metre width to preserve trees and fencing, while recognising the full registered width of 12 metres.

80. He stated that the survey demonstrated that upgrading within a 9 metre corridor would affect few trees, but full utilisation of 12 metres would require demolition of the fence line and affect mature trees within the additional three metres.

81. DW2 testified that five trees were felled within the 9 metre corridor, and that the parties agreed that only three trees

would be removed because the Respondent was to use a 6 metre carriageway, with the balance reserved for walkways, cycle tracks, drainage and allied features. He stated that mature trees within the remaining 3 metres were to be preserved, pipelines marked, access controls agreed for security, and the corridor marked on the deed plan for future reference.

82. DW2 stated that later survey records indicate an access corridor of 18 metres arising during a subdivision undertaken in 1988, and that the original easement length was 380 metres. He stated that the 1acre compensation aligns with an easement width of 12 metres; that initially, the access was from Ololua Ridge Road, and that the easement was created at the edge of Ololua Forest to serve the subdivision. He stated that Forest Lane Road was developed later, around 2020, providing back access. He stated that both the easement and the Respondent's parcel lie within Nairobi County.

83. In cross-examination, DW2 conceded that the Commissioner of Lands' letter did not specify the width of the easement and that he did not examine the Petitioner's title. He maintained, however, that survey records support a 12-metre easement and that both parties signed the joint survey report.

84. DW3, Benjamin Siro, an officer from the Directorate of Land Information Management Systems, testified that his evidence

was based solely on Survey of Kenya records. He produced correspondence dated 6th March 2023 and 20th June 2023.

85. In cross-examination, DW3 stated that he did not conduct any ground verification. He stated that his letter was not conclusive and was prepared on the basis of the information supplied. DW3 testified that survey records show that LR No. 13065 was later subdivided in 1988, during which an 18-metre road reserve was created. He stated that although variations in subdivision could affect access arrangements, the original right of way serving LR Nos. 6939/2 and 6939/3 had not been extinguished.

86. In re-examination, DW3 clarified that his evidence was limited to spatial survey information, not ownership. He confirmed that survey records indicate the existence of a registered wayleave serving plots A and C.

Submissions

87. Counsel for the Petitioner submitted that the existence of an easement over the Petitioner's land for the benefit of the Respondent's land was not in dispute. The contest, counsel argued, concerned whether the Respondent lawfully undertook to upgrade that easement and whether it lawfully felled indigenous trees standing on the Petitioner's land.

88. It was further submitted that whereas the Respondent changed the user of its parcel from agricultural to residential for purposes of developing townhouses, no corresponding change of user was sought or obtained in respect of the easement on the Petitioner's land.

89. Counsel submitted that the Respondent admitted having obtained an Environmental Impact Assessment licence for the construction of thirty units on its land and that the licence was extended for 24 months. It was argued that the said licence had expired by the time the cause of action arose, and that no evidence of renewal beyond the stated period was produced.

90. It was further submitted that, in any event, the EIA licence related solely to development on LR No. 6939/2 and did not extend to the easement situated on LR No. 13065. Counsel contended that the Respondent's intended upgrading of the access road from an earth or murram track to cabro or tarmac on the Petitioner's land was undertaken without authorization from the environmental regulator and was therefore contrary to **Section 59** 0f **EMCA,** the original terms of the easement and the applicable physical planning framework.

91. Counsel argued that under the Second Schedule to EMCA and the relevant regulations, works of the nature complained of required a prior environmental assessment and licensing.

In the absence of such licence, it was contended that the intended works were unlawful and posed a threatened violation of **Articles 42** and **69** of the **Constitution** and **Sections 3** and **58** of **EMCA.**

92. Counsel further submitted that the approvals exhibited by the Respondent from the County Government related only to works on the Respondent's parcel and did not authorize works on the easement on the Petitioner's land or entry thereon. The same position was taken in respect of the permit to cut trees, which, counsel argued, could not lawfully apply to the felling of trees on private land, the county's mandate being limited to public roads. It was also submitted that the renovation approval limited the works to a defined period and that works undertaken outside that period were unauthorized.

93. Counsel maintained that the evidence on record showed that the Respondent's land was not landlocked, being served by a public road known as Forest Lane Road which links to Ngong Road and Ushirika Road. In counsel's view, the Respondent's insistence on undertaking works on the Petitioner's property was therefore unlawful, malicious and amounted to a nuisance and destruction of the suit property.

94. Counsel relied on a letter dated 27th August 2014 authored by the Respondent's contractor and addressed to the Karen Lang'ata District Association. It was submitted that in that

letter, the Respondent identified Ngong Road and Forest Lane Road as the designated access routes, and further indicated that alternative access existed through Forest Road, Ushirika Road and Lang'ata South Road. Counsel argued that the Respondent expressly undertook not to use Ololua Ridge Road during all phases of the project unless otherwise agreed by relevant parties.

95. On that basis, the Petitioner's counsel urged the Court to find that no evidence was produced to demonstrate any subsequent agreement varying or reversing the said undertaking. Counsel argued that the Respondent's present position, that it is landlocked and must therefore rely on the easement, was an afterthought, and that the Respondent was estopped from departing from the undertaking upon which it obtained a no-objection from the residents' association.

96. Counsel further submitted that since acquiring the property in 2012, the Respondent did not demonstrate active use of the easement and only sought to assert it in 2021 when it attempted to upgrade it. It was also submitted that negotiations in 2020 to acquire an alternative wayleave and reroute the access, which were later rescinded and monies refunded, were consistent with abandonment of the easement.

97. Counsel contended that the easement, created in the 1970s, was limited to serving two single-family dwellings on land

whose user was agricultural. The Petitioner's case, it was submitted, was that the easement was a narrow murram track of about 3 metres, and that any enlargement, extension or upgrade beyond the original grant was unlawful. Reliance was placed on **Section 98** of the **Land Registration Act**, for the proposition that an easement is binding strictly to its terms and cannot be expanded without the servient owner's consent.

98. Counsel further submitted that an easement cannot be varied or burdened beyond what was contemplated at the time of its creation without the consent of the servient owner, and placed reliance on **Sections 28, 98** and **100** of the **Land Registration Act.** It was argued that the Respondent's change of user, coupled with the contractor's undertaking on access, either extinguished the easement or rendered it unnecessary.

99. Counsel maintained that the Respondent never sought or obtained the Petitioner's consent to vary the easement in tandem with the proposed developments on the dominant land, and that the Petitioner neither extended nor acquiesced to any change in the character, width or intensity of use of the access road.

100. Counsel disputed the Respondent's assertion that the Petitioner subdivided its land and created a wider road reserve, submitting that no cogent evidence was tendered to

support that claim or to demonstrate that any such subdivision was effected on the ground and in the register.

101. Counsel further contended that the letter dated 20th June 2023 relied upon by the Respondent was, at best, an uncorroborated opinion. Reliance was placed on **Gitau v Gitau & another [2025] KECA 1988 (KLR).** It was argued that even that opinion suggested that if an alleged subdivision and road reserve were effected, the Respondent's claimed easement could be extinguished. Counsel submitted that the Respondent's evidence did not validate the impugned acts, nor did it confer consent to upgrade the easement, and that the acts violated the Petitioner's rights to property and to a clean and healthy environment.

102. Counsel reiterated that the Respondent's land is serviced by Forest Lane Road, described as a public road connecting to Ngong Road, and cited ***Esther Wanjiku Mwangi & 3 others vS Wambui Ngarachu (suing as legal representative of the estate of Ngarachu Chege) [2019] eKLR***.

103. Notwithstanding the existence of the alternative road, counsel contended that the Respondent forcefully entered the Petitioner's land, felled indigenous trees and commenced excavation works aimed at widening the access route from a narrow murram track to a substantially wider corridor, contrary to the easement.

104. Counsel submitted that the change of circumstances, including the Respondent's intensified residential development and the availability of alternative tarmacked public access roads, extinguished the easement. Reliance was placed on ***Mwangi & 3 others vs Ngarachu (suing as legal representative of the estate of Ngarachu Chege) [2025] KECA 555 (KLR)***.

105. Counsel argued that if the Respondent's permits were intended to cover works on the easement on the Petitioner's land, nothing would have been easier than for such scope to be expressly stated. Reliance was placed on ***Nteere vs Kongoni Camp Limited [2022] KEELC 14891 (KLR)*.**

106. It was submitted that the Respondent's intended expansion and intensified use of the private access road to serve a townhouse development, without notice, consultation, consent and environmental assessment, constituted an unlawful variation of the easement and violated the Petitioner's rights under **Articles 42, 47, 60, 69** and **70** of the **Constitution**, **EMCA** and the **Fair Administrative Action Act.** Counsel cited ***Ken Kasing'a vs Daniel Kiplagat Kirui & 5 others [2015] eKLR***.

107. The Respondent's counsel submitted that the easement was a deliberately created and registered interest arising from the lawful subdivision of LR No. 6939 into three portions, namely LR Nos. 6939/2, 13065 and 6939/3. The subdivision was

approved subject to mandatory conditions, including registration of a right of way over Sub-Plot B in favour of Sub-Plots A and C and provision of a drainage wayleave. Survey Plan F.R. No. 122/9 of 5th July 1971 delineated the easement and embodied a binding undertaking by the transferor and successors. Compensation for the easement was effected through acquisition and amalgamation of LR No. 5830/9 with the former LR No. 6939/1, now LR No. 13065. The Petitioner therefore acquired its title with full knowledge of, and compensation for, the easement.

108. On trespass, counsel submitted that trespass requires proof of unlawful entry upon land in which the claimant has immediate and exclusive possession. Reliance was placed on the Court of Appeal's decision in ***Municipal Council of Eldoret vs Titus Gatitu Njau [2020] eKLR*.** It was submitted that the Respondent acted strictly within the registered easement while upgrading the access road, pursuant to a joint survey which confirmed a nine-metre corridor. It was submitted that the Petitioner adduced no credible evidence to support the assertion that the easement was limited to three metres. Entry within a valid easement, counsel argued, could not constitute trespass.

109. Counsel submitted that, in law an easement is a burden on the servient land for the benefit of the dominant land and limits the servient owner's proprietary rights,

notwithstanding the absence of any entry in the register. Reliance was placed on **Section 2** of the **Land Act**, **Sections 98 to 100** and **28** of the **Land Registration Act,** and the case of ***Kamau vs Kamau [1984] eKLR*****.** It was argued that the easement attached to the land, bound successors in title, and could only be extinguished by consent or lawful process, neither of which had occurred.

110. Counsel submitted that the Petitioner did not hold exclusive ownership over the easement corridor; that the easement was a valid and enforceable interest benefiting the Respondent's land, and that the Petitioner's title was necessarily subject to it. It was further submitted that no legal basis existed for extinguishing or cancelling the easement or excluding the Respondent from its lawful use. The Court was therefore urged to uphold the continued existence and enforceability of the easement in favour of the Respondent.

111. Counsel submitted that the Respondent obtained all requisite statutory approvals prior to undertaking the works, including an EIA licence from NEMA following submission of a comprehensive EIA Study Report which addressed the nature of the project, environmental impacts, traffic implications and the adequacy of the existing access road serving the project and written approvals from Nairobi City County and the County Department of Forestry.

112. It was further submitted that any challenge to the propriety of those approvals ought to have been directed to the relevant statutory bodies in accordance with the doctrine of exhaustion.

113. On compensation, counsel submitted that no illegality, trespass or encroachment had been established; that the Respondent's actions were undertaken within a registered easement and pursuant to valid approvals; that in the absence of unlawful conduct, no basis for compensation.

114. On competency of the Petition, counsel submitted that the Petition failed to meet the threshold in ***Anarita Karimi Njeru vs Republic [1979] eKLR***; that although numerous constitutional provisions were cited, the Petition did not demonstrate with precision how the Respondent violated any of the alleged rights and that the pleadings consisted of general allegations unsupported by evidence. Counsel relied on numerous authorities which I have considered.

Analysis and Determination

115. Having considered the pleadings, the affidavits on record, witnesses' testimony, and the rival submissions by counsel, the Court is of the view that the following issues arise for determination:

a. Whether this court has jurisdiction to determine this matter.

b. *Whether the easement existing over the Petitioner's land is subsisting and binding as against the Petitioner.*
c. *Whether the Respondent lawfully undertook cutting of trees, upgrading or improvement works on the easement.*
d. *Whether the Petitioner is entitled to the reliefs sought.*

116. The broad historical background is substantially a common ground. The Petitioner's land, originally LR No. 6939/1, and the Respondent's land, LR No. 6939/2, were subdivisions of the mother title, LR No. 6939, following subdivision approvals issued between 1970 and 1971. The other sub-division which arose from the said sub division was LR No. 6939/3. All the three sub divisions measured approximately 20 acres.

117. It is not disputed that, as a condition of the subdivision, access was to be secured for the benefit of LR Nos. 6939/2 and 6939/3 through LR No. 6939/1, and a right of way was thereafter reflected on the survey plan and noted on the Petitioner's title by dotted lines. The acceptance of the creation of a right of way over the Petitioner's land, LR No. 6939/1, is supported by correspondence between the Commissioner of Lands and the firm of Daly and Figgis, which facilitated the process of creation of subdivisions on LR NO. 6939.

118. The existence of an easement over the Petitioner's land is admitted, but the dispute has crystallized around three related questions. First, is the extent of the easement. The Petitioner's case is that the access was a narrow private murram track of about three metres width intended to serve two single family dwellings as they existed at the time, and that any widening, upgrading, or change in intensity of use required its consent.

119. The Respondent's case on the other hand is that the easement corridor is, on survey records and as confirmed by a joint survey report dated 7th September 2021, about 12 metres wide over a stretch of about 380 metres. However, according to the Respondent, it intents to only utilize 9 meters wide as a road reserve so as not to affect the existing life fence and tress.

120. Second, is whether the easement has become unnecessary or ought to be extinguished. The Petitioner maintains that the dominant land is not landlocked anymore because it is served by a public road, Forest Lane Road, and that the continued reliance on the easement is unreasonable and destructive. The Respondent maintains that the easement remains the most practical and secure access to its development and that availability of alternative access does not, of itself, extinguish a registered easement.

121. Third, is whether the Respondent violated the Petitioner's constitutional rights by entering its property, cutting down indigenous trees, and undertaking activities towards the upgrading and widening of the easement.

122. It is not contested that the Respondent undertook a residential development of about thirty units on LR No. 6939/2 after obtaining change of user and approvals for that project. The bone of contention is the Respondent's activities on or about 8th September 2021 along the access corridor passing through the Petitioner's land.

123. The Petitioner's case is that the Respondent's servants and contractors entered on the easement that traverses on its land without notice or consent, cut and removed indigenous trees, undertook excavation, and commenced preparatory works aimed at widening and upgrading the access road to serve the townhouse development, including the anticipated traffic associated with occupation.

124. The Respondent's position is that it did not trespass because it acted within the easement corridor as delineated in the survey plan and as confirmed by the joint survey, and that any tree removal and preparatory works were confined to the corridor and undertaken for purposes of improvement of the access forming part of the approved development.

125. The Petitioner anchors its complaint on **Articles 40, 42, 47, 69** and **70** of the **Constitution**, **the Fair Administrative**

Action Act, and **EMCA**, contending that the upgrading of an access road and felling of indigenous trees within a sensitive locality bordering Ololua Forest required environmental assessment and licensing specific to the activities on the servient land.

126. The Petitioner also treats the county permits produced by the Respondent, including the tree cutting certificate and renovation approval, as approvals directed at LR No. 6939/2 and incapable of authorising works on LR No. 13065 (formerly LR No. 6939/1), and therefore insufficient to justify the acts complained of.

127. The Respondent contends that it obtained the requisite county and environmental approvals for its development and for works associated with access, and that no additional EIA was required for improvement works within an existing easement corridor. It further contends that if the Petitioner's grievance is about environmental licensing or approvals, the statutory dispute resolution mechanism, including recourse to the National Environment Tribunal, ought to have been invoked, and that the Petition is therefore incompetent to the extent that it invites the Court to interrogate matters reserved for that process.

Whether this court has jurisdiction to determine this matter

128. The Respondent contended that this dispute ought to have been presented before the National Environment Tribunal on the ground that the Petitioner's grievance relates to environmental approvals.

129. The Petitioner, on the other hand, maintained that no Environmental Impact Assessment licence was issued in respect of the impugned activities undertaken on LR No. 13065 (formerly LR No. 6939/1) and that, in any event, the Tribunal has no jurisdiction to determine the alleged violations of fundamental rights and freedoms.

130. The doctrine of exhaustion requires a party, where the law has provided an alternative dispute resolution mechanism, to first pursue that mechanism before approaching the Court. Speaking to the rationale for this doctrine, the Court of Appeal in ***Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others [2015] eKLR*** observed as follows:

> ***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a***

postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

131. In the case of ***William Odhiambo Ramogi & 3 others vs Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested parties) [2020] eKLR***, a five-judge bench observed that the question of exhaustion arises where a litigant, aggrieved by an agency's action, seeks redress in court without first invoking the remedies available before that agency:

> ***"The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts…"***

132. The jurisdiction of the National Environment Tribunal is provided for in **Section 129(1)** of the **Environmental Management and Coordination Act.** In essence, the Tribunal hears appeals by persons aggrieved by the grant, refusal, transfer, variation, suspension or revocation of licenses or permits under the Act, the conditions imposed thereon, fees payable, or the making of environmental restoration and improvement orders by the Authority.

133. It is not disputed that the Respondent obtained from the Interested Party an Environmental Impact Assessment licence dated 4th August 2014 for the development of thirty town houses on LR No. 6939/2, and that a variation certificate dated 13th December 2017 extended the validity of that licence for a further 24 months.

134. Upon considering the pleadings and the reliefs sought, I am satisfied that the gravamen of the Petition is not an appeal against the grant, refusal, variation, or conditions of an Environmental Impact Assessment licence issued by the Authority in respect of the 30 houses.

135. The core complaint is that on 8th September 2021, the Respondent's servants and contractors entered the Petitioner's land, cut down indigenous trees, excavated, and commenced works aimed at widening and improving the access corridor, without the Petitioner's consent and outside the lawful scope of the easement.

136. The reliefs sought include injunctive and restorative orders, compensation, and cancellation of the easement. These are not remedies contemplated under **Section 129(1)** of the **EMCA**, the Tribunal's jurisdiction being appellate in nature and limited to decisions made by the Authority under the Act.

137. The doctrine of exhaustion would arise only where there exists a specific decision capable of appeal under **Section 129(1)** of **EMCA** and where the statutory forum is able to grant an effective remedy.

138. In this case, although the Petitioner has made reference to the validity and scope of the Environmental Impact Assessment approvals issued in 2014 and 2017, no appeal has been lodged against any such decision, and no decision by the Authority authorising the impugned road works on LR No. 13065 (formerly LR No. 6939/1) in 2021 has been identified. In the absence of an appealable decision within the meaning of **Section 129(1),** the exhaustion doctrine does not apply.

139. In addition, the Petition raises questions touching on proprietary rights over land, the scope and legality of an easement, alleged trespass, and the alleged threatened or actual violation of rights under **Articles 40, 42, 47, 69** and **70** of the **Constitution.** Those issues are not framed as a statutory appeal against a decision of the Authority within the meaning of **Section 129(1**) of **EMCA.** In the

circumstances of this dispute, I find that the doctrine of exhaustion, as invoked by the Respondent, does not oust this Court's jurisdiction, and the Petition is properly before this Court.

Whether the easement exists and whether the Respondent has the right to use it

140. The Court of Appeal in ***Mwangi & 3 others vs Ngarachu (Sued as the Legal Representative of the Estate of Ngarachu Chege - Deceased) [2025] KECA 555 (KLR)*** defined an 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."***

141. The essential characteristics of an easement were set out in **Re Ellenborough Park [1956] Ch 131**, namely, that there must be a dominant and servient tenement; the easement must accommodate the dominant land; be capable of forming the subject matter of a grant; and the dominant and servient tenements must be owned by different persons. These elements remain the standard for determining the existence and validity of easements within Kenyan law.

142. **Part X** of the **Land Act 2012** and **Sections 98** to **100** of the **Land Registration Act 2012** establish a comprehensive framework on the creation of easements through a prescribed form, as well as their enforcement, enjoyment and cancellation of easements. These provisions are however not retrospective in application. **Section 137(1)** of the **Land Act** expressly indicates that the provision on easements applies to easements made or coming into force on or after the commencement of this Act.

143. **Section 107 (1)** of the **Land Registration Act,** preserves rights and interests validly created prior to the commencement of the 2012 Act, with the result that such easements continue to subsist and are governed, as to their creation and validity, by the law applicable at the time they arose, unless expressly provided otherwise.

144. Prior to 2012, easements were created by statute, at common law, by deed or will, or in equity, through prescription. The nature and incidents of easements were earlier explained by the Court of Appeal in ***Kamau vs Kamau [1984] KECA 1 (KLR)*** 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…"

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.

A right of way is an obvious example of an easement."

145. The Court in the above case emphasised that once validly created, an easement runs with the land, binding successors in title to both the dominant and servient tenements.

146. In ***Brooke Bond (K) Limited vs James Bii [2013] KECA 498 (KLR),*** the Court of Appeal, while recognising that easements may arise by necessity as stated in ***Kamau v Kamau (supra),*** affirmed that in Kenya, easements are also creatures of statute, require creation in writing, and need not be created by deed. This position was recently affirmed in ***Mwangi & 3 others v Ngarachu (Sued as the Legal Representative of the Estate of Ngarachu Chege - Deceased) [2025] KECA 555 (KLR).***

147. Creation of easements by prescription is provided for under **Section 32** of the **Limitation of Actions Act**, which stipulates that:

"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."

148. In the present case, the easement over the Petitioner's land is not alleged to have arisen by equity or prescription. It was created as a condition for the subdivision of the original parcel LR No. 6939 into three portions, and was expressly noted on Grant IR No. 26024 in respect of LR No. 13065 (formerly LR No. 6939/1), the servient land (the Petitioner's land).

149. The Court of Appeal in ***Brooke Bond (K) Limited v James Bii [2013] KECA 498 (KLR)*** held that an easement constitutes a conveyance of an interest in land and must be effected by way of a transfer within the meaning of the **Registration of Titles Act, Cap 281**.

150. Similarly, in this case, the servient land, LR 6939/1 which later became LR No. 13065, on which the easement is present, was registered under the **Registered Titles Act (now repealed). Section 34** of that Act recognised easements as conveyances of interests in land and required that such interests be created in writing and noted against the title. It provided as follows:

"When land is intended to be transferred or any right of way or other easement is intended to be

created or transferred, the registered proprietor or, if the proprietor is of unsound mind, the guardian or other person appointed by the court to act on his behalf in the matter, shall execute, in original only, a transfer in form F in the First Schedule, which transfer shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such description as may be sufficient to identify it, and shall contain an accurate statement of the land and easement, or the easement, intended to be transferred or created, and a memorandum of all leases, charges and other encumbrances to which the land may be subject, and of all rights-of-way, easements and privileges intended to be conveyed.”

151. In the result, this Court finds that the easement in question was validly created and annexed to the dominant land, with the consequence that its benefit passed with the dominant tenement to the Respondent and its successors, while its burden passed with the servient tenement to the Petitioner and its successors. The Respondent therefore retains, in principle, the right to use the easement, subject to its lawful scope and manner of enjoyment.

152. With respect to the dimensions of the easement, the Petitioner has asserted that the access road is a narrow murram track of approximately 3.5 kilometers (*sic*) in length and 3 metres in width, while the Respondent contends that the easement measures about 12 metres in width over a length of approximately 380 metres.

153. The Petitioner did not place before the Court any survey plan, deed plan, or expert evidence establishing that the registered easement was limited to 3 metres width. Indeed, the Petitioner's witness conceded in cross-examination that the precise dimensions were not known and that the access appeared as a dotted line on the title. That concession significantly weakens the Petitioner's position on the actual width and length of the easement.

154. The Respondent relied on a report dated 28th September 2021, described as a joint survey conducted in September 2021, which indicated that the easement as demarcated on the ground measured approximately 9 metres in width.

155. The Petitioner challenged both the authenticity and the probative value of the report and denied having instructed the surveyor, Wycliffe Abiero to sign the said joint report. However, while no evidence was produced to demonstrate formal appointment, equally, no counter-survey, expert testimony, or alternative measurements were placed before the Court to rebut the report's findings.

156. DW2, a licensed land surveyor, testified that he was first engaged in 2013 to establish the boundaries, features, and access to LR No. 6939/2, and confirmed that the parcel originated from subdivision of LR No. 6939.

157. On the access, DW2 testified that the easement lies within the existing fenced corridor and measures approximately 12 meters by 380 meters. He stated that subdivision approval required a right of way through the Petitioner's land to serve LR Nos. 6939/2 and 6939/3, and referred to correspondence from the Commissioner of Lands, acceptance by Daly & Figgis Advocates, and Survey Plan F/R No. 122/9 dated 5th July 1971, which clearly depicts the right of way.

158. Based on survey records, DW2 stated that the registered easement measures approximately 12 metres by 380 metres, and that the portion encroaching on LR No. 6939/1 was compensated through amalgamation of LR No. 5830/9 to form LR No. 13065. He testified that the benefit of the easement runs with the dominant land.

159. DW2 stated that the access road has never been separately surveyed on the ground, which is why it appears as a dotted line in survey records. DW2 further testified that following the dispute in 2018, a joint survey was conducted in 2021 by himself and Wycliffe Abiero, identified as the Petitioner's surveyor, and that the survey confirmed the easement corridor and recommended that upgrading be confined to a

9-metre width to preserve trees and fencing, while recognising the full registered width of 12 metres.

160. He stated that the survey demonstrated that upgrading within a 9 metre corridor would affect few trees, but full utilisation of 12 metres would require demolition of the fence line and affect mature trees within the additional three metres.

161. He stated that the 1 acre compensation aligns with an easement width of 12 metres; that initially, the access was from Ololua Ridge Road, and the easement was created at the edge of Ololua Forest to serve the subdivision, and that Forest Lane Road was developed later, around 2020, providing back access. He maintained that survey records support a 12-metre easement and that both parties' surveyors signed the joint survey report.

162. The evidence of the surveyor, DW2, and an officer from the Directorate of Land Information Management Systems, DW3, was not challenged by the Petitioner by way of another expert report. As was held by the Court of Appeal in ***Williams & Kennedy Limited vs David Kimani & others, Nairobi Civil Appeal No. E682 of 2024***, the proper way to counter or rebut expert reports is by obtaining a report from a different expert.

163. Indeed, this court is also satisfied with the evidence of DW3 that the original proprietor of LR No. 6939/1 (the Petitioner

or its predecessor) was compensated for the easement through the acquisition and amalgamation of LR No. 5830/9, measuring approximately one acre, into the servient land. This evidence was neither refuted nor countered by the Petitioner and goes to the existence and validity of the easement, and the size enumerated above.

164. Taking the totality of the evidence on record, this court has no reason to doubt the Respondent's evidence that the easement was evaluated against the width of 9 metres found to exist on the ground, while 12 metres is the actual width of the easement.

165. Further, it is notable that under **Regulation 8** of the **Physical and Land Use Planning (General Development Permission and Control) Regulations 2021,** the minimum width for a public through road is 12 metres, while where the road is private, the minimum is not less than nine metres wide, subject to a truncation of four and a half metres.

166. The upshot of the foregoing is that the applicable legal framework recognizes 9 metres as the minimum lawful width for a private access road, absent express registration or approval to the contrary.

167. That being the case, and in the absence of a written agreement, it does not matter that the dominant land was no longer landlocked, or that the access was limited to serving two single-family dwellings on land whose user was

agricultural. Therefore, it is immaterial that the Respondent had identified Ngong Road and Forest Lane Road as the designated access routes or that the Respondent had changed the user of its land from agricultural to residential.

168. The critical question that follows is whether the Respondent was entitled to enter the Petitioner's land, fell indigenous trees, excavate, and undertake works aimed at widening or upgrading the access road.

Whether the Respondent lawfully undertook cutting of trees, upgrading or improvement works on the easement

169. The dispute under this issue centers on the Respondent's actions on or about 8th September 2021 along the access corridor traversing the Petitioner's land. It is not contested that the Respondent's agents entered the Petitioner's land, cut indigenous trees, undertook excavation works, and commenced preparatory activities aimed at widening and upgrading the existing murram access road to serve the Respondent's multi-unit residential development.

170. The Petitioner contended that these activities amounted to trespass and were undertaken without notice, consultation, consent, or compensation. It was further contended that the activities fell within projects contemplated under the **Second Schedule** to the **Environmental Management and Coordination Act,** including construction or rehabilitation

of access roads and developments undertaken within an environmentally sensitive locality, given the proximity of the suit property to Ololua Forest.

171. The Respondent conceded that trees were cut and excavation undertaken but maintained that the same was done pursuant to approvals issued by the County Government, including an Environmental Impact Assessment licence issued in respect of the development on LR No. 6939/2, a renovation permit dated 27th July 2021 authorising cabro works on that parcel, and a tree-cutting certificate dated 3rd September 2021.

172. The Respondent further contended that no additional environmental authorization was required for works undertaken within an existing easement, which it viewed as ancillary to the approved development.

173. According to the evidence of the surveyor, DW2, only five trees were to be felled within the 9 meter corridor, and that the parties agreed that only three trees would be removed because the Respondent was to use a 6 meter carriageway, with the balance reserved for walkways, cycle tracks, drainage and allied features. He stated that mature trees within the remaining 3 metres were to be preserved, pipelines marked, access controls agreed for security, and the corridor marked on the deed plan for future reference.

174. Access to land is an inherent incident of land ownership. An easement or right of way exists for the purpose of enabling

the dominant land to be reasonably accessed and enjoyed. Where such an easement exists, the dominant owner is entitled, at common law, to enter the servient land to carry out such works as are reasonably necessary to render the right of way effective, including maintenance and ancillary acts required to keep the access usable.

175. This position was upheld in the case of ***Carter & Another v Cole & Another [2006] EWCA Civ 398*** where Longmore LJ summarised the principles on the right to repair an easement as established by the courts through the years:

> ***"(1) A grantor of a right of way ("the servient owner") is under no obligation to construct the way;***
>
> ***(2) The grantee may enter the grantor's land for the purpose of making the grant of the right of way effective viz to construct a way which is suitable for the right granted to him ("the dominant owner"); see Newcomen v Coulson (1887) 5 ChD 133, 143 per Jessel MR;***
>
> ***(3) Once the way exists, the servient owner is under no obligation to maintain or repair it, see Pomfret v Ricroft (1669) 1 Wms. Saunders (1871 ed) 557 per Twysden J, Taylor v Whitehead (1781) 2 Doug KB 745 and Jones v Pritchard [1908] 1 Ch 630, 637, per Parker J;***

(4) Similarly, the dominant owner has no obligation to maintain or repair the way, see Duncan v Louch (1845) 6 QB 904;

(5) The servient owner (who owns the land over which the way passes) can maintain and repair the way, if he chooses;

(6) The dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost: Taylor v Whitehead (1781) 2 Doug KB, per Lord Mansfield. He has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner, see Liford's Case (1614) 11 Co Rep 46b, 52a (citing a case in the reign of Edward IV) and Jones v Pritchard [1908] 1 Ch 630, 638 per Parker J.”

176. From the foregoing authorities, it is evident that under common law, the owner of the dominant land is entitled, at his own expense, to enter the servient land for the limited purpose of maintaining or repairing an existing right of way, provided such works are reasonably necessary for the enjoyment of the easement and are carried out in a reasonable manner.

177. That right, however, is neither absolute nor unfettered. It is exercised subject to the Constitution and statutory framework on environmental impact licensing and development planning.

178. The evidence before the Court demonstrates that the access road in question served the Respondent's land and that the Respondent held a lawful right of way over the Petitioner's land. To that extent, entry onto the easement corridor for purposes connected with securing and maintaining access to the dominant land cannot, of itself, be characterised as trespass.

179. The cutting of trees and clearing of vegetation along the access corridor was undertaken in furtherance of that access and fell within the scope of acts ordinarily contemplated in the reasonable enjoyment of a right of way.

180. The Court is therefore unable to agree with the Petitioner's contention that the mere entry onto the servient land, or the carrying out of works incidental to access, automatically constituted trespass. An easement necessarily qualifies the servient owner's exclusive possession to the extent required to give effect to the right granted.

181. Of course, the existence of an easement does not exempt the dominant owner from compliance with statutory and constitutional obligations governing land use and environmental protection. While access-related works may be

permissible in principle, the manner, scale, and environmental impact of such works remain subject to the Environmental Management and Coordination Act and the regulatory oversight of the National Environment Management Authority, where applicable.

182. It is true, as argued by the Petitioner, that the reading of the licenses and approvals relied upon by the Respondent did not expressly authorise works on LR No. 13065 (formerly 6939/1), the Petitioner's land. However, a distinction has to be made between the Petitioner's land and the easement. The impugned works were in respect to a surveyed road measuring 12 meters by 380 meters and not on LR No. 13065.

183. The Petitioner's Counsel contended that the Respondent's intended upgrading of the access road from an earth or murram track to cabro or tarmac on the 'Petitioner's land' was undertaken without authorization from the environmental regulator and was therefore contrary to **Section 59** 0f **EMCA,** the original terms of the easement and the applicable physical planning framework.

184. Counsel further argued that under the Second Schedule to EMCA and the relevant regulations, works of the nature complained of required a prior environmental assessment and licensing. In the absence of such licence, it was contended, the intended works were unlawful and posed a

threatened violation of **Articles 42** and **69** of the **Constitution** and **Sections 3** and **58** of **EMCA.**

185. On the other hand, the Respondent has argued that having obtained an EIA License from NEMA for the development of the 30 units on LR No. 6369/2, additional environmental authorization was not required for works undertaken within an existing easement, which it viewed as ancillary to the approved development.

186. It is true, as argued by the Petitioner, that under Section **58(1)** of the **Environmental Management and Coordination Act,** a proponent of any project specified in the **Second Schedule** must submit a project report to the National Environment Management Authority before commencing such a project. Activities involving local or access roads are categorised as low-risk projects under the **Second Schedule** of **EMCA.**

187. Under the **Environmental (Impact Assessment and Audit) Regulations,** projects in the Second Schedule that are *low-risk* or *medium-risk* must submit a Summary Project Report (SPR) to NEMA. This is a lighter screening and licensing process. Only projects with potential for significant adverse impacts are required to submit a full EIA study report.

188. Having found that improving or paving a short local road, such as laying cabros over 380 m by 9 m is a low-risk project**,** where a Summary Project Report and license are required, the Respondent cannot lay cabros on the said 9-meter easement without an EIA license duly issued by NEMA.

189. However, this does in any way, as already stated above, prohibit the Respondent, or the residents of LR No. 6939/2 from using the 9 meter road which is the crux of the Petition. The Respondent and residents of LR No. 6939/2 do not require the permission of the Petitioner to pave and use the said road of access.

190. Further, the Respondent will require a permit from the Nairobi County Government to cut down trees that are standing on the projected 9 m by 380 m. Having found that indeed the access road had to be opened up, and the felling of trees was on the basis of a permit issued by the County Government of Nairobi, the same was done lawfully notwithstanding that it referred to LR N0. 6939/2, and not the access road.

Conclusion

191. This court has found that the Respondent's development on its land has not altered the identity or character of the dominant land. The land remains residential, and the easement continues to be used for vehicular and pedestrian access to residential dwellings, albeit at an increased level.

192. An increase in traffic arising from residential intensification, without more, does not amount to an unreasonable or excessive burden on the servient land. The evidence shows increased frequency of use, not a change in the nature of the use contemplated at the time of the grant.

193. Further, the existence of Forest Lane Road, while relevant, does not render the easement redundant or unlawful. The easement was expressly created, has subsisted over time, and has not been extinguished by agreement, statute, or operation of law.

194. The Court accordingly finds that the Respondent's use of the easement constitutes a permissible intensification of the same residential access for which it was created, and not a change in its essential character.

195. Further, the court has found that it is permissible under the law for the Respondent to upgrade the said access road after obtaining a license from NEMA, the upgrading being a low risk project.

196. To the extent that the court has found that the Respondent did not trespass on the Petitioner's land, the Petitioner is not entitled to compensation as claimed. In the result, the Petitioner's Petition dated 13th September 2021 is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 5th Day of February, 2026.

O. A. Angote

Judge

<u>In the presence of</u>:

Mr. Kinyanjui for Mr. Litoro for the Petitioner

Ms. Akello for Otieno for the Respondent

Mr. Ganya for the Interested Party

Court Assistant: Tracy