

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. 13 OF 2019

GRACE MAGOVA WANJALA
(Suing as the Administrator of the Estate of the late
JOHN **MAKESI**
WANJALA-----**PLAINTIFF**

VERSUS

VIPUL **R.**
DODHIA-----
DEFENDANT

JUDGMENT

1. The plaintiff brought this suit as the widow and legal representative of the estate of the late John Wakesi Wanjala. In the plaint dated **7/2/2019**, she sought:
 - (a) **Declaration that Plot No. Kitale Municipality Block 21/Mahali/18 belongs exclusively to the estate of the deceased.**
 - (b) **Permanent injunction restraining the defendant, his agents, servants, or otherwise, whosoever acting through him, from trespassing upon, creating any road, or committing acts of destruction on the suit land.**

2. The plaintiff contended that the late John Makesi Wanjala was the registered owner of the suitland measuring **1.934 Ha** or thereabout, which has **3**

housing units under occupation by tenants. It is deposed that on **3/2/2019**, the defendant without any lawful or reasonable cause, trespassed into the suit land, destroyed the fence, removed the wire fence and its posts, cut down trees, and commenced erecting an access road on the said land, without the consent and or permission of the plaintiff and the widow of the deceased and the administrator of the estate.

- 3.** As a result, the plaintiff averred that the estate suffered serious losses and damages due to the defendant's unlawful acts, including threats by tenants occupying the rental houses to vacate them, following interference with their peaceful occupation.
- 4.** The defendant opposed the suit through a statement of defence dated **29/4/2019**, terming the suit as incompetent, bad in law, and an abuse of the court process. The defendant averred that the existing access road on the ground is located on and passes through the width of land title No. **Kitale Municipality Block 32/2**, belonging to Avir Kanti Shah, who is the principal of the defendant.
- 5.** The defendant averred that on several occasions, he has written to the County Survey's office requesting the correction of the access road encroaching into

the aforesaid parcel of land, after which the survey process was conducted to determine the exact position of the access road, starting at Kwa Muthoni Market to Robinson Teachers College.

- 6.** The defendant averred that after the survey exercise, and in line with the area survey map, it was established that the actual road was L.R. No. **1972/R** and borders L.R. No. Kitale Municipality Block **32/2**, and ought to be **10** meters wide. The defendant averred that the surveyors also recommended that the access road be marked and moved to the corner position on the ground to conform with the area survey map.
- 7.** The defendant averred that the process of opening up the access road was slated for **21/2/2019**, and as it was going on through the relevant authorities, the plaintiff agents disrupted the exercise, acting in cahoots with the area Member of County Assembly. The defendant therefore denied the alleged acts of encroachment, destruction, loss, or damage as contained in paragraphs **3, 4, 5, 6, 7, 8, 9, 10**, and **11** of the plaint.
- 8.** Through an order dated **14/3/2025**, this court ordered that the dispute be referred to the Land Surveyor, Trans Nzoia, and the Land Surveyor

determine the boundary between land title No. **Kitale Municipality Block 21/Mahaki/18 and 32/2**, in line with the law, and to furnish the court with a report by **30/5/2025**.

- 9.** At the trial, **Grace Magova Wanjala** testified as **PW1**. She relied on a witness statement dated **1/7/2019** as her evidence-in-chief. PW1 told the court that she was the widow and administrator of the estate of the late John Mokesi Wanjala, who, in **1982**, bought the suit land alongside **13** other original shareholders.
- 10.** PW1 told the court that before the division or demarcation of the land, the instant access road was in existence, serving neighbours bordering L.R. No. **6622**. She said that the person who bought land formerly belonging to the Kenya Farmers Association knew of the access roads at the time of sale and never objected to the same.
- 11.** PW1 told the court that for the last **37** years, the access road has been under the maintenance of both the County and the National Governments, with full knowledge that it passes in the correct place. PW1 said that the physical appearance of her land on the ground was in line with the area survey map. PW1

urged the court to allow the status *quo* to be maintained.

- 12.** PW1 relied on a copy of a title deed for the suit land, a copy of an official search certificate dated **28/1/2019**, a certificate of confirmation of grant in **Kitale HC Succession Cause No. 146 of 2011**, dated **7/11/2017**, a death certificate dated **20/9/2011**, and the area map as **P. Exhibit No. (1), (2),(3), (4), and (5)**, respectively.
- 13.** PW1 told the court that her land was **4.8 acres** as per the title deed. PW1 said that she did not know the parcel number of the defendant's land; otherwise, what is before the court is only the sale agreement between Kenya Farmers Association Ltd and Cherangany Hills Ltd. PW1 said that if an access road is created on her land, it will affect her two developed houses, which will be pulled down. PW1 said that her late husband bought the land from the late Wafula Wabunge and was demarcated in **1982**, when the access road was still in existence.
- 14.** PW1 blamed the defendant for blocking or encroaching on the original access road using cement blocks in **2019**, leading to human and vehicle traffic on the road to start utilizing part of her

land as an access road. PW1 said that later on, the cement blocks were removed by unknown people.

- 15.** PW1 said that it was the defendant who interfered with the access road owned by the public. PW1 said that she was not bringing the suit on behalf of the members of the public. PW1 said that she obtained the title deed in **November 2005**. She did not produce the paper trail leading to the title deed before the court.
- 16. Vipul Dodhia** testified as **DW1**. He relied on a witness statement dated **6/5/2019** as his evidence-in-chief. DW1 told the court that he was a director of Cherangani Hills Ltd. He relied on a sale agreement dated **17/6/2013**, a copy of the title for **Kitale Municipality Block 32/2**, and a letter dated **4/7/2014** as **D. Exhibits No. (1), (2), and (3)**.
- 17.** DW1 denied trespassing into the plaintiff's land by creating an access road therein, as alleged or at all. DW1 said that the access road was created by the County Government of Trans Nzoia, since it is in charge of maintaining roads. DW1 blamed the plaintiff for blocking the rightful access road with the help of the area Member of County Assembly, causing the same to be erected on his land.

- 18.** DW1 insisted that **Kitale Municipality Block 32/2** belonged to him by virtue of the sale agreement and a transfer which was effected in his favour in **2018**. DW1 said that as of **2019**, he had authority from the seller Avir Kanti Shah, who is based in Dubai, to act on his behalf.
- 19.** DW1 said that he did not know the history of the access road, which has been in existence for a while. DW1 confirmed that he owns some road construction equipment but denied using it to make the access road in **2019**. DW1 said that he is the one who lodged a complaint after an access road was built on his land by writing a letter to the survey office dated **4/8/2015** to ascertain the exact locality of the access road. DW1 denied attempting or creating an access road on the plaintiff's land; otherwise, the two parcels of land are distinct and separate from each other.
- 20.** DW1 said that he is a brother and an appointed agent of Avid Kanti Shah, the registered owner of L.R. No. **6624**, originally No. **1792/4**, which was purchased from **KGGCU** by Cherangani Hills Ltd, a family company, after all the necessary consents and permissions by the relevant authorities were issued.

- 21.** DW1 said that there exists a public access road measuring **14** meters between the parcels, which the plaintiff unlawfully grabbed and fenced off, resulting in the existing road in the ground passing through the land owned by his brother. DW1 said that he had written to the County Survey office to correct the access road that encroaches on his brother's land. He said that later, the survey office came and indeed established the boundaries of the access road as per the map and recommendation for its marking and relocation to its correct position on the ground to align with the official area survey map.
- 22.** DW1 said that the opening of the access road by the relevant authorities was scheduled for **21/2/2019**, and while on, the plaintiff's agents and the area Member of County Assembly disrupted the same. DW1 said that though the access road has been in existence for a long time, it had wrongly and illegally been located on his land, after the plaintiff allegedly, unlawfully took over and fenced off a portion of the access road, which serves as the boundary between **Block 32/2** and the plaintiff's land.
- 23.** **DW1** said that he has never encroached on the plaintiff's land otherwise; encroachment of his land by the access road has been confirmed by the

relevant authorities, and that all that remains is to rectify the road position on the ground to align it with the rightful area map coordinates.

- 24.** The defendant told the court that he concedes and proposes that a survey be conducted to establish the correct and true position of the access road to bring the dispute to a conclusion.
- 25.** The plaintiff relies on written submissions dated **15/12/2025**, isolating four issues for determination. On the justification by the defendant to erect or create an access road on the plaintiff's land, the plaintiff submitted that there was no such justification without an express permission from her, or without a lawful court order to create an access road on private land.
- 26.** The plaintiff submitted that the defendant has produced no documents to prove ownership of **Kitale Municipality Block 32/2**, or as a brother, or a power of attorney from Avir Kanti Shah, who sold him the land.
- 27.** The plaintiff submitted that the defendant was unable to substantiate the contents of paragraph **11** of the statement of defence, that the access road was created by the relevant authorities. The plaintiff submitted that in the absence of ownership

documents for **Kitale Municipality Block 32/2**, the defendant had no basis to claim an equitable interest over the access road.

- 28.** The plaintiff submitted that the defendant lacks the capacity to lodge a claim or defend a claim over the access road. The plaintiff submitted that the acts of the defendant to create an access road on the deceased's land were unwarranted and likely to occasion loss and damage to the estate of the deceased. The plaintiff submitted that access roads are created by the government, and if the defendant is not restrained, her tenants, currently occupying the rental houses on the suit land, will vacate.
- 29.** As regard implementation of the surveyor's report, the plaintiff submitted that the maintenance of the access road is under the County Government, which has not complained over the access road position, nor have the bona fide owners of the adjacent parcels of land to the access road as it exists, protested or complained or sought to be joined in this suit counterclaiming for the access road.
- 30.** The plaintiff submitted that the surveyor's report was not produced by its maker and that the court should not order its implementation, as the defendant did not file a counterclaim seeking orders that the

position of the access road be altered. The plaintiff submitted that it is not in the interest of justice for the court, as an impartial arbiter, to grant orders that were not sought or counterclaimed by the defendant in his defence.

- 31.** The defendant relies on written submissions dated **15/12/2025**. He submitted that the claim is a boundary dispute and not the alleged trespass. Reliance is placed on **Section 18** of the Land Registration Act, that the dispute should first be resolved by the Land Registrar, who is the first port of call.
- 32.** On proof of ownership, the defendant submitted that the plaintiff failed to produce any evidence to show that she acquired the suit parcel through succession proceedings, such as the transfer forms, land control board consent, and stamp duty payment receipts. Further, relying on **Section 107(1)** of the Evidence Act, the defendant submits that the burden of proof of the existence of certain facts lies on he who alleges that such facts exist.
- 33.** The defendant submitted that the suit property was created irregularly and therefore cannot be protected under **Section 26 (1)(b)** of the Land Registration

Act. Reliance is placed on **Justin Gatumuta -vs- Kenya Power & Co. Ltd [2018] eKLR.**

34. Regarding trespass, the defendant relies on **Re B(children) (FC) [2008] UKHL 35** to submit that PW1 confirmed the existence of a public road maintained by the County Government and therefore trespass could not occur. Further reliance is placed on *Black's Law Dictionary, 8th edition, Section 3 (1)* of the Trespass Act, and **William Kamunge Gakui -vs- Eustace Gitonga Gakui (2016) eKLR.** The defendant also submitted that the plaintiff has not met the threshold to warrant the injunctive orders sought.

35. The court has carefully apprised itself of the pleadings herein, the evidence tendered, and the written submissions. The issues called for my determination are:

(1) If the court has jurisdiction to hear and determine the dispute.

(2) If the plaintiff has proved trespass, and or encroachment of her land by the defendant.

(3) If the defendant has proved encroachment of the access road by the plaintiff.

(4) If the acts of the plaintiff and the defendant are justified.

(5) What is the order as to costs?

- 36.** A cause of action is acts on the part of the defendant that gives the plaintiff a reason to complain. See **D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & another, [1982] KLR 1**. The plaintiff is complaining of the creation or erection, by the defendant, of an access road on her land contrary to the existing access road since **1982**, when her late husband acquired the suit land.
- 37.** The defendant, in his defence, levels blame on the plaintiff for interfering with the access road leading to the current use of part of **Block No. 32/2** as the access road.
- 38.** The Public Roads and Roads of Access Act, Cap **399**, establishes the framework for the creation and management of public roads in Kenya. It outlines the appointment of road boards, the identification and creation of access roads, and the rights of landowners regarding access to public roads.
- 39.** **Sections 8, 9, 10, 11, 12, 13, 14,** and **16** of the Act provide for the dedication of a line of public travel, application to construct a road of access, notice to be served on land owners affected, granting of leave to construct road of access, notification of

order to be registered, right of way over road of access, power to cancel or alter a road of access, and appeals by any aggrieved party to court.

40. Sections 139-144 of the Land Act **2012** relate to right of way, public right of way, and the powers of courts to enforce public rights of way. See **Dellian Langata Ltd -vs- Symon Thuo Muhia & Others [2018] eKLR.**

41. Article 40(3) of the Constitution provides that in the event land is acquired for a public purpose, there shall be adequate and prompt compensation for the same. In **Jackson Kipngeny Kipkurere & another -vs- David Busienei & Another [2021] eKLR,** the court observed that the procedure for creating a public access road, as provided by the Public Roads and Roads of Access Act and **Section 98** of the Land Registration Act, had to be followed. The court held that unless an owner of land voluntarily grants an easement on his land, the court can only grant an access order in respect of a suit land, where one is landlocked, subject to several conditions, including reasonable compensation under **Section 140** of the Land Act.

42. In **Dellian Langata Ltd -vs- Symon Thuo Muhia** (*supra*), the real nature of the dispute was whether

the alleged obstructed access road was private or public. The court, based on **Section 8(1)** and **(2)** of the Public Roads and Roads of Access Act, said that the conversion of a road of access to a public road was by an application to the Minister. The court held that there is a distinction between a public road and a road of access.

- 43.** The court said that a public road is set apart and designated as such, and once set aside is available for use by all members of the public without limitation or restraint, save as may be permitted by relevant authorities. A road of access was defined as having a connotation of private usage, and which is created through an application under the provisions of the Public Roads and Roads of Access Act.
- 44.** Having set the law governing access roads as well as public roads, the next question is how a party establishes the existence of a public or an access road. **Section 38** of the Evidence Act provides that any entry in any public or other official book or register, or record stating a fact in issue or a relevant fact and made by a public servant in the discharge of his official duty or by another person in performance of a duty is itself admissible.

45. The burden of proof is on he who alleges the existence of certain facts, the basis of which he wants the court to uphold his right or liability.
46. Trespass is defined under **Section 3(1)** of the Trespass Act as entry into, remaining upon, or erecting a structure on private land without reasonable excuse or consent by the occupier.
47. In **Agalo -vs- County Government of Trans Nzoia & Others [2025] KEELC 4482 [KLR] (11th June 2025) (Judgment)**, the court cited **Kenya National Highway Authority -vs- Shalien Masood Mughal& Others [2017] eKLR**, where the court held that there was scientific proof through a survey report that the disputed land had encroached on a road reserve and that a road reserve was an overriding interest which did not require to be noted in the register of the title.
48. The court also cited **Niaz Mohamed Jan Mohamed -vs- Commissioner for Lands & Others [2003] eKLR**, that it mattered not that the land acquired for a public road was not under use for it to remain a road reserve, a street, and vested in the relevant authority to hold it in trust for the public.
49. In **Kenya Urban Roads Authority Ltd -vs- Belgo Holdings Ltd [2025] KECA 764 [KLR] (9th May**

2025) (Judgment), the court observed that the fact that a person is lawfully registered proprietor of a land does not bar a claim based on an overriding interest being made and upheld.

- 50.** In this suit, the burden was on the plaintiff to prove encroachment or trespass to her land by an alleged creation of an access road on her land. The court in **D.T. Moi -vs- Mwangi Stephen Muriithi & Another [2014] eKLR**, said that a plaintiff has a duty to satisfy the court that his claim has been proved even in the absence of a rebuttal from the other side.
- 51.** In **Charter House Bank Limited -vs- Frank N. Kamau[2016] eKLR**, the court said that before a court can conclude that the plaintiff's suit is proved, credible and believable evidence must be adduced. The nature, extent, particulars, and details of how much of the plaintiff's parcel of land was encroached, dates when it occurred, and the perpetrator of the same were not pleaded in the body of the plaint or substantiated through any scientific evidence.
- 52.** Public roads or access roads, and their existence is a creation of the law. The said laws are the Public Road and Roads of Access Act, the Kenya Roads Act,

Article 62 and **66** of the Constitution, the Land Act, the Land Registration Act, and the Survey Act.

- 53.** In **Kenya Anti-Corruption Commission -vs- Lima Ltd & Others [2019] eKLR**, the court observed that public land could not be alienated in a manner that denies the public their right to use the land. **Article 62(1)(a)** of the Constitution provides for the right of access to public land. It is based on the principle of public interest and of free movement and access to public amenities, resources, and spaces.
- 54.** In **Republic -vs- Ministry of Lands & Others [2015] eKLR**, the court observed that any action that impedes public access to reserved land undermines the social contract between the state and the citizenry, which is essential for good governance and the rule of law. There is no evidence that the plaintiff made protests or complaints to the relevant authorities, such as the Lands Office, survey office, Kenya Road Authority, Kenya Urban Roads Authority, Kenya National Highways Authority, the National Land Commission, the County Government, or the Traffic Department, that the defendant had tampered with an access road or a public road.
- 55.** The plaintiff did not call the Land Registrar or Surveyor to produce the Registry Index Map, survey

map, survey reports, and development plan as a basis that the defendant had been found culpable or liable for interfering with a public road or access roads, contrary to the existing public records on a designated public road or access road.

- 56.** For a party to prove trespass, he has to show that his rights to use and access to land were violated. Exclusive and immediate possession of the land is key. See **M.Mukanya -vs- M'mbijiwe. (1984) KLR 761.**
- 57.** In **Vaz -vs- Oyatsi & Others [2025] KECA 251 [KLR] (21st February 2025) (Judgment)**, the court said that any authorised entry, whether present or continuous, was trespass, and under Black's Law Dictionary 8th Edition, trespass is like a permanent invasive on another's rights.
- 58.** In **Doshi v Chemutut & 7 others [2025] KECA 776 [KLR]**, the court held that trespass, as defined in **Ochieng -vs- Okumu [1995] KECA 169 [KLR]**, was an injury to a possessor's right, and therefore the proper plaintiff in an action of trespass to land is the person who has a title to it, or a person who is deemed to be in possession of the land.
- 59.** As to the ingredients of trespass, the court cited William **Kamunge Gaki -vs- Erustus Gitonga**

Gakui[2014] KECA 39 [KLR], that the plaintiff must prove that he has a right to immediate and exclusive possession of the land.

- 60.** In this suit, the defendant was not named as the person who personally or through a known and authorised agent, or servant, committed the alleged acts of encroachment. It was not enough for the plaintiff to allege encroachment without proof of the same. A case succeeds on the strength of the evidence tendered and not on the weakness of the defence.
- 61.** The plaintiff has urged the court not to rely on the surveyor's reports, which were prepared and filed before this court. The initial one was attached to the replying affidavit of Vipul Shah, sworn on **22/2/2019**. It is dated **8/10/2014** by B.O. Hussein, a County Surveyor. The second one is dated **19/6/2025**. The findings in the expert reports can only be challenged by rival reports. See **Kagina -vs- Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR)** and **Athman & 3 others -vs- Art 680 Limited & 2 others (Environment and Land Case. Civil Suit E021 of 2023) [2024] KEELC 217 (KLR) (30 January 2024) (Ruling)**. The plaintiff did

not call any experts to produce survey maps and Registry Index Maps.

- 62.** In **Barmasai -vs- Rono [2025] KECA 1489 [KLR] (19th September 2025) (Judgment)**, the court said that the Registry Index Map was a crucial cadastral document used in the land registration system to visually represent the location and boundaries of land parcels as an official record maintained by the Surveys of Kenya which is an integral part of land registration in Kenya, providing a geographical context, mapping out the physical existence and the precise boundaries of a property, relative to its surrounding.
- 63.** The area map that the plaintiff relied upon is not authenticated, certified, nor does it indicate who the maker is. On the other hand, as to **D. Exhibit No. (3)**, the defendant failed to call for the evidence of the experts to substantiate the contents of paragraphs **6, 7, 8, 9, 10, and 11** of the statement of defence dated **29/4/2019**. Ownership documents like title deeds per se, without a Registry Index Map, which complements and offers a detailed layout of land parcels, their shapes and their boundaries, as held in **Kitonga & Another -vs- Nzyoka [2024] KEELC 1667 [KLR]**, render the defence as a mere

statement without probative value, the same way the contents of the plaint are.

- 64.** Similarly, the court notes that the defendant failed to produce as an exhibit the surveyor's report dated **8/10/2015**. A copy of the title deed for **Kitale Municipality Block 32/2** does not show the Registry Map Sheet number. It is therefore not possible for this court to verify its map sheet number and or make a finding that it was the plaintiff who interfered with the defendant's land. Without a map sheet number, it is impossible for the court to make a finding on the proximity of the two parcels of land.
- 65.** Additionally, without the evidence of a physical planner, a roads engineer, and a land surveyor, it is impossible to know the extent, dimensions, locality, and route of the alleged public road of access, which both parties are alleging to have been encroached upon.
- 66.** The upshot is that I find the plaintiff's suit lacking merits. It is dismissed with costs.
- 67.** Orders accordingly.

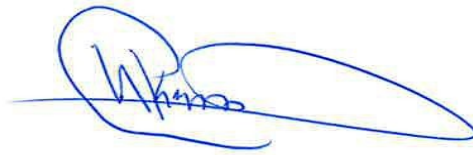
Judgment dated, signed, and delivered via
Microsoft Teams/Open Court at **Kitale** on this
11th day of February 2026.

In the presence of:

Court Assistant - Dennis

Okile for the plaintiff - present

Songole for the defendant - present

A handwritten signature in blue ink, appearing to be 'C.K. Nzili', is written over a horizontal line. The signature is stylized and somewhat cursive.

**HON. C.K. NZILI
JUDGE, ELC KITALE.**