

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NUMBER E091 OF 2024

JOMO KENYATTA UNIVERSITY OF
AGRICULTURE AND TECHNOLOGY.....APPELLANT

-VERSUS-

CECILIA NYAMBURA MUGO.....1ST RESPONDENT
FRANCIS GACHUNGA WAMBURU.....2ND RESPONDENT
CHRISTOPHER NGERA.....3RD RESPONDENT
*(Being an appeal from judgment and decree in Chief Magistrate's Court at
Thika (Hon. S. Atambo CM) civil case number 869 of 2008 dated 30-01-2024)*

RULING

This matter was slated for judgment today but I will instead deliver a ruling for reasons stated hereinbelow.

The appellant commenced suit in the trial court against the respondents seeking the following orders;

- a. A declaration that the defendants herein have unlawfully and without colour of right encroached on the access road.*
- b. A permanent injunction do issue against the defendants restraining them from encroaching in the plaintiff's access road thereof.*
- c. Costs of the suit.*

The appellant pleaded that it was the registered owner of all that parcel of land known as L.R. No. 13094 for which it held title number IR 86310. This land opened to Thika Highway through an access road. The appellant stated further

that it had occupied and used the land without interference since it was allocated in 1980 until 30-10-2008 when the respondents who are allottees of adjacent plots bordering the access road unlawfully and without justification encroached on the said access road by excavating a substantial portion of it with a view of constructing a building.

The respondents filed a defence in which they admitted the plaintiff was the owner of the above stated land but denied the alleged encroachment. They added a counterclaim in which they pleaded that the 1st and 2nd respondents were the owners of parcel number L.R. 21096/96 while the 3rd respondent owned parcel number L.R. 21096/97 both of which were far from the appellant's land. They added that the appellant had erected a fence from the gate of its property to Thika Highway cutting across the respondents' parcels claiming it to be an access road. They added that there was a 35 meters public access road and they had the right to use it. They prayed for the following final orders;

- a. An order to issue compelling the plaintiff by themselves, their agents and servants to forthwith remove the fence erected and vacate the defendants' property known as L.R. No. 21096/96 and 21096/97 and to allow the defendants a right of way and quiet enjoyment of their private properties.
- b. General and exemplary damages.
- c. Costs of the counterclaim.
- d. Interest on (b) above.
- e. Costs of the suit.

- f. Such other or further relief as this Honourable Court may deem fit to grant.

The trial court, after hearing the matter dismissed the suit and awarded general damages of Kshs 20,000,000.00 to the defendants for having been stopped from constructing their lands by an order granted in favour of the appellant. I have gone through the pleadings, the testimony of the parties and the exhibits. I have no doubt in my mind that the dispute was on the right of the parties to use the access road connecting the referenced parcels of land to the Thika Highway.

Whereas the ownership of the respective land was not in dispute, it is clear to me that the right to use the access a road cannot be separated from use and occupation of the parcels of land. All the pleadings and the testimonies of the witnesses were about the right to use the access road and in my view an access road is by all definition land.

Article 162(2)(b) of the Constitution creates special courts to hear and determine disputes relating to the environment and the use and occupation of and title to land. Pursuant to this constitutional dictate, the Parliament enacted Environment and Land Court Act Chapter 8D of the Laws of Kenya which provides in Sections 13(1) and (2) that;

- 1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
- 2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes*

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
- (b) relating to compulsory acquisition of land;*
- (c) relating to land administration and management;*
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
- (e) any other dispute relating to environment and land.*

Where the Constitution or a statute has vested jurisdiction in a specific court, tribunal or institution, the same cannot be exercised by another forum. The dispute in this matter having been involving right to use a public road fall under Section 13(2)(d) of the Environment and Land Court Act cited above. This matter belongs to Environment and Land Court and I find that this court has no jurisdiction to preside over this appeal. Consequently and as I am legally bound to do, I hereby down my tools for lack of jurisdiction.

I would have made an order transferring this matter to the Environment and Land Court at Thika but my hands are tied by the holding of the Court of Appeal in ***Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] KECA 250 (KLR)*** which is binding on this court. The Court of Appeal held as follows in regard to a court's powers to transfer a suit from a court which does not have jurisdiction;

*'In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under **Section 18** of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore*

*sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even **Article 159** of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.’*

Based on the above, my inevitable conclusion is that the appeal is incompetent for having been filed in the wrong court. The appeal is for that reason struck out with costs to the respondent.

Dated signed and delivered at Nairobi this 27th day of February 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Macharia holding brief for Mr. Mukele for the appellant and Mr. Kimathi for the respondent.