



Lemein v Nabaala; Mutiri & 11 others (Interested Parties) (Environmental and Land Originating Summons 1 of 2021) [2026] KEELC 567 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KEELC 567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2021
LN GACHERU, J
JANUARY 30, 2026**

BETWEEN

JOSEPH KARIA LEMEIN PLAINTIFF

AND

JOHN RIANOI NABAALA DEFENDANT

AND

NGUNJIRI MUTIRI INTERESTED PARTY

SAMMY KAARIA INTERESTED PARTY

MAKUWI OLE MASIKONDE INTERESTED PARTY

ESTATE OF THE LATE MAKUMI OLE MASIKONDE INTERESTED PARTY

THE PERSONAL REPRESENTATIVE OF THE LATE MAKUMI OLE MASIKONDE INTERESTED PARTY

RAHAB PASIAN INTERESTED PARTY

LEPOSO OLE MASIKONDE INTERESTED PARTY

THE ESTATE OF THE LATE LEPOSO OLE MASIKONDE INTERESTED PARTY

THE PERSONAL REPRESENTATIVE OF THE LATE LEPOSO OLE MASIKONDE INTERESTED PARTY

DISTRICT SURVEYOR, NAROK INTERESTED PARTY

DISTRICT LAND REGISTRAR, NAROK INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY



JUDGMENT

1. Vide an Originating Summons dated 9th February 2021, the Plaintiff/Applicant herein Joseph Karia Lemein has sought for determination of the following issues; -
 - a. The Plaintiff/Applicant herein be registered as proprietor in common of the specific section constituting a 9 meters road or public access more particularly in relation to Cis-Mara/Enaibelbel/Enengetia Nos. 721, 193, 345, 192 and former 191, which are presently the registered in the names of the Defendant and interested parties as the proprietors.
 - b. That the easement acquired and enjoyed by the Plaintiff/Applicant as well as the interested parties, the right of way and stock routes through the suit parcels and the use if any of boreholes, dams, water courses and rivers of the water found in the suit lands be absolutely and indefeasibly vested jointly in the Plaintiff/Applicant, as well as the interested parties.
 - c. The Defendant/Respondent by himself his servants, agents and otherwise howsoever be evicted and or ordered to vacate forthwith the specific section constituting a 9-meter road and/or public access more particularly in relation to Cis-Mara/Enaibelbel/Enengetia No. 721, 193, 345, 192 and former parcel No. 191.
 - d. The Defendant/Respondent by himself his servants, agents and otherwise whoever be permanently restrained from blocking access, entering, erecting fence, being or remaining on and in any part of all that land parcels known as Cis-Mara/Enaibelbel/Enengetia No. 721, 193, 345, 192 and former 191.
 - e. That the Defendant/Respondent by himself his servants, agents and otherwise however be and are hereby permanently restrained from denying, frustrating, blocking, impeding or otherwise interfering with the Plaintiff use and enjoyment of easement of all those parcels of land known as Cis-Mara/Enaibelbel/Enengetia No. 721, 193, 345, 192 and former parcel No. 191, and from blocking, erecting or maintaining a fence or wall limited to the specific section constituting a 9 meter road and or public access more particularly in relation to Cis-Mara/Enaibelbel/Enengetia No. 721, 193, 345, 192 and former parcel No. 191.
 - f. The costs of the suit be borne by the Defendant/Respondent.
 - g. Any other Order/further Orders and or grant any relief as the court may deem just, expedient, convenient, conclusive or necessary to make.
2. The said Originating Summons is premised on the following grounds and the annexed Affidavit of Joseph Karia Lemein. These grounds are; -
 - a. That the Plaintiff/Applicant is the registered owner of all that parcel of land known as Cis-Mara/Enaibelbel/Enengetia No. 671, a subdivision of former land parcel No. 191, which is in relation to this matter can be deemed to be dominant tenement.
 - b. That the Respondent is the registered owner of all that parcel of land known as Cis-Mara/Enaibelbel/Enengetia/721, wherein is a public road of 9 meters runs through the affected parcel.



- c. That the 1st to 9th interested parties are respectively the registered owners of their respective parcels of land known as Cis-Mara/Enaibelbel/Enengetia No.721, 193, 345, 192 and former parcel No. 191 which in relation to the matter can be deemed to be that of dominant tenement.
 - d. That for the longest time immemorial prior to the demarcation the Plaintiff/Applicant as well as 1st to 8th Interested parties practised their culture and their social economic lifestyle for years uninterrupted along the said route.
 - e. That immediately after the demarcation exercise the applicant continued to use the said public access road which traverses from land parcels Nos Cis-Mara/Enaibelbel/Enengetia No.721, 193, 345, 192 and former parcel No. 191, limited to 9 meters road only.
 - f. That the path is also used by other individuals including parastatals such as KWS and Kenya Forest Service.
 - g. That recently the Defendant/ Respondent in particular took upon himself and narrowed the said access road to a width of 5 meters and thereafter permanently closed the said road by fencing.
 - h. That the applicant raised concerns that saw the 10th and 11th interested parties visit the said parcel of land and accordingly they wrote a field report referenced as NRK/SURK/1/VOL/VII/190, confirming and ascertaining that the Defendant/Respondent has irregularly blocked the right of way in relation to the adjacent parcel of lands.
 - i. That the applicant has never been aware of the alienation of the specific portion until recently.
 - j. That it is the Plaintiff/Applicant contention and prayer that they are entitled to use the portion arising from easement as a matter of long use of well over 20 years.
 - k. That the use of the said road has opened the area for business and has made it easier for the Plaintiff/Applicant as well as other neighbours and community members to access the various public amenities such as schools, churches, health centres, chief's office etc.
 - l. That the Plaintiff/Applicant by virtue of Section 38(1) of the *Limitation of Actions Act* Cap 22, is entitled to apply for an order that they be registered as the proprietor of the suit land in place of the Defendant/Respondent.
3. The Originating Summons is also supported by the Affidavit of the Plaintiff/Applicant herein Joseph Karia Lemein sworn on 9th February 2021, wherein he reiterated most of the averments made on the grounds in support. The Plaintiff/Applicant also annexed a copy of the Mutation Form, Field diagram and observations on site, Report from the District Surveyor confirming that the Defendant/ Respondent blocked the road, Certificate of official searches which searches confirmed the registered owners of land parcels Cis-Mara/Enaibelbel/Enengetia No. 721, 671, 670, 669 and 191.
 4. The Plaintiff/Applicant alleged that he has been in occupation of the land parcel No Plot 691 since 1988, which land is a subdivision of land parcel No 191, and the public access land has been in existence even before the sub division of land parcel No 191.
 5. He also reiterated that since time immemorial, together with the other neighbours, they have settled and have continued to enjoy the use of the said public road which is limited to 9 Metres and traverses through the parcels of land being; Cis-Mara/Enaibelbel/Enengetia No. 721, 193, 345, 192 and former parcel No. 191, until recently when the Defendant/Respondent sought to block the said access road through the erection of a fence.



6. Therefore, the Plaintiff/Applicant is concerned that non-existence of public access is an attempt to deny them rights under existing easement.
7. The Originating Summons is opposed by the Defendant/Respondent who filed his Replying Affidavit dated 27th March 2023, and averred that he is the absolute registered owner of land parcel No. Cis-Mara/Enabelbel/Enenetia/721, having been issued with the title deed on 29th January 2013. Further, that there is no road cutting across his parcel of land, and even prior to the adjudication process such road never existed, as alleged by the Plaintiff/ Applicant. He attached a copy of his title deed and official search confirming ownership.
8. The Defendant/ Respondent further averred that the original parcel of land was Cis-Mara/Enabelbel Enenetia/174, which was registered in the name of Veronica Wanjiku Kereto, and was subdivided to create land parcels Nos Cis-Mara/Enabelbel Enenetia/720, 721, 722 and 723. He attached a copy of Mutation dated 20th March 1992, and averred that both mutation and title deed indicate that there is no road cutting through or subdividing his parcel of land being Cis-Mara/Enabelbel/Enenetia/721, into two.
9. The Defendant/Respondent maintained that there is no through way on his parcel of land Cis Mara/Enabelbel Enenetia/721, as it was resolved in a meeting held on 5th October 2018, as per the attached copy of minutes marked JKN 4, wherein people from Ogiek/Saimuani Community, had complained of not having an access road to Mau Forest. That this was confirmed by the Deputy County Commissioner –Narok Sub-County through a letter to the area chief dated 4th June 2018, marked JKN -5.
10. The Defendant/Respondent also averred that the District Registrar and the Surveyor in disregard of the advice by Deputy County Commissioner – Narok Sub-County and resolution reached by committee on 5th October 2018, intended to open an access road through his land, which he opposed vide his letter dated 28th June 2018.
11. The Defendant/Respondent also claimed that later in his absence the District Registrar and Surveyor through their letter dated 1st September 2020, went to his land to ascertain boundaries and opening of access road for Cis-Mara/Enabelbel Enenetia/346 and 192, which he alleged was illegal.
12. Further, the Defendant/Respondent averred that Land Parcel No. Cis-Mara/Enabelbel/Enengeita/191, does not exist as the same title was closed for sub-division giving rise to land parcels No. Cis-Mara/Enabelbel/Enengeita/669, 670 and 671 of John Ngunjiri Muthui Kaaria, the 1st Interested Party, Ole Karia Sammy the 2nd Interested party and Joseph Kaaria Lemein the Plaintiff/Applicant respectively and that the parcels of land do not have any easement on them.
13. The Defendant/Respondent also stated that in order to stop the illegal activities on his land, he moved to court and filed an application seeking injunctive order vide case No. CMELC No. 104B of 2020 – Narok, which orders were granted on 1st December 2020, allowing him to fence and close a non-existence road and return his parcel to its original form.
14. He deponed that the Plaintiff/Applicant and 7th Interested party had sought to be joined in the magistrate’s court case as interested parties, but later the Plaintiff/Applicant abandon that case and filed this case, which according to the Defendant is an abuse of court process.
15. After several interlocutory Applications, the matter was finally set down for hearing on 23rd June 2025, wherein the Plaintiff gave evidence for himself and called no witness. The Defendant also gave evidence



for himself and called no witness. None of the interested parties turned up in court to give evidence either in support or opposition to the suit.

Plaintiff's Case.

16. PW1 Joseph Karia Lemein adopted his witness statement dated 9th February 2021, as his evidence in chief. He also adopted the averments contained in his Affidavit in support of the Originating Summons as part of his evidence. Further, he produced the attached documents as his exhibits.
17. The Plaintiff/Applicant further testified that his case is related to an access road, which has not been opened to date. He urged the court to allow his claim.
18. Upon being cross examined by Mr Oyori for the Defendant/Respondent, he confirmed that his land parcel is No Cis Mara/ Enabelbel/Enenetia/ 671, which was a sub division of land parcel No 191. He also confirmed having seen the map of the area which showed his land as 671, and there are other parcels of land which uses this access road being land parcels Nos 193, 192 and 345 and 720.
19. It was his evidence that he did not know the process of demarcating a road, however, it was his further testimony that when a road is demarcated, the road users are not given a title. Further, that he intends to use the access road which passes through other people's land, and the said access road is a public road. Further, that from his childhood, he found his parents using the said access road. That this access road does not have a title, as it passes through many other parcels of land.
20. He also testified that he is not representing the other people in case, but he has come to court only for himself. He named the other road users being John Ngunjiri and the late Masikonde. He further testified that the access road in dispute leads to KWS Camp, but the said KWS is not a complainant herein.
21. Further, that the Mutation Form shows that there is a road, which is an access road and not a main road. He urged the court to register him as the owner of the access road, but not the land, though the surveyor's letter does not state that there is an access road.
22. On being cross examined by Ms Ngira for the Attorney General(AG), he confirmed that he had no Gazette Notice to show the access road in question. It was his evidence that an access road is a public road, and this particular one passes through four parcels of land. He told the court that he wanted the Defendant/Respondent to be ordered to vacate the said access road, and he did not want Nabaala(Defendant), to be evicted from his land. Further, he stated that the road is a public road, and he only wants it to be opened and not registered in his name.

Defendant's Case

23. DW1 John Riano Nabaala adopted his witness statement as his evidence in court. He also produced his list of documents as DExhibit 1. He further produced the Mutation Form, which showed that there was a road that passes through his land parcel No 721. Further, the Surveyor did not indicate that there was a road cutting through land parcel No 721. It was his evidence that he bought this land parcel No 721, in 2011, and there was no road cutting through it.
24. Upon being cross examined by Mr Mutai for the Plaintiff/Applicant, he confirmed that the report by the Surveyor showed that there was no road cutting across his land, and there was no road on his suit property. He also confirmed that from the certificate of official search dated 13th Feb 2019, it shows that there is an access road of 6.6m, which cuts across his land.



25. He confirmed that there is a court order dated 4th October 2023, which ordered him to re-open the road. On re-exam, he told the court that he only obeyed the court order, but he could not admit that there was a road cutting across his land.
26. After the close of the viva voce evidence, the court directed the parties to file and exchange written submissions. In compliance thereto, the Plaintiff/Applicant filed his written submissions dated 15th October 2025, and urged the court to allow his claim. On his part, the Defendant filed his written submissions dated 18th November 2025, and urged the court to dismiss the Plaintiff's case.
27. In his submissions, the Plaintiff/Applicant argued that he is entitled by way of easement to a public access road which passes through and border land parcel No Cis Mara /Enabel/Enengeti/721, registered in the name of the Defendant/Respondent.
28. He submitted that this access road has been in existence for a long time, and it serves the public in that area, but the Defendant has closed it illegally, and efforts to have it opened have been futile thus this suit.
29. For his submissions, the Plaintiff relied on Section 91(1) of the *Land Registration Act*, which states that an easement is a right attached to the land, which confers upon a proprietor of one parcel a benefit over another's land for a specific purpose, such as right of way.
30. He also relied on Section 98(1) of the *Land Registration Act* and Section 28 of the same Act on overriding interests, public right of way being one of them. Reliance was also placed in the case of *Nguruman Co. Ltd Vs Jan Nielsen Bonde & 2 Others* (2014) eklr, and *Giella vs Cassman Brown & Co Ltd* (1973) EA 358, on the issue of permanent injunction.
31. In his submissions, the Defendant/Respondent denied existence of any easement and relied on the case of *Kenya Rural Roads Authority vs Vipingo Ridge Ltd & Others* (Civil Appeal No 18 of 2019(20220 KECA 10899KLR); *Kamau vs Kamau* (1984) eklr, where the court held;

“ An easement is a convenience to be exercised by one land owner over the land of a neighbour without participation in the profit of that other land, the tenement to which it is attached, the dominant tenement and the other on which it is dominant tenement 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 servient tenement to very person into whose occupation these tenements respectively come.”
32. The Defendant/Respondent also relied on Sections 107, 108, 109 and 112 of the *Evidence Act* and Sections 27 and 28 of the Registered *Land Act*, Cap 300(Repealed), on the protection of the rights of the Defendant as an absolute proprietor of his parcel of land.
33. The above are the pleadings, the evidence adduced by the parties, in support of the case and against the instant Originating Summons, the exhibits produced, and the written submissions.
34. The court has considered the above available evidence, the rival written submissions and relevant provisions of law and finds the issues for determination are;
 - i. Whether the plaintiff is entitled to the orders sought in his Originating Summons;
 - ii. Who should bear costs of this suit.



I. Whether the plaintiff is entitled to the orders sought in his Originating Summons

35. It is evident from the available evidence that the bone of contention is the existence of an alleged public access road, which allegedly passes through various land parcels. Among the parcels of land is land parcel No Cis Mara/ Enabelbel/ Enegetia/721, which is registered in the name of the Defendant/ Respondent herein.
36. It is the Plaintiff/Applicant's allegations that the Defendant herein has blocked the said public access road, which passes through his land, thus inconveniencing so many other road users among them the Plaintiff/Applicant and the interested parties herein. The plaintiff testified that this access road also leads to KWS Camp, and Kenya Forest Camp. However, these two Government agencies were not parties to this suit, and were not called as witnesses.
37. The Plaintiff has made a claim, which has been denied by the Defendant. It is trite that he who alleges must prove, as provided by Section 107 of the *Evidence Act*, which provides;
Burden of proof.
“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
38. The Plaintiff herein is the one who has alleged, and the onus of proving these allegations rests upon him. The Plaintiff therefore had a duty to call sufficient evidence to prove his case on the required standard of balance of probabilities. See the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another (2005) 1EA 334, where the Court of Appeal held;
“As a general proposition under section 107 of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is placed upon a party ... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the *Evidence Act*”
39. From the available evidence, there is no doubt that the Plaintiff is the registered owner of land parcel No Cis Mara/ Enabelbel/Enegetia/671, and the Defendant is the registered owner of land parcel No Cis Mara/ Enabelbel/ Enegetia/721. The Plaintiff has alleged that there is in existence a public access road that cuts across various land parcels, and which public access road benefits many other road users, among them the interested parties herein including KWS and KFS.
40. With the denial of the allegations by the Defendant/Respondent, did the Plaintiff/Applicant call sufficient evidence to prove existence of the said public access road, and did he also prove that the Defendant/Respondent has blocked and/ or closed it?
41. To answer the above questions, the court will examine the available evidence and then determine each of the issues raised herein by the two parties in their submissions.
42. The Plaintiff/Applicant alleged that the referred public access road is an easement, which the other neighbouring road users and himself have been enjoying its use, but the said easement/ public access road, has now been interfered with by the Defendant's actions.



43. It is trite that an easement is a non-possessory right attached to land (the dominant tenement), that allows the landowner to use or restrict the use of a neighbouring parcel of land (the servient tenement) for specific purposes, such as access or utility services. It is a form of interest in land, often created through express grant, prescription, or statute. See Section 2 of the [Land Act](#).
44. This Section 2 of the [Land Act](#) states; an easement is "a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit."
45. Further, Section 28 of the [Land Registration Act](#) provides instances of overriding interest, wherein the said section provides that right to public way which is equivalent to an easement is an overriding interest, which does not need to be registered on the title.
46. It is evident that the Defendant /Respondent is the registered owner of land parcel No 721, which was he allegedly acquired in 2011, under the Registered [Land Act](#) Cap 300(repealed). In the above referred registration regime, the Defendant was deemed to be the absolute and indefeasible owner of his land parcel, with rights and privileges appurtenant thereto, as provided by Section 27(a) of the said Act, which states;

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

47. Further, the right of the Defendant/Rsspondent cannot be defeated except as provided by the law. See Section 28 of the repealed Cap 300, which states;

“The rights of a proprietor whether acquired on the first registration or whether acquired for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights and privileges appurtenances belonging thereto, free from all other interests and claims whatsoever , but subject;-

The above provision of Law has been reiterated in section 25 of the [Land Registration Act](#) 2012.

48. However, the above rights can be affected by the provisions of Section 30 of Cap 300(repealed) which provisions are now mirrored in section 28 of the [Land Registration Act](#), and provide instances when an individual absolute and indefeasibility of his title can be defeated, by overriding interests. The overriding interests are; interests that bound the proprietor of the land even if they were not recorded in the land register, and they include easements, profits, or rights of way.
49. The right of way or easement is one of such overriding interests, which is provided for by Section 30(a) of Cap 300(repealed) as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsists and affect the same, without their being noted on the register;-

- a. right of way, right of water and profits subsisting at the time of first registration under this Act.
- b.



50. Therefore, the Plaintiff/Applicant who alleged that there is existence of an easement as an overriding interest, passing through the Defendant's parcel of land, had the duty to discharge the evidential burden of proof. See the case of *Mbuthia Macharia vs Anna Mutua Ndwiga & Anor* (2017) eKLR, where the court stated that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty to adduce evidence in rebuttal; which is the evidentiary burden.
51. How was the Plaintiff/Applicant supposed to prove existence of the easement or overriding interests? In order to prove such existence of an easement, the Plaintiff needed to first satisfy the four essential characteristics established in the case of *Re Ellenborough Park* [1955] 3All ER667, [1956] Ch. 13
52. These four essential characteristics are;
- i. There must be a dominant tenement (the land that benefits) and a servient tenement (the land that is burdened).
 - ii. The easement must accommodate (benefit) the dominant land, not just the individual owner.
 - iii. The dominant and servient owners must be different persons.
 - iv. The right must be capable of being granted (it must be specific and certain, not too vague
53. If the claim is based on express or implied grant, then the plaintiff needed to prove the said claim by producing a Certificate of Official Search, which was to be conducted at the Land Registry to find any registered Form LRA 80 or Deed of Grant. Further, he needed to produce Survey Maps and Registry Index Map (RIM) or a survey plan from the Survey of Kenya to show physical markings of utility lines or access routes. See the case of *Mwangi & 3 others v Ngarachu* (Sued as the Legal Representative of the Estate of Ngarachu Chege- Deceased) (Civil Appeal 328 of 2019) [2025] KECA 555 (KLR) (21 March 2025) (Judgment)
54. If this easement is an implied right, then the Plaintiff/Applicant needed to prove that the right is "reasonably necessary" for the enjoyment of the land and was intended to be included during the sale or demarcation of the parcels of land if. See Section 98(5&6) of the *Land Registration Act*, which provide;
- 5) There shall be implied in every grant of an easement the grant of all ancillary rights which may be reasonably necessary for the full and effective enjoyment of the grant.
 - (6) A grant of an easement may contain an agreement between the owners of the dominant and servient lands binding either or both of them to pay for or contribute towards the cost of constructing, maintaining or re- pairing any way, wall, drainage, installation or work forming the subject matter of the easement.
55. Further, if the Plaintiff's claim is based on easement by necessity, which is common in landlocked properties, where there is no other way to access a public road., then the Plaintiff needed to prove; common ownership, whereby the dominant and servient parcels of land were once part of the same larger tract of land. Severance: meaning the land became landlocked when it was subdivided; Absolute Necessity, that there is no other reasonable means of entry or exit except through the neighbour's land, and in this case through the Defendant's land. See the case of *Majid v Sisters for Justice NGO & 3 others* (Environment & Land Case 197 of 2020) [2024] KEELC 974 (KLR) (27 February 2024) (Judgment).
56. If the Plaintiff's claim is based on long use or is a claim of easement by prescription (Long Use), then the Plaintiff needed to prove the following under the *Limitation of Actions Act* (Cap 22): 20 Years of Continuous Use: The plaintiff must show uninterrupted use for at least 20 years; Further; the use



must be nec vi, nec clam, nec precario—which means without force, without secrecy, and without permission.

57. The Plaintiff/Applicant also needed to avail sufficient evidence, either oral or through historical photographs, witness statements from independent witnesses or neighbours, and physical signs of use such as evidence of trodden or a worn path. Further, the claim must be filed within two years of the use being interrupted or being blocked as claimed by the Plaintiff herein. See the case of *Motachwa v Ogari* (Environment & Land Case 11 of 2015) [2022] KEELC 92 (KLR) (26 May 2022) (Judgment).
58. Did the Plaintiff herein satisfy the above conditions? It was his evidence that the easement or right of way that passes through the above-named parcels of land has been in existence from time in memorial. The Plaintiff's claim is therefore based on long use, or through prescription. If that is so, the *Limitation of Actions Act* comes into play.
59. On the issue of easements, Section 32 of the Limitations of Actions Act Chapter 22 of the Laws of Kenya provides as follows;

“Means by which easements may be acquired

- (1) Where –
- (a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or
 - b
 - (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 or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.”

60. The above section provides for the various measures through which easements may be acquired and further provides that an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceable, open and uninterrupted enjoyment of the same.
61. However, for the court to hold and find that an easement has been created through long use of 20 years and above, the person claiming such a right must call sufficient evidence to prove that such use and possession of the said easement of right of way has been open, peaceful, rightful and uninterrupted. Did the Plaintiff herein avail such evidence. There were no other witnesses called to support such use of this alleged easement for more than 20 years.
62. Without calling evidence to support his claim of long use of the easement, such claim remains an allegation, which allegation remains just mere allegations and not sufficient evidence and as such, the Plaintiff cannot be deemed to have proved his case on the required standard of balance of probabilities. See the case of *CMC Aviation Ltd. vs. Kenya Airways Ltd (Cruisair Ltd.)* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835: where the court held;

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they



remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

63. Further, Section 28(c) of the [Land Registration Act](#), creates and categorizes the right of way as overriding interest. It provides that;

“Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.

64. A look at Sections 98-100 of the [Land Registration Act](#), clearly set out provisions of law that provide a framework for creation of easements through formal instruments. However, it is evident that the easement being referred to by the Plaintiff herein is not the easement that is acquired through a formal registrable instrument. He alleged that this easement of public access has been created due to long usage and had been provided for by the Mutation Form. Section 98(7) & (8) of the [Land Registration Act](#) provide;

“(7) No easement and no right in the nature of an easement shall be capable of being acquired by any presumption of a grant from long and uninterrupted use.

(8) Nothing in this section shall prevent the lawful use of a right of way for persons and for stock acquired and that right of way shall be deemed to be property.”

Similar provisions are contained in Sections 136-141 of the [Land Act](#).

65. The Court of Appeal in the case of *Kamau vs Kamau* (1984) eKLR, observed 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.

66. The above are the provisions of law on creation of easements. The Plaintiff averred that there is a public access road that passes through various land parcels, which are owned by various land owners, the Defendant being one of them. That there are other road users like the Plaintiff, who have been affected by the Defendant action of closing the public access road.

67. However, none of those other alleged road users of this access road gave evidence in court to support the Plaintiff’s allegations especially the KWS and Kenya Forest Service. None of the interested parties appeared in court to support the plaintiff’s allegations.

68. How is a public access road created? Public access roads are created through legal mechanisms under the [Public Roads and Roads of Access Act](#) (Cap 399) and the [Land Act](#). This process may involve the relevant



Road Board, which notifies the affected landowners, and if approved, the access road is registered. See Sections 8, 9 and 10 of the [Public Roads and Roads of Access Act](#), CHAPTER 399 Laws of Kenya.

69. In the case of Dellian Langata Limited – Versus – Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education [2018] eKLR which was cited in the case of:- Jackson Kipngeny Kipkurere & another – Versus - David Busienei & another [2021] eKLR”, the court held;

“On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt.”

70. Further in the case of “Johnbosco Muinde Kamali & 5 others – Versus - Stephen Katili & Another, (2019) eKLR” as cited in “Jackson Kipngeny Kipkurere & another – Versus -David Busienei & another [2021] eKLR” where the court observed;

“If indeed the most convenient road to their properties is parcel number 450, then the procedure for creating a public access road should be followed. That procedure is provided for under the [Public Roads and Roads of Access Act](#) or Section 98 of the [Land Registration Act](#). Under section 98 of the [Land Registration Act](#), an owner of the Land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the Land to create an easement. If indeed the proposed interested parties are Land locked, which they have admitted they are not, then the court, under the provisions of section 140 of the [Land Act](#), can make an access order in respect of the suit land subject to several conditions including reasonable compensation.”

71. From the above cited provisions of law, and the cited authorities, it is evident that the Plaintiff having alleged that there was an access road passing through various parcels of land, then he needed to call evidence to prove that such an access road was created and is still existing. He could have proved this by calling witnesses to support his claim, or availing documentary evidence of creation of such public access road.
72. Further, the plaintiff ought to have called evidence and produced exhibits to show that this public access road was gazetted or by calling the evidence of the Land Surveyor and Land Registrar to confirm that indeed that there was a public access road as alleged by him, and the said access road had been blocked by the Defendant.
73. Without calling the evidence of the crucial witnesses, such as the District Surveyor, Land Registrar, witnesses from KWS and KFS, the interested parties herein and the other alleged road users, then the Plaintiff’s evidence remained as mere allegations, and allegations are not sufficient to prove a case on the required standard. See the case of Mureithi & another v Mwangi & 3 others [2024] KEELC 6230 (KLR)
74. The Plaintiff had even urged the court to issue an order that the 9 M road as an easement be registered in his name. The court finds this prayer not tenable because a public access road cannot be registered in the name of a private individual. Doing so, would then convert such a public access road to a private property. See the case of Karanu & another v Kimemia & 3 others [2024] KEELC 3967 (KLR)
75. Though the Plaintiff testified that the members of the public have used this access road from time in memorial, until when the Defendant closed it, even after the District Surveyor had confirmed that the Mutation Form showed existence of a public access Road through the named parcels of land. However, this court has found and held that the available evidence is not sufficient to prove the creation of an



easement, either formally or through implication. In the case of in Nakuru Industries Limited vs S S Mehta & Sons (2016) eKLR, the court held;

“Secondly the mere fact that the Public had formed a habit of using the suit land did not convert the same into public land. The actions of other members of public in accessing and excavating the plaintiff's land was unlawful. The defendant cannot rely on the unlawful actions of others to legitimize their own intrusion into the plaintiff's land. Given that the plaintiff has proved that it was the legal and registered owner of the suit land, the Defendant was obliged to obtain the consent and authorization from the plaintiff before entering into and excavating murram from the suit properties.”

76. Having considered the available evidence and having analysed that evidence as above, this court comes to an inescapable conclusion that the plaintiff did not marshal sufficient evidence to prove his case on the required standard of balance of probabilities.
77. For the above reasons, this court finds and holds that the Plaintiff is not entitled to the prayers sought in his Originating Summons dated 9th February 2021. Consequently, this instant Originating Summons is dismissed entirely.

II. Who should bear costs of this suit?

78. The court will be guided by the provisions of Section 27 of the *Civil Procedure Act*, which provides that costs are granted at the discretion of the court. Further, costs follow event and are ordinarily awarded to the successful litigant. The Defendant is the successful litigant and is thus awarded costs of this suit.
79. Ultimately, the court finds and holds that the Plaintiff's Originating Summons dated 9th February of 2021, is not merited. The said Originating Summons is dismissed entirely with costs to the Defendant/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 30TH DAY OF JANUARY 2026.

L. GACHERU

JUDGE

Delivered online in the presence of

Elijah Meyoki - Court Assistant.

Mr. Mutai for the Plaintiff

N/A for the Defendant

