

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC LAND CASE No. E055 OF 2024

SUSSY KUNANI (Suing as the Legal Representative &
Administrator of the Estate of the Late **WILSON YEGO**
PLAINTIFF

VERSUS

FREDRICK YEGO
DEFENDANT

JUDGMENT:

1. The Plaintiff's suit against the Defendant is contained in the Amended Plaint dated 24th January, 2025. The Reliefs sought in said Plaint are as follows:-
 - (a) A declaration that the defendant has unlawfully/unprocedurally encroached/interfered and/or blocked the access leading to the plaintiff's land **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13181** and **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13190** and that the said actions by the defendant are detrimental to the plaintiff's rights to user/easement.
 - (b) An order of eviction to forthwith to remove the defendant, his agents, servants and/or employer from the access road leading to the plaintiff's **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13181** and **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13190**.
 - (c) An order of permanent injunction restraining the Defendant herein either by himself, agents, or servants and anybody howsoever claiming through him from entering, encroaching

into, wasting, damaging, disposing, and/or in any manner committing acts of waste and/or interfering with the subject access road/easement.

(d) Costs of the suit and interest.

2. The Plaintiff pleaded that her late husband, Wilson Yego (deceased), is the registered, rightful and legal owner of the entire parcels of land known as **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13181** and **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13190** (the suit properties herein). She averred that after her husband's demise, the Defendant invaded the access road leading to the suit parcels, unlawfully fenced it and tilled it and has since refused to move out. The Plaintiff alleged that the Defendant has planted maize on the suit land without consent and/or license to do so.
3. The Plaintiff further averred that the Defendant's action violate her right to property under Article 40 of the Constitution. The Plaintiff alleged that the Defendant's acts of encroaching, interfering and fencing the access road is unlawful, unfair and without any legal basis and adverse to her rights of user since he has blocked the Plaintiff from accessing the suit parcels.
4. The Plaint and Summons were served upon the Defendant but he neither entered appearance nor filed a defence. Pursuant to this, the Plaintiff filed an Application dated 8th April, 2025 seeking for orders that the court deem the suit undefended and enter interlocutory judgment and endorse it for formal proof hearing. The said Application was allowed on 14th May, 2025 and the matter was fixed for formal proof hearing on 6th October, 2025.

5. As evidenced by the Affidavit of Service sworn by Omusundi Morgan Advocate on 22nd May, 2025 the Defendant was duly served with a Hearing Notice dated 14th May, 2025. The Plaintiff further served another hearing Notice dated 6th October, 2025 and an Affidavit of Service dated 8th October, 2025 filed in that regard. The Defendant did not appear for hearing on both occasions.

Hearing and Evidence:

6. The matter proceeded for hearing with the Plaintiff testifying as PW1. She introduced herself as a teacher residing in Kiplombe. PW1 produced the documents filed on 9th December, 2025 as PEXb 1-10. PW1 testified that she wanted the Defendant stopped from preventing her from accessing her land. PW1 clarified that the land belonged to her late husband. She asked the court to issue an injunction restraining the Defendant from denying her access to the suit land.
7. This being the end of the PW1's testimony, the Plaintiff's case was marked as closed. Thereafter, the Court directed that the Plaintiff file her final written submissions in the case. The Plaintiff complied and filed her submissions dated 9th February, 2026.

Submissions:

8. In the Plaintiff's Submissions, Counsel cited Section 2 of the Land Act, 2012 and Section 28 of the Land Registration Act, 2012 and submitted that rights of way and easements are overriding interests. Counsel submitted that although such interests affect registered land, they need not be noted in the

register. Counsel argued that the Plaintiff's right of access attaches to the land by operation of law. Counsel submitted that evidence showed that the suit properties are served by an access road which existed and was in use prior to the Defendant's interference. Counsel relied on the case of **Majid vs Sisters for Justice NGO & 3 Others (Environment & Land Case 197 of 2020)(2024) KEELC 974 (KLR)**.

9. Counsel argued that the Defendant's actions denied him access to her land and interfered with her use and enjoyment of her property contrary to the right to property protected under Article 40 of the Constitution. Counsel referred to the bundle of photographs showing that the Defendant had fenced off the access road and planted crops thereon. Counsel argued that in the absence of any defence and rebuttals, the Plaintiff's testimony and evidence remains unchallenged. With regards to the prayer for injunction, Counsel cited the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**.
10. Counsel claimed that the Plaintiff had established a prima facie case on the existence of a prima facie case, and the Defendant's obstruction thereof. Counsel submitted that she stands to suffer irreparable harm if the injunction is not granted as denial of access renders the property unusable and cannot be compensated by way of damages. Counsel asserted that the balance of convenience tilts heavily in favour of restoring and preserving access to the Plaintiff's land.

Analysis and Determination:

11. This court has carefully considered the pleadings herein, the witness testimony, the evidence placed before it and the

Plaintiff's submissions. The only issues that commend themselves for determination are:-

(i) Whether the Plaintiff's suit and the prayers sought therein are merited;

(ii) Who shall bear the costs of the suit?

(a) Whether the Plaintiff's suit and the prayers sought therein are merited;

12. It is evident from the available evidence that the bone of contention is the existence of a road, which allegedly allows the Plaintiff access to her properties known as Pioneer/Ngeria Block 1(EATEC)/13181 and Pioneer/Ngeria Block 1(EATEC)/13190. The Plaintiff produced a Title Deed over the suit properties herein both issued on 19th June, 2017 in the name of Yego Wilson Tich who is now deceased.
13. The Certificate of Death No. 1137337 indicates that the late Wilson Tich Yego passed away on 7th March, 2021. The Plaintiff also produced a Limited Grant of Letters of Administration Ad Litem issued in favour of Susan Kunani on 9th March, 2023 by the Eldoret Chief Magistrate's Court in CM Ad Litem Application No. 67 of 2023. It is this that gives the Plaintiff herein the locus standi to bring this suit.
14. It is the Plaintiff's allegations that the Defendant herein has blocked the said access road, which leads to the suit lands, thus inconveniencing her and denying her access as well as use thereof. The Plaintiff has relied on section 2 of the Land Act and Section 28 of the Land Registration Act which provides that an overriding interest does not need to be registered on the title.

15. Indeed, under the Land Registration Act, a registered proprietor has the right to hold land as the absolute and indefeasible owner subject only to certain overriding interests like public rights of way or easement, or a customary trust under Section 28 (b) of the Act. In **Lemein vs Nabaala; Mutiri & 11 others (Interested Parties) (Environmental and Land Originating Summons 1 of 2021) [2026] KEELC 567 (KLR)**,

“51. ... 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. ...

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...”

16. In this case, a look at the Survey Map produced as PEXb8 shows that what is in issue is a road that does not pass through the Defendant's land. Due to this, there is no dominant or servient tenement. PEXb8, therefore, does not show the existence of an easement but rather, a public road set apart for use by the Plaintiff, allowing her to access her properties, as well as for the use of other residents in that area.

17. In **Dellian Langata Limited vs Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education (2018) KECA 859 (KLR)**, the Court of Appeal defined a public road as follows:-

“Having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. 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 restriction save as may be determined by the relevant authorities. ... As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.”

18. PEXb8 clearly shows that there is a public road adjacent to the suit properties which was meant for the use by the Plaintiff as well as the owners of other properties in the area where the suit property is situated. The Plaintiff as the beneficial owner of the suit properties is entitled to the benefit of the said public road.

19. The photographs produced by the Plaintiff's however show that the Defendant has taken possession of the said public road, fenced it and planted crops thereon. The said fence has completely blocked movement through the public road. The Plaintiff has contended that the Defendant's actions on the said public road have restricted her access to the suit properties.
20. The Defendant filed no response to the Plaintiff's allegations with regards to the said public access road. But evidently, the portion he has fenced off, tilled and planted on does not belong to him. The Defendant has no interests or rights to use the public road to the exclusion of the Plaintiff or any other person. I am duly guided by the decision of the Court of Appeal in **Dellian Langata Limited vs Symon Thuo Muhia (Supra)**, where it was further held that:-

“Notably it is not in dispute that the subject road was one of the roads set aside at the time of sub-division of the parent title L.R 3591/3 out of which Thuo's property was established. The approved sub-division plan marked “DExh.9” attached shows the network of roads and the road in contention was clearly marked “9m road to be reserved.” We therefore agree with the learned Judge's observation that;

“...it cannot be gainsaid that in both sub-divisions plans the 6m and 9m road to be reserved were specifically mentioned and thus it can be justifiably found that the plan was approved as proposed including 9m road to be reserved along with additional conditions.”

It is clear to us that the disputed road is not and never has been designated as a private road and no evidence was tendered to show that it is a private road. It is more likely than not that the road is a public road and the learned Judge was so convinced on a balance of probability. Had it been a private access road there would have been an application under the provisions of the PRRA Act by the appellant but there was none. We are not persuaded that the actions of the appellant to bar and restrict the respondents from using the road were anchored on any valid legal foundation and to that extent the same infringe on the respondents' right to use the road to access their properties."

21. From PEXb8, the public road was clearly set apart to aid free movement in the area. It was never meant for ownership by any one person, and more particularly, it was not allocated to the Defendant herein. Unfortunately, the use for which the said public road has been employed by the Defendant has interfered with its intended user. The Defendant has no right to deal with the public road in a manner inconsistent with the purposes for which it was intended. The Defendant's occupation of the public road and utilisation thereof is thus unlawful.
22. There is no doubt that the Plaintiff is affected by the Defendant's conversion of the said access road to farming. Guided by the above decision and in the interest of justice, I find the Plaintiff's claim in this suit are merited. The court directs the Defendant to vacate the public road subject of this suit, and further cease his activities thereon.

23. Any fencing structures on the said public road as well as crops planted thereon shall be removed forthwith. Should the Defendant fail to comply, the Plaintiff shall be at liberty to involve the Sub-County Land Surveyor to implement and re-establish the public road in line with this judgment and as per sub-division map produced as PEXb8 herein.
24. As to whether an injunction should issue, the Plaintiff has contended that her access to the suit properties is impeded by the Defendant's fence and crops which are currently blocking the road. Thus if the injunction sought is not granted the Defendant will continue his illegal acts on the public road, which in any event does not in any way belong to him or any other private person. In view of the foregoing, I am satisfied that there is merit in the prayer for injunction sought in the Plaint.

(b) Who shall bear the costs of this suit?

25. On costs, the court will be guided by the provisions of Section 27 of the Civil Procedure Act, which provides that:-

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to

try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

26. It follows that costs are granted at the discretion of the court. Further, costs follow event and are ordinarily awarded to the successful litigant. The Plaintiff herein is the successful litigant and is thus awarded costs of this suit.

Orders:-

27. Consequently, the court finds that the Plaintiff's suit has merit and is determined as follows:-

(a) A declaration is hereby issued that the Defendant has unlawfully/unprocedurally encroached/interfered and/or blocked the access leading to the Plaintiff's land **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13181** and **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13190** and that the said actions by the Defendant are detrimental to the Plaintiff's rights to user/easement.

(b) An order of eviction be and is hereby issued forthwith to remove the Defendant, his agents, servants and/or employer from the access road leading to the plaintiff's **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13181** and **L.R No. PIONEER/NGERIA BLOCK 1(EATEC) 13190**.

(c) An order of permanent injunction be and is hereby issued restraining the Defendant herein either by himself, agents, or servants and anybody howsoever claiming through him from entering, encroaching into, wasting, damaging, disposing, and/or in any manner committing acts of waste and/or interfering with the subject access road/easement.

(d) The Plaintiff shall have the costs of the suit and interest.

28. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **23RD** day of **APRIL, 2026** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of;

Ms. Akinyi for Plaintiff.

No appearance for the Defendant.

Court Assistant - Laban.