

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC LAND APPEAL NO. E024 OF 2025

ABDUL KARIM NJERU 1ST

APPELLANT

SAMMY KITHAKA NJIRU 2ND

APPELLANT

VERSUS

COUNTY GOVERNMENT OF EMBU 1ST

RESPONDENT

THE DIRECTOR,

PHYSICAL PLANNING AND SURVEY..... 2ND

RESPONDENT

THE ATTORNEY GENERAL 3RD

RESPONDENT

JUDGMENT

1. The Appellants lodged this appeal against the decision of H. Nyakweba, Senior Principal Magistrate (SPM), delivered on 28/4/2023 in Embu CM ELC Case No. 87 of 2018 faulting the Learned Magistrate for holding that the 1st Appellant lacked capacity to enforce rights on the land known as Gaturi/Githimu/2487, 2490 and 2494 yet they were registered in favour of Ramadhan Njoka Mwando at the time the suit was filed.

They also faulted the trial court for failing to consider that the exhibits which they produced pointed to the fact that the access road had been blocked. They urged the court to set aside that judgment vide the memorandum of appeal dated 11/4/2025.

2. The Appellants filed Embu HCCC No. 133 of 2017 claiming that the 1st and 2nd Respondents illegally erected a permanent building on the access road abutting parcel no. Gaturi/Githimu/2486, 2487, 2490, 2494 and 2495. They claimed that there was a 12-metre wide access road, which served as a frontage to Gaturi/Githimu/2494 and 2487 on one side and Gaturi/Githimu/2495 and 2486 on the other side. They pleaded that the access road was marked as such on the registry index map (RIM) for Gaturi/Githimu on sheet No. 14 for that survey area. The Appellants sought a declaration that the construction of a permanent structure on the access road fronting the plaintiff's land Gaturi/Githimu/2486, 2487, 2494 and 2495 was illegal and unlawful. They sought an order for demolition of the structure.
3. The 1st and 2nd Respondents filed a defence denying the Appellants' claim while averring that if there was a structure on the ground, then it was constructed legally and that the demolition orders should not be granted. The 3rd Respondent also denied the Appellants' claim. They made an alternative plea that if at all there was a social hall being constructed on the disputed land, then it was constructed outside the access road for public interest and that was done according to the law.

4. The Learned Magistrate heard the case and in the judgment delivered on 28/2/2023, the court found that the 1st Appellant failed to prove his claim because the Amended Certificate of Confirmation of Grant dated 17/1/2019 showed that he was only entitled to inherit parcel no. 2487. The court found that he could not enforce any rights on parcel numbers 2486, 2490, 2494 and 2495 for want of any possessory right. The court's finding was that he lacked locus to enforce any right.
5. Regarding parcel no. 2486, the court found that the 1st plaintiff did not produce any document from the National Construction Authority (NCA) to support the allegation that the 1st Respondent erected a structure on the access road leading to that parcels of land without the necessary approvals from NCA. The trial court also found that the Appellants failed to call witnesses from NCA and the National Land Commission (NLC). The court noted that parcel no. 2486 was serviced by a 6 meter road which was developed. Further, that the physical audit on the ground confirmed that all the plots in question were properly serviced by roads. The court concluded that it could not be said that the structure that was being constructed on the access road was illegal and unlawful and declined to order its demolition.
6. The appeal was canvassed through written submissions. The Appellants faulted the trial court for finding that the 1st Appellant lacked capacity to bring claims in respect of Gaturi/Githimu/2486, 2490, 2494 and 2495 yet there was no dispute that the 1st Appellant was the administrator of his late

father's estate, Ramadhan Njoka Mwando Njoka, and that he was still the registered owner when the suit was filed. The trial court was faulted for holding that the Appellants failed to prove their claim yet the 1st Respondent had erected a structure on the access road illegally without NCA's approval, buttressed by the fact that NCA's report was produced in evidence.

7. Further, the Appellants submitted that the letters from NLC produced confirmed that the structure was erected on an access road. They urged that **NLC's letter confirmed that the road was a public road reserved as such and was not available for use for any other purpose.** They also faulted the Learned Magistrate for justifying the erection of the structure on an access road based on the existence of alternative roads servicing the affected parcels of land. The Appellant relied **on Silipet Properties Limited & Another v Chege Mwaura & Another (2017) eKLR** where the court observed that the defendants did not have a **right to block or close a public road without following due process.**
8. The 1st Respondent submitted that it was incumbent upon the 1st Appellant to prove his claim before the trial court to the required standard. It urged that the Appellants' witness confirmed that the plots in question were properly serviced by a 6-metre road, which is developed. The AG submitted that the claim was rightly dismissed by the trial court. The 1st Respondent maintained that by failing to testify, the 2nd Appellant's case against the

Respondent was rightly dismissed by the trial court. It urged the court to dismiss the appeal.

9. The Hon. Attorney General submitted that no documentary or expert evidence was produced to confirm that the road was a registered public access road or any statute or planning regulation was breached. Further, that the 2nd Respondent confirmed that due process was followed before construction and that the land upon which the structure was erected was available for such use since an alternative access road existed that served the relevant plots. The AG argued that the claim of illegality was unsubstantiated and that the Appellants failed to prove their case on a balance of probabilities as required by Section 108 of the Evidence Act.
10. The AG submitted that the Appellants' claim was pegged on the allegation that the construction blocked access to several plots and interfered with their easement rights, which are governed by Section 98 of the Land Act. Additionally, that the Appellant failed to produce any registered easement document or surveyor's report to corroborate their claims. The AG reiterated that there was an alternative access to the plots and that they are not landlocked. The AG maintained that the Appellants failed to prove their case to the required standards.
11. The issue for determination is whether the appeal has merit. The Respondent did not call any evidence before the trial court. The 1st Appellant gave evidence and produced the confirmed grant in respect of the estate of Ramadhan Njoka Mwando; copies of

searches for Gaturi/Githimu/2487, 2490, 2494, 2495 and 2496. He also produced copies of the complaint made to NCA dated 13/4/2017, letter from the County Government of Embu pointing out that the land in Dallas on which the social hall was to be constructed was a road reserve and that it did not serve any meaningful purpose because the sub division of the adjacent land resulted in an alternative access road.

12. The Director of Physical Planning and Survey, Embu County pointed out that when converting a road to a social hall, they should formalize the user from a road reserve to a social hall and prepare building plans which have to be approved by the relevant authorities, Public Health, County Government Engineer, NEMA and Physical Planning. This letter, emanating from the survey department, confirms that there is a process for converting public land reserved for one purpose to a different public purpose.
13. The Appellants produced the investigation report prepared by NCA dated 6/3/2016, which confirmed that the social hall constructed on the disputed land was constructed without architectural drawings and a compliance certificate to show that the project was registered with NCA. The Appellants produced photographs of the construction of a social hall and correspondence from NLC. NLC's internal memo dated 9/6/2017 confirmed that the building was constructed on a road reserve that was not available for allocation.

14. Looking at the registry index on RIM showing where the social hall was constructed, it abuts parcels 2495 and 2486 on one hand and 2494 with 2487 on the other side. There is no indication that any notice was given that the road was to be closed and converted into a plot that could be allocated for other public use. The Ag's contention that the 2nd Respondent confirmed that due process was followed before the construction of the social hall lacks basis since none of the Respondents tendered any evidence before the trial court.
15. The Public Roads and Roads of Access Act requires that a notice should be sent to persons who may be affected by an order cancelling or altering the alignment of a road of access. Contrary to the AG's submissions, this matter did not involve a question of easement, it dealt with land set aside for a road within the area covered by the RIM. What emerges from the correspondence from NCA, NLC and Director of Physical Planning and Survey, Embu County is that the critical stakeholders who would include proprietors of land abutting the road sought to be closed, were not involved and did not participate when the decision to close the road and construct a social hall on it was taken.
16. The appeal is allowed. The judgment of the SPM in Embu CM ELC Case No. 87 of 2018 is set aside. Prayers 1 & 2 of the plaint dated 9/8/2017 are allowed. The Appellants are awarded the costs of the appeal and the suit before the trial court be borne by the Respondents.

Delivered virtually at Bungoma this 17th day of March 2026.

**K. BOR
JUDGE**

In the presence of: -

Ms. Siprose Ombongi the 1st Respondent

Court Assistant- Diana Kemboi

No appearance for the other parties

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