



**Teleposta Pension Scheme Registered Trustees v Mvita Development  
Investment Limited (Environment and Land Case Civil Suit  
1259 of 2003) [2018] KEELC 4880 (KLR) (26 July 2018) (Judgment)**

Neutral citation: [2018] KEELC 4880 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1259 OF 2003**

**AK BOR, J  
JULY 26, 2018**

**BETWEEN**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES ..... PLAINTIFF**

**AND**

**MVITA DEVELOPMENT INVESTMENT LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff in its amended plaint filed on 23/5/2017, seeks a declaratory order that no access road was ever registered as passing between Land Reference Numbers 209/14990/3 and 209/14990/4. The Plaintiff was the registered owner of these two (2) parcels of land until 2006 when it sold the properties to Samson Kibet Toroitich and Monica Wanyama respectively who in turn transferred the plots to Quantymax Consolidated Company Limited and Hawi Developers Limited respectively.
2. The Minister for finance transferred and vested in the Plaintiff L.R. Nos. 209/3083 and 3084 vide Legal Notice No. 154 published in the Kenya Gazette Supplement No. 59 of 5/11/1999 to enable the Plaintiff discharge its pension liabilities in respect of pensioners of the Kenya Post and Telecommunication Corporation, Postal Corporation of Kenya, Communications Commissions of Kenya and Telkom Kenya Limited. Upon the registration of the vesting order, new deed plans and certificates of title were issued to the Plaintiffs known as L.R. Nos. 209/14990/3 and 209/14990/4.
3. On 21/10/2003 the Defendant through its agents notified the Plaintiff of the intention to construct a road passing through the Plaintiff's plots. The Plaintiff avers that there was no road passing through its plots at the time the properties were vested in it. According to the Plaintiff, the Defendant's threat to construct an access road through the two plots was unlawful and actionable.
4. In its Amended Defence and Counterclaim filed on 26/9/2017, the Defendant pleads that the Government allocated L.R. No. 209/11872 to St. Georges Secondary School in 1992 with the



- intention that the school could sell the land and utilise the sale proceeds for its development. L.R. No. 209/11872 is separated from the school by Kirichwa Kubwa River and could only be accessed through L.R. Nos. 209/3083 and 3084 which belonged to Kenya Post and Telecommunication Corporation (KPTC) at the time.
5. The Defendant avers that the Commissioner of Lands requested KPTC to allow an access through its two properties by way of a 6-meter road to be excised from KPTC's two plots and that KPTC agreed subject to commercial compensation. The Defendant states that this condition was subsequently waived. Upon receiving KPTC's confirmation, the Defendant claims the Commissioner of Lands instructed the Director of Surveys to provide access to L.R. No. 209/11872 which was done and the deed plan duly prepared.
  6. St. George's School sold L.R. No. 209/11872 to the Defendant at the agreed consideration of Kshs. 15 Million which the Defendant paid to the school. The transfer was registered and the Defendant was issued with a title on 12/10/1998.
  7. The Defendant avers that the Plaintiff commissioned Jooyato Surveys to undertake another survey of its two (2) properties which were transferred pursuant to the gazette notice. The latter survey ignored the Director of Surveys approval of F/R 312/189 which confirmed the existence of the access road known as L.R. No. 209/3083/1 and wrongfully amalgamated the roads with the Plaintiff's properties.
  8. The Defendant maintains that the access road was excised before the two plots were transferred to the Plaintiff and the Plaintiff therefore, has no right over the access road. It also urged by the Defendant that there was no obligation in law to register the particulars of the road against the Plaintiff's title. The Defendant avers that the Plaintiff's predecessor in title gave an unequivocal representation that the access road would be excised from the properties and the Plaintiff is consequently estopped from denying this fact since it acquired the titles together with the liabilities attached to them.
  9. The Defendant denies that the intended construction of the access road amounted to a trespass on the Plaintiff's properties. The Defendant counterclaimed the sum of Kshs. 18,887,707.40 as at 30/4/2004 being the increment in the development cost of the 56 apartments it was to construct on its property which it claims was caused by the delay in the commencement of the works. The Defendant argues that its development of the apartments could not commence on time because the Plaintiff denied the contractor access onto the Defendant's property.
  10. The Defendant also claims that as a direct consequence of the Plaintiff's denial of access to its land, the Defendant was forced to purchase an adjacent parcel of land being L.R. No. 209/14990/7 at Kshs. 9.5 million from William Peter Changwony in order to access its property. The Defendant claims this sum from the Plaintiff as well as general damages together with interest and costs.
  11. The Plaintiff called one witness. Wilfrida Mwambao, the Plaintiff's Property Officer gave evidence based on the records kept by the Plaintiff. She stated that in 1999 the government of Kenya published in the Kenya Gazette Supplement a Notice vesting L.R. Nos. 209/3083 and 209/3084 in the Plaintiff to enable it to discharge its pension liabilities in respect of persons who as at 30/6/1999 was entitled to receive a pension from the Plaintiff as well as the employees of Communication Commission of Kenya, Postal Corporation of Kenya and Telkom Kenya Limited. She produced copies of the legal notices. The Plaintiff instructed Jooyato Surveys to process titles for the two properties in favour of the Plaintiff and new titles for L.R. No. 209/14990/3 and 209/14490/4 were issued to the Plaintiff on 12/11/2002. She produced copies of those titles. The Plaintiff could develop the properties or sell them and reinvest the sale proceeds.



12. On 29/10/2003, the Plaintiff received a letter from Mruttu Salmann & Associates on behalf of the Defendant notifying the Plaintiff of the intention to construct the road on 3/11/2003 that would pass through the Plaintiff's property.
13. The Plaintiff confirmed from its surveyors that no such road was registered to pass through its property. The Plaintiff took the view that the Defendant's threat to construct an access road through its land was unlawful and amounted to trespass on its properties. The Plaintiff filed this suit and obtained orders barring the Defendant and its agents from constructing an access road through its properties until the suit was determined. The Plaintiff sold the two parcels of land in 2004.
14. The Plaintiff argues that the Defendant failed to tender any evidence to show that the registration of the Plaintiff's titles was procured fraudulently or that there was a registered access road in existence at the time when the properties were vested in the Plaintiff. The witness urged the court to dismiss the Defendant's counterclaim as having no basis.
15. The witness confirmed that the Director of Surveys wrote to the Plaintiff on 22/4/2004 alleging that there was an unregistered access road passing through the two parcels of land and requested the surveyor to surrender the deed plan referred to on F/R No. 317/62 for cancellation. The Plaintiff maintains that this was an afterthought since the Director of Surveys did not notify the Plaintiff of the existence of the access road when it processed and approved the Plaintiff's deed plans. That letter was written after the Plaintiff had filed this suit.
16. The Plaintiff produced the Gazette Notice transferring assets to it. It lists L.R. No. 209/3083 as being in Githunguri Road, Lower Kileleshwa and gives the size of the 3-bedroom bungalow together with the staff quarters and the garage. It also listed L.R. No. 209/3084 in the same place measuring 0.965 and indicates that there was a residential block with two units one of which had 2 bedrooms and the second had three bedrooms and gave their sizes. She produced the copies of the certificates of title for L.R. No. 209/14990/3 measuring 0.2002 ha. The deed plan No. 244481 attached to this title is dated 1/10/2002. The certificate of title in respect of L.R. No. 209/14990/4 measuring 0.2139 ha was issued to the Plaintiff and later transferred to other persons. Deed plan no. 244482 dated 1/10/2002 was attached to this title.
17. The witness also produced a copy of the letter dated 29/10/2003 on the proposed construction by the Defendant and the Plaintiff's surveyor's letter to the Plaintiff dated 12/11/2003. In the letter, the surveyor pointed out that when the survey to create a road between the Plaintiff's plots was carried out, it was not cross referenced on F/R No. 52/62 which formed the basis of the Plaintiff's surveyor's subdivision and therefore was not taken into consideration. The surveyor stated that subdivision scheme plans underwent statutory approvals before title documents were issued. The letter further stated that the approved part development plan for the Defendant's land showed that it was part of St. Georges School and that an access existed through the school.
18. The witness confirmed that there were other properties next to the river after the Plaintiff's properties. She did not know how the owners of those plots accessed their plots. She maintained that there was no road registered against the Plaintiff's titles even at the time it sold the properties to 3<sup>rd</sup> Parties.
19. Mr. Oyato, a licenced Land Surveyor carrying on business as Jooyato Surveys gave evidence for the Plaintiff. He received instructions in 2001 from Teleposta Pension Scheme Registered Trustees to amalgamate, subdivide or submit for registration various parcels of land situated in Kileleshwa, Nairobi that had been vested in Teleposta Pension Scheme. He was given a copy of the vesting order which listed L.R. Nos. 209/3083 and 209/3084. He purchased survey plan F/R 52/62 in respect of L.R. Nos. 209/3068 to 3084. He produced a copy of this survey plan. He prepared a new survey plan which



- was authenticated by the Director of Surveys on 17/9/2002 and given L.R. Nos. 209/14990/3 and 209/14990/4. When he completed the survey exercise, he gave the Plaintiff the registered certificates of title for these parcels of land.
20. He later learnt after completing the survey exercise that the Defendant had written a letter to the Plaintiff alleging that an access road existed passing through the Plaintiff's plot numbers L.R. No. 209/14990/3 and 209/14990/4 and demanded that it be opened.
  21. He denied that no such access road existed since it was not evident from the existing survey plan F/R No. 52/62 that there was such a road. The survey plan is a legal document which ought to confirm the existence of any encumbrance or easement against the property.
  22. Further, he stated that the Director of Surveys did not bring to his or the Plaintiff's attention any correspondence regarding the existence of an access road between the Plaintiff's two parcels of land when the Director checked his survey work. His survey was approved without any reference to access road. He also pointed out that the survey plan which created the access road was not cross referenced on F/R No. 52/62 which forms the basis of its subdivision. He further stated that the Plaintiff had not executed a deed of surrender for an access road to pass between its two plots.
  23. He pointed out that the part development plan reference no. 42/23/94/2 showed a 9-metre road between L.R. Nos. 209/3087 – 3088 which was intended to serve plot numbers A, B, C, D, E and F which eventually became L.R. No. 209/11872. The part development plan no. 42/23/94/2A showed an attempt was made to create a road between L.R. Nos. 209/3083 and 3084 but it was not completed as the part development plan is not approved. He was of the opinion that to gain an access between the Plaintiff's plots, the Defendant would have approached the Plaintiff and purchased a portion of its land for use as a road on a willing buyer willing seller basis. The other option would have been to initiate the process of compulsory acquisition in accordance with the law which the Defendant did not do.
  24. The surveyor confirmed that the Director of Surveys who is a custodian of survey records has power to rectify errors in surveys, which is done in consultation with the surveyor who undertook the survey work. He stated that when he prepared the survey he did not know that there was a road between the two (2) plots as this had not been included in the records held by the Director of Surveys.
  25. The defence called Victor Kiprono Kirui, a land surveyor in the Ministry of Lands, Cadastral Section where all the survey records are kept. He produced F/R Nos. 52/62, 312/189, 262/197 and 230/148 which have a bearing on L.R. No. 209/11872. F/R No. 52/62 was the original survey plan. F/R 312/189 which shows an access road between L.R. No. 209/3083 and No. 209/3084 was prepared in December 1996 and it shows that the resultant road was given L.R. No. 209/3083/1. He confirmed that F/R No. 317/62 which was authenticated on 17/9/2002 does not show the road. It was prepared as an amalgamation after the resurvey was done. New numbers were issued for the Plaintiff's parcels of land and L.R. No. 209/3083 became 209/14990/5 while L.R. No. 209/3084 became 209/14990/4. No provision was made for a road in those surveys. He stated that the Director of Surveys had power to make corrections where previous surveys did not consider all the necessary provisions. He confirmed that F/R 317/62 shows a river on the far right of the plan and that L.R. No. 209/11872 is not reflected on this F/R. Neither is it on F/R No. 52/62.
  26. He confirmed that for one to be allocated a plot they had to have a part development plan showing the plot in the area. When planning is done, there must be an access road included in the plan. He confirmed that where properties are registered and one requires an access road, there must be an amalgamation first and if the property is owned by a different party, then one must purchase the land for the access road. He stated that F/R No. 312/189 showed an amalgamation and creation of an access road on the inset.



27. He stated that when presenting plans for registration, licensed surveyors were expected to submit surrender documents for the access road. F/R 312/189 which has L.R. No. 209/3083/1 confirmed there was to be a surrender. The witness did not know whether the surrender was ever done to the lands office. He stated that all survey plans are authenticated and filed at the Survey Department. He also confirmed that the deed plans ought to have accompanied the surrender of titles by the registered proprietor of plots numbers 3083 and 3084. He stated that surrenders are usually voluntary and where an owner refuses to surrender voluntarily, the survey plan should be cancelled.
28. The witness could not tell if the deed plans were surrendered by the Plaintiff even though the records showed that the deed plan number for the road of access was still held at survey department. The witness confirmed that the copy of F/R 312/189 which he had was cross referenced on F/R 52/62 but not the copy that the court had. He also confirmed that the last survey plan prepared was F/R 317/62. The surveyor who prepared this was supposed to have checked all the survey plans within the vicinity of that land.
29. He stated that when Mr. Oyato did the survey work for the Plaintiff, he only referred to F/R 52/62 on his coordinate list yet he should have shown all the other properties in the surrounding area. F/R 312/189 which created the access road was done in 1996 before the vesting order of 1999 that transferred the plots to the Plaintiff. He relied on the letter dated 14<sup>th</sup> March in which the Commissioner of Lands stated that he was made to understand that KPTC had accepted a proposal to have an access to L.R N. 209/11872 next to St. Georges School annexed from L.R. No. 209/3083 and 3084 owned by KPTC. The letter instructed the Director of Surveys to do a resurvey adopting that proposal and also mentioned the issue of compensation.
30. The Defendant's director gave evidence. He confirmed that the Defendant owned L.R. No. 209/11872. This land was allocated to St. Georges Secondary in 1992 to enable the school dispose of the land and utilise the proceeds for its development. The property was separated from the school by a river and bordered KPTC's two plots through which it could be accessed. The Commissioner of Lands requested KPTC to allow access through its plots by way of a 6 metre road to be excised from the two plots. KPTC's Managing Director agreed to provide the said access road subject to commercial compensation but that he later waived that requirement. He relied on KPTC's letter of 17/6/1996.
31. The Commissioner of Land instructed the Director of Surveys to provide access to the Defendant's property through KPTC's two plots. The school sold the plot to the Defendant. The witness was of the view that the subsequent survey of KPTC's two parcels of land undertaken by Jooyato Surveys was improperly done because it ignored the Director of Surveys' approval of F/R 312/189 which had confirmed the existence of the access road as L.R. No. 209/3083/1 which the surveyor amalgamated with the Plaintiff's two other properties in the resurvey that resulted in new L.R. Nos. 209/14990/3 and 209/14990/4.
32. The Defendant intended to develop 56 apartments on its land for sale and entered into a contract with N. K. Brothers Limited for the development. The construction was delayed because the Plaintiff denied the contractor access to the Defendant property. This led to the escalation of the contractor's cost and resulted in an increment of Kshs. 12,903,505/=. The Defendant sought to recover this sum from the Plaintiff together with the sum of Kshs. 9.5 million which the Defendant was forced to expend in purchasing the adjacent parcel of land in order to allow the contractor to access the Defendants property.
33. The witness produced the correspondence exchanged with the contractor on the development of the apartments for sale together with the additional costs. The contractor's letter of 24/11/2003 stated that the contractor's staff members were chased away by the owners of the adjacent plots when they



- went to the site on 22/11/2003. He also produced a copy of the sale agreement for the plot that the Defendant was forced to purchase for purposes of getting an access road to its land.
34. The Defendant also called the Quantity Surveyor whom it retained for the development of the apartment block as a witness. He stated that the contract was for a fixed term 54 weeks at the fixed price of Kshs. 179,890,000/=. When the Plaintiff denied the contractor access to the plot, it led to an escalation of the contractor's costs, the plumbing sub-contractor and the electrical sub-contractor. The quantity surveyor approved the additional payments due to the price increment caused by the delays and denial of access to the Defendant's property.
35. Parties filed and exchanged written submissions. The issues for determination are:
- a. Whether an access road had been excised from the Plaintiff's properties prior to the transfer of the plots to the Plaintiff;
  - b. Whether the Defendant is entitled to a right of way through the access road designated as L.R. No. 209/3083/1;
  - c. Whether the Defendant is entitled to the damages it seeks from the Plaintiff as a result of the Plaintiff's refusal to allow the Defendant's contractor access through its property;
  - d. Whether the court should issue the orders sought by the Plaintiff; and
  - e. Who should bear the costs of this suit?
36. The Defendant submitted that the Plaintiff's surveyor failed to abide by the directions of the Director of Surveys when he resurveyed the Plaintiff's plots and prepared F/R 317/62 that did not take into account F/R No. 312/189 which shows the existence of the access road. It argued that the Plaintiff's Surveyor should have taken the deed plan created from F/R No. 317/62 to be registered then he would have discovered that F/R No. 312/189 had already been certified by the Director of surveys. This is the one which created the access road to be used by the Defendant.
37. Section 31 of the *Survey Act* allows the Director of Surveys to correct errors on survey plans. If there was an error on the part of the Plaintiff's surveyor when he resurveyed the Plaintiff's plot, then the Defendant could have applied to the Director of Surveys to correct the error. The surveyors who gave evidence confirmed that the Defendant could have obtained an access through the Plaintiff's plot through purchase following which the Plaintiff would have surrendered its deed plans, survey plans and title to enable the creation of the access road. The Plaintiff had to give consent for this to happen and be compensated for its land. This did not happen in this case.
38. The Defendant submitted that the Plaintiff's surveyor failed to carry out due diligence which would have disclosed that the Plaintiff's plots were subject to certain overriding interests such as the right of way outlined in Section 30 of the Registered *Land Act*, which has since been repealed. Section 30 stipulated that all registered land was subject to overriding interests that subsisted and affected the land without their being noted on the register. The interests included rights of way, rights of water and profits subsisting at the time of first registration under that Act. The certificates of title in this case were issued under the Registration of Titles Act and not the Registered *Land Act*.
39. The Defendant relied on the case of Kenya Power and Lighting Company Limited v. Kipevu Inland Container EPZ Limited [2018] eKLR. The case dealt with an easement or wayleave in respect of power lines. The dispute in this case is over an access road and not a wayleave.



40. The Plaintiff's letter dated 17/6/1996 in response to the letter of the Commissioner of Lands stated that KPTC was willing to give the six metre access road to the plot belonging to St. George's Secondary School contemplated by the Commissioner, subject to appropriate commercial compensation.

41. The letter from the Commissioner of Lands to the Director of Surveys dated 14<sup>th</sup> March 19... stated as follows:

RE: ACCESS ROAD TO L.R. 209/11872- NAIROBI CITY NEXT  
TO ST. GEORGE'S SCHOOL

The above allocation refers.

I am made to understand that the Kenya Posts and Telecommunication Corporation accepted a proposal to have access to the above plot annexed from LR 209/ 3084 and 209/3083 (which are both owned by the said corporation). You may therefore have a resurvey done adopting this proposal and compensation to the KPTC land be c...ed from the above parcel of land.

F. K. ORIOKI

For: COMMISSIONER OF LANDS

42. In the above letter, the Commissioner only stated that he was made to understand that KPTC had accepted the proposal to have the access road annexed from its two plots. There is no evidence that compensation was paid to KPTC. The Defendant did not produce evidence to confirm that KPTC waived the requirement for compensation which was the condition it gave for the creation of the access road in its letter of 17/6/1996 addressed to the Commissioner of Lands.

43. It is not in dispute that the Plaintiff was registered as the owner of the two plots long before the plot that was allocated to St. George's School was surveyed. That is the plot the Defendant purchased. This position is confirmed by F/R No. 52/62 prepared in 1949 which shows plot numbers 3083 and 3084. F/R No. 312/189 prepared in 1996 created plot numbers 209/3083/1, 209/3083/2 and 209/3084/2. The inset map on F/R No. 312/189 confirms that plot numbers 3083 and 3084 existed as a joint plot without a road separating the two plots. It is indicated on this survey plan that L.R. No. 209/3083/1 and 209/3084/1 were for surrender. There is no evidence to confirm that they were indeed surrendered. F/R No. 317/62 dated 29/5/2002 produced by the Defendant does not have a road running between L.R. No. 209/14990/4 and L.R. No. 209/14990/5; which are the new numbers for the Plaintiff's plots previously demarcated as 3083 and 3084. This confirms that no access road had been excised out of the Plaintiff's two plots prior to the transfer of the plots to the Plaintiff.

44. The court is to take the certificates of title over L.R. No. 209/14990/3 and L.R. No. 209/14990/4 issued to the Plaintiff on 12/11/2002 as conclusive evidence that the Plaintiff was the absolute and indefeasible owner of the two plots under Section 23 of the Registration of Titles Act, subject to the encumbrances, easements, restrictions and conditions endorsed on the titles. There was no easement or restriction endorsed on the Plaintiff's certificates of title over the two plots. The Defendant did not prove that it was entitled to a right of way through an access road to cut through the Plaintiff's two plots. That being the position, the Defendant is not entitled to the orders it seeks in the counterclaim.

45. The court finds that the Plaintiff has proved its case on a balance of probabilities and grants the reliefs sought in the Amended Plaint dated 22/5/17. The Defendant failed to prove its counterclaim. It is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi on 26<sup>th</sup> July 2018.

**K. BOR**



## **JUDGE**

### **In the presence of: -**

Mr. Bundotich for the Plaintiff

Mr. Kavagi holding brief for Mr. Chacha Odera for the Defendant

Mr. V.Owuor- Court Assistant

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