



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MAKUENI**

**MAKUENI ELC NO. 83 OF 2017**

**EQUATOR INN LTD T/A TSAVO INN HOTEL.....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA LTD.....DEFENDANT**

**JUDGMENT**

1. On the 31<sup>st</sup> September, 2015 the Plaintiff commenced this suit against the Defendant by a way of a plaint dated 30<sup>th</sup> September, 2015. He seeks the following orders against the Defendant:-

**a) A Declaration do issue that the property known as L.R. No. 11794/2 (formerly 11487/1) is subject to an encumbrance in favour of a right of way for the property known as L.R. No. 11794/1 (formerly 11487/2).**

**b) An order of injunction do issue restraining the Defendant or its agents, servants and or employees form constructing or further constructing a wall across the Plaintiff's access to the Nairobi – Mombasa highway or from harassing, threatening or otherwise adversely interfering with the Plaintiff's fundamental proprietary right of way with respect to the Defendant's parcel L.R. No. 11794/2 (formerly 11487/1) and right of enjoyment of Plaintiff's parcel L. R. No. 11794/1 (formerly 11487/2).**

**c) A order of mandatory injunction do issue compelling the Defendant or its agents, servants and or employees to remove any obstruction of the entrance to Tsavo Inn Hotel and Plaintiff's right of way through the Defendant's plot.**

**d) A Declaration do issue that the Defenant's acquisition and registration as proprietor of the property known as L.R. No. 11794/2 (formerly 11487/1) is unlawful, null and void.**

**e) Special damages in an amount to be assessed by the court for loss of use from 1<sup>st</sup> May 2015 until right of way is finally reinstated to the Plaintiff.**

**f) General damages for mistreatment and nuisance by the Defendant.**

**g) Interest on paragraphs e) and f) above at 20% per annum from 1<sup>st</sup> May 2015 until payment in full and costs of this suit.**

**h) Any other relief that this Honourable Court deems fit and just to grant be issued.**

2. It's claim is denied by the Defendant vide its statement of defence dated 7<sup>th</sup> December, 2015 and filed in court on even date.

3. Hearing of the substantive suit commenced on the 27<sup>th</sup> November, 2017. The Plaintiff called Nila Desai (PW1) who adopted her witness statement that she recorded on the 30<sup>th</sup> September, 2015 as her evidence.

4. Desai's (PW1) evidence in chief was that the Plaintiff is the registered owner of parcel of land known as L.R. No. 11794/1 (formerly 11487/2) situated in Mtito Andei along Nairobi/Mombasa highway.

5. The Plaintiff runs Tsavo Inn Hotel which has an archway entrance of two elephant tusks.

6. The Plaintiff's plot is bordered by the Tsavo National Park, the Defendant's land parcel number LR 11794/2 (formerly 11487/1) as well as a road reserve. She went on to say that the Plaintiff and its witnesses have always enjoyed unrestricted right of way from its plot through the Defendant's plot onto Nairobi/Mombasa highway. She pointed out that the said right of way has existed uninterrupted and known to the previous owners of the Defendant's plot and to the Defendant's.

7. Desai (PW1) further testified that in or about 2013 the Defendant planned to carry out works which was likely to disturb the Plaintiff's plot which included the construction of a boundary wall, introduction of unacceptable noise levels and sewerage interference with run off but the Defendant's project manager assured the Plaintiff that the construction would not affect the Plaintiff's right of access and other enjoyments.
8. However in 2015, the Defendant put up a wall and effectively blocked the Plaintiff's entrance and intended to introduce unacceptable noise levels likely to affect wildlife and the Plaintiff's customers.
9. The witness pointed out that the Plaintiff bought the hotel in the late 1970's. She said that the Plaintiff also owned the portions currently occupied by the Defendant. She added that the Plaintiff sold the portion to Caltex.
10. Her evidence in cross-examination was that the Plaintiff's property number LR 11794/1 and the Defendant's parcel number 11794/2 are both located along Nairobi/Mombasa highway. She said that she and others can access their property through some other entrance.
11. She said that even though they have complained of noise pollution and run off from the Defendant's property, they have not brought evidence of that fact in court. She also admitted that even though they have said that the tusks are of historical value, no such evidence was adduced. She said that even though the Plaintiff has suffered loss due to the activities of the Defendants, the Plaintiff has not filed details of the loss.
12. Her evidence in re-examination was that they have used the entrance that has tusks for nearly 20 years.
13. The Defendant called Beryl Adhiambo (DW1) who is its project engineer as to sole witness. Adhiambo (DW1) produced the Defendant's documents filed on the 7<sup>th</sup> December, 2015 as DEX Nos. 1 to 12 respectively.
14. According to Beryl (DW1), the Defendant's property borders that of the Plaintiff and that both properties have access to the highway as can be seen from the site layout plan (DEX No. 9). She pointed out that both plots are on the left hand side of the road as one heads to Mombasa from Nairobi.
15. She said that the Plaintiff's plot falls behind that of the Defendant and that at no point has the Defendant allowed the Plaintiff to use its plot as an access to the highway. She said that the Defendant does not run lodges on its property so as to compete with the Plaintiff's property.
16. She went on to say that they got the necessary approvals (DEX No. 7 and 8) before they commenced construction and that the station was designed to take care of the run off. She revealed that there are trenches drains that cater for the runoff and that the soil in the area is highly absorbent. As for the noise, Beryl (DW1) said that the station runs pumps which do not make noise.
17. Beryl's (DW1) evidence in cross-examination was that she did not know for how long the Plaintiff's business has been in existence. She said that the Defendant bought land parcel number LR 11487/1 on the 9<sup>th</sup> September, 2010 from Total Kenya and could not tell who the owners were before Total Kenya.
18. She said that the Defendant acquired all the requisite approvals before commencing construction. She said that she was aware of an order stopping the construction.
19. Her evidence in re-examination was that the tusks are right after the Defendant's boundary. She said that the tusks were never affected by the construction. She further said that the Plaintiff can access the highway from her own plot.
20. In their Written Submissions, Wandabwa Advocates raised nine (9) issues for determinations. These were:-
  - a) **Whether the Plaintiff had run a successful hotel business on L.R. No. 11794/1 (formerly 11487/2) for over 43 years and had enjoyed unrestricted right of way to its land through L.R.No. 11794/2 (formerly 11487/1).**
  - b) **Whether the Defendant's land L.R. No. 11487/2 (formerly 11487/1) was at all material times subject to an encumbrance in favour of Plaintiff being an unrestricted right of way for the Plaintiff's property known as L.R. No. 11794/1 (formerly 11487/2)?**
  - c) **Whether the Defendant's construction on L.R. No. 11794/2 (formerly 11487/1) and a wall effectively blocked Plaintiff's Plot entrance, introduced unacceptable noise levels affecting wildlife and Plaintiff's clients?**
  - d) **Whether the Defendant's act led to breach of Plaintiff's right to property and or any interest in or right over its property, including right of way through the Defendant's Plot.**
  - e) **Whether the Defendants act were unreasonable, in bad faith with the intention of destroying the Plaintiff's business.**
  - f) **Whether the Defendants act lead to economic loss to the Plaintiff?**
  - g) **Whether the suit is res-judicata?**

**h) Whether the Plaintiff is entitled to reliefs sought?**

**i) Who is entitled to the costs of the suit?**

21. On the issue of whether or not the Plaintiff has right of way, the Plaintiff's Counsel cited Section 28 of the Land Registration Act No. 3 of 2012 that creates and categorizes the right of way as overriding interest. The Counsel added that section 28(c) and (b) of the same Act provides;

*“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.*

*(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*

*(j) any other rights provided under any written law.”*

22. In addition the counsel further cited Section 32 of the Limitation of Actions Act which provides for the various measures through which easements may be acquired and submitted 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.

23. The Counsel further submitted that Sections 98 of the Land Registration Act provides for a framework for creation of easements through formal instruments and pointed out that the easements pleaded by the Plaintiff herein is not the type acquired through a formal registered instrument.

24. Section 32 of the Statute of Limitations Chapter 22 of the Laws of Kenya as follows:-

**2. 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.**

**(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.**

25. The Counsel further submitted that the absoluteness and indefeasibility of an easement was re-affirmed by the Court of Appeal in the case of **Kamau –Vs- Kamau (1984) eKLR** in the following words;

*“where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions.”*

26. The Counsel added that the legal ramification of the foregoing statutory framework and judicial pronouncement is that a land owner, who allows another the peaceable, open and uninterrupted enjoyment of an easement against his land, will stand precluded from exercising his proprietary right against the other person to the extent of the easement upon crystallization.

27. The Counsel emphasized that the running of time for purpose of crystallization is not disrupted by change of ownership of the subject land.

28. On the issue of whether the Defendants acts were unreasonable and in bad faith with the intention of destroying the Plaintiff's business, the Counsel submitted that the Plaintiff's use of way through the Defendant's land has been exercised over the years without interference from the previous and current owners of the Defendant's premises.

29. Subsequently, the Counsel opined, the decision of the Defendant to terminate this right is calculated to frustrate the Plaintiff's business and to unfairly attract the clients that would ordinarily go to the Plaintiff's business.

30. On the issue of whether a mandatory injunction should be issued against the Defendant, the Plaintiff's Counsel submitted that the

Plaintiff has merit for the grant of the same because of the special circumstances that surround the matter in questions.

31. The Counsel pointed out that by constructing a wall across the Plaintiff's entrance, the Defendant blocked the Plaintiff and its customers entrance hence irreparable damage has been occasioned to the Plaintiff's business.

32. The Counsel further submitted that the Plaintiff's business is more than a mere business as it represents an irreparable asset and passion that has stood tall and gained reputation over the years and therefore the balance of convenience tilts in favour of granting an injunction.

33. On whether or not the suit is *re judicata* by virtue of **Rajni Desai T/A Tsavo Inn Service Motors –Vs- National Oil Corporation of Kenya Ltd in Machakos ELC 287 of 2011** and **Machakos BPRT Reference No. 39 of 2011**, the Plaintiff's Counsel submitted that in the former suit, the issue was termination of a petrol station dealership hence which had been granted to the Plaintiff by the Defendant. As for the latter case, the Counsel pointed out parties in the subject matter are not the same as the ones before this court. The Counsel submitted that this case is not *res judicata*.

34. Regarding the issue of who should bear the cost of this suit, the counsel submitted that the Defendant having unlawfully interfered with the Plaintiff's right of way, it ought to bear the cost.

35. The Defendant did not file any submissions.

36. Having read the evidence on record as well as the submissions that were filed by the Plaintiff's Counsel, my finding is that there is unequivocal evidence that the plaintiff acquired Tsavo Inn in the late 1970's. It is not disputed that the Defendant's parcel of land was part of the Plaintiff's property before the Defendant sold it to Caltex which in turn sold it to Chevron and Total before ending up in the hands of the Defendants herein.

37. There is also evidence to show that the portion where the elephant tusks (that were erected in the 1940's are) was open to allow access to the Plaintiff's Inn. Until the year 2015, the Plaintiff appears to have lived peacefully side by side with the previous owners of the suit property until the Defendant came on board. There is nothing to suggest that the Plaintiff did not enjoy access to their property through the entrance where the tusks are during the aforementioned period.

38. It seems to me that the Plaintiff did enjoy access to its property for over 20 years. As was pointed out by the Plaintiff's Counsel, 20 years is the period within which an easement crystallizes under the Statute Limitation Act, Chapter 22 of the Laws of Kenya.

39. I agree with the Plaintiff's counsel that the legal framework favors the Plaintiff. The Defendant cannot be heard to hide under the claim of proprietorship of the suit property. As was correctly pointed out by the Plaintiff's Counsel, the running of time for the purpose of crystallization of the easement is not disrupted by the change of ownership of the subject land and the approvals that the Defendant got to construct on its parcel of land.

40. Given the above reasons, I hold that by blocking the access road, the Defendants acted unreasonably, in bad faith and with the intention of destroying the Plaintiff's business as there is nothing to show the easement interfered with the Defendant's running of its own business.

41. I am further convinced that the Plaintiff merits the grant of the mandatory injunction under the circumstances. Needless to say, I am in agreement with the Plaintiff's Counsel that this suit is not *res judicata* since the issue on **Rajni Desai T/A Tsavo Inn Service Station –Vs- National Oil Corporation of Kenya Ltd in Machakos ELC 287 of 2011** is different from the suit and is hence is distinguishable. And so is **Machakos BPRTC 39 of 2011**.

42. Flowing from the above, it follows therefore that the Plaintiff should be awarded costs. As for the award of special damages to before assessed by the court, it is trite law that special damages must not only be pleaded but must also be proved. In my Judgement, I will not award the Plaintiff only special damages. Furthermore no evidence was led which could enable this court to assess the same. Equally, I will not award the Plaintiff general damages.

43. The upshot of the foregoing is that I am satisfied that the Plaintiff has on a balance of probabilities a cause of action against the Defendant.

44. In circumstances, I hereby proceed to enter judgement for the Plaintiff and against the Defendant in terms of prayers (a), (b), (c), (d) plus costs and interest of the suit. It is so ordered.

**SIGNED, DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:-**

Ms Kyalo for Mr. Kiplagat for the Defendant

Mr. Mutunga holding brief for Mr. Wadebwa for the Plaintiff

Mr. Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**26/11/2018**