Dreamers Limited v Bhagisana Limited; Chief Land Registrar & another (Interested Parties) (Environment & Land Case 191 of 2019) [2024] KEELC 1807 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1807 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 191 OF 2019

EK WABWOTO, J

MARCH 20, 2024

BETWEEN

DREAMERS LIMITED ..... PLAINTIFF

AND

BHAGISANA LIMITED ..... DEFENDANT

AND

CHIEF LAND REGISTRAR ..... INTERESTED PARTY

NAIROBI COUNTY GOVERNMENT ..... INTERESTED PARTY

JUDGMENT

1. By a Plaint dated 6th June, 2019 and which was amended orally on 1st November, 2022, the Plaintiff sought for the following reliefs against the Defendant: -

    a. A declaration that all that property known as L.R. No. 1870/1/527 is subject to an encumbrance in favour of a right of way for L.R. No. 1870/1/528 also known as 1870/528/1.

    b. An order of injunction restraining the Defendant, its agents, employees and / or servants from fencing off the Plaintiff's access to Mwanzi Road, harassing, threatening or otherwise adversely interfering with the Plaintiff's fundamental proprietary right of way of L.R. No. 1870/1/527 and L.R. No. 1870/1/528 also known as 1870/528/1.

    c. A mandatory injunction compelling the Defendant, its agents, employees and/ or servants to remove any obstruction imposed on the common access.

    d. A permanent injunction restraining the Defendant from constructing a boundary that would restrict the Plaintiff's use of the common access on L.R. No. 1870/1/527.

e. A Permanent Injunction restraining the Defendant from restricting any access to the common amenities enjoyed by the Plaintiff over L.R. No. 1870/1/528 also known as 1870/528/1 which includes the provision of water through the borehole situated on L.R No. 1870/1/527.

f. Costs of this suit and interest from date of filing suit.

g. Any other relief that this Honourable Court deems fit and just to issue.

2. The suit was contested by the Defendant vide a Statement of Defence dated 29th January, 2021.

The Plaintiff' case

3. It was the Plaintiff's case that the it is the registered lessee from the Government of Kenya for parcel of land known as Land Reference Number 1870/1/528 being the premises comprised in a Certificate of Title as Number 1.R. 62772 (hereinafter referred to as the Plaintiff's Property) for the unexpired term of 57 years and 11 months from 1st January 1978.

4. The Plaintiff acquired ownership over L.R. No. 1870/1/528 pursuant to a transfer dated 10th March 2014 between the Plaintiff and Mwanzi Road Developers Limited.

5. The Defendant is the registered proprietor of parcel of land Known as L.R. No. 1870/1/527 (hereinafter referred to as the Defendant's Property), situated adjacent to the Plaintiff's Property.

6. The original property was registered in the name of Mwanzi Road Developers Limited as a lessee from the Government of Kenya for the term of 57 years 11 months from 1st January 1978.

7. Sometime after its acquisition, Mwanzi Road Developers Limited sought to and commenced the process of subdivision of the original property into 2 subplots. The requisite application for subdivision was made to the then Nairobi City Commission (hereinafter referred to as "The Commission") for approval.

8. On 9th July 1986, the Commission held a meeting to discuss the proposed subdivision of the original Property by Mwanzi Road Developers Limited and thereafter submitted a Scheme Plan for the Subdivision of the original property to the Director of City Planning and Architecture for approval.

9. Pursuant to the meeting, the then Deputy Director - City Planning & Architecture wrote a letter referenced as CP & ARCH /DC/2541/LR.1870/1 addressed to the Commissioner of Lands indicating that the Commission was recommending the aforesaid subdivisions for approval subject to the following conditions being complied with:

a. Application for water supply to each subplot to be made to the General Manager (Water and Sewerage Department) and his conditions for such supply be met.

b. Subplot B to be connected to the sewer with plans for the same to be made and approved by the Commission.

c. Both Subplots to be provided with a common access from the main road, (in this case, Mwanzi Road.) The form of application for permission to construct an access in a public street would be approved by the Commission.

10. On 19th July 1986, the said subdivisions and the conditions thereto aforesaid were approved by the Director of City Planning and Architecture. Accordingly, the Original Property was subdivided into to subplots 1870/1/181/A and 1870/1/181/B.

11. After the subdivisions were approved, the title to the original property was surrendered and new titles in respect of the subplots 1870/1/181/A and 1870/1/181/B were issued bearing new L.R Numbers to wit LR. No. 1870/1/527 and L.R. No. 1870/1/528 respectively. Accordingly, any new proprietors of the two parcels would possess the same subject to the encumbrances particularly in paragraph 9 (c) above.

12. The common access once constructed, was utilized by Mwanzi Road Developers and the Defendant even after the Defendant became owner of L.R. No. L.R. No. 1870/1/527. In particular, a common parking was created on the said access for visitors to both L.R. No. 1870/1/527 and L.R. No. 1870/1/528.

13. Additionally, the two properties utilize a common borehole owing to the restrictions placed by the Nairobi County on the number of boreholes per area.

14. Thereafter, by a transfer dated 10th March 2014, Mwanzi Road Developers Limited transferred L.R. No. 1870/1/528 to the Plaintiff. The said transfer was registered against the aforesaid title on 31st March 2014 as presentation No. 2972.

15. Accordingly, the Plaintiff averred that a successor of title became the lessee of L.R. No. 1870/1/528 for the unexpired term of 57 years 11 months from 1st January 1978.

16. It was averred that that the common access was one of the reasons the Plaintiff purchased L.R. No. 1870/1/528 as it was clearly made to believe that the access was for use by owners and/or occupants of both L.R. No. 1870/1/527 and L.R No. 1870/1/528.

17. It was also averred that at the time of purchase, there were existing apartments which the Plaintiff sought to renovate into high end residential apartments and add other amenities including restaurants. To this effect, the Plaintiff conducted an Environmental Impact Assessment on the proposed construction of high end serviced apartments on L.R. No. 1570/1/528 to ascertain that the same had no adverse effect on the surrounding properties.

18. In line with the foregoing, the Plaintiff through the Environmental Impact Assessment Report, obtained comments on the proposed construction from the neighbours including Defendant who expressed no reservations to the same and the use of the common gate as its access.

19. The Plaintiff also averred that after the Environmental Impact Assessment was conducted, the National Environment Management Authority approved construction of 20 high-end residential apartments on the Plaintiff's Property and issued an EIA licence dated 8th May 2014 to that effect.

20. Afterwards, the Plaintiff, obtained the requisite approvals and proceeded to construct 26 high end residential apartments with restaurants and other amenities known as Landmark Suites on L.R. No. 1870/1/528. A certificate of Occupation was issued by the Nairobi City County on 26th May 2016.

21. It was stated that at the time of obtaining planning permit the construction of Landmark Suites, the Nairobi County did not set out additional planning requirements with regards to an additional and/or alternate access as it was always noted that there existed a common access for both properties.

22. However, on 13 March 2019, the Plaintiff's directors received a letter from the Defendant's Chairman, Mr. Onesmus M. Gachiuri indicating that the Defendant's investors had incorporated a strategic investor who had queries on the current use of one access gate.

23. The Defendant thereafter improperly and/or unlawfully ordered the Plaintiff to establish its own access gate within 3 months from 13th March,2019, failure to which, the Defendant would fence off the common boundary without further reference to the Plaintiff.

24. The Plaintiff averred that the continued use of the common access for over 20 years constitutes an easement by virtue of Section 32 (2) of the Limitations of Actions Act Cap 22 Laws of Kenya and therefore an overriding interest out the Defendant's Property by virtue of Section 28 (h) of the *Land Registration Act* No. 3 of 2012.

25. The Plaintiff further avers that once the easement was validly was created as a prerequisite to subdivision of the original Property, the same is annexed to the Defendant's Property as the subservient tenement. Accordingly, the burden passed to the Defendant on purchase of L.R. No. 1870/1/527.

26. It was contended that a restriction on the common access would render the landmark suites completely locked out from guests and /or service provides, ultimately resulting into the Catastrophic collapse of the entire development as demonstrated at paragraph 29 of the Plaint.

27. During trial, two witnesses testified on behalf of the Plaintiff. Salim Alibhai testified as PW1. He stated that he is a director of the Plaintiff Company. He relied on his witness statement dated 7th June, 2022 and list and bundle of documents dated 6th June 2019 as his evidence in chief. He also produced a further bundle dated 28th October, 2022. He also added that the Plaintiff owns the suit property L.R. No. 1870/528/1. He also stated that if the common boundary is fenced, they will not have access since there is no alternative access.

28. On cross-examination, he stated that he became the director of the Plaintiff in 2014 and that is when the Plaintiff acquired the property. He stated that they engaged directly with Mwanzi Road Developers to purchase the property. He also stated that the title was initially issued to Mwanzi Developers Limited. He further stated that the property was inspected before purchase. He stated that his property is adjacent to Mwanzi Road and that 27 – 22 meters of his property touched on Mwanzi Road.

29. On further Cross-examination, he stated that the common area is what has brought the parties to court. He stated that he was not sure what the road access area is and he did not know where the sewer line was. He also stated that the properties were owned by one entity before being sold to Mwanzi Road Developers Limited.

30. When asked about the meaning of the words, “Common Access” and “Combined Access” he stated that they refer to one and the same. He also stated that the letter for the year 1986 and its scheme did not indicate where common access place shall be. He also stated that both properties are accessed from Mwanzi Road. His property is clearly demarcated from the dead plan and that the title does not have any conditions. He also stated that the Plaintiff did not construct a wall at the access road. He also stated that the Plaintiff did construct the common gate which was within the Plaintiff’s boundaries which includes the Common Access.

31. When asked about the EIA report, he stated that the same was done by the experts. He stated that the Defendant’s directors were not consulted as per the EIA questionnaires that were filed. He also stated that the said forms do not show the location of the property. He also stated that the property was bought for residential use as apartments but it is currently being used as a restaurant, several apartments and has a swimming pool. He stated that he was not sure whether they did a change of user and whether the Defendant was consulted. He also stated that the Common access has been used for several years and that there is no room to access the property from the Plaintiff’s boundary.

32. When re-examined, he stated that the word "Combined Access" refers to "Common". He also stated that he did not see any permission to construct an access road. He also stated that there was always right of way and that there was previously a discussion on jointly meeting the cost of the boundary.

33. Eric Mutwiri testified as PW2. He stated that he is a qualified land Economist and Licensed Valuer. He relied on his witness statement dated 28th October 2022 as his evidence in chief.

34. When cross-examined, he stated that he had not filed any expert report save for his witness statement. He also stated that a Surveyor is better placed to deal with issues of boundaries. Land Economists deals with valuing properties and interest in land. He also stated that he did not know who was the owner of the property in 1986.

35. When asked about his understanding on the word "Combined Access", he stated that he had reviewed several legislations but had not seen the definition of the word "Combined Access". However, he added that the words "Combined Access" and "Common Access" may be seen different by an Industry Expert. He also stated that "Common Access" would mean to be used together with while "Combined Access" could mean "Common and side by side". He also stated that the access road forms part of the Defendant's property and the same is not a Public road. He also stated that there was no letter on surrender of any Legal rights in respect to the land. He also stated that the communication from the Nairobi City Commission referred to combined access but did not indicate where it would be. He also stated that he did not see any application/permission for its approval. He further stated that the letter from Nairobi Commission did not indicate the words Joint and Common. He also stated that he did not see any EIA report. He also stated that according to the deed plan, all properties are to be accessed from the Plaintiff's property.

36. When re-examined, he stated that there is no specific definition or standard on what is a "Combined Access".

The Defendant's case

37. The Defendant filed a statement of defence dated 29th January, 2021. It was averred that in 1986, Samji Ravji Halai applied for the development of apartments in part of their property (LR No. 1870/1/181). Accordingly, he developed apartments on one part of the property and retained his old house on the other side of the property.The Nairobi City County approved the development subject to retaining one access to the two portions of land. At this time, the actual sub-division of the properties had not been completed and the two portions belonged to Samji Ravji Halai. In the year 1990, the Defendant acquired the whole property LR No. 1870/1/181 (comprising the two portions) and developed apartments on both portions which comprised of 4 blocks.

38. It was also averred that at the time of acquiring the property, the equal shareholders and directors of the Defendant were:

    i. Samji Ravji Halal

    ii. Onesimus Mwangi Gichuiri

    iii. Naran Mavji Ratna (deceased)

    iv. Bhagwaji Mavji Ratna

39. On 8th February 1994, the above shareholders of the Defendant held a meeting where they agreed as follows:

i. The property LR No. 1870/1/181 be subdivided into two parcels of land which are currently known as LR No. 1870/1/527 and L.R No. 1870/1/528

ii. Plot A (LR No. 1870/1/527) remains with the Defendant whose shareholders would be Samji Ravji Halai and Onesimus Mwangi Gichuiri while Plot B (LR No. 1870/1/528) to be owned by the other shareholders being Naran Mavji Ratna and Bhagwaji Mavji Ratna who incorporated Mwanzi Road Developers Limited.

iii. Mwanzi Road Developers Limited undertook that in the event of separate management being introduced, they would undertake to ensure that the boundary fence and the new gate are constructed at no cost to the Defendant.

40. It was averred that the Defendant had agreed with Mwanzi Road Developers Limited, the previous owners of the property that it would install entrance gate on its property and a boundary wall would be erected on the boundary of the two properties.

41. It was contended that prior to the subdivision of the original property LR No. 1870/1/181, one the special conditions governing the use of it in 6th June 1978 was that the land and buildings were to be used for residential purposes and not more than one private dwelling to be erected on the land. On 26th June 1987, the above condition was reviewed and provided that the land was to be used for flats or residential apartments. Upon subdivision of original property LR No. 1870/1/181 into L.R. No. 1870/1/527 and L.R No. 1870/1/528 both the Defendant and Mwanzi Road Developers Limited complied with the conditions of use of the property as they used it for residential flats only. After the purchase of the property, the Plaintiff has been unlawfully, illegally and without following the change of use process been utilizing the property for commercial purpose as a hotel and/ or restaurant. The Plaintiff further erected and/ or established a restaurant on the property in blatant breach of the submitted plans and building codes and contrary to the user of the property further increasing the traffic and the number of people using the Defendant's gate without consideration to the security of the premises. The approved plans submitted by the Plaintiff for the extension of apartments provided for an access gate in the Plaintiff's property directly to the main road, Mwanzi Road.

42. The Defendant also averred that vide a letter dated 21st July 2015, the Plaintiff was informed by the Defendant that they were improperly using the access to the Defendant's plot by parking vehicles in a careless way and in some cases grounding vehicles for over a month to the Defendant's access. Thus, the Defendant required of them to cease from parking and depositing debris on its property and access way

43. It was also averred that vide another letter dated 26th October 2015, the Defendant notified the Plaintiff that they would no longer share the common services such as security and the gate situated on the Defendant's property. The Defendant further requested the Plaintiffs to live within their boundaries and reinstate the Defendant's gate which had been demolished by the Plaintiffs.

44. It was contended that despite the above, the Plaintiff did not heed to the Defendant's requests which necessitated the Defendant in writing another letter dated 6th April 2016 requiring the Plaintiff to do the following:

i. Reinstate the Defendant's gate and gatehouse to the quality before demolition.

ii. Remove their cabro-paving blocks in the Defendant's access.

iii. Establish their vehicular access to their plot and limit themselves to their plot boundaries.

iv. Construct boundary fence on the common boundary.

45. On 28th April 2016, the Defendant received a letter dated 27th April 2016 from the Plaintiff requesting permission to access the Defendant's Property to connect their sewer line.

46. It was contended that it was a common agreement and or understanding between the Defendant and Mwanzi Road Developers Limited that the common access gate was to be used temporarily until the latter established its own gate for access to the property. It was also contended that no consent was to be created on its property and any use of the common access gate was to be used under express control and permission by the Defendant.

47. During trial, two witness testified on behalf of the defence. Onesmus Mwangi Gichuiri testified as DW1. He stated that he was a director of the Defendant and a Quantity Surveyor by profession. He relied on his witness statement dated 28th April, 2022 and produced the Defendant's bundle of documents dated 28th April, 2022 in his evidence in Chief.

48. When Cross-examined, he stated that in 1996, the property had only one gate. He also stated that the current gate to the property was opened in 1996 after they had developed the plot. He also stated that as per the documents that had been produced in evidence, Sub Plot A & B were to be provided with a combined access and not a separate access. He also stated that the Defendant had protested use of driveway for parking in 2015 and also use of the same for unloading of construction materials. He also referred to the letter dated 6th April, 2016 which showed the Defendant's protest against demolition of the gate. He also stated that the Defendant only complained when it became a nuisance. He also stated that the Defendant never asked for any plans to be cancelled save for approval plans issued on 27th February, 2014.

49. When asked whether the Plaintiff has an alternative access, he stated that they currently have none.

50. When re-examined, he stated that he initially bought the property as one and he took possession when it was still undivided. He stated that he understood combined access to mean, the access to be adjoining. He also stated that he constructed on access adjoining Mwanzi Road in 1996 since at that time, it was still owned by one person.

51. He also stated that he was never consulted by the EIA expert during the EIA process. He stated that the Plaintiff has 21 metres access to the road. He further stated that the wall dividing the 2 properties was done by the Plaintiff.

52. Henry Mwangi Gatai, an architect testified as DW2. He relied on his witness statement dated 9th May, 2022 as his evidence in chief.

53. On Cross-examination, he stated that the letter from the City Council appeared to refer to the condition No. 3 on Combined Access and not separate access. He also stated that he first visited the site in the year 2022 and he would not know how the property was in the year 1996.

54. He also stated that as an architect, he was required to have sight of the latest approved development plans and the latest were for the year 2019. He also stated that he had no knowledge where the previous access was.

55. When re-examined, he stated that he only referred to the latest drawings which he considered relevant.

56. He also stated that combined access means that access of both parties should be next to each other and that condition No. 3 of the letter dated 23rd February, 1994 was adopted from the letter of Nairobi County verbatim. He also stated that he did not see any application made for combined access.

The case of the Interested parties.

57. The 1st Interested parties herein did not file any pleadings not participated in these proceedings despite knowledge of the same. They equally never filed any written submissions for consideration by this Court.

The Plaintiff's submissions:

58. The Plaintiff filed comprehensive written submissions dated 30th August, 2023. The Plaintiff submitted on the following four issues:

    a. Whether the access gate is the combined access stipulated under the planning conditions.

    b. Whether an easement and/or right of access through prescription was created through the Defendant's property L.R. No. 1870/7/527 to the Plaintiff's property L.R. No. 1870/1/528 due to usage between 1994 through to 2015.

    c. Whether an equitable easement was created.

    d. Whether there is an easement of necessity.

    e. Whether the Plaintiff is entitled to rely on proprietary estoppel.

    f. Whether the Plaintiff is entitled to the reliefs sought.

59. The Plaintiff submitted that the current access gate for all intents and purposes was the combined access envisaged in the Planning Conditions and therefore blocking usage is contrary to the conditions for sub-division. It was also submitted that throughout the years there has never been objection from Nairobi County and its successors up until after the present suit was filed.

60. It was argued that pursuant to the letter dated 23rd February, 1994, the Ministry of lands approved the subdivision scheme and reiterated the conditions by Director of City Planning. Plots 527 and 528 were created and it was evident that no new application to construct an access in a public street was made or approved by the Director of City planning. It was argued that the letter was explicitly in stating that the that the two plots are only to share a combined access from the street and not a common access thereby trying to create an artificial distinction.

61. It was submitted that an easement and/or right of way through prescription was created through the Defendant's property L.R. No. 1870/1/527 in favour of the Plaintiff's property L.R. No. 1870/1/528 and reliance was placed to the provisions of Section 32 of the Limitations of Actions Act and Section 28 of the *Land Registration Act* No. 3 of 2012 and the cases of Kamau -vs-Kamau [1984] eKLR, R. -vs- Oxfordshire CC, Ex parte (C, ex P. Siminguell) PC 1999) 3, and Equator Inn Ltd t/a Tsavo Inn Hotel -vs- Nairobi Oil Corporation of Kenya Ltd [2018] eKLR .

62. In respect to the users being claimed by the Plaintiff, it was submitted that one is access and exit and a right of way over Plot 527. The other is parking of vehicles by residents on the drive way on plot 527. The right of way predominantly relates to pedestrian and vehicles movement, including but not limited to entry and exit through the combined access and on the driveway on plot 527. The parking of vehicles relates to residents of plot 528. The Plaintiff claims to have an easement of these particular uses.

63. It was argued that the user being claimed by the Plaintiff has been used openly and without force since the combined access has been used from 1990. It was also argued that the combined access has been in use for over 20 years. From the issuance of titles in July, 1994 to July, 2015 when a letter was written by the Defendant, it was after 21 years and therefore well within the 20 years' period. It was also argued that

in the instance case, there was no permission but rather an enforcement of the claim for an easement. It was also argued that there was no express or implied permission but acquiescence or deference. Reliance was placed to the cases of R-vs- Sunderland City Council, Exparte Beresford [2004] 1 All ER 160, Mills & Another -vs- Silver & other [1991] I All ER 449 and R(Lews) -vs- Redcar & Cleveland Borough Council [No. 2] [2010] UK SC 111, [2010] 2 AC 70.

64. On the aspect of easement by necessity, it was submitted that apart from acquiring an easement by prescription, the Plaintiff has pleaded that a restriction on the common access would render the Plaintiff's development completely locked. Reliance was placed on Halisbury's Laws of England, 4th Edition, Volume 16 (2) and the case of Union Lighterage Co. -vs- London Graining Dock Co. [1902] Ch. D. 557 which was cited with approval in the case of Sweet -vs- Somner [2005] 2 All ER 64.

65. Citing the Cases of Acquilla Properties Limited -vs- Bhypendia Patel [2017] eKLR and Peony Management Company Limited -vs- Desterio Oyatsi [2020] eKLR, it was submitted that if indeed the Court were to hold that there was a common understanding on the user of the combined access and the driveway on plot 527, then that common understanding would lead to a grant of easement in equity.

66. In respect to the doctrine of proprietary estoppel, it was submitted that the same was applicable in this case and reliance was placed to the case of Kenya Nairobi Capital Corporation Limited -vs- Albert Mano Cardero & Another [2014] eKLR, Grabb -vs- Arun District Council [1976] CH 179 and Taylors Fashions Limited -vs- Liverpool [Viction Trustees Co. Ltd [. Supra]

67. The Plaintiff also urged the Court to grant the reliefs sought in their plaint.

68. Counsel for the Plaintiff also had an opportunity to highlight the Plaintiff's written submissions on 20th December, 2023 wherein he distinguished the following authorities, which had been filed by the Plaintiff, Esther Nyakio Kairu -vs- Violet Ndeti [2011] eKLR and Loveluck Edwards -vs- Idal Development Ltd [2012] EWHC 716. It was argued that there was no permission in respect to the drive way. It was also argued that proprietary estoppel was not pleaded by Defendant.

The Defendant's submissions

69. The Defendant filed written submissions dated 28th November, 2023. Counsel for the Defendant submitted on the following three issues:

    i. Whether any right of way or easement on the Defendant's property L.R. NO. 1870/1/527 exist in favour of the Plaintiff?

    ii. Whether the Conditions by Nairobi City Commission that both parties to be provided with Combined access creates any rights in favour of the Plaintiff over the Defendant's property?

    iii. Whether the Plaintiff is entitled to the reliefs sought.

70. It was submitted that there is no easement created in favour of the Plaintiff over the Defendant's property and that the Plaintiff has not satisfied any of the necessary Principles required to establish easement. m Reliance was placed to the cases of Benina Ndugwa Kanyuru & 4 others -vs- National Land Commission [2015] eKLR, Re Ellen borough Park [1956] CH 131, Esther Wanjiku Mwangi & 3 others -vs- Wambui Grachu [2019] eKLR and Kamau –vs- Kamau 1984 [eKLR].

71. On whether the conditions by Nairobi City Commission that both properties be provided with combined access creates any right in favour of the Plaintiff over the Defendant's property, it was argued that in 1986, when the owner of the original parcel of land commenced the subdivision process, the Nairobi City Commission approved the subdivision on condition that the two subplots emanating from the subdivision be provided with a "Combined access" from the road. This Condition was also

provided for by the Ministry of Lands and Housing in its letter of 23rd February, 1994. The Condition specifically requires for application for permission to Construct an access in a public street to be approved by City Commission. It was argued that the Plaintiff has not submitted any proof that the Defendant's access was the approved access point by the City Commission.

72. It was submitted that in the meeting held on 31st August, 1994 when the two plots were still under the ownership of the Defendant, it was agreed between the shareholders that in the event of any change in the management or ownership of L.R. No. 1870/1/528, the Plaintiff's predecessor (Mwanzi Road Developers Limited) would undertake the construction of a boundary fence and gate to demarcate the two properties. This position was also confirmed or affirmed by the letter dated 1st September, 1994 from Mwanzi Road Developers Limited. It was contended that the use of the Defendant's gate and access to the Plaintiff's property from 1994 to 2014 was a temporary condition or a matter of convenience between the parties which was to lapse in the event of change of ownership of plot No. 1870/1/528. Thus, the Plaintiff's argument for the creation of an easement via prescription cannot stand. It was also submitted that the Planning authorities never intended for the Defendant to share its driveway or its property with the Plaintiff. This position is reinforced by the letter dated 2nd March, 2020 from the Nairobi City County. It was argued that during the site visit conducted on 16th March, 2023, it was noted that the properties have a similar arrangement, the only divergence being failure or refusal by the Plaintiff to establish its own access

73. The Defendant's Counsel was also granted an opportunity to highlight the Defendant's written submissions. Counsel added that the issue of estoppel was not pleaded and the Court should look at the difference between "Combined Access" and "Common Access" since the Plaintiff is mixing issues of "Combined Access" and "Common Access". The Court was urged to dismiss the Plaintiff's suit with costs.

Analysis and Determination

74. The Court has carefully considered the pleadings filed herein, the evidence adduced and the prevailing jurisprudence together with the relevant providers of the law and finds that the key issues for determination are as follows:

    i. Whether an easement was created through the Defendant's property L.R. No. 1870/1/528.

    ii. Whether the conditions by the then Nairobi City Commission that both properties to be provided with Combined access creates any rights in favour of the Plaintiff over the Defendant's property.

    iii. Whether the Plaintiff is entitled to the reliefs sought.

75. The Court shall now proceed to analyze the said issues sequentially.

Issue No. I Whether an easement was created through the Defendant's property L.R. No. 1870/1/528.

76. Before proceeding to address this issue, it is important to consider the background of the matter and what led to the filing of this case by the Plaintiff.

77. The Plaintiff is the current registered owner of L.R. No. 1870/1/528 and is claiming an easement on the Defendant's property L.R. No. 1870/1/527. The portion the Plaintiff is claiming an encumbrance on it is part of the Defendant's land. The two subject properties originated from the subdivision of a land parcel known as L.R No. 1870/1/181 which was originally under the ownership of Shah R. Halai. In 1986, Shamji R. Halai applied to the Nairobi City Commission for the division of the property

into two portions so as to enable him to develop them. At that time, he was using subplot A which is currently the Defendant's property as his residential home and he was to develop apartments on subplot B. The Nairobi City Commission granted approval for the property's subdivision in 1986 wherein it inter alia gave a condition that subplot A and B to be provided with a Combined access from the Road.

78. The Property was later sold to the Defendant before the subdivision could be completed. The Defendant then pursued the formal subdivision of the main property into the current two properties. Plot No. 528 and plot 527 came into existence and title I.R. NO. 62722 was issued to Plot No. 528 on 20th July 1994 and title I.R. No. 62895 was issued to plot 527 on 25th July, 1994 to Defendant. The Plaintiff acquired plot 528 on 31st March, 2014 and continued using the access and drive way on the Defendant's property.

79. On 21st July, 2015, the Defendant issued a letter dated 21st July 2015 wherein it informed the Plaintiff to stop parking on the Defendant's property. Later on, 6th April, 2016, the Defendant informed the Plaintiff to inter alia establish own vehicle access and limit itself to its own boundary. It was alleged that the Plaintiff did not comply with this and this prompted the Defendant to issue another notice dated 13th March, 2019 requiring the Plaintiff to establish own gate within three (3) months failure of which the Defendant would fence the boundary fence between the two plots. The Plaintiff being aggrieved by the said action from the Defendant proceeded to file this suit vide a Plaint dated 6th June, 2019.

80. Having considered the above background, it is not in dispute that in 1986, the then Nairobi City Commission while granting an approval for subdivision of the properties gave inter alia a condition that the sub plots A & B be provided with a Combined Access from the main road. The Plaintiff argues that it acquired the property on the belief that the Common access and drive way on plot 527 was for the benefit of plot No. 528. It was also contended that the Common Access would continue to be utilized by both properties as was the case over 30 years since no additional or alternative access points were established.

81. In its submissions the Plaintiff submitted that the current access gate for all intents and purposes was the combined access envisaged in the Planning Conditions. It was also submitted that the word combined is to unite for a common, shared or joint purpose. The Defendant on the other hand maintained that the two plots are to share a combined access from the street and not a common Access.

82. For a start, there is no definition of the word "Combined Access" and Common Access" in our statute. The letter of 1986 clearly stipulated as follows:

> "Subplots A & B to be provided with a Combined Access from Road/Street" form of application for permission to construct an access in a public street to be approved by City Commission"

83. A keen perusal of the said letter points out to the need to ensure that both plots A & B were to be provided with a Combined access from the Road/Street.

84. In the circumstances, the contention by the Defendant that there was to be individual access is misplaced and as such, it is the finding of this Court that the use of the word combined access as having been applied in reference to plot A & B was to ensure that the said access way is used by both the Plaintiff and the Defendant as a common or joint access.

85. Having addressed the application of the words combined access the context of this matter the main issue for consideration is now whether an easement was created through the Defendant's property L.R. 1870/1/527 in favour or the Plaintiff's property OL.R. No. 1870/1/528.

86. The Black's Law dictionary defines an easement as:

> " A right in the owner of one parcel of land, by reason of such ownership to use the land of another for a special purpose not inconsistent with a general property in the owner"

87. Section 32 of the *Limitation of Actions Act* Cap 22 stipulates the means by which easement may be acquired.

> " Means by which easement may be acquired:
>
> (1) Where:
>
> (a) Access and use of light or air to and for any building have been enjoyed with the building as an easement or
>
> (b) Any way or watercourse or the use of any water has been enjoyed as an easement or
>
> (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, Air, or to such way or watercourse or use of water or to such other easement is absolute and indefeasible."

88. The Plaintiff demonstrated during trial that from the time they acquired the property in the year 1994, they continued using the same access until when the Defendant communicated to the Plaintiff the need to create their access vide letters dated 21st July, 2015, 26th October, 2015 and 6th April, 2016. As such, it was contended that an easement by prescription was created and became an overriding interest and as such, the same 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 a subsequent occupier of the parcels subject to the easement.

89. The Court of Appeal in the Case of Kamau vs Kamau 1984 eKLR stated as follows:

I. "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 is the dominant and the other on which it is imposed it the servient tenement.

> II. Once on 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.
>
> III. A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A license not coupled with an interest in land is revocable unless the contract for it contains a term express or implied, that it shall not be revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts which are injurious to another and can be the subject of any action if their enjoyment is obstructed."

90. Equally, in the case of RE Ellenbourgh Park [1956) CH 131 an easement was defined as follows:

> " Easements are common law rights enjoyed by a person over the land of another. They include the right of way, right of light, right of water, profit among others. Whereas

easements are nowadays recognized as incorporeal hereditaments, that is objects of property in themselves, initially easements were construed as rights appurtenant to corporeal hereditaments, that is a privilege which could be obtained for the benefit of the corporeal land. For there to be declared an easement, four essential elements must be satisfied:

i. There must be a dominant tenement and a servient tenement. That is, an easement does not exist in gross but can only be appurtenant to (related to) a dominant tenement. A dominant tenement may be the adjoining land to which an easement (such as a right of way) is sought across another's land (servient tenement).

ii. An easement must confer a benefit on (accommodate) the dominant tenement. The benefit conferred to the dominant tenement is not necessarily analogous to personal advantage to the occupier of the land, the concern is how the easement makes the dominant tenement better and more convenient property by increasing its general utility, conferring access among others.

iii. The dominant and servient tenement must not be owned and occupied by the same person. In its very nature easement is a right in the soil of another (in alieno solo).

iv. The easement must be capable of forming a grant. Although in practice easement are established by long user, the presumption always is that a grant was once made."

91. From the foregoing, it is evident that the combined access has been in use from the time the Plaintiff acquired the property in 1994. It was also evident that the combined access was used without any interruption, inconvenience or restriction until when it was protested by the Defendant on 21st July, 2015. This was in essence for a period of over 20 years which the Plaintiff utilized the same. In the circumstances, it is the finding of this Court that there was an easement created through the Defendant's property to be used by the Plaintiff.

Issue No. 2 Whether the conditions by the then Nairobi City Commission that both properties to be provided with Combined access creates any rights in favour of the Plaintiff over the Defendant's property.

92. It was contended by the Defendant that the Plaintiff was attempting to use this Condition to claim an easement over the Defendant's property yet the Plaintiff had not submitted any proof that the Defendant's access was the approved access pointed by the City Commission and therefore it was not proved that this condition is related to the current access position. It was also contended that the letter dated 2nd March, 2020 by Nairobi City County had notified the Plaintiff that the use of the Defendant's access neck or drive way to reach their property constitutes an unlawful encroachment unto the Defendant's land.

93. In considering this issue, it is worth noting that when the Plaintiff acquired the property herein, it continued using the same combined access upto and until 2015 when the Defendant protested. As such as had been held earlier by this Court, it acquired its right of easement over the same. The letter referenced to and relied upon by the Defendant dated 20th March, 2020 was issued way after the Plaintiff's right of easement had crystalized and as such the same cannot be considered as having disrupted he Plaintiff's continuous use of the said easement.

94. In view of the foregoing, it would not be fair for this Court to consider the letter dated 20th March, 2020 and the lack of approved permission from the Nairobi City County as the aspects upon which the conditions imposed in the 1986 letter failed to create any rights in favour of the Plaintiff over the Defendant's property.

Issue No. 111 Whether the plaintiff is entitled to the reliefs sought

95. The Plaintiff sought for several reliefs as enumerated in its Plaint. In its submissions, it was submitted that an easement by prescription and necessity exists in favour of Plaintiff's property L.R. No. 1870/1/528 also known as 1870/528/1 over the right of access through the Defendant's property L.R. No. 1870/1/527 given that it has proved to have enjoyed a right of way on the Defendant's property for over 20 years. The evidence tendered before Court supported the Plaintiff's case and as such and in view of the findings made by this Court, this court is satisfied that the Plaintiff has proved its case on a balance of probability and is entitled to the reliefs sought.

96. On the issue of costs, under Section 27 of the *Civil Procedure Act*, the same is a discretion of the Court and ordinarily costs follow the event, unless otherwise stated. However, in the instant case, considering the circumstances of this case and the long-established relationship of the parties herein who have been neighbours for over time in respect to the aforementioned properties, this Court directs each party to bear own costs of the suit.

97. Before I conclude, I wish to express my sincere gratitude to each and every counsel who appeared in this matter for their industry and able presentation of their respective client's cases.

Final orders

98. In conclusion, it is the finding of this Court that the Plaintiff has indeed proved its case to the required standard and this Court proceeds to enter judgment in favour of the Plaintiff against the Defendant in the following terms:

    i. A declaration be and is hereby issued that ALL THAT property known as L.R. No. 1870/1/527 is Subject to an encumbrance in favour of a right of way for L.R. No. 1870/1/528 Also Known As 1870/528/1.

    ii. An Order of Injunction be and is hereby issued restraining the Defendant, its agents, employees and/or servants from fencing off the Plaintiff's access to Mwanzi Road, harassing, threatening or otherwise adversely interfering with the Plaintiff's right of way in respect of L.R. No. 1870/1/527 and L.R. No. 1870/1/528 also known as 1870/528/1.

    iii. A Mandatory Injunction be and is hereby issued compelling the Defendant, its agents, employees and/or servants to remove any obstruction imposed on the Common Access.

    iv. A permanent injunction be and is hereby issued restraining the Defendant, its agents, employees and/or servants from Constructing a boundary that would restrict the Plaintiff's use of the Common Access on L.R. No. 1870/1/527.

    v. A Permanent Injunction be and is hereby issued restraining the Defendant, its agents, employees and or servants from restricting any access to the Common amenities enjoyed by the Plaintiff over L.R. No. 1870/1/528 also known as 1870/528/1 which includes provision of water through the boreholes situated on L.R. 1870/1/527.

    vi. Each Party to bear own costs of the suit.

    Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Shah for Plaintiff.

Mr. Muturi and Mr. Muchiri for Defendant.

No appearance for Interested Parties.

Court Assistant: Caroline Nafuna.