Mwangi & 3 others v Ngarachu (Sued as the Legal Representative of the Estate of Ngarachu Chege - Deceased) (Civil Appeal 328 of 2019) [2025] KECA 555 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 555 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 328 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

MARCH 21, 2025

BETWEEN

ESTHER WANJIKU MWANGI ..... 1ST APPELLANT

JAMES NGARACHU CHEGE ..... 2ND APPELLANT

WILSON GITONGA NGARACHU ..... 3RD APPELLANT

JOHN KAMAU NGARACHU ..... 4TH APPELLANT

AND

WAMBUI NGARACHU ..... RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NGARACHU CHEGE - DECEASED

(Being an appeal from the Judgment and decree of the Environment and Land Court at Murang'a (J.G. Kemei, J.) dated 25th April 2019 in E.L.C. Case No. 422 of 2017 (OS))

JUDGMENT

1. By an Originating Summons dated 17th July 2017, filed at the High Court of Kenya at Murang'a, the appellants instituted Environment and Land Court (ELC) Civil Suit No. 422 of 2017 (OS) and sought determination of the following questions;

    a. that the applicants are entitled to an easement measuring 58m long and 3m wide over land parcel Number Loc.8/Kaganda/73 which together with their families have openly and peacefully without any interruption used as an access road to and from their lands Loc.8/ KIGANDA/1654, 1655 and 1657 respectively, since the year 1963, a period of over 51 years preceding the presentation of this Originating Summons to Court;

b. that a declaration be made that Ngarachu Chege (deceased), who is the registered proprietor of land parcel No Loc.8/Kaganda/73 (the suit property), held the property subject of the easement in trust for the applicants;

c. that the deceased's title in respect of the said portion of 58m long by 3m wide in Loc.8/Kaganda/73 is extinguished under section 17 of the Limitations of Actions Act;

d. that under section 38 of the Limitations of Actions Act, the applicants are entitled to be registered as the owners of the easement measuring 58m long by 3m wide over land parcel No Loc.8/Kaganda/73; and

e. that the costs of this suit be awarded to the applicants.

2. The suit was predicated on grounds that; the appellants are the registered owners of Loc.8/Kaganda/1654-1657 respectively, which parcels are resultant subdivisions of Loc.8/Kaganda/77, originally registered in the name of their late father; the appellants have acquired proprietary rights over the said land by operation of law; Ngarachu Chege deceased had granted the appellants' father access road in exchange for a portion equal in measurement to the access road out of Loc.8/Kaganda/77. That the deceased executed the documents, which facilitated the amendment of the Registry Index Map.

3. The appellants stated that Ngarachu Chege died in 2002 and they continued to use the access road without interference from the respondent until 2014 when the respondent blocked the access and diverted water pipes, which had been laid along the road thus denying water to the appellants. That this blockade has occasioned difficulties in access to schooling, medical centres and the river as they are now forced to take a longer route to access them.

4. The respondent denied the appellants' claim and stated that the appellants' parcels of land have access to the main road through the road below their land. She admitted that her husband and the appellants' father had allowed each other cross-paths on their respective parcels for access which paths existed until the appellants closed the access on their end prompting her to block access on her side of the land.

5. That the clan and the local administration had arbitrated the dispute and instructed that the access be kept blocked for the sake of peace. She denied the claim that her husband had excised a portion of the land for the access during his lifetime arguing that if any was done then it was a forgery as her husband, being illiterate, could only thumbprint documents and not sign as shown in the mutation form. That by 2014 her husband was elderly and sickly and could not have signed the mutation forms. That the District Land Surveyor was stopped by an order of the Court from excising her land to create the access road, which she claims, was being done without her consent, participation and authority.

6. In the impugned judgment delivered on 25th April 2019, J.G. Kemei, J. held that she had noted that the appellants were claiming an easement over land measuring 58 meters by 3 meters, which they claimed, was excised by the respondent's husband in his lifetime and had urged to be registered as owners of the said land. She held that a claim of easement is a claim on use of land rather than possession or ownership; and that an easement on one-hand benefits and on the other burdens and if it was to be allowed that the easement holder is registered as an owner of the space over which he enjoys an easement, then land which is a factor of production would be unnecessarily burdened thus limiting its tradability as a commodity.

7. Further, the trial Judge held that it was possible for a number of rights to be created on land. That an easement is geared towards creating interaction among neighbours of social and commercial nature. Rights of access are social and commercial in that respect. She stated that the claim as urged by the appellants was, therefore, untenable and she saw no reason to look into the issues of the probity of the

mutation forms. The learned Judge went on to find that if the land were to be registered in their names, it would amount to a total ouster of the owner of the servient land, which is against the very nature of a right to an easement. Further, that an easement dissipates/dissolves once there is unity of the servient and dominant tenements and the owner of the servient tenement continues to retain exclusive control and ownership of the land. The easement being an overriding interest may or may not be registered on the title. It moves with the land. It is a right that binds the land and not the holder of the easement.

8. The Judge noted that curiously, the appellants accepted the mutual arrangement between the original owners of the two lands but there was no evidence that they provided for corresponding easement on their land during their subdivision. Finally, she held that the the doctrine of necessity did not apply for the simple reason that none of the lands is landlocked. And that there was no injustice or hardship to warrant the application of the doctrine of necessity in the case. The suit was dismissed.

9. Aggrieved by the judgment, the appellants appealed to this Court citing nine grounds in the memorandum of appeal dated 19th December 2019 as follows: that the learned Judge erred in law and in fact in failing to consider the merits of the appellants' case against the respondent; in failing to consider and apply the express provisions of section 32 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya; in failing to consider and apply the express provisions of section 28 and 98 - 100 of the *Land Registration Act* No. 3 of 2012; in failing to consider and apply the express provisions of section 136 -141 of the *Land Act*; in finding that if it was to be allowed that the easement holder is registered as an owner of the space over which he enjoys an easement then land which is a factor of production would be unnecessarily burdened thus limiting its tradability as a commodity; in finding that the dominant tenement in the dispute is Loc.8/Kaganda/77 while the servient tenement is Loc.8/Kaganda/73; in finding that the licence with which the appellants enjoyed the right of access on the servient tenement lapsed with the death of the original owner; in finding that the appellants failed to establish any right of easement arising from their long use and in finding that the claim as urged by the appellants was untenable and that there was no probative value of the mutation forms.

10. The appellants pray that this appeal be allowed with costs and the trial court's judgment be set aside.

11. At the virtual hearing on 7th May 2024, learned counsel Ms. Tank appeared for the appellants while Mr. Mbue Ndegwa appeared for the respondent. Both counsel relied entirely on their submissions and made no oral highlights.

12. The appellants submitted on two issues as to whether the appellants are entitled to an easement over the respondent's land and whether the trial Judge erred in law and fact in the judgment dated 25th April 2019.

13. In regard to the 1st issue reliance was placed on Kamau -vs- Kamau [1984]eKLR on this Court's definition of an easement. It was submitted that in the instant suit the appellants are the registered owners of Loc.8/Kaganda/1654-1657 respectively which parcels are resultant subdivisions of Loc.8/Kaganda/73 originally registered in the name of their late father and that the appellants acquired proprietary rights over the same by operation of the Law. Further that Ngarachu Chege the respondent's deceased husband had granted the appellants' father access road in exchange for a portion equal in measurement to the access road out of Loc.8/Kaganda/77 and that the deceased executed the documents which facilitated the amendment of the registry index map.

14. It was submitted that Ngarachu Chege died in 2002 and the appellants continued to use the access road without interference from the respondent until she blocked the access and diverted water wipes which had been laid along the road thus denying water to the appellants. Further that this blockade has occasioned difficulties in access to schools, medical centres and the river as they are now forced to take a longer route to access them.

15. It was submitted that the essence of an easement as per Kamau -vs- Kamau (supra) is the convenience brought about by the dominant land's proprietor utilizing /accessing the servient land or portion of it thereof. It was stated that to this end the owners of the two parcels of land being Loc.8/Kaganda/73 and Loc.8/Kaganda/77 in 1963 entered into an arrangement where the respondent's husband granted the appellants' father a portion of his land Loc.8/Kaganda/77 measuring 58m by 3m wide as an access path for both the main road and the river.

16. It was submitted that the appellants' father died in 1980 and the respondent's husband who died in 2002 did not challenge the right of way accessible to the appellants' and that the access road continued to be used by the appellants until 2014 when the respondent blocked it on the allegation that she had been stopped by the appellants to access parcel Loc.8/Kaganda/77.

17. Further it was submitted that there is no contention with regard to the existence of an easement as between the original owners of the property and further that the said easement was created by agreement in 1963 and stood until 2014 after the actions of the respondent. Reliance was made to section 32 of the *Limitation of Actions Act*, Cap 22 and Kiluwa Limited & Another -vs- Commissioner of Lands & 3 Others [2015]eKLR .

18. Counsel emphasised that the original easement conferred benefit to the appellants as it allowed them to access the road and further lay water pipes for collection from the river and that the same is not denied by the respondent and that further by looking at Kamau -vs- Kamau (supra) in which the court clearly states that an easement is a convenience tool used in exercise of one owner over the land of a neighbour. It was submitted that the easement created was valid and legitimate and should have been maintained contrary to the actions of the respondent.

19. As to whether the trial Judge erred in law and fact in the judgment dated 25th April 2019, it was submitted that the subdivision of a dominant tenement does not ex vestigium extinguish the easement created. Reliance was placed on Kiluwa Limited & Anor -vs- Commissioner of Land & 3 others (supra). It was stated that the trial Judge failed to consider that the divided properties Loc.8/Kaganda/1654-1657 utilised the easement created by the dominant tenements as of convenience to access the road.

20. It was stated that the easement in question did not cease to exist upon division of the original dominant tenement but rather continued to exist as between Loc.8/Kaganda/1654-1657 and Loc.8/Kaganda/77 and hence that the easement has existed for more than 50 years from the arrangement of the original properties in 1963 and satisfies the 20-year threshold required in section 32 of the Limitations of Actions Act.

21. It was further submitted that the trial Judge erred by claiming that an easement is a claim in use of land rather than possession or ownership which is contrary to section 38(3) of the *Limitation of Actions Act*. It was stated that the originating summons filed by the appellants sought registration of the easement in their favour thus refuting the averment that an easement is solely a claim in use of land and further affirming that a proprietor of a dominant tenement can seek a proprietary claim in an easement.

22. Finally, counsel urged that the claim by the learned Judge that the registration of easement in favour of the appellants unifies the servient and dominant tenements is unfounded and not based in fact as the easement exists sui juris of the servient and dominant tenement. We were urged to set aside the said judgment.

23. In opposing the appeal, counsel for the respondent highlighted the definition of an easement as defined under section 2 of the *Land Act* and Black Law Dictionary. Reference was also made to Section 32 of the *Limitation of Actions Act* which provides for the means by which easements maybe acquired and

section 28(c) and (h) of the *Land Registration Act*, which categorizes the right of way as an overriding interest.

24. Counsel also cited section 138(3) of the *Land Act* which provides that:

> "(3) Unless an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement."

25. Further, it was stated that section 98 to 100 of the *Land Registration Act* provides further for the creation of easements and analogous rights by a formal instrument and sets out what is to be contained in the said instrument, cancellation and extinguishment and enjoyment of the easement.

26. Reliance was further placed on Kamau -vs- Kamau (1967) EA 105, Dreamers Limited -vs- Bhagisana Limited; Chief Land Registrar & another (Interested Parties) (Environment & Land Case 191 of 2019) [2024] KEELC 1807 (KLR) on the characteristics of an easement. It was submitted that the ELC applied the above test in the appellant's case.

27. In regard to the dominant and servient tenement, it was submitted that the ELC analyzed the evidence on record and held that the dominant tenement was land parcel no. Loc.8/Kaganda/77 and the servient tenement was land parcel No. Loc.8/Kaganda/73. Further, that the court also considered that the appellants had already pleaded that land parcel no. Loc.8/Kaganda/77 had been subdivided after the original owner passed away in 1980 into four (4) parcels of land parcel being Loc.8/Kaganda/1654-1657 and that the respective titles issued in 2016. Further it was submitted that the trial court further found that the dominant tenement ceased to exist upon subdivision and that the appellants had failed to tender evidence showing that the four (4) parcels of land neighbour the servient tenement. It was thus submitted that it's on the basis of the foregoing that the court correctly found that the appellants had not proved the existence of the dominant tenement.

28. It was also submitted that the court also considered that the appellants had submitted that they had become entitled to an easement over land parcel number Loc.8/Kaganda/73 under Sections 32 and 38 of the *Limitation of Actions Act*. It was stated that the court on analyzing the evidence on record found that there being evidence of permission a claim of adverse possession by long use cannot arise in the circumstances.

29. Counsel stated that the court further considered time for the purpose of establishing the appellants claim under Section 38 of the *Limitation of Actions Act* started running in 2002 and the 20 years would have lapsed in the year 2022. It was stated that the appellants suit having been filed in the year 2017 it was filed 5 years ahead of the statutory period provided for in law. In addition, that the court found that the original owner's mutual agreement was to create a cross path to serve both lands for mutual convenience and as such no evidence was tendered to the effect that there was an intention to create a right of way.

30. It was also submitted that the court also considered that the appellants had pleaded to have established an easement by prescription as per the provisions of section 28 (c) and (h) of the *Land Registration Act* No. 3 of 2012 and that the court analyzed the evidence on record and found that the appellants used the land with the permission of the respondent and therefore permission negated the doctrine of prescription.

31. Further it was submitted that the court considered the provisions of sections 98 to 100 of the *Land Registration Act*, similar provisions in sections 136 to 141 of the *Land Act* and found that the easement as pleaded by the appellants was not the type acquired through a formal registrable instrument.

32. Counsel maintained that in arriving at the conclusion that a claim for easement is a claim on use of land rather than possession or ownership, the court considered that the appellant had prayed for an order that they were entitled to an easement measuring 58 meters by 3 meters in the respondent's land which was allegedly excised by the respondent's husband when he was alive and that they should be registered as owners of the same.

33. Further, that the court found that if the land was to be registered in the appellants' names, it would amount to ouster of the owner of servient land which negates the very nature of a right to an easement.

34. Further, it was submitted that the court also considered that whereas there was mutual arrangement between the original owners of the two parcels of land, there was no evidence tendered by the appellants that a corresponding easement was created in land parcel numbers Loc.8/Kaganda/1654-1657 during subdivision in 2016.

35. With regards to the doctrine of necessity, it was submitted that the court found that none of the lands were landlocked and, therefore, the same was not applicable. We were urged to dismiss the appeal and uphold the trial court's judgment.

36. We have considered the record of appeal, the grounds of appeal, the rival submissions and the applicable law. A first appeal is a valuable right of the parties; therefore, the appellate Court is required to re-appraise the evidence and arrive at its own independent conclusions. (See Rule 31(1)(a) of the Rules of this Court). However, as for the factual issues, trial courts are finders of fact, therefore their findings on matters of fact should be accorded a high degree of deference. An appellate court will only overturn a conclusion of fact if the trier of facts decision was clearly erroneous. This is to be contrasted with a conclusion of law, which will receive higher scrutiny. (See Kenya Ports Authority vs. Kustron (Kenya) Limited [2009] 2 EA 212).

37. Did the appellants demonstrate to the satisfaction of the court below that their claim for an easement over the respondent's land was merited?

38. The claim for easement was founded on sections 32 of the *Limitation of Actions Act*. An easement is the right of one landowner to make use of another nearby parcel of land for the benefit of his own land. An easement may take many forms; however, the most commonly encountered easements are a right of way; a right to light and a right of support.

39. Section 32 of the *Limitation of Actions Act* stipulates the means by which easement may be acquired: It provides as follows:

> " Means by which easement may be acquired: 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.

1. 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."

40. The classic case of Re Ellenborough Park [1955] 3 All ER 667, [1956] Ch. 131 sets out the four essential characteristics of an easement as follows:

    a. there must be a dominant (land which benefits from the easement) and a servient (land over which the easement is exercised) tenement;

    b. it must be capable of forming the subject matter of the grant of an easement;

    c. the easement must accommodate the dominant land; and

    d. the owners of the dominant and servient land must be different people. The general rule is that a person cannot have an easement over their own land. An exception to this rule is where an owner of two parcels of land grants an easement over one parcel to the tenant of the other.

41. From the record, it is evident that the appellants' claim for easement was based on Action section 32 (1)(c) of the Limitations of Actions Act. As the above provision suggests, the law of the acquisition of easements and profits is founded on a presumption; namely that when a right has been enjoyed for over two decades, such right is recognized by the law.

42. Therefore, a party claiming a prescriptive right will be required to call evidence that he has been in use for 20 years and that such use has been open to bring home to a reasonable owner of the servient tenement that a right is being asserted. If these facts are proved to the satisfaction of the court, the claim will succeed. It must however be kept firmly in mind that these evidential presumptions are rebuttable and, where facts are open to two

    explanations, the burden remains on the claimant to establish the explanation which is consistent with the use being as of right.

43. The issue under consideration will turn on the question whether the appellants demonstrated by evidence that they used the access, openly and as of right for 20 years. It is common ground that the appellants' land before subdivision being parcel

    Loc.8/Kaganda/77 bordered the respondent's land Loc.8/Kaganda/73. In this case the dominant tenement was parcel Loc.8/Kaganda/77 while the servient tenement was parcel Loc.8/Kaganda/73.However, from the record it is noted that the dominant land Loc.8/Kaganda/77 was subdivided after the death of the appellants' father and 4 new titles were issued in the names of the appellants and the copies of certificates dated 8th May 2017 show that the appellants became registered as owners in 2016.

    After the sub-division it is not clear whether the access road was retained on any of the four (4) sub-divisions.

44. From the perusal of both survey plans produced in court, as noted by the trial court, there is a road below the original parcel Loc.8/Kaganda/77 and none of the parcels is landlocked and, therefore, the need for benefit or dependency on the respondent's parcel of land as held by the trial court was indeed not true. As the trial court found, a position we fully agree with, that the appellants are seeking

an easement for purposes of convenience rather than a benefit of a right of way as envisioned by an easement.

45. We are satisfied that the appellants' contentions which seemed to suggest a creation of an easement in their favour through an agreement by their deceased father and the respondent's deceased husband has no foundation in law and we reject it. An easement is creatable only by the conscious act in writing of the parties, and at any rate the land owner of the servient tenement, and required to be noted in the certificate of title, this was not the case here as no easement was registered and noted on the title.

46. In this regard we are in agreement with the reasoning and analysis of this Court in the case of Kamau -vs- Kamau (supra); which dealt with the creation of easements both at common law and in equity.

47. The position on easements in Kenya is governed by statute requiring only that the same be created in writing and not by deed. In any event, it is not disputed that the appellants' father had also allowed the respondent's family to use part of his land for access and the appellants on a kind of quid pro quo basis but the appellants fenced off that path, and that is what triggered the respondent's action of fencing off her side. The respondent has not claimed any right of easement over that portion that belongs to the appellants.

48. It is clear to us that the two original owners of the land, who were related, mutually agreed to create a cross path to serve both lands for their mutual convenience. There is no evidence that there was an intention to create a right of way. Although it was claimed that the respondent's late husband had signed some mutation forms (a fact denied by the respondent who termed such forms as forgeries), the said forms were not registered and had no force of law. What we can glean from the evidence was that there was a mutual agreement between the land owners to use each other land for access to other surrounding conveniences. The appellants were the first to violate that verbal agreement by blocking the respondent and they should not be heard to complain.

49. We hold, as did the trial court, that the appellants failed to establish any right of easement arising from long use within the meaning of section 32 (1) (c) of the *Limitation of Actions Act*. We also find that the ingredients on an easement listed in Re Ellenborough Park (supra) are not manifestly present in this case.

50. We would also wish to point out that in as much as the easement is tied to the land and not the registered owner, in this case, following the subdivisions of the original title, the appellants' land changed its nature and any easement attached to the original Title could not be claimed as of right by the appellants. We also note from the record, that there is an access road at the bottom of the appellants' parcels of land, and no party is landlocked.

51. The upshot of our consideration is that we find no merit in this appeal and we dismiss it with costs to the respondent.

DELIVERED AND DATED AT NYERI THIS 21ST DAY OF MARCH, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR