



REPUBLIC OF KENYA



National Oil Corporation of Kenya Limited v Equator InnEquator Inn Limited t/a Tsavo Inn Hotel (Civil Appeal 161 of 2019) [2024] KECA 1149 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1149 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 161 OF 2019
SG KAIRU, F TUIYOTT & JM MATIVO, JJA
SEPTEMBER 20, 2024**

BETWEEN

NATIONAL OIL CORPORATION OF KENYA LIMITED APPELLANT

AND

EQUATOR INN LIMITED T/A TSAVO INN HOTEL RESPONDENT

(Being an appeal from the Judgment and decree of the Environment and Land Court at Makueni (C. Mbogo, J.) dated 26th November 2018 in E.L.C Case No. 83 of 2017)

JUDGMENT

1. By a plaint dated 30th September 2015, filed at the High Court of Kenya at Nairobi, Equator Inn Limited T/A Tsavo Inn Hotel (the respondent) instituted Environment and Land Court (ELC) Civil Suit No. 944 of 2015 against National Oil Corporation of Kenya Limited (the appellant). The suit was subsequently transferred to Makueni vide a ruling delivered on 6th April 2017 (Eboso, J.) and assigned Makueni ELC Case No. 83 of 2017.
2. The respondent's claim was that it is the registered proprietor of all that parcel of land known as L.R. No. 11794/2 (formally LR No. 11487/2), situated at Mtito Andei having acquired it in 1962 while the appellant owned LR No. 11794/2 (formally L.R. No. 11487/1) bordering its aforesaid land. The respondent averred that it operated hotel business on the said land for 43 years, and during the said period, it enjoyed unhindered access into its land from Mombasa Road, which is the only access to its plot linking its plot with the said road. The respondent's grievance was that in 2015, the appellant started constructing a wall blocking its aforesaid access to the main road.
3. The respondent prayed for the following orders against the appellant: (a) a declaration that the appellant's land is subject to an encumbrance in the respondent's favour, namely, a right of way to its property. (b) an injunction restraining the appellant or its agents from constructing a wall across the said access road to the Nairobi – Mombasa highway. (c) a mandatory injunction compelling the



- appellant or its agents to remove any obstruction to the said entrance. (d) a declaration that the appellant's acquisition and registration of L.R. No. 11794/2 (formerly 11487/1) is unlawful, null and void. (e) special damages for loss of use of the land, (f) general damages for inter alia nuisance, (g) interests on the above sums and any other relief the court may deem fit.
4. In its statement of defence dated 7th December 2015, the appellant maintained that the respondent had been unlawfully interfering with its property by directing its customers to access its premises through its property without its consent and in total disregard of the boundary. Further, the respondent's property borders the Nairobi/Mombasa highway with a clear road access to its property. Nevertheless, it admitted undertaking construction of a boundary wall.
 5. In the impugned judgment delivered on 26th November 2018, Mbogo, J. held that by blocking the access road to the respondent's land, the appellant acted unreasonably, in bad faith and with the intention of destroying the respondent's business because there was nothing to show that the easement interfered with the appellant's business. The learned judge held that there was no dispute that the respondent had enjoyed access to its property for over 20 years through the appellant's property. The trial court also held that under the Limitation of Actions Act, an easement crystallizes after 20 years. Lastly, the learned judge held that the appellant could not hide behind its claim of ownership of its land, because computation of time for the purpose of crystallization of an easement cannot be disrupted by change of ownership of the land, or approvals to undertake a construction.
 6. Aggrieved by the judgment, the appellant appealed to this Court citing 7 grounds in its memorandum of appeal dated 23rd April 2019 as follows:
 - a. The learned judge failed to appreciate that the suit was res judicata since the same issues in question were determined in Machakos ELC No. 287 of 2011, Ranji Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya, and Machakos Business Premises Rent Tribunal Reference No. 39 of 2011, Rajni Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya Ltd.
 - b. The learned judge misconstrued sections 136,137,138, 139 and 140 of the Land Act, 2012 and improperly applied the law to the appellant's prejudice.
 - c. The learned judge erred in declaring the appellant's acquisition and registration as proprietor of LR. No. 11794/2 (formerly 11487/1) was unlawful, invalid, an issue that neither was supported by evidence nor was it canvassed at the trial.
 - d. The learned judge erred in law and fact in holding that the respondent had a right of easement over the appellant's property despite uncontroverted evidence that the respondent has an alternative access to its property through the Nairobi-Mombasa highway.
 - e. The learned judge erred in law and fact by failing to consider the defendant's defence and evidence of its ownership of the property.
 - f. The learned judge erred in law and fact in holding that the respondent had met the threshold for the grant of mandatory injunction contrary to evidence and the applicable legal principles.
 - g. The learned judge failed to appreciate the appellant's right to use and enjoy its property protected under Article 40 of the Constitution as read with sections 25 and 26 of the Land Registration Act.
 7. The appellant prays that this appeal be allowed with costs and the trial court's judgment be set aside.



8. In support of its appeal, the appellant submitted that the respondent's suit before the ELC was res judicata. According to the appellant, the respondent's claim before the ELC was previously determined in High Court Civil Suit No. 287 of 2011, Rajni Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya Ltd and Machakos BPRT Reference No. 39 of 2011, Rajni Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya Ltd. It argued that before the trial court was a boundary dispute disguised as a claim for an easement, yet the appellant's similar claims in the above suits were dismissed by courts of competent jurisdiction. Therefore, the ELC lacked jurisdiction to hear the case. The appellant cited section 7 of the *Civil Procedure Act*.
9. The appellant maintained that the findings by the learned judge were erroneous and superfluous because they were not based on the evidence adduced by either party and it was also admitted by the respondent that the appellant was the lawful registered proprietor of LR No.11794/2 (formerly 11487/1) which borders the respondent's land. It was the appellant's case that there was no basis for the trial court to find that the respondent's acquisition and registration of the property was unlawful, therefore, the trial court aided an illegality by arriving at a finding based on a false presumption of ownership.
10. The appellant contended that the learned judge disregarded uncontroverted evidence that the respondent had an alternative access to its premises from the main road and proceeded to hold that the respondent had enjoyed access to its property for 20 years, which is the period within which an easement crystallizes under the *Limitation of Actions Act*.
11. The appellant also submitted that an easement only accrues where the dominant tenement would otherwise be inaccessible and/or useless without the easement. The appellant relied on Esther Wanjiku Mwangi & 3 Others vs. Wambui Ngarachu (sued as legal representatives of the estate of Ngarachu Chege - Deceased) [2019] eKLR in support of the holding that where there exists an alternative access road for the dominant tenement, the land is not landlocked, therefore an easement cannot be sought for the purposes of convenience. It was also the appellant's case that the learned judge disregarded its defence that it purchased the subject property on 9th September 2010, therefore, all along the respondent was a trespasser.
12. The appellant also contended that the mandatory injunction was granted based on erroneous assumptions rather than on evidence and the applicable legal principles. It contended that there were no special circumstances to merit the said order. It argued that the construction of a wall did not constitute special circumstances because there was an alternative route. Further, an Environmental Impact Assessment was done prior to the construction, and all the requisite approvals and/or permits were obtained. Consequently, in the absence of special circumstances, it was improper for the learned judge to issue the injunction. The appellant contended that the mere fact that an illegality has gone on for a considerable period does not make it right.
13. In addition, the appellant faulted the learned judge for disregarding the principles for granting injunctions as laid out in *Giella vs. Cassman Brown & Co. Ltd* [1973] E.A 358. In support of this assertion, the appellant cited *Hancox, JA. in Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu* [1982 – 88] KAR 278 in support of the holding that an appellate Court can reverse a trial court's decision if it appears that the learned judge failed to take into account relevant considerations.
14. In opposition to the appeal, the respondent submitted that its case before the trial court was not res judicata because the issues before the BPRT were remarkably different from the issues before the ELC, and in any event, the BPRT has no jurisdiction to determine issues relating to easements. Regarding ELC No. 287 of 2011, the respondent maintained that the case involved a tenant/landlord dispute relating to dealership of a petrol station unlike the suit before the ELC, which related to easements.



Lastly, the wall complained of was built in August 2015, 4 years after the commencement of Machakos ELC No. 287 of 2011 and BPRT Reference No. 239 of 2011.

15. The respondent maintained that its right of way has been created through prescription and there is undisputed evidence that the respondent has been enjoying the right of way through the appellant's property for a period of over 43 years openly as of right and without interruption even from previous owners. Further, under section 32 of the Limitations of Actions Act, an easement crystallizes into an absolute and indefeasible right upon the lapse of 20 years of peaceful, open and uninterrupted enjoyment of the easement. In support of the forgoing submission, the respondent cited this Court's decision in *Kamau vs. Kamau* [1984] eKLR.
16. The appellant also submitted that whereas easements created by implication of the law are of necessity, the same is not true for right of way claimed by way of prescription. Therefore, the claim that the respondent should not have another right of way for an easement to be granted cannot hold in this matter where the easement claimed is one created by prescription, which is founded on the *Limitation of Actions Act*.
17. Answering the argument that it had not formalized the easement as required by section 38 (3) of the *Limitation of Actions Act*, the respondent disputed the applicability of the said section to its case. To support its position, it cited *Fairview Estate Limited vs. Ann Wangari Kirima & 2 Others* [2006] eKLR which held that once an easement is acquired under section 32 of the Act, the vesting upon the person who has acquired it and its registration against the affected title is a mere formality.
18. Responding to the appellant's argument that the impugned judgment violates its right to property under Article 40 of *the Constitution*, the respondent argued that Article 40 rights are not absolute, but can be limited provided that the limitation is reasonable and justifiable as set out in Article 24 of *the Constitution*. Therefore, upholding the existence of an easement is in line the limitation of right to property under Article 24 of *the Constitution*.
19. Regarding the mandatory injunction granted by the trial court, the respondent contended that the learned judge granted the said order after he found that there existed an easement and that the judge properly exercised his discretion in granting the said order.
20. 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. Kuston (Kenya) Limited* [2009] 2 EA 212).
21. Upon considering the entire record, the impugned judgment, the parties' submissions and the authorities cited, we find that the following issues will effectively determine this appeal. (i) whether the respondent's suit before the ELC was res-judicata; (ii) whether the respondent's claim for an easement was merited, and (iii) whether the mandatory injunction was merited.
22. On the issue of res judicata, the appellant's argument was founded on its assertion that the issues before the ELC were determined by courts of competent jurisdiction in *Rajni Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya Ltd*, Machakos ELC 287 of 2011 and Machakos BPRT Reference No. 39 of 2011.



23. Undeniably, the object of Res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issues determined by a court of competent jurisdiction in the subject matter of the suit. Section 7 of the Civil Procedure Act which deals with res judicata contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are:
- (i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. (ii) The former suit must have been between the same parties or privies claiming under them. (iii) The parties must have litigated under the same title in the former suit. (iv) The court which decided the former suit must have been competent to try the subsequent suit. (v) The matter in issue must have been heard and finally decided in the former suit. (See *Lotta vs. Tanaki* [2003] 2 EA 556.)
24. Its basic law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling, which is in its nature final and conclusive, the judgment or ruling is res judicata. It follows that if in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right, which was determined by the earlier judgment, or ruling is called in question, the defence of res judicata can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.
25. The basic requirements for res judicata are the same cause of action, the same relief involving the same parties was determined by a court previously. Somervell L. J. in *Greenhalgh vs. Mallard*
- (1) [1947] 2 All ER 257 stated that res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. The Supreme Court in *Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another* [2016] eKLR stated the following regarding res judicata: “[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.”
26. The issue under consideration will turn on the question whether the dispute before the ELC was litigated and determined in the previous cited cases. In determining the question of res judicata, the learned judge at paragraph 41 of the judgment held that the issues in *Rajni Desai T/A Tsavo Inn Service Motors vs. National Oil Corporation of Kenya Ltd*, Machakos ELC 287 of 2011 and *Machakos BPRT Reference No. 39 of 2011* were not the same as in this case. Our reading of the record leaves us with no doubt that the former case involved termination of a petrol station dealership while the latter was a tenant/landlord dispute. Still on the latter case, it’s an elementary fact that the jurisdiction of the BPRT is limited to landlord/tenant disputes arising from business premises. We find no merit in the appellant’s assertion that the respondent’s suit was res judicata relying on the above two suits.
27. We now turn to the germane issue in this appeal, which is whether the learned judge erred in finding that the respondent had proved its claim for easement. The cornerstone of the respondent’s case was that its 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 piece 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. (A right of support is an easement by which an owner of a structure on land has a right to rest or support it in whole or in part upon the land or structure of an adjoining owner (as by inserting beams in the adjoining wall on the boundary).



28. Section 32 of the *Limitation of Actions Act* 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.
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.”

29. 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.

30. From the record, it is evident that the respondent’s claim for easement was based on section 32 (1) (c) of the Limitations of Action 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.

31. 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.

32. The issue under consideration will turn on the question whether the respondent demonstrated by evidence that it used the access, openly and as of right for 20 years. It is common ground that the respondent’s land borders the appellant’s land. The appellant’s land borders the main road while the respondent’s land does not.



There is uncontroverted evidence that the respondent has for over 43 years been accessing Mombasa High Way using an access road which passes through the appellant's land. There is unchallenged evidence that the respondent constructed an elephant like tusks structure at the entrance to the said access road. Also uncontroverted is the respondent's evidence that for the said period of 43 years, it has operated a hotel business on its land and its customers use the said access road. It is also important to mention that the appellant did not dispute erecting a wall across the said road, thereby blocking the said access. The respondent's uncontested evidence that it has used the said access road for 43 years sufficiently demonstrated that it had acquired the right of easement over the appellant's land 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 manifestly present in this case.

33. It is also important to underscore that section 28 of the *Land Registration Act* creates and categorizes the right of way as an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. Section 28 of the *Land Registration Act* provides:

- “28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- a. spousal rights over matrimonial property;
 - b. trusts including customary trusts ;
 - c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - d. natural rights of light, air, water and support;
 - e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
 - g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
 - j. any other rights provided under any written law.

34. The above section recognizes overriding interests as enforceable without being registered in the register and bind a registered proprietor and his/its transferee even if he/it does not know of their existence.



It is therefore immaterial if a party purchased the property as was urged by the appellant. In *Mwangi Muguthu vs. Madan*, J.A defined overriding rights as which though not registered are binding on the proprietor of land and as thus they don't have to be registered.

35. There is uncontroverted evidence by the respondent that it bought the larger part of its land in the late 1970's and that it sold part of its property to a petrol station known as Caltex and subsequently Caltex sold LR. No.11794/2 to Total and finally Total sold LR. No.11794/2 to the appellant. It was also the respondent's evidence that despite parting with the ownership of LR. No.,11794/2, the said parcel contained an open portion to allow them to access their hotel and that it is only in 2015 when the appellant tried to block the entrance by building a wall. It is also noteworthy that the respondent admitted that both the appellant's and the respondent's properties are located along Nairobi- Mombasa highway and that the respondent could only access its property through the disputed access road.
36. Granted, the appellant only acquired possession of LR 11794/2 on 9th September 2010 after buying it from Total Kenya. However, as at the time the appellant gained ownership, 20 years had lapsed. Its basic law that where an easement has been created, it enjoys protection irrespective of change of ownership of the property. This position was articulated by this Court in *Ruth Wamuchi Kamau vs. Monica Mirae Kamau* [1984] eKLR, it was held:
- “Once an 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”.
37. On the issue of easement by prescription, the learned judge of the ELC stated as follows:
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.”
38. We agree with the learned judge that there existed an access road traversing the appellant's, L.R. No. 11794/2 (formerly 11487/1) and the respondent's L. R. No. 11794/1 (formerly 11487/2). The history of this access road goes back to 1970's. The respondent enjoyed access to its inn through the appellant's property and thus the access was peaceful and openly as of right and was without interruption. Consequently, we affirm that the respondent's right to easement on the appellant's property is absolute and indefeasible and it was only through the suit before the ELC that the respondent could formalize its claim for easement. Consequently, the appeal touching on easement and lack of formalization of the easement fail.



39. Regarding the grant of the mandatory injunction, the predecessor of this Court in the case of *The Despina Pontikos* [1975] EA 38 held at page 57 paragraphs G, H:

“We should begin by remarking that this court has held more than once that interlocutory mandatory injunction should only be granted with reluctance and only in very special circumstances. On the other hand, the issue of an injunction is an exercise of discretion and it is well established that this court will only interfere with the exercise of his discretion by a trial judge in exceptional circumstances though it will not hesitate to do so if the exercise of discretion has been based on any wrong principles”.

40. The general principles on when an appellate court may interfere with a discretionary power of a trial court are now well settled. In *Mbogo & Another vs. Shah*, [1968] EA, these principles were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice...”

41. The learned judge while granting the mandatory injunction held that by blocking the access road, the appellant acted unreasonably, in bad faith and with the intention of destroying the respondent’s business, as there is nothing to show the easement interfered with the appellant’s business. The mandatory injunction restored the status quo which existed before the appellant built the wall that blocked the respondent and its customers from accessing its premises. Having correctly found that the respondent had an absolute and indefeasible easement on the appellant’s property, it is our view think that it was fair and just in the circumstances for the trial court to restore the status quo that had prevailed for 43 years. Accordingly, we find no misdirection on the manner in which the learned judge exercised his direction.

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

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR.

