



Karanu & another v Kimemia & 3 others (Environment & Land Case 42 of 2019) [2024] KEELC 3967 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 42 OF 2019**

JG KEMEI, J

APRIL 30, 2024

BETWEEN

GRACE WANJIKU KARANU 1ST PLAINTIFF

DOUGLAS GITU NDEITHI 2ND PLAINTIFF

AND

EDDY PETER NDUNGU KIMEMIA 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU 2ND DEFENDANT

DIRECTOR OF SURVEY KIAMBU 3RD DEFENDANT

REGISTRAR OF LANDS KIAMBU 4TH DEFENDANT

JUDGMENT

1. At all material times to filing this suit the 1st and 2nd Plaintiffs are the registered owners of parcel Sigona/1391 and 1392 while the 1st Defendant is the registered owner of Sigona/285 and 138 adjacent and abutting the Plaintiff's plots.
2. That the Plaintiffs access their lands through a road created by the owners of parcel 350 and 302 who surrendered part of their plots to create a road (now in contention) to enable the Plaintiffs access their plots being Sigona/1391 and Sigona/1392. That this road has been maintained exclusively for the Plaintiffs and their said neighbours. That it has not been acquired by either the County or National Government nor is it available for use by the 1st Defendant.
3. That on 16/1/2019 the Defendant forcefully and violently demolished a wall/ fence separating Plaintiffs' plots from that of 1st Defendant without notice and or consent and the same amounted to trespass, nuisance and a breach of his right to land. That the destruction of the wall exposed them and their property to insecurity.



4. The Plaintiffs sought the following reliefs:-
 - a. A declaration that the surveying and provision of the private access road as a Public road was unprocedural, illegal and null and void and the mutation forms so showing the road to be a public road be rectified and/or cancelled.
 - b. An order of mandatory injunction directing the Defendants to restore and/or reinstate the gate and wall to its original form before the invasion of the Plaintiff's property.
 - c. A permanent injunction restraining the Defendants whether by themselves or their agents, servants, employees or any other person claiming under them from trespassing onto, entering, demolishing structures on, occupying and or in any other manner interfering with the quiet possession and enjoyment of and / or dealing with the suit premises Sigona/1391 and Sigona/1392 and in particular converting the Plaintiffs' private access road into a public road.
 - d. General damages for trespass, destruction of property (gate and wall), nuisance and breach of rights to property.
 - e. Costs and interest.
 - f. Any further or other relief.
5. The 1st Defendant denied the Plaintiffs' suit through his amended defence and counterclaim dated 13/10/2022. The 1st Defendant stated that the access road was created when the mother title, Sigona/137 was subdivided into two portions that created parcel 285 and 286. That Parcel 137 was owned by the Plaintiffs' father.
6. That according to the Registry Index Map (RIM) for L.R No. 285 the access road exists and the same cannot be closed or blocked without the 1st Defendant's consent in writing. He undertook to produce the said RIM's before the Court.
7. That the illegal structures blocking the access road were removed by the Engineer Kikuyu Sub County on 17/1/2019 following the complaint he lodged with the authorities.
8. In his counterclaim the 1st Defendant reiterated the averments in the defence and added that he is the registered owner of parcel Sigona 285. He averred that there is a private access which was excised when the subdivision giving rise to his property was done and a mutation duly registered on 16/10/1987. That the access is adjacent to the Plaintiffs plots. That the barrier constructed by the Plaintiffs was duly removed on 17/1/2019 by the Engineer giving the 1st Defendant access to his property.
9. The 1st Defendant is apprehensive that unless the Plaintiffs are stopped they will continue to block the access road thus denying him the right to access his property. That the access to his property is through the existing private access road which should remain. That the access road has been illegally blocked by the Plaintiffs without informing the 1st Defendant forcing him to raise a complaint to the authorities. The blockage was removed by the Engineer Kikuyu after the Plaintiff was given notice on 14/11/2018. The Court was urged to injunct the Plaintiffs from blocking the access road. In the counterclaim he sought the following orders:-
 - a. A permanent injunction restraining the Plaintiffs/Defendants in the counterclaim their agents, employees, servants or any other person whatsoever from erecting and/or constructing illegal barriers/structures on the private access road leading to the 1st Defendant's / Plaintiff in the counterclaim premises being L.R. No. Sigona/285 and to demolish any such barriers/structures erected on the private access road.



- b. An order compelling the OCS of Kikuyu Police Station as well as the Kikuyu Sub-County Road and Traffic Engineer to enforce the orders issued by this Honourable Court.
 - c. General damages for the loss damage and inconvenience suffered by the 1st Defendant/Plaintiff in the counterclaim.
 - d. Costs of this suit.
10. PW1 – Grace Wanjiku Karanu testified and relied on her witness statement dated 25/2/2019 and produced documents marked as PEX No. 1-13 in support of her case. She stated that the Plaintiffs own parcels are Nos Sigona 1391 and Sigona 1392, being subdivisions of parcel 286. That the original mother title was parcel 137. Upon subdivision it yielded parcel 285 and parcel 286 in 1987. Shown the cadastral map, the witness stated that there is an access road to parcel 285. Further subdivisions of parcel 286 yielded parcels 301 and 302. Thereafter parcel 301 was subdivided to create parcels 349 and 350. Parcel 349 was subdivided to yield parcel 1391 and 1392 (suit lands). She stated that she was not present when the subdivisions were carried out and that she was not aware that there is an access road to the 1st Defendant’s land. That her mother in law blocked the access leading to the 1st Defendant’s property.
 11. She added that on notice by the Sub-County Surveyor, the barrier was removed to give access to the 1st Defendant.
 12. In cross examination by the County Attorney, the witness informed the Court that her husband was served with a notice by the Sub-County Roads Engineer. That they refused to open the gate forcing the Sub-County Engineer to re-open it.
 13. The witness reiterated that the 1st Defendant accessed his land from the lower part as well as through parcel 138 which abuts the main Nairobi – Nakuru Highway. That her husband wrote a letter to the Director of Survey questioning why there were 2 mutations over the same land but no response was forthcoming from the Director of Survey.
 14. She added that access to Sigona 1391 and Sigona 1392 was created during the subdivision of parcel 286 in 1993 while the 1st Defendant purchased parcel 285 from her father in law in 1987. She added that she is not aware if the 1st Defendant claimed the access road from her father in law, the original owner of the lands.
 15. PW2 – Lena Mutua stated that she is a private Surveyor licensed to practice as such with Landteck Mappers. She produced a Surveyor’s Report dated 16/5/2022. That the purpose of preparing the report was to ascertain if the ground area matched with the area contained in land parcel Nos. Sigona 1391 and Sigona 1392. That the two plots measure one acre.
 16. In cross examination she informed the Court that she had not placed any evidence before the Court to vouch for her professional qualifications.
 17. She stated that though the map on page 134 of the Plaintiffs’ trial bundle (RIM of the area) contains the road access marked in yellow, in her opinion she stated that the access road is illegal because the road was not surrendered to the Government. She however admitted that she failed to present mutations with respect to the various subdivisions that have taken place over the years. Shown the Mutation Form for Sigona/137 dated 9/9/1987, she pointed out to the Court that there is an access road in the mutation leading to parcel 285. In addition, when shown the mutation for parcel 301, she stated that the same was registered on 25/1/1990 and that the said mutation also contains the access road. That parcel 1391



- and 1392 both measure 0.2020Ha. each. She disclosed that the dispute had been heard by the Land Registrar although she did not attach the proceedings and or the outcome.
18. The witness further stated that for an access road to be legal, both land owners must sign the mutation form and that in this case there is only one signature. She also clarified that in the event both lands are owned by one person then the signature of the land owner suffices. She stated that the access road to parcel 285 is on the lower side where there is a 9 metre wide road. In her opinion the 6 meter access road cannot be accommodated by the existing measurements on the ground. She added that in many instances quack Surveyors may include an illegal road in the survey plan. She stated that in her opinion there is no access road to parcel 285.
 19. Eddy Peter Ndungu Kimemia testified as DW1. He relied on his witness statement dated 15/9/2020 as his evidence in chief. He produced documents marked as DEX No. 1- 6.
 20. He informed the Court that he was not involved in the original subdivisions of parcel 137 and as the mutation was processed by the original registered owner at the time he purchased the land. That there is no access road between parcel 138 and 285 save for a footpath which he has created for his own use. That the County officials removed the barrier after the Plaintiffs blocked the same.
 21. DW2 – Jacelyn Wangare Mukoma introduced herself as the Land Registrar, Kiambu Land Registry. She stated that the access road to parcels 285 and 286 is shown on page 3 of the Mutation Form for subdivision of parcel 137. That plot 301 yielded parcels 349 & 350 vide mutation registered on 25/1/1990. That the size of the road ought to be indicated in the mutation. However, failure to indicate is not fatal as it can be rectified.
 22. DW3 – Michael Muikirie stated that he is the Surveyor in charge of Kiambu County. He stated that there is a 6 metre road that serves parcel 285 as shown in the mutation and Survey Plan Nos. 5, 7 and 9 Sigona. He admitted that the 6 meter access road exists on the ground though it was omitted in the mutation which omission is not fatal as it can be rectified.
 23. The 2nd – 4th Defendants closed their cases as well and called no witnesses.

Written submissions

24. The Plaintiff submitted that the 1st Defendant's land is accessed through an access road on the lower side of Parcel No. Sigona 285. They contend that the original owners of Parcel 285 did not create any road access through the Plaintiffs' land to that of the 1st Defendant. It was further contended that the 1st Defendant has not petitioned the Minister for an access road through the Plaintiffs' lands. If the 1st Defendant was to make such an application, it could only be allowed with conditions such as: compensation for the Plaintiffs' parcel of land. The Plaintiffs further submit that the purported access through their land was illegally and unlawfully inserted without the knowledge or consent of the Plaintiffs or their late father. That the public access road neither leads to a public highway, railway nor a halt as envisaged under Section 2 of the *Public Roads and Roads of Access Act*. That the access road only leads to the Plaintiffs' parcels and not through to the 1st Defendant's land.
25. That the 1st Defendants contention that their access road traverses Sigona /1391 and 1392 is an illegality. It was contended that according to the mutation form dated 16/11/1987 parcel No. Sigona 285 has a road access at the bottom of that plot abutting plot No. Sigona 163. In addition, that the 1st Defendant failed to produce evidence to show how the public road (if any) was created. Further that the 1st Defendant has neither produced evidence in support of an application to the District Roads Board seeking to create an access road to his land as required under Section 9 of the *Public Roads and Roads of Access Act*. That the 1st Defendant neither sought the creation of a public road or a road of



access in accordance with the law. That the 1st Defendant has demonstrated his desire of creating a road through the Plaintiffs parcels for his own convenience and the Court was urged to disallow his claim. Plaintiff relied on the decision of the Court in *Erick Kiprotich Soi & Ano. v. John Matere Kereri & Ano.* (2021)eKLR where the Court observed-

“... It is apparent to me that what the Plaintiff wants, is to have a road of access created through the Defendant’s land. If this is the case, then the Plaintiff needs to approach the Minister or District Roads Board pursuant to Sections 8 and 9 of the *Public Roads and Roads of Access Act* so that they may consider creating a road of access for the Plaintiff or the Public ...”

26. It was also observed that the access road created for the Plaintiffs lands was not surrendered to the Government and therefore the said access road cannot be termed as a public road. In any event, the 1st Defendant already enjoys access to his properties via two access roads ie lower side of Sigona 285 and through Sigona 138 and which abuts Nairobi – Nakuru Road.
27. The 1st Defendant submitted that according to the mutation dated 7/9/1987 the then registered proprietors of the land subdivided the land and created a public road for use to access resultant subdivisions. That subsequent subdivisions were carried out while maintaining the existence of the public road. That the Plaintiffs acquired the property after the access road had been created. That upto date the said access road is provided for in the Registry Index Map for Sigona area and is used by all the plot owners who live in the adjacent parcels. Further that the access road is not part of the plots belonging to the Plaintiffs.
28. It was submitted by the 1st Defendant that the Plaintiffs have no right to block the access road and deny the 1st Defendant access to his property. That the actions of the Plaintiffs are illegal. With respect to the alleged alternative access road, the 1st Defendant argued that if indeed there are two access roads to his property, then he has a right to use both and that it would be hypocritical for the Plaintiffs to declare one illegal and leave the other untouched.
29. The 1st Defendant observed that the Plaintiffs have not registered a private road over the said access road as provided for in law.
30. It was submitted that the Plaintiffs erected a barrier blocking the access to the 1st Defendant’s land, which barrier was removed by the Surveyor from Kikuyu Sub-County. That the actions of the Plaintiffs in erecting the barrier are illegal and unlawful. In conclusion the 1st Defendant urged the Court to dismiss the Plaintiff’s suit on account of failure to proof their claim and allow the 1st Defendant’s counterclaim.

Analysis and determination

31. Having considered the pleadings, the evidence adduced during the trial and the written submissions the issues for determination are;
 - a. Whether the Plaintiff has proved their claims.
 - b. Whether the 1st Defendant has proved his claims in the counterclaim
 - c. Costs of the suit and the counterclaim
32. It is not in dispute that the Plaintiffs are the registered proprietors of parcels 1391 and 1392 while the 1st Defendant is the registered owner of parcel 285. The dispute between the parties revolves around whether or not the road passing next to the Plaintiffs should be available to the 1st Defendant for access



to his land. Interalia whether the said access road was illegally unprocedurally created and whether the same should be cancelled.

33. The legal framework of how a public road and or a road of access is found in the *Public roads and roads of access Act* Cap 399, the *Land Act* and the *Land Registration Act*. A public road is defined in the *Public roads and roads of access Act* Cap 399 Act as follows;

- a. Any road which the public had a right to use immediately before the commencement of this Act;
- b. All proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the *Government Lands Act* (Cap. 280), at any time before the commencement of this Act;
- c. All roads and thoroughfares hereafter reserved for public use.

34. In this case parties have referred to the access road by various names as a public road, access road and a private road. The Act recognises two roads only that is public road and roads of access. Section 9 of the *Public Roads and Roads of Access Act* Cap 399 Act does not define what an access road is but discusses how it is created. It states as follows;

- “(1) Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act: Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.
- (2) Any owner or occupier of lands who has constructed a road in circumstances which did not require the making of an application under subsection (1) of this section may make application to the board of the district in which the road is situated for a declaration that the road is a road of access, and for the registration of the road of access as though an order had been made under section 11 of this Act.
- (3) Every such application shall be accompanied by such fees as the Minister may prescribe, and the board shall not be obliged to proceed upon any such application except upon payment of such fees.”

35. In this instant case the access road (for lack of a better term) under contention was created during the subdivision of parcel 137 measuring 14.47 acres owned by Kinuthia John Kanyonyoge and Ndeitha Karanu. According to the mutation on record registered on 16/7/87 the subdivision curved out 2 parcels of land namely 285 measuring 2 acres and 286 measuring 12.47 acres. It is worth noting that the access road was created from the main road all the way to parcel 285. Subsequent subdivisions resting on the parcel 349 that yielded parcels 1392 and 1391 provided for the same access road on the mutation.



36. PW2, DW1 and DW3 all agreed that the contested access road is contained in the mutation forms forming the subsequent subdivisions of the lands leading to the creation of the suit lands. The Plaintiff in my considered view has not tabled any evidence in support of any illegality in the creation of the access road. In any event the same was created by the previous owners of the land and not the 1st Defendant. It is not in dispute that the Plaintiffs acquired the suit lands later and therefore it is not plausible to argue that the access road was meant for the two parcels only. There is a higher probability that the access was meant to serve the 1st Defendant given that the subplots Nos. 138-170 already enjoyed access from the main Nairobi – Nakuru Highway. It is also noted that the 1st Defendant acquired the land in 1992 when the access road was in existence from 1987.
37. It is not in dispute that according to the RIM presented in Court parcel 285 has another access through an access road below. The basis upon which the Plaintiffs think that this access should be closed has not been explained. There is no law that prohibits multiple access of a property. Our Planning law does not allow for the creation of a landlocked land. Parcel 1391 and 1392 are not landlocked however the Plaintiffs insist that by allowing access to the 1st Defendant they will be opening their properties to insecurity. No evidence was however tabled to support this contention. Equally the fact that the 1st Defendant owns parcel 138 is not sufficient reason to deny him access through the access road on the RIM. Each land must be looked at as an independent unit and an access planned for it.
38. The Court notes that the acreage of the Plaintiff's lands are indicated as 0.5 of an acre each. These parcels formed part of parcel 349 which measured 0.4 ha or 0.98 acres approximated to one acre. It follows that upon subdivision none of the acreage of parcel 349 was surrendered to form part of the access road in question which access had previously been created in 1987. The Court does not agree with the evidence of PW2 that the acreage of the Plaintiffs land does not accommodate a 6 meter road. In any event the said surveyor ought to have tabled evidence of the acreages of parcels 138-170 to show if indeed the said parcels would be affected by the access.
39. Evidence led by DW3 shows that the existence of the road is clearly delineated in the RIM for Sigona. According to the said RIM there is nothing to show that the access is not available to serve the 1st Defendants land.
40. From the foregoing the Court concludes that the area marked as a road access in the RIM does not belong to the Plaintiffs and therefore they have no right to block the same. I also find that there is no evidence of trespass having been visited on the Plaintiffs lands.
41. It was submitted by the DW3 that the access has not been surrendered to the Government and or registered in accordance with *Public Roads & Roads of Access Act* Cap 399. The Court notes that the said Act lays a clear framework which the parties are at liberty to take to achieve the registration and or classification of the said road.
42. On the question of general damages for loss and inconvenience, the Court finds that there was no evidence that the 1st Defendant was inconvenienced having admitted the presence of an access to his land from the lower end of the said land. Further there is no evidence that he suffered any damages noting that none was pleaded and proved. Considering the history of the dispute I order each party to meet the cost of their suit.
43. In the end the Plaintiffs case fails and the 1st Defendant's counterclaim succeeds and I enter Judgement in favour of the 1st Defendant as follows;
 - a. A permanent injunction restraining the Plaintiffs/Defendants in the counterclaim their agents, employees, servants or any other person whatsoever from erecting and/or constructing



illegal barriers/structures on the private access road leading to the 1st Defendant's / Plaintiff in the counterclaim premises being L.R. No. Sigona/285 and to demolish any such barriers/ structures erected on the private access road.

- b. An order compelling the Officer In Charge (OCS) of Kikuyu Police Station as well as the Kikuyu Sub-County Road and Traffic Engineer to enforce the orders issued by this Honourable Court.
- c. General damages for the loss damage and inconvenience suffered by the 1st Defendant is disallowed

44. Each party to meet their costs.

45. Orders accordingly

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st and 2nd Plaintiff – Absent

Thimba for 1st Defendant

2nd, 3rd and 4th Defendants - Absent

Court Assistants – Phyllis / Oliver

