IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KIAGE, JJ.A)

CIVIL APPEAL NO. 144 OF 2014

BETWEEN

DELLIAN LANGATA LIMITED…….…….…….…....…….APPELLANT

AND

SYMON THUO MUHIA…..…….……..... 1ST RESPONDENT

MARY NJOKI THUO……...….2ND RESPONDENT

AGRICULTURAL FINANCE CORPORATION...…..3RD RESPONDENT

THE NAIROBI CITY COUNCIL……..……..….4TH RESPONDENT

THE COUNCIL OF LEGAL EDUCATION…….....5TH RESPONDENT

(An appeal from the decision of the High Court at Nairobi (Rawal J.) dated 31st March 2009) in **HCCC No. 3316 of 1993 Consolidated With HCCC No. 3311 of 1993)**

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JUDGMENT OF THE COURT

This appeal, which brings into sharp focus the perennial tension between public and private claims over land, is brought by **Dellian Langata Ltd** (the appellant) against the judgment of the High Court (Rawal, J. as she then was) delivered on 31st March 2009 in the two consolidated suits in which she issued the following orders in favour of the 1st and 2nd respondents, **Symon Thuo Muhia** and **Mary Njoki Thuo** (the Thuos);

> **1. The closure of LR. No. 3591/3/R and/or LR. No. 3591/39 by Dellian Langata Ltd is unlawful.**
>
> **2. Dellian Langata Ltd has no claim on the said property which is a public road access.**
>
> **3. The allocation and/or grant of deed plan showing LR. 3591/3/R as LR. 3591/39 is null and void.**
>
> **4. Dellian Langata Ltd shall surrender the disputed road i.e LR.3591/3/R along with the**

original title deed of LR. 3591/3 to the Commissioner of Lands.

5. Dellian Langata Ltd shall pay costs to the plaintiffs.

6. The plaintiff in HCCC 3611/93 to pay the cost of Nairobi City Council.

A brief background of the dispute is that the Thuos are husband and wife and the registered owners of land parcel **LR. 3591/22 (the suit land)** situated in Langata in Nairobi which is a sub-division of the original parcel known as **LR 3591/3** measuring **100 acres** and registered in the appellant's name.

On 5th February 1998, the Thuos entered into an agreement for sale with the appellant to purchase the said land. Under the agreement the appellant undertook to comply with all the sub-division conditions imposed by the relevant government and quasi-government authorities including obtaining the final approval to the proposed sub-division scheme of **LR. 3591/3.** Prior to the sale of the suit land, a sub-division creating parcels **LR. 3591/22** and **LR. 3591/23** had been approved by the Commissioner of Lands subject to the following conditions *inter alia*; that the pre-existing 6 meter access road between them be enhanced to 9 meters in accordance with the Planning Regulations and Practice; the appellant to surrender the said land to the government free of charge; the appellant to surrender lease of 999 years and new leases for 99 years be issued in their stead.

The Thuos have always maintained that the letter from the Commissioner of Lands dated 26th August, 1987 giving approval imposed the condition that the disputed road **LR. 3591/3/R** was to be reserved to serve as a public and/or access road to the suit property.

The Thuos alleged that on or about June, 1993 the appellant breached the aforesaid conditions and instead proceeded to unlawfully erect poles and barbed wire across the said disputed road, preventing them from freely accessing their residence. Consequently, they filed a suit seeking *inter alia* a declaration that the appellant was not entitled to registration and possession of the disputed road being **LR. 3591/3/R** and **LR. 3591/39** and is obliged to surrender the same to the government in accordance with the aforesaid letter from the Commissioner of Lands and the High Court ruled in their favor.

Aggrieved by that decision the appellant preferred an appeal to this Court. Its memorandum of appeal dated 4th June, 2014 raises eleven grounds of appeal but in written submissions, its advocates, **M/s Makhandia & Makhandia Advocates**, elected to address two main grounds (ground 2 and 3) only set out as follows;

2. The learned Judge misapprehended or *ignored the legal requirements or procedure for the establishment of a public road which are set out in the Public Road and Roads of Access Act Cap 399(PPRA Act) of the Laws of Kenya in consequence whereof she arrived at a wrong finding on the legal status of the road on the strip of land known as LR. No 3591/39.*

3. The learned Judge failed to appreciate or to realize that for a public road to be established or constructed the process set out*under Section 8 of the Public Road and Roads of Access Act aforesaid must be complied with.*

The learned Judge was faulted for declaring that the disputed road on **LR. 3591/39** was a public road. Counsel cited the definition of public road as found in the **Public Roads and Roads of Access Act, Cap 399, Laws of Kenya (PRRA Act) as;**

a. Any road which the public had a right to use immediately before the commencement of the Act;

b. All proclaimed or reserved roads and thorough fares being or existing on any land sold or leased or otherwise held under the East African 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 thorough fares hereafter reserved for public use.

Counsel cited **Section 8**of the aforesaid Act on the establishment of public roads which provides as follows:-

> **"8(1) whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel."**

It is the appellant's view that it is only the Minister in charge of roads who is mandated by law to establish or create a public road through a duly gazetted order. It buttressed its position by reference to **Sections 43 and 44 of the Interpretation and General Provisions Act**, **Cap 2** which provide;

> **"43. Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.**
>
> **44. Power to appoint by name or office where the President, a Minister, a public officer or a public body is empowered by a written law to appoint a person to perform any functions or hold any office, he or it may either appoint a person by name or appoint the holder of a named office to perform the functions or hold the office in question."**

The appellant emphasized this point by citing this Court's decision in ***KARISA CHENGO & 2 OTHERS vs. REPUBLIC*** **[2014] eKLR** which, referring to those provisions, held that where a statute imposes duties on a certain office they can only be performed by holders of such office and no other persons or courts**.** Counsel also cited ***SAMUEL KAMAU MACHARIA & ANOTHER vs. KENYA COMMERCIAL BANK*** **[2012] eKLR.**

Counsel emphasized that the appellant's Director, **Philis Christabel Wambua Maranga** had testified that she applied for the road and paid for it as a private access road to her residence and that the intention of the parties as per the sale agreement was that the purchasers were to open up an access road of 18 meters at their own cost with no mention of the disputed 9 meter road.

It criticized the learned Judge for holding that the disputed road was a public road which it could not do as the process as envisaged in **Section 8 of PRRA Act** was not followed hence the learned Judge usurped the Minister's powers and therefore lacked jurisdiction which rendered the decision a nullity since, as was stated in ***OWNERS OF MOTOR VESSEL „LILIAN S? vs. CALTEX OIL KENYA LTD*** **[1989] KLR 1 "…anything done without jurisdiction is a nullity."**

The appellant accordingly prays that the High Court declarations be set aside and the disputed road be declared to be a private road of access belonging to it with liberty for the owners occupying the lands along the road to use the same, subject to the terms and conditions that shall be agreed upon with the appellant.

In opposing the appeal, the 1st and 2nd respondents' advocates, **Gathenji & Co. Advocates** in their written submissions dated 29th November, 2016 took the view that the question before this Court was whether the appellant is entitled to challenge the evidential findings of the trial Judge. To support this view they relied on ***PETERS vs. SUNDAY POST [1958] EA 434 LTD AND SELLE & ANOTHER vs. ASSOCIATED MOTORS BOAT LTD*** **[1968] E.A 123** to emphasize that the jurisdiction of the appellate court in reviewing evidence ought to be exercised with caution. They contended that the appellant has not met the threshold to justify interference by this Court by showing that the learned Judge acted on no evidence or misapprehended the evidence nor was he/she plainly wrong.

Regarding the procedure for establishment of a public road and/or road of access under the PRRA Act,

Counsel referred to HCCC 3316 of 1993 ***AFC vs. DELLIAN & NAIROBI CITY COUNCIL*** *and stated that none of the agreed issues raised before the trial* court touched on the issue of establishment of the road under the PRRA Act. Indeed the appellant did not plead breach of the Act and the learned Judge was under no obligation to assume that the Act was relevant. They clarified that the disputed road was established via the conditions of sub-division demanded by the Nairobi City Council that the said road was to be reserved as per the letter dated 26th July, 1987. The contents of the sale agreement were not in dispute.

According to the 1st respondent, his expert witness **Mr. Patrick Hawkes Kinyanjui** stated that the intention of the 9m road as per the sub-division plan was to serve plots no. **LR. 3591/21, 22, 23 & 26**. He opined that by showing the 9m road as **LR**. **3591/3/R,** that in itself was an indication that there was a provision for a road. The 1st respondent averred that the appellant's witness **DW1, Christabel Maranga**, did not intimate at any given point that any affected party was under an obligation to apply to the Minister for establishment of a public or road of access. Further the appellant's **DW2**, **David Nyika,** also testified that the disputed road was not part of **LR. No. 3591/26** and was to be kept as a reserve road.

Counsel contended that the learned Judge had the distinct advantage of having visited the site to ascertain the position on the ground and also of observing the demeanor of the witnesses. It was their further contention that the matters raised in this appeal concerning the PRRA Act were not pleaded, were not subject of contest and were not traversed before the High Court and hence could not form a ground of complaint on appeal. They relied on ***CAPTAIN HENRY GANDY vs. CASPAR AIR CHARTERS LTD*** **[1956] 23 LR 139.**

Counsel asserted that the process of sub-division produced the disputed road pursuant to their agreed terms of contract and the decision of the Planning Authority was final as no appeal was filed with the relevant authority.

With regards to the applicable law, the 1st and 2nd respondent cited the **Land Planning Act**, **Cap 303**, the **Development and the use of Land (Planning) Regulations 1961** (replaced by the **Physical Planning Act 6 of 1996)** which were all considered by the learned Judge**.** They noted that the appellant brought its application for approval under the then applicable planning regulations.

Counsel opined that the Minister is only called upon to create a road on a parcel usually virgin, where none has been created by the process of sub-division, planning or the like and when there is no reservation through sub-division and/or planning authority conditions for sub-divisions. The provision dealing with the Minister's creation of a public road was therefore inapplicable to the case.

They challenged the evidence of the appellant's witness **Christabel Maranga** and asserted that there was a road of access prior to the sub-divisions scheme in which the 6m road was excised and thereafter widened by 3m. They submitted that they had no obligation to pay for the making of the disputed road in accordance with the terms of contract of sale and the appellant had no discretion but to provide for the disputed road of access in accordance with the conditions of approval of the sub-division scheme. They urged us to dismiss the appeal with costs to the 1st and 2nd respondent.

The advocates for **Agricultural Finance Corporation** (3rd Respondent) **M/s. Kairu McCourt Advocates** opposed the appeal and essentially reiterated the 1st and 2nd respondents' submissions. Counsel submitted that the appellant never applied under **Section 9(2)** of the PRRA Act for a declaration that **LR**. **3591/3/R** was a road of access neither did she comply with **Section 13(2**) of the aforesaid Act in which the Appellant would have had to put a sign stating that it was a "**Private Road".** Thus the appellant purposefully failed to do so to prevent the 3rd respondent from applying under **Section 13 (8)** for the right to use the disputed road as an access road.

Counsel contended that the 3rd respondent constructed its facility on that premise with the belief created by the appellant that that it was a road of access or a public road. The appellant's surveyor **DW2** confirmed that he was neither a qualified surveyor nor a planner when he drew the plans and was therefore not qualified to prepare the plans.

He urged the court to reject the appellant's assertion that the High Court did not have any business declaring the road a public road as this was not raised in that court and could not now be raised in this Court. In conclusion, he maintained that the appellant did not take any action against the decision of the interim planning authority, the Nairobi City Council (4th respondent) which was final.

Counsel prayed that the appeal be dismissed with costs to the 3rd respondent and the appellant be ordered to abide by the orders issued by the High Court considering that where there is a conflict between the private interest and public, the public interest must prevail.

For the Nairobi City Council, the 4th respondent, its advocate, **M/s Kithi & Co. Advocates** reiterated that the appellant has introduced new issues for determination at the appellate stage, respecting compliance with the provisions and requirements provided for under the PRRA Act they asserted that at no point did parties ever seek that the court determines whether the procedure for the establishment of a public road under the PRRA Act were complied with and this cannot be introduced at this stage.

They relied on ***STANDARD CHARTERED FINANCIAL SERVICES LTD & 2 OTHERS vs. MANCHESTOR OUTFITTERS (SUITING DIVISION) LIMITED (NOW KNOWN AS KING WOOLEN MILLS LTD & 2 OTHERS*** **[2016]eKLR** for that submission.

They also adopted the submissions of the 1st and 2nd respondent with regard to the issue of the applicable laws and asserted that the **Land Planning Act, Cap 303** (now repealed) gave the 4th respondent the authority to control all land use and developments in its area of jurisdiction. Thus it has authority to consent to or decline any sub-division application or to issue consent subject to various conditions including the surrender of the said parcel of land for purposes of creating means of access.

They argued that in the instant case, as they had required a surrender of part of the subject suit property for purposes of establishment of an access road the provisions of the PRRA Act cannot apply and the Land Planning Act is the only applicable statute. They prayed that the appeal be dismissed with costs to the 4th respondent. The 5th respondent, the Council for Legal Education did not file any submissions and at the hearing its learned counsel

Mrs. Oduor informed us that she was adopting the submissions made by the 3rd respondent and seeking dismissal of the appeal.

On this first appeal, we are under a duty to re-consider and re-evaluate the evidence afresh with a view to reaching our own conclusions only bearing in mind the fact that we do not have the advantage the learned Judge had of seeing and hearing the witnesses as they testified as the respondents variously submitted.

We have carefully re-considered and re-evaluated the evidence afresh. We have also considered the judgment of the learned Judge as well as the parties' submissions and will now proceed to put the grounds of appeal in context, taking the evidence on record into account. Unless the conclusions reached by the trial judge have no basis in law or unless the learned Judge based her conclusions on wrong principles, this Court will be cautious and circumspect and therefore will be reluctant to overturn the judgment of the trial court. This is not the same as saying we cannot do so if there is cause for reversal.

Having considered the record of appeal and submissions, we frame two main issues for determination;

a. Whether this Court has jurisdiction to determine new issues not pleaded before the trial court.

b. Whether the disputed road is a public road of access or a private road for the appellant.

On the first issue of unpleaded matters, the general principle that a new point not raised in the pleadings may not be allowed or used as a basis of judgment is set out in older decisions of this Court and its predecessor. In ***GIRDHARI LAL VIDYARTHI vs. RAM RAKHA*** **(1957) EA 527 C.A**, for instance, the former Court of Appeal, held that the appellant could not be heard to allege an express trust when he had

only pleaded a resulting trust before the trial court.

The position is not an inflexible one, however, and as other authorities show the position now obtaining is that the Court has discretion to permit a new point to be taken on appeal where certain conditions obtain.

In ***SECURICOR (KENYA) LTD vs. E.A DRAPPERS LTD AND ANOR*** **[1987] KLR 338**, it was held that the Court of Appeal has a discretion to admit a new point at appeal but that the discretion must be exercised sparingly; the evidence must all be on record; the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below.

The law on the matter was condensed by Platt JA in ***WACHIRA vs. NDANJERU*** **(1987) KLR 252**, as follows:

> **"The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."**

From the proceedings on record, it appears that **DW1**, who went to the aid of the appellant, did not testify about the procedure of establishment of a public road of access in accordance with **Section 8 (1**) of the PRRA Act, neither did she plead that parties were under an obligation to apply to the Minister for the declaration of a public road.

We are of the opinion that the appellant's choice to address those two new and unpleaded grounds, and abandoning the rest, is an afterthought akin to an adventurous fishing expedition which it would be improper to entertain. In the circumstances of this case, we shall not determine the unpleaded issues as we do not have the jurisdiction to entertain such new issues that were not subject to contest at the trial court.

Going back to the substantive issue, we are alive to the fact that the real nature of the dispute herein is whether the access road alleged to have been obstructed was a private or public road. The respondents contend that the **PRRA Act, Section 13 (8)** is not applicable since they are not seeking to have a road of access created as there is already an existing public road in regard to which the appellant has no right to prevent them and/or indeed other members of the public from using.

From the record, it is indisputable that the appellant did dig holes, planted poles and placed barriers on the road that traverses through the appellant's premises and into the respondents' property. It is clear that the 4th respondent wrote to the appellant vide a letter dated 24th September, 1992 informing it of the illegal closure of a road reserve and asking it to comply with the regulations. There is evidence that approval of sub-division was granted by the 4th respondent albeit subject to the conditions set out therein as per the letter dated 16th November, 1987.

It is also evident from the correspondence from the 4th respondent that the subject road is designated as a public road. One such is a letter dated 28th April, 1993 which states…." **This is to inform you that the 9m road reserve at the Northern boundary of the Plot should be maintained."**

Further, our understanding of **Section 8 (1) & (2)** of the PRRA Act is that it provides for conversion of road of access to a public road by application to the Minister. **Section 9** of the Act provides for an owner who has no reasonable access to a public road or to a railway station or halt to apply to the board to construct a road of access to link him to the public road, railway station or halt. **Section 13** of the Act provides for right of way over a road of access where such a road has been constructed following an application under **Section 9** and for all purposes a road of access is by its nature a **"Private Road**" and indeed belongs to and is owned by the person who made the application and constructed the same.

That is why under **Section 13 (2**) such a person is permitted to put up a signboard where the access road

joins the public road bearing the words **"Private Road".**

Having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.

Notably it is not in dispute that the subject road was one of the roads set aside at the time of sub-division of the parent title **L.R 3591/3** out of which Thuo's property was established. The approved sub-division plan marked **"DExh.9"** attached shows the network of roads and the road in contention was clearly marked "**9m road to be reserved**." We therefore agree with the learned Judge's observation that;

> **"…it cannot be gainsaid that in both sub-divisions plans the 6m and 9m road to be reserved were specifically mentioned and thus it can be justifiably found that the plan was approved as proposed including 9m road to be reserved along with additional conditions."**

It is clear to us that the disputed road is not and never has been designated as a private road and no evidence was tendered to show that it is a private road. It is more likely than not that the road is a public road and the learned Judge was so convinced on a balance of probability. Had it been a private access road there would have been an application under the provisions of the PRRA Act by the appellant but there was none.

We are not persuaded that the actions of the appellant to bar and restrict the respondents from using the road were anchored on any valid legal foundation and to that extent the same infringe on the respondents' right to use the road to access their properties.

From the foregoing, it is our finding that the appellant has failed to prove that the access road which was created following the sub-division **LR. No. 3591/3/R and/or LR. No. 3591/39** is a private road whose use is restricted only to the appellant. We therefore find no fault with the trial court's finding that the closure of LR 3591/3/R and/or LR 3591/39 was unlawful and that the appellant has no claim on the said property as it is a public road of access.

What is more, this appears to have been a case of an individual attempting to trump and negate the rights of the public in view of the fact that the other sub-divided plots such as sub-plot E were meant for development of schools and other public amenities. We must hold that the interest of the public overrides that of an individual. We echo the sentiments of this Court in ***EAST AFRICAN CABLES LIMITED vs. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW & APPEALS BOARD AND ANOTHER*** [**2007] eKLR** expressing the philosophy behind the view that public interest should take precedence in the following words:-

> **"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."**

In the premises and for the reasons we have stated above we find no merit in this appeal. Consequently, it fails in entirety and is hereby dismissed. Each party shall bear its own costs.

Dated and delivered at Nairobi this 26th day of January, 2018.

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR