Kinuthia v Kimeranco Enterprises Ltd (Environment and Land Appeal 20 of 2019) [2024] KEELC 5879 (KLR) (20 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5879 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 20 OF 2019

AK BOR, J

AUGUST 20, 2024

BETWEEN

PETER NJENGA KINUTHIA ..... APPELLANT

AND

KIMERANCO ENTERPRISES LTD ..... RESPONDENT

JUDGMENT

1. This appeal relates to a six-metre road said to have been created from the land known as Laikipia/Nyahururu/3868. The Appellant owned that parcel of land together with parcel no. 3867 according to the plaint initially filed in the Environment and Land Court in Nakuru in 2015. The Appellant was the owner of parcel no. 3868 comprising 2.02 hectares (ha) and through the mutation forms dated 17/12/2013, he caused that land to be subdivided into four portions and made provision for a six-metre road of access. The resultant portions were Laikipia/Nyahururu/10714 measuring 0.809 ha, parcel no. 10715 measuring 0.202 ha, parcel no. 10716 measuring 0.404 ha, parcel no. 10717 measuring 0.404 ha and the six-metre road of access which took up an area of 0.220 ha. Registers for these parcels were opened and registered in his name and the registry index map (RIM) was amended to reflect the new parcels of land and the road of access.

2. Through the sale agreements dated 12/3/2013 and 12/12/2014, the Appellant sold parcel numbers 10714 and 10715 to the Respondent. He claimed that before entering into the sale agreements the Respondent had notice of the actual size, extents, boundaries, demarcations, state and condition of the two parcels of land and took them subject to their sizes and the boundary demarcations.

3. The Appellant's claim was that the Respondent had, without any reasonable cause, interfered with the six-metre road of access by blocking it with a metal gate and digging a trench in it thereby making it part of his two parcels of land while disregarding the rights of the users of parcel numbers 10716 and 10717 over the road which in the RIM was a distinct road of access. The Appellant went further to aver that the Respondent had also put up a perimeter fence inside parcel no. 3867 which he owned and which

was separate from the parcels the Respondent purchased from him. The Appellant sought an order for the Respondent to unblock the road of access by removing the metal gate erected on it and levelling the trench which he had dug on the road. Further, he sought an order to restrain the Respondent, his agents or employees from interfering with the use of the road of access and the Appellant's land parcel no. 3867.

4. In its defence and counterclaim filed in court on 24/11/2017, the Respondent averred that the road of access was a private road exclusively meant to serve parcel numbers 10714, 10715, 10716 and 10717. It denied that there was any correlation between parcel no. 3867 and the parcels it bought from the Appellant while clarifying that the Appellant owned parcel numbers 10716 and 10717.

5. The Respondent admitted that it put a fence on the boundary between parcel numbers 10714 and 10715 on the one hand and parcel no. 3867 on the other hand for security reasons and that it gave the Appellant a key to the gate but the Appellant insisted that the road of access was intended to serve parcel no. 3767 contrary to the parties' agreement and that in any case parcel no. 3867 had a frontage to the Nakuru-Nyahururu Highway.

6. The Respondent pleaded that the road of access cut across parcel numbers 10714 to 10715 and was situated on the western end which bordered parcel no 3867. It averred that the road of access was to give entry to the land that was initially parcel no. 3868 so that the four portions being parcel numbers 10714 to 10717 could have access to the main Nakuru-Nyahururu Highway. It maintained that the road was not a public road but was a private one for which it contributed the sum of Kshs. 350,000/= to co-own with the Appellant with respect to parcel numbers 10716 and 10717. It pleaded that it made payment under the sale agreement through a direct transfer and that the last payment was made vide cheque. He gave the breakdown as Kshs. 7,000,000/= for the two-acre parcel of land @ Kshs. 3,500,000/= per acre, Kshs. 184,000/= for the purchase of cedar trees on parcel no. 10714 and Kshs. 350,000/= being the Respondent's contribution for the access road.

7. The Respondent averred that in breach of the contract, the Appellant registered the access road as a public road that was to serve all other parcels of land excised by the Appellant out of parcel no. 10716, 10717 and 3867 and that it fraudulently got the road registered and obtained a title deed from the Ministry of Lands office showing that the road was public. The Respondent sought a declaration that the registration of the road as a public road was subject to a trust or proprietary estoppel in its favour and the transfer of the road to its name or in the alternative, a refund of the sum of Kshs. 350,000/=. It also sought general damages for breach of contract.

8. The matter was transferred to the ELC in Nyahururu before being transferred to the Magistrates court vide the order made on 17/4/2018 by Lady Justice M. Oundo. The hearing proceeded before the Senior Resident Magistrate on 13/2/2019. The trial court found that the road of access in dispute was not a public road and went ahead to dismiss the Appellant's suit and to award costs to the Respondent. The trial court dismissed the Respondent's claim with costs to the Appellant. Aggrieved by that decision, the Appellant lodged this appeal against the findings of the Learned Magistrate.

9. In the Memorandum of Appeal filed in court on 11/12/2019, the Appellant faulted the trial court for holding that the six-metre road created from parcel 3868 was a private road of access despite it appearing in the RIM and having been declared a public road by the Government Surveyor and the ELC Judge. He also faulted the trial court for making findings that were contrary to the findings of the ELC Judge in the same suit. He added that the trial court erred by finding that the impugned road was meant to provide access only to the suit parcels of land and was not open for public use. The other attack on the findings of the trial court were that it erred by finding that the Respondent had not blocked the road by erecting a gate at the entrance of the road and by finding that the road was exclusively owned by

the Appellant and the Respondent. The other challenge was that it was erroneous for the trial court to find that the Respondent did not trespass onto the Appellant's parcel 3867 when he had erected a fence along its boundary on the inside part of the land.

10. The trial court was also faulted for ignoring the Government Surveyor's report which stated that the disputed road appeared in the RIM and as such was not a private road. The court was also faulted for failing to interpret and decipher the intention of the parties in the sale agreements and for failing to dismiss the Respondent's counterclaim based on the terms of the agreements. The Appellant urged the court to set aside the judgment of the trial court vide which its suit was dismissed, grant an order for the Respondent to unblock the six-metre road by removing the metal gate erected on it and level the trench dug on the road. He also sought a permanent injunction to restrain the Respondent from interfering with the use of the road created from parcel 3868 and the Appellant's parcel no. 3867. The Appellants also sought to have the counterclaim in Nyahururu ELC Case no. 270 of 2018 dismissed with costs and to have the Respondent pay the costs for that suit as well as this appeal.

11. The court directed parties to file written submissions on the appeal which it duly considered. The Appellant gave a summary of the pleadings, the evidence before the trial court and the judgment. He submitted that the two sale agreements were clear on their respective subject matters and that his intention when he entered into the two sale agreements was to sell parcels 10714 and 10715. He maintained that the sale transaction did not create any form of trust between the parties over the six-metre public road. He reiterated that he only sold the two parcels of land to the Respondent excluding the six-metre road and denied that a proprietary estoppel arose since he never made any promise for an interest over the six-metre road.

12. The Appellant faulted the trial court for failing to make a finding that the six-metre road was not subject to any sale transaction and the Respondent could not have acquired any ownership interest over the road. He adverted to the surveyor's report dated 17/4/2015 which stated that the six-metre access was a public road provided during the subdivision of parcel no. 3868 to provide access to the resultant parcels newly created being parcels 10714, 10715, 10716 and 10717. He also cited the ruling delivered at the Nakuru ELC on 20/9/2016 where the court observed that from the material placed before it at that stage of the proceedings, it was apparent to the court subject to the Respondent proving otherwise at the trial, that the road in question was a public road. The ELC observed that if it were a public road then it did not see how the Respondent could rightfully close a public road so that it was only accessible by a select group of persons. Further, that it was immaterial that the Appellant had a key to the gate erected at the entrance of the road for if it were a public road then it was supposed to be open and accessible to the whole public. The Appellant faulted the trial court for finding that the six-metre road of access was not a public road and that it was meant to provide access only to the suit parcels of land and was not open to the public use. He faulted the trial court for not considering the surveyor's report and for making a finding that was contrary to the superior court's findings on the road.

13. The Appellant cited various decisions on the point that a public road once set apart and designated as such was available for use by all members of the public and another decision mentioning that the RIM had clearly designated a public access road which had been blocked by the Respondent's development. The Appellant submitted that he had demonstrated before the trial court that parcel 3867 on one part and parcel nos. 10714 and 10715 on the other part were separated by the six-metre road and that the Respondent was not justified in putting up a fence on parcel 3867. The Appellant referred this court to the ruling of 20/9/2016 by the Nakuru ELC regarding the fencing by the Respondent on the opposite side of the road which abutted the Appellant's parcel no. 3867. The Appellant maintained that the Learned Magistrate did not take into consideration the findings of the superior court and that the trial court should have made a finding on his prayer for a permanent injunction with regard to parcel 3867.

Lastly, the Appellant submitted that the trial court erred in not awarding him the costs of the suit yet he had proved his case on a balance of probabilities. He urged the court to allow the appeal based on the Memorandum of Appeal dated 6/12/2019.

14. In its submissions filed on 3/5/2024, the Respondent contended that it was not open for the Appellant to introduce other prayers in the appeal. It pointed out that the sole prayer in the plaint was for a permanent injunction to restrain it from interfering with the use of the road of access created from parcel 3868 and the Appellant's parcel 3867. It maintained that the issue of blocking the access road, removal of the gate and levelling of the trench were not issues during the trial and that they were not determined in the impugned judgment. It was emphatic that the Appellant was bound by its pleadings and should not be allowed to raise a fresh case without due amendments being made. The Respondent referred the court to the Appellant's testimony where he confirmed that the Respondent had removed the gate, the fence and made the road level which made this a non-issue that matter having been resolved at the interlocutory stage.

15. The Respondent submitted that there had been significant developments on the suit property after the conclusion of the trial which the Appellant as the owner of the adjacent land should have been aware of. The Respondent submitted that it had sold and transferred parcels 10714 and 10715 and that they were now registered in the name of a third party who was in possession and who was neither a party before the trial court nor in this appeal. It hastened to add that there were no orders barring the sale or transfer of the suit property and that in any event its title and possession had never been contested. In its opinion, granting the injunction sought in the appeal would be futile and incapable of obedience by the Respondent who has no interest or control over the suit land.

16. The Respondent submitted that the trial court rightly held that the disputed road was a private access road intended to serve only the four parcels of land owned by the Appellant and the Respondent. According to the Respondent, it was noteworthy that the access road did not exist before the subdivision of parcel no. 3868 in 2013 and was created purposely to grant access to the resultant subdivisions being parcels 10714 to 10717 as evidenced by the mutation form.

17. The Respondent denied that the impugned road could be a public road defined under Section 2 of the Public Road and Roads of Access Act which defines a public road as any road which the public had a right to use before the commencement of the Act or all roads and thoroughfares reserved for public use. It denied that the disputed road had been reserved for public use while arguing that the presence of an access road on the mutation form did not of itself mean that the road was a public road and that it was only the RIM which could clarify this. It reiterated that no RIM was tendered in evidence by the Appellant who bore the burden to prove the designation, reservation or surrender of the road as a public road. It added that the road in issue was created during and as a result of the subdivision of the mother title for parcel 3868 and while urging that that land was private land before and after the subdivision. It added that there was no evidence of when, how and the process through which any portion of the land was converted from the private to public land.

18. It adverted to Section 9 of the *Land Act* which stipulates how private land may be converted to public land either through compulsory acquisition, reversion of leasehold to the government on expiry of a lease, transfer or surrender. The Respondent submitted that the other way through which a public road could be created from private land would be through the creation of a public right of way by the cabinet Secretary for Lands in consultation with the National Land Commission, the County Government, the owner and the local public. Further, that it would involve the issuance of notices in the Kenya Gazette and compensation to the land owner as provided in Sections 146 to 148 of the *Land Act*. It maintained that no evidence existed to show that the road in question ever became a public road.

19. Regarding the surveyor's report, the Respondent submitted that that was never produced during the trial and the surveyor who prepared it was not called to testify and produce it. It pointed out that the surveyor's report was not included in the record of appeal which the Appellant compiled and that it did not form part of the evidentiary material in the final determination of the dispute. The Respondent cited *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR where the Court of Appeal addressed the issue of when a document became part of the evidence in a case. The court noted that when a document is filed it does not become part of the judicial record. Secondly, that when the documents are tendered in evidence or produced as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record and constitutes evidence. The court clarified that the marking of a document for identification had no relation to its proof since a document was not proved merely because it was marked or filed. The Respondent urged the court to disregard the surveyor's report while emphasising that the report was merely the observation and opinion of the maker and that they were not of any probative value without him testifying and being subjected to cross-examination.

20. On the ruling of the ELC at the interlocutory stage, the Respondent submitted that it was not binding on the trial court during the full hearing of the suit and relied on the decision in *Paul Tirimba Machogu v Rachel Moraa Mochama* [2015] eKLR where the Court of Appeal observed that some of the findings of the Learned Judge at the interlocutory stage were strongly expressed but the fact remained that those findings were only prima facie findings which would not bind the trial Judge. It pointed to the statement by the Learned Judge of the ELC that those were his observations at the interlocutory stage and the Respondent would have his day in court to justify his actions and that the matter was subject to the Respondent proving otherwise at the trial. The Respondent maintained that the observations made by the Judge at the interlocutory stage were not meant to bind the trial court but were to assist in establishing whether the Appellant had made out a prima facie case at that stage.

21. The main issue for determination is whether the court should allow the appeal and set aside the judgment of the trial court. The reliefs sought in the Memorandum of Appeal by the Appellant are an order requiring the Respondent to unblock the six-metre road created from parcel 3868 by removing the metal gate and levelling the trench; and an injunction to restrain the Respondent from interfering with the use of the road created from parcel 3868 and 3867. A corollary issue which the court has to determine in this appeal is whether the Learned Magistrate can be faulted for not considering the surveyor's report and for making a finding that was contrary to the superior court's findings on the road.

22. The court agrees with the Respondent that the issues to be ventilated in the appeal are those which arose at the trial and from the pleadings and not the new issues which the Appellant has set out in the Memorandum of Appeal. Looking at the plaint filed before the trial court, it is apparent that the only prayer which the Appellant sought in his plaint was a permanent injunction to restrain the Respondent from interfering with the use of the access road created from parcel no. 3868 and the Appellant's land being parcel no. 3867. He also sought the costs of the suit. What the court has to determine in this appeal is whether or not the disputed access road is a public road.

23. As Munyao Sila J. noted in the ruling on the interlocutory application for injunction dated 20/9/2016, his preliminary finding that the disputed road was a public road was based on the material tabled before the court at that stage and was subject to the trial. The finding was not final as the court was dealing with an application for injunction in which the Appellant was required to establish a prima facie case in order to be granted a temporary injunction pending hearing and determination of the suit. The issue as to whether the access road was or was not a public road was to be determined by the trial court.

The Learned Magistrate cannot be faulted for arriving at a different determination on this issue after hearing and evaluating facts of the case and the evidence adduced.

24. The Appellant did not call the surveyor as a witness to give evidence and produce his report dated 17/4/2015. The Learned Magistrate rightfully excluded the surveyor's report when evaluating the evidence and determining the dispute over the access road for the reason that the evidence of the surveyor was not produced and tested through cross examination.

25. To determine whether the disputed road is a public road, it is necessary to evaluate the relevant facts and evidence tendered at the trial. The Appellant gave evidence at the trial and produced copies of the titles for the four parcels of land as well as the sale agreement showing that he sold the two parcels of land to the Respondent. He denied that he sold the Respondent the road and maintained that he was only selling land and trees. He told the court that beacons for parcel no. 10714 had been put and he gave the Respondent the mutations to show how the land was but the road of access was not marked by beacons. He added that even when they entered into the second agreement dated 10/12/2014 in respect of parcel no. 10715, they recorded a similar agreement which excluded the road. He maintained that the money he was paid was only for the land and not the road which according to him belonged to the Government. He referred the court to the photographs taken showing the gate and the layout of the parcels of land.

26. While testifying before the trial court, the Appellant told the court that by fencing his land without his consent, the Respondent's act amounted to trespass. He told the court that the Respondent had no interest in parcel 3867 and that there was a road which separated them and that they had no common boundary. He referred the court to the ruling delivered by Mr. Justice Sila Munyao in Nakuru ELC Case No. 63 of 2015 on 20/9/2016 where the court gave an order for the District Land Surveyor, Laikipia to give his decision on whether the road of access was private or public. It was his evidence that the report dated 17/4/2015 was prepared and filed in court on 20/4/2015 to the effect that the road of access was public and would have been parcel no. 1714. He stated that the Respondent was ordered to remove the gate and the fence on plot no. 3867 and fill up the trench. He told the court that the Respondent complied with the order and removed the gate, the fence and made the road. He confirmed to the court that he was using the road access heading down to parcel numbers 10716 and 10717.

27. On cross-examination, the Appellant stated that the drawings did not show plot numbers 10714 and 3867 because the mutation was for plot no. 3868. Regarding the land which he sold to the Respondent. The land was 2.5 acres and the total cost included the sum of Kshs. 184,000/= for the trees even though the trees were not mentioned in the agreement. He denied that the Respondent paid him any other extra money. He confirmed to the court that he owned parcel no. 3867 and that it was on the Nakuru-Nyahururu road. He could access the main road and parcel no. 3867 did not have another access road since it is next to the main road. He went to the land with the buyer before he sold it to him in 2013. The mutation had not been registered and he had not yet subdivided the land. He stated that they went back after it was subdivided and he gave the buyer the mutation sometime in March-April 2014 before the buyer paid him. He told the court that beacons were put on the land on 17/12/2013.

28. Evanston Kimani Muhandu, a director of the Respondent gave evidence on its behalf and told the court that he bought land from the Appellant in 2014 and that parcel no. 10714 touched the tarmac road. He did not buy the land on the lower part which was far from the main road. He paid the full consideration including Kshs. 350,000/= which was in respect of an access road. He first bought the two acres comprised in parcel no. 10714 and later bought the half acre comprised in parcel no. 10715 for Kshs. 2,000,000/=.

29. He told the court that he paid Kshs. 7,534,000/= in total for the two acres of land and that it included the sum of Kshs. 350,000/= for the access road and Kshs. 187,000/= for the trees. He told the court he paid for the access road so that he could access the lower part of the land. His understanding was that they would share the land proportionately with each one of them getting two and half acres and the road was supposed to be a private road for the Respondent. He clarified that the sale agreement did not specify the trees, access road and the land. He told the court that the Appellant wanted the access road to serve his other property being parcel no. 3868 which was not the agreement and that this land had an access to the main road. He confirmed to the court that he removed the fence and the gate when he was ordered to do so by the ELC.

30. On cross-examination, he stated that the access road was not indicated as part of the purchase of the land. He had not seen any evidence of registration of the access road as a public road. He conceded that parcel numbers 10714 and 10715 did not share a common boundary with parcel no. 3867. He saw the road of access when the mutation forms were given to him and conceded that the road was outside his portion. He explained that the sale agreement was shallow and did not talk of the trees because they were acting in good faith when they entered into the transaction.

31. Daniel Mbugua Kinyanjui, a land broker also gave evidence. He told the court that the purchase price for the first two acres was @Kshs. 3,500,000/= per acre amounting to 7,000,000/= and Kshs. 534,000/= was for the access road after it was measured. They met three times before the parties entered into the sale agreement. He maintained that the Appellant lied to the Respondent and sold it a road of access.

32. After hearing the evidence, the Learned Senior Principal Magistrate summarised two main issues for determination. These are whether the Respondent had committed an act of trespass on the suit land and whether the Appellant was entitled to the reliefs sought in the plaint. From the analysis of the evidence, the Learned Magistrate concluded that the disputed narrow strip of land measuring six-metres in width between parcels 10714 to 10717 and parcel 3867 touching the Nakuru-Nyahururu Highway on the upper part of the land on parcel 10714 was meant to serve parcel numbers 10714 to 10717 based on the mutation form tendered in evidence by the Appellant. The court found that having bought parcels 10714 and 10715, the Respondent was entitled to the road of access which was not meant to be open to public use even if it was being used to access those properties from the main road.

33. The Learned Magistrate cited *Dellian Langata Limited v Symon Thuo Muhia & 4 Others* [2018] eKLR where the court distinguished between a public road and a road of access. The court stated that a public road was set apart and designated as such and once it was set aside it was available for use by all members of the public without limitation or restriction except as the relevant authorities determined. A road of access had the connotation of private usage and was characterised by a party applying to have an access road constructed to connect or link such a party to utilities such as public road, railway station or a halt.

34. The Learned Magistrate also referred to *Kipkirui Arap Koskei v Philemon Kipsigei Tangus & Another* [2015] where the court observed that there could have been a road of access through the Respondent's land but it was not a public road of travel while noting that if a public road existed it ought to have been reflected in the RIM. The court declined to grant a declaration that a public road of access existed through the Respondent's land and made the recommendation for the plaintiff to approach the Minister or the District Roads Board to consider creating a road of access for him or the public passing through the Respondent's land under the *Public Roads and Roads of Access Act*.

35. The Learned Magistrate came to the conclusion that the road of access in dispute was not a public access road since it was meant to provide access only to the suit parcels of land and was not open to public use even though it was being used to access the suit parcels of land from the main road. Further,

it found that by erecting the gate, the Respondent did not block the Appellant from using his two parcels of land at the lower end. The court observed that the Appellant's parcel no. 3867 did not use the access road and the court therefore found that the road was owned by the Respondent and the Appellant only as it pertained to parcels 10716 and 10717. The court found that the Respondent had not trespassed on the Appellant's parcel 3867 and that the road of access was preserved as such due to the resultant subdivision and was therefore not open to the public. In addition, that no evidence was adduced by the Appellant to confirm that the road of access was reflected in the RIM. The court dismissed the Appellants claim with costs to the Respondent.

36. Regarding the counterclaim sought by the Respondent for based on trust or proprietary estoppel in its favour and the transfer of the road to the Respondent, the court stated that it was impossible to have the public road transferred or registered in anyone's name since it was supposed to belong to all members of the public. Having found that the road of access was not public but a private road, the court found that the prayer sought by the Respondent including the one for breach of contract could not stand and dismissed the Respondent's counterclaim with costs to the Appellant.

37. It is not in dispute that the Appellant subdivided his land known as parcel number 3868 to create parcel numbers 10714 to 10717 and set apart a six-metre road of access during that subdivision. The Appellant's grievance was that the Respondent to whom it had sold parcel numbers 10714 and 10715 had blocked the six-metre access road with a metal gate at its entrance from the main road and dug a trench on the road thereby depriving other road users' rights over that road. No evidence was led by the Appellant to show that the six-metre road was a public road. He did not produce the amended RIM which he referred to and argued that it showed the access road as a public road. The Learned Magistrate based his findings on this fact.

38. The court agrees with the analysis and findings of the Learned Magistrate that the six-metre road was not a public road but was intended for accessing the resultant plots created from the subdivision of parcel 3868, which would be parcel numbers 10714 to 10717 only. No evidence was led to show that members of the public were using the road before the Respondent blocked it. The Appellant failed to prove his case on a balance of probabilities.

39. The appeal lacks merit. It is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Nderitu Komu for the Appellant

Mr. Ben Deenambo for the Respondent

Court Assistant: Vanessa Muiruri