



**Otiende & 5 others v Dache & 4 others (Environment and Land Appeal
E032 of 2024) [2024] KEELC 5000 (KLR) (1 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E032 OF 2024**

E ASATI, J

JULY 1, 2024

BETWEEN

**LUCAS OTIENO OTIENDE 1ST APPELLANT
DAKAN ODHIAMBO OKUMA 2ND APPELLANT
PAUL OTIENO OKEYO 3RD APPELLANT
JARED OTIENO AYOO 4TH APPELLANT
MILDRED GUMBO 5TH APPELLANT
JENIFFER ODHIAMBO GUMBO 6TH APPELLANT**

AND

**MICHAEL OGINGA DACHE 1ST RESPONDENT
KISUMU DISTRICT LAND REGISTRAR 2ND RESPONDENT
KISUMU DISTRICT LAND SURVEYOR 3RD RESPONDENT
THE COMMISSIONER OF LANDS 4TH RESPONDENT
THE ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. This ruling is in respect of the Notice of Motion application dated 11th June 2024 brought by the appellants pursuant to the provisions of sections 1A, 3, 3A and 80 of the *Civil Procedure Act*, Order 42 Rule 6 and 51 Rules 1, 3 and 4 of the *Civil Procedure Rules*. Prayers 1, 2, 3, 4, 5 and 6 of the application have been overtaken by events as they sought for interim relief pending the hearing and determination of the current application. That leaves prayer 7 as the substantive prayer for determination. Prayer 8 seeks for an order that the costs of the application be provided for.



2. The grounds upon which the application was brought are that the appellants were aggrieved by the whole decision of the trial court delivered on 11th June 2024 (herein the ruling) striking out the appellants' application to set aside the judgement of the trial court delivered on 31st May 2023 (herein the judgement) and to have the appellants joined as Defendants in the suit. That consequently, the appellants have lodged an appeal against the ruling. That the appeal has high chances of success. That the Respondents stand to suffer no prejudice if the orders sought are granted whereas the appellants properties are completely landlocked with no public access road to the main road and any attempt to remedy with the help of the area Chief, police and County Surveyor's office have been futile. That the application has been brought without inordinate delay and that it is in the interest of justice that the application be allowed.
3. The application was supported by the contents of the Supporting Affidavit sworn by the 1st appellant on 11th June 2024, the Further Affidavit by the 5th Appellant and the annexures thereto.
4. The application was opposed by the 1st Respondent vide the Grounds of Opposition dated 24th June 2024. The case of the 1st respondent is that the suit land is undisputedly registered in the name of the 1st Respondent, that the access road which was ordered to be closed vide the judgement was created on the 1st Respondent's land, parcel No. Kisumu/Kogony/5551 (herein the suit land), that the applicants' usage of that illegally created access road constitutes acts of trespass by the appellants, that the appellants' instant application purports to seek an illegal perpetration of gross continuing trespass which constitutes an offence in the law, that the alleged access road was created without due process as contemplated in the [Public Roads and Roads of Access Act](#) Cap 399 Laws of Kenya and that the instant application is bad in law, frivolous, misconceived and otherwise an abuse of the court process as it seeks to assist the appellants in perpetrating acts of gross trespass.
5. The application was urged orally on 24. 6. 2024. It was submitted on behalf of the appellants that the appellants were not parties in the lower court suit but pursuant to the judgement, the Respondents proceeded to fence around the appellants' properties. That consequently, the appellants sought to be joined in the suit and have the judgement set aside. That however, the trial court ruled that it was functus officio and could not issue any orders. That the ruling locked out the appellants from the suit. That the 1st Respondent has closed the road of access, erected a gate and is cutting down trees.
6. That the appellants have filed an appeal the appeal herein against the ruling. That the grounds of opposition filed by the 1st Respondent are to the effect that the appellants are trespassers and that that should have been a ground for their joinder in the suit. That the appeal has high chances of success. That the appellants will continue being denied access if the orders sought are not granted that there will be no prejudice that will be suffered by the Respondents if the relief sought is granted.
7. On behalf of the 1st Respondent, it was submitted that the appellants are not challenging ownership of the suit land by the 1st Respondent. That under section 98 of the [Land Act](#), a land owner cannot be compelled to create an easement on his land. That section 140 of the [land Act](#) gives the appellants a remedy which they should pursue. That no security has been offered by the appellants as provided in Order 42 Rule 6 of the [Civil Procedure Rules](#). That the fact that the appellants have been using the access road for 30 years does not make it lawful.
8. I have considered the application, the contents of the Supporting Affidavit and Further Affidavit filed by the appellants, the Grounds of Opposition filed by the 1st Respondent and the oral submissions made by Counsel. Prayer 7 of the application which is the substantive prayer for determination herein seeks for an order setting aside the judgement delivered by the trial court on 31st May 2023 and all consequential orders arising therefrom pending the hearing and determination of the appeal. The



appeal herein, as is clear from the heading of the Memorandum of Appeal dated 11th June 2024, is against the ruling of the Chief Magistrate's Court at Kisumu by Hon. V. Ogutu in the application dated 5th June 2024 in Kisumu CM ELC No. 266 of 2018 Michael Dache vs Kisumu District Land & 3 others. As deposed in paragraph 3 of the Supporting Affidavit, the application dated 5th June 2024 filed before the trial court sought to set aside the judgement delivered on the 31st May 2023 and to have the appellants joined in the suit as Defendants. It is the ruling in respect of that application which is the subject of the appeal herein. One of the substantive issues to be determined in the appeal is whether or not the trial court was right in not setting aside the judgement as prayed. Setting aside of the judgement is therefore not an order that can be granted at this stage of the appeal as to do so would amount to compromising the appeal without the same being heard.

9. Prayer 8 of the application seeks that costs of the application be provided for. On this the court is guided by section 27 of the *Civil Procedure Act* which provides that costs of any action, cause or other matter, or issue follow the event. No reason has been given for the court to exercise its discretion otherwise.
10. For the foregoing reasons this court finds that the application lacks merit and hereby dismisses it. Costs of the application are awarded to the 1st Respondent.

It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 1ST DAY OF JULY 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Kevin: Court Assistant.

Okidi holding brief for Ogejo for the Appellants/Applicants.

Anuro for the 1st Respondent.

No appearance for the 2nd, 3rd, 4th and 5th Respondents.

