



**Homescope Properties Limited & another v Gachuki & Odera (Sued as Chariman & Secretary Karen Ngong View Estate) & another (Environment & Land Case 793 of 2013) [2023] KEELC 20656 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 793 OF 2013  
SO OKONG'O, J  
OCTOBER 5, 2023**

**BETWEEN**

**HOMESCOPE PROPERTIES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**DR PAUL OCHANDA SAOKE (SUING ON HIS BEHALF AND ON BEHALF OF THE RESIDENTS OF EVE GARDENS ESTATE) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID GACHUKI & PAMELA ODERA (SUED AS CHARIMAN & SECRETARY KAREN NGONG VIEW ESTATE) ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Pleadings**

1. The Plaintiffs brought this suit by way of a plaint dated July 2, 2013 in which they sought judgment against the Defendants for:
  - a. A declaration that Karen Ngong View Estate access roads which lie on L.R. No. 12882 are public access roads and unhindered entry and exit should be accorded to the plaintiffs who are residents of Eve Garden Estate, members of the public, and all public utility personnel, their workers, employees, servants and/or agents.
  - b. A permanent injunction restraining the defendants whether by themselves, their servants and/or agents or whoever from blocking, barricading or in other way obstructing, refusing, and/or denying the Plaintiffs and all the residents of Eve Garden Estate, their servants, employees and/or agents access through Karen Ngong View Estate access roads situated on L.R. 12882 within Karen Ngong View Estate.



- c. Costs of the suit and interest.
  - d. Such ancillary orders as the circumstances of the case may require.
2. The Plaintiffs averred that the 1<sup>st</sup> plaintiff had developed a gated community known as Eve Gardens Estate which comprises 10 magnificent villas adjacent to Karen Ngong View Estate. The plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs owned a residential villa each in the estate. The Plaintiffs averred that at all material times, access to Eve Gardens Estate had been through a public access road passing through Karen Ngong View Estate. The plaintiffs averred that before filing this suit, the 1<sup>st</sup> defendant unlawfully barricaded the said public access road by erecting a barrier and stationing guards who had continued to deny the plaintiffs access to their homes prompting them to use alternative longer and insecure route.
  3. The plaintiffs averred that they sought the intervention of the 2<sup>nd</sup> defendant which although had earlier stated that the said access road was indeed a public road had recanted that position and was conniving with the 1<sup>st</sup> Defendant to deny the Plaintiffs the use of the access road. The Plaintiffs averred that the Defendants' actions were unreasonable, arbitrary, wrongful, and illegal. The Plaintiffs averred that the same amounted to an infringement of their fundamental freedom of movement and right to use a public access road. The Plaintiffs averred that owing to the Defendants' said illegal actions, the Plaintiffs had suffered tremendous loss and inconvenience. The Plaintiffs averred that they had been exposed to the dangers of using unsafe and longer alternative access roads.
  4. The 1<sup>st</sup> Defendant filed a statement of defence on July 30, 2013. The 1<sup>st</sup> Defendant denied the Plaintiffs' claim in its entirety. The 1<sup>st</sup> Defendant averred that the access road passing through Karen Ngong View Estate was not a public road as alleged by the Plaintiffs. The 1<sup>st</sup> Defendant averred that the access road to Eve Gardens Estate was through Jogoo Road off Ngong Road in Kajiado County.
  5. The 1<sup>st</sup> Defendant averred that if at all it did erect any barrier and stationed guards on any road as claimed, the same was on Karen Ngong View estate which was not a public access road. The 1<sup>st</sup> Defendant averred further that if at all there was any access to Eve Gardens Estate through the access road passing through Karen Ngong View Estate which was denied, the said access was merely a conditional license granted to one, Magdalene Njoki Muiruri. The 1<sup>st</sup> Defendant prayed that the Plaintiffs' suit be dismissed with costs.
  6. The 2<sup>nd</sup> Defendant filed a statement of defence on July 17, 2013. The 2<sup>nd</sup> Defendant denied the Plaintiffs' claim in its entirety. The 2<sup>nd</sup> Defendant denied the jurisdiction of the court and contended that the Plaintiffs ought to have lodged their claim with the National Environment Tribunal. The 2<sup>nd</sup> Defendant averred further that the suit did not disclose any triable cause of action against it.
  7. The 2<sup>nd</sup> Defendant denied that it had admitted that the Plaintiffs were entitled to use the disputed access road. The 2<sup>nd</sup> Defendant averred that residence groups had the right to make their own security arrangements and to manage their associations. The 2<sup>nd</sup> Defendant averred that the Plaintiffs were not entitled to the reliefs sought and prayed that their suit be dismissed with costs.

### **The evidence**

8. The plaintiffs' first witness was Peter Mathenge Gitonga (PW1). He testified as follows: He was living in Eve Gardens Estate. Before this suit was filed, to access his house in the estate from Ngong Road, he used to use Jogoo Road. He was using Jogoo Road because the 1<sup>st</sup> Defendant had erected barriers on a public road within the 1<sup>st</sup> Defendant's estate, Karen Ngong View Estate through which Eve Gardens Estate could be accessed from Ngong Road. They could access their estate through Jogoo Road or the



1<sup>st</sup> Defendant's estate. The access road through the 1<sup>st</sup> Defendant's estate was a public road. Following their complaint to the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant confirmed that the access road through the 1<sup>st</sup> Defendant's estate was a public road and directed the 1<sup>st</sup> Defendant to open the access road. The 1<sup>st</sup> Defendant failed to comply with the said directive. The access roads within the 1<sup>st</sup> Defendant's estate were surrendered to the Government of Kenya in 1988 according to entries numbers 36,37 and 38 in the title that gave rise to the properties comprised in the 1<sup>st</sup> Defendant's estate. The 1<sup>st</sup> Defendant had no authority to restrict the use of the said access roads because any land surrendered to the government constitutes public land. The Plaintiffs had applied to join the 1<sup>st</sup> Defendant's association to participate in taking care of their common interest but the 1<sup>st</sup> Defendant rejected their application on the ground that their estate was in Kajiado. PW1 produced the documents in the Plaintiffs' list of documents as exhibits.

9. On cross-examination, PW1 reiterated that apart from the access road through the 1<sup>st</sup> Defendant's estate, they had an alternative access to their estate through Jogoo Road. PW1 stated that their estate was situated in Kajiado County while the 1<sup>st</sup> Defendant's estate was in Nairobi County. He denied that the disputed access road was meant to be used solely by the residents of the 1<sup>st</sup> Defendant's estate. On re-examination, PW1 stated that whether or not to use the alternative road of access to their estate was a matter of choice for the members of the public.
10. The Plaintiff's second witness was Paul Ochanda Saoko (PW2). He stated as follows in his evidence in chief: He was a resident of Eve Gardens Estate. Eve Gardens Estate was adjacent to the 1<sup>st</sup> Defendant's Ngong View Estate in Karen. There was a public access road passing through Karen Ngong View Estate to Eve Gardens Estate. At the time of his testimony, the residents of Eve Gardens Estate were using the said public road through Karen Ngong View Estate to access Ngong Road without any problem following an order that was issued by the court restraining Karen Ngong View Estate from interfering with the access road. They had to pass through a barrier erected on the road by Karen Ngong View Estate. The 1<sup>st</sup> Defendant did not give them any reason for denying them the use of the said road.
11. The first witness for the Defendants was Francis Kariuki (DW1). He testified as follows: He was living in Karen Ngong View Estate. The estate had an association whose members were the owners of the properties and the residents of the said estate. He was the chairman of the management committee of the association. He adopted his witness statement as his evidence in chief and produced the 1<sup>st</sup> Defendant's bundle and supplementary bundle of documents as exhibits.
12. On cross-examination, he stated that Eve Gardens Estate had its access road to Ngong Road and its residents did not need to pass through the 1<sup>st</sup> Defendant's estate to access Ngong Road. He stated that the residents of Eve Gardens Estate who were not members of their association were using the access road through their estate while it was them who were maintaining the road through the association. He stated that they had to be members of their association to use the road. He admitted that the access road through their estate was a public road and that it was open for use by the public. He qualified that by saying that the road was public to the extent that it was for use by the residents of their estate. He stated that the land for the said road was provided by the residents of the estate for their use. He denied that they had prohibited the public from using the road in dispute because they were maintaining it. He stated that their concern was the security of the residents of their estate.
13. The 1<sup>st</sup> Defendant's next witness was David Zinny Weyusia (DW2). He stated as follows in his evidence in chief: He was a consultant Physical Planner and an environmentalist. He was instructed by the 1<sup>st</sup> Defendant to carry out some investigations on planning. He undertook the assignment and prepared a report that was annexed to his witness statement. He produced his report and several documents that he obtained from Kajiado Survey Office as exhibits. He confirmed that the 1<sup>st</sup> Defendant's estate was



located within Nairobi County while the Plaintiffs' estate was located in Kajiado County. He stated that the disputed road was a local road meant to serve the local community. He stated that the road was meant to provide individual plots with access to the main road. He stated that such roads are generally public roads that have been surrendered to the government. He stated that the Plaintiffs' estate had an access road to Ngong Road. He stated that from the mutation that gave rise to the plots within the Plaintiffs' estate and the Registry Index Map for the area, it was clear that the Plaintiffs' estate had direct access to Ngong Road. The road of access was known as Jogoo Road which was in Kajiado County. He stated that the road within the 1<sup>st</sup> Defendant's estate that the Plaintiffs' wanted to use was in Nairobi County. He stated that the developer of the 1<sup>st</sup> Defendant's estate surrendered the roads within the 1<sup>st</sup> Defendant's estate to the government to serve the residents.

14. On cross-examination, DW2 stated that the design of the road in dispute made it a local road whose use was limited to the 1<sup>st</sup> Defendant's estate. He stated that for the Plaintiffs to use the access road in dispute, they had to make an application to Nairobi City County to provide them with an access road through the 1<sup>st</sup> Defendant's estate under the provisions of the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed).
15. On examination by the court, DW2 stated that the restricted user of the disputed access road did not convert it to a private road. He stated that it was still a public road but designed to serve the residents.
16. The 2<sup>nd</sup> Defendant did not adduce evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing.

#### **The 1<sup>st</sup> Plaintiff's submissions**

17. The 1<sup>st</sup> Plaintiff filed its submissions dated September 20, 2022. The 1<sup>st</sup> Plaintiff framed three issues for determination namely; whether the disputed road is a private road or public road, whether the defendants' action of barring the Plaintiffs from accessing the road is lawful or an infringement on the Plaintiffs' constitutional rights, and whether the Plaintiffs are entitled to the prayers sought. On the 1<sup>st</sup> issue, the Plaintiffs submitted that the 2<sup>nd</sup> Defendant had confirmed in a letter dated February 7, 2013 that the disputed road was a public road planned to serve the residents of the 1<sup>st</sup> Defendant's Karen Ngong View Estate only. The 1<sup>st</sup> Plaintiff submitted that in its earlier letter dated November 9, 2012 in response to the 1<sup>st</sup> Defendant's request for approval to erect security barriers, the 2<sup>nd</sup> Defendant had stated that since the disputed road within Karen Ngong View Estate was a public road, the 1<sup>st</sup> Defendant had to allow entry by all public utility personnel and all other road users. The 1<sup>st</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant had in a much earlier letter dated August 3, 2012 informed the 1<sup>st</sup> Defendant that it had no mandate to stop or deny members of the public free access to the disputed road.
18. The 1<sup>st</sup> Plaintiff referred to the definition of public road in section 2 of the *Public Roads and Roads of Access Act* and submitted that the disputed road fits the description of a public road. The 1<sup>st</sup> Plaintiff submitted that the road in dispute runs from Ngong Road to the Plaintiffs' estate. The 1<sup>st</sup> Plaintiff submitted that the road had not been designated as a private road. The 1<sup>st</sup> Plaintiff submitted that the 1<sup>st</sup> defendant neither applied to construct the road as a private road nor to convert the public road to a private road. The 1<sup>st</sup> Plaintiff submitted that the disputed road was a public road the use of which the Defendants had no right to block or restrict without following due process. In support of this submission, the 1<sup>st</sup> Plaintiff cited *Dellian Langata Limited v. Symon Thuo Mubia & others* [2018]eKLR. The 1<sup>st</sup> Defendant urged the court to make a finding that the disputed road was a public road.



19. On the second issue, the 1<sup>st</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant's action of restraining the Plaintiffs from using the disputed road was unlawful and amounted to an infringement of their constitutional right and freedom of movement. The 1<sup>st</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant acted unjustly and in bad faith. The 1<sup>st</sup> Plaintiff cited *George Munge v. Sanjeer Pancho Sharma & 3 others* [2012]eKLR and urged the court to stop what it referred to as oppressive and mischievous conduct of the Defendants.
20. On the last issue, the 1<sup>st</sup> Plaintiff submitted that the Plaintiffs had established their claim against the Defendants, and as such they were entitled to all the reliefs sought in their plaint. The 1<sup>st</sup> Plaintiff submitted that the access road within the 1<sup>st</sup> Defendant's estate was a public road and unhindered entry and exit should be accorded to the Plaintiffs.

## **2<sup>nd</sup> Plaintiff's submissions**

21. The 2<sup>nd</sup> Plaintiff filed his submissions dated July 18, 2022. The issues framed by the 2<sup>nd</sup> Plaintiff for determination by the court were similar to those framed by the 1<sup>st</sup> Plaintiff save for one issue concerning the jurisdiction of the court to determine the Plaintiffs' claim. On the issue of jurisdiction that was raised by the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Plaintiff submitted that this court had jurisdiction to determine this suit. In support of that submission, the 2<sup>nd</sup> Plaintiff cited article 162 (2) of the *Constitution of Kenya*, section 13 of the *Environment and Land Court Act*, section 129 of the *Environment Management and Coordination Act* 1999 (EMCA), and several decided cases. On whether the disputed road was a private road whose use was restricted to the 1<sup>st</sup> defendant or a public road for use by the public at large, the 2<sup>nd</sup> Plaintiff submitted that the disputed road was a public road and not private. The 2<sup>nd</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant had no right or authority to prevent the Plaintiffs from using the road to access their properties.
22. On whether the 1<sup>st</sup> Defendant's actions of restraining the Plaintiffs' access to their properties through the disputed public road was lawful and whether it was unreasonable, arbitrary and amounted to an infringement of their fundamental freedom of movement, the 2<sup>nd</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant had no right to block or close a public road without following due process. The 2<sup>nd</sup> Plaintiff submitted that the 1<sup>st</sup> Defendant was impeding their right of access to their properties through the public road that traverses through the 1<sup>st</sup> Defendant's estate and connects with the Plaintiffs' estate. The 2<sup>nd</sup> Plaintiff urged the court to find that the Defendants' actions were illegal and to enter judgment for the Plaintiffs as prayed in the plaint.

## **The 1<sup>st</sup> Defendant's submissions**

23. The 1<sup>st</sup> Defendant filed submissions dated September 23, 2022. The 1<sup>st</sup> Defendant framed three issues for determination namely; whether the road in dispute was a public road for use by the public or a private road used exclusively by the residents of the 1<sup>st</sup> Defendant's estate, whether the 1<sup>st</sup> Defendant's action of restraining the Plaintiffs from using the said road amounted to an infringement of the Plaintiffs' freedom of movement and whether the Plaintiffs were entitled to a permanent injunction as sought.
24. The 1<sup>st</sup> Defendant submitted that whereas the Plaintiffs had placed reliance on section 2(c) of the *Public Roads and Roads of Access Act* for the definition of a public road, the disputed road was a road of access solely constructed and designed to meet the traffic flow of the sub-divisions of the property known as L.R 12882 comprised in Grant No. I.R 36684. The 1<sup>st</sup> Defendant submitted that their second witness was an expert witness whose area of expertise was physical planning. The 1<sup>st</sup> defendant submitted



- that the witness stated in his report that the *Physical Planning Act*, chapter 286 Laws of Kenya (now repealed) was the core legislation providing for the preparation, content, procedure, approval, and implementation of Development Plans in Kenya.
25. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant informed the Plaintiffs in a letter dated 7<sup>th</sup> February 2013 that although the disputed road was a public road, the same was planned to serve the residents of the 1<sup>st</sup> Defendant's estate only as it was a local access road. The 1<sup>st</sup> Defendant submitted that the Plaintiffs were also informed that their estate was in Kajiado and as such the access road to their estate was Jogoo Road in Kajiado. The 1<sup>st</sup> Defendant submitted that there was a difference between a public road and a road of access. In support of this submission, the 1<sup>st</sup> Defendant cited *Dellian Langata Limited v. Symon Thuo Mubia & 4 others* (*supra*), *Kipkirui Arap Koske v. Philemon Kipsigei Tangus & another* [2015] eKLR and *Stephen Kimotho Karanja v. Paul Wandati Mbochi* [2019] eKLR. The 1<sup>st</sup> Defendant submitted that the Plaintiffs had no permission to use the access road in the 1<sup>st</sup> Defendant's estate. The 1<sup>st</sup> Defendant submitted that the Plaintiffs could not forcefully use the said road as that would amount to trespass.
26. On whether the 1<sup>st</sup> Defendant's action of restraining the Plaintiffs from using the said road amounted to an infringement of the Plaintiffs' freedom of movement, the 1<sup>st</sup> Defendant submitted that the Plaintiffs' estate is in Kajiado County and not in Nairobi County a fact that the Plaintiffs had not denied. The 1<sup>st</sup> Defendant submitted that the access road within the 1<sup>st</sup> Defendant's estate was a 9-meter road made for local use. The 1<sup>st</sup> Defendant submitted that the 1<sup>st</sup> Defendant's estate was a controlled development area and as such additional traffic was not envisaged when provision was being made for the access road.
27. The 1<sup>st</sup> Defendant submitted that granting the Plaintiffs the remedies sought would amount to an infringement of the 1<sup>st</sup> Defendant's estate residents' right to enjoyment of their properties. The 1<sup>st</sup> Defendant submitted that the Plaintiffs' claim was unsubstantiated. The 1<sup>st</sup> Defendant submitted that the Plaintiffs' insistence on gaining access to their estate through the 1<sup>st</sup> Defendant's estate was driven by an ulterior motive.
28. The 1<sup>st</sup> Defendant submitted that the Plaintiffs were not entitled to the reliefs sought. In support of this submission, the 1<sup>st</sup> defendant cited *Nguruman Limited v. Jan Bonde Nielsen & 2 others*, C.A No. 77 of 2012; [2014] eKLR. The 1<sup>st</sup> Defendant submitted that the Plaintiffs had failed to establish a *prima facie* case as it was apparent that the road in dispute was an access road meant for use by residents of the 1<sup>st</sup> Defendant's estate and not a public road. The 1<sup>st</sup> Defendant submitted further that the Plaintiffs' estate was located in Kajiado County and not in Nairobi County and the road of access to the Plaintiff's estate was Jogoo Road off Ngong Road in Kajiado County. The 1<sup>st</sup> Defendant submitted that the use by Magdaline Njoki Muiruri of the disputed road was because of a license agreement that she had entered into with the 1<sup>st</sup> Defendant's estate association. The 1<sup>st</sup> Defendant submitted that the license was personal to Magdaline Njoki Muiruri and the same was not transferable to her tenants, purchasers, and successors of her property. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiffs' suit with costs.
29. The 1<sup>st</sup> Defendant filed supplementary submissions dated 9<sup>th</sup> November 2022 in response to the 1<sup>st</sup> Plaintiff's submissions in which it reiterated its submissions filed on September 23, 2022.

### **Analysis and Determination**

30. I have considered the pleadings, the evidence on record, and the submissions filed by the parties. I am of the view that the following are the issues that arise for determination in this suit:



- i. Whether the road in dispute is a public road for use by the general public or a road of access for use primarily by the residents of the 1<sup>st</sup> Defendant's estate to access their properties within the parcel of land originally known as L.R. No. 12882 comprised in Grant No. 36684.
- ii. Whether the Plaintiffs have a right to unrestricted use of the road within the 1<sup>st</sup> Defendant's estate to access Ngong Road from their estate.
- iii. Whether the Plaintiffs are entitled to the reliefs sought.

**Whether the road in dispute is a public road for use by the general public or a road of access for use primarily by the residents of the 1<sup>st</sup> Defendant's estate to access their properties within the parcel of land originally known as L.R. No. 12882 comprised in Grant No. 36684.**

31. A public road is defined under section 2 of the *Public Roads and Roads of Access Act*, chapter 399 (hereinafter referred to as "the 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;"

32. Section 8 of the Act provides as follows:

8. Dedication of line of public travel
  - (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 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.
  - (2) In every order made under this section, the line of public travel to be established, altered, or cancelled or the road of access to be converted into a line of public travel shall be clearly described.
  - (3) Where an order under this section dedicates a line of public travel or converts a road of access into a line of public travel, such line of public travel shall be dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads.
  - (4) Before making and publishing any order under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel."

33. Section 9 of the said Act provides as follows:

9. Application to construct a road of access



- (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.”

34. From the definition of a public road above, a public road was a road that the public had a right to use before the commencement of the Act on 10<sup>th</sup> August 1920, 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 the Act, and all roads and thoroughfares reserved for public use under the Act. It is not disputed that the disputed road was not in existence before the commencement of the Act in 1920. The disputed road could not therefore fall within the definition of a public road under section 2 (a) and (b) of the Act. That leaves the question of whether it can fall under Section 2 (c) of the Act. For a road to be a public road under Section 2 (c) of the Act, the road must have been reserved for public use under the Act. From my understanding of the provisions of the Act, a road can be reserved as a public road only under Section 8 of the Act. Under that Section of the Act, the Minister in charge of Roads may establish a public road or may convert a road of access established under section 9 of the Act into a public road. The road in dispute was constructed by the developers of the properties within the parcel of land formerly known as L.R. No. 12882 comprised in Grant No. 36684(1<sup>st</sup> Defendant’s estate). The disputed road was therefore not established by the Minister. Section 9 of the Act sets out the procedure for creating an access road. From the evidence on record, the disputed road was not created under the provisions of Section 9 of the Act. The disputed road was therefore not an access road as provided in the Act. It could not therefore have been converted into a public road under Section 8 of the Act. In any event, there is no evidence that the procedure for converting a road of access to a public road was complied with concerning the disputed road. It is therefore my finding that the disputed road within the 1<sup>st</sup> Defendant’s estate is not a public road as contended by the Plaintiffs. It is also not a road of access within the meaning of Section 9 of the Act as contended by the 1<sup>st</sup> Defendant. As I have mentioned earlier, the road in question was not established or constructed under Section 9 of the Act. It cannot therefore be an access road as provided in the law.



In the case of *Dellian Langata Limited v. Symon Thuo Mubia & 4 others* (*supra*), the Court of Appeal made a distinction between a public road and a road of access as follows: -

“...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, a 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”.

35. Having held that the disputed road is neither a public road nor an access road, the next question that arises is, what kind of a road it is. I am of the view that the creation of roads like the one in dispute is a recent development and as such the same is not covered under the *Public Roads and Roads of Access Act*, chapter 399 Laws of Kenya (the Act) which is an archaic piece of legislation that was enacted in 1920. The Act did not envisage the establishment of roads within planned developments and gated communities. Regrettably, the legislature has not seen the need to overhaul this legislation to align it with the latest trends in property and road infrastructure developments. The 1<sup>st</sup> Defendant’s estate does not have a single road but several roads. As mentioned earlier, the roads were established and constructed by the developers of the 1<sup>st</sup> Defendant’s estate. I am in agreement with the Defendants that the roads that were created within the parcel of land formerly known as L.R. No. 12882 were intended to serve only the residents of the properties within the said parcel of land (the 1<sup>st</sup> Defendant’s estate). I am of the view that although the said roads were surrendered to the City Council of Nairobi, that alone did not make them public roads for unrestricted use by the general public. In my view, the City Council was supposed to hold the titles in respect of the said roads merely as trustees for the residents of the 1<sup>st</sup> Defendant’s estate as the roads were meant for communal use and did not form part of the said residents’ properties. Since the roads within the 1<sup>st</sup> Defendant’s estate were constructed by the developers of the estate for use by the residents of the estate and were maintained by the said residents, the management of the 1<sup>st</sup> Defendant’s estate had a right to manage the use of the said roads to ensure that they served the purpose for which they were constructed and also as part of ensuring the security of the residents.
36. The extent to which the public can use roads of this nature is not for me to prescribe. I am of the view that that is the province of the legislature. What I can say is that any member of the public who has a valid reason for going into the 1<sup>st</sup> Defendant’s estate has a right to use the said roads within the estate for getting into the estate and getting out of the estate. The dispute before me does not concern the rights of the general public to use such roads. What I need to determine is whether the Plaintiffs had a right to use the roads within the 1<sup>st</sup> Defendant’s estate to access their premises from Ngong Road.

**Whether the Plaintiffs have a right to unrestricted use of the roads within the 1<sup>st</sup> Defendant’s estate to access Ngong Road from their estate.**

37. From the evidence before me, I am not satisfied that the Plaintiffs have a right to use the roads within the 1<sup>st</sup> Defendant’s estate to access their estate from Ngong Road. As I have mentioned earlier, the roads within the 1<sup>st</sup> Defendant’s estate are not public roads. They are therefore not open to the public for unhindered use. I have looked at the survey map (P.EXH.7) through which L.R No. 12882 was subdivided to give rise to the properties forming the 1<sup>st</sup> Defendant’s estate. This map shows that the 1<sup>st</sup> Defendant’s estate is located in the City of Nairobi and that the roads within the 1<sup>st</sup> Defendant’s estate



including the one in dispute were established during the said subdivision for use by the residents within the estate and to access Ngong Road. When these roads were established, the Plaintiffs' estate was not in existence. From the evidence on record, the Plaintiffs' estate is on a parcel of land known as Ngong/ Ngong/ 47118 which is situated in Kajiado County. I have looked at the Mutation Form through which the parcels of land, Ngong/ Ngong/ 10857 and Ngong/ Ngong/ 10858 which were consolidated to give rise to Ngong/ Ngong/ 47118, were created. I have noted that an access road from the Plaintiffs' estate to Ngong Road was created through that Mutation Form. This is clear from the Registry Index Map for Ngong-Ngong. The Mutation Form and the Registry Index Map were produced as part of the 1<sup>st</sup> Defendant's exhibit 3. The two documents show that the 1<sup>st</sup> Defendant's estate has access to Ngong Road without passing through the 1<sup>st</sup> Defendant's estate. All the Plaintiffs' witnesses admitted that they could access Ngong Road through an alternative access road. The road is known locally as Jogoo Road and it is in Kajiado County where the Plaintiffs' estate is situated. The Plaintiffs who did not disclose to the court even at the trial that their estate is located in Kajiado County did not produce any evidence showing that when Title No. Ngong/ Ngong/ 47118 on which the estate is situated was created, it was to be accessed from Ngong Road through the 1<sup>st</sup> Defendant's estate. The Registry Index Map for Ngong-Ngong Registration Section shows a direct access road from Ngong Road to the Plaintiffs' estate. The said Registry Index Map does not show that there is a road from Title No. Ngong/ Ngong/ 47118 through the 1<sup>st</sup> Defendant's estate which is in Nairobi City County to Ngong Road. In *Kipkirui Arap Koske v. Philemon Kipsigei Tangu & another* [2015] eKLR Munyao J. stated as follows in a similar case:.

“We have already seen from the evidence that there is no recognized public road of access through the land of the defendant. There could have been some road of access, but the same is not a public line of travel. I am unable to hold that there exists a public road through the defendant's land. If one existed, it ought to have been reflected in the RIM which is not the case.

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 the 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, passing through the defendant's land. But I am unable to grant a declaration that there exists a public road of access through the defendant's land as sought by the plaintiff, and neither can I order a rectification of the Registry Index Maps to reflect a public road, for none exists, over the defendant's land.”

35. The Plaintiffs did not dispute DW2's report in which he stated that Jogoo Road which was the existing road of access from Ngong Road to the Plaintiffs' estate was in good condition and was shorter. According to the report, the residents of the Plaintiffs' estate had other motives for insisting on accessing their premises through the 1<sup>st</sup> Defendant's estate in Karen. Due to the foregoing, it is my finding that the Plaintiffs had no right to access their estate through the 1<sup>st</sup> Defendant's estate.

#### **Whether the Plaintiffs are entitled to the reliefs sought.**

36. Having found that the Plaintiffs had no right to use the disputed road within the 1<sup>st</sup> Defendant's estate, the Plaintiffs' case fails wholly. The Plaintiffs have failed to prove their case against the Defendants. The Plaintiffs are therefore not entitled to any of the reliefs sought in their plaint.



**Conclusion:**

37. The Plaintiffs' suit is dismissed with costs to the defendants.

**DELIVERED AND DATED AT KISUMU ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2023**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Maonga h/b for Ms. Chitechi for the Plaintiff

Mr. Onyango h/b for Mr. Chacha for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

