



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 793 OF 2013

HOMESCOPE PROPERTIES LTD..... 1ST PLAINTIFF

DR. PAUL OCHANDA SAOKE 2ND PLAINTIFF

VERSUS

DAVID GACHUKI

PAMELA ODERA

Sued as Chairman & Secretary of

KAREN NGONG VIEW ESTATE 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT

RULING

The Plaintiff by a Notice of Motion application dated 2nd July 2013 seek an interlocutory injunction to restrain the Defendants whether by themselves, their employees, agent servants, assignees and/or whomsoever from barricading, obstructing or in any other way whatsoever refusing and/or denying the plaintiffs members of the public and all the residents of Eves Garden Estate, their servants and/or agents access through Karen Ngong view Estate Access Roads situated within Karen Ngong View Estate on **L.R. 12882** pending the hearing and determination of this suit.

The application is supported on the grounds set out in the supporting affidavit sworn by **Mohammed Ahmed** and on the grounds appearing on the face of the affidavit namely:

- i. That the Defendants have unlawfully denied the plaintiffs access to their residence through the public access road that passes through Karen Ngong View Estate.**
- ii. That the Defendants unlawful acts are an infringement of the plaintiffs rights of use and enjoyment of their property and undermines their fundamental freedom of movement.**
- iii. That the plaintiffs have a prima facie case with a probability of success.**
- iv. That the balance of convenience tilts in the plaintiffs favour and damages cannot be sufficient, remedy.**

The Plaintiffs by their plaint inter alia seek judgment against the Defendants jointly and severally for:-

“A declaration that Karen Ngong View Estate Access Roads which lies on L.R. NO. 12882 are public roads and unhindered entry and exit should be accorded to the plaintiffs, residents of Eves Garden Estate members of the public and all public utility personnel, their workers, employees, servants and/or agents”.

The plaintiffs contend that the 1st plaintiff (Homescope Properties Ltd) has developed a gated community Estate known as Eves Garden Estate comprising 10 Villas (homes) adjacent to Karen Ngong View Estate. The homes were sold to members of the public who formed themselves into an Association known as Eves Gardens Estate for purposes of better managing the estate. While during the construction period the access to Eve Gardens Estate was through a public access which passes through Karen Ngong View Estate of the 1st Defendant herein, the plaintiffs aver that after the 10 homes were completed and people moved in the 1st Defendant has barricaded and obstructed the plaintiffs from accessing their properties through the road of access contending that the said road was only open for use by residents of Karen Ngong View Estate.

The Plaintiffs contend that the access road is a public road and not a private road and that the 1st Defendant has no right or authority to prevent the Defendants from using the road of access to access their own properties. The 2nd Defendant, the County Government of Nairobi apparently has written three contradictory letters, one dated 7th February 2013 marked “**MA5**” confirming the access roads although being public roads were planned to serve the residents of Ngong View Estate only and are local access roads. An earlier letter dated “**MA6**” being a response to a request for authority by Karen Ngong View Estate Association for authority to erect security barriers the 2nd Defendant gave authority subject to conditions and inter alia condition (b) in the said letter was in the following terms:-

(b) Ngong View Estate road being a public road, entry shall be allowed of all public utility personnel e.g Kenya Power Company, Nairobi Water Company and all other road users.

By yet another letter dated 3rd August 2012 attached to the plaintiffs further affidavit marked ‘**MA2**’ written before the approval by the City Council for the erection of the Security barrier was given the City Council clearly acknowledged the access road to be a public road.

The City Council in the letter wrote as follows:-

“We have received complaint by a member of the public who is being denied free access to this public road by the guards manning the same. You are hereby informed that you have no mandate to stop/deny a member or members of the public free access as this shall lead to the City Council moving to site and removing the erected barriers at your own cost”.

The plaintiffs in the premises aver that there is connivance on the part of the 1st Defendant and the 2nd Defendant to deny the plaintiffs access through the said public road on the pretext that the road is not a public access road whereas it indeed is.

The Defendants oppose the application and have filed a replying affidavit through **Dr. David Gachuki**, Chairman of the 1st Defendant sworn on 29th July 2014. In the replying affidavit the 1st Defendant avers that Karen Ngong View Estate was carved out of what was originally **L.R. NO. 12882** following the subdivision of the land into 33 subplots. That as a consequence of the subdivisions the access road the subject of this application was created from the surrender of title by the original owner of **L.R. NO. 12882** and that members of Karen Ngong View Estate developed the said access road and have continued to maintain the same.

The 1st Defendant acknowledge that in July 2009 they granted one **Magdaline Njoki Mururi** access to her property in Eves Garden Estate through the road access through Karen Ngong View Estate but aver that hers was merely a license that was non transferable which condition she had accepted. The 1st Defendant further states that Eves Garden Estate was born out of the subdivision of Land title

Ngong/Ngong/10858 which was registered in the joint names of **Magdaline Njoki Muiruri** and the 1st plaintiff. The Defendant contends that the licence to **Magdaline Njoki Muiruri** was personal to her and did not and could not be extended to the subsequent owner of the subtitles following the subdivision. While the 1st Defendant admit that title number **Ngong/Ngong/10858 and L.R. NO. 12882** are adjacent to each other it is the 1st Defendant's contention that the two properties had no common link and/or access roads as between the two properties and it is the 1st Defendant's averment that the land title **Ngong/Ngong/10858** had an access via Jogoo road off Ngong Road but which the plaintiff considers to be rough, long, inconvenient and more risk prone and hence the preference to use the access road through the 1st Defendant's Estate.

The plaintiffs and the 1st Defendant have filed written submissions but the 2nd Defendant, the County Government of Nairobi neither appeared nor did they file any response to the plaintiffs application. The submissions by the parties reiterate the facts as set out in the affidavits. The plaintiffs submits that they have demonstrated to the court that they have a prima facie case with a probability of success. The plaintiffs assert that the 1st defendant is impeding their right of access through the public road that traverses through the 1st Defendant's estate and connects with the plaintiffs estate. The same being a public road, the plaintiffs submit every member of the public has a right to access and use it.

The Defendant submits that the plaintiffs have not complied with the provisions of the **Public Roads and Roads of Access Act Cap 399 Laws of Kenya** in that they have not applied and have not been granted leave to construct a road of access or to use an existing road of access. The 1st Defendant further submits that there has been no compliance with **Sections 145 and 146 of the Land Act NO. 6 of 2012** which lay down the procedure of applying for a communal right of way and thus there cannot be any basis for enforcement of public rights of way under section 149 of the Land Act. The 1st Defendant argues that the plaintiffs ought to have followed the procedure as provided under **Section 13 (8) of the Public Roads and Roads of Access Act** for authority to use the road of access and cannot in the premises approach this court for any remedies before they have exhausted the remedies set out under the said Act. To support this proposition the 1st Defendant refers the court to the case of **Diasta Investments Ltd - vs- Nilesh Devan Kara Shah & 4 others HC ELC NO. 340 of 2011**, Nairobi (unreported) where the court held that a party ought to exhaust the mechanisms provided by an Act of parliament in dealing with disputes and/or grievances before seeking any redress from the court.

The 1st Defendant also referred the court to the decision of this court in the case of **International Centre for Policy and Conflict & 5 others – vs- The Attorney General & 4 others (2013) eKLR** where the court held thus:-

“An important tenet of the concept of the rule of Law is that this court before exercising its jurisdiction under Article 165 of the constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act....”

“Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....”

The plaintiffs contend that the Public Roads and Roads of Access Act, section 13 (8) cannot have application since the plaintiffs are not seeking to have a road access created as there is already an existing public road in regard to which the 1st Defendant has no right to prevent the plaintiffs and/or indeed other members of the public from using.

The plaintiffs claim that the 1st Defendants cannot have exclusive proprietary right to use the public road through their estate and contend that the 1st Defendant's actions of blocking the plaintiff's from using the public road amounts to limiting the plaintiffs rights and freedoms of movement as enshrined in the

constitution under the Bill of Rights Article 20. The plaintiffs further aver that the 1st Defendant's snub of the plaintiffs offer to contribute to the maintenance of the road made in good faith goes to show the callousness, malafides and the high handedness that the Defendants have treated the plaintiffs with. The plaintiffs to support the proposition that where a party acts in an arbitrary, oppressive or unreasonable manner a court of law would intervene and issue an injunction to restrain such conduct referred the court to the case of **George Munge –vs- Sanjeer Pancho Sharma & 3 others (2012) eKLR where Kimondo Judge** while dealing with a somewhat similar matter observed thus:-

“---The Defendants may have paid the City Council of Nairobi as per the receipts at page 25 and 26 of the replying affidavit. But that cannot convert a public road or a City road into a private road. I take Judicial notice that resident associations in various parts of the City have evolved as necessary partners to fill in the void left by the City Council or security agents. But in carrying their mandate they should not infringe upon private property rights or the right of the public to access or use public or city roads. Voluntary associations like the 4th Defendant cannot enforce a local rule in an arbitrary, capricious, oppressive or unreasonable manner”.

Kimondo Judge in the same case while considering the threshold for the grant of an interlocutory injunction as enunciated in **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** cited with approval the finding in the court of Appeal case in **Aikman – vs- Muchoki (1984) KLR 353** where their Lordships stated thus:-

“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success, However where going by the material placed before it at an interparties hearing of an application for injunction it appears to the court that the plaintiff has a strong case like where it is clear that the Defendant's act complained of is or may be unlawful, the issue of whether or not damage can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”.

In the present matter before me it is not in doubt that the 1st Defendant has placed barriers on the road that traverses through the 1st Defendant's estate and abuts the plaintiffs estate. There is evidence that vide letter dated 9/11/2012 approval for erection of security barriers was granted by the City Council albeit subject to the conditions set out therein. It is also evident from the correspondence from the City Council that the subject road is designated as a public road.

Under the public Roads and Roads of Access Act Public road is defined under section 2 as follows:-

- 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 Crown Lands Act, 1902 or the Government Lands Act (Cap 280) at any time before the commencement of the Act;**
- c. **all roads and thorough fares hereafter reserved for public use.**

The road of access under contention in this matter would appear to fit the definition under (c) above.

Section 8 (1) and (2) of the Public Roads and Roads of Access Act provide for conversion of road of access to public 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 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 provisions of the Public Roads and Roads of Access Act the court is persuaded 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. Limitation as to use may be as to the nature or type of vehicles that may not use such a road. 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.

I have considered the provisions of **Sections 139 to 149 of the Land Act NO. 6 of 2012** relating to rights of way and in my view the same apply to situations where a person or a community do not have access or right of way and there is necessity for creation of such a right and the person or the community apply. The provisions do not apply where there is already a public road or road of access as in the instant case. Although there are contested issues of fact in this matter. I am persuaded on the material placed before the court, that the plaintiffs have demonstrated and established they have a prima facie case with a probability of success. Notably it is not indispute that the subject road was one of the roads set aside at the time of subdivision of the parent title L.R NO. 12882 out which the 1st Defendants estate was established. The sketch plan marked **“MAI”** attached to the plaintiffs further affidavit sworn on 9th October 2013 shows the network of roads and the road in contention running through from Ngong Road to the plaintiffs Eve Gardens Estate. The road is not designated as a private road or at least no evidence has been tendered to show that it is a private road. If indeed it is a private access road there would have been an application under the provisions of the Public Road and Roads of Access Act Cap 399 Laws of Kenya by the 1st Defendants.

On the evidence on record it is more likely that the road is a public road but I make no determination on the issue as that will be in the province of the trial court to determine at the trial after taking and hearing evidence. The plaintiffs are seeking to be permitted and allowed to use the road as they are entitled to and I think the plaintiffs have in the circumstances of this case established a prima facie with a probability of success. I am not persuaded the actions by the 1st Defendant to bar and restrict the plaintiffs from using the road are anchored on any valid legal foundation and to that extent the same infringe on the plaintiffs right to use the road to access their properties. There is no basis for the continuation of the factions which clearly are prejudicial to the plaintiffs.

In the premises and for the reasons appearing above I grant an interlocutory order of injunction against the Defendants in terms of prayer NO.(3) of the Notice of Motion dated 2nd July 2013. The parties are directed to comply with order 11 of the Civil Procedure Rules within the next 45 days from the date hereof after which either party can apply for mention of the suit for pretrial directions. As the matter has a tinge of public interest as epitomised by the respective associations officials representing their associations I will make no order for costs respecting the application and I direct that each party will meet their costs for the application.

Ruling dated signed and delivered at Nairobi this 14th day of March 2014.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the 1st Plaintiff

.....for the 2nd Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant