



Homescope Properties & another v Gachuki & Odera (Sued as Chairman & Secretary of Karen Ngong View Estate) & another (Civil Application E534 of 2023) [2024] KECA 1410 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1410 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E534 OF 2023
LA ACHODE, AO MUCHELULE & SG KAIRU, JJA
OCTOBER 11, 2024**

BETWEEN

HOMESCOPE PROPERTIES 1ST APPLICANT

DR PAUL OCHANDA SAOKE (SUING ON HIS BEHALF AND ON BEHALF OF THE RESIDENTS OF EVE GARDENS ESTATE) 2ND APPLICANT

AND

DAVID GACHUKI & PAMELA ODERA (SUED AS CHAIRMAN & SECRETARY OF KAREN NGONG VIEW ESTATE) 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

(Being an application for an injunction pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi dated 5th October 2023 in ELC Cause No. 793 of 2013)

RULING

1. In their application dated 14th November 2023, the applicants, Homescope Properties Limited and Dr. Paul Ochanda Saoke, on behalf of the residents of Eve Gardens Estate seek orders against the respondents, David Gachuki and Pamela Odera, as officials of Karen Ngong View Estate, and against the County Government of Nairobi, that pending the hearing and determination of their intended appeal, there be: stay of execution of the judgment and decree of the Environment and Land Court given on 5th October 2023; and an injunction to restrain them from enforcing or implementing a written notice dated 31st October 2023 denying or refusing residents of Eve Gardens Estate access to a road passing through Karen Ngong View Estate situated within the L.R. No. 12882.



2. Based on the grounds on the face of the application, the supporting affidavit of Dr. Paul Ochanda Saoke, and the written submissions by Rabala & Company Advocates, it is the applicants' case that the Karen Ngong View Estate Association wrongfully denied residents of Eve Gardens Estate access through a road, which they contend is a public road, that passes through Karen Ngong View Estate.
3. In the impugned judgment, the learned Judge of the ELC in dismissing the applicants suit held that the contentious road is a private, as opposed to a public road, and the same is meant to exclusively serve the residents of Karen Ngong View Estate; that the residents of Eve Gardens Estate have no right to use it; and that the access to Eve Gardens Estate in Kajiado County is through an access road known as Jogoo Road, which, the applicants assert, is a risky and dangerous road.
4. Aggrieved by the Judgment, the applicant lodged a Notice of Appeal on which the present application is hinged.
5. It is submitted by counsel for the applicant that the intended appeal is arguable, that among other grievances with the Judgment, it will be demonstrated during the hearing of the appeal that the learned Judge of the ELC misconstrued

Section 9 of the *Public Roads and Roads of Access Act*; and that the Judge erred in holding that the contentious road is not a public road. It is urged that the appeal will be rendered nugatory unless the orders sought are granted; that despite the residents of Eve Gardens Estate having offered to contribute to any maintenance and service charge in connection with the access through Karen Ngong View Estate, they have been condemned to use "the alternative access road via Jogoo Road, Off Ngong Road".

6. The case for Karen Ngong View Estate in opposition as set out in the replying affidavit of the Chairman of the Association, Francis Kariuki and in the written submissions canvassed before us by Miss. Detho, learned counsel, during the hearing of the application, is that the intended appeal is not arguable; that it was demonstrated before the ELC that Eve Gardens Estate is located in Kajiado County and access to it is through Jogoo Road in Kajiado County; that the expert evidence tendered before the trial court in that regard was not contested; and that considering that the applicants have an access road, the intended appeal will not be rendered nugatory. It was urged that in the event that the appeal is successful, the barriers erected to block access can be easily removed.
7. We have considered the application, the affidavits, and the rival submissions against the settled legal principles applicable in applications of this nature. See for instance *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others*, Civil Application No. 31 of 2012, [2013] eKLR. As to whether the intended appeal is arguable, we are persuaded that it is. Based on the Memorandum of Appeal, there is for instance the argument that the Judge erred in his interpretation of Section 9 of the *Public Roads and Roads of Access Act* and in concluding that the contentious road is a private road. The applicant need not establish many arguable grounds. One ground is sufficient. See Transouth *Conveyors Ltd v Kenya Revenue Authority & Another [2007] eKLR (Civil Application No. 37 of 2007)* where the Court held that even:

"A solitary issue, if it is arguable on appeal, is of course sufficient to warrant favourable treatment of an application under rule 5(2)(b)."

As we bear in mind that an arguable appeal is not one that will necessarily succeed, we do not think the intended appeal is frivolous.

8. On the nugatory aspect, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 E.A. 227, expressed that "what may render the success of an appeal nugatory must be considered within the circumstances of each particular case." And in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others*,



Civil Application No. 31 of 2012, [2013] eKLR the Court stated that in considering whether or not an applicant has satisfied the second limb for the grant of an order of stay of execution, namely whether the intended appeal will be rendered nugatory, the Court must consider “whether or not what is sought to be stayed if allowed to happen is reversible.”

9. In this case, it is common ground that the contentious road through Karen Ngong View Estate is an alternative route of access to Eve Gardens Estate who have access through, the seemingly less attractive Jogoo Road. As submitted by counsel for the Karen Ngong View Estate, if the appeal succeeds, the barriers through Karen Ngong View Estate that block access through that estate can be ordered to be removed and are easily removable. What is sought to be stayed or injunctioned is reversible. We are therefore not persuaded that the intended appeal will be rendered nugatory.
10. In the result, the applicants’ application dated 14th November 2023 fails and is hereby dismissed. Considering that the parties are residents welfare associations, we will make no orders as to costs in this instance.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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L. ACHODE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

