



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT NAIROBI**

**ELC NO. 805 OF 2016 CONSOLIDATED WITH ELC NO.806 OF 2016**

**GULED HOUSING COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**NARARASHI WHOLESALERS (AK) LTD.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ACCRA TRADING CENTER LIMITED.....DEFENDANT**

**RULING**

I have before me two (2) applications for injunction. The first application was brought by Guled Housing Company Ltd. and Narashi wholesalers (AK) Ltd. who are the Plaintiffs in ELC No. 805/2016 (hereinafter referred to as “the Plaintiffs” for ease of reference) while the second application was brought by Accra Trading Centre Ltd. who is the Plaintiff in ELC No. 806/2016 (hereinafter referred to as “the Defendant” for ease of reference). The Plaintiffs’ application was brought by way of amended Notice of Motion dated 28<sup>th</sup> July, 2016. In the application, the Plaintiffs sought an injunction to restrain the Defendant from entering, trespassing upon, pulling down and/or removing structures or in anyway interfering with the ongoing construction of a boundary wall and improvements on all that parcel of land known as L.R No. 209/6497 (hereinafter referred to as “the suit property”) or in any way interfering with the Plaintiffs’ quiet possession of the suit property pending the hearing and determination of this suit. The application was brought on the grounds that the Plaintiffs obtained the requisite approvals from the County Government of Nairobi to construct a boundary wall on the suit property so as to protect the same from trespassers. Following the said approval, the 1<sup>st</sup> Plaintiff engaged a contractor to undertake the construction of the said wall. While the construction was in progress, the Defendant’s directors and employees in the company of hired goons unlawfully entered the suit property and demolished the said wall without any lawful cause and in the process injured the 1<sup>st</sup> Plaintiff’s employees and stole equipment and tools which were being used in the construction of the said wall. The Plaintiffs contended that the Defendant had threatened to continue with the acts of trespass aforesaid unless restrained by the court. In their affidavit in support of the application, sworn by Saleh Welli Aden Dahir, the Plaintiffs annexed among others, copies of approved plans for the said wall and a letter dated 5<sup>th</sup> April, 2016 from the Nairobi City County confirming the said approval. The Plaintiffs also annexed photographs showing the damaged wall.

The Defendant’s application which was filed in ELC No. 806 of 2016 was brought by way of Notice of Motion dated 13<sup>th</sup> July 2016. In the application, the Defendant sought a temporary injunction restraining the 1<sup>st</sup> Plaintiff, Accra Trade Centre Ltd. from constructing a perimeter wall on the public access road, erecting or causing to be erected any structure of whatsoever nature on the said access road, maiming, mutilating, defacing and/or destroying the said public access road bordering L.R No. 209/4349 (hereafter

“Plot No. 209/4349”) and L.R No. 209/798 R (hereinafter “Plot No. 209/798R”) pending the hearing and determination of this suit. The Defendant also sought a mandatory injunction compelling the 1<sup>st</sup> Plaintiff to pull down the portion of the perimeter wall which it had already put up on the said access road and to reinstate the said access road in the same state in which it was prior to the said construction.

The Defendant’s application which was supported by the affidavit sworn by James Njuguna Ngururi on 13<sup>th</sup> July, 2016 was brought on the grounds that the Defendant is the owner of Plot No. 209/4349 while the 1<sup>st</sup> Plaintiff is the owner of Plot No. 209/798 R. The Defendant contended that Plot No. 209/4349 and Plot No. 209/798 R are adjacent to each other and are accessed through inner lanes and access roads which are public roads. The Defendant’s complaint is that the 1<sup>st</sup> Plaintiff has illegally converted the said lanes and access roads to its own use. The Defendant contended that following the 1<sup>st</sup> Plaintiff’s encroachment on the said lanes and access roads, it lodged a complaint against the 1<sup>st</sup> Plaintiff with the National Land Commission (NLC) for investigation and appropriate redress. The Defendant averred that the parties made representation before the NLC and the NLC reserved its decision on the complaint. The Defendant averred that while the parties were awaiting the decision of the NLC on the matter, the 1<sup>st</sup> Plaintiff commenced the construction of a perimeter wall around the said public access roads thereby seizing the same for itself and blocking access to the Defendants property (Plot No. 209/4349). The Defendant averred that the said wall has been erected by the 1<sup>st</sup> Plaintiff maliciously with the intention of frustrating the Defendant and its businesses. The Defendant averred that it had established a prima facie case against the 1<sup>st</sup> Plaintiff and also demonstrated that it will suffer irreparable harm if the orders sought are not granted. In its affidavit in support of the application, the Defendant annexed among others, a copy of its certificate of title for Plot No. 209/4349, a copy of a survey plan, Folio No. 63, Register No. 216 for the suit property, a copy of the submissions made by the Defendant before the NLC and photographs showing the wall that had been put up by the 1<sup>st</sup> Plaintiff. The Defendants’ application was opposed by the 1<sup>st</sup> Plaintiff through a replying affidavit sworn by Mohamed Hassan Maalim on 25<sup>th</sup> July, 2016.

The two (2) applications were argued together before me on 29<sup>th</sup> November 2016 when Ms. Lipwop appeared for the Plaintiffs and Mr. Otieno appeared for the Defendant. I have considered the two applications together with the affidavits filed in support of and in opposition thereto. I have also considered the submissions by the advocates who appeared for the parties and the authorities which were cited in support thereof. I will consider the two applications together as they are related and the determination of one, would dispose of the other.

The dispute between the parties revolves around the ownership of the parcel of land known as L.R No. 209/6497 (“the suit property”). The disputed perimeter wall is being put up around this property. The Plaintiffs have not denied that they are putting up the said wall. The Plaintiff have contended that the 1<sup>st</sup> Plaintiff is the registered proprietor of the suit property and that the said wall is being put up lawfully after the necessary approvals were obtained from the Nairobi City County. The Plaintiffs have denied that the suit property is a public road or a lane used to access Plot No. 209/4349 owned by the Defendant. In his replying affidavit sworn on 25<sup>th</sup> July, 2016 and filed in opposition to the Defendant’s application, the director of the 1<sup>st</sup> Plaintiff, Mohammed Hassan Maalim set out in detail the history of the suit property. The history of the suit property goes back to 1965 when the title was created. From the material on record, the suit property had changed hands several times before the same was transferred to the 1<sup>st</sup> Plaintiff by the 2<sup>nd</sup> Plaintiff on 14<sup>th</sup> December 2007. The original Grant No. I.R 20571 dated 28<sup>th</sup> January 1965 was surrendered to the Government of Kenya on 22<sup>nd</sup> May, 2001 in exchange for a new Grant No. I.R 86112 dated 2<sup>nd</sup> June 1999. Unlike the earlier Grant which prohibited development on the suit property and restricted its use to “a means of access to and from Land Reference Number 209/798”, the new Grant No. I.R 86112 did not have such restriction. The new Grant permitted development of shops, offices and flats on the suit property subject only to the approval of the Commissioner of Lands and the Local Authority. The Plaintiffs have placed evidence before the court showing that they obtained approval from the Nairobi City County to put up the wall in contention on the suit property.

On its part the Defendant has contended that the suit property is an access road which was reserved for

use by the owners of Plot No. 209/4349 to access the said property. The Defendant has accused the Plaintiffs of grabbing a public road of access and rendering its property inaccessible. In proof of its case against the Plaintiffs, the Defendant annexed to the affidavit of James Njuguna Ngururi in support of its application, a certificate of title for Plot No. 209/4349 dated 8<sup>th</sup> September, 1953 together with a Deed Plan dated 22<sup>nd</sup> May, 1953. The Defendant also annexed a survey plan, Folio No. 63 which gave rise to the said Deed Plan. From the said Deed Plan and Survey Plan, what is now the suit property was a 30 meter piece of land which ran adjacent to what was Plot No. 209/798R, Plot No. 209/4349 and Plot No. 209/3538. According to the Defendant, the position of the suit property on the ground should be as it was in 1953 when the Plot No. 209/4349 was created. The Defendant's contention is that the land which is now comprised in the suit property is still a lane and should remain as such.

I have considered the rival contentions by the parties. It appears to me from the material on record that after Plot No. 209/4349 was created in the year 1953, the area was re-planned and a new parcel of land was created between Plot No. 209/798 owned by the 1<sup>st</sup> Plaintiff and Plot No. 209/4349 owned by the Defendant. This parcel of land was created in the area which was hitherto referred as a lane. In the circumstances, it is not true that the suit property is a lane or a public road as claimed by the Defendant. The lane was closed way back on 28<sup>th</sup> January 1965 when the suit property was created. Whether or not the closure of the lane and the creation of the suit property were carried out lawfully are issues which this court cannot determine in the present applications. The same will have to await plenary hearing. As I have stated earlier, as at the time the 1<sup>st</sup> Plaintiff acquired the suit property from the 2<sup>nd</sup> Plaintiff on 14<sup>th</sup> December, 2007, the suit property had changed hands several times and the title for the suit property had been in existence for over 40 years. The Defendant has not placed any material before me showing that the creation of the suit property was carried out unlawfully and that the Plaintiffs were involved in the illegality. On the evidence before me, I am satisfied that the 1<sup>st</sup> Plaintiff is the registered proprietor of the suit property and that the suit property is not a public road. I am also satisfied that the construction of a perimeter wall which the 1<sup>st</sup> Plaintiff was carrying out on the suit property was lawful. The 1<sup>st</sup> Plaintiff being the owner of the suit property had a right to deal with the same in whatever manner deemed fit. The perimeter wall being put up by the 1<sup>st</sup> Plaintiff was approved by the Nairobi City County. There is no evidence that the construction complained by the Defendant was being carried out in a manner injurious to the Defendant's interest in Plot No. 209/4349. I have noted from Grant No. I.R 20571 annexed to the Replying Affidavit of Mohammed Hassan Maalim that the suit property was created in 1965 to serve Plot No. 209/798. There is no evidence that the Defendant used to access Plot No. 209/4349 through the suit property. Even if it is assumed, that the 1<sup>st</sup> Plaintiff was wrongfully putting up a wall on a public road as claimed by the Defendant, I am of the view that it was not open to the Defendant to forcefully enter the suit property and demolish the said wall. The Defendant cannot be a judge in its own cause.

For the foregoing reasons, I am satisfied that the Plaintiffs have established a prima facie case against the Defendant with a probability of success. I am also satisfied that the Plaintiff would suffer irreparable harm if the orders sought are not granted. The 1<sup>st</sup> Plaintiff risks being dispossessed of the suit property by the Defendant if the Defendant is not restrained from the activities complained of by the Plaintiffs. In view of the foregoing findings, the Defendant's application must fail. The injunction sought by the Defendant has no basis. The Defendant has in my view not satisfied the conditions for granting a temporary injunction.

The upshot of the foregoing is that I find merit in the Plaintiff's amended Notice of Motion dated 28<sup>th</sup> July, 2016. The same is allowed in terms of prayer 4 thereof. On the other hand, the Defendant's application by way of Notice of Motion dated 13<sup>th</sup> July, 2016 is dismissed.

The Plaintiff shall have the costs of both applications.

**Delivered and signed at Nairobi this 27<sup>th</sup> day of June, 2017**

**S. OKONG'O**

## **JUDGE**

### **Ruling Delivered in open court in the presence of:**

Ms. Lipwop for 1<sup>st</sup> Plaintiff

Ms. Lipwop for 2<sup>nd</sup> Plaintiff

N/A for the Defendant

Kajuju Court Assistant