



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

**AT MILIMANI**

**ELC CASE NO. 192 OF 2017**

**HUDSON KIHUMBA WANGUHU & 17 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**PAUL RICHU & 4 OTHERS as officials of**

**THOME V RESIDENTS WELFARE ASSOCIATION.....1<sup>ST</sup> DEFENDANT**

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

**RULING**

1. The applicants are owners of plots and homes within Thome V Estate in Nairobi. The applicant's brought a notice of Motion dated 21<sup>st</sup> March 2017, seeking the following reliefs:-

***i. Spent***

***ii. Spent***

***iii. Spent***

***iv. That the Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves or through their agents from erecting barriers in form of gates, spikes, walls ,ditches or in any other form whatsoever on road No. P 2262-Nairobi and P 1909-Nairobi within Thome V Estate in Nairobi or on any other access roads within Thome V Estate pending the hearing and determination of the main suit herein.***

***v. That the Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves or through their agents, servants, employees or representatives from denying the applicants access to their properties within Thome V Estate, Nairobi in and by whatever form or manner including the use of security guards and other agents pending hearing and determination of the main suit herein.***

***vi. That the Officer Commanding Station, Kasarani Police Station be and is hereby ordered to provide security and assist in and ensure enforcement of the order.***

***vii. That the cost of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.***

2. The first Respondent is a welfare association which operates under the provisions of its constitution. Some of its duties include ensuring that Thome V Estate is secure, provision of security lights to common areas, maintenance of roads within the estate among others. The association erected barriers and gates and in some instances maintained spikes in order to control and vet those who are entering and exiting the estate. In order to facilitate the association's activities, the Association resolved to charge each member a monthly fee in addition to certain other amounts payable once to carter for payment of security guards manning the gate and barriers and maintenance of the common areas.

3. The applicants complained to the Nairobi City County that access to their homes was being hindered by guards who were manning the gates and barriers. Their contention is that they are not members of the Association and that they are being forced to pay certain monies before the gates and barriers are opened for them. That in some instances they are forced to alight from their vehicles to open the gate for themselves at odd hours thus exposing themselves to carjackers and other criminals.

4. The applicants contend that they cannot be forced to join an Association to which they do not ascribe to. That when they complained to the Nairobi City County, the County gave the Association notice to remove the barriers and after the Association failed to remove the barriers, the County Officials came and pulled down the gates and carted them away. The gates were later brought back at the intervention of the former Governor of Nairobi County Dr Evans Kidero. The applicants also contend that the Association dug a trench across one of the roads to force the applicants to use the gates which had been erected. The applicants reported the incident to the local police who authorised them to refill the dug trench which they did. When the gates were brought back, the Association started putting them up. Their plea to police to intervene and stop this did not elicit any help. Instead the police started harassing the applicants threatening to arrest them.

5. The first respondent has opposed the applicant's application through grounds of opposition filed on 10/5/2017. The first respondent contends that the applicants' application has been overtaken by events in that the gates and barriers have already been erected. That the applicants' application is an abuse of the process of court which is only meant to shield the applicants from facing charges of malicious damage to property.

6. The second respondent has opposed the applicant's application through a replying affidavit sworn on 31/3/2017. The affidavit is sworn by the acting Chief Officer, Roads Public Works and Transport, Nairobi City County. The second respondent admits that indeed they received a complaint from some residents of Thome V Estate who raised their concern with regard to erection of gates and barriers on certain roads within the estate. The county issued a notice to the first respondent to remove the barriers which had been erected without following the law. The gates were later removed and carried away. They were however returned back with advice that the first respondent gets relevant permission to put up the gates and barriers subject to concurrence of the affected parties.

7. I have carefully considered the applicant's application as well the opposition to the same by the respondents. This being an application for injunction, the principles for grant of the same are now well settled following the celebrated case **of Giella Vs Cassman Brown Co.(1973)EA 358**. An applicant has to demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be issued unless otherwise the applicant might suffer loss which will not be compensated in damages. If the Court is in doubt, it will decide the application on a balance of convenience.

8. In the instant case, there are over 200 home and plot owners in Thome V Estate. The first respondent's objective of erecting the gates and barriers was to ensure that the estate is secure. This is clear from the documents annexed to the applicant's application. One cannot ensure security if there is no means of controlling those who are entering or exiting the estate. Gates and barriers cannot be left without guards manning them. These guards have to be paid and this pay can only come from the residents.

9. The applicants are contending that they are being forced to pay amounts when they have not been consulted and that above all, they are not members of the Association and cannot be forced to join the same. Their other concern is that the barriers were erected without permission from the relevant

authorities. Their other complaint is that they are forced to open the gates for themselves thus exposing themselves to carjackers. There is no doubt that the applicants themselves are aware that there are security concerns in the area. This is why they fear that they may be carjacked when they leave their cars to go and open the gate by themselves. The reason why the applicants open gates for themselves is that they have not made any contribution towards payment of the guards who man the gates.

10. The applicants are contending that they are not members of the first respondents Association and that they cannot be forced to join the Association. This is perfectly so and article 36 of the Constitution is clear on that. The applicants want the gates removed permanently. They are contending that security is a function of the National Government and that therefore the gates should not be there. Security is a concern of not only the National Government but also all citizens. This is why we have community policing and the Nyumba Kumi Initiatives.

11. The first respondent's gates which were taken were returned and the first respondent was advised to seek permission in accordance with section 49 of the Kenya Roads Act. The gates which were removed have since been put back. There is no evidence that these gates were put up without the permission from the relevant authorities. In granting an injunction, the applicant must not only demonstrate that he has a prima facie case. The court in granting or declining to grant the injunction has to weigh whether the grant of the injunction will cause more harm than it can prevent. In other words the court has to consider which side will suffer most.

12. The main objective of erecting the gates is to enhance security of the area. Majority of the residents are for the gates. It is only a few like the applicants who do not want the gates. If an injunction were to be given, it will cause more harm than it can prevent. It is common knowledge that in all estates, there are these barriers and their sole purpose is to enhance security by controlling the movement in and out of those estates. The applicant cannot seek to have the gates permanently removed when they themselves admit that there are real security challenges. There is need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Article 24 of the Constitution is clear on this. If there is justification for limiting certain freedoms and rights, that can be done in accordance with the law. This is why the Kenya Roads Act, allows persons or associations to erect security barriers on roads. It is clear that where such barriers are put up by Associations such as in this case, not all residents of the area are members but those non-members have to put up with those limitations because they are justifiable in an open and democratic society. I therefore find that the applicants have not only failed to show that they have a prima facie case but that an injunction cannot be given in the circumstances. I find the applicant's application to be lacking in merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **12<sup>th</sup>** day of **October, 2017**.

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Mulaku for Mr Namada for Plaintiffs

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**