



Kinyanjui & 13 others v Richu & 4 others as officials of Thome V Residents Welfare Association & another (Environment and Land Case Civil Suit 192 of 2017) [2024] KEELC 4359 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 192 OF 2017
OA ANGOTE, J
MAY 30, 2024**

BETWEEN

- KENNETH KIBATHI KINYANJUI 1ST PLAINTIFF**
- GEORGE WARUHIU 2ND PLAINTIFF**
- ISAIAH NGENOH 3RD PLAINTIFF**
- DOUGLAS MUTHUI WANGUO 4TH PLAINTIFF**
- JANE WARUINGE 5TH PLAINTIFF**
- EMILY MBUGUA 6TH PLAINTIFF**
- MARGARET WANJIRU KIARIE 7TH PLAINTIFF**
- NJUGUNA GITHURI 8TH PLAINTIFF**
- LUCY NJERI 9TH PLAINTIFF**
- EVELYNE KIBATHI 10TH PLAINTIFF**
- WILLY MAINA 11TH PLAINTIFF**
- GEORGE MUNGAI 12TH PLAINTIFF**
- GEORGE ODENYO 13TH PLAINTIFF**
- ANTONY KAREU MURAGE 14TH PLAINTIFF**

AND

- PAUL RICHU, KIMANI MBUGUA, BEN RUHI KANYI, DAVID NJUGUNA, ALEX MAGEMBE AS OFFICIALS OF THOME V RESIDENTS WELFARE ASSOCIATION 1ST DEFENDANT**
- CITY COUNTY OF NAIROBI 2ND DEFENDANT**



JUDGMENT

1. Through an Amended Complaint dated 18th May 2022, the Plaintiffs have sought for the following reliefs:
 - a. A permanent injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents, servants, employees or representative from erecting barriers in the form of gates, spikes, walls, ditches or in any other form whatsoever on Road No. P2262-Nairobi and P1909-Nairobi within Thome V Estate in Nairobi or on any other access roads within Thome V Estate without following due process.
 - b. A permanent injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents, servants, employees or representatives from denying the Plaintiffs access to their properties within Thome V Estate, Nairobi in whatever form or manner.
 - c. A permanent injunction restraining the 2nd Defendant from authorizing erection of barriers in the form of gates, spikes, walls, ditches or in any other form whatsoever on Road No. P2262- Nairobi and P1909-Nairobi within Thome V Estate in Nairobi or on any other access roads within Thome V Estate without following due process and without the involvement and consent of the Plaintiffs as property owners in the effected land section.
 - d. A declaration that the existing gates and barriers as erected and maintained by the 1st Defendant are illegal and unlawful and are hindrances to the Plaintiffs right of movement, ingress and egress from their homes and properties and should be ordered removed by the 1st Defendant and in default, by the 2nd Defendant and in default by the Plaintiffs under the supervision of OCPD and OCS Kasarani Police Station and Division at the 1st Defendant's Cost.
 - e. The Defendant's individually, jointly and severally be condemned to pay damages to the Plaintiffs.
 - f. Cost and interest of this suit.
2. It is the Plaintiffs' case that they are the registered owners of land and homes in Thome V Estate in Nairobi. They deponed that they enjoyed peaceful ownership of and access to their properties until 2016, when the 1st Defendant began to make it difficult for those who are not members of the 1st Defendant, to enjoy their constitutional right of free movement in and out of their homes.
3. The Plaintiffs averred that without consulting the Plaintiffs, the 1st Defendant demanded that all property owners in the Estate become members of the 1st Defendant contrary to the law, and that the 1st Defendant demanded that each homeowner first pays a sum of Kshs. 65,000 for development and a further Kshs. 4,000 every month for security.
4. The Plaintiffs aver that the 1st Defendant erected two gates on two public access roads on the eastern part of the Estate, namely P2262-Nairobi and P1909-Nairobi and hired security guards to man them. It is their case that the gates were erected without the approval of the 2nd Defendant and contrary to the law and that in September 2016, the 1st Defendant placed heavy spikes across the gates and caused them inconvenience.



5. They claim that they have been forced to pay the demanded sums and those that have failed to do so have been denied access to their gates and subjected to risk and embarrassment and that in October 2016 and 24th December 2016, the 1st Defendant, without any justification or notice to the residents, hired a wheel loader and dug a huge ditch across Road No. 2262- Nairobi to force all residents to use the gates even if the route was inconvenient.
6. According to the Plaintiffs, despite the 2nd Defendant's order for removal of the gates through correspondence in January and March 2017, the 1st Defendant failed to comply, leading to forceful demolition by the 2nd Defendant on 8th March 2017. However, it was averred, the gates were returned to the 1st Defendant on 18th March 2017 by the 2nd Defendant.
7. The Plaintiffs averred that the 1st Defendant's actions amount to a blatant breach of their constitutional rights including the right to quiet enjoyment of their properties, the right to freely enter and exit their homes, the right and freedom to chose to belong or not to belong to a society, and the right to be consulted and to participate in any decision-making process in which their interests are to be affected.
8. The 1st Defendant opposed the suit vide a Statement of Defence dated 13th February 2020. It averred that there has never been change in its management since 2005, and therefore the allegation that all property owners were forced to secure membership is unfounded.
9. According to the 1st Defendant, the sum of Kshs. 65,000 was for construction of a police post while Kshs. 3,000 was for hiring security officers because there was rampant insecurity in the area and that the monies collected for the construction of a police post was put in a bank account in the name of the association.
10. The 1st Defendant urged that the gates were a security measure sought due to rising insecurity in the estate and that the gates were erected to avert insecurity to the residents.
11. In its Defence dated 15th April 2021, the 2nd Defendant averred that when it received a complaint letter from the Plaintiffs regarding the erection of gates by the 1st Defendant, it took appropriate actions and wrote to the 1st Defendant on 27th January 2017 and that in the letter, it informed the Plaintiffs it will not tolerate or allow any illegal gates to be erected on county roads without the requisite approvals. They then issued a seven-day notice to the 1st Defendant to remove the illegally erected gates and to follow due process.
12. The 2nd Defendant averred that it has not directly or indirectly caused an infringement or breach of the Plaintiffs' constitutional rights as alleged by the Plaintiffs.

Hearing and Evidence

13. PW1, Margaret Wanjiru Kiarie, relied on her witness statement dated 18th May 2022 as her evidence in chief. In her statement, she averred that the Plaintiffs were all registered owners of land in Thome V Estate but were not members of the 1st Defendant Association; that her property is LR No. 13330/201 and that she has lived in Thome V Estate for 25 years.
14. PW1 deponed that the Plaintiffs enjoyed peaceful ownership and access to their properties until 2016 when the 1st Defendant impeded their right to free movement and that over time, the 1st Defendant has insisted that membership to the Association is mandatory to all residents of Thome V and has subjected them to pay levies they have not consented to, and rules and regulations they are not party to.
15. She testified that the 1st Defendant erected two gates on two public access roads P2262-Nairobi and P1909-Nairobi, dug gullies across other roads within the Estate for security purposes, hired security



- guards to man them and demanded a development fee of Kshs. 65,000 and a monthly fee of Kshs. 4,000 from all residents, including non-members.
16. According to PW1, the said amounts were to be paid into the personal accounts of the officials of the 1st Defendant despite the 1st Defendant's Association being registered; that some of the Plaintiffs have reluctantly made the payments to avoid inconvenience and embarrassment and that the gates and gullies erected without the consent of the residents and without the approval of the 2nd Defendant are contrary to law and have interfered with the estate's infrastructure in water and electricity supplies.
 17. PW1 stated that non-members/defaulters and their guests are inconvenienced into having to open external gates even at wee hours of the night, subjecting them to insecurity against their persons; that pedestrians are also unable to get into and out of the estate without the 1st Defendant's consent and that the 1st Defendant has further subjected the Plaintiffs to suffering without justification by erecting a board next to the gates and writing names of perceived defaulters subjecting them to embarrassment.
 18. PW1 averred that despite intervention from the 2nd Defendant, who through a letter dated 27th January 2017, declared the 1st Defendant's installation of gates illegal and unauthorized, the 1st Defendant refused to comply leading to forceful removal of the offending gates by the 2nd Defendant. However, it was stated, the 2nd Defendant later unlawfully allowed the gates back, which continue to be maintained by the 1st Defendant to date.
 19. She stated that in September 2016, the 1st Defendant placed heavy spikes across the gates which inconvenienced them further, which spikes were only removed at the intervention of the police; that in October 2016 and on 24th December 2016, the 1st Defendant without notice or justification, hired a wheel loader and dug a ditch across Road no. 2262-Nairobi within the estate to force all residents to use the gates.
 20. PW1 testified that they started their own Association, Thome V East Welfare Association in 2017, which has about 30 members. PW1 produced three bundle of documents.
 21. PW2, Antony Kareu Murage also relied on his witness statement dated 18th May 2022. He averred that he is a property owner of LR No. 13330/ 193 in Thome V Estate and has lived there for 25 years; that he is not a member of the 1st Defendant's Association, but is the Chairman of another association named Thome V East Welfare Association and that the 2nd Defendant has allowed him to carry out auto diagnostic and auxiliary services from his property.
 22. PW2 averred that he is aggrieved by the 1st Defendant's actions of denying him access to his property, including his family and that even if the demanded amounts are for security, the same is too expensive and non-members of the 1st Defendant cannot demand accountability as they have no access to the 1st Defendant's accounts.
 23. PW2 stated that despite the lack of approval from the 2nd Defendant, the 1st Defendant in July and October 2021 dug a ditch across a public road in the estate and attempted to install a barrier, which efforts were thwarted by the 2nd Defendant's officers.
 24. During cross-examination PW2 stated that there were about 600 plots, which have around four associations; that they have a police post inside Thome V Estate and that they have no security issues.
 25. When the Plaintiffs closed their case, the 1st Defendant sought an adjournment for the Defence hearing on the ground that the 1st Defendant's witness was unwell and unable to appear before court. The court declined to grant the adjournment and closed the Defendants' case.

Submissions



26. In the Plaintiff's submissions dated 1st February 2024, Counsel for the Plaintiff submitted that the right to own, access and enjoy private property is a constitutional right that can only be taken away by the state under a law and by the voluntary acquiescence of the citizen by agreement.
27. It was submitted that there are other associations in the Thome residency and the Plaintiffs belong to their own association, Thome V East Neighborhood Association; that these Associations are served by common public utility facilities, including public access roads; that their section was not developed as a gated community and that individuals acquired their own property and built private residences.
28. The Plaintiff's Counsel argued that the 1st Defendant is composed of private individuals who have formed an association, and they have no right to police the lives of their fellow citizens by erecting barriers across public roads and charging them to access their homes.
29. Counsel submitted that there is no dispute that the subject matter roads are public roads under the authority of the Kenya Roads Board, as provided for in the *Kenya Roads Act* 2007; that the 2nd Defendant, the Nairobi County Government, is the manager of the said roads and that the 1st Defendant did not seek the authority of the 2nd Defendant and failed to consult with the Plaintiffs before erecting the gates.
30. Counsel's final submission was that the Plaintiff has sought for damages of Kshs. 500,000 for the ridicule and embarrassment suffered, having to come out of their vehicles in the rain or late at night to open the barriers by themselves as well as having to open for their own visitors in the midst of loud announcements that they do not pay service charge.
31. Counsel relied on the cases of Baburam & 3 Others (Suing as the Legal Representatives of the Estate of Rael Chemeli Baburam) vs Suereca East Africa Limited & Another [2022] eKLR, Jaswinder Singh Jabbal vs Mark John Tilbury & another [2019] eKLR and Tim Mwai & 2 Others vs Extra Mile Limited [2018] eKLR.
32. The 1st Defendant's Counsel, through submissions dated 15th February 2024, relied on the case of Hudson Kihumba Wanguhu & 17 others vs Paul Richu & 5 others [2017] eKLR, where the court declined to grant an injunction to remove the gates.
33. Counsel submitted that PW2, stated that Thome V Estate has over 600 homeowners, out of which only 18 have filed this suit; that this shows that the majority of the residents therefore have no problem with the gates and walls and that this was due to a spike of insecurity in the area.
34. Counsel relied on the case of Kirinya M. Mwenda vs Runda Water Limited & Another [2014] eKLR where the court held that the rights of individual residents must be limited by the rights of the common good of other residents; that the witnesses confirmed that they have always enjoyed access to their property and that the gates and barriers are only meant as a security measure to keep off intruders and security threats.
35. It was Counsel's submission that should the court grant the injunction orders sought by the Plaintiffs, it will cause irreparable suffering to the majority of the residents as they will be exposed to insecurity.
36. In their submissions dated 20th February 2024, Counsel for the 2nd Defendant submitted that the Plaintiffs' suit against the 2nd Defendant offends Order 2 Rule 15(1) of the Civil Procedure Rules; that the Plaintiffs' witnesses openly stated that they did not have a claim against the 2nd Defendant and that the Plaintiff does not demonstrate how the 2nd Defendant violated the Plaintiffs' rights.
37. Counsel argued that the 2nd Defendant has been forced to defend a frivolous suit at a huge cost and that the suit should be dismissed with costs.



Analysis and Determination

38. This court has considered the pleadings, testimony and submissions in this matter. The following issues arise for this court's determination:
- a. Whether the 1st Defendant lawfully erected barriers on P2262 Nairobi and P1909-Nairobi.
 - b. Whether the 1st Defendant has infringed on the Plaintiffs' rights.
 - c. The orders which this court should issue.
39. The Plaintiffs' case is that they are property owners in Thome V Estate, and they are not members of the 1st Defendant, Thome V Residents Welfare Association. They assert that some of them are members of another association, Thome V East Neighborhood Association.
40. According to the Plaintiffs, the 1st Defendant has infringed on their right of movement by installing barriers, gates, gullies and walls without their consent; that they have required them to pay an initial sum of Kshs. 65,000 for development and a monthly fee of Kshs. 4,000 for security; and that they have inflicted harm and embarrassment upon them by requiring to open the gates for themselves and their guests, at their risk and inconvenience.
41. The Plaintiffs further assert that the said barriers have been installed on public roads, without the consent of the 2nd Defendant. PW1 averred that despite intervention from 2nd Defendant, who through a letter dated 27th January 2017, declared the 1st Defendant's installation of gates illegal and unauthorized, the 1st Defendant refused to comply leading to forceful removal of the offending gates by the 2nd Defendant.
42. The 1st Defendant has opposed the suit on the basis that the gates are a security measure sought due to rising insecurity in the estate; that the Kshs. 65,000 was for construction of a police post while Kshs. 3,000 was for hiring security officers because there was rampant insecurity in the area and that the monies collected for the construction of a police post was put in a bank account in the name of the Association and that there are no personal names in the bank account.
43. The 2nd Defendant, on its part averred that when it received a complaint letter from the Plaintiffs regarding the erection of gates by the 1st Defendant, it took appropriate actions and wrote to the 1st Defendant on 27th January 2017.
44. They averred that in the letter, they stated that the 2nd Defendant would not tolerate or allow any illegal gates to be erected on county road without the requisite approvals. They then issued a seven-day notice to the 1st Defendant to remove the illegally erected gates and to follow due process.
45. The 2nd Defendant has also averred in the Defence that the Plaintiffs have not demonstrated how it has infringed on their rights. In their submissions, they claim that the Plaintiff's suit against it offends Order 2 Rule 15(1) of the Civil Procedure Rules.
46. Under Order 2 Rule 15(1) of the *Civil Procedure Act*, the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action. The 2nd Defendant has not sought, through its Statement of Defence, to strike out the Plaintiffs' suit or to amend the same to be excluded. It is trite that parties are bound by their pleadings, and that submission, by their nature, are not pleadings at all.



47. In any case, it is apparent, that the Plaintiffs have in fact sought a relief against the 2nd Defendant. In the Plaint, the Plaintiffs have sought for a permanent injunction to restrain the 2nd Defendant from allowing the installation of barriers, spikes or walls on the access roads, without following due process and without the involvement and consent of the Plaintiffs as property owners in the effected land section.
48. The 2nd Defendant has therefore been properly joined as a Defendant to the suit, in accordance with Order 1 Rule 3 of the Civil Procedure Rules 2010, which states that a person may be joined as a Defendant against whom any right to relief arising out of an act or transaction is alleged to exist.
49. Section 49 of the [Kenya Roads Act](#) prescribes the process to be followed on installing structures on public roads. It provides:
- “(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission-
- (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
 - (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
 - (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.
- (2) An Authority may, in its discretion, give or refuse to give permission under this section.
- (3) When giving permission the Authority may prescribe-
- (a) the specifications with which the structure, other thing, alteration or addition for which permission is requested must comply;
 - (b) the manner and circumstances in which, the place where, the conditions on which the structure, other thing, alteration or addition may be erected, constructed, laid, established or made; and
 - (c) the obligations to be fulfilled by the owner in respect of the land on which the structure, other thing, alteration or addition is to be erected, constructed, laid, established or made.
- (4) Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an



Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.

- (5) If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.
- (6) A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both.

50. It is not disputed that the 1st Defendant has undertaken various constructions including installation of barriers, on two public roads, being P2262-Nairobi and P1909-Nairobi, which run through the section known as Thome V Estate. This has not been denied by the 1st Defendant and was confirmed by the 2nd Defendant in its Statement of Defence.
51. The Plaintiffs adduced two letters sent by the 2nd Defendant to the 1st Defendant. The first letter is dated 27th January 2017 and signed by Eng. Michael G. Ngari, Chief Officer Transport, Roads and Public Works.
52. In the letter, the Chief Officer acknowledged receipt of a letter from the 1st Defendant dated September 2016 which showed that while the 1st Defendant's application was under review by the County, their neighbours had written and objected to the presence of the already erected gates.
53. The 2nd Defendant stated in the letter that it would not allow illegally erected gates to be erected on county roads without the approval of the county. The 1st Defendant was therefore ordered to remove the gates with immediate effect. In the letter, the 1st Defendant stated that for the barriers and gates to be maintained, the 1st Defendant must sign agreements with all their neighbours and get county approvals for erecting the gates.
54. The 2nd Defendant issued a seven-day notice from 27th January 2017 for the parties to agree on the management of the gate with neighbours, failure to which it would remove the offending gates.
55. The second letter by the 2nd Defendant to the 1st Defendant is dated 6th March 2017. The letter, signed by F.N. Karanja, the Acting Chief Officer, Roads, Public Works and Transport, indicated that the security gates should have the express authority of the Director of Roads Nairobi City County in order to comply with the [Kenya Roads Act](#) and that the erection of the gates could only be allowed where all the affected residents were in agreement as regards location and management of the security gates. In this case, there was no such agreement in place.
56. These letters by the 2nd Defendant indisputably established that the gates installed by the 1st Defendant were unlawful and illegal. These letters also confirmed that this illegality was brought to the attention of the 1st Defendant.
57. The 1st Defendant has not established its compliance with the 2nd Defendant's notices issued on 27th January 2017 and 6th March 2017, with respect to reaching consensus with the Plaintiffs and other



- neighbours opposed to the gates. Further, the 2nd Defendant has not proved that the re-installation of the gates and the barriers on the roads of access was pursuant to the 2nd Defendant's compliance with the terms of its notices.
58. It is then clear that the 1st Defendant has been operating with impunity and has made no effort to obtain the requisite approvals from the Director of Roads, Nairobi City County, in order to regularise the installation of the barriers in Thome V Estate. The construction of the gates and barriers in question are therefore illegal and unlawful.
59. The right to freedom of movement is set out in Article 39 of *the Constitution*. Subarticle (3) articulates the right to enter, remain in and reside anywhere in Kenya.
60. This court notes that this right has not been denied, but with the erection of the gates and barriers along the roads of access, there is an added limitation, due to the delay in the time taken to open and close the same.
61. It is also noteworthy that the prevailing circumstance is that the 1st Defendant has instructed the guards not to open the gates for defaulters of the monthly security fee. This requires non-members and those not paying the monthly fee to open the gates for themselves and for their guests, at all hours of the night and in all weather conditions, risking the security of such persons.
62. Article 24(3) of *the Constitution* provides for the limitation of rights and freedoms by the state or person, provided that the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied. These requirements, set out in Article 24(3), include the following relevant factors:
- a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”
63. Kimondo J, in *George Munge v Sanjeev Pancho Sharma & 3 Others* [2012] eKLR took judicial notice that residential associations have developed to fill a void left by the city council or security agents. The court however cautioned that the mandate of these associations should not infringe upon private property rights or the right of the public to access or use public or city roads, and that voluntary associations cannot enforce a local rule in an arbitrary, capricious, oppressive or unreasonable manner.
64. Obaga J in an earlier ruling in this case, *Hudson Kihumba Wanguhu & 17 others vs Paul Richu & 4 Others as officials of Thome V Residents Welfare Association and the City County of Nairobi* [2017] eKLR also noted that in all estates, there are barriers whose sole purpose is to enhance security by controlling movement in and out of those estates.
65. Although this court is persuaded that the remedy sought by the Plaintiffs to remove the gates entirely would visit greater harm to the residents of Thome V Estate, the erection of the said gates should comply with the due process which this court has summarized above.



66. It is further not unreasonable for the Plaintiffs to pay applicable fees for the common service enjoyed of security, maintenance and upkeep of the Estate, even though they are not members of the Association providing these services. This position was ably stated by Majanja J in *Kiriinya M. Mwendia vs Runda Water Limited & Another* [2014] eKLR as follows:

“The petitioner is not a member of the Runda Association but he is a beneficiary of the common services it provides including security, maintenance and upkeep of the Estate it is not unreasonable for him to pay the fees applicable to all the members of the Association for the services which he receives. To insist that he pays for commons services provided to all residents is not a violation of his freedom of association protected under Article 36 of *the Constitution*.”

67. The right to freedom of association under Article 36 of *the Constitution* is also in issue in this suit. This prescribes the right to form, join and participate in the activities of an association. It also includes the right not to be compelled to join an association.

68. The facts in this case are that Thome V Estate was not established as a gated community. Land owners independently bought and developed their respective properties. The 1st Defendant’s Association and Thome V Neighbourhood Association were later established to address common challenges such as security.

69. The Plaintiffs have asserted that they are not members of the 1st Defendant’s Association, but that the 1st Defendant installed gates, gullies and walls in Thome V Estate, without their consent, and has required them to contribute a one-time development fee of Kshs. 65,000 and a monthly fee of KShs. 4,000.

70. The 1st Defendant had countered that the Plaintiffs are the minority, with the majority of more than 500 homeowners in Thome V Estate having no problem with the gates and walls. In *Kiriinya M. Mwendia vs Nairobi City County & 2 others* [2018] eKLR, the court cautioned that even though a majority of the residents of an estate are members of an association, such association is still bound to uphold *the Constitution* and its tenets in its activities.

71. The Plaintiffs have produced a copy of the 1st Defendant’s constitution which provides that it is mandatory for all owners of plots and homes to be members of the Thome V Residents Association. The same constitution requires contribution of members towards shared projects being KShs. 45,000 and maintenance of shared services such as roads, lighting and water, being KShs. 20,000. It also requires a monthly fee of Kshs. 3,000 for the provision of security and maintenance of shared services.

72. This court has already found above the gates that were installed by the 1st Defendant were unlawful. Considering that the Estate was not established as a gated community, and that the associations were established in Thome Estate after the residents had bought their properties, the said property owners cannot be forced to join a particular association. These associations having been established voluntarily, their membership ought to equally voluntary.

73. While the purposes of an Association are noble, the 1st Defendant cannot purport to impose terms that are not agreeable to other residents in the Estate. This would be contrary to the Plaintiffs’ right to fair administrative action, under Article 47 of *the Constitution*, which provides that:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

74. Section 4(3) of the Fair Administrative Actions Act 2015 further provides that:

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

75. The failure by the 1st Defendant to afford the Plaintiffs and other non-members notice of the intention to install the gates as well as information and evidence to support its decision to charge Kshs. 65,000 and the monthly fee of Kshs. 4,000 impugned on the Plaintiffs’ right to fair administrative action.

76. In conclusion, this court finds that the gates and barriers erected on the public roads in Thome V Estate, being P-2262 Nairobi and P 1909 Nairobi were illegally and unlawfully erected. This court also finds that the 1st Defendant breached the Plaintiffs’ right to fair administrative action by failing to issue notice and to involve the Plaintiffs while arriving at the payment terms for the installation of the gates and other common services such as security.

77. For those reasons, the court makes the following final orders:

- **a. A declaration be and is hereby issued that the existing gates and barriers as erected and maintained by the 1st Defendant are illegal and unlawful.**
- **b. That the 1st Defendant to remove the gates and barriers on all the public access roads within the Estate until such a time that it gets written approval of the 2nd Defendant, and the Plaintiffs and the majority of the residents of Thome V, including non-members of the 1st Defendant, through a mediation process, with the aim of reaching an agreement on the terms of the use of the barriers.**
- **c. Costs of this suit to be borne by the 1st Defendant.**

Dated, signed and delivered virtually in Nairobi this 30th day of May, 2024.

O. A. Angote

Judge

In the presence of;



Mr. Shikoli for Mr. Mwinzi for 1st Defendant

Ms Omamo holding for Namada for Plaintiff

Ms Cheruiyot for 2nd Defendant

Court Assistant: Tracy

