



**Guled Housing Company Limited & another v Accra Trading Centre Limited  
(Environment & Land Case 805 of 2016 & Environment and Land Case Civil Suit  
806 of 2016 (Consolidated)) [2023] KEELC 17369 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17369 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 805 OF 2016 & ENVIRONMENT  
AND LAND CASE CIVIL SUIT 806 OF 2016 (CONSOLIDATED)**

**SO OKONG'O, J**

**APRIL 18, 2023**

**BETWEEN**

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

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

**AND**

**ACCRA TRADING CENTRE LIMITED ..... DEFENDANT**

**RULING**

**Background:**

1. I will hereinafter refer to Guled Housing Company Ltd. and Nararashi Wholesalers (AK) Ltd. who are the Plaintiffs in ELC No. 805/2016 as “the Plaintiffs” and Accra Trading Centre Ltd. who is the Plaintiff in ELC No. 806/2016 as “the Defendant” for ease of reference. The Plaintiffs brought an application herein by way of an 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 any way 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 had 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. The 1<sup>st</sup> Plaintiff thereafter 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 said acts of trespass unless restrained by the court.

2. The Defendant also brought an application in ELC No. 806 of 2016 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, Guled Housing Company Ltd. from constructing a perimeter wall on a 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 referred to as “Plot No. 209/4349”) and L.R No. 209/798R (hereinafter referred to as “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.
3. The Defendant’s application that was supported by the affidavit sworn by James Njuguna Ngururi was brought on the grounds that the Defendant was the owner of Plot No. 209/4349 while the 1<sup>st</sup> Plaintiff was the owner of Plot No. 209/798 R. The Defendant contended that Plot No. 209/4349 and Plot No. 209/798 R were adjacent to each other and were being accessed through inner lanes and access roads which were public roads. The Defendant contended that the 1<sup>st</sup> Plaintiff had 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 (hereinafter referred to only as “NLC”) for investigation and appropriate redress. The Defendant averred that the Defendant and the 1<sup>st</sup> Plaintiff made submissions 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 construction of a perimeter wall around the said public access roads thereby seizing the same for itself and blocking access to the Defendant’s property (Plot No. 209/4349). The Defendant averred that the said wall had been erected by the 1<sup>st</sup> Plaintiff maliciously with the intention of frustrating the Defendant and its businesses.
4. The Plaintiffs and the Defendant opposed each other’s application and the two applications were heard together. In a ruling delivered on 27<sup>th</sup> June 2017, the court stated as follows in part:

“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 Plaintiffs 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.

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 application before the court:**

5. What is now before the court is the Defendant's Notice of Motion application dated 14<sup>th</sup> August 2017 seeking the following orders:
  1. That the Honourable Court be pleased to review, vacate and/or set aside the ruling of the Honourable Justice S. OKONG'O made on 27<sup>th</sup> June 2017.
  2. That costs of this Application be provided for.
6. The application that was brought under order 45 rule 1(1) of the *Civil Procedure Rules* was based on the ground of discovery of a new important matter/evidence namely, the ruling of the National Land Commission(NLC) on the dispute between the parties made on 20<sup>th</sup> December 2016. The Defendant averred that the said ruling followed a complaint that it had lodged with the NLC about the illegal conversion of public roads/lanes to private property in the Central Business District area in Nairobi City and specifically, L.R No.209/6497(the suit property) and L.R No.209/13769/1. The Defendant averred that in the said ruling, NLC found that the suit property was and had been public utility land planned and alienated as a public access road and any allocation of the same was a nullity. The Defendant averred that NLC directed that the title for the suit property be revoked.
7. The Defendant averred that the court delivered its ruling of 27<sup>th</sup> June 2017 without considering the said decision of the NLC. The Defendant averred that the said ruling of the NLC had just come to its attention and that the same could not have been brought to the attention of the court before the ruling. The Defendant averred that it was in the interest of fairness and justice that the ruling of the court made on 27<sup>th</sup> June 2017 be reviewed and/or varied. The Defendant averred that it was apprehensive that its property was under threat of being denied access due to the perimeter wall that the 1<sup>st</sup> Plaintiff was constructing on a public road illegally occupied by the Plaintiffs. The Defendant averred that the application was made in good faith and should be allowed to enable these suits to be expeditiously heard and determined.
8. The application was opposed by the Plaintiffs through a replying affidavit sworn by Mohamed Hasan Maalim. The Plaintiffs averred that the 1<sup>st</sup> Plaintiff was the registered owner of the pieces of land situated in the City of Nairobi known as L.R No. 209/798 and L.R No. 209/6497(the suit property). The Plaintiffs averred that the suit property was not a public road and/or an access lane to private property. The Plaintiff averred that the decision of the NLC dated 14<sup>th</sup> August 2017 was erroneous and bad in law as it failed to take into account the following material facts and evidence;
  - i. That the suit property was created when the narrow 30ft lane between L.R.209/798 and L.R.209/4349 was vacated and the road was closed by the Commissioner of Lands.
  - ii. That L.R No. 209/6498 the adjacent parcel of land was allocated to Social Services League by a letter of allotment dated 3<sup>rd</sup> February 1964.



- iii. That on 29<sup>th</sup> July 1964, the Director of Survey duly approved the closure of the said road and issued a new grant with respect to L.R No. 209/6469 in favour of Kenya Breweries Ltd. to use as private access to the rear facilities on L.R No. 209/798.
9. The Plaintiffs averred that there had been no discovery of any new important fact or evidence. The Plaintiffs averred that from the material on record L.R No. 209/3538 no longer existed as the same was amalgamated with a section of the lane in dispute to become L.R No. 209/6498 and that there had never existed L.R No. 209/13769/1 since L.R No. 209/798 (to which the 1<sup>st</sup> Plaintiff was the registered owner) had never changed its shape or extent since creation.
10. The Plaintiffs averred that under article 67 (d) of *Constitution* the NLC could only make recommendations to appropriate authorities. The Plaintiffs averred that the recommendations of the NLC were not binding upon the court. The Plaintiffs averred that the Defendant had not identified any new important matter that met the threshold provided under Order 45 of the *Civil Procedure Rules*. The Plaintiffs averred that the application lacked merit and should be dismissed with costs.
11. The Plaintiffs filed a further affidavit also sworn by Mohamed Hasan Maalim on 9<sup>th</sup> May 2018. In the affidavit, the Plaintiffs contended that by another decision contained in its letter dated 11<sup>th</sup> April 2018, the NLC vacated and/or set aside its earlier determination made on 7<sup>th</sup> February 2018 that had declared the suit property a public access road. The Plaintiffs averred that the NLC reviewed its earlier decision for reasons contained in the said letter. The Plaintiffs averred that the Defendant's application had no merit in as it was based on the earlier erroneous determination by the NLC.
12. The Defendant filed a further affidavit sworn on 15<sup>th</sup> September 2020 by its director, James Njuguna Ngururi. In the affidavit, the Defendant averred that through its ruling dated 27<sup>th</sup> June 2017, the court granted the Plaintiffs a temporary injunction restraining the Defendant from entering, trespassing upon, pulling down and/or removing structures or in any way interfering with the ongoing construction of a boundary wall and improvements on the suit property or in any way interfering with the Plaintiffs' quiet possession of the suit property. The Defendant averred that when the ruling was delivered, the Defendant had filed a complaint with the NLC seeking a review of grants and dispositions of L.R 209/6497(the suit property) and L.R No. 209/13769/1. The Defendant averred that the complaint challenged the legality of the suit property and L.R No. 209/13769/1 which were owned by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively. The Defendants averred that at the time the said ruling was delivered, the NLC had not determined the complaint by the Defendant against the Plaintiffs.
13. The Defendants averred that the NLC determined the complaint in its Ruling dated 20<sup>th</sup> December 2016 in which it declared that the suit property was and had always has been a public utility land planned and alienated as a public access road and that any allocation of the same was a nullity and recommended that the title for the suit property be revoked. The Defendants averred that in a letter dated 11<sup>th</sup> April 2018 addressed to the Defendant, the NLC gave a contradictory ruling that on 8<sup>th</sup> March 2018, the NLC following emergence of new evidence held that the suit property had never been a public road.
14. The Defendant averred that it challenged the said decision by the NLC rendered through the said letter dated 11<sup>th</sup> April 2018 by way of Judicial Review in ELC JR. No. 29 of 2018, *Accra Trading Centre Limited v. National Land Commission, Chief Land Registrar and Guled Housing Company Limited*. The Defendant averred that it sought among others; an order of certiorari to remove into this court for purposes of being quashed the decision of the NLC made during its review committee meeting held on the 8<sup>th</sup> March 2018 through minute 1/5/32018-iv reversing its earlier determination of review of grants and disposition of public land, Land Reference Number 209/6497 and Land Reference



Number 209/13769/1 contained in a letter dated 11<sup>th</sup> April 2018, an order of prohibition directed at the Chief Land Registrar prohibiting him from acting on the decision by the NLC contained in a letter dated 11<sup>th</sup> April 2018 with regard to the determination of review of grants and disposition of public land, Land Reference Number 209/6497 and Land Reference Number 209/13769/1.

15. The Defendant averred that in the judgment that was delivered by the court on 5<sup>th</sup> May 2020 in the said Judicial Review proceedings, the court granted the orders that it had sought against the NLC and the Chief Land Registrar with the result that the 1<sup>st</sup> Plaintiff remained divested of all proprietary rights in suit property which rights never existed in the first instance as the title to the property was obtained unlawfully. The Defendant averred that the Plaintiffs being the occupants of land whose title was obtained unlawfully and was subsequently revoked, the Plaintiffs lacked the locus standi to sue in respect of the said property. The Defendant averred that it had sufficient reason for seeking orders for review and/or setting aside of the ruling delivered on 27<sup>th</sup> June 2017.

#### **The submissions:**

16. The Defendant's application was heard by way of written submissions. The Defendant filed submissions dated 7<sup>th</sup> February 2022 while the Plaintiffs filed submissions dated 26<sup>th</sup> July 2022.

#### **The Defendant's submissions:**

17. In its submissions, the Defendant framed two issues for determination namely;
  - i. Whether the application has merit.
  - ii. Whether the Defendant will suffer irreparable damage if the application is disallowed and orders sought denied.
18. On the first issue, the Defendant submitted that; there was a new important matter /evidence that could not be produced by the Defendant at the time when the ruling sought to be reviewed was made. The Defendant relied on the case of *Evans Bwire v. Andrew Aginda*, Civil Appeal No.147 of 2006 and *Republic v. Public Procurement Administrative Review Board & 20 Others* [2018] eKLR in support of this submission. The Defendant submitted that its application for review was made without unreasonable delay.
19. The Defendant submitted that the application met the threshold for grant of the order of review as provided for under Order 45 Rule 1 of the *Civil Procedure Rules*. The Defendant submitted that its application invoked the discretionary powers of the court which must be exercised judiciously. The Defendant submitted that it would suffer loss if the ruling of 27<sup>th</sup> June 2017 was executed since the Plaintiff was likely to continue with the construction of the perimeter wall on the public road/access lane to the Defendant's property thereby restricting access to the same.
20. On the second issue, the Defendant submitted that it would suffer substantial loss if the application was disallowed and the orders sought denied as its property was under a threat of being rendered inaccessible due to the perimeter wall that the Plaintiffs were constructing on a public road that was illegally occupied by the Plaintiffs. The Defendant submitted that this will occasion it substantial loss that cannot be remedied by an award of damages.

#### **The Plaintiffs' submissions:**

21. In their submissions the Plaintiffs framed one main issue for determination namely; whether the Defendant was entitled to the review orders sought. The Plaintiffs cited *Alpha Fine Foods Limited v. Horeca Kenya Limited & 4 Others* [2021] eKLR and submitted that there had been no discovery of



a new important fact. The Plaintiffs submitted that from the material on record, L.R No. 209/3538 was no longer in existence as the same was amalgamated with a section of the lane in dispute to become L.R No. 209/6498. The Plaintiffs submitted further that L.R No. 209/13769/1 never existed as L.R No. 209/798 had never changed its shape or extent since creation.

22. The Plaintiffs submitted further that the purported new evidence was a decision and recommendation by the NLC made under article 67 (d) of the *Constitution* which was not binding upon the court. In support of this submission, the Plaintiffs relied on *Kenya Vision 2030 Delivery Board v. Commission on Administrative Justice & 2 Others ESC 35 (KLR) (24 March 2021) (Judgment)*. The Plaintiffs submitted that it had appealed to the Court of Appeal against the decision of this court made on 5<sup>th</sup> May 2020 which quashed the decision of the NLC made on 11<sup>th</sup> April 2018 that had vacated and/or set aside its earlier determination and recommendation dated 20<sup>th</sup> December 2016 issued on 7<sup>th</sup> February 2017 that had declared the suit property a public access road. The Plaintiffs submitted that the said decision of the NLC dated 20<sup>th</sup> December 2016 could not form a basis for the review sought until after the Court of Appeal had determined the said appeal and clarified the position. The Plaintiffs submitted that the Defendant had not identified any new important matter or evidence that met the threshold under Order 45 of the *Civil Procedure Rules* as the recommendation of the NLC cannot be classified as evidence. The Plaintiffs submitted that the court in its ruling delivered on 27<sup>th</sup> June 2017 granted injunctive orders sought by the Plaintiffs after being satisfied that the 1<sup>st</sup> Plaintiff was the registered proprietor of the suit property. The Plaintiffs submitted that given that the recommendation by the NLC was not binding on the court and that the issue of the legality of the creation of the suit property was pending determination by the court at the trial, this court should decline to review the injunctive orders granted on 27<sup>th</sup> June 2017 as the Plaintiffs will be prejudiced by the Defendant's interference with their activities. The Plaintiffs urged the court to dismiss the application with costs.

#### **Analysis and Determination:**

23. I have considered the application, the affidavits, and the submissions filed by the parties. In my view, the only issue arising for determination in the application before the court is whether a case has been made out by the Defendant for the review of the orders made herein on 27<sup>th</sup> June 2017. The court's power to review its orders and decrees is provided for in section 80 of the *Civil Procedure Act* as follows:

“ Any person who considers himself aggrieved –

- a. By a decree or order from which an appeal is allowed by this *Act*, but from which no appeal has been preferred, or
- b. By a decree or order from which no appeal is allowed by this *Act*.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

24. Order 45 of the *Civil Procedure Rules* under which the Defendant's application has been brought lists specific grounds upon which an application for review can be made as follows;

- a. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
- b. Where there is a mistake or error apparent on the face of the record.



- c. For any other sufficient reason.”
25. The Court of Appeal set out the requirements to be satisfied by an applicant seeking a review in *Francis Origo & another v. Jacob Kumali Mungala*, Eldoret C.A No. 149 of 2001, [2005]eKLR as follows:
- “... it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”
26. Similarly, in *Kenya Power & Lighting Company Limited v. Benzene Holdings Limited t/a Wyco Paints* [2016]eKLR, the requirements for review were set out as follows:
- “To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”
27. The scope of the court’s jurisdiction to review its own orders was captured in *John Kamau Ruhangi v. Kenya Reinsurance Corporation*, Civil Appeal No. 208 of 2006, [2012]eKLR as follows:
- “It is important to bear in mind that order 44 rule 1 of the *Civil Procedure Rules* sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.”
28. The Defendant’s application was brought on the ground of the existence of
- “a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.”
- In *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v. Kariuki Marega & Another* [2018] eKLR the court stated as follows:
- “We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”
29. In *D.J. Lowe & Company Ltd. v Banque Indosuez*, Civil Appl. NAI. 217/98 (UR) the Court stated as follows:
- “Where such a review application is based on fact of the discovery of fresh evidence the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part





and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

30. The Defendant filed ELC No. 806 of 2016 on 13<sup>th</sup> July 2016. The Defendant’s Notice of Motion application which was the subject of this court’s ruling of 27<sup>th</sup> June 2017 sought to be reviewed herein was filed on the same date. At the time of filing the said suit and application, the Defendant had already lodged a complaint with the NLC against among others the Plaintiffs herein and had sought the revocation of among others the title for the suit property on the ground that the same was unprocedurally and irregularly issued and as such was illegal. The Defendant’s contention before the NLC and before this court was that the suit property was created from a public access lane that was serving among others the Defendant’s parcel of land, L.R No. 209/4349. In my ruling of 27<sup>th</sup> June 2017, I considered the Defendant’s claim that the suit property was irregularly and illegally created from an access lane. My finding was that the Defendant had not established on a prima facie basis that the suit property was created illegally. I observed that the lane that was the subject of the Defendant’s complaint was closed on 28<sup>th</sup> January 1965 by the Commissioner of Lands when the suit property was created. I observed further that the suit property had been in existence for over 40 years and had changed hands several times before the same was acquired by the 1<sup>st</sup> Plaintiff on 14<sup>th</sup> December 2007. Finally, I stated that the issue of whether or not the closure of the said lane and the creation of the suit property was lawful could not be determined on the interlocutory applications that were before me. The same had to wait for the plenary hearing of the dispute.
31. It appears that on the basis of the same material that was before this court, the NLC had made a determination on 20<sup>th</sup> December 2016 that the suit property was illegally created from a public access road and as such the allocation of the same to the original owner thereof was null and void. The NLC recommended that the title that was held by the 1<sup>st</sup> Plaintiff be revoked. It appears that this determination was not made public until 7<sup>th</sup> February 2017 by which time, the Plaintiffs and the Defendant had already argued their applications and the matter was pending a ruling. I am in agreement with the Defendant that in the circumstances, the NLC’s determination of 20<sup>th</sup> December 2016 could not have been brought to the attention of the court meaningfully prior to the ruling of 27<sup>th</sup> June 2017. The next question that I need to answer is whether the said determination by the NLC is of such weight evidentially that upon consideration of the same, the court should be persuaded to have a different view on the strength of each party’s case in relation to the legality of the suit property. I am not satisfied that that is the case. There is nothing new in the said determination by the NLC. The material that was before the NLC is the same material that was placed before this court. On that material, I am unable to reach a different conclusion from that of 27<sup>th</sup> June 2017. As correctly submitted by the Plaintiffs, the said determination by the NLC is not binding on this court. This court is legally seized of the dispute between the parties and has jurisdiction to hear and determine the same. The court had already stated that the legality of the closure of the access lane from which the suit property was created can only be determined at the trial. The court is yet to hear the parties. There is nothing new before me on the basis of which I can hold at this stage that the suit property was unlawfully created. The NLC’s determination contains nothing new as I have already mentioned. It simply agrees with the position that was taken by the Defendant before this court and which the court considered in its ruling of 27<sup>th</sup> June 2017.
32. I wish to add that the said determination by the NLC was subsequently set aside by the NLC in a letter dated 11<sup>th</sup> April 2018. In the letter, the NLC stated that on 8<sup>th</sup> March 2018, it had reconsidered its earlier decision on the review of the title for the suit property and based on the new evidence that was presented to it, it had reversed the said determination in which it had held that the suit property was



a public access road and that its title should be revoked. In the said determination of 8<sup>th</sup> March 2018, the NLC held that the suit property had never been a public access road.

33. The Defendant challenged this new determination by the NLC by way of a judicial review and had the same quashed on 5<sup>th</sup> May 2020. The Plaintiffs have challenged the decision of the court that quashed the decision of the NLC made on 8<sup>th</sup> March 2018 communicated to the parties by a letter dated 11<sup>th</sup> April 2018. The matter is pending determination in the Court of Appeal. In view of the fluid nature of the legality of the NLC's determination of 20<sup>th</sup> December 2016, which in any event is not binding on this court, it would be unsafe to rely on the same as a basis for reviewing this court's ruling of 27<sup>th</sup> June 2017. The court is persuaded that justice would be better served if the orders made on 27<sup>th</sup> June 2017 are not disturbed and the parties are heard and the dispute is fully and finally determined by this court.

**Conclusion:**

34. The upshot of the foregoing is that the Defendant's Notice of Motion application dated 14<sup>th</sup> August 2017 has no merit. The application is dismissed with costs to the Plaintiffs.

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF APRIL 2023**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Ahono h/b for Ms. Maina for the Plaintiffs

Mr. Nyachio h/b Mr. Muchemi for the Defendant

Ms. J. Omondi-Court Assistant

