



**Maina v Director, Physical & Land Use Planning, Kiambu
County Government & another (Environment & Land Petition
E005 of 2022) [2023] KEELC 17689 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E005 OF 2022**

JG KEMEI, J

MAY 31, 2023

**IN THE MATTER OF ARTICLES 2(1) & (4), 3(1), 10, 22, 23, 27, 28, 40, 47, 50,
165(3), 258 & 259 OF THE CONSTITUTION OF KENYA IN THE MATTER OF
CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLES 19, 20, 21, 22, 23, 27, 28, 40, 47 & 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

SUSAN WANJIKU MAINA PETITIONER

AND

**DIRECTOR, PHYSICAL & LAND USE PLANNING, KIAMBU COUNTY
GOVERNMENT 1ST RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER LANDS, HOUSING,
PHYSICAL PLANNING, MUNICIPAL ADMINISTRATION & URBAN
DEVELOPMENT, KIAMBU GOVERNMENT 2ND RESPONDENT**

RULING

1. The Applicant filed this Motion dated the 16/5/2022 seeking the following orders;
 - a. Spent.
 - b. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue an interim conservatory order staying the impugned Enforcement Notice No 00776 issued by the Respondents on January 11, 2022.
 - c. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue an interim conservatory order restraining the Respondents, by themselves, their agents and/or servants and/or any person whatsoever from stopping and/or



interfering with construction works undertaken on all that property known as LR No Ruiru/kiu Block 3/2060 Plot No 955 Kahawa Sukari.

- d. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue an interim conservatory order staying the purported revocation of development permission and cancellation of construction permit for the development undertaken on LR No Ruiru Kiu Block 3/2060 Plot No 955 Kahawa Sukari.
 - e. That pending the hearing and determination of the Petition filed herewith, the Honourable Court do issue interim conservatory orders in like terms as prayer numbers 2, 3 & 4 above.
 - f. That costs of this Application be borne by the Respondents.
 - g. Any other order the Court may deem just and fit to grant.
2. The Application is supported by the affidavit sworn by the Applicant deponed on the 17/5/2022. She stated that she is the registered owner of all that parcel of land known as LR No Ruiru Kiu Block 3/2060 Plot No 55 Kahawa Sukari under development. That on the 11/1/2022 she received an enforcement notice No 00776 directing the stoppage of construction, seek development permission failure to which the ground would be reinstated to its original state. The gist of the notice was that the Applicant was in breach of regulations for developing a multi dwelling house upto 1st floor without permission. That the said notice is unreasonable for want of reasons given to the Applicant in advance.
 3. The Applicant has detailed how she complied with all the legal requirements and obtained relevant approvals and made the attendant payments. That despite receipt of a letter of approval to commence development of a 5 bedroom masonette on the property the Respondents in the letter dated the 11/1/2022 purported to revoke the said approvals by ordering stoppage of the approved works and directing the Applicant to seek a new approval. That in compliance with the directive, halted further construction works and submitted architectural drawings dated the 20/1/2022.
 4. The Applicant has detailed how her Constitutional rights to fair administrative action have been violated by the Respondents by interalia revoking development permission and construction permit and stopping construction without prior and adequate notice and the reasons for the action; failing to make available the dispute resolution mechanism for adjudicating the appeals. That the actions of the Respondents are unreasonable and unconscionable for the reasons that the construction permit allowed her to develop a 5 bedroomed maissionete, which simply means a flat with rooms on two floors within the building.
 5. Further she posits that the decision to halt her development was at the behest of a few individuals at Kahawa Sukari Welfare Association and Kahawa Sukari Limited who have seemingly taken up the statutory functions of the Respondents as an approving authority. That the powers to approve development are vested in the Respondents and cannot be delegated and or influenced by a private entity, the Respondents included. The Respondents were faulted for surrendering their statutory functions to partisan private entities which acts are ultra vires and unreasonable.
 6. She urged the Court to grant the orders to forestall imminent damages to the building due to the prevailing weather conditions and attendant financial loss.

The Response

7. The 1st and 2nd Respondent filed a Replying Affidavit sworn by Hannah Maranga on the 10/3/2023 where she deponed that she is the County Director of Physical and Land Use Planning in the 2nd Respondent County.



8. That the Applicant applied for construction permit of a 5 bedrooed mansion in July 2021 located in Kahawa Sukari. The original architectural drawings were submitted and approved under Plan No RRU-SD-CPDOO-AAA-7888 on the 28/7/2021. That the said drawings were approved for a 5 bedroom single dwelling house unit as the development located in Kahawa Sukari, a place designated for a single dwelling residential units. Further that a construction permit No SD-CPDOOO6AAAA3174 dated the 27/7/2021 was issued together with a letter of authority to commence development as per the approved architectural plans.
9. That on or around January 2022 their officers received a complaint that there was what appeared to be a multi-dwelling development coming up on the suit land. Upon visiting it was noted that the Applicant was developing multi dwelling units comprising of one bedroom and bedsitter units which is not compatible with the character of the area and the lease conditions of the title which has designated the area as a single dwelling controlled residential development. That there was no change of user from single dwelling residential unit to multi-dwelling units. That the Applicant is developing phase 2 of one bedroom and bedsitter units to accommodate multiple families/residents and not single 5 bedroom maisonette as submitted in the architectural drawings, hence the stoppage of the construction.
10. The deponent further stated that in her own letter dated the 20/1/2022, the Applicant admitted that she was undertaking construction contrary to approved plans. That the Applicant's said admission has contravened Section 67 (1) (a) and (b) (iii) of *Physical and Land Use Planning Act* (PLUPA) and is not deserving of orders of interim conservatory orders. That the orders being equitable in nature, the Applicant is not deserving of them because she has not come to equity with clean hands. Further the Applicant was faulted for non-disclosure of material facts which is that noncompliance with buildings conditions. That the Respondents cannot be faulted for carrying out their statutory duty under Section 55(1) (a) (c) and (g) of *PLUPA*.
11. In conclusion the deponent stated that Section 57(5) of PLUPA 2019 gives the 2nd Respondent the mandate to revoke development permission for non-compliance with the provisions or conditions imposed on the development permission for any justifiable cause.
12. In a further affidavit sworn on the 24/3/2023 the Applicant stated that the Respondents admit that she submitted an Application for a proposed 5 bedroom mansion which Application and architectural designs were approved on the 5/7/2021 along with the construction permit approving construction of 5 bedroom maisonette which construction proceeded in earnest until the 11/1/2022 when the said permits were revoked with a directive that she applies for a fresh approvals. She sought reapproval in compliance with the directive of the 2nd Respondent. See letter dated the 20/1/2022. There being no response from the Respondents she inquired about the Liaison committee for purposes of lodging an appeal against the enforcement notice. At this time the building was at the roofing stage and being exposed to the adverse effects of the elements. That due to the delays in hearing the matter and to avert any further damage to the property, she was forced to continue construction. She decried the lack of response to her letter dated the 20/1/2022, letter resubmitting the architectural drawings for reapproval failure to provide a mechanism to hear the dispute, all which in her opinion are actions that smack of injustice and meant to frustrate her on account of Kahawa Sukari.

The written submissions

13. It was submitted on behalf of the Applicant and relied on the case of *Centre for Human Rights Education and Awareness (CREAW) & 7 others* PET. No 16 of 2011 where the Court stated that a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a



- likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution rights.
14. Interalia, a *prima facie* case is not one that must succeed at the hearing of the main case neither is it a frivolous case. The case must disclose arguable Constitutional issues. The Court is not being called upon to make any definitive findings of either fact or law as this is the realm of the trial Court ultimately. See the holding in Kevin K. Mwiti & Others vs Kenya School of Law & others (2015) eKLR
 15. With respect to a *prima facie* case, the Applicant contends that her rights to fair administrative actions were violated by the Respondents in issuing the enforcement notice and stoppage of the construction; failure to give priority and adequate notice and reasons for the stoppage of the works; failure to give the Applicant an opportunity to be heard before making the adverse decision; failure to give information and materials and evidence relied in arriving at the decision; failure to afford the Applicant the right to a review or internal appeal against the administrative decision.
 16. Further the Applicant contends that the enforcement notice is unreasonable and is ripe for judicial review for the reasons that development permission was approved for 5 bedroom maisonette which is a flat with rooms on two floors within a building. The Applicant in compliance with the approvals developed a 5 bedroomed residential house. Despite compliance she has been accused of developing upto 1st floor without development permission. That the above actions have not been controverted by the Respondents and are actionable at the instance of the Petitioner and therefore constitute a *prima facie* case with high chances of success.
 17. On prejudice the Applicant submitted that she will suffer prejudice if the conservatory orders are not issued for reasons that her development has stalled making her right to affordable housing illusionary; losses as the construction is at advanced stage due to the exposure of building materials to the elements; financial losses as a result to the stoppage of works and idle materials and men on the ground. That there is no loss on the part of the Respondents at all.
 18. Further that the Petition will be rendered nugatory if the orders are declined. The impugned notice demands stoppage of the works in default the building will be demolished. This poses a real danger to the Applicants development and this Court was urged to grant conservatory orders to preserve the substratum of the Petition.
 19. That the lower risk of injustice in this case is in granting the Conservatory orders sought and stopping the interference by the Respondents with the approved construction work pending the hearing and determination of the Petition. See the case of Amir Suleiman Vs Amboseli Resort Limited (2004) eKLR That the risk of injustice lies in refusing the conservatory orders leading to further stalling and demolition of the development leading to prejudice and loss to the Applicant if her Petition is finally successful.
 20. Further that the conservatory orders will enhance the Applicant's Constitutional rights, fair administrative action fair hearing and access to justice. See the case of Board of Management of Uburu Secondary School vs City County Director of Education & 2 others (2015) eKLR
 21. The 1st and 2nd Respondent filed written submission on the 13/3/2023.
 22. On *prima facie* case and irreparable loss, the Respondents submitted that the Applicant has admitted building contrary to the approved permission which acts the Court was urged to hold as illegal. That the Applicant failed to proof compliance with the conditions of approval such as through architectural, structural drawings etc. That they have failed to proof *prima facie* case with a probability of success against the Respondents.



23. On balance of convenience, the Court was urged that the same favours the Respondents on the ground that the Respondents were carrying out their mandate under Section 55, 57 and 65 of the PLUPA. Reliance was placed on the decision of Nahendra Chaganlal Solanki Vs Neepu Auto Spares Limited HCCC No 90 of 2003 where the Court held that in an Application for injunction, the Court must warn itself of the danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise cautionary steps.
24. Finally it was submitted that the Applicant having come to Court with unclean hands, no Court of equity should aid her to derive an advantage from her wrong doing. That the Applicant failed to discharge her duty to show that she had complied with all the conditions and provisions of the law with respect to the construction permit. Reliance was placed on the case of Francis Munyoki Kilonzo & anor vs Vincent Mutua Mutiso (2013) eKLR

Determination

25. The key issue is whether the Applicant is entitled to the orders sought.
26. Article 22 of the Constitution of Kenya provides as follows;
 - “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
 - a) A person acting on behalf of another person who cannot act in their own name;
 - b) A person acting as a member of, or in the interest of, a group or class of persons;
 - c) A person acting in the public interest; or
 - d) An association acting in the interest of one or more of its members.”
27. This Court has jurisdiction to grant appropriate relief under Article 22 of the Constitution of Kenya including declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies violates infringes or threatens a right or fundamental freedom in the bill of rights and is not justified under Article 24, an order for compensation and an order of Judicial Review.
28. In the main the Applicant seeks conservatory orders staying the enforcement notice issued on the 11/1/2022; conservatory orders restraining the Respondents from stopping and or interfering with construction works undertaken on the suit land; conservatory orders staying the revocation of development permission and cancellation of construction permit for the development on the suit land.
29. It is trite that a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory orders there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
30. When a Court is called upon to determine whether a *prima facie* case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of Board of Management



of Uhuru Secondary School Vs. City County Director of Education & 2 others [2015] eKLR the Court posited that:

“It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis...”

31. A frivolous case was defined in the case of Trust Bank Limited v Amin Company Ltd & another [2000] KLR 164, as cited in Mary Wangari Mwangi v Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 others [2013] eKLR, as follows:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

32. Courts have set out principles to be considered in determining whether or not to grant conservatory orders in Constitutional Petitions. In the case of Martin Nyaga Wambora -vs- Speaker of the County Assembly of Embu & 3 others Petition No 7 of 2014 the Court stated as follows:-

(59) In determining whether or not to grant conservancy orders, several principles have been established by the Courts. The first is that: “... [an Applicant] must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

(60) To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus an allegedly threatened violation that is remote and unlikely will not attract the Court’s attention.

(61) The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.”

33. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR, a two judge bench of the Supreme Court stated as follows as regards conservatory orders:-

“Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

34. It is trite that at this stage the Court is not being asked to consider the merits of this stage as this is best left to the determination of the Petition.



35. It is the case of the Applicant that she has obtained approvals for the construction of a 5 bedroom mansion and that without any explanation having been given, the Respondents issued an enforcement notice. That she complied and stopped the construction but to avert more damage she continued the same at some point.
36. The Respondents on the other hand contend that the Applicant has failed to comply with the conditions of the construction permit and proceeded to develop one and two bedroom units also known as multidwelling units instead of single dwelling development that was approved. As a result and pursuant to the provisions of Section 55 of PLUPA the officers issued an enforcement notice and seek reapprovals.
37. I have perused the enforcement notice dated the 11/1/2022 which ordered the Applicant to stop construction in default the premises shall be demolished to the ground. I hold that if the Application is dismissed the real danger will be the demolition of the building as stated in the enforcement notice. I therefore find that there is a *prima facie* case.
38. That said it is not lost on the Court that the Respondents contend that the Applicant has put up multi dwelling houses on the property, an averment that was not directly rebutted by the Applicant. This Court will therefore be called upon to determine the twin issues of compliance with the construction permit and the Building code. It has been offered by the Applicant that she continued the construction to avert damages to the building, details of which were scanty. It is also on record that the Applicant seems to have resubmitted some architectural drawings for approval. None of the parties have offered any detail as to the outcome of this action, if any.
39. Given the contested matters raised in the preceding paras, it is clear to the Court that there is need to preserve the substratum of the suit. I say so because in the event that the Application is granted, this will give the Applicant the go ahead with the construction in the face of the question whether or not the building is in compliance with the provisions of PLUPA and the construction permit given. If in the end it is found that it was not complaint I see huge losses if the building has to be demolished. The Court holds that the course that appears to carry the lower risk of injustice and losses if it should turn not to have been wrong should be to preserve the substratum of the case.
40. To balance the right of the Applicant to enjoyment of her property rights and the right to fair administrative actions and the statutory duty of the Respondents to enforce the law, the Court finds that the compelling and appropriate orders that are mete to grant are that parties maintain *status quo* in the following terms;
 - a. The enforcement notice issued on the January 11, 2022 be and is hereby suspended forthwith pending the hearing and determination of the Petition.
 - b. The Applicant is estopped from continuing with the construction of the premises pending the hearing and determination of the Petition.
41. Each party to bear their own costs.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**



Delivered online in the presence of;

Orengi HB Nganga Mbugua for Petitioner

1st & 2nd Respondents – Absent but served through email

Court Assistants – Kevin & Lilian

