



REPUBLIC OF KENYA



KENYA LAW
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Meath & another (Suing on behalf of Cola CBO) v Odhiambo (Environment & Land Case E011 of 2023) [2023] KEELC 17910 (KLR) (12 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17910 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E011 OF 2023
CA OCHIENG, J
JUNE 12, 2023

BETWEEN

JOAB OMANYALA MEATH 1ST PLAINTIFF

AGABIO ISAAC NYAGA 2ND PLAINTIFF

SUING ON BEHALF OF COLA CBO

AND

FREDRICK ODHIAMBO DEFENDANT

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the February 20, 2023 where they seek the following orders:-
 1. Spent.
 2. An order for an injunction do issue restraining the Defendant/Respondent by himself, his servants, employees, agents and/or any one of them from continuing to erect an illegal structure within the Community environment on LR No 20172/50 under Cola CBO by any means whatsoever and howsoever pending the hearing and final determination of this Application herein.
 3. An order for an injunction do issue restraining the Defendant/Respondent by himself, his servants, employees, agents and/or any one of them from interfering with the applicants quiet and peaceful enjoyment of their properties by any means whatsoever and howsoever pending the hearing and determination of this suit herein.
 4. An order of injunction do issue restraining the Respondents by himself, his servants, employees, agents and/or any one of them from interfering with the Applicants right to privacy



by any means whatsoever and howsoever pending the hearing and determination of this suit herein.

5. That the costs of this Application be borne by the Respondent.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Agabio Isaac Nyaga who is a member of the Plaintiff CBO. He deposes that he has authority of the other members to swear this Affidavit. He avers that the Plaintiff draws its membership from any member who has acquired a duly registered certificate of title with all its rights and interest in the parcel of land LR No 20172 situated in Mavoko Municipality as per Clause 4 of the Cola CBO Constitution. He contends that the construction within the Cola CBO should be buildings hosting only one household as provided for in special condition No 5 on the Special Conditions of title. He claims the Respondent is erecting an unauthorized Highrise multi residential property on LR No 20172/50 currently at its third level planned to host 16 households instead of one. Further, that the said structure poses security threat not only to the residents of Cola Community but also to the public at large and will circumvent the privacy of the neighbours. He insists that the illegality perpetrated is causing pain to other residents of the area and is disturbing peace and tranquility in the community with some neighbours indicating their intentions to leave their homes. He avers that the Community's initial inquiry from the Respondent indicate there is no evidence of County Approval, National Construction Authority Approval, No grant of Change of User and no National Environment Management approval. Further, it is a special condition of the title that no building shall be erected on the land nor shall additions or external alterations be made to any buildings otherwise in conformity with plans and specifications previously approved in writing by the Commissioner of Lands and the Local Authority. He reiterates that it is a special condition that the buildings shall not cover more than fifty per centum of the area of land or such lesser area as may be laid down by the Local Authority in its bylaws. He confirms that on June 22, 2022, the Plaintiff wrote to the Director, Department of Physical Planning and copied the said letter to the Physical Planner Mavoko, Public Health Mavoko, Inspectorate and Enforcement Section Mavoko, National Construction Authority Mavoko and NEMA representative Mavoko complaining of the illegal development but their letter failed to elicit a response.
3. The Application was opposed by the Defendant who filed a Replying Affidavit sworn by Fredrick Odhiambo Ochieng where he deposes that he was the registered owner of land parcel No 20172/50 prior to selling it to one Thomas Obutu Makori on September 13, 2021. He confirms that the transfer of lease from himself to Thomas Obutu Makori was registered against the mother title as entry No 4 on September 13, 2021 under presentation No 1162. He explains that Condition No 1 of the Special Conditions allows the Grantee of the parcel of land to erect any building on it subject to the approval of the plans and specifications in writing by the Commissioner of Lands including the Local Authority and this does not bar the Grantee from constructing on the parcel. He contends that no letter or report by any security team or personnel has been enclosed to persuade the Court of the threat a building erected would pose or is posing to the residents. He avers that the Applicant has never written to him about the alleged issue of breach of security and peace in the area. Further, that he was never copied neither as a party in the aforementioned letters and consequently the same cannot elicit a response from him but only the registered owner. He opposes the Application for injunction and insists that his name should be struck out with costs for misjoinder in these proceedings. Further, that since the Applicant has sued the wrong party, they are not entitled to be granted orders of injunction. He reiterates that the Applicant has failed to demonstrate that it will suffer any irreparable damage that cannot be compensated.
4. The Plaintiff filed a Further Affidavit sworn by Agabio Isaac Nyaga where he reiterates his averments and insists that no suit shall be defeated due to misjoinder and this Court may deal with matters in



controversy. He contends that the Defendant has not attached any evidence of approvals of the plans and specifications granted by the Commissioner of Lands and in absence of the same he is barred by the Special Conditions of title from constructing the illegal structure on parcel of land number LR 20172/20. Further, that the Defendant has not denied construction on land parcel number LR 20172/20. He claims the Defendant has attended several Cola CBO meetings and group discussions on the issue but never disclosed the change of ownership of the parcel of land.

6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. I have considered the instant Notice of Motion Application including the respective Affidavits, annexures and rivaling submissions and the only issue for determination is whether the Plaintiff is entitled to order of interlocutory injunction restraining the Defendant from constructing on land parcel number LR 20172/50.

8. In line with the principles established in the case of *Giella Vs Cassman Brown & Company Limited* (1973) EA 358, I will proceed to decipher whether the Plaintiff is entitled to the orders as sought in the instant Application.

9. As to whether the Plaintiff has established a prima facie case to warrant the orders of interlocutory injunction as sought, I will rely on the definition of the same as stated in the case of *Mrao Ltd v First American Bank Limited* (2003) KLR 125 where the Court described it as follows:-

“... is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. The Plaintiff claims the Defendant is constructing an unauthorized Highrise multi residential property on LR No 20172/50 contrary to the by-laws of the CBO that requires buildings hosting only one household as provided for in Special Condition No 5 on the Special Conditions of Title. Further, that the said structure poses security threat not only to the residents of Cola Community but also to the public at large and will circumvent the privacy of the neighbours. The Plaintiff explains that the Community's initial inquiry from the Respondent indicate there is no evidence of County Approval, National Construction Authority Approval, No grant of Change of User and no National Environment Management approval.

11. The Defendant opposed the instant Application and insisted that he is not the proprietor of LR No 20172/50. He explained that he was the registered owner of land parcel No 20172/50 prior to selling it to one Thomas Obutu Makori on September 13, 2021.

12. Looking at the documents presented, I note that the suit land is currently registered in the name of Thomas Obutu Makori at entry No 4 on September 13, 2021 under presentation No. 1162. Even though it is not disputed that there is a construction on the suit land, I opine that orders the Plaintiff are seeking against the Defendant are futile as they are against a party who is not the owner of the construction. In the circumstance, I find that the Plaintiff has not established a prima face case as against the Defendant to warrant the orders sought.

13. In further associating myself with the decision *Nguruman Ltd Vs Jan Bonde Nielsen* CA No 77 of 2012, where the Court of Appeal held that in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction and I will hence decline to do so.



14. In the foregoing, I find the Notice of Motion Application dated the February 20, 2023 unmerited and will dismiss it.

15. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

JUDGE

