Okalo v Sofat & 3 others (Environment & Land Case 410 of 2011)
[2023] KEELC 20291 (KLR) (28 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 410 OF 2011

OA ANGOTE, J

SEPTEMBER 28, 2023

BETWEEN

AGWU UKIWE OKALO ..... PLAINTIFF

AND

SURESH SOFAT ..... 1ST DEFENDANT

CITY COUNCIL OF NAIROBI ..... 2ND DEFENDANT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD DEFENDANT

SADHANA SURESH SOFAT ..... 4TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 12th August, 2011 and filed in court on the same date. The Plaint was amended on 23rd December, 2011 and further amended on 11th December, 2013. In the Further Amended Plaint, the Plaintiff is seeking the following reliefs:

    a. A declaratory order that the constructions being undertaken by the 1st and 4th Defendant along the common boundary of Land Reference No. 214/573 and Land Reference No. 214/544 and the resultant storey building directly overlooking the Plaintiff's compound are unlawful, unconscionable and in utter violation of the Plaintiff's security and integrity of his property being Land Reference No. 214/573.

    b. A permanent injunction restraining the Defendants by themselves, their servants, employees and/or servants or whosoever from constructing and/or continuing with constructions of the said storey building along the said common boundary of Land Reference No. 214/573 and Land Reference No. 214/544 and/or authorising, sanctioning or approving the same.

c. That a mandatory order be issued for the demolition of all structures and/or buildings built along the common boundary wall on Reference Number 214/544 erected by the 1st and 4th defendant.

d. General damages.

e. Costs of the suit.

f. Any further or alternative relief which this honourable court may deem fit to grant.

2. The Plaintiff averred in the Plaint that he is the bona fide owner of a parcel of land known as Land Reference No. 214/573 within Nairobi which measures approximately 0.7325Ha and that the 1st and 4th Defendants on the other hand own Land Reference No. 214/544 which borders the Plaintiff's property.

3. It is the Plaintiff's case that sometime in early 2011, the 1st and 4th Defendants commenced construction works along the common boundary and upon inquiry, the 1st Defendant unequivocally informed the Plaintiff that he was putting up a boundary wall and that few months later, the Plaintiff discovered that the supposed boundary wall was actually part of a building being put up along the boundary fence.

4. It was averred by the Plaintiff that as the construction continued, it became evident that the 1st and 4th Defendants were putting up a storey building along the common boundary dominantly overlooking his compound and in particular the bedroom window; and that his property houses the Portuguese ambassador vide a Lease dated 22nd November, 2008, a fact well known to the 1st and 4th Defendants, thus compounding the matter further.

5. According to the Plaintiff, and by extension his tenant, he was aggrieved by the 1st and 4th Defendants' conduct as the structure being put up portends dire consequences on the privacy, security, serenity, value and suitability of his property and that he obtained a report from Searite Holdings Limited confirming the possible dire ramifications of the constructions on his property.

6. It is the Plaintiff's case that the property will significantly lose its comparative advantage and value; that the 1st and 4th Defendants are carrying out the constructions without the requisite plans, consents and/or approvals from the 2nd and 3rd Defendants and that despite his efforts to articulate his plight to the 1st and 4th Defendants in the spirit of good neighbourliness, they have remained callous and indifferent.

7. Similarly, it was averred, despite his pleas to the 2nd and 3rd Defendants to intervene, they have failed, refused and/or neglected to act accordingly and that the conduct of the Defendants herein is illegal, oppressive, a nuisance, unreasonable, untoward and utterly unconscionable.

8. The Plaintiff denied that the building was being put up 15 feet away from the boundary lines and that it was in compliance to Nairobi County Council by-laws. The Plaintiff also denied the allegation that there were no windows in the backwall and that consequently the building did overlook his compound.

9. The Plaintiff denied the claim that the Ambassador was no longer an occupant in the property and further faulted the 1st and 4th Defendants for breaching mandatory provisions of the law by incorporating arguments in their pleadings. The Plaintiff prayed that the Amended Defence and Counterclaim be struck out and judgment be entered as prayed for in his Further Amended Plaint.

10. The 1st and 4th Defendants filed a Statement of Defence and Counterclaim, in which they denied the Plaintiff's allegations. The 1st and 4th Defendants averred that the Plaint discloses no reasonable cause of action as there is no disclosure that they had contravened any by-laws of the County Council of

Nairobi and that there is no basis on which the claim for aesthetic presentation lies as they are permitted to build on the said plot.

11. According to the 1st and 4th Defendants, they indeed commenced construction on the aforesaid plot but that it was not along the common boundary but 15 feet away from it as per the Nairobi County Council by-laws and that in any event, there is no way the building could have overlooked the Plaintiff's Bedroom compound as there are no windows on the back wall of the house.

12. The 1st Defendant in particular denied being a joint owner of L.R. No. 214/544 and at the same time denied giving any assurance to the Plaintiff that he was putting up a boundary wall.

13. As to the matter of the tenancy of the Plaintiff's house, the 1st and 4th Defendants stated that the occupancy of the Plaintiff's house was immaterial and further that the Ambassador is no longer a tenant in the house as the Republic of Portugal had since closed its embassy in Kenya, which was the case as at the time of the filing of the Further Amended Plaint.

14. It was averred by the 1st and 4th Defendants that the claim that the Plaintiff attempted to resolve the dispute by engaging them in discussions, as well as the report by Searite Holdings LTD are matters of evidence and should not have formed part of the pleadings and that they took offence in the wording of the Plaintiff's grievances as to the security, privacy and serenity because the same is an abuse of due process.

15. The 1st and 4th Defendants stated that they had all the requisite plans, permits and approvals required by law, noting also that the Plaintiff failed to give particulars of the alleged illegality, and nuisance in his Plaint. The 1st and 4th Defendants prayed the suit against them to be dismissed with costs.

16. In her Counterclaim, the 4th Defendant averred that the Plaintiff's action slowed down the development and occupation of her property for three months and incurred loss and damages; that she has lost a total of Kshs. 2,900,000 which she avers is the sum total of KShs. 1,500,000 which she has lost for non-occupation of the property being rent for the three months, and a further sum of KShs. 1,400,000 paid to the contractor for delaying him from completing his work.

17. The 1st and 4th Defendants have therefore prayed for the following orders in the counter claim:

    i. KShs. 2,900,000/-

    ii. Damages

    iii. Interest on the above sum and also on the damages.

    iv. Costs

    v. Any other relief that this honourable court may deem fit to grant.

18. The 3rd Defendant, NEMA, stated in its Defence that it was the 4th and not the 1st Defendant that approached it for an Environmental Impact Assessment (EIA) approval; that it agrees with the Plaintiff that indeed the construction was going on without its knowledge or approval and that it only found out about the construction works through this suit, whereupon it conducted a site visit and stopped the construction work until when the 1st and 4th Defendants complied with the law.

19. It was averred by the 3rd Defendant that the 4th Defendant had lodged an application for an EIA Licence before filing of this suit but that the same was only issued to him to construct one (1) residential unit on the subject parcel of land L.R. No.214/819 (214/544/2) on 20th September, 2011; that the construction was therefore commenced prematurely and that the suit should be dismissed with costs to be met by the 1st and 4th Defendants.

20. In its Defence, the 2nd Defendant denied the allegation that the 1st and 4th Defendants' construction was going on without the requisite plans, consents and/or approvals. The 2nd Defendant also denied its alleged failure, refusal and/or neglect to act on the Plaintiff's plea for its intervention and denied that the Defendants' conduct was illegal, oppressive, a nuisance, unreasonable, untoward and utterly unconscionable.

21. The 2nd Defendant averred that the suit is defective, incompetent and does not disclose any cause of action against it and that it would move to have the suit struck out or dismissed with costs for failure to disclose a cause of action.

Hearing and evidence

22. The Plaintiff, Agwu Ukiwe Okali, testified as PW1. PW1 adopted his witness statement dated 12th August, 2011 as part of his sworn evidence-in-chief. PW1 testified that he is the registered owner of a property in Muthaiga, Nairobi Kenya, known as Land Reference No. 214/573, the suit property herein, which he used to reside on, but not anymore.

23. It was his evidence that at the time of filing the suit, the Ambassador of Portugal used to occupy the house; that he does not know why he left but he complained of the impugned construction; that he advertised the property for lease and that although some people came to view the house, no embassy has expressed interest to occupy the same as opposed to previously and that all the viewers did not say anything but noted the ongoing construction.

24. PW1 testified that the 1st and 4th Defendants own the property adjacent to his property; that there is a distinct fence between the two properties with chain-link and Kai Apple; that the impugned construction began in the second half of 2011; that prior to commencement of the construction, he had met the 1st Defendant at Muthaiga Mini Market, and that the 1st Defendant informed him that he intended to build a boundary wall between their properties two (2) feet from the boundary and that this discussion was not put in writing.

25. It was averred by PW1 that the wall the 1st Defendant built touches the chain-link; that the 1st Defendant had informed him that he had two acres on his property which would have been enough to construct the new building far from the boundary; that he was concerned with the damage the new building would bring to the value of his property; that the impugned building is elevated above his and has a commanding view of his property and his driveway; and further that the said building has a flat roof and he has at some point seen people on the roof thus compromising his security and privacy.

26. It was the Plaintiff's testimony that there are no other developments of that nature in that area; that he wrote to the 1st and 4th Defendants of his concerns vide the letter dated 13th July, 2011 which they responded to by stating that they had all approvals for the construction and that his property has been adversely affected as there is no interest shown in it by tenants due to the 1st and 4th Defendants' structure.

27. According to PW1, the 1st and 4th Defendants further drilled holes in the wall through which discharge/effluence is directed into his property; that the 1st and 4th Defendants did not stop construction alleging that the order issued to stop construction was directed at the wrong party and that the prayers in his Further Amended Plaint should be granted.

28. On Cross examination, PW1 stated that he had not sued the 4th Defendant in the original Plaint; that the conveyance dated 14th May, 2009 was in the name of the 4th Defendant; that he was not aware that the orders which stopped the construction were vacated on 23rd July, 2012 and that he was also not

aware what the requirements were for getting the approvals but he believed one had to submit the building plans.

29. PW 1 stated further on cross examination that his fence did not trespass into the 1st and 4th Defendants' property; that his property measures 0.753HA and the boundaries were set in 1923, the same year his house was constructed and that if there was any encroachment, it happened before he got the property, which he has owned since 1983.

30. PW 1 stated that he is now aware that the property was sold and the 1st and 4th Defendants no longer own it but he never amended his Plaint; that he has never met the new owner; that there was no balcony on the impugned building and there was no window facing his premises and that he only found out about the NEMA approval when the matter was filed in court.

31. On re-examination, PW1 testified that he was not aware if the conditions set out in the letter dated 12th October, 2010 were met; that construction begun before he moved to court on 12th August, 2011 and the Certificate of Compliance had not been issued and that the open drains were draining effluent into his compound.

32. The 1st Defendant testified as DW1, and adopted his witness statement as his sworn evidence-in-chief. He also produced the documents in the 1st and 4th Defendants' List of Documents as his exhibits 1 to 21. DW1 stated that the impugned building did not have windows facing the Plaintiff's house; that the Portuguese Ambassador occupied the Plaintiff's house but he left on re-deployment by his country and that the he was not behind the Ambassador's departure.

33. On Cross examination, DW1 testified that he was not the owner of the suit property; that there was no document addressed to him; that it is true the Plaintiff's house, as well as all the houses in the area, had an ambassadorial status and that the 4th Defendant had all the building approvals from the 2nd Defendant.

34. An officer of the 3rd Defendant, relied on the witness statement dated 29th September, 2012 as his evidence-in-chief. He informed the court that he had worked for the 3rd Defendant for 10 years; that he was an environmental officer between 2010 and 2014 and that the procedure for issuance of an Environmental Impact Assessment (EIA) was followed.

35. It was the evidence of DW2 that he stopped the Defendant's construction because it was commenced before issuance of an EIA and that there was no objection from the neighbours to the issuance of the EIA although he was aware of a complaint that the construction was being done without the EIA license.

36. The last Defence witness was the 4th Defendant, DW 3. She adopted her witness statement dated 5th September, 2012 as her sworn testimony and relied on the documents produced by DW 1. It was her evidence that she had complied with all the requirements and followed proper channels to obtain all the permissions for the construction.

37. On cross-examination, DW3 stated that she is the registered owner of the suit property; that DW 1 was her husband and acted as her agent in dealing with the Plaintiff and other authorities with regard to the suit property; that she could not remember if the construction was stopped and that she had plans which were approved by the 2nd Defendant.

38. It was the evidence of DW4 that she did not know the distance between her wall and the Plaintiff's boundary but that there was a proper distance between her wall and the Plaintiff's land; that the Plaintiff's land is adjacent to hers; that her house as seen in the photos is higher than the Plaintiff's and that there is no problem if there is no space between her wall and her house.

39. DW3 informed the court that she sold the house. She denied involvement in any corrupt dealings while obtaining the approvals or that the Plaintiff's land had been devalued by her constructing her house. Dw3 denied that her house was built on the Plaintiff's wall; and that she did not remember trying to buy the Plaintiff's land before developing her land.

Submissions

40. The Plaintiff's advocate submitted that the Defendants failed to adhere to the requirements of Rule 15(2) of the Physical Planning (Building and Development) (Control) Rules, by not leaving a space between the boundary wall and the offending building; that the construction was started before the EIA licence was issued; and that when the same was issued, it was based on a report that was allegedly doctored. According to counsel, the neighbours who were interviewed in the report were unknown and not residents in the area.

41. It was submitted that the 4th Defendant's construction also contravened Regulations 4(1) and Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003, which required persons around the project to be consulted and their views taken into account and that the lack of public participation was a breach of the provisions of the above-mentioned regulations.

42. The Plaintiff's counsel relied on the case of Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others, Nakuru ELC Constitutional Petition No. 50 of 2023 where it was held that:

> " Where a procedure is for the protection of the Environment is provided by the law and not followed, then the assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has the potential to harm the environment."

43. Counsel for the Plaintiff submitted that the offending construction also contravened Section 30 of the Physical Planning Act, CAP 286 Laws of Kenya; that it is clear that the 1st and 4th Defendants did not have the requisite approvals and did not provide evidence that they had them at the commencement of the construction and that consequently, they were in breach of the law.

44. It was submitted that the construction was carried out in blatant violation of the Plaintiff's right to property as enshrined under Article 40 of *the Constitution* of Kenya and that the right to use and enjoyment of the Plaintiff's property encompassed the right to be protected from physical harm, such as damage to the lawn or buildings on the property, mental disturbance or annoyance of the persons occupying the property and interference that causes economic loss or depreciation of the property.

45. Counsel submitted that the construction was a nuisance as defined in Clerk and Lindell on Torts and that when a Plaintiff complains of an interference with enjoyment of his land, the interference has to be regarded as substantial. Counsel relied on a host of cases including Campbell vs Paddington Corporation and Vanderpant vs Mayfair Hotel Co. (1930) 1 Ch 138.

46. The Plaintiff's Counsel also submitted that the building is on the common boundary of the Plaintiff's property and that of the 4th Defendant and that this has not been disputed and that due to the offending construction, the Plaintiff has not been able to secure tenants to his property. For this he relied on the case of Mohazo EPZ Limited vsWide Garments EPZ Limited & Another (2020) eKLR and Dalton vs Henry Angus & Co. (1881) UKHL 1.

47. It was also submitted on behalf of the Plaintiff that the 1st and 4th Defendants were the owners of the offending property and thus were liable for the consequences of any act done on their property and

that the Plaintiff had shown that he had suffered loss as a result of the actions of the Defendants for which the Defendants were liable.

48. The 1st and 4th Defendant's advocate submitted that the court has no jurisdiction to determine the issue of boundaries unless the boundary had been determined under Section 18(2) of the *Land Registration Act* and that the Plaintiff failed to exhaust all mechanisms provided under the law as the challenge of the Environmental Impact Assessment Licence should have been handled by the National Environmental Tribunal (the NET), and for the challenge against physical planning approval by the Liaison Committee under the *Physical and Land Use Planning Act*.

49. With regard to the issue of nuisance, Counsel submitted that the Plaintiff does not reside on his property and that he did not provide evidence in court of any complaint made by his tenant of the alleged nuisance and that the Plaintiff needed to establish that what was done was unreasonable and that the doctrine of reasonableness is a fundamental basis of nuisance law.

50. Counsel for the 1st and 4th Defendants submitted that the doctrine of nuisance rests on what is normal and lawful use of one's property; that what constitutes reasonable use of one's property depends on the locality (see Sturges vs Bridgman (1879) LR 11 Ch D 852) and that taking note that Muthaiga is an area that slopes, regardless of the number of storeys, any house built on a higher plane than the Plaintiff's would have a view of the compound of their neighbour.

51. Counsel submitted that the EIA licence was obtained as required and therefore there was no breach of the law in that instance; that the relevant development approvals were also obtained and the claim that the Defendants were in breach is false and that the Plaintiff did not tender evidence to show that the Portuguese Ambassador vacated his premises because of the construction.

52. The 2nd Defendant's counsel argued that the 4th Defendant had complied with the requirements for approval and was issued with the approval to construct; that the 2nd Defendant had discharged its mandate; that the EIA was produced in court which was proof that it was issued, and further, that the approval was based on the EIA report.

53. Counsel submitted that the Environment and Land Court did not have original jurisdiction for a complaint regarding the issuance of an EIA Licence and that the proper forum was the National Environment Tribunal.

54. The Court also received the 3rd Defendant's submissions in which they are in agreement with the submissions of the 2nd Defendant that the ELC Court has no jurisdiction over the suit and that under Section 129 of the EMCA, the appeal in respect of the decision pertaining the EIA should have been lodged in the NET.

55. According to the counsel the suit contravenes the doctrine of exhaustion and that the fact that the suit is multi-pronged, containing other prayers that did not fall under the ambit of the NET, could not oust the jurisdiction of the tribunal. Counsel relied on the case of Kibos Distillers Limited & 4 Others vs Benson Ambuti Andega 7 3 Others, Civil Appeal No. 153 of 2019 (2020) eKLR).

56. Counsel also submitted that the Plaintiff had not suffered any damage, whether general or special, as he had testified that his premises was now occupied by another tenant; that he had nothing to show that the amount the current tenant pays is less than what the previous tenant paid and that the claim was misplaced and devoid of merit and hence should be dismissed with costs.

57. The Plaintiff's advocate filed his Submissions in Answer. It was submitted that the dispute was not a boundary dispute as alleged by the 1st and 4th Defendants and that the admission that the 4th Defendant

transferred the suit property to a 3rd party during the pendency of the suit contravenes the doctrine of lis pendens.

58. It was submitted that the failure by the 1st and 4th Defendants to produce an approved building plan means either that there is none in existence, or if it does exist it varies materially from what was actually constructed; that the omission of a site plan shows a deliberate attempt to hide their true intentions about the construction to the authorities and that the failure to comply with the law lead to significant damage to the Plaintiff's proprietary interests.

Analysis and Determination

59. Having considered the parties' pleadings, evidence, submissions as well as the relevant legal framework and authorities, the following issues arise for determination:

    i. Whether this court has jurisdiction to hear this suit; and if yes,

    ii. Whether the impugned construction on Land Reference Number 214/544 had the requisite development permission and/or approvals under the relevant law;

    iii. Whether the impugned construction on Land Reference Number 214/544 had the requisite NEMA approval;

    iv. Whether the activities complained of were a nuisance to the Plaintiff and violated his right to peaceful enjoyment of his property;

    v. Whether the Plaintiff is entitled to the reliefs sought in the Plaint; and

    vi. What happens to the Defendant's Counterclaim.

60. The first issue for determination is that of jurisdiction. In the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, it was held by the Court of Appeal that the jurisdiction of a court or tribunal to entertain a dispute is so crucial that whenever an objection to its jurisdiction is taken, the issue should be decided right away as a preliminary matter. The court further stated that a court which has no jurisdiction has no business taking one more step in the matter. The court held, inter alia, as follows:

> "...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the question right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. When a court has no jurisdiction there would be no basis for continuation of proceedings pending further evidence ..."

61. The Defendants have all submitted that the jurisdiction of this court was invoked prematurely and offends the doctrine of exhaustion. It was submitted that the issues herein should have been submitted to the Physical Planning and Land use Liaison Committee which has original jurisdiction in matters development, and to the National Environment Tribunal which deals with the issuance of EIA licence.

62. This suit was filed in the year 2011 when the cause of action arose. At the time, the repealed Physical Planning Act was still in force. That is the law to guide this court on issues relating to development permission. Under the repealed Physical Planning Act, disputes relating to land use and building permission were to be ventilated in the relevant Liaison Committees. Section 10 of the repealed Act provided for the functions of the Liaison Committees as follows:-

> "(2) The functions of other liaison committees shall be:-

(a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;

(b) to enquire into and determine conflicting claims made in respect of applications for development permission;

(c) to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;

(d) to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas; and

(e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act."

63. Section 33(3), (4) and (5) of the repealed Physical Planning Act, provided that:

"(3) Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13.

(4) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.

(5) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court."

64. When one reads Section 10 together with Section 33 of the repealed Act, it appears that the jurisdiction of the Liaison Committee would only be invoked after the approving authority had made a decision on a development application. Where a developer undertook a development without an approval, the jurisdiction of the Liaison Committee would not be invoked. In such a case, a challenge against the actions of the developer could only be raised in a court of law.

65. Similarly, under Section 129 of the Environmental Management and Coordination Act (EMCA), the jurisdiction of the NET is invoked only after NEMA has made a decision on an application. Where a developer decides to undertake a project without approval from NEMA, any person aggrieved by the developer does not have recourse a NET. Their recourse lies in a court of law.

66. The issue in the current case is neither the issuance of the development approval under the Physical Planning Act nor the issuance of an Environmental Impact Assessment Licence by NEMA or objections thereto. The dispute by the Plaintiff is that the construction was commenced without the approvals, permits and/or licences.

67. It is therefore safe to say that with the way the pleadings were framed, this suit is before the proper forum and the court has jurisdiction to hear the matter.

68. With due respect to the 1st and 4th Defendant's submission, this matter is not about boundaries, or to be specific, the matter is not about the extent of the boundary between the Plaintiff's and the Defendants' property. Although there was a mention of a boundary dispute as between the parties, that is not what is before this court for determination. It does not therefore fall under the ambit of Section 18 of the *Land Registration Act*.

69. The second issue is whether the impugned construction had the requisite development permission in terms of building approval. The 1st and 4th Defendants produced a letter dated 12th October, 2010, which the Plaintiff was shown in court and confirmed that it was a development permission for construction of a dwelling house.

70. The Defendants also produced in evidence a Certificate of Compliance indicating that the construction was not only approved, but that it was inspected by the 2nd Defendant and given a clean bill of health. The validity if these documents was not challenged by the Plaintiff. To this end, the court finds that there was in existence a valid approval for the construction that was been undertaken by the 1st and 4th Defendants.

71. I agree with the Advocate for the 2nd Defendant that if indeed the 1st and 4th Defendants were not forthcoming in providing the building permissions, the Plaintiff should have exercised diligence and requested for copies of the same from the 2nd Defendant. He failed to do so. The fact that he did not know of the existence of the approvals does not negate their validity or import.

72. The second issue is whether the impugned construction on Land Reference Number 214/544 had the requisite NEMA approval. It is not in dispute that when the 1st and 4th Defendants commenced construction on their property, they had yet to procure the Environmental Impact Assessment Licence from NEMA.

73. DW 2, an officer from NEMA testified that he visited the premises and made a finding to the effect that the impugned project had been commenced without an EIA Licence and as a consequence, stopped the construction because it was commenced before issuance of an EIA License. This testimony by DW 2 has been corroborated by not only the 1st and 4th Defendants but also by the Plaintiff.

74. As per the condition set out in the notice stopping the construction, which notice is dated 8th September, 2011, the 4th Defendant was directed to "stop further construction activities immediately until you acquire an EIA license from NEMA". DW 2 testified that the EIA license was eventually issued upon compliance with the conditions set out in its letter of 8th September, 2011, and the 4th Defendant was issued with an EIA Licence which was produced in court.

75. The Plaintiff's complaint is that he was not included in the public participation process during the issuance of an EIA license. It was the Plaintiff's submission that the public participation process in the procurement of the report was flawed.

76. The issuance of an EIA icense is anchored in *the Constitution* of Kenya under Article 69 (1) (f) which requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. This requirement is also set out in the EMCA as well as relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 ("the Regulations") made thereunder.

77. Section 58 (1) of the Environment Management and Coordination Act provides as follows:

> "Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing,

commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee."

78. Regulation 4 of the Environment (Impact Assessment and Audit) Regulations, 2003 provides that:-

> " No proponent shall implement a project -
>
> a. likely to have a negative environmental impact; or
>
> b. for which an environmental impact assessment is required under the Act or these Regulations; unless an environmental impact assessment has been concluded and approved in accordance with these Regulations."

79. This court will also be guided by Regulation 7(1) of the Environmental (Impact Assessment & Audit) Regulations, which provides that:-

> " Every proponent undertaking a project specified in the Second Schedule of the Act as being a low risk project or a medium risk project, shall submit to the Authority a summary project report of the likely environmental effect of the project."

80. According to the EIA Licence issued by NEMA to the 4th Defendant, the project being undertaken by the 1st and 4th Defendant's is described as a single dwelling unit. A reading of Schedule 2 of the EMCA reveals that the only time a dwelling house requires an Environmental Impact Assessment Report is under Medium Risk Developments, at Paragraph 2 (1)(a) which lists "Urban Development including (a) establishment of multi-dwelling housing developments of not exceeding one hundred units..."

81. The upshot is that since the building put up by the 1st and 4th Defendants was not a multi-dwelling house development as listed in schedule 2, it fell short of the requirements to conduct an Environmental Impact Assessment Study and therefore the EIA report was not a necessity to begin with. Consequently, public participation was therefore not mandatory, and the 1st and 4th Defendants could proceed to apply for the EIA Licence without the report.

82. Out of prudence, and commendably so, the 1st and 4th Defendants sought for the services of a lead expert registered by NEMA to conduct and Environmental Impact Assessment report for the said development. They cannot be penalised for exercising diligence. In any event, if the Plaintiff had any objections as to the issuance of the License, he should have lodged an objection to the NET but he did not do so.

83. The Plaintiff claimed that the 1st and 4th Defendant's action constituted a nuisance. The term nuisance was defined in the case of Nakuru Industries Limited vs S.S Mehta & Sons (2016) eKLR in line with the definition in Clerk and Lindsell on Torts at page 1354 para 24-01 as:-

> " An act or omission which is an interference or with disturbance of or annoyance to a person's rights used or enjoyed in connection with land. It is caused usually when the consequences of persons actions on his land are not confined to the land, but escape to his land causing an encroachment and causing Physical damage or unduly interfering with the neighbours use and enjoyment of his land."

84. From the above definition, it emerges that causing effluence and/or discharge to pass onto another's land constitutes a nuisance. It is clear from the circumstances of this case that at some point during the pendency of this suit, and as a consequence of the activities on the Defendants' land, some sort of effluence and/or discharge escaped onto the Plaintiff's land unduly interfering with his enjoyment of the same.

85. This was proved by the Plaintiff's exhibit 8 which is a photograph showing the said effluence and/or discharge. The 2nd Defendant's letter dated 30th August, 2011 also gives a record of the nuisance complained of. One of the conditions listed in that letter (Condition 3) is worded "close the storm water drainage directed to your neighbour and re-direct it to open drain."

86. However, this letter is superseded by the letter from the 2nd Defendant dated 14th September, 2011, which is the Certificate of Compliance, issued two weeks after the letter of 30th August, 2011. The Certificate of Compliance gives the construction a clean bill of health. This court then can only presume that the Certificate of Compliance was given after further inspection which confirmed that the 1st and 4th Defendants had complied with its conditions.

87. It is also not lost on the court that the Plaintiff himself testified that he did not know when the photograph showing that there was effluence/discharge flowing from the Defendants' property was taken. This is unfortunate as it would have informed the court whether there indeed was compliance with the 2nd Defendant's conditions. As matters stand, the court can only be guided by the evidence before it, which is that the construction was given a clean bill of health.

88. The second facet is that of peaceful enjoyment of the Plaintiff's property. The Plaintiff submitted that he has a right under Article 40 of *the Constitution* to acquire and own property of any description and in any part of Kenya. The right to own land also comes with the right to use and enjoyment of that land.

89. The testimony of the Plaintiff was that the building the 1st and 4th Defendants were constructing faced his property and therefore posed a security threat to his property; and that it compromised his privacy. The Plaintiff produced a report from Searite Holdings to back up his position.

90. On cross examination, the Plaintiff admitted that there was no door or window facing his property as alleged in the Plaint. He was referred to his own exhibit 7, which was a Surveyor's Report on the Intrusive Developments on the property, where he admitted that the opening he had referred to as a door did not directly face his property. The 1st and 4th Defendants also reiterated that the impugned building had no windows facing the Plaintiff's property.

91. That being the case, it follows that there is no discernible violation to the right to property, at least not as envisaged under Article 31 of *the Constitution* of Kenya which provides that:-

> "
>
> "31. Privacy
> Every person has the right to privacy, which includes the right not to have—
>
> a. Their person, home or property searched;
>
> b. Their possessions seized;
>
> c. Information relating to their family or private affairs unnecessarily required or revealed; or
>
> d. The privacy of their communications infringed."

92. In any event, it is clear from the evidence and testimonies given to this court that the Plaintiff's complaint is not that the 1st and 4th Defendants' impugned building materially interfered with the enjoyment and peaceful occupation of his property, but that it compromised the aesthetic value of his property. The Plaintiff cited the case Vanderpant vs Mayfair Hotel Company (1930) 1 Ch 138, where Luxmore J said:

> "It is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living but according to plain and sober and simple notions among English people."

93. The claim for aesthetic presentation is the very definition of "elegant and dainty modes and habits" as envisioned in the Vanderpant Case (supra). Consequently, the court must find that no sufficient evidence has been given to prove that the Plaintiff's right to ownership and peaceful enjoyment of his property has been violated.

94. It must further be pointed out that rights and duties are inextricably linked and cannot be separated, they go hand in hand. They are the polar opposites of one coin. For instance, *the Constitution* grants a citizen one right, but it also imposes an obligation on him or her to avoid dangers to his life and to respect the lives of others.

95. Only in the world of duties can rights be possessed and enjoyed equally. Each right is accompanied by a corresponding obligation or duty to not inhibit others from enjoying the same right. The same applies to the right to property. The Plaintiff does indeed have the right to own property and to have peaceful enjoyment of the same. However, it is also the Plaintiff's responsibility to acknowledge the same right for others.

96. Since people live in communities, they cannot insist on exercising their rights without regard to the rights of others. This means that the Plaintiff cannot therefore impose unnecessary burdens on other property owners which prevent them from enjoying their property, which is what appears to be happening in this suit. The Plaintiff cannot expect to hold the 1st and 4th Defendants enjoyment of their own property by dictating how they can develop the same, moreso after complying with the law.

97. With regard to the alleged loss of rent as result of the impugned building, the Plaintiff submitted that the right to property includes an individual's right to be protected from interference that causes economic loss or depreciation of property. The Plaintiff alleged in his pleadings and testified that at the time of filing the suit, he had a tenant in his house who happened to be none other than the Portuguese Ambassador. The Plaintiff produced in evidence a Lease between himself and the Government of the Republic of Portugal.

98. It was his contention that the departure of his tenant was caused by the impugned buildings. He sought general damages on the basis of the loss of rental income.

99. The 1st Defendant on the other hand testified that indeed the Portuguese Ambassador occupied the Plaintiff's property at some point but that he was not the reason behind his departure. The 4th Defendant on cross examination confirmed that the entire area including the Plaintiff's premises was designated Ambassadorial status, but on re-examination, he denied that the Plaintiff's house had ambassadorial status. That aside, this court notes that there is no proof that the said Ambassador left the Plaintiff's premises due to the impugned buildings.

100. With regards to damages, this court shall rely on the Court of Appeal decision in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it."

101. Notably, no evidence was presented to assist the court to assess general damages, if at all. Indeed, there is no evidence before this court to show that the Defendants breached any law or agreement to warrant the award of damages. Indeed, the fact that there is a tenant in the Plaintiff's house, although paying less rent than the previous tenant, is proof enough that the house still holds value. After all, ambassadorial status or not, there was no guarantee that the house would always house an ambassador.

102. In conclusion, it is the finding of this court that the Plaintiff has failed to prove his case on a balance of probabilities. What then happens to the Defendant's counterclaim?

103. In her Counterclaim, the 4th Defendant averred that the Plaintiff's action slowed down the development and occupation of her property for three months and that she incurred loss and damages; that she has lost a total of Kshs. 2,900,000 which she avers is the sum total of KShs. 1,500,000 which she has lost for non-occupation of the property being rent for the three months, and a further sum of KShs. 1,400,000 paid to the contractor for delaying her from completing his work.

104. The distinction between general and special damages was explained by the Court of Appeal in the Jogoo Kimakia Bus Services Ltd vs Electrocom International case (supra) where it was stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

105. In Joseph Kipkorir Rono vs Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses...General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded."

106. Notably, from the testimonies they gave in court and the documents adduced, no evidence was given by the 1st and 4th Defendants in support of their counter-claim. The 1st and 4th Defendants' counsel did not even submit on the counterclaim. The counter-claim therefore also fails and the same is dismissed.

107. For the reasons I have given above, I dismiss the Plaintiff's suit and the 1st and 4th Defendants' counter claim with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Shaw for Plaintiff

Mr. Were for 1st and 4th Defendants

Mr. Moriasi for 2nd Defendant

Court Assistant - Tracy