



Lamba & another v Pearls Kids Academy Limited & another; Nairobi County Government & another (Interested Parties) (Environment & Land Case E078 of 2023) [2023] KEELC 20964 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E078 OF 2023
AA OMOLLO, J
OCTOBER 26, 2023**

BETWEEN

DAVINDER LAMBA 1ST PLAINTIFF

SUNIL LALCHAND SHAH 2ND PLAINTIFF

AND

PEARLS KIDS ACADEMY LIMITED 1ST DEFENDANT

SAVITA VIRCHARD SHAH 2ND DEFENDANT

AND

NAIROBI COUNTY GOVERNMENT INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

1. The Applicant filed a notice of motion dated February 27, 2023 under Order 40 and 51 of the [Civil Procedure Rules](#); section 3A and 63(e) [Civil Procedure Act](#), sections 45, 46, 56-57 and 72 of the [Physical Land Use and Planning Act](#) and other applicable laws. The applicant sought for the following orders;
 1. Spent
 2. That pending the hearing and determination of the suit filed herewith, this Honourable Court be pleased to restrain the 1st & 2nd defendants/respondents, their agents, servants, employees or any person acting under its authority by way of an injunction from establishing, operationalizing and/or in any other



way carrying on the business of a school, known as Pearls Kids Academy on LR.No.1870/X/84 situated in Westlands, Sports Road.

3. That an order do issue directing the 1st & 2nd defendants to pull down, remove and clear all those advertisement posters inviting members of the public to enroll their kids into the school and/or stop any admissions into the school pending the hearing and determination of the application and suit.
 4. That an order do issue directing the 1st & 2nd defendants to pull down, remove and clear all those unapproved/ illegal structure extensions on the main house making up the school premises, including but not limited to classrooms, kitchen, ablution block/ gate extension into the plaintiffs common user road and the other facilities comprising the school pending the hearing and determination of the application/suit.
 5. That order do issue barring the 1st and 2nd defendants/respondents their agents, servants, employees or any person acting under its authority from using the alternative/illegal gate blocking the main entrance to the estate pending the hearing and determination of the suit/ application.
 6. That the costs of this application be provided for.
 7. That such other and/or further relief be granted as this honourable court may deem fit and just to grant in the circumstances of this matter.
2. The motion was supported by the supporting affidavit and further affidavit sworn by Davinder Lamba on February 27, 2023 and April 6, 2023 respectively. The grounds of the motion were that the defendants have established a school known as Pearls Kids Academy on LR.No.1870/X/84 situated in Westlands, sports road hereinafter referred to as “the suit property” which land is adjacent to Plot No.1870/X/21 and Plot No.1870/X/83 owned by the 1st and 2nd plaintiffs respectively.
 3. Mr Lamber deposed that the plaintiffs acquired various properties and established their own estate, demarcated the roads and established various gates for their own security, sanity, beauty within their residential homes and have lived in harmony for over 30 years. He added that the initial owner of the suit property passed away and it was taken over by the 2nd defendant as the beneficiary who together with the 1st defendant have converted their residential home into a commercial/school related business without following due process of the law.
 4. The plaintiffs contended that the estate within which the defendants/ respondents have established a school, is coat zoned strictly for residential purposes and development and that the development of the school is a violation of the conditions attached to the mother title over the property on which the school is situated.
 5. They added that the establishment and operation of Pearls Kids Academy within the estate is a blatant breach of the planning regulations for the area and the defendants/respondents herein did not obtain a change of user of the property as required by the law before they established the school and all the necessary approvals including but not limited to NEMA approvals and approvals from the County Government of Nairobi.
 6. The Plaintiffs stated that there is no report from NEMA on environmental impact assessment and noise pollution and that the ministry of education requested the defendants to remove all the grills from the windows which they cannot because the structure is in the form of a residential home not a school. The plaintiffs explained that the 1st defendant school is in a limited compound meant for



- a home and cannot accommodate 90 students as per their school approval report, noting that the neighbouring school of Nairobi Baptist is across the road thus does not affect the estate.
7. The plaintiffs further contended that if at all the defendants/respondents did obtain the requisite change of user, the same was obtained illegally and irregularly as the local community was neither notified nor consulted by the defendants/respondents or the interested parties about the intended change of user before the same was granted by the relevant county authority. They aver that before the County issues authorities on change of use, the same has to be published in the Kenya Gazette for members of the public going to be affected to respond to it. That the defendants were issued with conditional authority on change of use in 2016 but failed to implement the same within the required period hence the permission lapsed.
 8. They further stated that establishment and operation of the said school has put further strain on the already stretched public resources such as security, road infrastructure and the continued operation of the school will lead to a complete breakdown of these resources to the disadvantage of the area residents. That it has also caused nuisance to residents who have been deprived of their right to quiet possession and peaceful enjoyment of their residential properties.
 9. The plaintiffs explained that the defendants being aware of the fact that the suit property is at the entrance of the estate, created an alternative gate (orange gate) without their approvals and that of the interested parties to let in cars dropping and picking up students, thus blocking the main entrance (black gate) to the estate, inconveniencing the estate residents and interfering with their quiet stay and use of our properties. They pleaded about reporting the issue/ illegal developments on the suit property to the 1st interested party's department of Physical Planning who then issued an enforcement notice barring the defendants from continuing with their illegalities. However, the enforcement notice was ignored, neglected and the Respondent carried on with establishing the school.
 10. The application was opposed by the defendants' replying affidavit sworn on March 16, 2023 by Trusha Shah, who stated that she owns the suit property inheriting it from the 2nd defendant who passed away on February 17, 2020 as is evidenced by the Certificate of Confirmation of Grant dated January 24, 2023. She deposed that the power to control land use and development is vested in the County government and the owner intending to develop his/her property for any purpose other than that earmarked in the title should involve the county government.
 11. Ms Shah deposed that she applied from the City Council of Nairobi, a change of user from residential to commercial in the year 2015, in line with the Physical Planning Act and paid the requisite fee of Ksh. 121,000/- That the application was granted vide the 1st Interested party's Notification of Approval dated March 25, 2015 bearing the official stamp of Nairobi City County.
 12. She added that vide letter dated September 16, 2016, they wrote to Nairobi City County seeking authority and or permission to construct plot entrance/access and improve frontage to serve the development. That the authority to construct the access road was granted vide the letter dated November 4, 2016 (copy annexed to the replying affidavit).
 13. She deposed further that the 1st defendant is duly registered under the Ministry of Education as a private mixed day Kindergarten offering CBC Curriculum, having completed student intake and officially opened in January 2023. That the school is fully operational after having complied with all the requirements and getting licenses and or approvals from the County and Ministry of Education (9 copies of the licenses dated 1.3.2023 were annexed).
 14. The 2nd defendant contended that the 1st defendant was primarily established for the public good of the society offering access to education. That the plaintiffs' properties are next to Nairobi Baptist Church,



Westlands which has a full primary school and the plaintiffs/applicants herein have never complained about it. The defendant stated that it has established in its own compound with a perimeter wall, lockable gate and security which is separate and distinct from the plaintiff's properties hence allegations of traffic causing congestion do not suffice.

15. Further, the defendant stated that the application has been overtaken by events because the School is already established and operational, student admission has since closed, construction was completed and the 1st defendant's gate and or access is pursuant to the City County's approval. They added that their development Application procedure as envisaged by section 31 of the *Physical Planning Act* cap 286 was followed to the letter. The Plaintiffs' further affidavit dated April 6, 2023 controverted the facts as deposed in the replying affidavit.

Submissions

16. The plaintiffs/applicants filed their submissions dated April 14, 2023 which laid out the background of the motion and identified issue for determination as to whether the Applicants should be granted the injunctive orders sought in the Application pending hearing and determination of the suit.
17. Relying on the principles for issuing such relief as settled in the case of *Giella v Cassman Brown Co. Ltd* (1973) EA 358, the plaintiffs submitted that they have demonstrated that they have a prima facie case with high probability of success, and they stand to suffer irreparable loss which cannot be compensated by way of damages, with the balance of convenience tilts on their side.
18. They submitted that they have a right under article 40) subject to article 65 to acquire and own property of any description and in any part of Kenya and should not be interfered with by the neighbor while using their property. That the estate is zoned as a residential area for homes alone and no schools are allowed to operate in the area thus the alleged change of use to commercial was not outlined to be a school and the voluminous number of people a school holds was not disclosed to the 1st interested party before granting approvals.
19. They further submitted that the purported approvals adduced by the respondents were obtained illegally without public participation, and that the approval issued was conditional to be done within 2 years from the date of issuance. Also, that the procedure for change of use of a property can only be obtained after the 1st interested party has issued a gazette notice to invite members of the public to give their views on the proposed change of use, failure to which the procedure is declared null and void.
20. The plaintiffs submitted that section 40 of the *Physical Land Use Planning Act* provides that: -

“Within thirty days of the preparation of a county physical and land use development plan, the county planning authority shall publish a notice in the Gazette, in at least two newspapers of national circulation and through electronic media informing the public that the draft county physical land use development plan is available at the places and times specified in the notice.”
21. The Plaintiffs submitted that the city should be organized in such away to be habitable for all residents thus the rights for the Respondents to operate school under the guise of offering basic education does not imply that other people's rights should be infringed upon and in support cited the case of *Kenya Bus Services Ltd & 2 others v Attorney General* [2005] 1 KLR 787 which held that;

“The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights



are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World "

22. The plaintiffs submitted that the defendants have attached their approvals for easement or access road but in their application/drawings they did not disclose to the 1st interested party that indeed there existed a huge access road and a gate to the estate that was going to be blocked by the creation of their secondary gate.
23. The plaintiffs submitted that the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is actual, substantial and demonstrable, injury that cannot adequately be compensated by award of damages. And in this case, the subject matter is establishing a school on land within an estate which cannot be irreplaceable by way of damages if the defendants are not constrained by way of an injunction because the school generates noise pollution, smoke pollution from the kitchen, traffic congestion leading to wasting of time at the main entrance of the estate whose effects cannot be compensated in monetary terms.
24. The defendants submitted that in their replying affidavit sworn on March 16, 2023 has demonstrated that they involved the County government in 2015 to 2016 as evidenced in the correspondences annexed, purposely with the aim of changing the land use from residential to commercial. They stated that the 2nd defendant applied for Change of user and paid the requisite fee of Ksh 121,000/ to the Nairobi City County as proof of seeking permission to construct plot entrance and improve frontage to serve the development of the suit property.
25. The defendants relied on the cases of *Giella (supra)*, *National Bank of Kenya Duncan Owour Shakali & another CA No.9 of 1997* and *Habib Bank Ag Zurich v Eugene Marion Yakub CA No 43 of 1982*(unreported) in submitting that the Plaintiffs have not established a prima facie case. They stated that the plaintiffs' allegations of breach of right to quiet possession of property are baseless, unfounded and do not suffice, given the location of the defendants' and the plaintiffs' Premises.
26. The defendants further submitted that their play area faces the main road and is not in any way remotely close to the plaintiffs' premises which are adjacent to Nairobi Baptist Church which has a full primary school. Further, that the building adjacent to the Plaintiffs' property is commercial. They cited the case of *Sheriff Abdi Hassan v Nabhif Jama Aden* (2006) eKLR where the Court of Appeal stated that, "the courts have been reluctant to grant mandatory injunctions at the interlocutory stage, however where is prima facie established as per the standards spelt out in law and the party against whom the mandatory injunction is sought is on the wrong the courts have taken action to ensure justice is meted out without the need to wait for full hearing of the entire case."
27. The defendants submitted that if at all any right owing to the plaintiffs/applicants have been violated (which is denied), damages will suffice as adequate remedy and relied in the case of *Olympic Sports House Limited v School Equipment Centre Limited* Civil case 190 of 2012[2012] eKLR. They also cited the case of *Amir Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589 stating that the court in responding to prayers for interlocutory injunction relief should always opt for the lower rather than the higher risk of injustice.

Determination:

28. The issue for determination is whether the plaintiffs have met the threshold for issuance of the injunction sought for in their application. The principles upon which temporary injunctions may be granted are well settled as argued by both parties both putting reliance to the case of *Giella v Cassman Brown (supra)*. On the issue as to whether the plaintiffs have a prima facie case, I shall consider the



- grounds in support of their motion, that the defendants have set up a school within the residential estate without the requisite approvals.
29. I have also taken note that the Defendants have confirmed that the school in subject was set up and is running arguing the same was done after complying with all the requirements, getting licenses and or approvals from the 1st interested party and the Ministry of Education. They annexed copies the said approvals and receipt of payment for change of user.
 30. The Plaintiffs alluded that the produced approvals were not obtained procedurally because they were not involved, there was no environmental impact assessment conducted and that the change of user was not gazetted. At this interlocutory stage of the proceedings, the court will not delved into analyzing the authenticity of the documents annexed to the affidavits in support of and against the application. However, for purposes of determining whether the Plaintiff has established a prima facie case to warrant the grant of the orders sought, I will consider whether or not they have laid a prima facie case.
 31. On the face of documents relied upon by the Defendants the change of user dated 16th February 2015 read thus; “proposed change of user from residential to commercial (Offices & shops)” This application was approved on March 25, 2015 and although it was for commercial purpose, the change of use it was intended for was specified. The letters dated 2016 refers proposed construction of a plot of access to serve L.R No 1870/X/70. There is no application for change of user to put up a school from the City County of Nairobi, thus an inference drawn of non-compliance with Planning Regulations and which is a clear demonstration that the Applicants’ complaint has some basis
 32. Secondly, the defendants annexed letters from the Ministry of Education allowing to operate from 1st March 2023. Since the application for change of user was made in 2015, the law required the defendants to carry out an environmental impact assessment. The second schedule of EMCA No. 8 of 1999, provides that an EIA be carried out in respect of any activity that is out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use.
 33. It is discernable from the pleadings that the suit property was designed as residential premises, for example, as gleaned from the application for change of user. Since the intended land use change was out of character with its surrounding, the Defendants ought to have undertaken an environmental impact assessment. However, there is no EIA license annexed to the replying affidavit to ascertain if the exercise was done. This omission evidences the presence of a prima facie case put forth by the Applicants.
 34. The defendants argument that they obtained the requisite approvals from the 1st Interested Party and the Ministry of Education does not take away their obligations of complying with the Land Use and Physical Planning Regulations. Allowing the defendants to proceed with the development (running of the school) before complying with the law is asking the court to abet an illegality.
 35. It is therefore my finding that the Applicants have met the threshold for granting the orders of temporary injunction as sought. The defendants put forth an argument that the orders of temporary injunction cannot be granted at this stage noting that the school is up and running. The Applicants came to court as soon as they saw the advertisements inviting enrolment for pupils to their school and they obtained temporary orders of injunction on 13th March 2023 which required the Defendants to stop pupils’ admission into the school.
 36. Consequently, I will allow it on the following terms;
 - a. That pending the compliance with the EIA and Change of User Regulations and or hearing and determination of this suit (whichever is earlier) this honourable court does issue orders restraining the 1st & 2nd defendants/respondents, their agents, servants, employees or any



person acting under their authority by way of a temporary injunction from operationalizing, running and/or in any other way carrying on the business of a school, known as Pearls Kids Academy on LR.No.1870/X/84 situated in Westlands, Sports Road.

- b. The costs of the application to the Applicants

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH OCTOBER 2023

A. OMOLLO

JUDGE

