



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Nairobi City County (Environment & Land Case
E149 of 2023) [2023] KEELC 20863 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E149 OF 2023**

**MD MWANGI, J
OCTOBER 17, 2023**

BETWEEN

FRANCIS CHRISTOPHER MAINA NJOROGE PLAINTIFF

AND

THE NAIROBI CITY COUNTY DEFENDANT

RULING

1. By a Notice of Motion Application dated 26th April, 2023, the Plaintiff/Applicant has sought for the following substantive orders against the Defendant/Respondent: -
 - a. That pending the hearing and determination of this suit the Defendant/ Respondent, its agents, workers, auctioneers and or anyone acting on its behalf from trespassing, digging trenches for a sewerage line, destroying perimeter wall, damaging the property or dealing in any manner whatsoever with Land Reference Number 13468/888 Njiru Sub County, Nairobi.
 - b. That the Officer Commanding Njiru Police Station be directed to supervise these Court Orders.
 - c. That costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Francis Christopher Maina Njoroge, the Plaintiff herein deponed on the 26th April, 2023. He states that he is the registered proprietor and owner of Land Reference Number 13468/ 888, Njiru Nairobi (the suit property). He alleged that sometimes in April 2023, the Defendant unilaterally, arbitrarily, unlawfully and without a valid reason issued an enforcement notice to specifically remove his perimeter wall and construct a sewerage line through his property.
3. The deponent further depones that he has been in occupation, use and developed the suit land since 2000 to date and has permanent structures including the concrete perimeter wall. As a registered



proprietor of the suit property he is entitled to protection of his ownership rights under Article 40 of the *Constitution* and Sections 25 (1) and 26 of the *Registered Land Act*, 2012.

4. He avers that he stands to suffer loss of his land, the concrete wall and massive damages to his property if this court fails to intervene.

Replying Affidavit

5. The application is opposed by the Defendant who filed a Replying Affidavit sworn by Wilfred Wanyonyi Masinde. The deponent confirms that in deed the Applicant is the registered owner of the property. However, the perimeter wall referred to in the application is an illegal development which has blocked the road. It had received complaints from the Nairobi Water and Sewerage Company who were in the process of constructing a sewerage line in the area but the same could not happen as the Applicant's perimeter wall had blocked the road. Upon conducting a site visit, the Defendant's officials confirmed that the area in dispute is part of the public road as per the attached Survey Plan.
6. The deponent further avers that the Defendant issued an enforcement notice to the Plaintiff, which notice requires an aggrieved party to appeal to the Nairobi County Liason Committee in accordance with Section 61 of the *Physical and Land Use Planning Act*, No. 13 of 2019 Laws of Kenya. Subsequently, a meeting was held in an effort to resolve the dispute. It was agreed in the meeting that the perimeter wall had indeed encroached the wayleave.
7. The Defendant further affirms that the Applicant is yet to exhaust the dispute resolution mechanisms as provided for under the *Physical and Land Use Planning Act*. More so, since the Applicant has not appealed the said enforcement notice with the relevant authorities, the application is therefore premature and ought to be dismissed.
8. The deponent states that the Plaintiff cannot seek the protection of the right to property under Article 40 of the *Constitution* as the property where the wall is constructed was acquired unlawfully. Further, that the Applicant never obtained development approvals from the Defendant. The application should therefore be dismissed with costs.

Further Affidavit

9. The Plaintiff filed a Further Affidavit deponed on the 26th June, 2023. He avers that the attached Survey Plan dated 1st February, 1989 shows a clear Sewerage Line and Way Leave which is quite apart from the property described as Title No. LR 194771 hence the Respondents were clearly trespassing on his land.
10. The alleged complaints against him are false as the Deed Plan from the Director of Surveys dated 19th February, 2016 shows clearly that the property did not block the road or sewer line.
11. He further states that the Defendant in seeking to lay the Sewerage Line through his property technically seeks to revoke, reallocate and recall part of the allocated plot which is not under the mandate of the County Liason Committee hence it lacks the jurisdiction to entertain claims of breach of Constitutional rights and freedoms.

Court's Directions

12. With the Consent of the parties, the court directed that the application be dispensed with by way of written submissions. Both parties complied.



Plaintiff/Applicant's Submissions

13. The Plaintiff restates his case in his submissions and submits that he is in danger of losing title to the suit land in which he has been living in, occupied and developed for the past 25 years. He submits that he has established a prima facie case with a probability of success. He has shown that he is bound to suffer loss that cannot be adequately compensated by damages.
14. He relies on the principles of injunction as enunciated in the case of *Giella v Cassman Brown* (1973) EA 358.

Defendant/Respondent's Submissions

15. The Defendant/ Respondent submits that the Applicant's case does not meet the threshold enunciated in the case of *Giella v Cassman Brown* (*Supra*). No evidence has been adduced to controvert the claim that the perimeter wall extends from the private property to the adjacent public road as depicted in the Survey Plan.
16. The Defendant/Respondent further submits that this being a discretionary remedy, a party who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. The Applicant herein has not adduced evidence that he obtained development approvals from the County Government.
17. As to whether the Applicant stands to suffer irreparable harm not compensable in damages, the Defendant submits that the conduct of the Applicant of blocking a public road is unlawful and he should not be allowed to continue benefitting from it at the detriment of the other residents. That the essence of issuing an Enforcement Notice was for an aggrieved party to file an appeal at the Nairobi County Liaison Committee. Further, that the Applicant has therefore not exhausted the dispute resolution mechanisms hence the application should be dismissed with costs.

Issues for Determination

18. I have considered the application, the Affidavits and the rival submissions thereon. The issues for determination are:
 - a. Whether the Plaintiff/ Applicant has exhausted the existing Dispute Resolution Mechanisms before invoking the Jurisdiction of the Court.
 - b. Whether the Plaintiff/ Applicant is entitled to an order of temporary injunction as sought.

Analysis and determination

Whether the Plaintiff/ Applicant has exhausted the existing Dispute Resolution Mechanisms before invoking the Jurisdiction of the Court.

19. The ownership of the suit property is not in dispute in this case. The Plaintiff/Applicant's complaint is against the enforcement notice issued by the Respondent. The [Physical and Land Use Planning Act](#), Act No. 13 of 2019, is the relevant statute that makes provision for the planning, use, regulation and development of land. The objectives of the Act set out in Section 3 includes: -

'Providing a mechanism for dispute resolution with respect to physical and land use planning'



20. Section 72 of the Act empowers the County Executive Committee Members to serve upon an owner, occupier, agent or developer of property or land with an enforcement notice where a development has commenced on any land without development permission or where any condition in the development permission granted has not been complied with. Where any person upon whom an enforcement notice has been served is aggrieved by that notice, as in this case, that person has a right of appeal to the relevant County Physical and Land Use Planning Liaison Committee within 14 days of being served.
21. Section 73(4) of the *Physical and Land Use Planning Act* provides that any party who is aggrieved by the determination of the County Physical and Land Use Liaison Committee may appeal to the Court (read Environment and Land Court) only on a matter of law and the Court shall hear the appeal in 30 days.
22. As this Court stated in the case of *Eric Kiprotich Soi & Another v Director General Nairobi Metropolitan Services* [2022] eKLR:
- “the law is therefore clear that this Court, on matters falling under the provisions of the *Physical and Land Use planning Act*, enjoys appellate jurisdiction and on matters of law only.”
23. The Plaintiff/ Applicant has not come to this Court by way of an appeal. From the Plaint, the Plaintiff/ Applicant seeks a permanent injunction against the Defendant restraining him from destroying his perimeter wall, digging sewerage trenches and trespassing on his property. It is evident that this suit and the instant application were prompted by the issuance of the Enforcement Notice by the Defendant.
24. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019; *William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows at paragraph 52:
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution ...*”
25. The Court of Appeal in the case of *Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 others* (2015) eKLR, expressed itself on the doctrine of exhaustion as follows: -
- “It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked”.
26. In as far as the grievance against the enforcement notice is concerned, this Court doesn’t have the jurisdiction to consider it in the first instance in accordance with the provisions of the *Physical and Land Use Planning Act*. This Court’s jurisdiction in matters of ‘enforcement notice’ is appellate. The same ought to be heard and determined in accordance with the provisions of section 72(3) of the *Physical and Land Use Planning Act*. The attempt by the Plaintiff to circumvent the law by instituting the instant suit before exhausting the mechanism provided for under the Statute is nothing but an abuse of the process of Court and clearly a violation of the doctrine of exhaustion.



27. Accordingly, the Court makes the following findings: -

- a. The application by the Plaintiff herein violates the doctrine of exhaustion and amounts to an abuse of the process of Court in view of the provisions of Section 72 and 73 of the *Physical and Land Use Planning Act*.
- b. The Notice of Motion application dated 26th April, 2023 is hereby struck out with costs to the Defendant/Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER, 2023

M. D. MWANGI

JUDGE

