REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 1034 OF 2014

NYAYO EMBAKASI RESIDENTS ASSOCIATION

Suing through its registered officials

GOERGE OCHOLA, ANTONY SANG,

ALOISE LUMUTU AND WILSON WAMBUA..................PLAINTIFFS

VERSUS

NATIONAL SOCIAL SECURITY FUND.....................1ST DEFENDANT

CHINA JIANGXI INTERNATIONAL............................2ND DEFENDANT

KENYA LIMITED

RULING

The court on 28th October 2014 directed the plaintiffs application dated 1st August 2014 and the 1st Defendant's application dated 22nd September 2014 to be canvassed and heard together.

The plaintiff's application seeks an order of injunction against the Defendants restraining them from trespassing on, wasting, constructing on alienating and/or otherwise interfering or dealing with **L.R. NO.140/479** and **140/480** delienated as public utility plots for construction of nursery school and playground respectively for residents of **Nyayo Embakasi Estate court NO. 516** pending the hearing and the determination of the suit. The application is premised on the grounds set out on the face of the application and on the grounds set out on the annexed affidavit of **George Ochieng Ochola** sworn on 1st August 2014. The plaintiff is a Residents Welfare Association and the foundation of their claim principally against the 1st Defendant is that the 1st Defendant has contravened the master plan for the **Nyayo Embakasi Housing Estate** development which had reserved specific areas for public utility to cater for recreational and social amenities and has contracted the 2nd Defendant to construct maisonettes on **L.R.NO.140/479** and **140/480** which had been demarcated for a Nursery School and a Children's playground. The Residents aver that these plots were constituted as public plots for the benefit of the

Residents which the 1st Defendant could not deal with in any manner without consulting the Residents for their approval and/or consent. The Residents aver that the proposed construction of additional maisonnettes will have the effect of not only exerting pressure on the already stretched essential services such as provision of water but will also deny the Residents social and recreational facilities that the initial design and master plan had taken account of.

The plaintiffs contend that they purchased, units in the 1st Defendant's estate development on the basis that initial design and masterplan was to be respected and argue that the construction of additional maisonnettes on the plots that were reserved for social and recreational services would change the character of the estate to the prejudice of the plaintiffs. It is the averment of the plaintiffs that efforts to engage with the management on the issue of irregular developments has not elicited any commitment on the part of the Defendants and the plaintiffs fear that unless the Defendants are restrained by way of injunction as prayed they are likely to proceed with the developments to the prejudice of the plaintiffs.

The 1st Defendant has filed a replying affidavit in opposition to the plaintiff's application through one **Mutemi Nzau**, a manager in charge of the property Development Department of the 1st Defendant sworn on 29th September 2014. The 1st Defendant avers that it is a statutory body established under the **National Social Security Fund Act NO. 45 of 2013** with a mandate to provide social security to members through registration, collection of contributions, and prudent fund management of any available funds for the purposes of the Fund in accordance with the provisions of the Retirement Benefits Act. The 1st Defendant avers that as a means of meeting part of its investment obligations and plans it contracted the 2nd Defendant to construct Maisonnettes on **L.R. NO**. **140/479** and **L.R.NO. 140/480** which plots were hived out of **L.R. NO**. **9042/179**. The contract with the 2nd Defendant is worth **Kshs.2,155,407,742/-** as per the contract dated 21st February 2013 attached to the replying affidavit. The 1st Defendant further avers that the 2nd Defendant took possession of **L.R. NO. 140/479** and **L.R.NO. 140/480** and commenced development on the same in June 2013 and that the plaintiffs were aware of the construction of the contract works and are therefore guilty of laches in bringing the present proceedings.

The 1st Defendant denied the allegations that the constructions being undertaken in the suit plots **L.R. NO. 140/479** and **480** are not in conformity with the approved master plan for **Nyayo Estate Embakasi** and contended that the construction of the proposed maisonettes does not interfere with the initial designs of the estate and/or the future provision of essential services such as security, water and electricity and averred that the constructions are in compliance with the approved master plan. The 1st Defendant contended that the construction/developments have been approved by the City County of Nairobi as evidenced by the approved location plan, master plan and site plan annexed to the 1st Defendant's affidavit.

The 1st Defendant states **L.R. NO. 140/479** and **L.R.NO.140/480** were indeed set aside for construction of residential premises as evidenced by the annexed leases for the respective plots and thus the plaintiffs allegation that the same were set aside for a nursery school and play ground respectively for residents of **Nyayo Estate court 516** is untrue. The 1st Defendant further avers that contrary to the plaintiffs assertions there were already eleven (11) plots earmarked for schools and playgrounds and two (2) of them namely **L.R. NO. 140/174** and **L.R. NO.140/85** both delineated for construction of a nursery school and L.R. **NO. 140/84 and L.R. NO.140/175** delineated as open space and recreation purposes have developed. Respective leases are annexed to the 1st Defendant's affidavit. The 1st Defendant further states they applied for approval for development of the suit plots from the City County of Nairobi which approval was duly given on 5th June 2014. Such approval the 1st Defendant argues would not have been given if the properties had been set aside as public utility plots.

The 1st Defendant contends the plaintiffs have not demonstrated a prima facie case with any probability of success to warrant them the grant of an order of injunction as sought. The balance of convenience to the contrary would favour the 1st Defendant who has demonstrated ownership and has commenced development on the suit properties on the basis of duly approved plans and stands to suffer irreparable

damage if the injunction is granted. The 1st Defendant further contends the plaintiffs are undeserving of the equitable remedy of injunction as they approached the court with unclean hands as they failed to disclose to the court the true purposes for which the suit lands were delineated as they instead chose to mislead the court that the plots were set aside for public utilities.

The 1st defendant's application dated 22nd September 2014 principally seeks an order that the exparte injunctive orders granted on 4th August 2014 and irregularly extended on 15th August 2014 be reviewed, varied and set aside. The basis of the 1st Defendants application as appears from the grounds set out in support of the application and on the supporting affidavit is that the exparte order of injunction issued on 4th august 2014 lapsed automatically after the expiry of 3 days on 7th august 2014 due to lack of timeous service in terms of Order 40 rule 4(3) of the Civil Procedure Rules 2010. The 1st Defendant contends that the temporary exparte orders were irregularly extended to 27th October 2014 contrary to the provisions of Order 40 Rule 4 (2) of the Civil Procedure Rules which permits extension of exparte orders only for a period of 14 days. The Defendant states that the exparte order having lapsed automatically by expiry of time there was no order in force capable of being extended.

The plaintiffs filed grounds of opposition to the 1st Defendant's application on 17th November 2014 and set out the following grounds:-

1. The application is incurably defective and contravenes the provisions of section 19 of the **ELC Act and article 159(2)** of the Constitution of Kenya.

2. The orders sought cannot be granted on the basis of the grounds set out in the circumstances as the application is overtaken by events.

3. The application has drawn is vexatious, scandalous and grossly misconceived in law and ought therefore to be struck out.

The court directed the parties to file written submissions to canvass the applications. The plaintiff filed their submissions on 17th November 2014 while the 1st Defendant filed its submissions on 20th November 2014. The parties in their submissions reiterate the facts of the matter as set out in their respective affidavits and further outline their positions in regard to the legal issues.

Having reviewed the pleadings and the submissions by the parties the issue for determination in regard to the application by the plaintiff is whether the plaintiff has satisfied the conditions and/or criteria for the grant of temporary interlocutory injunctions as established in the leading case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** to warrant the court to grant them an injunction as sought. In regard to the 1st Defendant's application the issue for determination is whether the exparte order of injunction granted on the 4th August 2014 was validly extended on 15th August 2014 the same having not been served in compliance with the law and further having been extended for a period exceeding fourteen days and/or whether the same ought to be reviewed, varied or set aside.

<u>The Plaintiffs application dated 1st August 2014</u>

The plaintiffs application being one seeking the grant of an interlocutory injunction the plaintiff is required to satisfy the conditions for grant of a temporary injunction as established in the **Giella –vs- Cassman Brown** case (**supra**):-

1. That they have a prima facie case with a probability of success,

2. That damages would not be an adequate remedy and that they stand to suffer irreparable harm unless the injunction is granted, and

3. In case the court is in doubt the court should consider in whose favour the balance of

convenience tilts in determining the application.

The plaintiffs contention is that the two subject plots **L.R.NO. 140/479** and **L.R.NO.140/480** were set aside for public utilities as per the original development plan and/masterplan and thus were not available to the Defendants to develop residential maisonnettes on them without appropriate consultation with the residents and the latter giving their approval/consent to the change of user. The plaintiffs refer to the initial approval of the development given by the Town Planning Committee of the then City Council of Nairobi on 17/11/1995 annexed at page 41 of the plaintiffs bundle of documents marked **"C001**" and state the approval set conditions that were in conformity with the original master plan of the entire estate and argue that the 1st defendant having completed the development in 1998 cannot now seek approvals to develop more maisonettes on the open spaces such as **L.R. NOs. 140/479** and **140/480.** I have perused the said approval and what the plaintiffs describe as the master plan annexed as the last document at page 43 and nowhere are the suit plots identified. Thus there is no demonstration by the plaintiffs that indeed the suit plots were infact set aside for public utility purposes.

The 1st Defendant for its part has tendered evidence to show that plot **L.R. NOS. 140/479** and **140/480** were infact not set aside for public utility purposes. The 1st Defendant has annexed copies of leases in respect L.R **NOS.140/479** and **140/480** at pages 1-4 of the 1st Defendant's bundle of documents that show the leases were issued in 2001 to the 1st Defendant and were registered at the Lands Office on 20th December 2007. The reserved user of the two plots as per the special conditions appended to the leases is-

> **"The land and building shall always be used for residential purposes only".**

The 1st Defendant further stated the plots that were intended for public utility purposes have not been interfered with and asserts that eleven (11) plots were earmarked for schools and playgrounds and out of those two have been developed together with their playgrounds namely **L.R. NOS 140/174** and **140/85** which were delineated for construction of nursery school and **L.R. NOS. 140/175** and **140/84** which were delineated as open space and recreation purposes. The leases in respect of these plots clearly show what the reserved user was.

i. Lease of **L.R.NO. 140/174** user was – nursery school

ii. Lease of **L.R.NO. 140/175** user was – open space and recreation.

iii. Lease of **L.R.NO. 140/84** user was open space and recreation.

iv. Lease of **L.R. NO. 140/85-** user was for nursery school.

All these leases were issued to the 1st Defendant in 2001. The plaintiff was registered as an association on 8th February 2012 long after the suit properties were allocated to the 1st Defendant and title issued to the 1st Defendant.

The 1st Defendant has obtained approvals for the construction of the maisonnettes on plot **L.R. NOS.140/479** and **140/480** in conformity with the masterplan annexed at page 19 of the 1st Defendant's bundle of documents. The approved plan for the subdivision of **L.R. NO. 9042/179** by the City Council out of which the suit plots were hived is annexed at page 24 of the 1st Defendant's bundle of documents and the Commissioner of Lands endorsed his approval to the subdivision scheme on 2nd January 1997. The City County of Nairobi gave its approval to the detailed drawings of the maisonnettes on 6th August 2014 as per the annextures at pages 20-23 of the 1st Defendant's bundle of documents. The Nairobi City County's Planning Department approved the construction of the proposed maisonnettes on the two suit properties on 5th June 2014 as per the annextures at pages 38 and 39 of the plaintiffs bundle of documents. The approval for the construction was subject to the conditions attached thereto. That the

approving authority paid special regard to public concerns like the ones raised by the plaintiff in this suit is evident and conditions (**W**)-(**Y**) addressed these concerns:-

> **(W) No trees shall be cut down and/or unprooted without the written permission from Director of Environment City Council of Nairobi.**
>
> **(X) NSSF to develop plot NO. 817 for a secondary school and 3 stream primary school for the County.**
>
> **(Y) The plot earmarked for a market/social Hall is to be surrendered to the County free of cost for the development of the facilities.**

On the basis of the material presented by the plaintiff before the court I am not persuaded that the plaintiff has a prima facie case with a probability of success. The 1st Defendant is the registered owner of the suit properties and has demonstrated that they have approval to develop Maisonnettes on the two suit properties. In my view the approvals are in conformity of the reserved user of the subject properties. The plaintiff has in my view not established and/or proved that the suit plots were reserved for public utility purposes and their allegations to that effect runs counter to the availed evidence that the suit plots were actually reserved for residential purposes only as per the exhibited leases.

I dare say that the plaintiffs omitted to place before the court information that the two subject plots are titled and the same are registered in the name of the 1st Defendant and that they have a reserved user for residential purposes only. This information in my view was available from the Ministry of Lands and a search would have revealed the true state of facts. Had this information been presented before the court at the exparte stage there is every likelihood that the court would not have issued an exparte temporary injunction as it did. I am in the premises not satisfied that the plaintiff has demonstrated a prima facie case that would pass the test laid by the court of appeal in the case of **MRAO LTD –VS- First American Bank Ltd & 2 others** (**2003 KLR 125** where the Judges in expressing what constitutes a prima facie case stated.

> **"a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It 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".**

Having come to the conclusion that the plaintiffs have not established that they have a prima facie case with a probability of success I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of Kenya **Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

> **"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".**

The 1st Defendant prima facie is the registered owner of the suit properties and their title is protected under the provisions of sections 24, 25 and 26 of the Land Registration Act 2012 such that their title is absolute and indefeasible and can only be challenged under the limited grounds provided under section 26 (1) of the Land Registration Act:-

> **a. On the ground of fraud or misrepresentation to which the person is proved to be a party, or**

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The plaintiffs have not challenged the 1st Defendants title on any of the two grounds and no evidence of any fraud has been tendered to impugn the titles and thus the 1st Defendant's are entitled to have the full enjoyment of their rights as the owners of the suit land without any restriction by the plaintiffs provided they observe the law which they have demonstrated compliance with.

The 1st Defendant's development having been approved in compliance with the Physical Planning Act, Cap 286 Laws of Kenya, the plaintiff's recourse if any should have been perhaps through the appeal process and procedure established under the said Act. Parties are obligated to exhaust any process/procedure set out under the law and required to be carried out by any institution before they can have recourse to court. The physical planning Act sets out elaborately how grievances arising out of the approval process have to be dealt. The plaintiffs ought to have exhausted the process/procedure established there under.

In the premises and for the reasons set out above I decline to grant an injunction in the terms sought by the plaintiffs in their Notice of Motion dated 1st August 2014. I order the same dismissed with costs to the 1st Defendant.

1st Defendant's application dated 22nd September 2014.

As I have determined the plaintiff's application for injunction is for dismissal that essentially disposes the 1st Defendant's application which sought the exparte order of injunction granted on 4th August 2014 and extended on 15th August 2015 to be reviewed, varied and/or set aside. The 1st Defendant's application dated 22nd September 2014 is premised on the fact that the exparte order granted on 4th August 2014 was not served on the 1st Defendant within three days as required under the law and therefore had lapsed automatically and there was no order in force on 15th August 2014 that could lawfully have been extended as the court did. The 1st Defendant avers that the order and the application were infact served on them on 14th August 2014 although the affidavit of service states the service had been effected on 13th August 2014 which in any event was outside the period of three days that the applicant was required to effect service of the application within.

Order 40 Rule 4 (3) provides:-

> **"In any case where the court grants an exparte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse".**

This rule is couched in mandatory terms which underlines the need to strictly comply with its requirements. None compliance with the requirements of the provision automatically renders the injunction inoperative. No court order is required to lapse the order of injunction if the same is not served as provided. It simply lapses by the passing of time.

The plaintiffs have sought to down play the failure to effect service of the order of injunction in compliance with the provisions of Order 40 Rule 4 (3) and seek refuge under the provisions of article 159 of the Constitution no doubt the provision under 159 2 (d) that demands of the court not to place undue reliance on procedural technicalities at the expense of doing substantive justice. The plaintiffs also seek to rely on section 19 of the Environment and Land Court Act which equally enjoins the court not to pay undue regard to procedural technicalities in meeting out justice. With respect I do not think the provisions under Order 40 rule 4 (3) would constitute procedural technicalities. They are express and explicit provisions that in my view do not leave any room for Manauvre. A party that approaches the court under a certificate of urgency and obtains a prejudicial exparte order against the opposing party

such as an injunction has an obligation to serve the opposite party at the earliest possible time so that such party can take whatever action is necessary to protect their interest including perhaps applying for such injunction to be vacated, set aside and/or varied. Earlier in this ruling I indicated the plaintiffs did not perhaps make full disclosure and that would be a good reason for a party to apply to set aside an exparte injunction. See the cases of **Hussein Ali & 4 others –vs- Commissioner of Lands and 8 others (2013) e KLR** and **Aviation & Airport Services Workers Union (K) –vs- Kenya Airports authority & Another (2014) e KLR** where the courts emphatically stated that where a party is guilty of material non disclosure such party would be underserving of the equitable order of injunction and any advantage gained on account of such non disclosure such as the grant of exparte injunction will be taken away. Thus the importance of prompt service cannot be over emphasized.

The 1st Defendant has submitted that the extension of the exparte order of 4th August 2014 on 15th August 2015 was irregular since the same had not been served on the 1st Defendant within three days of its issue. The court has found some difficult in determining whether the extension of the interim order was irregular as submitted by the 1st Defendant on account of the wording of Order 40 Rule 4 (3). The subrule uses both the words **"Grant" and "issue".**

"Where the court grants an exparte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleadings on the party sought to be restrained.

"(emphasis mine).

The question does arise from when does the period of 3 days run? Is it from the time the court grants the order or from the time the order is issued after formal extraction of the same? The subrule appears to distinguish between **grant of the order** and **issue of the order**. In my view when the court makes the pronouncement that the order is granted that constitutes the grant of the order but that order is only issued after it has been extracted and approved by the court in this case by the Deputy Registrar through signing and sealing of the same.

The court order is further only capable of being served after it has been extracted approved and duly signed and sealed by the court and thus in my considered view the period provided for service under Order 40 Rule 4(3) can only run from the date of the issue of the order which must be when the Deputy Registrar approves and seals the order. In the present matter the order annexed to the 1st Defendant's application is stated to have been issued on 12th September 2014. I fail to understand how the order that is stated to have been issued on 12th September 2014 could have been served on 13th or 14th August 2014 when it had not been issued. It can only mean no valid order had been served on the 1st Defendant in which case there was no compliance with Order 40 Rule 4 (3) of the Civil Procedure Rules and therefore the order not having been served as required under the said subrule 3 of rule 4 no valid extension of exparte order could properly have been made unless with the consent of the 1st Defendant and/or by the court in the exercise of its discretion under Order 40 Rule 4 (2) of the Civil Procedure Rules.

Hon. Lady Justice Gitumbi on 15th August 2014 extended the interim Order of injunction to 27th October 2014 without ascertaining whether the order had been served on the Defendants regularly in accordance with the provisions of Order 40 rule 4 as she clearly stated that the matter was to be mentioned on the said date to confirm whether the Defendants had been served since the plaintiffs had not as per the court record filed an affidavit of service and merely stated the plaintiffs Advocates clerk was in the process of filing the same at the registry. In the premises I would agree with the 1st Defendant's counsel that the interim order was irregularly extended.

However as I have declined to grant the plaintiff's the order for injunction on merit the 1st Defendant's application is superfluous. The upshot is that I order the plaintiffs application dated 1st August 2014 dismissed with costs to the 1st Defendant. The interim order of injunction granted on 4th August 2014 is hereby vacated and discharged.

Orders accordingly.

Ruling dated, signed and delivered this…**30th**……day of…**January**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Mtange..For the Plaintiffs

MS. Ngonje.....................................For the Defendant