



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 23 OF 2021

IN THE MATTER OF ARTICLES 2 (1), 3 (1), 10 (1) AND (2), 12(1), 19, 20, 21, 22 (1), 23, 24, 42, 50, 69, (1), (a), (d), (f), (g), (h) AND (2) AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 43, 69 AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 3, 3A, 9,12, 29, 30, 58, 59, 60, 63, 64, 67, 68, 69, 108, 109 AND 121 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

AND

IN THE MATTER OF REGULATIONS 1, 2, 3, 4, 6, 7, 8, 9,10, 11,12, 13, 16, 17, 20, 21, 22, 23, 24, 28, 29, 31, 40, 42, 43 AND 47 OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT REGULATIONS), 2003

AND

IN THE MATTER OF SECTIONS 55, 56, 57, 58, 59, 60, 61, 63 AND 67 OF THE PHYSICAL AND LAND USE PLANNING ACT 2019

AND

IN THE MATTER OF SECTIONS 1, 2, 3, 4, 5 AND 6 OF THE ACCESS TO INFORMATION ACT, 2016

BETWEEN

REDEMPTEER AKUMU.....1ST PETITIONER
DANIEL KWARO.....2ND PETITIONER
DAVID ODENY.....3RD PETITIONER
FARIDA KAITANY.....4TH PETITIONER
JAVAN KOUKO.....5TH PETITIONER
ALLOICE OCHIENG.....6TH PETITIONER
CAROLINE OKELLO.....7TH PETITIONER
STEPHEN OKELLO.....8TH PETITIONER

VERSUS

ZERUBABEL APARTMENTS LIMITED.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT.....3RD RESPONDENT

RULING

The Petitioners who are 9 in number have filed this petition against Zerubabel Apartments Limited, County Government of Kisumu and National Environmental Management Authority claiming that they **are owners and/or residents in various properties situate along Barring Road of Awuor Otiende Road in Milimani Estate Kisumu city.**

They state that the 1st Defendant/Respondent is the registered proprietor and/or beneficial owner of Kisumu/Municipality/Block 12/137 which is also situate in the same immediate neighborhood as the applicants' properties. The 1st Respondent is currently developing its property and is putting up two blocks of apartments which are 7 storeys high which is in blatant contravention of the approval from the 2nd and 3rd Respondents. The development is a threat to the Applicant's right to clean and healthy environment as guaranteed under Articles 42 of the Constitution of Kenya.

They contend that there was no public participation in the approval of the 1st Respondent's change of user of the land Kisumu/Municipality/Block 12/137 from a single dwelling residential use to multi-dwelling residential use as mandatorily required under Section 55 of the Physical and Land Use Planning Act, 2019.

The petitioners argue that there was no public participation in the approval of the 1st Respondent's development before the same was commenced as required under Section 59 of the Environmental Management and Co-ordination Act and Section 57 of the Physical and Land Use Planning Act, 2019. The 2nd and 3rd Respondents have failed to inspect the said development and ensure that the conditions imposed upon the 1st Respondent are adhered to.

Moreover, that the Applicants right to a clean and healthy environment is being threatened by the existence of the 1st Respondent's development. The entire process of the development complained of is a manifestation of a deliberate and systematic contravention of the law and regulations meant to regulate such developments for the sake of protection of the environment, with the result that where there has been partial compliance it has been followed by deception in the purported implementation of the project by creating additional floors and additional developments to the detriment of the environment and the neighboring residents. It is in the interest of justice that this Application be allowed.

The Petitioners have also filed a notice of motion under Articles 42, 69 and 70 of the Constitution of Kenya, as read with Articles 22 and 23 thereof, Sections 13 and 18 of the Environment and Land Court Act, Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules and all enabling provisions of the law praying for the orders that **this Honorable Court be pleased to grant temporary orders of injunction stopping the 1st Defendant their agents, servants, employees and/or any other persons however from constructing or from causing any further developments on Kisumu/Municipality/Block 12/137 pending the hearing and determination of the main suit.**

Furthermore, that this Honorable Court be pleased to grant temporary orders of injunction stopping the intended occupation of the premises set to being on 1st November 2021. The costs of this Application be provided for.

The applicants state that they are uncomfortable with the developments made by the 1st respondents because **there is no sufficient provision for parking with the risk that the residents and visitors of the said apartment may be forced to use part of the public road as parking thus interfering with the neighbors' access to their properties.**

They fear that the expected congestion that will accrue upon the full occupancy of the development once completed will be a security risk to the owners of the adjoining properties. The infrastructure that supports sewerage and water services in the area is insufficient to support the additional households that will be housed in the development hence there will be a strain in the share d services resulting in the interruptions and damage to the infrastructure with accompanying health risks.

According to the petitioners, the development is incongruent with other developments in the neighborhood as the area is designated a low-density residential area. The high rise blocks will occasion breach of the neighbors' privacy and security. The rise in the motor vehicle and human traffic in the area will lead to a rise in noise and air pollution thereby compromising the peace and health of the residents.

The applicants contend that the 1st respondent is undertaking development on the suit property against the law to the detriment of Environment and Neighboring residents. The 1st respondent in reply states that the subject property was previously registered in the name of Zerubbabel Investment Limited. That on or about late 2019, the 1st respondent's company Gad Works Holdings Limited entered into a Joint Venture Agreement with Zerubbabel Investment Limited to develop residential apartments now known as the 1st Respondents on the subject property.

The 1st Respondent forwarded the summary project report to the 3rd Respondent for approval who upon screening and assessment issued their approval in line with the Provisions of Environmental Impact (Assessment and Audit) Regulation 2019.

The 3rd Respondent after due consideration of the relevant factors approved the said report allowing the 1st Respondent to proceed with the approved project on 15.10.2020.

That Zerrubabel Investment Limited, through one of its directors, applied to the 2nd Respondent as required by law for change of user from single dwelling to multi dwelling of the subject property on or about September of 2020.

The 2nd Respondent on 21.09.2020 advertised, the 1st Respondent's change of user application inviting any parties with an objection to forward the same in writing within 14 days.

That the same notice was placed at the gate of the subject property within full view of the public including the Petitioners herein.

That after the lapse of the statutory 14 days with the 2nd Respondent not having received any objections from the public including the petitioners herein, granted zerrubabel Investments Limited's Change of user application to multi dwelling.

That on 06.10.2020, The 1st Respondent submitted the building plans to the 2nd Respondent herein for approval which plan contrary to the Petitioners Claims indicated the 1st Respondent's intention to put up two blocks of apartments. The 2nd Respondent after duly considering the aforesaid building plans on 03.11.2020 notified the 1st Respondent of their approval of the same.

The 1st Respondent upon obtaining all the relevant approvals put up a board as is required by law at the gate of the subject property which board contained all reference numbers for the requisite approvals/licenses obtained from the National Construction Authority, the 2nd and 3rd Respondent.

That the construction of the apartments on the subject property begun sometimes in November of 2020 and over the course of the said construction, the 2nd Respondent sent its officers to inspect the building who certified that the same complied with the approved building plans.

That the 1st Respondent following the aforementioned inspection, certified the first block as conducive for occupation where after the current residents moved in on 01.11.2021.

The 3rd Respondent on her part filed a replying affidavit whose import is that she received and acknowledged the 1st Respondent's copy of the Environmental Impact Assessment Summary Project Report, (SPR) on 29th September 2020. That upon the receipt of the Summary Project Report, a site visit was done on 14th October 2020 in accordance with the Environmental (Impact Assessment and Audit) (Amendment) Regulations, 2019 which confirmed that construction had not started.

That on 24th September 2020, questionnaires for the proposed development were distributed and filled by members of the public in an attempt by the 1st Respondent to comply with EMCA 1999.

That the project report also had the following supporting documents annexed thereto;

- a) Change of User certificate License No. BLD/ST/253/JULY-2020.
- b) National Construction Authority (NCA) License No. 50624015710134.

That on 15th October 2020 the Summary Project Report for the proposed five (5) storey residential development on Plot No. Kisumu Municipality/Block 12/137 Milimani East was processed and approved.

That on 1st July 2021 the 1st respondent received a request for information from the residents of Barring Road, near El Paso Restaurant in Milimani Kisumu. The petitioners alleged that due to the development being on a half-acre plot most of its future tenants will be compelled to park on roads thereby causing congestion and inaccessibility to Petitioner's properties.

That acting on the requests and complaints of the plaintiffs, the 3rd Respondent replied to the request on 6th July 2021 stating that the documents requisitioned for are public and can be obtained by anyone from the agencies.

That further inspections by the 3rd respondent have revealed that what the Petitioners are deeming additional floors are in fact the ground floor, which does not constitute the five floors and a floor atop the 5th Floor demarcated for airing laundry.

That the Petitioners are misconstrued in their belief that the 1st Respondent has violated the provisions of EMCA 1999 by alienating a portion of its development atop the 5th floor for airing laundry.

That the Petitioners intend on misleading this court by alluding to the project being out of character yet there are several high rise buildings within the vicinity of the project such as Jumbo apartments, a ten (10) storey building.

That the 3rd Respondent's participation in this suit is limited to the environmental issues and not structural integrity of the buildings or change of user. That subsequently, the 3rd Respondent do not find any compelling reason to interfere with the 1st Respondent's project at this

stage. In the further affidavit of Redemptor Akumu, it is stated that the project is not complete and that the 1st Respondent is actually in the process of constructing a second block of apartments on the same Kisumu/Municipality/Block 12/137 and is at the 3rd Storey.

ANALYSIS AND DETERMINATION

It is trite that where a Petitioner alleges violation of the Constitution, he/she must plead with reasonable precision, the provisions of the Constitution which have allegedly been violated, the manner in which they have been violated and the remedy sought for that violation. The Constitutional provisions cited in the petition are Articles 10, 28, 35, 42, 60 and 69. Article 10 is on National Values and principles of governance which includes *inter alia*, public participation.

Section 58(2) of EMCA provides that;

The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.

With regard to publication, section 59 (2) of EMCA provides as follows;

Upon receipt of an environmental impact assessment study report from any proponent under [section 58\(2\)](#), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state;

- a) a summary description of the project.*
- b) the place where the project is to be carried out.*
- c) the place where the environmental impact assessment study, evaluation or review of the report may be inspected; and*
- d) a time limit not exceeding sixty days for the submission of oral or written comments on the environmental impact assessment study, evaluation or review report.*

I have considered the application for conservatory orders, the supporting affidavit, replying affidavits and rival submissions and do find that he 1st and 3rd Respondents have not demonstrated that the procedure stipulated in the Environmental Management Co-ordination Act was followed in the construction of the suit blocks, conversely the Petitioners have shown on a prima facie basis that the procedure was not followed due to the fact that there was no public participation as required by law. However, the court can only determine this issues effectively during full hearing when the parties will provide evidence in respect of their allegations.

The principles governing the grant or denial of the injunctive orders were laid down in the celebrated case of *Giella vs. Cassman Brown* (1973) E.A 358. In this case the court held as follows;

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

It follows therefore that the main issue for determination is Whether the plaintiff has established the threshold for injunction as set out in the land mark case of *Giella vs. Cassman Brown*.

Public participation is inscribed in Article 10 of the Constitution of Kenya which Article provides:

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

Public participation is a national value and a principle of governance that cannot be ignored by any organ of the government. The respondents have not demonstrated that they observed this value or principle. I do find that the applicants have demonstrated a prima facie case with a likelihood of success. I am further satisfied that the applicants are likely to suffer irreparable harm which cannot be adequately compensated with damage as the constructions likely to affect the Environment and privacy of the applicants. Such damage can't be compensated in monetary terms. The upshot of the above is that I do grant a **temporary order of injunction stopping the 1st Defendant their agents, servants, employees and/or any other persons from constructing or from causing any further developments on Kisumu/Municipality/Block 12/137 pending the hearing and determination of the main suit. That this Honorable grants a temporary orders of injunction stopping the intended further occupation of the premises. The costs of this Application be in the cause**

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF FEBRUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.