



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CASE NO.605 OF 2013

PARKSIDE MEDICAL CENTRE.....PLAINTIFF/APPLICANT

-VERSUS-

NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT

RULING

1. By an application dated 16th May, 2014, the Plaintiff seeks injunctive orders restraining the Defendant, its servants and agents from stopping the developments being carried on by the Plaintiff on the Plaintiff's parcel of land namely Land Reference number 209/12614/3 to 209/12614/24 (both inclusive) or interfering in any manner whatsoever with the Plaintiffs right to quiet user possession and enjoyment thereof pending the hearing and determination of this suit. The Plaintiff also seeks orders to stay the proceedings in City Court Magistrates Court Criminal Case No. 198 of 2014 pending hearing and determination of this suit.

2. The application is predicated on both the grounds stated on the face thereof as well as two the affidavits of James NjengaMungai sworn on 16th May, 2014 and 28th November, 2014. The genesis of the Plaintiff's complaint is that the Defendant's officers had moved to the Plaintiffs property and destroyed a boundary wall that was securing the Plaintiff's property and assets. This left the Plaintiff's property exposed and at the risk of loss. Further the Plaintiff contended that the developments which had been approved by the Defendants as well as the National Environmental Management Authority (NEMA) were at risk. The Defendant had apparently approved the construction of twenty one (21) town houses on the property.

3. On 5th May, 2014 the Defendant however served upon the Plaintiff an Enforcement notice pursuant to the provisions of **Section 30(1)** of the **Physical Planning Act (Cap 286)** demanding an immediate close down to the ongoing development and construction of the boundary wall and also a removal of the said boundary wall.

4. The Plaintiff contends that the Enforcement Notice had no basis and further that the same amounts to the Defendant interfering with the Plaintiff's rights to own and use property as outlined under the Constitution. The Plaintiff also contends that the Defendant's action are illegal unfair and an abuse of authority.

5. The Defendant's brief response is that the boundary wall was being erected by the Plaintiff without approval and further that the construction was next to and touching on a riparian way-leave. The Defendant further contended that the permission to construct the boundary wall if any had not only

expired but had been obtained “without sufficient material disclosure of the subject parcels”. The Defendant also contested the fact of allocation of the suit property to the Plaintiff by the Ministry of Lands.

6. During the parties oral submissions, Mr. Nderitu for the Plaintiff reiterated the fact that the construction and developments were being undertaken on the basis of approvals granted by the Defendant. With leave of the court, the Plaintiff filed a Further Affidavit to detail the court on exactly when the construction commenced. The Further Affidavit was filed on 28th November, 2014. The Plaintiff submitted that the construction works begun in February, 2014 and that both the Defendant and the chief regulator of the environment NEMA had given their approvals. The Plaintiff stated that the approval was valid for one year from 25th April, 2013. The Plaintiff then faulted the Enforcement Notice which had stated that there was no approval by the Defendant for the works then being undertaken by the Plaintiff. The Plaintiff concluded by stating that it had established a prima facie case with chances of success and further that the Plaintiff would suffer irreparably if no injunction was granted against the Defendant.

7. In response, the Defendant through Counsel Mr. Odoyo submitted that the Plaintiff had failed to establish a prima facie case and further that the Plaintiff had failed to establish that it had already commenced the construction works. The Defendant further stated that the Enforcement Notice was perfectly valid and had to be complied with pursuant to the provisions of **Section 30** of the **Physical Planning Act 1996**. It was also the Defendants contention that the Plaintiff would not suffer irreparably in the absence of an injunction.

8. I have considered the parties submissions as well as carefully read through the pleadings and affidavits filed herein. At this stage, I am conscious of the fact that the Plaintiff need only establish a prima facie case with chances of success to be entitled to an injunction if I am also satisfied that the Plaintiff will suffer irreparably and beyond any recompense through damages in the absence of an injunction: See **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358, Mrao Ltd –v- First American Bank of Kenya Ltd & 2 others [2003] KLR 1215**. I am also conscious of the fact that an injunction is an equitable and discretionary remedy and in considering an application for the same all relevant factors must be taken into consideration: see **Bonde –v- Steyn [2013] 2 EA 8**.

9. Considering the circumstances of the case, the Plaintiff’s main quarrel is with the Enforcement Notice issued by the Defendant on 5th May, 2014. There is certainly no dispute that the Plaintiff is the registered proprietor of and dutifully entitled to develop the suit property. It is however first to be noted that Enforcement Notices are issued pursuant to **Section 38** of the **Physical Planning Act (Cap 286)**. The purpose of an Enforcement Notice is to buttress development and Planning laws, by-laws and directives or conditions of any grant or user. It will more often than not apply to land which planning permission is required even if the tenure is freehold or absolute proprietorship. Ordinarily an Enforcement Notice ought to specify the grounds and basis for the Notice, it ought to describe the development or planning questions, it must be also state the steps to be taken by the recipient to remedy the directive or bylaw or condition not being complied with and finally, it ought to specify the date it takes effect and the period for compliance. The Physical Planning Act (Cap 236) has a prescribed format which pretty much takes into account all the above requirements. As to the validity of the notice, all depend on details availed by the Planning Inspector in the notice. An Enforcement Notice under the Physical Planning Act assists in controlling development. It brings sanity to use of land by stopping all unauthorized developments. Under the Physical Planning Act it will obtain under Section 38 thereof.

10. It is evident that the Act also provides elaborate procedure for any challenge to an Enforcement Notice. The challenge is to be by way of an appeal to the liaison committee and the significance of an appeal, being filed is that pending determination of the appeal the notice is of no effect until the appeal is finally determined and disposed of. In my view the Enforcement notice is not just of no effect when the appeal is pending before the liaison committee or the National liaison committee, it should be of no effect too if an appeal is preferred from the decision of the National liaison committee to the High court. This is in view of the fact that not only would there be a crucial planning decision under challenge but also due to the provisions of Section 38(7) of the Physical Planning Act which stays any development until any

appeal is determined. By the better reason, it would not be reasonable for the Planning authority to put to effect an enforcement notice, yet stay any undertakings by the land owner or user :see **R –v- Kuxhaus& others [1988] 2 All ER 705.**

11. In the instant case, an Enforcement Notice was issued on 5th May, 2014. It specified that a boundary wall was being constructed by the Plaintiff without prior approval from the Defendant. The Plaintiff was asked to discontinue the development and to remedy the situation within 7 days by way of demolishing the offending structure. The Notice was served upon the Plaintiff on 5th May, 2014. The Plaintiff apparently did not heed the notice and neither did the Plaintiff lodge an appeal as prescribed under the Act. Time lapsed and the defendant moved to enforce the notice whereupon the Plaintiff also moved the court. The Plaintiff states that the notice period had not lapsed before the Defendant moved into the suit property and demolished not only the allegedly offending boundary wall but also arrested one of the Plaintiff's employees.

12. I find as a fact that the Plaintiff is the registered proprietor of the suit property. I also find as a fact that all the Plaintiff's property comprised in the suit property are all either ¼ of an acre or bigger in size. I also find as a fact that the Enforcement Notice was served upon the Plaintiff on 5th May, 2014. I appreciate that I should not be making conclusive findings of facts at this stage of the proceedings but the foregoing findings are based on the simple fact too that they have not been disputed or challenged. I have further been able to identify the fact that the Plaintiff obtained approval from the National Environment Management Authority (NEMA) for the development of town houses on 30th May, 2013 and even more significantly that the Plaintiff had on 25th April, 2013 obtained from the Defendant approval to develop twenty one town houses on the subject plot. The Plaintiff's case is that because of the two approvals (from the Defendant and NEMA) both which were valid as at the time the Enforcement notice as was served cannot stand.

13. The licence by NEMA is valid for 24 months. The planning approval or permission by the Defendant's predecessor in title had various conditions. The approval was also to lapse if the developments were not commenced within twelve months of the date of approval. Effectively, the Plaintiff was to commence construction on or before 24th April, 2014. In an attempt to show that this was done the Plaintiff availed documents showing that title was handed over to the contractor in or about February, 2014 and a deposit of Kshs. 4,800,000/= paid. I have perused the documents availed, none of them relates to the suit property. They relate to Land Reference No. 209/13256. I am not particularly convinced even on a prima facie basis that the Plaintiff complied with the condition to commence construction works within twelve months of the 25th day of April, 2013.

14. It is to be noted that the Enforcement notice related specifically to the boundary wall which was under construction. The approval by the Defendant did not allude to construction of a boundary wall. Unfortunately, no evidence was availed by the Plaintiff to show that the approved plans included the boundary wall which was itself to cost a staggering Kshs. 115,000,000/= ,if the Plaintiff's further affidavit is to be taken on its face value. In these respects, I hold the view that the Plaintiff has not established a prima facie case with chances of success.

15. The Defendant also contended that the Plaintiff should have appealed to the liaison committee before moving the court. It is apparent that the statute provides this clear avenue. The obvious reason is that planning issues are better reviewed first by the planning authority. The statute proceeds to give the parties the right to move to the High Court if dissatisfied with a decision of the liaison committee. It may very well be argued that in moving to the High Court the Defendant was denied the right to an appellate forum. I must however point out that the High Court's jurisdiction is unlimited: see Article 165(3) (a) of the Constitution. In certain cases it may actually be limited to appellate jurisdiction if legislation so provides: see Article 165(3) (e) of the Constitution. In the instant case, in moving directly to the High court the Plaintiff simply divested itself of the right to have a second to interrogate the validity of the Enforcement notice. The jurisdiction, however of the court to entertain the suit for an injunctive relief could however not be taken away.

16. In the long run, I hold the view that the Plaintiff has failed to establish a prima facie case with any chances of success. I am also not convinced that the Plaintiff stands to suffer irreparably and neither has it been suggested that the Defendant will not be in a position to compensate the Plaintiff if the latter is finally vindicated at trial. The circumstances of this case, which involves development planning issues, considered in their totality dictate that I dismiss the application.

17. The application dated 16th May, 2014 is hereby dismissed with costs.

18. Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of April, 2015.

J. L. ONGUTO

JUDGE

Mr. Nderitu for the Plaintiff/Applicant

Mr. Odoyo for the Defendant/Respondent