



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E166 OF 2021**

**RAJAN RAJNIKANT DHANANI.....PLAINTIFF**

**- VERSUS -**

**NAIROBI CITY COUNTY GOVERNMENT..... DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 17<sup>th</sup> May 2021 brought under Sections 3A and 63(c) and (e) of the Civil Procedure Act and Order 40 Rules 2, 3 (3) of the Civil Procedure Rules and all enabling provisions of law.
2. It seeks orders:-
  1. Spent.
  2. Spent.
  3. **That an order of injunction be and is hereby issued restraining the Defendant whether by its employees, servants, agents or otherwise howsoever from disrupting, stopping or otherwise obstructing the duly approved development/construction work on the suit property i.e LR NO 209/7944 situated in Kyuna estate, Nairobi pending hearing and determination of this suit.**
  4. **That the costs of this application be provided for.**
3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.
4. The application is supported by the affidavit of Rajan Rajnikant Dhanani, the Plaintiff/Applicant herein sworn on the 17<sup>th</sup> May 2021.
5. The application is opposed. There are grounds of opposition filed by the Defendant/Respondent dated 24<sup>th</sup> May 2021.
6. On the 8<sup>th</sup> June 2021, the court with consent of the parties directed that the application be disposed of by way of written submissions.
7. The Plaintiff's/Applicant's submissions are dated 20<sup>th</sup> August 2021. Counsel for the Plaintiff submits that the assertion by the Defendant that the Plaintiff ought to have first exhausted the dispute resolution mechanism set out in the Physical Planning Act Cap 286 Laws of Kenya, cannot hold as no enforcement notice was served on the Plaintiff. He further submits that it is only upon service of the enforcement notice that the dispute resolution procedure can be applicable. This court therefore has jurisdiction to entertain this matter.
8. The Plaintiff further submitted that the Plaintiff /Applicant who is the registered owner of the suit property got all the approvals necessary to undertake the said development. The Defendant/Respondent did not tender evidence to rebut these facts.
9. It is also the Plaintiff's/Applicant's submission that the development outlay on site and offsite will go to waste. He will then suffer irreparable loss if these orders are not granted.
10. It is further the Plaintiff's submissions that the balance of convenience tilts in favour of the plaintiff. He prays that the application be allowed with costs.

11. The Defendant's/Respondent's counsel on the other hand submits that the Plaintiff/Applicant has violated and breached section 13(1) of the Physical Planning Act Cap 286 Laws of Kenya which requires that any person aggrieved by the decision of the Director ought to appeal to the Liaison Committee.

12. That for this reason that the court lacks jurisdiction to hear and determine this matter and the Plaintiff/Applicant has not exhausted the available remedies.

13. It prays that the application be dismissed in limine with costs to the Defendant/Respondent. Further that a declaration be issued that this court lacks jurisdiction to entertain this matter.

14. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the grounds of opposition and the rival submissions. The issues for determination are:-

**i. Whether this court has jurisdiction to hear and determine this matter.**

**ii. Whether the Plaintiff's/Applicant's application meets the threshold for grant of temporary injunction.**

**iii. Who should bear costs of this application?**

15. It is the Defendant's/Respondent's case that the Plaintiff/Applicant ought to have exhausted the dispute resolution mechanism set out under section 13(1) of the Physical Planning Act (Cap 286) Law of Kenya. I agree with counsel for the Plaintiff/Applicant that the same was repealed. Section 72 of the Physical and Land Use Planning Act No 13 of 2019 provides that:-

**“(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of the county executive committee member that:-**

**a. a developer commences development on any land after the commencement of the Act without the required development permission having been obtained; or**

**b. any condition of a development permission granted under this Act has not been complied with.**

**2. An enforcement notice shall-**

**(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;**

**(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and**

**(c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any other activities.**

**3. Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant county Physical and Land Use Planning liaison committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.**

**4. Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days”.**

16. It is the Plaintiff's/Applicant's contention that he was not served with an enforcement notice. I agree with counsel for the Plaintiff's submissions that it was only upon service of the enforcement notice that the Plaintiff/Applicant would go through the dispute resolution mechanism set out in Section 72 of the Act.

17. There is no evidence tendered by the Defendant/Respondent to confirm that the said enforcement notice was served on the Plaintiff/Applicant. I therefore find that this court has jurisdiction to entertain this application.

18. The principles governing the grant of temporary injunction were laid down on the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs Frist American Bank Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

19. The Plaintiff/Applicant is the registered proprietor of the suit property. He has annexed various approvals from the Defendant and other bodies to his affidavit in support. These approvals were given before he undertook the development. It is the Defendant's/Respondent's case that it did not issue any approval to the Plaintiff/Applicant. It however, did not tender any evidence to rebutt the Plaintiff's/Applicant's documents. I find that the Plaintiff/Applicant has established a prima facie case with a probability of success at the trial.

20. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Limited & Another [1990] KLR 557** (Bosire J as he then was) held that:-

**“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”**

The Plaintiff/Applicant has demonstrated that the materials are likely to go to waste if these orders are not granted. I find that he deserves this Court’s protection. I also find that the Plaintiff/applicant has demonstrated that damages would not be adequate remedy.

21. In conclusion, I find merit in this application and grant the orders sought namely:-

**a. That an order of temporary injunction is hereby issued restraining the Defendant whether by its employees, servants, agents, or otherwise howsoever from disposing, stopping or otherwise obstructing the duly approved development/construction works on LR NO 209/7944 situated in Kyuna Estate in Nairobi pending the hearing and determination of this suit.**

**b. That costs of this application do abide the outcome of the main suit.**

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Mungla for the Plaintiff

Ms Munda for the Defendant

Steve - Court Assistant