



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 172 OF 2015**

**PEARL BEACH HOTEL LIMITED..... 1ST PETITIONER**

**ALNOOR KANJI ..... 2ND PETITIONER**

**-versus-**

**KENNETH STANLEY HAJI ..... 1ST RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2ND RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT**

**AUTHORITY ..... 3RD RESPONDENT**

**RULING**

1. The Application for consideration is the Plaintiff's Notice of Motion dated 7th July 2015. The Application seeks the following orders:

- i. Spent
- ii. Spent
- ii. THAT this Honourable Court be pleased to issue conservatory orders directed at the 1st Respondent stopping and/or suspending the continued construction, developments being undertaken on all that parcel of land known as **Plot No. 6304/I/MN** otherwise referred to as Mawimbi residence pending the hearing and determination of the petition herewith.
- iv. Spent
- v. THAT this Honourable Court be pleased to issue a temporary order of injunction restraining the 1st Respondent from proceeding with any developments, construction, in respect of all that parcel of land known as **Plot No. 6304/I/MN** otherwise referred to as Mawimbi residence and from in any way encroaching and/or interfering with the applicants possession and enjoyment of all that parcel of land known as **Land Reference Number Subdivision No. 6228 of Section I Mainland North**, situated within Nyali, Mombasa County pending the hearing and determination of the petition herewith
- i. THAT this Honourable Court be pleased to issue any further orders and directions as it may deem fit in the interest of justice.

ii. Costs of the Application be in the cause.

2. The Application is supported by the Affidavit of ALNOOR KANJI sworn on 2nd July 2015 and on the grounds on its face. The Petitioners' case is that they operate a beach resort known as ENGLISH POINT MARINA situate on **Land Reference No. Subdivision No. 6228 of Section I Mainland North** (hereinafter "the Petitioners' property") within Nyalı Mombasa. That the 1st Respondent owns **Land Reference No. 6304/MN/I** (hereinafter "the 1st Respondent's property") which is adjacent to the Petitioners' property.

3. The Petitioners contend that the 1st Respondent is currently undertaking an eight-storey development on its said property which fundamentally interferes with the Petitioners' enjoyment and use of their property and which poses a great risk to the environment. That the development by the 1st Respondent impedes the Petitioners' access to their property and blocks the view to the creek, the sea bed and other sceneries including Fort Jesus. Further that the development has been undertaken by the 1st Respondent in total disregard to environmental considerations and the impact of the development to the ecosystem.

4. The Petitioners fault the 3rd Respondent for failing to take into account measures that are necessary to ensure that there is effective public participation prior to considering approvals regarding the project and for failing to hold consultative meetings with affected stakeholders as espoused by the principles of public participation under Article 69 (d) of the Constitution of Kenya 2010. That the 3rd Respondent failed to enforce the applicable principles of the law, by-laws, guidelines and the operative laws and regulations governing such developments within Mombasa County.

5. The Petitioners' case against the 2nd Respondent is that it has purported to unlawfully and illegally issue development approvals to the 1st Respondent in open violation of the provisions of the Physical Planning Act, Cap. 286 of the Laws of Kenya, the Building Codes applicable to such developments and in total disregard of the objections raised by the applicants herein and without taking into account the risks posed to the environment in violation of Article 40 and 42 of the Constitution and in further breach of the Petitioners' right to legitimate expectation and to equal protection and benefit of the law under Article 27 of the Constitution.

6. The 1st Respondent opposed the Petitioners' application through his Replying Affidavit sworn and filed on 17<sup>th</sup> September 2015. The 1<sup>st</sup> Respondent accuses the Petitioners of non-disclosure of material facts pertaining to the development on his plot. The 1st Respondent avers that the Petitioners commenced construction of the English Point Marina on their plot when the 1st Respondent was already in occupation of his property. That the Petitioners undertook the construction in a manner that had no regard for the 1st Respondent as a neighbour and the 1st Respondent suffered extreme prejudice throughout the construction period through noise pollution, dust and the debris from the construction was strewn all over the beach front. That during the construction, the Petitioners maliciously attempted to block the access to the public beach and blocked the 1<sup>st</sup> Respondent's view of the creek and direct access to the public beach.

7. The 1st Respondent accuses the Petitioners, during their construction, of disregarding the sensitive marine ecosystem at the seafront and destruction of existing flora and natural habitat at the seafront. The 1st Respondent further accuses the Petitioners of other construction malpractices such as the erection of mechanical plants at the wall adjacent to the common perimeter wall, blocking the direct view of the ocean by erecting 105 apartments, erecting pillars of the jetty in a manner that blocks access for the boats from slipway as the jetty covers the entire seafront of the Petitioners' property and partly obstructs the seafront of the 1st Respondent's property.

8. The 1st Respondent stated that he commenced the development on his plot in 2011 and has had several discussions with the Petitioners in respect of the same in order to minimize lawful conflict with the Petitioners. That the building plans for the 1st Respondent's development have been severally approved and renewed over the years. Further that the development was approved by the National Environmental Management Authority (NEMA) after endorsement by the adjacent property owners.

9. For the conservatory orders and temporary orders of injunctions to issue against their Respondents the

Petitioners must establish a prima facie case with a probability of success and that their rights under the constitution have been breached. The orders sought of this interlocutory stage directly affect only the 1<sup>st</sup> respondent who is undertaking the developments. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file any response to the application.

10. The Petitioners submitted that the developments being undertaken have deviated from the architectural drawings that had been sent to them earlier to comment on. Further that they never got any response from the 3<sup>rd</sup> Respondent on how their objections to the 1<sup>st</sup> Respondent were considered. The petitioner submits that their right to a clean and healthy environment has been breached and issues environment affects the entire public.

11. Mr. Nyongesa for the 1<sup>st</sup> Respondent submitted that certain material issues were not brought to the court's attention including the fact that the Petitioners did not take care of certain environmental concerns while undertaking development on their plot. He submitted that the 1<sup>st</sup> Respondent acquired his property in 2002, built a house on it and moved to live in it. He stated that the Petitioners acquired their property after him and began their development in 2010. The 1<sup>st</sup> Respondent further submitted that there was public participation before he began construction as demonstrated by their documents annexed in the replying affidavit.

12. The 1<sup>st</sup> Respondent wondered why the Petitioners waited for 3 years and when the construction was near completion to bring this suit. The 1<sup>st</sup> Respondent submits that the Petitioners do not have exclusive rights in regard to viewing of the ocean, fort Jesus and the creek. The 1<sup>st</sup> Respondent continued that the Petitioners ought to have undertaken their development in consideration of the rights of other neighbouring property owners. The 1<sup>st</sup> respondent submitted that the blockage of the sea view for the hotel lounge complained of is caused by the Petitioners' own apartments.

13. The 1<sup>st</sup> Respondent has accused the Petitioner of destroying the flora and fauna in the area and blocking the public access to the beach through a wall that was constructed. He accused the Petitioners of coming to court with unclean hands and therefore not deserving the grant of the orders sought. The 1<sup>st</sup> Respondent submits that he is suffering loss as the construction ought to have been concluded in end of October and he will pay the contractor money in damages for breach of contract. He asked the court to dismiss the application.

14. From the pleadings and submissions, I find three issues for my determination;

Whether the Petitioners were made aware of the 1<sup>st</sup> respondent's development through public participation.

ii) Whether the 1<sup>st</sup> Respondent has deviated from the approved building plans shown to the Petitioners.

(iii) Whether the Petitioners have come to court with unclean hands therefore do not deserve the orders sought in the application.

15. According to the 1<sup>st</sup> Respondent, what are under construction are additional floors to an existing 3 floor building. The 1<sup>st</sup> Respondent submitted that he started the construction being questioned in 2011 and annexed the several building approved plans given on diverse dates by the 2<sup>nd</sup> Respondent. He did annex environmental impact assessment forms duly filled and signed by owners of neighboring plots, the Petitioners included. The 1<sup>st</sup> Respondent has also annexed the requisite approvals given to him by NEMA (3<sup>rd</sup> Respondent) plus correspondence with other relevant bodies.

16. The Petitioners have not denied signing the E.I.A forms exhibited. The 1<sup>st</sup> Respondent deposed that he has also held several meetings with the Petitioners in order to address their environmental concerns.

The Petitioners did not deny attending these meetings. The respondent deposed further that he took all necessary measures to address the environmental concerns raised by the Petitioners in those meetings. The Petitioners annexed the drawing that was advertised publicly by the 1<sup>st</sup> Respondent as annexures “**S-Z**” which they said conflicts with what is the actual construction on the ground annexed in the picture in marked ‘**AA**’. The documents signed by the Petitioners and discussions held between them and the 1<sup>st</sup> Respondent is a clear indication that there was indeed public participation undertaken before the commencement of the project.

17. The second issue is whether this 1<sup>st</sup> Respondent deviated from the approved development plans. According to the Petitioners, what was shown to them is contained in annexures “**S-Z**” while what is being built is different as per annex “**AA – EE**”. The respondent in answer stated there is no deviation in the construction from what was approved. The Petitioners submitted that the current construction is 8 storied building instead of six storeys. The 1<sup>st</sup> Respondent pleaded that he has a right to develop his plot and that he is building a 5 floor apartment not 8 as alleged by the Petitioners. I have looked at the documents annexed as **S-Z** which in my opinion confirms the 1<sup>st</sup> Respondent’s contention that his development is 5 floors. Besides the documents contained in “**S-Z**”, the Petitioners did not show any evidence that there is in existence another development plan for eight floors. During submissions, the photograph of the building under construction and annexed by both parties did not have the eight (8) floors. The 1<sup>st</sup> Respondent’s annexure marked as **KSH-7(g)** is an approval letter for permission to develop residential building of 5 floors on plot no 6304/1/MN. There is nothing placed before this court to prove that there is deviation by the Respondent from what was approved in the plan.

18. The last issue for my determination is whether the Petitioners’ environmental rights have been abused. In the E.I.A form signed by some of the neighbours e.g. Peter John Dredge indicated the development would not affect him through dust, noise, security and traffic, so did Martin Dunford and Royal Beach Apartments. The Petitioners have not explained both in the affidavit and in submission on how the development is affecting the rights to a clean environment for instance in regard to dust and noise emissions. The Petitioners made no mention on the effect on sanitation which relates to a clean environment. The 1<sup>st</sup> Respondent submitted and the pictures show that the construction is advanced almost nearing completion. It is therefore at a stage if there was indeed abuse of the environment, it would be easy to highlight. The Petitioners only made a general statement that their right to a clean and healthy environment is breached. It is difficult for the court to grant stop order premised on such generalities.

19. I can only deduce that the Petitioners main and key complaint is the likely loss in terms of the aesthetic value of their property and their investment. This is in relation to the averment that the 1<sup>st</sup> Respondent is blocking their hotel lounge view of the Sea front, Fort Jesus and the Creek. The Petitioners needed to demonstrate that such loss if at all is irreparable.

20. In light of my findings on each of the three issues I outlined in paragraph 17 *supra*, I find the Petitioners have not demonstrated that they have a prima facie case because they admitted being made aware of construction of a five (5) floor apartment. The 1<sup>st</sup> Respondent was given approvals by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and should not at the interlocutory stage be made to suffer the inaction if any of the two Respondents. Secondly the Petitioners came to court too late when the construction is near completion. They waited until the 1<sup>st</sup> Respondent had incurred so much expense and they have not given any undertaking as to damages. Lastly, the Petitioners have not demonstrated that their loss if any is irreparable. The application is therefore without merit and I hereby dismiss it with costs to the 1<sup>st</sup> Respondent.

**RULING DATED & DELIVERED THIS 16<sup>TH</sup> DAY OF DECEMBER 2015**

**A. OMOLLO**

**JUDGE**