REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 270 OF 2010

NIXON AZARIA O. OOKO …….…… PLAINTIFF

VERSUS

ROSE WEKE ……..……1ST DEFENDANT

NICHOLAS K. WEKE ……..…...…… 2ND DEFENDANT

TOWN COUNCIL OF RONGO ……..…….. 3RD DEFENDANT

RULING

1. The plaintiff filed suit against the defendants on 29th September 2010 seeking among other reliefs; a declaration that the construction and/building of a funeral home and/or mortuary on **LR No. Kamagambo/ Kabuoro/1561** (hereinafter referred to as "**the suit property"**) is bound to affect the environment and expose the plaintiff to pollution and nuisance contrary to the provisions of the National Environment and Management Co-ordination Act No. 8 of 1999 (hereinafter referred to as "**the Act**"), a permanent injunction to restrain the defendants from building, constructing and/or carrying out any development pertaining to the said funeral home and/or mortuary on the suit property, subject to the authority and/or permission of National Environmental and Management Authority (hereinafter referred to as "**NEMA**") and, an order compelling the 3rd defendant to ensure and/or enforce compliance with the building by-laws as well and the provisions of the Physical Planning Act, where appropriate. The plaintiff's suit was brought on the grounds that the plaintiff is the registered proprietor of all that parcel of land known as **LR No. Kamagambo/Kabuoro/4405** (hereinafter referred to as "**Plot No. 4405**") which land neighbours the suit property which is registered in the name of the 2nd defendant. The plaintiff claimed that the 1st and 2nd defendants without obtaining the necessary approvals and/or authorization from the relevant authorities such as the 3rd defendant and NEMA commenced the construction of a funeral home on the suit property and had in the process exposed the area residents of Kodero Bara village to environmental degradation, pollution and nuisance. The plaintiff claimed that the plaintiff and other residents had lodged a petition with NEMA to assess and/or ascertain the impact of the construction of the said funeral home within residential premises on the environment and that before that assessment was done, that 1st and 2nd defendants colluded with the 3rd defendant and commenced the construction works. The plaintiff claimed that as the owner of Plot No. 4405 which neighbours the suit property where the construction works were going on, the plaintiff was exposed to environmental degradation, pollution, nuisance and health hazard. It is on account of the foregoing that the plaintiff sought the reliefs that I have set out herein above against the defendants.
2. Together with the plaint, the plaintiff lodged an application by way of chamber summons dated

29th September 2010 seeking a temporary injunction to restrain the defendants from putting up, erecting, building and/or constructing a funeral home and/or mortuary on the suit property without obtaining the environmental assessment inspection report (hereinafter referred to as "**E.A.I**") and the requisite building plans pending the hearing and determination of this suit. The plaintiff's application was based on the same grounds set out in the plaint which I have already highlighted above. In summary, the plaintiff contended that as the registered proprietor of Plot No. 4405 he was entitled to exclusive and quiet possession and/or occupation thereof and that the 1st and 2nd defendants had commenced the construction of funeral home and/or mortuary on the suit property which neighbours Plot No. 4405 without the consent and/or approval of the plaintiff and the area residents. The plaintiff contended further that the said construction was being conducted without EAI from NEMA and approved building plans. The plaintiff claimed that the said construction was a threat to the health of the plaintiff and as it would affect the environment of the entire area where it is taking place and expose the plaintiff to health hazard, pollution and nuisance.

3. The plaintiff's application was opposed by the defendants. The 1st and 2nd defendants contended that what they were putting up was a nursing home and not a funeral home or a mortuary. They contended that contrary to the plaintiff's contention that the project had not been approved by the relevant authorities, the same had been approved by the 3rd defendant and NEMA. The 1st and 2nd defendants denied that the project would have adverse environmental impact on the area where it is being undertaken and that the plaintiff's parcel of land namely Plot No. 4405 was located next to the suit property on which the said nursing home was being constructed. The 1st and 2nd defendants contended finally that the plaintiff's application had been overtaken by events since the construction works that the plaintiff had moved to court to stop had already been completed. The plaintiff's application for temporary injunction was heard by Makhandia J. (as he then was) who in a ruling delivered on 30th November 2010 dismissed the application with costs to the 2nd and 3rd defendants. Makhandia J. made a finding that the plaintiff had concealed material facts to the court and as such was lacking in candor. The judge also found that the plaintiff had misled the court as concerns material facts. The court found that whereas the 1st and 3th defendants were putting up a nursing home, the plaintiff had misled the court that what was being put up was funeral home and/or a mortuary. The court also found that contrary to the plaintiff's allegations, the 2nd and 3rd defendant's project had received all the necessary approvals which included approvals from the 3rd defendant, NEMA and the department of Physical Planning. The court also found that contrary to the plaintiff's contention, the plaintiff's parcel of land namely, **Plot No. 4405** is not neighbouring the suit property as alleged by the plaintiff. The court noted that the plaintiff failed to file a further affidavit to rebut the averments that were contained in the replying affidavits that were filed by the 2nd and 3rd defendants which portrayed the plaintiff as a liar. The court held that the plaintiff's lack of candor and concealment of material facts were sufficient to dispose of the plaintiff's application for injunction but noted that even if the application was considered on merit, the court was not satisfied that the plaintiff had established a prima facie case. The court found that the plaintiff had failed to prove the environmental degradation, pollution and nuisance which he had claimed would be caused by the 1st and 2nd defendant's project. The court also found that the plaintiff had failed to prove that he would suffer irreparable harm if the injunction was not granted. It is on account of the foregoing that the plaintiff's application for a temporary injunction was dismissed.
4. On 16th May 2011, the plaintiff filed an application dated 12th May 2011 seeking; a review of the order of 30th November, 2010 a foresaid which dismissed the plaintiff's application for a temporary injunction and, the issuance of a temporary injunction to restrain the 1st and 2nd defendants from operating and/or running a mortuary and/or a funeral home on the suit property without the authority and/or mandate of NEMA. This is the application which is the subject of this ruling. The plaintiff's application which was brought under Order 40 rule 1, Order 45 rules 1, 3 and 4 and order 51 rules 1, 3 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, B, 3A and 80 of the Civil Procedure Act was brought on the grounds that; the plaintiff had since discovered that the 1st and 2nd defendants had indeed commenced the running and/or operation of a mortuary on the suit property although in the earlier application for injunction, they had disputed the fact that they intended to operate a mortuary from the suit property. The plaintiff claimed

further that the running and/or operation of the said mortuary had not been approved by NEMA.

5. The plaintiff claimed that the establishment of a mortuary on the suit property under the name and style of Rosewood Nursing Home and Mortuary was a new fact that had arisen since the dismissal of the plaintiff's earlier application for injunction. The plaintiff reiterated that the said establishment shares a boundary with the plaintiff's homestead and that the denial on the part of the 1st and 2nd defendants that they were in fact setting up a mortuary was dishonest and fraudulent. The plaintiff claimed that there was an error apparent on the face of the record which justifies the review of the court order of 30th November 2010. The plaintiff's application was opposed by the 1st and 2nd defendants. Through a replying affidavit sworn on 19th April, 2013 by the 2nd defendant the 1st and 2nd defendant's termed the plaintiff's application as an abuse of the process of the court. The 1st and 2nd defendants contended that what they were running on the suit property was a nursing home and that it is mandatory for every nursing home to have a cold room and that it is the cold room at the said nursing home which the plaintiff was referring to as a mortuary. The 1st and 2nd defendants contended that the Medical practitioners and Dentists Board cannot license a nursing home unless it has a cold room and that the 1st and 2nd defendants' facility was duly approved and registered by all the relevant authorities. The 1st and 2nd defendants contended that the plaintiff had challenged the licence that had been issued to the 1st and 2nd defendants by NEMA to construct the said nursing home through appeal to the National Environment Tribunal in Nairobi which appeal was dismissed. The 1st and 2nd defendants contended that they had already obtained EIA licence from NEMA for the project and that the nursing home was duly registered and licenced by the Medical Practitioners and Dentists Board as a Private Medical Institution.
6. On 22nd April 2013 the advocates for the parties agreed to argue the plaintiff's application for review by way of written submissions. The Plaintiff filed his submissions on 12th August 2013 while the 1st and 2nd defendants filed their written submissions on 28th August 2013. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the 1st and 2nd defendants' affidavit in opposition to application. Finally, I have considered the written submissions filed by the advocates for the parties and the authorities cited. In my view, the issues that arise for determination in this application are the following;

i. **Whether the plaintiff has established sufficient grounds to warrant the review of this court's order made on 30th November 2010?**
ii. **Whether the plaintiff is entitled to the interlocutory injunction sought?**

7. **Issue No. (i):**

As I have stated earlier in this ruling, the plaintiff's application was brought under among others, Order 45 rules 1, 3 and 4 of the Civil Procedure Rules. Order 45 rule 1 provides that, a person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or an account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of such decree or order without unreasonable delay. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996** (Unreported) the Court of Appeal stated that:

> *"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a*

statute or other provision of law cannot be a ground for review."

In the case of, **Nairobi City Council –vs- Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996** (unreported), it was stated that:-

> *"The current position would then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason."*

8. As I stated herein earlier, the plaintiff's application for review was brought on the grounds that the plaintiff had since the delivery of the ruling by the court on 30th November 2010 discovered a new and important matter and/or evidence which was not within his knowledge and as such he could not produce at the hearing of his earlier application for temporary injunction. The plaintiff's application was also brought on the ground that there exists a mistake and/or error apparent on the face of the record of the said ruling by the court. According to the plaintiff's submissions, the new matters and/or evidence which the plaintiff discovered after the order of 30th November, 2011 are the following:-

a. A letter dated 26th April 2011 by the 2nd defendant to the Medical Practitioners and Dentists board in which the 2nd defendant admitted that the nursing home which he had claimed to be constructing had not been licenced by the said board.
b. A copy of Environment Impact Assessment Licence dated 9th December 2010 issued to the 2nd defendant for the proposed Placina Nursing Home which shows that the said licence was not issued until the date thereof namely, 9th December 2010.
c. A letter dated 13th April 2011 from the Medical Practitioners and Dentist Board to the 2nd defendant to the effect that what the 1st and 2nd defendants had set up on the suit property was actually a funeral home and not a nursing home as had been alleged by the 1st and 2nd defendants and that the said funeral home was not licenced by the said board.

9. The plaintiff submitted that the contents of the foregoing documents are contrary to the position that had been taken by the 1st and 2nd defendants during the hearing of the earlier injunction application which position was believed by the court and led to the dismissal of the plaintiff's application. The plaintiff submitted further that the said correspondence and documents supports the position that had been taken by the plaintiff during the hearing of the earlier application for injunction that the 1st and 2nd defendants were setting up a funeral home and not a nursing home which position the court had held to be misleading. The plaintiff submitted that these documents were not within his reach at the time of filing the earlier application for injunction and that he could not have laid his hands on them even with the exercise of utmost due diligence. The plaintiff argued further that these documents show that the defendants misled the court into dismissing the plaintiff's application for injunction and in fact committed perjury. The plaintiff submitted that the discovery of these new and important evidence which are relevant to the determination of the dispute at hand justifies the review of the order issued by the court on 30th November 2010. I am not in agreement with the submission by the plaintiff that the matters that I have set out herein above constitutes new evidence that the plaintiff could not place before the court when the earlier application for injunction was filed and argued. The plaintiff had contended in the earlier application for injunction that the 1st and 2nd defendants were constructing a funeral home and that the said construction was neither approved by the 3rd defendant nor licenced by NEMA.
10. The fact that the 1st and 2nd defendants were constructing a funeral home and that the same had not been licenced by NEMA is not something which the plaintiff has just discovered. The information was with the plaintiff. The problem is that the plaintiff placed no evidence before the court in proof thereof. The fact that the plaintiff has since the delivery of the ruling in the earlier application for injunction gone out and obtained evidence in proof of the facts which were otherwise within his knowledge all along does not make such evidence new. I am of the opinion that this court cannot be called upon to review its order which was made on the ground that a party

had failed to prove certain facts on the grounds that such a party has since obtained evidence that can prove the facts that it had failed to prove when the order was made. The plaintiff had failed to convince the court that the 1st and 2nd defendants were putting up a funeral home and that the project was not approved by the 3rd defendant and NEMA. The plaintiff has now obtained correspondence dated April, 2011, four (4) months after the order of the court was made and an EIA licence from NEMA dated December 2010, a few days after the order of the court sought to be reviewed, which supports his earlier application for injunction and now wants the court to find that his earlier application was in fact well founded and should have been allowed and for the court to proceed to review its earlier order and grant the injunction which had been denied. With all due respect, this cannot happen. An order for review cannot issue because a party has since the issuance of the order or decree sought to be reviewed obtained evidence in support of a case or an application which was disallowed for lack of evidence. I therefore find the plaintiff's application to be without merit to the extent that it is based on the discovery of new and important evidence.

11. The plaintiff had also argued that the 1st and 2nd defendants caused the dismissal of the plaintiff's earlier application through fraud and that this is a sufficient reason to review the order of 30th November 2010. The plaintiff's contention is that the 2nd defendant's claim in his replying affidavit in response to the plaintiff's earlier application for injunction that the 1st and 2nd defendants had obtained EIA licence from NEMA for the project was fraudulent because the said licence was not obtained until 9th December 2010. I have perused the 2nd defendant's affidavit that was sworn on 18th October 2010 in reply to the plaintiff's earlier application for injunction. The 2nd defendant did not at all claim that the 1st and 2nd defendants had obtained EIA licence from NEMA. What the 2nd defendant stated in the said affidavit was that the 1st and 2nd defendants had prepared and submitted to NEMA an Environmental Impact Assessment Project Report with respect to the project and that the project had been approved by NEMA. This claim was misleading because NEMA had not approved the project at that time. The same cannot however be said to have been fraudulent. From the documents that were annexed to the said affidavit, the 1st and 2nd defendants had had engaged an environmental management consultant to prepare for them an Environmental Impact Assessment Project Report (EIAPR) for the project for submission to NEMA for the purposes of EIA licence. In the course of the preparation of that report, the said consultant held a number of meetings with the area residents at which meetings, the project is said to have been approved by the residents. The report by the said consultant together with the minutes of the said meetings were submitted to NEMA for approval and issuance of EIA licence. By a letter dated 27th September 2010, NEMA invited several stakeholders to comment on the said report before it could make a decision on the same. I believe that it is after receipt of comments from the said stakeholders that the EIA licence dated 9th December 2010 was issued. The consultants said report together with NEMA's letter to stakeholders calling for comments on the report before the licence was issued were placed before the court. No EIA licence of whatsoever nature forged or otherwise was placed before the court by the 1st and 2nd defendants. The 2nd defendant had made untrue allegation in his affidavit but from the material that he placed before the court, I cannot say that the allegation was fraudulent and that the court was defrauded into denying the plaintiff an injunction on account of the said misleading allegation.

12. The same position obtains with regard to the 2nd defendant's contention during the hearing of the earlier application for temporary injunction that he was constructing a nursing home and not a funeral home. Again, it is true that the 2nd defendant had deposed in his affidavit aforesaid that what he was putting up was a nursing home and not a funeral home. This statement according to the material placed before the court may not have been true or honest. However, I have no reason to believe that the statement was made with the intention of defrauding the court. The report by the Physical Planning department and the Environmental Management Consultant that were presented to court for the then proposed Placina Nursing Home referred to the project as a Nursing Home. It is not clear and the issue may not be determined in these proceedings as to when the idea of setting up a mortuary as part of the Nursing Home came up. According to the Certificate of Registration of the institution and its operating licence for the year 2013, the institution has

been licenced to operate as a nursing home and has been registered as such. The 1st and 2nd defendants have contended that what they have is a cold room which is normal and required to be maintained in all nursing homes. Whether this is true or not can only be determined at the trial.

13. What I can say at this stage is that I have no sufficient evidence before me that the allegation that had been made by the 2nd defendant that he was constructing a nursing home and not a funeral home was fraudulent so as to warrant the review of the order that was made by the court on 30th January 2010. The plaintiff's application for review also fails on this second ground of fraud. The plaintiff had also brought this application on the ground of an apparent error and/or mistake on the face of the record. The plaintiff did not argue this ground. The much I can say is that as was held in the case of, **National Bank of Kenya Ltd –vs- Ndungu Njau** (supra), an error or omission which justifies a review of an order or a decree must be self evident. I have not seen any error on the face of the order of Makhandia J. (as he then was) made on 30th November 2010 and none has been pointed out by the plaintiff. Before I conclude on this point, I would wish to add that as I have stated earlier in his ruling, the plaintiff's application for injunction was not dismissed solely on account of lack of candor or for failure to establish a prima facie case which may have been attributed to the alleged misleading information by the 2nd defendant. The court had also found that the plaintiff had failed to prove that he would suffer irreparable harm if the injunction sought was not granted. The court stated that *"If this claim was meant to show that the plaintiff will suffer irreparable loss then he has failed miserably."* Due to the foregoing, it is my finding on the first issue that the plaintiff has not satisfied me that sufficient reasons do exist to warrant the review of this court's order of 30th November, 2010.

14. **Issue No. (ii):**

In the plaintiff's application, the plaintiff had sought the review of the order of 30th November 2011 and for the court to issue an injunction to restrain the 1st and 2nd defendants from operating and/or running a mortuary and/or funeral home on the suit property without authority and/or mandate from NEMA. The plaintiff's similar application had earlier been dismissed by the court. The prayer herein for injunction was therefore predicted upon the court allowing the prayer for review of the order that dismissed the earlier application for injunction. The plaintiff having failed in the limb of the application for review, this limb seeking injunction cannot be granted. I would wish to add that, even if the plaintiff had made out a case for review, this court would not have granted the injunction sought. The injunction is sought subject to the 1st and 2nd defendants obtaining authority and/or mandate from NEMA. The 1st and 2nd defendants have placed before the court uncontroverted evidence that they have already obtained EIA licence from NEMA for the project which licence was issued on 23rd January, 2012. In the circumstances, the plaintiff's application has been overtaken by events.

15. **Conclusion;**

The upshot of the foregoing is that the plaintiff's application dated 12th May 2011 has no merit. The same is hereby dismissed with costs to the 1st and 2nd defendants.

Delivered, dated and signed at Kisii this 28th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Okemwa h/b for Oguttu for the Plaintiff

N/A for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE