REPBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

ELC SUIT NO. 355 OF 2012

BART KIBATI – CHAIRMAN

PAUL OWORA – SECRETARY

DAVID AWORI – TREASURER

Suing as Officers and on behalf of

GIGIRI VILLAGE ASSOCIATION

duly registered Association as No. 20554……..PLAINTIFFS/APPLICANTS

=VERSUS=

HARROW INVESTMENT LTD……..1ST DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI…….….1ST DEFENDANT/RESPONDENT

RULING:

The Plaintiffs/applicants have brought this Notice of Motion dated 19th June, 2012, against the Defendants herein, Harrow Investments Ltd, 1st Defendant and City Council of Nairobi, 2nd Defendant seeking for various Orders:-

a. *That a Temporary Order of Injunction be issued to the 1st Defendant, its servants and/or agents from carrying out any further construction or developments of any nature or commercial activity* ***on LR No.Block 91/160 and 161 Gigiri Estate, Nairobi.***

b. *That a mandatory Order of injunction be issued to restrain the 1st Defendant, its servants or agents forthwith from discharging raw sewer, noxious or any injurious waste into Karura River.*

c. *A Mandatory Injunction to compel the 1st Defendant, by its servants and/or agents to demolish all illegal construction and developments stipulated in the prayer above.*

d. *A mandatory injunction to compel the Defendants to restore the said premises to the immediate condition prior to damages.*

e. *That the 2nd Defendant and the National Environmental management Authority (**NEMA**) to supervise the execution and performance of the Orders stipulated .*

f. *Costs of the application be provided for.*

The application was premised on the following grounds and also on the annexed affidavit of ***Paul Miyare Owora.*** These grounds are:

i. *That the 1st Defendant has acted in flagrant breach of the provisions of the local Authority and Environmental Management and Co-ordination Act No.8 of 1999.*

ii. *That the 1st Defendant purported to have obtained NEMA approval for Development by deception.*

iii. *That the Defendants have deliberately refused to comply with the provisions of Act No. 8 of 1999 with regard to protection of the environment.*

iv. *The Defendants have violated and continue to jeopardize the plaintiffs' right to clean and healthy environment and cause a nuisance.*

One **Paul Miyare Owora,** the Secretary of the Plaintiff Association swore an affidavit on behalf of Gigiri Village Association, the plaintiff herein. He averred that he is the owner of ***Plot No. 91/158 Gigiri Estate*** which he purchased about 20 years ago. That he developed his residential premises on the plot and he has lived there ever since. Further, that the Estate was developed to be an up market, serene residential estate and all the owners and residents formed an association called Gigiri Village Association in which the deponent is a member and the secretary. He further averred that on 9th July, 2006, the Association and himself noted an advert in the Nation Newspaper purporting to give notice of an application for change of user for the property described as **Block 91/260 and 261.**

That though there were no such plots, the Deponent and Association wrote letters objecting to the said change of user and they published their Notice of Objection on 28th July, 2006 in the Standard Newspaper. Further, the Association had carried out searches within the relevant authorities such as Physical Planning Department of the Ministry of Lands and Settlement and established that **Plots No. 91/260 and 91/261** did not exist in **Gigiri Estate**. However, the National Environmental management Authority (**NEMA**) published a Notice for Environmental Impact Assessment Report over Plots No. **Block 91/160 and 91/161** and not **91/260/261.** It was the deponent believe that the Notice of application for change of user over Plots **91/260 and 91/261** was meant to mislead the Plaintiffs and the public. He further deposed that they did not receive any response to their letters until on or about November, 2011, when they noticed construction and development of **Plot No.91/160** and **161** and on inquiry, they determined that it belonged to the 1st Defendant who was putting up commercial premises for offices and other amenities.

He further deposed that the Association secured a copy of the planning brief and noted that the application for change of user was for **Block 91/161** dated July 2006 and was for development of offices only, though the Nairobi City Council Planning zoning remains Zone 13 designated for one family residential development. The deponent further averred that the provisions of Environmental Management and Co-ordination Act were not complied with and the approval and licences from **NEMA** were obtained by deception.

The deponent contended that the developments being undertaken by the 1st Defendant are illegal and unlawful and in breach of the law. Further, that the Plaintiffs have protested to various authorities and lodged their complaints in regard to these illegal developments but no action has been taken and the illegal construction continues. The plaintiffs/applicants have therefore resorted to this court for redress.

The application on was vehemently opposed by both the 1st and 2nd Defendants.

One,***Alnashir Popat, of Eden Square,*** swore an affidavit on behalf of the 1st Defendant. He averred that he is an alternate Director of the 1st Defendant and he is authorized to swear the Affidavit on its behalf. The deponent averred that the Plaint filed herein does not disclose any cause of action against the 1st Defendant. He contended that the 1st Defendant is the registered proprietor as lessee of all that piece of land known as **Nairobi/Block 91/438** and under special condition No.3. **" the land and buildings shall only be used for offices",** as evidenced by annexture **AP1.** He also contended that the said land is an amalgamation of two plots namely **Block 91/160** and **91/161** whose original user was residential but changed to offices following an application for change of user by the 1st Defendant. The Plaintiffs' lodged their objections against the proposed change of user.

However, the 2nd Defendant granted the 1st Defendant the change of user on 14th November, 2008 as evidenced by annexture **AP2.**

The deponent further contended that the Plaintiffs did not challenge the said decision and they cannot now challenge the same in this court. Further, the 1st Defendant in consultation with NEMA developed plans for construction of five-storey office block. Subsequently, the 2nd Defendant approved the 1st Defendant's application for alterations and additions of the approved plans as per annexture AP4.

The deponent further averred that the 1st Defendant applied for and on 14th March 2011 obtained an Environmental Impact Assessment **(E.I.A)** licence from NEMA. The plaintiffs did not challenge the said decisions as provided by **EMCA** and they cannot challenge it now at this juncture. That prior to the grant of the said licence, NEMA had required the 1st Defendant to comply fully with the requirements of the applicable laws and regulations which the 1st Defendant complied with.

The deponent further averred that instead of the plaintiffs challenging the various acts and decisions, of the 2nd Defendant and NEMA , the Plaintiffs engaged in concerted campaigns of harassing and intimidating the 1st Defendant in an effort to frustrate the developments. Further efforts by the 1st Defendant to engage the Plaintiffs constructively have been spurned by the plaintiffs. That the 1st Defendant has always addressed the concerns raised by the Plaintiff as evidenced by annexture AP 11 and AP 12 .

It was the deponent contention that Gigiri neighborhood is not an exclusive residential area as repeatedly asserted by the plaintiffs. He averred that about half of the area consists of non-residential establishments and/or developments as shown by AP 13.

Further, the Deponent denied ever alluding or inquiring whether NEMA official were amenable to taking bribes nor did they ever suggest that they were willing to pay bribes to anyone for any reason as alluded to in Mrs Wachira's letter. The Deponent further contended that the 1st Defendant has invested considerable sum of money into the project as evidenced by annexture AP 15.

The 2nd Defendant also filed its Replying affidavit which was sworn by one **Rose Muema** , the Director of City Planning of the City Council of Nairobi. She averred that the suit property falls within Zone 13 of the guide of Nairobi City Development Ordinances and zones. She further averred that the guide expressly declared in its preamble to being open to challenges to ensure the council's better performance and it is not therefore in itself binding.

The deponent further admitted that the 2nd Defendant did approve change of user of the suit property which approval was not absolute. It was conditional upon the applicant's compliance with the various terms and conditions stated therein. Further, that prior to the said approval of change of user, the 1st Respondent's caused an advertisement to be put up in the local daily as required by law. She also deposed that the 1st Respondent put a Public Notice at a conspicuous place on the suit property inviting members of the public desirous of lodging objections to the intended change of user to do so within the period of 14 days. The 2nd Respondent received the objections, considered it and went ahead and

approved the 1st Respondent's application with some conditions that the development was to adhere to. She further deposed that the 2nd Respondent followed all the procedural requirements and due regard to all relevant facts in arriving at the said decisions.

The deponent contended that if the applicants were not satisfied with the change of user, they should have appealed to the Liaison Committee with a further appeal to the **National Liason Committee,** and final appeal at the High Court. The applicants failed to follow the laid down procedure for handling such matter.

The deponent further averred that the applicants have not established existence of special circumstances which would warrant the court to issue a mandatory injunction. That a mandatory injunction sought herein would be tantamount to delivering a final Judgment against the Defendants/Respondents without giving them an opportunity to be heard. She further contended that the applicants have not established any of the principles laid down in the case of **Giella Vs Cassman Brown** to warrant issuance of the orders sought. That the proceedings herein are an abuse of the Court process and should be dismissed with costs.

The parties herein consented to canvass the instant Notice of Motion by way of written submissions. I have now carefully considered the filed written submissions, the pleadings generally and the relevant laws and I make the following findings:-

The Plaintiffs/Applicants have sought for injunctive relief from this Court. The granting of temporary injunction is a matter within the discretion of the court and that discretion must be exercised judicially. Since the applicants herein have sought various injunctive relieves, they have a duty to establish various legal principles upon which such injunctions are granted. These principles have variously been restated by court. In the case of, **Professor David Musyimi Ndetei Vs Housing Finance Company of Kenya Limirted, Nairobi,(Milimani) High Court civil Case No. 456 of 2006 , (Waweru J, on 25/1/2007) , s**tated that :-

" The principles to be applied in applications for temporary injunctions are that an applicant must show a prima-facie case with a probability of success" an interlocutory injunction will not be granted unless the applicant must otherwise suffer irreparable injuries which would not be adequately compensated by an award of damages. If the court is in doubt, it will decide the application on a balance of convenience (see **Giella Vs Cassman Brown & Co. ltd (1973) EA 358.**

The applicants also sought for grant of Mandatory injunction. The applicants having come to court to seek for an equitable relief, they needed to establish that they deserve the Orders sought. The issue of Mandatory injunction has been dealt with by courts in various cases. The courts have unanimously held that mandatory injunction can only be granted in exceptional circumstances. In deciding whether to grant the Mandatory Injunctions sought herein by the applicants, I will be guided by the case of **Kenya Breweries Ltd and another Vs. Washington O. Okeyo , Civil Appeal No. 332 of 2000 (2000) 1EA 109,** where the court of appeal held that:-

"A Mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application (see **Halsbury's Law of England Volume 24, 4th Edition paragraph 948).**

The applicants therefore needed to establish that special circumstances do exist and that the case is a clear one which ought to be decided at once. The above position was also held in the case of **Locabail international Finance Ltd Vs Agro-Export and others (1986) 1ALL ER 901.**

In the instant application, have the applicants established the laid down principles for grant of both temporary and mandatory injunction?.

From the pleadings and the annextures to the application there are some undisputed facts; there is no doubt that the applicants are Officials of **Gigiri Village Association**, which is an up market low density residential area classified under zone 13 by the City Council of Nairobi, the 2nd Respondent herein.

There is also no doubt that the 1st Defendant is the registered owner of **Nairobi Block 9/438,** which is an amalgamation of two **Plots Block 91/160 and 91/161.** The said parcel of land is within Gigiri area which falls under zone 13 of the guide of Nairobi City Development Ordinances and zones.

There is also no doubt that the 2nd Defendant allowed and approved the 1st Defendant to amalgamate the two parcels of Land. The 2nd Respondent also approved development of five storey building on the suit property by the 1st Defendant. There is no doubt that National Environment Management Authority (NEMA) was also involved in approval of the development herein.

There is also evidence that the Plaintiffs were opposed to the change of user of the suit property as applied by the 1st Defendant. The plaintiffs raised objection with 2nd Respondent. However, the 2nd Respondent went ahead and approved the 1st Defendant application for change of user and also their development plans.

The court has also considered the lease documents issued to the 1st Defendant by the Ministry of Lands and signed by the Land Registrar on 28th March, 2011. Clause 3 of the special conditions states that:-

" The land and building shall only **be used for offices".**

The 1st Defendant is the registered owner of Nairobi **Block 91/438** as evidenced by the Certificate of Lease, **AP1.** The Plaintiff/applicants are not disputing that fact. The 1st Defendant is therefore the absolute owner of this parcel of land as envisaged ***Section 26(1)*** of the Land **Registration Act** which states as follows:

2**6.**(1)***The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

The first defendant herein being the registered owner of the subject suit land has been bestowed by **Section 24(a) of Land Registration Act,** with certain rights and interests upon Registration. **Section 24(a)** of the Land Registration Act states as follows:-

24. ***Subject to this Act—(a)***

"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that

Land together with all rights and privileges belonging or appurtenant thereto; and"

The 1st Defendant herein being the registered owner is entitled to exercise the rights bestowed unto it by section 24 above

Article 40 (1) of the Constitution 2010 provides for protection of right to property. **Article 40 (1)** reads as follows:-

" …….every person has the right, either individually or in association with others to acquire and own property.

a. *Of any description and*
b. *On any part of Kenya*.

Article 42, of the Constitution 2010, on the other hand guarantees right to **clean and healthy environment**. The applicants alleges that the Defendant actions have infringed on their right to clean and health environment. On the other hand, the 1st Defendant alleges that by their actions, the plaintiffs are threatening to deny the 1st Defendant its right to property. Those are issues that need to be interrogated by the court and determined by the trial court.

The applicants have alleged that the 1st Defendant acted in flagrant breach of the provisions of the Local Authority Acts and **NEMA** and also obtained approval from **NEMA** through deception.

I have considered the numerous annextures attached to the pleadings herein. It is indeed true that the plaintiffs raised objection to the 1st Defendant application for the change if user. The 2nd Defendant averred that after considering the application by the 1st Defendant and the objection by the Plaintiffs, it went ahead and approved the 1st Defendant change of user. The applicants have alleged that was contrary to the regulations, laid down in the Physical Planning Act, and also a contravention of the zoning guidelines. However, the 2nd Defendant submitted that if the plaintiffs were dissatisfied with the decision of the City Council of Nairobi, the Physical Planning Act was clear on the procedure to be followed by a dissatisfied party. The applicants ought to have appealed to the **liason committee,** with a further appeal to the **National liason Committee** and a final appeal to the **High Court.** The applicants failed to do so. It was the submissions of the 2nd Respondent that the applicants have not established a **prima facie case with high probability of success.** The 1st Defendant also submitted that it applied to NEMA for the necessary approval and after meeting the requirements set out by NEMA, as per annexture **AP 8**, NEMA, gave them approval to carry on with the development. It was the 1st Defendant's submissions that the plaintiffs did not appeal against that decision by NEMA and the Plaintiffs are now precluded from questioning the decisions of the two regulatory bodies having failed to challenge their decisions though the mechanisms and procedure provided by the relevant Acts of Parliament.

I have considered all the annextures herein and it is indeed correct that the Plaintiffs did not challenge the decision by 2nd Respondent and NEMA to approve the 1st Defendants developments. I will concur with the submissions by the 1st and 2nd Respondents that they did follow each and every step before the development in issue was commenced. The issue as raised by the Plaintiffs can adequately be addressed with finality after being canvassed at the trial. The applicants have therefore failed to establish that they have a prima facie case with probability of success.

The other question to answer is whether the plaintiffs will suffer irreparable damages which cannot be compensated by an award of damages. The applicants submitted that they stand to suffer loss of clean environment as stipulated by **article 42 and 60(a)** of the Constitution, that there is threat to degradation of the environment and also degrading and devaluing of the residential area which was earmarked to be a zone 13, exclusively residential area.

The Respondents submitted that though the subject area was stated to be a zone 13 area, that is residential area only, the said zoning was open to challenge to ensure the 2nd Respondent's better performance and thus it was not binding. The 1st Respondent submitted their development is well planned commercial development like many other developments in the said area as evidenced by annexture **AP 13.** It was therefore submitted by the Respondents that applicants have not established that they will suffer irreparable damage that will arise if the development is allowed to proceed.

I have considered the submissions herein on the issue of irreparable damage and I concur with the Respondents that the plaintiffs have not demonstrated that they will suffer irreparable damages which cannot be compensated by way of damages if the developments are allowed to proceed.

On the **mandatory injunction**, the applicants ought to have shown that there exist special circumstances

to warrant grant of such mandatory injunctions. The applicants herein have raised issues of fact and law. The said issues can only be determined through a trial. At this stage, I cannot make a conclusive or definitive findings of fact or law as most of the issues are in dispute. This is not a clear and simple case that can be decided at once. There is no evidence that the defendants are trying to steal a march against the plaintiffs.

The court finds that there are no basis laid down by the applicants to warrant this court grant the mandatory injunctions sought herein. There are no special circumstances demonstrated herein to allow the court issue mandatory injunction (see **the Official Receiver and Provisional Liquidator, Kenya National Assuarance Co.ltd Vs John Gitiche Mbao, Civil Appeal No. 236 of 1999**.

The 1st Defendant also submitted that the alleged development has been completed. A certification of Occupation was produced in court by the 1st Defendant. That allegation was denied by the Plaintiffs/Applicants. It is evident that an order of injunction is supposed to maintain the **Status Quo**. An injunction cannot be granted once the event intended to be injuncted has been overtaken by events.

(See **Mavoloni Company Ltd Vs Standard Chartered Estate Management Ltd, Civil App. Nairobi 266 of 1997.**

Having now carefully considered the instant Notice of Motion, I find that there are substantive issues herein which I cannot delve into and make a final conclusion at this stage. I therefore decline to grant any mandatory injunction. The applicants also failed to establish the laid down principles for grant of temporary injunction. I will also decline to grant the temporary injunction sought.

In light of the above, the court finds that the plaintiffs/Applicant's Notice of Motion dated 19/6/2012 has no merit. The same is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and delivered this 28th day of March, 2014

L. GACHERU

JUDGE

In the Presence of:-

Mr Osiemo for the Plaintiffs/Applicants

Mr Mbaluto holding brief for Mr Amoko for the 1st Defendant/Respondent.

None attendance for 2nd Defendant/Respondent.

Lukas: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above counsels and in the absence of 2nd Defendant/Respondent's counsel.

L. GACHERU

JUDGE

28/3/2014