



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 954 OF 2014

BERNICE WANJIKU GACHEGU..... PLAINTIFF

VERSUS

BR. FAUZ QUEISHI.....1ST DEFENDANT

BR. SULEIMAN HARUNANI..... 2ND DEFENDANT

BR. MOHAMED VIRANI.....3RD DEFENDANT

BR. ZOOL NIMJI.....4TH DEFENDANT

BR. ALTAF GANATRA.....5TH DEFENDANT

BR. ADAM ALI..... 6TH DEFENDANT

BR. AHMED ALVI..... 7TH DEFENDANT

BR. RIZWAN DADA..... 8TH DEFENDANT

BR. FAUZ QUEISHI9TH DEFENDANT

RULING

The plaintiff's Notice of Motion application dated 21st July 2014 is before the court for determination.
The Plaintiff prays that:-

- i. The Defendants by themselves their agents and/or any one acting at their behest or as an official of Parklands **Mosque & Madrasa Society** be restrained from continuing with any further excavation and/or construction on **L.R.209/17039** Parklands Nairobi pending the hearing and determination of this suit.
- ii. The court be pleased to visit the site for a better acquaintance with the facts in issue.
- iii. The costs of this application be provided for:

The Plaintiffs application is premised on the grounds that appear on the body of the application and on

the annexed supporting affidavit sworn by **Bernice Wanjiku Gachegu**, the plaintiff herein on 21st July 2014. The following grounds have been set out by the plaintiff in support of the application.

1. That the plaintiff is the registered proprietor of land parcel **L.R.209/17040** that abuts **L.R. NO.209/17039**.
2. That the excavation and construction works commenced by the Defendant and/or their agents on land parcel **L.R. NO.209/17039** are real danger to the plaintiff and her family on land parcel **L.R.209/17040**.
3. That the magnitude of the works sought to be undertaken by the defendants completely alters the property of land parcel **L.R.209/17040** and diminishes its value and user.
4. That the defendants conduct is willfully and deliberately calculated to force the plaintiff to relinquish her land to the Defendants having resisted their overtures to acquire the land.

The facts in support of the plaintiffs application are set out in the affidavit sworn by the plaintiff and briefly, the plaintiff's case is that she is the registered proprietor of **L.R.NO.209/17040** and she resides on the property with her family and has so resided thereon for over 20 years. The plaintiff states that her residential property abuts **L.R.NO.209/17039** which she avers that for a long time housed the area chief's offices and was developed with semi- permanent structures. The plaintiff states that the defendants on diverse dates took over the property **L.R.209/17039** in unclear circumstances and put up semi permanent structures which are used as a worship centre for Muslim faithful.

The plaintiff states that the Defendants have embarked on a redevelopment project and have pulled down the semi permanent structures on **L.R.NO. 209/17039** and whilst the plaintiff was away in Maputo Mozambique on official duties the defendants excavated their plot including the land adjacent to the plaintiff's house and perimeter fence with the result that the plaintiff's house was left precariously hanging and there is a real danger that the house could collapse anytime and therefore poses grave danger to the plaintiff and her family. The plaintiff avers that the Defendants have been interested in acquiring her parcel of land to annex it to their plot but the plaintiff has resisted the overtures and thus the present excavation activities may be calculated to force the plaintiff to vacate her property. The plaintiff deposes that the Defendants conduct and proposed development is intended to diminish the value of her property and lead her to vacate her property owing to increased human and vehicular traffic and other attendant social challenges. The plaintiff thus seeks the court's intervention to order a stoppage of the Defendants activities of excavation and the proposed construction of a Mosque and other facilities on the Defendants parcel of land.

The Defendants filed grounds of objection dated 11th September 2014 and a replying affidavit sworn by **Suleiman Harunani** the 2nd Defendant on behalf of the Defendants on 11th September 2014 in opposition to the plaintiff's application for injunction. Inter alia the Defendants set out the following grounds of objection:

- i. **The plaintiff has no prima facie case with a probability of success.**
- ii. **Damages would be an adequate remedy.**
- iii. **The balance of convenience lies against granting of an injunction.**
- iv. **That the plaintiff has not disclosed and/or has concealed material facts which disentitles her to an equitable remedy as she has not approached the court with clean hands.**

The Defendants depone that **Parklands Mosque** and **Madrassa Society** acquired the suit property **L.R. NO.209/17039** in 2011 with the object of building an Islamic Centre which encompassed a Mosque, educational facilities, a library, a multiparties to cater for people in the Parklands area. The Defendants have annexed a copy of the title in respect of **L.R.NO.209/17039** marked "SH2" which shows the 2nd Defendant together with 3 others are registered as owners as Trustees for **Parklands Mosque and Madrassa Society**. Under special condition 3 the reserved user of the Defendants parcel of land is "**The land and buildings shall only be used for Mosque and related religious purposes**". The Defendants state that the process of acquiring the suit property commenced in 2002 and have annexed a bundle of correspondence marked "SH8" depicting how both the plaintiff's title and their title came into existence through the subdivision of **L.R.NO.209/6253 Mpaka Road Nairobi** which had been allocated and

owned by one **Elijah Kipngeno Arap Bii**.

The Defendants state that their building and construction plans for the proposed project have been approved by the City Council of Nairobi and **NEMA** and that the structural drawings and plans have equally been approved. The Nairobi City County approval dated 19/12/2013 is attached as is the **NEMA** approval dated 3/3/2014. The structural design and drawings were approved by the City Council of Nairobi Engineering Department on 16/7/2014. The Defendants aver that having obtained all the necessary approvals for the proposed project they awarded the construction contract to a contractor who moved on site and commenced the works as per the contract. Following a complaint by the plaintiff a Senior Planning Inspector at the request of the Defendants visited the site and prepared a report exhibited as **“SH7”** (though the report is unsigned). The Senior Planning Inspector report observed that the development was approved by the Nairobi City County and that the excavations for the basement level were within the plot boundaries. The report indicated further excavations would be necessary since solid stable surfaces had not been established. The reported noted excavations near existing structures had not been done.

The report recommended that as the development was approved with two basements parking levels the developer needed to move speedily to implement the same to avoid collapse of the foundation walls due to prolonged exposure. The report further recommended that systems of supporting the existing neighbouring plots developments be devised by the project consultants.

The Defendants further have obtained a report from the project’s structural Engineers marked **“SH9”**. The report dated 2/8/2014 provides in part thus:-

“The building has been designed as a reinforced concrete frame with reinforced concrete retaining walls along the periphery of the plot. In addition a masonry block skin wall braced with reinforced concrete columns and beams has been provided to support the face of the excavations as well as providing permanent formwork for the construction of the reinforced concrete retaining wall....”

Further the structural Engineers report adds:-

“As is the norm bulk excavation of the basement was done by mechanical means using an excavator and carted away in lorries. However, a 1.5 metre buffer was left unexcavated at the edges so as not to impair the safety and stability of the neighbouring property. This band of soil will be removed by controlled manual excavation in segments as the construction of the basement progresses. Furthermore, a concrete slab exists above the band of soil adjacent to the neighbouring building. This provides protection of the top soil against the infiltration of surface runoff that can undermine the top soil.

The excavations carried out for the basements are currently stable and there is no evidence of stability being compromised. No water was observed on the sides of the excavation, which could cause slippage of the soil.....”

The structural Engineer cautiously concluded his report by sounding what I would call a warning when he stated thus:-

“In order to forestall a Mishap caused by instability of the face of excavations as a result of prolonged exposure to the elements, we would strongly advise that construction of the retaining walls be carried out immediately”.

The Defendants aver that they have used the property as a worship centre from 1993 which fact is acknowledged by the Plaintiff, and state that the project when completed will be beneficial to the community at large. The stoppage of the project works occasioned by the plaintiff’s action has triggered financial claims from the contractors and the stalling of the project will only serve to expose the Defendants to further financial losses. The Defendants contend that the balance of convenience in the circumstances, tilts in their favour and cannot be in favour of the plaintiff.

The parties filed written submissions. The plaintiff on 25/9/2014 and the Defendant on 2/10/2014 in which the parties reiterate the facts as set out in their respective affidavits. I have carefully considered the plaintiff's Notice of Motion, the affidavit in support and in opposition and the parties written submissions and the issue for the court to determine is whether the plaintiff has demonstrated that she has a prima facie case with a probability of success and, if so, whether she has satisfied the threshold for the grant of an interlocutory injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**.

The court of Appeal in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & others (2003) KLR 125** held that **“prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”**.

Having regard to the facts and circumstances in the present case I am not persuaded that the plaintiff has demonstrated she has a prima facie case against the Defendants with any probability of success. Both the plaintiff and the Defendants hold title to their respective parcels and the registered proprietors of their respective parcels of land. A proprietor of land upon registration is vested with absolute ownership rights which are indefeasible except as now provided under section 26 (1) (a) and (b) of the Land Registration Act NO. 3 of 2012.

Section 24 of the Act provides 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,

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all the implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements liabilities or incidents of the lease.

The Defendants are the registered owners of a leasehold interest for a term of 99 years from 1/7/1993 over **L.R.NO.209/17039** which is reserved for use as a Mosque and related religious purposes. The Defendants proposed project is consistent with the reserved user and all the necessary and appropriate approvals have been sought and obtained by the Defendants for the project. The plaintiff's concern as I have understood it is that the Defendants in implementing the project have carried out excavations which have created a **“precipice or cliff”** along the edge of the common boundary and very close to her residential building such that she is apprehensive her house could **“cave in or collapse”**. The plaintiff apart from making the statement that there is danger of her house collapsing by reason of the Defendants activities on their property has not furnished any evidence to suggest there has been a weakening of the foundation to her house or that there is likely to be effects that could be detrimental to the plaintiff.

The Defendants in their response furnished two reports, one from a Senior Planning Inspector and the other from the project's structural engineer. The report by the project's structural engineer explained the technical structure of the design and specifically stated that the basements were designed with reinforced concrete retaining walls along the periphery plot to prevent any damage to the neighbouring properties. The Structural Engineer further affirmed the excavations carried out for the basements were presently stable and there was no evidence of instability. Having regard to the two technical reports and in the absence of any converse report from the plaintiff I am satisfied that there is no evidence of any imminent danger of the plaintiff's house collapsing by reason of the excavations. I am also satisfied that the Defendants have taken sufficient precautions against occasioning damage to the neighbouring properties and of note the Defendants have left unexcavated a portion of 1.5 metres along the lengthy of the plaintiff's plot boundary as a precautionary measure until reinforcements are done. It is also customary for the Nairobi City County, planning Department to supervise any ongoing developments to ensure they

are being carried out in conformity with the approved plans.

I have considered the case of **Kenya Bureau of Standards –vs- Lunga Lunga Timber Mart Ltd (2009) eKLR** referred to me by the plaintiff but with respect the facts in that case were totally different to the facts in the present case as in that case the plaintiffs sought to stop a nuisance that was affecting and impacting the business they were carrying on in their property. In the present case the Defendants are in the process of developing their own property in conformity with the reserved user and the only point of contest is whether the excavations pose a danger to the plaintiff's house on the adjacent plot. There is no evidence that there is such a danger and the evidence available points to the Defendants having taken sufficient precaution to prevent any such danger.

In the circumstances I hold no prima facie case has been established. I am also not persuaded that the plaintiff has demonstrated she would suffer any damage that would not be compensated by an award in damages. I think damages would be an adequate remedy in the eventuality of any damage to the plaintiff's house. The balance of convenience equally would be in favour of the Defendants they having gone through the approval processes for the project and having commenced the project works. The contracts are time specific and any delays will result in escalation of costs.

I in the premises hold that the plaintiff's application lacks any merit and I decline to grant the injunction sought by the plaintiff. I discharge the interim order of injunction granted on 21st July 2014.

Having regard to the circumstances of this matter I direct that each party meets their own costs of the application.

Ruling dated, signed and delivered this **31st** day of **October** 2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... for the Plaintiff

..... For the Defendants