REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE 391 OF 2019

ANDREW OMBOTO.....1st PLAINTIFF

BRENDA SAMBWA.....2nd PLAINTIFF

STEPHEN KYALO MULA.....3rd PLAINTIFF

WINIFRED BOSIBORI OBAGA.....4th PLAINTIFF

VERSUS

BOARD OF TRUSTEES, NATIONAL

SOCIAL SECURITY FUND.....1st DEFENDANT

THE LAND REGISTRAR, NAIROBI.....2nd DEFENDANT

THE HON ATTORNEY GENERAL.....3rd DEFENDANT

EATON TOWERS (KENYA TOWERS) LIMITED.....4th DEFENDANT

NAIROBI CITY COUNTY.....5th DEFENDANT

COMMUNICATIONS AUTHORITY OF KENYA.....6th DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY.....7th DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated the 10th September, 2020, the 4th Defendant herein (*Applicant*) seeks for the following reliefs;

i. That this suit be dismissed and/or discontinued due to the collapse of the Substratum.

ii. That the costs of this Application and of the entire suit be awarded to the 4th Defendant.

2. The Application is premised on the grounds on the face of the Motion and supported by the affidavit of the 4th Defendant's advocate who deponed that the Plaintiff instituted this suit against the 4th Defendant by a Plaint dated 6th December, 2019, filed simultaneously with a Notice of Motion Application dated 4th December 2019.

3. According to the 4th Defendant's counsel, the said Plaint and the Motion sought similar orders being *inter alia*; a declaration that the sublease granted by the 1st Defendant to the 4th Defendant be declared null and void; a declaration that the 4th Defendant is a trespasser and thus issuance of eviction orders; a declaration that the construction commenced on three (3) sites is illegal and thus be demolished and a

permanent injunction against the intended construction of three (3) sites.

4. It was deponed that vide the Ruling delivered on 12th March, 2020, the Plaintiffs' application aforesaid was dismissed and was found to be an abuse of the court process because there were some members of the Estate in question who had moved to the National Environmental Tribunal on appeal and that there were appeal proceedings pending before the Environment and Land Court arising from an order granted in the lower Court against the construction of the base stations in question.

5. It was further deponed by the 4th Defendant's advocate that the Physical Planning Act (now repealed) provided a mechanism for lodging of any complaint to the Liaison Committee and subsequently, if there was any change of user, the Plaintiffs' grievances should have been channeled to the Laison Committee and that even in the case of grant of an Environmental Impact Assessment by NEMA, the Plaintiffs should have appealed to the National Environment Tribunal and not file the present proceedings.

6. Counsel deponed that the Plaintiff, having sought similar prayers at the interlocutory stage as they are seeking in the main suit, the effect of denial of the said prayers in the Ruling is the collapse of the substratum of the suit and in the absence of any appeal against the said Ruling, the suit has abated and that even though the Court did not dismiss the entire case, the Plaintiffs have never appealed nor moved the Court for an amendment to introduce any fresh cause of action or substratum to survive the suit.

7. In response to the application, the Plaintiffs' counsel deponed that vide a Motion and Plaint both dated 4th December, 2019, the Plaintiffs sought for interlocutory orders; that the Plaint dated 4th December, 2019, *inter alia* challenges the actions of the 1st Defendant in purporting to let/sublet the six sites where the 4th Defendant is constructing or has earmarked for construction of base transceivers in contravention of the **Sectional Property Act of 1987**.

8. It was deponed that the court, vide its Ruling dated 12th March, 2020, dismissed the said Motion on the grounds that the court lacked the requisite jurisdiction as a court of first instance to adjudicate on physical planning issues as the Liaison Committee was the appropriate forum and further that the Court lacked jurisdiction as a court of first instance to adjudicate on national environment management matters citing the National Environment Tribunal as the appropriate forum.

9. Counsel deponed that the Court did not address, determine, nor dismiss the issue regarding the purported lease and/or sublease which will determine the legality of the 4th Defendant's presence at the six construction sites in property known as Nairobi Block/140 and thus, whether the 4th Defendant was a trespasser and that the fact that the Plaintiffs opted not to appeal against the Ruling, does not in any way extinguish the substratum of the suit with regard to the dispute of validity or otherwise of the purported lease and/or sublease between the 1st Defendant and the 4th Defendant.

10. It was deponed by the Plaintiffs' advocate that it is misleading and unconscionable for the 4th Defendant to perceive the dismissal of the application dated 4th December, 2019 as rendering the prayers sought in the Plaint dated 4th December, 2019 *res judicata*; that the substratum of the suit subsists and the interest of justice dictate that the suit proceeds to full hearing and be heard and determined on its merits.

Submissions

11. The 4th Defendant's counsel submitted there is nothing left of the Plaintiff's case as the same has abated and its substratum has since collapsed. It was submitted that the essence of the Plaintiffs suit is that the sub-lease by the 1st Defendant to the 4th Defendant was contrary to the Sectional Properties Act and there was an alleged failure to conduct an Environmental Impact Assessment.

12. It was submitted that further, the Plaintiffs' suit was premised on the grounds that the 4th Defendant breached the law in its quest to construct Base Station Transceivers; that there had been a change of user that had not been published hence Plaintiffs had not been consulted; that the construction of the BTS was an alleged health hazard and had contributed to degradation of the houses and estate and that the court's Ruling of 12th March, 2020 was to the effect that there was evidence that the 4th Defendant had obtained the requisite licenses to undertake the construction complained of.

13. It was submitted that there was a representative suit filed by and on behalf of Nyayo Estate Residents in the lower court and NET and the Plaintiffs could not dissociate themselves from the other residents and file their own proceedings; that in any event, any issues with respect to the license or Environmental Impact Assessment could only be addressed through an appeal to the National Environmental Tribunal (NET); that no evidence of change of user had been adduced and that at any rate, any issues concerning change of user should be escalated to the Liaison Committee and not by a direct access to this court.

14. According to counsel, since the delivery of the Ruling, no amendment has been sought to introduce any different cause of action other than those alleged in the Plaint and dismissed on 4th December, 2019 and that in as far as the Plaint still refers to them, they cannot be adjudicated during trial and are *res judicata*.

15. Counsel for the 4th Defendant submitted that as long as the other suits referred to by the Court in its ruling of 12th March, 2020 are pending, the doctrine of *sub judice* precludes the Plaintiffs from proceeding with the hearing of this case and that even if there is a pending issue as alleged by the Plaintiffs, due to the concurrent proceedings, there is potential for conflicting decisions to be issued by the court.

16. Counsel placed reliance on the cases of ***John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR*** and ***Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR*** where the court held that the doctrine of *res judicata* is meant to bring an end to litigation.

17. In support of the application, the 6th Defendant's counsel submitted that as the prayers sought in the Plaint were similar to the orders sought in the application, which application was dismissed, it follows that the substratum of the suit has collapsed and proceeding with the suit will be an academic exercise; that the court termed the application as an abuse of the court process and that as held in the case of ***Republic vs Commissioner General, Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2017] eKLR*** citing the case of ***Stephen Somek Takwenyi & Another vs David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009*****,** the court has an inherent jurisdiction to preserve the integrity of the judicial process.

18. The Plaintiffs' counsel submitted that whereas indeed the court declared that it lacked the requisite jurisdiction with respect to the two limbs of arguments on physical planning and environmental management disputes, the court preserved the arguments regarding title, management, lease and subleases allowing the Applicant to take possession of the suit property and the same ought to be governed by the provisions of the **Sectional Properties Act** and the Owners manual for the full trial.

19. It was submitted by the Plaintiffs' counsel that the validity of the title numbers and other related documents referred to by the Applicant and the 1st Defendant are triable issues which can only be canvassed during the full hearing with full facts being placed before the court and that as espoused by the Court in **Jane *Kamene Mulandi & 7 others vs Gerald Mutunga Mutyetumo [2020] eKLR*****,** the question of the genuineness or otherwise of documents cannot be determined at this interlocutory stage.

20. It was submitted that this court is duly vested with jurisdiction to handle the dispute herein as it deals with ownership, title and management of Sectional property. Reliance in this regard was placed on the case of ***Tamurei Kobilo Chepkaitany vs Chepkaitany Kaimugul [2021] eKLR***. While referring to the case of ***Gladys Murhoni Kibui vs Geoffrey Ngatia [2021]eKLR,*** the Court held that the Environment and Land Court has jurisdiction to determine a dispute before it which revolves around title to land

21. It was submitted that failure to appeal or review a Ruling cannot in itself form a basis of dismissing the main suit and denying the Plaintiffs their constitutional rights to a fair trial and that the Plaintiffs' suit should be determined on merits. Reliance in this regard was placed on the case of ***Sukhdev Singh Laly vs Gerald Richard Kafeero & Anor[2012]eKLR*** where it was held that the objective of an interlocutory application where interim relief is sought is not to conclusively determine a dispute between the parties.

Analysis & Determination

22. Having considered the pleadings and submissions herein, the sole issue for determination is;

i. *Whether the Ruling of 12th March, 2020 collapsed the substratum of the suit and rendered the main suit res judicata*

23. The 4th Defendant/Applicant herein seeks to have this suit dismissed and/or discontinued. It is his contention that that the Plaintiffs sought similar prayers at the interlocutory stage which are the same orders they are seeking in the main suit; that the application was dismissed by the court on 12th March, 2020; that the dismissal of the application collapsed the substratum of the suit and that in the absence of any appeal against the said Ruling or amendment of the Plaint introducing a new cause of action, the suit has abated and any attempt therein to re-litigate the issues is *res judicata*.

24. The Plaintiffs maintain that not all the matters were addressed by the court in the application; that the fact that the Plaintiffs opted not to appeal against the Ruling, nor amend the Plaint does not in any way extinguish the substratum of the suit and that an interlocutory application can in any event not determine a suit.

25. To put matters into context, the present suit was instituted by way of a Plaint dated the 6th December, 2019, where the Plaintiffs sought the following orders; a declaration that the sublease granted by the 1st Defendant to the 4th Defendant be declared null and void, a declaration that the 4th Defendant is a trespasser, a declaration that the construction commenced on the three sites is illegal and thus be demolished, a permanent injunction against the intended construction on three (3) sites that is yet to commence being illegal, general and special damages, interests and costs of the suit.

26. Filed contemporaneously with the suit was an application dated 4th December, 2019, which sought temporary injunctive orders restraining the 4th Defendant from proceeding with the construction of six base transceiver stations within Nyayo Estate pending the determination of the suit, revocation of the sublease issued to the 4th Defendant by the 1st Defendant in contravention of the Sectional Properties Act and revocation of the the approvals/licenses issued to the 1st Defendant by the 5th, 6th and 7th Defendants for construction of the base transceiver stations pending the hearing and determination of the suit.

27. In the said application, the Plaintiffs also sought for permanent injunctive orders revoking the sub-lease issued by the 1st Defendant to the 4th Defendant pending the hearing and determination of the suit and an order compelling the 2nd Defendant to produce the sectional plan no 3, the Memorandum & Articles of Association and the particulars of its past and present office bearers.

28. On 12th March, 2020, a Ruling in respect of the Plaintiff's application was rendered and the court in dismissing the same stated thus;

> ***"……The same residents of Embakasi were consulted as required by the relevant laws. Some members of the Estate have even moved to the NET on appeal. There are also appeal proceedings which have been filed before the Environment and Land Court arising from an order granted in the lower Court against the construction of the base stations. This therefore means that the applicants have filed these proceedings which are actually an abuse of the process of the court. The four are residents of Nyayo Embakasi Estate. They cannot isolate themselves from the other residents and file their own proceedings. During the hearing, there was an argument by their counsel that they cannot be tied down to a Residents Association which they do not recognize. If***

this were to be the case, courts will be inundated by cases because the estate carries over 2000 Residents.

The Physical Planning Act (Now repealed) provided a mechanism for lodging of any complaint to the Liaison Committee. If at all there was any change of user and I have not seen any evidence, then any grievances the Applicants had, had to be channeled to the Liaison Committee. This is the case with grant of an EIA License. If NEMA granted an EIA License then the applicants would have appealed to the NET and not file these proceedings. If the Court were to grant some prayers in the manner sought, it should amount to determining the dispute at interlocutory stage. I therefore find no merit in this application which is dismissed with costs to the Respondents."

29. In determining this matter, the court is alive to the principle that decisions made at an interlocutory stage do not bind the trial court in making its final determination. As expressed by the Court of Appeal in ***Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR***;

"In every application for an interim injunction in a pending suit it is necessary for the court to enter, to some degree, into the merits of the case in order to determine whether a prima facie case exists. To what degree the court will enter will vary with the facts of each case. When the court declares that prima facie case exists it intends to say that the case of the plaintiff is not without merits. Any opinion expressed by the court, whether it be of the trial court or an appellate court or revisional court cannot in law preclude the trial court from considering the issue afresh when deciding the suit (emphasis added by us) and for that purpose it must have regard to all the material then before it. In deciding that issue, it will properly have no regard to the finding rendered on the point while disposing of the application for interim injunction. No matter how superior the court rendering that finding including High Court, the trial court is bound in the proper discharge of its duties to ignore the finding when it proceeds to dispose of the suit and to apply its mind independently to the decision of the issue."

30. The 4th Defendant has averred that the Ruling of this court extinguished the substratum of the suit. The court thinks not. It should be remembered that in making the observations that it did, the court was solely determining the question of whether the Plaintiffs had made out a prima facie case warranting the grant of injunctive orders. The court was not and indeed could not make conclusive determination of the dispute at that stage.

31. As expressed by the Court of Appeal in ***Paul Tirimba Machogu vs Rachel Moraa Mochama [2015] eKLR*;**

"...the learned Judge properly appreciated the gravity of the matter before him and directed his mind to the conditions for the grant of both a temporary prohibitory and a temporary mandatory injunctions… The learned Judge of the lower court may have expressed himself strongly in some of his findings but the fact remains that those findings were only prima facie findings which will not bind the trial Judge. The learned Judge was considering an interlocutory application at the nascent stage of the suit long before the opportunity to amend was closed, directions taken or discovery given."

32. Indeed, the court appreciates and agrees with the sentiments of the learned judge in the case of ***Sukhdev Singh Laly vs Gerald Richard Kafeero & Another (supra)*** cited by the Plaintiffs who stated thus

"...the objective of an interlocutory application where interim relief is sought is not to conclusively determine a dispute between the parties."

33. In view of the foregoing, the court finds that the Ruling of 12th March, 2020 did not collapse the substratum of the suit. Indeed, the Ruling of the court does not bind the trail court.

34. That being the case, it follows that the 4th Defendant's argument that the suit is *res judicata* cannot stand. Being guided by **Section 7** of the **Civil Procedure Act**, it appears that first, there is no former suit to speak of and second, there has been no final determination of the matter. The supreme court of India in ***State of Maharashtra and Another vs National Construction Company, Bombay, Supreme Court Civil Appeal No 1497 of 1996*** unequivocally stated as follows:

"The important words are "has been heard and finally decided". The bar applies only if the mater directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made."

35. In the court of Appeal case of ***John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others(supra)*** cited by the 4th Defendant, the court was dealing with a question of the applicability of res judicata to constitutional petitions where it was submitted that the Petition was *res judicata* as the issues raised therein had been determined by the same court in a Judicial Review Application. In discussing the elements of *res judicata*, the court relied on the case of ***Kamunye & others vs Pioneer General Assurance Society Ltd [1971] E.A. 263***;

"Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives."

36. This suit having not been head and determined conclusively, the court finds that the principle of *res judicata* is inapplicable.

37. Vide their submissions, the 4th Defendant submitted that the bar of *sub judice* prevents this court from proceeding with the suit. This issue was however not raised in the Application, nor vide the Affidavit in support of the Motion. It is trite that submissions are not evidence. This was espoused by the court in the case of ***Republic vs Chairman Public Procurement Administrative Review Board & another Ex-***

Parte Zapkass Consulting and Training Limited & another [2014] eKLR where it was held that:

> ***"The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."***

38. The above notwithstanding, the doctrine of *sub judice* is encompassed under Section 6 of Civil Procedure Act which defines the above principle as follows;

> ***''…….. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.''***

39. A party who seeks to rely on a plea of *sub judice* is enjoined to place before the court any evidence of a suit or proceeding that is pending in another court involving the same parties or their privies over the same subject. None has been provided by the Applicant. The 4th Defendant bases its argument on this matter being *sub judice* where the court, in its Ruling, observed as follows:

> ***"Some members of the Estate have even moved to the NET on appeal. There are also appeal proceedings which have been filed before the Environment and Land Court arising from an order granted in the lower Court against the construction of the base stations."***

40. As the court was not determining the question of *sub judice*, its statement aforesaid without anything more cannot be used by the 4th Defendant herein as conclusive evidence of *sub judice*. The 4th Defendant should have placed before this court copies of the pleadings in those matters, which it did not do.

41. The 4th Defendant has argued that the filing of this suit is an abuse of the court process. The Court of Appeal in ***Maureen Waithera Mwenje & another vs David Kinyanjui Njenga & 2 others [2021] eKLR*** cited with approval the case of ***Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd and 2 Others [2009] eKLR*** where the court differently constituted defined the phrase 'abuse of the court process' thus;

> ***"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective." (emphasis added)."***

42. Indeed, the court appreciates that as held by the courts in the cases of ***Republic vs Commissioner General, Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2017] eKLR*** and ***Legal Advice Centre aka Kituo Cha Sheria vs Communication Authority of Kenya [2015] eKLR*** cited by the 4th and 6th Defendants, the court has inherent jurisdiction to protect itself from abuse.

43. However, it is apparent that the 4th Defendants' contention that this suit is an abuse of the court process is heavily predicated on its argument that the Ruling delivered on 12th March, 2020 collapsed the substratum of the suit and the suit has since abated.

44. Having found that the Ruling did not extinguish the suit, and not having made positive determinations with respect to the questions of *res judicata* and *sub judice*, it follows that the suit cannot be said to be an abuse of court process.

45. The upshot of the foregoing is that the Application dated 10th September, 2020 is unmerited and the same is dismissed with costs to the Plaintiffs.

Dated, signed and delivered virtually in Nairobi this 21st day of April, 2022

O.A. Angote

Judge

In the presence of;

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant: John Okumu