REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 340 of 2011

DIASTA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

NILESH DEVAN KARA SHAH.....1ST DEFENDANT

KATILAL DEVAN KARA SHAH.....2ND DEFENDANT

HASWHIN DEVANI KARA SHAH.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....5TH DEFENDANT

RULING

The Plaintiff has filed a Notice of Motion application brought under Order 40 Rule 1(b) and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Sections 3(1) and (3) of the Environmental Management and Coordination Act, section 29 of the Physical Planning Act and Articles 22,23 and 42 of the Constitution of Kenya, seeking the following substantive prayers:-

1. That pending the hearing and determination of this suit, a permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their employees, servants and/or agents or otherwise, howsoever from proceedings and/or continuing with the construction of a ten (10) storeyed shops and offices block or any other constructions of similar size and/or nature on L.R. No. 209/7584.

2. That a mandatory injunction be and is hereby issued directing and/or compelling the Defendants to liaise and consult with the Plaintiff and all other stakeholders while planning any other development(s) on the aforementioned parcel of land and to obtain all requisite approvals from the respective Government Authorities and ensure that the same are obtained procedurally, regularly, legally and properly, taking into account all the relevant and applicable laws and regulations thereto.

3. That a mandatory injunction be and is hereby issued compelling the Defendants to adhere to the Licence issued to them to construct eight (8) floors including the basement and ground floor only on the said parcel of land as opposed to the current ten (10) floors and any other development(s) outside the legally approved one(s) on the said parcel of land and any such building be demolished.

4. That the Court does declare that the Plaintiff's, its tenants, occupants and other neighbours rights to a

clean and healthy environment have been and/or are likely to be contravened and that the said Plaintiff, tenants, occupants and neighbours need protection.

The application is premised on eleven grounds appearing on the face of the application which are reiterated in the supporting affidavit sworn on 11th July 2011 by Priten Patel, a director of the Plaintiff. The Plaintiff's case is that the Defendants who are the registered proprietors of LR. No 209/7584 proposed the construction and/or development of shops and offices with a total of eight (8) floors which included the basement, ground floor and the first (1st) to sixth (6th) floors. The Defendants are said to have carried out an environmental project study whereupon an Environmental Impact Assessment Project Report was submitted for approval the National Environmental Management Authority (NEMA). It is deponed that NEMA approved the proposed construction and issued the Defendants with an Environmental Impact Assessment (EIA) License dated 28th April, 2009

The Plaintiff is the registered owner and occupier of L.R. No. 1870/IX/184, which is adjacent to the Defendants' parcel LR. No 209/7584. The Plaintiff stated that it was duly invited and did submit its views on the proposed development. It is the Plaintiff's case that upon the issuance of the Environmental Impact Assessment (EIA) License, the Defendants have now proceeded to construct a building of ten (10) floors on the land known as L.R. No. 209/7584 contrary to the EIA License issued by NEMA on 28th April 2009. The Plaintiff alleged that the two (2) extra floors were constructed and added without approval and/or authorization as per the statutory and mandatory procedures requiring issuance by NEMA of a further Environmental Impact Assessment License. Neither were there consultations with the Plaintiff and/or owners of the other adjacent parcels of land as required by the provisions of the Environmental Management and Co-ordination Act and the Environmental (Impact Assessment and Audit) Regulations. 2003.

Further, the Plaintiff stated that the Defendants have failed to comply with condition 7 of the (EIA) License by undertaking construction works at night, public holidays and Sundays, which poses great security risk to the Plaintiff’s property prompting the Plaintiff to engage additional security. The Plaintiff also stated that it made a formal complaint to NEMA regarding the illegal construction of additional two (2) floors and breach of the conditions of the EIA License, and copied the said letter to the Mayor of Nairobi City Council, the Chief Architect Nairobi City Council and to the Senior Analyst, Kenya Anti-Corruption Commission. Further, that the complaints have not elicited any response necessitating this application.

It is the Plaintiff’s claim that the continued illegal construction of the additional 2 floors poses great, imminent danger and harm to the Plaintiff's building which is adjacent to the building under construction by the Defendants, as well as exposing the Plaintiff's tenants and workers to grave danger and harm. Further, that if the Defendants are not injuncted, the Plaintiff, its tenants, occupants and neighbours will continue to suffer an infringement on their rights to a clean and healthy environmental contrary to the provisions of the Constitution and the Environmental Management and Co-ordination Act.

The Plaintiff filed a supplementary affidavit sworn on 22nd August 2011 and filed in court on 24th August 2011 wherein it is deponed that the Defendants failed to obtain the requisite approvals of the revised building plans from the City Council of Nairobi before commencing with the construction of the disputed two (2) additional floors of the building erected on Land Reference Number 209/7584. Further, that the Defendants also failed to obtain a Certificate of variation of the Environmental Impact Assessment (EIA) License issued by NEMA as required by law and that the construction of the two (2) additional floors on the building is unprocedural, unlawful and/or illegal.

It is further deponed to therein that the Defendant's parcel of land known as L.R. Number 209/7584 upon which the building in dispute has been erected measures 0.1046 hectares. The Plaintiff avers that that according to the relevant City Council of Nairobi building by-laws, rules and regulations, the permitted plinth area for a building that can be constructed on such a parcel of land is 2,615 square meters.

The Plaintiff alleges that the City Council of Nairobi irregularly, illegally and/or unlawfully approved a

plinth area of 3,739.9 square metres for the building of eight (8) floors exceeding the permissible plinth area for the Defendants' parcel of land by 1174.8 square meters which is forty five per cent (45%) over and above the permitted plinth area. In addition, that the two (2) additional floors of 541/4 square meters each have increased the plinth area covered by the said Defendants' building to a total of 4872.8 square meters exceeding the allowable plinth area by 2257.8 square meters, which according to the Plaintiff, is eighty six per cent (86%) over and above the permitted plinth area of 2615 square meters.

The Plaintiff further stated that the Defendant's L.R. Number 209/7584 falls under Zone 3 of the City Council of Nairobi Zoning policies and regulations which prescribe a maximum of four (4) storeys for the area of the Defendants' parcel of land. According to the Plaintiff, even if the two (2) additional floors were to be severed and dealt with separately from the rest of the building, the approval of the original building plan for the construction of an eight (8) floors building was unprocedural, irregular, illegal, unlawful and void *ab initio* thereby rendering the whole building an illegal structure which should not be allowed to subsist.

The Plaintiff averred that since the approval and subsequent construction of the Defendants' building did not adhere to the required City Council of Nairobi building by-laws standards, rules and regulations, the building poses a great danger to the Plaintiff's building, its occupants, tenants, other neighbours in addition to imposing an extremely heavy load on the area infrastructure including roads and water supply. The documents annexed by the Plaintiff as supporting documents included a copy the Environmental Impact Assessment Report and Licence referred to, the letters of complaint to NEMA, the Defendant's title to L.R No. 209/7584, documents from Nairobi City Council on the zoning policies and regulations and on the Defendants building plans.

The application is opposed and the 2nd Defendant has filed a replying affidavit sworn on 20th July 2012 and filed in court on the said date. The 2nd Defendant depones that the Defendants are the registered proprietors of L.R No. 209/7584 whereon they commenced construction in 2009 of a multi-stories building to be used for shops and offices after obtaining all the requisite approvals, including an environmental impact assessment license. The 2nd Defendant states that that the Plaintiff was the only neighbour who objected to the project claiming that the project would impose a heavy load on the local infrastructure by increasing traffic jam and causing water shortage.

The 2nd Defendant admits that under the original approved building plans, the building was to have eight floors which was changed as the construction works progressed to include a further two floors, and that the revised building plans were submitted to the City Council of Nairobi and approved on 27th September, 2010. Copies of the revised building plans were annexed. It is deponed by the 2nd Defendant that due to an inadvertent oversight on part of the Defendants' professional advisers, the Defendants failed to apply to NEMA for a variation of the Environmental Impact Assessment Licence. The 2nd Defendant states that they took immediate steps to regularize the position by applying to NEMA for a variation of the Environmental Impact Assessment on 19th July, 2011 and annexed a copy of the application for variation.

According to the 2nd Defendant, the building works are complete and the only outstanding matters are the installation of the lifts and interior finishing. It is deponed that the Defendants have invested an estimated sum of Kshs.250 million into the development which was partially financed by a loan of Kshs.90,000,000/= from 1 & M Bank Limited. The 2nd Defendant avers that they stand to lose a minimum estimated sum of Kshs.4,000,000/= per month so long as the outstanding works are not completed.

Contrary to the Plaintiff's averments, the 2nd Defendant deponed that no building works took place at night, on weekend and public holidays as claimed, and maintained that the construction was done in full compliance with condition 7 of the Environmental Impact Assessment Licence. The 2nd Defendant denied knowledge of the various letters which the Plaintiff had written to various authorities and stated that none of the Defendants were approached with the concerns raised in the said letters. The 2nd Defendant

maintained that though the Plaintiff asserted its right to clean and healthy environment had been breached, it had failed to specifically identify how the construction of two additional floors had adversely interfered with this right.

According to the 2nd Defendants' depositions, the application before court is an abuse of the court process for reasons that the Environmental Management and Coordination Act does not contain provisions for the enforcement of breaches of Environmental Impact Assessment Licenses through a court action, and that equally, the Physical Planning Act has in-built mechanisms for enforcement of its provisions providing criminal penalties.

In a further affidavit sworn on 20th January 2012 and filed in court on the same date, the 2nd Defendant stated that a Certificate of variation "to add to extra floors" was issued by NEMA on 8th December, 2011, A copy of Certificate of Variation has been annexed as "RDSK6". The 2nd Defendant denied that the Defendants made misrepresentations to the City Council of Nairobi as alleged by the Plaintiff and annexed as "RDSK7" a copy of a letter from the City Council of Nairobi letter confirming that the revised plans were properly reviewed and approved.

In yet another further affidavit was sworn on 29th November 2012 and filed in court in court on the same date the 2nd Defendant depones that subsequent to the institution of this suit, the Defendants have completed construction of the office block on L. R. No. 209/7584. Further, that in compliance with the orders of the Court, the Defendants have obtained an occupation certificate for the six floors excluding the 7th and 8th floors. The 2nd Defendant depones that they are losing and will continue to lose rental income for the six floors amounting to Kshs.1,805,503/= in addition to the expected rent for 7th and 8th floors amounting to Kshs 662,420/=. According to the 2nd Defendant, the Plaintiff should provide adequate security with respect to the rental income for the period during which the injunction will last in the vent the application will be allowed.

Counsel for the Plaintiff filed submissions dated 28th November 2011 on the same date. The submissions were highlighted before court on 29.11.2012. It was submitted on behalf of the Plaintiff that owing to the failure of the relevant government departments to act, the only remedy left for the Plaintiff to safe guard its interest was through this court which has unlimited jurisdiction in all civil matters. Further, that the Plaintiff's cause of action arises out of a threat of infringement by the Defendants of the Plaintiff's right to a clean environment and therefore, that the jurisdiction of the court is derived from articles 2(1), 22(1), 23(1) & (3), 42, 69(1)(g), 69(2) and article 70(1), (2) and (3) of the Constitution. Counsel relied on the case of **Peter Kinuthia Mwaniki & 2 others -vs- Peter Njuguna Gicheha & 3 others (2006) eKLR.** Further, it was submitted that the right to bring an action in the High Court is conferred by section 3 of the Environmental Management and Coordination Act.

It was submitted on behalf of the Plaintiff that the approval of the original plans and the subsequent variation to include 2 additional floors did not comply with the zoning specifications of the City Council of Nairobi and therefore, that the Defendants' building threatened the Plaintiff's right to a clean and healthy environment. Counsel relied on the case of **Phenom Ltd -vs- National Environment Management Authority,(2005) eKLR**

On whether the Plaintiff had established a *prima facie* case with probability of success, it was submitted that all the Plaintiff needs to show is that there is a likelihood that its right to clean and healthy environment is likely to be contravened and reliance was placed on the cases of **Giella -vs- Cassman Brown(1973)EA 358, Nzioka & 2 others -vs- Tiomin Kenya Ltd (2001)1 KLR (E & L) 40**, **Peter Kinuthia Mwaniki & 2 others -vs- Peter Njuguna Gicheha & 3 others (2006) eKLR, Endere -vs- Karen Roses Ltd (2006)1KLR(E & L)72, Joseph Kiai Cherotich -vs- Timsales Ltd, (2004) eKLR.** Submissions were further made that were the Defendants to continue with construction of the building, the anticipated damage and loss to the environment would be irreparable and cannot be adequately compensated for damages. In respect of the balance of convenience, it was submitted that the same tilts in favour of the Plaintiff as the risk of harm to the environment and the general public who include the Plaintiff is greater than the risk to the Defendants' building.

Finally it was submitted on behalf of the Plaintiff that by the Defendants' building's failure to meet the tenets of sustainable development and threatening the Plaintiff's right to a clean and healthy environment, there exists special circumstances to warrant the grant of a mandatory injunction. Counsel relied on the case of **Kenya Breweries Ltd -vs- Washington Okeyo C.A. No. 322 of 2000.**

Counsel for the Defendants filed submissions dated 8th February 2012 on the same date. The submissions were highlighted before court on 29.11.2012. Counsel for the Defendants submitted that there is no allegation which brings the injunction application within the purview of Order 40 Rule 1(b) and therefore, that the reliefs sought in the application are not available. While relying on the cases of **Salim Lemuta Konyokie & anor -vs- Erick Konchellah & anor Kisumu HCCC No. 174 of 2004** and **Francis Mburu Mungai -vs- Director CID & anor HC Misc. No. 615 of 2005,** it was submitted on behalf of the Defendants that the court lacks jurisdiction to grant final orders on an interlocutory application.

Counsel for the Defendants stated that Section 1A and 1B of the Civil Procedure Act are interpretative provisions on procedure and do not confer on the court the power to grant any substantive relief. Further, that section 3A of the Civil Procedure Act preserving the inherent jurisdiction of the court should not be invoked where there are provisions governing matters in issue which are section 63 and Order 40 of the Civil Procedure Code in this case. In addition, Counsel submitted that proceedings to enforce the Bill of Rights under Article 22 of the Constitution should be by way of a petition and he relied on the case of **Francis Mburu Mungai -vs- Director CID & anor, HC Misc. No. 615 of 2005.** It was also submitted on behalf of the Defendants that Section 3 of the Environmental Management and Coordination Act and section 29 of the Physical Planning Act grants local authorities power to control development and do not confer jurisdiction on the courts to grant the reliefs sought in the application.

The Defendants' counsel submitted that NEMA has put in place a statutory mechanism for the adjudication and resolution of complaints with respect to the Environmental Management and Coordination Act. Equally, that criminal sanctions are available at the instance of the City Council of Nairobi for actions done contrary to the Physical Planning Act. Counsel for the Defendants relied on the cases of **Passmore & Others -vs- The Oswaldwistle Urban District Council (1898) AC 387** and **London Borough of Southwark -vs- Williams & anor (1971)2All ER 175** to support the proposition that where parliament has prescribed a mechanism by which certain disputes are to be resolved, it is improper for a party to lodge private law proceedings seeking relief.

Finally, it was submitted on behalf of the Defendants that the Environmental Impact Assessment variation for the construction of the additional floors was fully within the law and reliance was placed on the case of **Tony Mzee & others -vs- Director General NEMA & others, Tribunal Appeal No. Net/18/2007** in this regard.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. I will first address the preliminary issue raised of whether this court is the right forum to entertain this dispute. The Plaintiff submitted that this court has unlimited original civil jurisdiction, and that the right to commence a suit of this nature in the High Court for the infringement of their right to a clean and healthy environment is entrenched in the Constitution of Kenya.

It was also submitted by the Plaintiff that it has made efforts to have the relevant departments of government intervene, but that none of them have responded. It attached as its annexure "PP5" to the supporting affidavit sworn by Priten Patel on 11th July 2011 letters of complaint dated 4th May 2011, 16th May 2011 and 15th June 2011 addressed to the Chairman of the National Environment Management Authority.

It is my opinion that the procedure that applies to the facts of this case with respect to the exercise of the powers granted to the Nairobi City Council under section 29 – 30 of the Physical Planning Act is the one provided in section 41 (3) of said Act, which states as follows:

"(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered

against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit."

Any person aggrieved by a decision of the local authority under that subsection is required to appeal against such decision to the respective liaison committee. Appeals from such liaison committee lie to the National Liaison Committee and then to the High Court. No evidence has been provided by the Plaintiff to show that they moved the Nairobi City Council to follow this procedure. If the procedure was followed, it is clear from the said provisions that the Plaintiff should first appeal to the relevant liaison committee established under section 7 of the Physical Planning Act, before moving this Court.

With respect to the allegations made by the Plaintiffs that two extra floors were constructed by the 1st – 3rd Defendants without the approval of NEMA, I note that the 1st – 3rd Defendants have since obtained revised building plans and a variation of the Environmental Impact Licence allowing the said construction. This fact notwithstanding, the correct procedure that ought to have been followed by the Plaintiff in this respect is to bring an appeal before the National Environment Tribunal at the first instance, as provided for under section 126(2) of the Environment Management and Coordination Act which states that:

"the Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority or any relevant committee thereof, as the case may be."

No evidence of such an appeal to the National Environment Tribunal has been provided by the Plaintiff. I therefore agree with the 1st -3rd Defendants submissions that the Plaintiff ought to exhaust the mechanisms provided by Parliament in dealing with the disputes herein, before proceeding to this Court. Even though this Court has been granted jurisdiction by the Constitution, this jurisdiction should not be invoked at the first instance where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the Plaintiff**.**

This issue was raised in **Republic v National Environmental Management Authority & 2 others exparte Greenhills Investment Ltd & 2 others ,(2006) 1KLR (E&L) 784**, where Ibrahim J. (as he then was) held that section 129 of the Environmental Management and Co-ordination Act requiring filing of appeals to the National Environment Tribunal in the first instance, does not oust the jurisdiction of the High Court of considering applications for judicial review of the decisions of NEMA. However, the Honourable Judge did state that it is an arguable point of law whether the existence of this statutory or alternative remedy in law precludes applicants from coming to the High Court to seek judicial review orders.

The position was later clarified by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425,** where it was held that:

"where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

This Court is also now enjoined to promote alternative dispute resolution methods under Article 159 of the Constitution.

Lastly, every person is obligated to respect, uphold and defend the Constitution under Article 3. State organs and public officers are also required to apply the principles and values provided in Article 10, which include human rights and sustainable development, whenever they apply and interpret any law or make and implement policy decisions. These provisions will apply to the public officers and bodies when exercising powers under the Physical Planning Act, and the Environment Management and Coordination

Act.

The Plaintiff's application is in the premises stayed for the foregoing reasons, pending the Plaintiff's compliance with the procedures of dispute resolution provided for under the Physical Planning Act and the Environmental Management and Coordination Act as detailed out in the foregoing.

There shall be no order as to costs at this stage.

Dated, signed and delivered in open court at Nairobi this ____18th_____ day of ____February_____, 2013.

P. NYAMWEYA
JUDGE