



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 219 OF 2013

VELOS ENTERPRISES LTD1ST PETITIONER

WANANCHI GROUP (KENYA) LTD 2ND PETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT1ST RESPONDENT

CITY COUNTY NAIROBI2ND RESPONDENT

RULING

Introduction

1. The petitioners have lodged this matter alleging violation of their rights with respect to land parcel number L.R. 209/10272 situated on Mombasa Road, Nairobi. They claim that on 19th April 2013, the respondents trespassed on their said property which houses the 2nd petitioner's telecommunication equipment and demolished the wall surrounding it. They further allege that as a result of the respondents' actions, their right to property has been infringed and was likely to be further infringed; that they were also not given any notice prior to the demolition, and therefore their right to fair administrative action was also infringed.
2. In their application dated 24th April 2013, they seek the following orders:
 1. ***THAT this application be certified urgent and be heard ex parte in during the High Court Vacation in the first instance due to its urgent as regards prayers no 2, 3, 4, 5, 6 and 7.***
 2. ***That prayers no 3,4,5,6, and 7 be granted during the ex-parte hearing pending the inter-partes hearing of this application.***
 3. ***That pending the hearing and determination of this petition, a Conservatory order be and is hereby issued staying the implementation and or execution of the decision the City Council of Nairobi and Nairobi County Government to demolish erections and property on L.R No 209/10272.***
 4. ***That pending the hearing and determination of this petition, an order of temporary injunction be and is hereby issued restraining the respondents herein, City Council of Nairobi and Nairobi County Government their agents, servants, employees and or any person whomsoever acting***

under its instructions, from entering onto or in any manner interfering with the petitioners proprietary rights over L.R No 209/10272.

5. *That pending the hearing and determination of this petition, an Order of Temporary injunction be and is hereby issued restraining the respondents herein, City Council of Nairobi and Nairobi County Government their agents, servants, employees and or any person whomsoever acting under their instructions, from demolishing in particular the 2nd Petitioners Dish Farm, perimeter walls and or fence on and to the property L.R No 209/10272.*
6. *That pending the hearing and determination of this petition, an Order of Temporary injunction be and is hereby issued restraining the respondents herein, City Council of Nairobi and Nairobi County Government their agents, servants, employees and or any person whomsoever acting under their instructions, from proceeding to construct/ excavate a road through L.R No 209/10272.*
7. *That in order to secure the property, the property, the petitioners be and hereby allowed to re-construct and or restore back to normal the demolished perimeter walls or fence and gate in respect of L.R. No 209/10272*
8. *That the Respondents be condemned to pay costs of this application*

3. The application, which was argued before me inter partes on 23rd July 2013, is based on the following grounds:

1. *The respondents on the 19th April 2013 at noon either by themselves, individually, jointly or through Servants, Agents, Officials and/or employees and by use of threats, unlawfully trespassed and entered forcefully on the e1st Petitioners Title L.R. No L.R. No 209/10272 and demolished part of the perimeter wall surrounding the Property as well as the electrical gate surrounding the property.*
2. *The respondents'' said acts are unlawful, in bad malice (sic) and unconstitutional; no notice has ever been issued to the 1st petitioner and the 2nd petitioner and there has been no hearing nor right to fair administrative action was granted to the petitioners. The Respondents have threatened the petitioners that they would still go back to the suit property and demolish the erections therein for the purposes of constructing a Road.*
3. *The respondents have conducted and discharged themselves in the Most un-constitutional and oppressive manner to the petitioners without regard to the best interests of the petitioners rights borne out of rightful ownership of property.*
4. *The fundamental rights infringed being infringed and likely to be infringed are:*
 - a. *Under Article 40 of the constitution-Protection of right of property*
 - b. *Under Article 27 of the Constitution-Equality and Freedom from discrimination*
 - c. *Under Article 47 of the Constitution-Tight to fair administrative action*
 - d. *Under Article 50 of the Constitution- Right to a fair and public hearing*
5. *The Petitioners are apprehensive that unless restrained by this honourable court the respondents will continue with the infringement complained of as against the Petitioners.*
6. *It is in the wider interest of justice and equity that the orders herein sought are granted.*

The Petitioners' Case

4. The case for the petitioners as presented by their Counsel, Mr. Wekesa, is set out in two affidavits

in support of the application for conservatory orders sworn by **Ramesh Sheth**, a director of the 1st petitioner, on 23rd April 2013 and **Ms. Wambui Maina**, the Group Legal Manager of the 2nd petitioner, sworn on the same date. The petitioners also rely on two further affidavits sworn by Mr. Sheth and Ms. Maina on 20th June 2013 in response to the replying affidavit of **Mr. John K. Barreh** sworn on 4th June 2013 on behalf of the respondents.

5. The facts of the case as they appear from the affidavits sworn on behalf of the petitioners are that the 1st petitioner is the registered proprietor of L.R. No. 209/10272. On or about 7th November 2011, it entered into a lease agreement with the 2nd petitioner in respect of a portion of the said title for a term of ten (10) years. The 2nd petitioner has erected on the said parcel, referred to as the *Dishfarm*, expensive equipment surrounded with a perimeter wall and an electric fence for security purposes.
6. The petitioners claim that on 19th April 2013, the respondents, by use of threats, trespassed and forcefully entered on the perimeter wall and the electrical gate surrounding the property; that they did so on the allegation that a portion of the property was a road reserve; and that they had authority to enter and secure the road. The petitioners aver that the demolition of their property was illegal as the respondents had not given any notice of the intended demolition.
7. In their further affidavits and submissions before the court, the petitioners alleged that two enforcement notices had been issued by the respondents; that the said notices are a nullity as they did not mention the owner of the property affected, the land reference number or the road as required under Regulation No 5 of the Physical Planning (Enforcement Notices) Regulations 1998, and that the notices quote a different L.R No, 209/16027. With specific regard to the second enforcement notice, the petitioners allege that it is also unlawful as it mentions the owner of the property as SS Mehta, and does not mention the affected property.
8. The petitioners claim on the basis of the survey plan annexed to the affidavit of Ramesh Sheth sworn on 20th June 2013 that the demolitions were unlawful as the survey plan does not show a road reserve; that if the respondents wished to affect a road reserve, they should not have affected any other portion other than the portion marked "A" on the said survey plan.
9. They aver that the malicious destruction done to the property does not guarantee the safety of the 2nd petitioner's expensive equipment as it had rendered the property and the equipment insecure and vulnerable to being stolen or tampered with. They ask that the court grants the orders sought in the application pending the hearing and determination of the petition.

The Response

10. The respondents oppose the application and have filed an affidavit and a further affidavit sworn by Mr. John K. Barreh on 4th and 28th June respectively. In the said affidavit, Mr. Barreh avers on behalf of the respondents with regard to the land parcel in question that all that parcel of land originally described as plot L.R No 209/16027, which is adjacent to L.R No 209/16028, was subdivided by the then proprietors. They state that upon sub-division resulting into, among others, the suit property in this matter, L.R No 209/10272, the proprietor was required by law to provide a road reserve which road reserve was indeed surrendered upon sub-division of the said plot L.R No 209/16027 and excision of L.R. No 209/16028.
11. The respondents aver further that in January 2012, they became aware that the 2nd petitioner was erecting illegal developments, including a perimeter wall, without the approval of the respondents, and that the developments had conspicuously encroached on the road reserve. They state that the 2nd respondent therefore issued an enforcement notice on the 2nd petitioner under the provisions of the Physical Planning Act requiring that remedial measures be undertaken within seven (7) days. The 2nd petitioner, in acknowledgement of the said Enforcement Notice, wrote to the 2nd

respondent seeking an extension of 60 days within which to comply with the notice. It did not, however, comply, and the 2nd respondent therefore issued a reminder Enforcement Notice dated 3rd December 2012. However, despite these notices, the 2nd petitioner did not comply with the notices, and consequently, the respondents were left with no option but to enforce the law.

12. The respondents therefore take the position that the application is without merit and does not meet the criteria for grant of temporary injunctions. They argue, further, that the petitioners are guilty of material non-disclosure which disentitles them to the grant of equitable relief.
13. In his submissions, Mr. Milimo observed that the gist of the petitioner's application is that no notice was given to them; that there was no fair hearing prior to the demolition of the wall; that the demolitions were done on 19th April 2013; and that this was when the respondents informed them that a part of the land was on a road reserve.
14. The respondents termed the petitioners' averments summarised above as falsehoods and lies. They contend that the petitioners had erected illegal communication masts without approval, portions of which, as well as the boundary wall, were on a road reserve; and that the petitioners had consolidated their land parcels by construction of the boundary wall which was on a road reserve. They had been served with an enforcement notice under section 30 of the Physical Planning Act as early as 23rd January 2012. The notice required them to stop further developments and remove the offending structures from the road reserve. Following the initial notice, meetings were held between the petitioners and officers of the 2nd respondent and correspondence exchanged. In the said correspondence, the petitioners, according to the respondents, had undertaken to remove the offending structures and had sought 60 days to enable them comply. The respondents have annexed to the affidavit of Mr. Barreh the correspondence exchanged between the 2nd petitioner and the respondents' officers on the matter, and they contend that the petitioners concealed material facts when making their application before the court, and that of itself ousts the petitioners from the grant of equitable relief as it was deliberate non-disclosure of material facts.
15. The respondents contend that the petitioners have not tendered any approval of the communication masts as required under Section 38 of the Physical Planning Act; that the respondents have a duty to control all developments in their area of jurisdiction, and failure to seek approval renders such developments liable for demolition under section 30(4)(b) of the Act. They contend therefore that they are simply exercising their statutory mandate in carrying out the demolitions. They assert that the petitioners have not discharged the burden placed on them to establish a prima facie case in order to merit grant of the orders sought; and that it would be an abuse of the court process for the petitioners to ask the court to grant them an injunction to enable them continue flouting the law by blocking a road reserve and maintaining developments made in breach of the Physical Planning Act. They therefore ask that the petition be dismissed with costs.

Determination

16. The petitioners have sought conservatory orders and an interim injunction following the partial demolition of a wall on a portion of L. R. No. 209/10272. At the ex parte hearing of their application, they alleged that no notice had been served upon them prior to the demolition, and they alleged violation of their right to a hearing and to fair administrative action. Consequently, they were granted prayers 1 to 6 of the application pending inter partes hearing of this application. On 15th May 2013, I permitted the petitioners to rebuild the demolished part of the wall to secure their equipment pending the hearing and determination of this application.
17. Following the response by the respondents in the affidavit of John K. Barreh, the petitioners filed two further affidavits by Mr. Sheth and Ms. Maina on behalf of the 1st and 2nd petitioners respectively in which they alleged that no proper notice had been served upon them, and that the two notices served were irregular and therefore null and void. Mr. Wekesa submitted at length on the illegality of the said notices, seeming to abandon the petitioners' earlier contention that no

notice had been served.

18. In addressing my mind to this matter, I remind myself that I am dealing with it at an interlocutory stage. I will therefore not deal with the various averments made by the parties with regard to whether or not approvals for the developments in question were sought or not, and whether or not there was a road reserve with respect to which the notices were served. The issue that I am concerned with is whether there was a violation or threatened violation of the petitioners' constitutional rights, and whether I should grant the temporary injunctions sought by the petitioners.
19. The petitioners have sought a temporary injunction to stop the respondents from enforcing the notices requiring them to remove the developments allegedly made without approval, and which encroach on a road reserve. They allege in their petition and affidavit in support that they were never served with an enforcement notice under section 30 of the Physical Planning Act, and so their right under Article 47 to fair administrative action had been breached.
20. I believe the law with regard to the grant of temporary injunctions as enunciated in the case of **Giella –vs- Cassman Brown(1973) EA 358** is now well settled. The applicant must show that it has a prima facie case with a probability of success; that damages will not be an adequate remedy should the injunction not be granted and the applicant later succeeds in its claim; and where there is doubt, the balance of convenience lies in its favour.
21. To these principles have been added, in recent cases, new considerations in light of the requirements of the new Constitution. In his judgment in **Symon Gatutu Kimamo & 587 Others –vs- East African Portland Cement Co. Ltd. [2011]eKLR Machakos High Court Petition No. 333 of 2011**, Ngugi J observed at paragraph 9 thereof as follows:

9. In similar strain, Justice Musinga has explained that while the three-prong test in Giella Case is the fulcrum in our jurisprudence on interlocutory injunctions, the Giella Principles acquire a different hue when fundamental rights are involved. Justice Musinga put it this way in the Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2011] eKLR:

'In an application for an interlocutory injunction to restrain breach of a fundamental right, the court may have to go beyond the ordinary tests as stated in Giella v Cassman Brown Co. Ltd. While the applicants must demonstrate that there has been breach or threatened breach of their constitutional rights and thereby show that they have a prima facie case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights.

22. In considering this matter and whether or not to grant the orders sought, I must do so on the basis of the averments by the parties and the evidence before me weighed against the **Giella –vs- Cassman Brown** principles and the requirements of the Constitution as enunciated above.
23. The crux of the petitioners' case is that the respondents demolished the wall on the subject property without according them a hearing. This is the averment contained in both the affidavit of **Ramesh Sheth** and **Wambui Maina** sworn in support of the petition and the application on 23rd April 2013.
24. However, I note from the correspondence annexed to the replying affidavit of **John K. Barreh** sworn on 4th June 2013 that not only had a notice been issued, but that there had been several emails and letters exchanged between the 2nd petitioner and the 2nd respondent's officers, and meetings held to discuss the matter, more than a year before the alleged demolitions took place.

These averments have not been challenged by the 2nd petitioner, nor has it disowned the emails and letters. The contents of the emails and letters, which are set out hereunder verbatim, are instructive.

25. On 23rd January 2012, the respondents sent an Enforcement Notice under section 30 of the Physical Planning Act, Cap 286 of the Laws of Kenya. The notice is dated 23rd January 2012 and is addressed to '**Wananchi Group L. R. No. 209/16027 Mombasa Road.**'

26. It is apparent that the 2nd petitioner did receive the notice, for in an email dated 25th January 2012 (annexure **JKB 3(A)**), it wrote to the respondents as follows:

WANANCHI Wednesday, 25 January 2012 8.55

From: "Tim Kajume" tim.kajume@ke.wananchi.com

To: jkathenge@yahoo.co.uk

Cc: "Robertmbugua" Robert.mbugua@ke.wananchi.com "Wambui maina" [<wambui.maina@eacp.co.ke>](mailto:wambui.maina@eacp.co.ke)

Dear Mr. Kathenge,

This is to appreciate for your time yesterday (sic). It was quite informative for us and we are now in a more informed state to handle such issues in the future. To update you, we have started the process of compiling the relevant documentation requested and our technical team is in the process of putting a project plan to handle to (sic) relocation of dishes. Once again thank you for the support and indulgence.

Regards

Tim Kajume

Group HR Manager

Wananchi Group(K) Limited

27. In a letter dated the same day, (**JKB 3(B)**), Ms. Wambui Maina, the 2nd petitioner's Group Legal Manager, wrote as follows to the 2nd respondent:

January 25, 2012

Mr. Justus M. Kathenge

Assistant Director, City Planning Department

City Council of Nairobi

City Hall Annexe, 2nd floor

P. O. Box 13515-0010

Nairobi

Dear Sir,

RE: NCC ENFORCEMENT NOTICE – LR NO 209/16027

We refer to the above matter and the meeting held in your office on January 24, 2012.

As discussed, we were not aware of the presence of a road reserve at our dish farm and we have contacted our landlord, Velos Enterprises Ltd, with a view to resolving the matter. In the meantime and based on the discovery of the facts, we are willing to and shall make arrangements to remove and relocate the affected dishes. This will entail certain business adjustments and re organization as well as searching for alternative sites to mount the dishes. We therefore kindly request you to indulge us and kindly extend the compliance period to at least sixty (60) days from the date of this letter to enable us undertake the processes necessary to relocate the dishes effectively. We shall keep you posted of the progress and will confirm with you once done.

We shall appreciate your consideration and look forward to your response.

Yours faithfully

For: Wananchi Group (Kenya) Limited

Wambui Maina

Group Legal Manager

28. Finally, in an email dated 30th January 2012 and titled ‘**RESPONSE TO NCC ENFORCEMENT NOTICE – WANANCHI**’, (JKB 3(C)) Ms. Maina again wrote to the 2nd respondent as follows:

Monday, 30 January 2012 12:11

From “wambui maina” wambui.maina@eacp.co.ke

To: jkathenge@yahoo.co.uk

Mr. Kathenge

We hope you are well and in receipt of our email below and the hard copy of the letter which was delivered to your office on January 25, 2012.

We await your kind response

Rgds

Wambui

----Original Message----

From: wambuimaina [<mailto:wambui.maina@eacp.co.ke>]

Sent: Wednesday, January 25, 2012 9:55 AM

Subject: RESPONSE TO NCC ENFORCEMENT NOTICE - WANANCHI

Mr. Kathenge,

Hope you are well.

It was a pleasure meeting you at your office yesterday. Thanks you (sic) for receiving us and giving us the opportunity to discuss the matter.

As agreed, attached is the letter requesting for the extension to comply with the notice.

We have sent an advance copy on e mail but we are delivering the hard copy in your offices before close of business today.

We trust you shall find it in order and look forward to receiving you response.

Once again, thank you

Regards

Wambui Maina

Group Legal Manager

Wananchi Group

29. Clearly, therefore, contrary to the averments by both Mr. Sheth and Ms. Maina, not only had they received the enforcement notice dated 23rd January 2012, but they had also engaged in discussions with the 2nd respondent, had been informed that their dishes were on a road reserve, had undertaken to remove them, and had sought and been granted a period of 60 days within which to relocate the dishes, but had failed to do so. The exchange of correspondence and discussions took place in January, 2012, more than a year before the demolitions which the petitioners now challenge took place. They did not then raise any issues with regard to the identity of the land parcel in question, nor the legality of the notices.
30. Yet, one year and two or so months later, the petitioners came to this court and sought and obtained equitable relief on the basis that they had never been served with any notice by the respondents, that they only learnt of the existence of a road reserve on the day of the demolitions, and that their constitutional right to fair administrative action had been breached. It is only after the respondents produced the correspondence between the parties that the petitioners decided to change their story, contending that the notices were illegal. As correctly argued by the respondents, the petitioners cannot have it both ways. Either they stand on the allegation that they were not served with any notice, or they accept that they were indeed served with enforcement notices, but show how the notices were illegal. They do not have the luxury of arguing both ways in light of their very clear correspondence with the respondents.
31. A party coming before the court alleging violation of its rights and seeking a temporary injunction, which is an equitable relief, is surely under an obligation to place all material before the court relevant to a determination of the issue, and not to conceal any material that is relevant to the matter. In this case, senior officers of the 1st and 2nd petitioners have deliberately concealed material facts. Indeed, they have, as is evident from the affidavit of the Group Legal Manager of the 2nd petitioner, perjured themselves by lying on oath that they had never been given any notice by the respondents, and that they were not aware until the demolition took place on 19th April 2013 that their dish farm was on a road reserve.
32. In effect, the petitioners obtained interim injunctive orders from the court on the basis of false

information; and they also obtained orders to rebuild the wall to protect their dish farm on the basis of falsehoods.

33. Nyarangi JA in **Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** underscored the importance of full and frank disclosure of material facts when he cited with approval the words of the court in *The Andria (Vasso)*, [1984] 1GB 477 in which the court stated as follows with regard to non-disclosure of material facts:-

“It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex-parte application, even though the facts were such that, with full disclosure, an order would have been justified.”

34. I believe the same principle applies when a court is considering an application for an injunction inter partes. It must be re-emphasized that an injunction is an equitable remedy, and a party seeking such relief disentitles itself from such relief by failing to disclose all material facts or deliberately avers to facts which it knows to be untrue.

35. In addition, the Constitution demands that as a society, we embrace a new value system, based on the principles set out at Article 10 thereof, that demands honesty and integrity from all. It is therefore incumbent on a party coming before the court to seek protection of its constitutional rights to do so in a manner that brings integrity and honesty to the process. To do otherwise, and to lie on oath as the petitioners in this case have done, is to abuse the court process. It is a practice that cannot be countenanced, and which disentitles the petitioners from any relief from this court.

36. Aside from that, in light of the fact that the petitioners, contrary to their assertions, had received notice in good time and were fully aware of and had held discussions with the respondents with regard to the facts that they now claim not to have been aware of, I am not satisfied that they have made out a prima facie case with a probability of success.

37. In the circumstances, the application dated 20th April 2013 is hereby dismissed with costs to the respondents.

38. For the avoidance of doubt, the interim orders granted in this matter stand vacated.

Dated Delivered and Signed at Nairobi this 23rd day of August 2013

MUMBI NGUGI

JUDGE

Mr. Wekesa instructed by the firm of Sichangi Partners & Co. Advocates for the Petitioners

Mr. Milimo instructed by the firm of Milimo, Muthoni & Co. Advocates for the respondents.