REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 214 OF 2013

HARDY RESIDENTS ASSOCIATION (Suing through its officials

1. Wanaina Kenyanjui

2. Karen Mclean

3. Neil Mcrae…….....……...PLAINTIFF

VERSUS

ANDREW NG'ANG'A ……..…..…… DEFENDANT

RULING

The Plaintiff has filed an application by way of a Notice of Motion dated 4th February 2013 seeking firstly, that a temporary order of injunction do issue restraining the Defendant from carrying on the business of a student hostel on L.R. No. 2327/172 in Hardy Estate, Langata. Secondly, that a mandatory injunction do issue directing the Defendant to pull down, remove and clear from L.R. No. 2327/172 in Hardy Estate (hereinafter referred to as "the Defendant's land"), all those structures making up the student hostel including boarding facilities, the pit latrines, showers, stones, dining area and kitchens within 14 days of the order.

The Plaintiff's application is premised on grounds that that the development of a student hostel on the Defendant's land is unauthorized and illegal, as the buildings housing the student hostel are not vetted or approved by the relevant authority. The Plaintiff contends that there is no approval obtained to convert the user of the suit property from the zoned residential user to the business of a student hostel, and further that the development of a student hostel requires the sanction of the National Environment Management Authority (NEMA) and public participation of the residents of the Estate which was not done. The Plaintiff also avers that the development is a nuisance to its members, who have been deprived of the right to quiet possession and enjoyment of their residential properties.

A detailed account of the operations of the said hostel and activities of the students residing thereon, and how the same have caused the Plaintiff's members discomfort, inconvenience and disturbance was given in a supporting and supplementary affidavit sworn on 4/2/2013 and 5/6/2013 respectively by the Plaintiff's secretary, Karen Mclean. The deponent annexed supporting documents including a copy of the official search of the Defendant's land, letters of objection by the Plaintiff dated 9/10/2012 and 29/10/2012, an advertisement in the *Standard* newspaper published on 2/1/2012 showing application for

change of user by the Defendant, and letters of demand to the Defendant's advocates.

The Notice of Motion was opposed by the Defendant's mother, Millicent Wambui Mugih, who swore a Replying Affidavit on 14/3/2013 and a Further Affidavit on 15/7/2013 on behalf of the Defendant. The deponent admitted that the hostels on the Defendant's land opened in September, 2012, and that they have a capacity to accommodate between 300 – 400 students, but currently hosts 185 students. It was her disposition that she purchased the property measuring about 10 acres in 1993, and that at the time of purchase, it was already developed with the buildings which currently stand on it including the hostels.

The deponent stated that she subsequently obtained for approval of change of user from residential to a nursery school, subject to conditions which she deposes she met. The deponent further averred that in 1995, she made application for change of user from a nursery school to a catering college, which application was objected to by the Plaintiff. It was the Deponent's averment that the City Council responded to the Plaintiff comprehensively on the issues raised in its objection. The deponent stated she has had students who have been boarding in the said facilities since 1995 with the acquiescence of the Plaintiff's members, present and past. She explained that the reasons for applying for the current change of user is to reflect the current exclusive use of the Defendant's land as hostels and not as a catering school as was previously.

The deponent further denied applying for change of user to include an office on the property, and that the advertisement on the Standard Newspaper referred to by the Plaintiff was not placed by herself or the Defendant. The Defendant denied that allegations of nuisance alleged by the Plaintiff and that she had breached provisions of the law as alleged. She deposed further that the Plaintiff having already lodged objections with the City Council of Nairobi, should await the outcome and exhaust all the remedies as provided by law and therefore, the suit herein is premature.

The parties filed written submissions, and also made oral submissions in court at the hearing of the Notice of Motion in support of their urgings. Counsel for the Plaintiff filed submissions dated 6/6/2013 wherein he reiterated the contents of the application and supporting affidavits. Counsel submitted that the subject hostel, operated by the Defendant is a contravention of section 30 of the Physical Planning Act which is to the effect that any development undertaken within an area of a local authority must be permitted by the local authority. It was his submission that the effect of not seeking prior approval is that such development is null and void and the same must be discontinued.

Counsel further submitted that the Defendant had breached section 58 of the Environmental Management and Co-ordination Act, by failing to prepare an Environmental Impact Assessment Report and also failing to obtain prior approval from National Environment Management Agency (NEMA). Counsel submitted that the objection raised to the Defendant's application for change of user from residential to student hostels as advertised in the *Standard* newspaper on 2/11/2012 is still pending at the City Council of Nairobi.

It was submitted by the counsel that the Defendant cannot claim to hold change of user, and neither can he deny that its property was in fact residential as clearly stated in the said application. In support of its case the Applicant cited the case of **Ocean Freight E.A Limited v Esmailji & Another (2004) KLR 463** where the Court found the breach of the law regarding the planning of and use of land material in granting an injunction. Consequently, that in accordance with section 30(4) of the Physical Planning Act, the Defendant is required to restore the land in question to its original condition before the development.

Counsel submitted that the Plaintiff had established a *prima facie* case against the Defendant to warrant the grant of an injunction restraining the Defendant from running a hostel, and a mandatory injunction to have the structures constituting the hostel brought.

Counsel for the Defendant filed submissions dated 26/7/2013 and submitted on three aspects of law, namely: jurisdiction, *locus standi* and test for grant of an injunction. On jurisdiction, counsel submitted that the Plaintiff having submitted its dispute to the City Council of Nairobi and NEMA, was bound to pursue that dispute resolution mechanism to the end and thus it was not open to it to simultaneously lodge

court proceedings. Counsel cited various cases including the case of **Philemon Donny Opar v Orange Democratic Movement & 2 Others (2013) eKLR** where the Court held that where there is clear procedure for redress of any particular grievances prescribed in the Constitution or in an Act of Parliament, that procedure should be strictly followed.

The counsel further submitted that the Plaintiff lacked *locus standi* to institute the suit as it was registered after the current dispute had arisen. Therefore, the suit should be dismissed on this ground alone even without considering its merits.

As regards, the test for grant of an injunction, counsel submitted that the Applicant did not make an attempt to meet the test laid out in the celebrated case of **Giella v Cassman Brown**. Counsel submitted that the Plaintiff's case was hinged on the alleged violation of the provisions of the Physical Planning Act and the Environmental Management and Co-ordination Act and the regulations thereunder, in respect of change of user, development approvals and environmental impact assessment test.

Counsel further submitted that the Defendant's hostels have been in existence since 1995 before the enactment of the Environmental Management and Coordination Act, and thus cannot have been expected to be in compliance with non-existent laws at the time. Counsel also reiterated that the Defendant demonstrated that she had taken steps to comply with the provisions of the Physical Planning Act and had fulfilled requirements in obtaining change of user.

Counsel also submitted that the Plaintiff had neither alleged nor shown that it stands to suffer loss which cannot be compensated by way of damages. It was his submission that an injunction would occasion loss upon the Defendant, as the students would be most prejudiced and affected and in that regard, and that the balance of convenience therefore titled in favour of the Defendant. Counsel also submitted if the court were to grant the injunctive order, the effect would be to deprive the Defendant's ailing mother of her only source of living.

In respect of an order of mandatory injunction, counsel submitted that Applicant had not met the test for grant of such an order. Counsel cited the case of **Locabail International Finance Ltd v Agro-Export & Another, (1986) 1 All ER 901** which established the principles of granting an interlocutory mandatory injunction that it ought not to be granted in the absence of special circumstances, and even then only in clear cases either where the Court is of the view that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied, or where the defendant has attempted to steal a march on the Plaintiff.

The Defendant's counsel contended that the Plaintiff's case was not clear, there was no existence of any special or exceptional circumstances and the order involves demolition of massive structures which cannot be remedied. Thus the damage to the Defendant would be incalculable and largely irredeemable.

I have read and carefully considered the pleadings, evidence and submissions provided by the parties. I will start by addressing two preliminary issues raised by the Defendant. The first is that of jurisdiction, and the Defendant argued that since the Plaintiff has already lodged an objection with the City Council of Nairobi, it should exhaust all the remedies available as prescribed in the Physical Planning Act, before invoking the jurisdiction of this Court.

This Court has exclusive jurisdiction in matters relating to the use, occupation and title to land and the environment under Article 162(2) (b) of the Constitution. However, despite this exclusive jurisdiction, this Court will defer to statutory provisions which provide effective remedies and procedures to a dispute that is before it, and may require that such remedies and procedures be exhausted first in appropriate circumstances. The Physical Planning Act in this regard in sections 7 to 10 establishes municipal, district and national liaison committees, which are empowered to hear and determine appeals lodged by persons aggrieved by decisions made by local authorities under the Act.

Likewise under section 129 of the Environmental Management and Co-ordination Act, the National Environment Tribunal is set up to hear and determine appeals arising from the decisions made by

authorities given powers under the Act.

However, in the present case no decision has been made by the named authorities that can be the subject of an appeal and the application of the procedures laid down in the two statutes. Arising from the perceived inaction by the concerned authorities, the Plaintiff has opted come to this court for relief, and rightly so, as section 13 (7) of the Environment and Land Court Act specifies that interim or permanent preservation orders including injunctions can be given by this court in the exercise of its jurisdiction. It is thus the finding of this Court that the Plaintiff has properly invoked the jurisdiction of this court.

I will not belabor the second preliminary issue raised by the Defendant of *locus standi* , as the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules are unequivocal that a Plaintiff in a suit has locus to apply for an injunction, to restrain a Defendant from causing damage to property or an injury of any kind.

The substantive issues that remain to be determined are firstly, whether the Plaintiff has met the requirements for the grant of a temporary injunction, as established in the decision in **Giella vs Cassman Brown & Another (1973) EA 358,** and secondly, whether it has in addition shown any special circumstances to entitle it to the mandatory injunction sought.

The first question I need to answer is whether the Plaintiff has established a *prima facie* case. It is not disputed that the Plaintiff's members own and/or reside in premises that neighbor the Defendant's land. The Plaintiff also gave elaborate descriptions of the inconvenience and interference with the enjoyment of their properties resulting from the operations of student's hostel on the Defendant's land. These included the nuisance caused in terms of noise, congestion on the roads, and instances of riotous students that raised security concerns among the Plaintiff's members.

The Plaintiff in addition relied on the procedures that require to be followed by the Defendant under the applicable law, which in this regard is the Physical Planning Act and Environmental Management and Co-ordination Act. Section 30 (1) of the Physical Panning Act provides that no person shall carry out development within the area of a local authority without a development permission granted by the local authority. Development is defined under section 3 of the Act to include the making of any material change in the use or density of any buildings or land.

The law regards the effects of a development on the private rights of others as a material consideration in the granting of development permission, and that is why there are elaborate provisions on the consultation and participation by those who may be affected by a development in the Physical Planning Act in section 32 of the Physical Planning Act. Under this section the local authority to which an application for approval is made is required to have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area.

Environmental considerations are also now fundamental to any development approval, and an environmental impact assessment may be required to be provided under section 36 of the Physical Planning Act. In addition, section 58 (1) of the Environmental Management and Co-ordination Act provides as follows in this regard:

> **"(1)Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.**
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> **(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1),**

that the intended project may or is likely to have or will have a significant impact on the environment, so directs."

The undertakings stated in the Second Schedule to the Act include general projects that involve an activity out of character with its surrounding; any structure of a scale not in keeping with its surrounding; and major changes in land use.

The Plaintiff in this regard brought evidence to show that the application for change of user was made by the Defendant retrospectively, in an advertisement in the *Standard* Newspaper of 2nd November 2012, after the Defendant had started the hostel operations in September 2012. The Plaintiff also produced evidence of the various objections they made to the relevant authorities in the form of a letter to the Director General of NEMA dated 9th October 2012, and two letters of objection and complaint to the Town Clerk of the City Council of Nairobi dated 29th October 2012 and 3rd November 2013 with regard to the use of the Defendant's land as hostels.

The Defendant does not dispute operating a student's hostel on his property from September 2012, and stated that she only applied for change of user permission to reflect the current use of the premises and not because it was necessary, as the premises were previously used as a boarding facility.

It is my view that the exclusive use by the Defendants of his premises as a students' hostel, from its previous use as a catering school is a material change of user within the meaning of section 3 of the Physical Planning Act and the Second Schedule to the Environmental Management Act. This is for the reasons that substantial and greater physical and social impact is likely arise from the exclusive use of the premises as a student's hostel not only on the Defendant's land, but also on the neighbouring environment.

It is also clear from the provisions of section 30 of the Physical Planning Act and section 58 of the Environmental Management and Co-ordination Act that approval is required to be given before the commencement of any development or material change of use of land, and not after such change of use has occurred. I must add that one of the main reasons for this prior approval is to address and mitigate the issues and objections like the ones now being raised by the Plaintiff in this court before such development or user commences.

As the Defendant as admitted that he is yet to get a change of user approval from the relevant planning authorities, and has not provided any evidence of an environmental impact assessment, it is my view that the he is in breach of the relevant planning and environmental laws, and the Plaintiff has thereby established a *prima facie* case, to warrant the grant of an order of temporary injunction.

The next question to be answered therefore, is whether there is irreparable damage likely to be caused to the Plaintiff that cannot be compensated by way of damages, if an injunction is not granted. I am inclined to answer this question in the affirmative for two reasons. The first is that the injury complained of by the Plaintiff will be of a continuing nature as long as the Defendant operates the student's hostels on his parcel of land. Secondly, I hold the opinion that no amount of damages can ever adequately compensate for harm being caused to the physical and social environment, nor can it buy one peace of mind. These reasons notwithstanding, this Court is alive to the prejudice that may be caused to students residing in the said hostels if an injunction is issued, and will therefore exercise its discretion to mitigate any adverse effects to the said students by giving them adequate time to look for alternative accommodation.

The second substantive issue before the court is whether the Plaintiff is entitled to the mandatory injunction sought. The Court of Appeal has held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109,** that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The effect of granting an order of mandatory injunction as prayed by the Plaintiff would be to demolish the buildings on the Defendant's property. The issue in dispute at this stage of the proceedings in my view

is the operation of the hostel on the said property without the necessary approvals. Demolishing the said buildings is not an appropriate remedy at this stage. The Plaintiffs should now proceed with the pursuit of the enforcement of the planning procedures and sanctions if any, to redress their grievances. The mandatory injunction sought will also amount to determining this matter with finality before it proceeds to trial. Consequently, the said prayer is denied.

It is thus the finding of this court that the Plaintiff's Notice of Motion partially succeeds for the foregoing reasons, and I hereby accordingly order as follows:

1. That with effect from 1st January 2014 the Defendant by himself, his workers, servants, agents, and tenants shall be and are hereby restrained from carrying on the business or activities of a student hostel on L.R. No. 2327/172 in Hardy Estate, Langata, pending the hearing and determination of the suit herein or until further orders.
2. The parties herein shall be at liberty to apply.
3. The costs of the Plaintiff's Notice of Motion dated 4th February 2013 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this _____29th____ day of ____October_____, 2013.

P. NYAMWEYA

JUDGE