REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

ENVIRONMENTAL & LAND CASE 523 OF 2009

KENYA CHRISTIAN INDUSTRIAL
TRAINING INSTITUTE ……..……PLAINTIFF

VERSUS

ABDULAHI MOHAMMED HUSSEIN ……..… DEFENDANT

RULING

The Plaintiff is the registered owner of L.R. No.209/12484 situate in Eastleigh Nairobi measuring 1.852 hectares as shown by the title document marked "BH-1" annexed to the supporting affidavit sworn by BERKELEY HACKETT who is its director. Upon possession of the property in 1970, the Plaintiff begun to run a vocational training centre with a student and staff population of over 1500 people. The property is adjacent to the Defendant's property L.R. No.209/12681. HACKETT states that the two properties are separated by a natural drainage system which is clearly reserved and indicated in deed plans "BH-3" and "BH-4" issued by the Ministry of Lands and Settlement and the City Council of Nairobi, respectively. The drainage system allegedly serves the whole fifth street of Eastleigh Section II which is geographically situated downstream in an area prone to flooding. The Plaintiff has conducted a beautification programme bordering the drainage ditch which has considerably added to the effectiveness of the entire street. The Plaintiff's case is that since sometime in August 2009, the Defendant has commenced construction of a building on his land by digging a foundation which has cut across the said drainage system and encroached into its perimeter wall. In the course of the construction, it was pleaded, the Defendant has erected massive construction support structures against the perimeter wall which, in addition to encroachment on the foundation, have considerably weakened the wall which is set to give way and collapse.

The Defendant has further cut off five (5) telephone lines leading to the Plaintiff's property, thereby severely disrupting the communication system which is core in the running of the education system. He has also, by constructing on the drainage system, obstructed the natural flow of waste down the system which is causing a pile - up upstream that will invariably cause flooding on the Plaintiff's property and the surrounding environment. The Plaintiff complained to the National Environmental Management Authority (NEMA) which on 10th September 2009 issued a stop order prohibiting the Defendant from interfering with the natural system. The stop order is marked "BH-6". The Defendant has not heeded the order.

The Plaintiff filed this case seeking a permanent injunction against the Defendant by himself, his agents and/or servants from encroaching, trespassing, constructing and in any other way interfering with its property. It also sought general damages for trespass. With the suit was filed an application under **Order 39 rules 1, 2, 3** and **9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act** for an interlocutory injunction pending the hearing and determination of the suit.

The Defendant denied there is a natural draining system between the two parcels, that he had encroached on the Plaintiff's perimeter wall, or that he had dug a foundation that has cut across the drainage system or weakened the wall. In the Defence and replying affidavit he stated that he is building and excavating on his property in accordance with approved plans issued by the City Council of Nairobi. He said the building plans were approved pursuant to verification of existing easements where the alleged natural drainage did not exist as alleged. He denied that any structures have been created that are likely to affect the perimeter wall, to disrupt communication or to cause any damage in flooding. The complaint to NEMA, it was stated, was instigated by the Plaintiff.

On the application for injunction, M/s LUNANI for the Plaintiff and MR. OSUNDWA for the Defendant filed written submissions which they highlighted in court. They each made reference to various authorities. I am grateful to them.

It is agreed that the conditions for the grant of interlocutory injunction have been settled since the decision in **GIELLA .V. CASSMAN BROWN & CO. LTD [1973] EA 358** in which it was held that an applicant must show a *prima facie* case with a

probability of success. Secondly, an interlocutory injunction will not normally be granted unless the application might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

Has the Plaintiff shown a *prima facie* case with a probability of success? The Plaintiff and the Defendant have adjacent parcels. The Defendant has approved plans to develop his property. The Plaintiff operates a vocational training institution on its property and has undertaken a beautification programme thereon. In law, a registered owner of property is entitled to its exclusive possession, use and peaceful and quiet enjoyment. Is there a natural drainage system between the plots? Has the Plaintiff shown that the Defendant is encroaching or intruding on its parcel by the construction he is conducting on his plot?

The Defendant also raised the issue that the dispute between them was a boundary one in which case has no jurisdiction. Further that, the Plaintiff is complaining about an easement in which case an injunction cannot issue. Further that, the Plaintiff has to sue in nuisance. At the hearing of the main suit all these issues and contentions will become clear. At this state the court has to make tentative findings on them.

Regarding whether or not the said properties are separated by a natural drainage system, the Plaintiff produced deed plans which only show the properties border each other. The Defendant produced letter from Nairobi City Water & Sewerage Company Limited marked "B" which says there is no sewer and water pipes passing through his plot. He also produced a letter, marked "F", which says that a site inspection was carried out which showed the boundary between the two plots is marked by the existing wall between the two properties; and that the two properties are distinct and do not overlap, or one is not part of the other. Lastly, the City Council has approved plans for the Defendant to develop his plot. This is shown by "F1".

The stoppage order "BH-6" referred to by the Plaintiff shows that NEMA's concern was that the Defendant had commenced construction of residential block on his property without undertaking an Environmental Impact Assessment as required by the provisions of the **Environmental Management and Coordination Act, 1999.** It is in the Consultation and Public Anticipation Schedule that there is an opinion that the construction will interfere with natural drainage when rains comes and that the floods will be detrimental to school children.

In short, the court agrees with the Defendant that the Plaintiff has not demonstrated that there exists a natural drainage system between the properties. It follows that the allegation by the Plaintiff that the construction the Defendant is undertaking has caused a pile up upstream that will cause flooding on its property has not been substantiated. Neither has it been shown that the construction has caused obstruction to the natural flow of waste.

The Plaintiff alleged the construction has weakened the perimeter wall separating the two properties. This was denied by the Defendant. It was further alleged that the construction has cut off telephone lines and thereby disrupted the Plaintiff's communication. The Defendant denied this. It is notable that there has been no expert assessment of the impact of the construction on the perimeter wall. It is also true that the telephone provider would be the first one to complain that its lines have been damaged or interfered with. In short, no material has been placed before the court to enable a finding on these issues in favour of the Plaintiff.

On the facts before the court, the dispute between the Plaintiff and Defendant is not about the boundary between their properties. There appears to be no dispute that the perimeter wall rests on the boundary. Neither party is complaining that the other is moving the boundary or interfering with it. The complaint by the Plaintiff is that the Defendant is undertaking construction on his land in a manner that is damaging the perimeter wall and interfering with a drainage system between them. This not a boundary dispute and neither is it an easement issue. It is basically a complaint about the Defendant's interfering with the Plaintiff's quiet use and enjoyment of its land. It is a trespass dispute. On these two points the court agrees with M/S LUNANI and finds the submissions by MR OSUNDWA not merited.

In short, the court finds that the Plaintiff has not shown that the Defendant is constructing on his property in a manner that is interfering with, or causing damage on, its property. In other words, the Plaintiff has not demonstrated a *prima facie* case. After finding that no damage has been shown, it is futile to go into the issue whether or not the injury alleged is such no damages can adequately or appropriately compensate. Further the Defendant is developing his land. He is entitled to do this. The balance of convenience should tilt in his favour.

HACKETT swore a replying affidavit on 12th January 2010 in answer to the Defendant's application that was filed on 15th December 2009 to set aside, review and/or discharge the injunction that had been issued on 15th October 2009. In the affidavit it was deponed that the Ministry of Lands had on 21st October 2009 recalled the plot from the Defendant on basis that it had erroneously been allocated to him as it was a plot earmarked and reserved for a school. The letter is "BH-3". There was also a letter "BH-2" from the City Council dated 22nd December 2009, cancelling the building approval to the Defendant for the same reasons. First, those allegations would run against the Plaintiff's plea in the Plaint, and the averment in affidavit by HACKETT in support of the present application that plot no.209/12681 belongs to, and is registered in the name of, the Defendant. On this point I agree with MR. OSUNDWA. A party is bound by his pleadings. Until the title to the Defendant has been legally cancelled or revoked, he is the legal and registered owner of the property.

In conclusion, I dismiss with costs the Plaintiff's application for interlocutory injunction.

DATED AND DELIVERED AT NAIROBI
THIS 6TH DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E