



**Kiagi v Seifert (Sued in his own capacity and as an official of the
New Nyali Resident Association) (Environment & Land Case
221 of 2020) [2022] KEELC 14944 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 221 OF 2020
NA MATHEKA, J
NOVEMBER 22, 2022**

BETWEEN

PAUL ONYANGO KIAGI PLAINTIFF

AND

**HUBERT SEIFERT (SUED IN HIS OWN CAPACITY AND AS AN OFFICIAL OF
THE NEW NYALI RESIDENT ASSOCIATION) DEFENDANT**

RULING

1. The application is dated 21st December 2020 and is brought under Section 1A, 3A and 80 of the *Civil Procedure Act* and order 40 rules 1 and 2 of the *Civil Procedure Rules*, 2010 seeking the following orders;
 1. This Application be certified as urgent and heard ex parte in the first instance.
 2. Pending the hearing and determination of this application, there be and is hereby issued an order of injunction to restrain the Plaintiff either by himself, his contractors, agents, employees, directors, shareholders or any other person acting on his behalf from constructing and undertaking development of mixed use building on the property known as Plot No. MN/1/3205.
 3. Pending the hearing and determination of this application the Honourable Court be pleased to stay its orders made on 7th December 2020.
 4. Upon hearing of this application interpartes the ex parte order made by the Honourable Court on 7th December 2020 be and is hereby set aside.
 5. Pending the hearing and determination of this suit, there be and is hereby issued an order of injunction to restrain the Plaintiff either by himself, his contractors, agents, employees, directors, shareholders or any other person acting on his behalf from constructing and



undertaking development of mixed use building on the property known as Plot No. MN/1/3205.

6. Costs of this application be paid by the Plaintiff.
2. It is based on the grounds inter alia that the Plaintiff has commenced construction of a mixed use building on the suit property comprising of basement, ground, 1st - 10th floor, duplex floor and pent house development on the Plaintiff's property known as L.R No. MN/1/3205 situate in New Nyali Area within Mombasa County. The Plaintiff's development is being undertaken without a valid approval from the County Government of Mombasa. Further, the development is being undertaken in a manner that is illegal and is in breach of the laws and regulations as explained in the application and the supporting affidavit. It is necessary and in the interest of justice that the Honourable court investigates and interrogates the issues raised in this application and suit and makes a finding on the same before the Plaintiff can be permitted to continue with its development. If this matter is not certified as urgent and interim orders granted as prayed, the Plaintiff will continue with its development in a manner that will be injurious to the Defendant, the residents of New Nyali and the public at large.
3. This court has considered the application and submissions therein. The Plaintiff has raised a Preliminary Objection dated 12th October 2021 challenging the jurisdiction of this court to hear and determine the Defendant's application dated 21st December 2020 on the ground that the claim raised by the Defendants ought to be heard by the Mombasa County Physical & Land Use Planning Liaison Committee. The court will consider this issue first. Section 61 (3-4) of the *Physical and Land Use Planning Act* 2019 provides that,
4. An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
5. An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.
6. The Defendant has submitted that Section 93 of the same Act provides that where the Liaison Committee has not been established, this court has jurisdiction. All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.
7. On 17th October 2022 counsel for the Defendant submitted to court that the Liaison Committee does not exist, he further stated that an email was sent out to the advocates who are interested in serving in the Committee but still it has not begun operations.
8. When this court was faced with a similar issue in *Benson Karomo & another (Suing as the Chairman and Secretary respectively of the New Nyali Residents Association) vs Paul Onyango Kiagi & another* (2021) eKLR, the Court ruled on 8th December 2021 and held that,

this court is not the appropriate forum to hear and determine the matter at this stage. Since Section 61 of the *Physical and Land Use Planning Act* 2019, provides that a challenge to the decision of the Planning Authority shall first lie with the relevant Liaison Committee, then the jurisdiction of this court has been invoked prematurely. As provided by Section 61 of the *Physical and Land Use Planning Act* 2019 there is a procedure for dispute resolution



in instances where a party is aggrieved by the decision of the County Executive Committee Members concerning any development permission matters like in the instance case.”

9. The ruling in ELC 227 of 2020 was delivered on 8th December 2021, a year later I have a similar question of law before the court. At the time of the said ruling this court was not made aware that the said Committee was not in existence. Section 93 provides that:-
10. All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.
11. I find this Preliminary Objection has no merit and I overrule the same. This court has jurisdiction to determine the matter and will now proceed to determine that application dated 21st December 2020. It is based on the grounds that the Plaintiff has commenced construction of a mixed use building on the suit property comprising of basement, ground, 1st - 10th floor, duplex floor and pent house development on the Plaintiff's property known as L.R No. MN/1/3205 situate in New Nyali Area within Mombasa County. The Plaintiff's development is being undertaken without a valid approval from the County Government of Mombasa. Further, the development is being undertaken in a manner that is illegal and is in breach of the laws and regulations.
12. The power of court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.
13. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 defined a prima facie case is. It held

So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” The court went further to hold that “A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case.”
14. The Defendant/Applicant states that the Plaintiffs development is against the terms of the memorandum of understanding and the New Nyali Resident Association was not consulted. That he did not get the necessary approvals from the County Executive Committee member. That the development being a commercial one will be detrimental to the stipulated residential low density estate.
15. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR the court held that,

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable



remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

16. The Applicant/Defendant has stated that they would suffer irreparable damage however I find that the balance of convenience is not their favour due to the time it took to prosecute this application. The court in Nguruman Limited (supra), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that;

If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

17. The Applicant seeks to set aside an order issued on 7th December 2020. This application is being prosecuted in October 2022. The Respondent stated that the development is over three quarters complete and that equity assists the vigilant and not the indolent. The balance of convenience is in favour of the Respondent. I find that the application is not merited and I dismiss it with costs. Parties are advised to comply with order 11 and set the suit down for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER 2022.

N.A. MATHEKA

JUDGE

