**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 194 OF 2019**

**PATRICK MUSIMBA LIMITED.....PLAINTIFF**

**=VERSUS=**

**CHINA RAILWAYS NO. 10 ENGINEERING GROUP CO. LTD.....1st DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT.....2ND DEFENDANT**

**RULING**

The plaintiff brought this suit on 11th June, 2019 seeking the following reliefs;

1. A declaration that the 1st defendant's development project on the property known as L.R No. 194/32 situated along Acacia Drive Karen ("the suit property") is in direct contravention of the Nairobi City Council Planning and Zonal Policy.

2. An order of injunction restraining the 1st defendant from constructing and/or continuing to construct a commercial/engineering office complex and/or administrative offices on the suit property.

3. An order directing the 2nd defendant to refrain from dealing with and/or attending to or presiding over and/or handling the 1st defendant's application for change of user of the suit property from residential to commercial/engineering office complex and/or to administrative offices.

4. General and exemplary damages.

5. Costs.

Together with the plaint, the plaintiff filed an application brought by way of Notice of Motion dated 6th June, 2019 seeking the following orders;

1. Spent.

2. Spent.

3. A temporary injunction restraining the 1st defendant from constructing and/or continuing with construction on the suit property pending the hearing and determination of the suit.

4. An order compelling the 1st and 2nd defendants jointly or severally to furnish the court with; a copy of the Approved Plan CPF AP 535, Approved Technical Plan No. CPF – AQ 665, amendment to approved plan CPF AP 535, proposed gym, sauna and changing on the suit property, and all documents lodged with the 2nd defendant in respect of the application for extension of use of the suit property from residential to include professional office (engineering) and application for change of use from residential to administrative office.

5. Spent.

6. Any such further or other order that this court in its discretion shall issue to meet the ends of justice.

7. Costs of the application.

The plaintiff's application was brought on the grounds set out on the face thereof and on the affidavit and further affidavit of the plaintiff's director, Hon. Dr. Patrick Musimba sworn on 6th June, 2019 and 12th August, 2020 respectively and a supplementary affidavit sworn by Mutiso Steve Kimathi on 16th November, 2020. In summary, the plaintiffs case is as follows. The plaintiff was at all material times the registered proprietor of all that parcel of land known as L.R No. 194/33 situated along Accacia Drive, Karen ("the plaintiff's property") while the 1st defendant was the registered proprietor of all that parcel of land known as L.R No. 194/32 ("the suit property") which is also situated along Accacia Drive, Karen. The plaintiff's property and the suit property are adjacent to each other. The Physical Development Plan (PDP) for the area where the plaintiff's and the suit property are situated provides that the area which is in Zone 12 of Nairobi City Development Ordinances and Zones, is strictly for residential use. After the 1st defendant purchased the suit property, it was presumed that the 1st defendant had applied for and was issued with approval to construct a residential house on the suit property. From the notice that was put outside the suit property where the 1st defendant was carrying out construction of the presumed residential house, the 1st defendant's plan for the building it was putting up on the suit property was registered as "Approved Plan CPF AP 535 and Technical Plan No. CPF – AQ665." While the construction of the said building on the suit property was going on, the 1st defendant placed a public notice at the gate of the suit property informing the public that the 1st defendant had made an application to the 2nd defendant to extend the use of the suit property from residential to include professional office (Engineering).

Karen & Langata District Association (KLDA) which represents the interest of the residents of Karen and Langata and, the plaintiff lodged objection with the 2nd defendant to the said application by the 1st defendant for extension of use of the suit property to include offices. Following the said objections, on 10th May, 2018, the 1st defendant informed the residents of Karen and Langata who had raised the said objections that the 1st defendant had abandoned its application for change of user and that it would only pursue approval of plans for its modern house. The plaintiff believed that the 1st defendant's application for change of user had been withdrawn. On 12th March, 2019, the 2nd defendant published in the Daily Nation newspaper a notice of the 1st defendant's application for change of use of the suit property from residential to administrative offices. The plaintiff once again lodged an objection to that application for change of use of the suit property for residential to administrative offices. The plaintiff did not receive any response from the 2nd defendant to this latest objection.

In May, 2019, the plaintiff's director noticed that the building that the 1st defendant was putting up on the suit property started to resemble a commercial property rather than a residential one. The plaintiff's said director became suspicious that the 1st defendant may have been issued with approval for change of use of the suit property by the 2nd defendant. The plaintiff's said director visited the 2nd defendant's offices and managed to peruse the approved plans for the 1st defendant's project that revealed that the 1st defendant had all along intended to construct an administrative centre and not a modern house and that its plans had received a technical approval on 3rd July, 2018. The 1st defendant misrepresented that it was constructing a residential house so as to circumvent the legal process involved in obtaining a change of user of the suit property. The offices being put up by the 1st defendant on the suit property were likely disturb the peace of the residents of the neighbouring properties and would negatively impact on the property values. The commercial use of the suit property would also have negative social impact on the plaintiff's property and would pose a security risk owing to the increased human traffic expected in the suit property.

Despite the objection that had been raised by the plaintiff, the 1st defendant continued with construction on the suit property which construction could be modified to fit commercial purposes contrary to the Physical Development Plan for the area. The plaintiff was also not involved in any environmental impact assessment of the project. The plaintiff was apprehensive that the 1st defendant having obtained approval for its building plans through a tainted process was also likely to obtain a change of use of the suit property contrary to the law. The plaintiff contended that it was at imminent risk of suffering irreparable harm in the form of negative social and environmental impacts of the project and that the value of its property also stood the risk of going down.

The plaintiff contended further that the court had jurisdiction to grant the order for production of documents sought in the application at interlocutory stage in view of the urgency of the issues raised in the application. The plaintiff averred that the 1st defendant had admitted that it had obtained a change of use of the suit property and that since the approval for the said change of use was given by the 2nd defendant contrary to the provisions of the law and while objections against the same were pending, the plaintiff had established a prima facie case. The plaintiff averred further that no decision had been rendered by the 2nd defendant that could be subjected to an appeal to the Liaison Committee under the Physical Planning Act and that the court had jurisdiction to hear and determine the application. The plaintiff averred further that the cause of action arose after 12th March, 2019 and as such the suit was not time barred.

The application was opposed by the defendants. The 1st defendant filed grounds of opposition dated 22nd August, 2019 and replying affidavits sworn by Liu De Yong and Victoria Morena on 22nd August, 2019 and 27th September, 2020 respectively. In its grounds of opposition and replying affidavits, the 1st defendant contended that the verifying affidavit filed by the plaintiff was defective the same having been commissioned by an advocate who was a partner in the firm of advocates on record for the plaintiff. The 1st defendant averred that the defect in the affidavit rendered the suit fatally and incurably defective. The 1st defendant averred further that the plaintiff's suit was premature in that the plaintiff had not exhausted the remedies that were available to it under the Physical Planning Act, 1996 before coming to court. The 1st defendant averred further that the plaintiff's complaint should have been brought by way of judicial review. The 1st defendant contended further that the plaintiff had failed to demonstrate that the 1st defendant had infringed on any of its property rights. The 1st defendant averred that the injunctive order sought by the plaintiff to restrain construction on the suit property had been overtaken by events since the construction works had been completed. The 1st defendant averred further that the order sought for production of documents could be dealt with during discovery and that it was not necessary for the court to grant the same. The 1st defendant averred further that in any event, the order was in the nature of a mandatory injunction and that the same had not been sought in the plaint. The 1st defendant averred that in the circumstances, the order was not available to the plaintiff. The 1st defendant averred further that the 1st defendant had already obtained a change of use of the suit property and as such the order seeking to restrain deliberation on the application for change of use was similarly spent. The 1st defendant urged the court to dismiss the application.

The 2nd defendant opposed the application through a Notice of Preliminary Objection dated 3rd October, 2019. The 2nd defendant contended that the plaintiff's suit was time barred and that the material relied on by the plaintiff in support of its case did not comply with the previsions of the Evidence Act, Chapter 80 Laws of Kenya. The 2nd defendant averred further that the plaintiff's prayer for production of documents should have been channelled through the Commission on the Administration of Justice pursuant to Section 11 of the Access to Information Act.

The plaintiff's application was heard by way of written submissions. The plaintiff filed its submissions dated 25th September, 2020. The 1st defendant filed its submissions dated 22nd August, 2019 while the 2nd defendant filed its submissions dated 3rd October, 2019.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavits filed by the defendants in opposition to the application. The following is my view on the matter. The main orders sought by the plaintiff are in the nature of prohibitory and mandatory injunction. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in Giella *v* Cassman Brown & Co. Ltd. [1973] E.A 358**,** an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in of Mrao Limited *v* First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. …All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."**

An applicant for a temporary mandatory injunction on the other hand must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited *v* Agro-Export (1988) 1 All ER 901, where the court stated that:

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks 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. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction."**

In Shepherd Homes Ltd. *v* Shandahu [1971] 1 Ch.304, Meggary J. stated as follows:

> **"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation".**

It is on the foregoing principles that the plaintiff's application falls for consideration. I am not satisfied that the plaintiff has satisfied the conditions for grant of the orders sought. The plaintiff has not satisfied me that it has a prima facie case against the defendants with a probability of success. It is not disputed that the plaintiff's complaint relates to development approval that was sought by the 1st defendant under the Physical Planning Act, 1996 (now repealed) (the Act). It is not disputed that the Act had an inbuilt mechanism for resolving disputes arising thereunder. The plaintiff has not satisfied me that he had exhausted that machinery before coming to this court. It is now settled that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. In Narok County Council *v* Trans Mara County Council and Another, CA No. 25 of 2000 the court stated as follows:

> **"As the law (Local Government Act) provides for procedure to be followed in distribution of assets and liabilities then the parties are bound to follow that procedure provided by the law. This had to be done before the parties could resort to a court of law."**

In Secretary, County Public Service Board & another *v* Hulbhai Gedi Abdille, CA No. 202 of 2015[2017] eKLR the court stated as follows:

> **"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."**

See also Speaker of the National Assembly *v* James Njenga Karume, Civil Application No Nai 92 of 1992 (Nai. 40/92 Ur).

It is also not clear to me from the material placed before the court by the plaintiff whether the plaintiff's complaint concerns change of use application that has been considered and granted or one which is yet to be considered. If the change of use application has not been approved by the 2nd defendant as the plaintiff seems to suggest which is disputed by the 1st defendant, the plaintiff has not satisfied me that valid grounds exist to warrant the grant of an injunction to stop the 2nd defendant from considering the application. The 2nd defendant had power under the Physical Planning Act, 1996(now repealed) to consider and approve or reject application for development permission within its jurisdiction. The court cannot stop the 2nd defendant from exercising its statutory power without valid reasons which in my view have not been established by the plaintiff in this case. The court cannot speculate on the outcome of the 1st defendant's application for change of use; whether it will be granted after consideration or not.

The validity of the affidavit filed by the plaintiff in support of the application is also highly in doubt. The affidavit is commissioned by Andrew Oluoch Oduor whose address is the same as that of the firm acting for the plaintiff in the suit. Whether or not the said Andrew Oluoch Oduor had resigned as a partner in the firm can only be determined at the trial. No reasonable explanation has however been given why he continued to use the postal and e-mail address of the firm which is on record for the plaintiff after he had resigned from the firm as alleged.

I am also of the view that the orders sought by the plaintiff if granted would be in vain. In the replying and supplementary affidavits filed by the 1st defendant, the 1st defendant contended that the construction works on the suit property have been completed. This averment was not controverted by the plaintiff. If the construction works have been completed, then there is nothing to stop through the injunction sought by the plaintiff. With regard to the order for production of documents, I am in agreement that the prayer is in the nature of a mandatory injunction and as such it must have a basis in the plaint. I am in agreement with the 1st defendant that no such order has been sought by the plaintiff in the plaint. The prayer is in the circumstances without any basis and cannot be granted at an interlocutory stage. I am also in agreement that an order for production of documents can be made during discovery of documents and it is not necessary to seek such order from the court before exchange of documents by the parties.

For the foregoing reasons, I am not satisfied that a prima facie case with a probability of success has been established by the plaintiff. The plaintiff having failed to establish a prima facie case, it is not necessary for me to consider whether or not the plaintiff stands to suffer irreparable harm if the orders sought are not granted.

The upshot of the foregoing is that I find no merit in the Notice of Motion application dated 6th June, 2019. The application is dismissed with costs to the defendants.

**Dated and Delivered at Nairobi this 11th day of February, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Omemo for the Plaintiff

Mr. Kihanga for the 1st Defendant

N/A for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant