



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E 056 OF 2021

ZENITH GARDENS MANAGEMENT LIMITED.....1ST PLAINTIFF

ANTHONY PRAXEDES D’COSTA.....2ND PLAINTIFF

=VERSUS=

NAIROBI METROPOLITAN SERVICES.....1ST DEFENDANT

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

RULING

1. This suit was triggered by an enforcement notice issued on 10/2/2021 by the 1st defendant. It, *inter alia*, required immediate vacation of Block C of Zenith Gardens, erected on Land Reference Number 1870/111/549 (Original Number 91), Brookside Gardens Drive, Westlands, Nairobi. The 1st defendant sought immediate vacation of the said block of apartments on the ground that there were structural failures in the building.
2. Together with the plaint, the plaintiffs brought a notice of motion dated 16/2/2021 through which they sought an interim/conservatory order of stay, staying the enforcement notice dated 10/2/2021, pending the hearing and final determination of this suit. The said application was argued before me five minutes ago, and is the subject of this ruling.
3. Mr Ogari, counsel for the applicants argued that the crux of the application was that the applicants were seeking an extension of time within which to engage a structural engineer and comply with the notice. He added that the 1st defendant is a management company with 24 shareholders, hence the need to consult and engage a structural engineer.
4. Opposing the application, Mr Allan Kamau, counsel for the 1st defendant, submitted that the applicants had not met the criteria upon which a conservatory order is granted. He referred the court to the report by the National Construction Authority (NCA) and submitted that the particular development had structural failures and was sinking. He referred to various photographs and submitted that the building was a real danger to the members of the public because it had cracks and was sinking.
5. I have considered the application; the rival affidavits and submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key question in the application. The single question falling for determination in the application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to grant conservatory orders.
6. This is a dispute which should have been adjudicated on within the primary dispute adjudication framework in the **Physical and Land Use Planning Act, 2019**. There is, however, common ground that the relevant physical and land use liaison committee has not been fully constituted and/or operationalized. It is against that background that this court is exercising its original jurisdiction under **Section 13** of the **Environment and Land Court Act**.
7. The criteria upon which jurisdiction to grant a conservatory order is exercised was articulated by the **Supreme Court of Kenya** in **Peter Gatirau Munya vs Dickson Mwenda Kithinji & 2 others** in the following words:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”
8. In the present application, there is a report by the National Construction Authority showing that the affected block of apartments has

structural flaws and recommending that the building should remain vacant until remedial measures recommended by the structural engineer are enacted. At this point, the applicants have not furnished the court with a technical report by a structural engineer demonstrating that any particular section of the affected block is safe for occupation by the public. In the circumstances, the court will defer to the technical report by the National Construction Authority to avert loss of lives.

9. The net result is that the court is hesitant to grant a conservatory order whose effect might result into loss of lives or general harm to the public. Put differently, it is not in the public interest to grant a conservatory order in the circumstances of this application at this stage. Consequently, the court is not satisfied the applicants have satisfied the criteria for grant of a conservatory order in the circumstances of the present application. In the end, the notice of motion dated 16/2/20121 is declined. Costs in the cause

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MARCH 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Allan Kamau for the 1st Defendant

Court Assistant: June Nafula