



Maranga v Upper Kapiti Residents Association & 2 others (Environment & Land Case E080 of 2022) [2023] KEELC 19808 (KLR) (18 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E080 OF 2022
MN GICHERU, J
SEPTEMBER 18, 2023**

BETWEEN

HANNAH NJAMIU MARANGA PLAINTIFF

AND

UPPER KAPITI RESIDENTS ASSOCIATION 1ST DEFENDANT

PAUL N MAEMA 2ND DEFENDANT

COUNTY GOVERNMENT OF KAJIADO 3RD DEFENDANT

RULING

1. This ruling is on the Notice of Motion dated October 13, 2022. The motion which is by the Plaintiff is brought under Order 40 Rules 2 and 4, Order 51 Rule (1) of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law.
2. The motion seeks the following residual orders.
 3. That the three Defendants by themselves, their members, employees, servants, agents or nominees be restrained by an order of injunction from entering, trespassing, disrupting, stopping construction, harassing, intimidating, interfering and/or restricting the Plaintiff from carrying out construction works on her property known as Title No. Kajiado/Kaputiei-North/15369 located in Kitengela, Peniel Estate off EPZ Road within Kajiado County pending the hearing and determination of this suit.
 4. That the court issues an order to the officer commanding Kitengela Police Station to implement the above order.
 5. That the costs of this application be in the cause.
 6. That this court makes any other order that it deems fit.



3. The motion is supported by eighteen (18) grounds, a supporting affidavit dated October 13, 2022 with ten (10) annexures and a supplementary affidavit dated 9/3/2023 with two annexures. The gist of the above mentioned material is as follows.
4. First and foremost, the Plaintiff is the registered owner of the suit property which she bought in the year 2004 with the intention of developing multi-dwelling residential apartments.
5. Secondly, after following all due process, she obtained approval from the third Defendant, National Environment Management Authority (NEMA) and National Construction Authority (NCA) to undertake the project. The project entailed the development of a 5 floor apartment on the suit land. To this end, she procured funds amounting to around Kshs. 75 million and commenced the construction.
6. Thirdly, between October 8 and 10, 2022 she was confronted by the second Defendant and some individuals purporting to be members of the first Defendant. They stormed into the suit land, trespassed therein, caused chaos and havoc, harassed and assaulted workers on site, disrupted the construction and even ordered a stop thereof. The reason for all this was that the Plaintiff was allegedly in contravention of zoning guidelines and regulations.
7. Fourthly and according to the Plaintiff the purported zoning guidelines are irregular and invalid because they were not adopted by the third Defendant as required by the law. Moreover, the suit land is not within the first Defendants' area but at Peniel Estate.
8. Fifthly, the applicant stands to lose more than the Defendants who will suffer no harm if the orders sought are issued because she incurs losses of Kshs. 50,000/= daily for payment of security services on site, workers on standby, hired machinery and is in danger of breaching contracts between herself and the contractor and in addition loss of income expected from the investment.
9. Sixthly, on February 24, 2023 National Environment Management Authority (NEMA) which had suspended the Plaintiff's Environmental impact assessment licence No. PSL 19199 on October 19, 2023 lifted the said suspension. In addition to the above, the Plaintiff had filed Appeal Case No. 40 of 22 at the National Environment Tribunal which issued some orders on January 23, 2023.
10. Seventhly, the County Director of Physical Planning Kajiado who has the authority to revoke construction approvals if a proposed project is unsuitable or fails to comply with planning guidelines has not found any cause to revoke the Plaintiff's plans. For the foregoing and other reasons, she prays that the application be allowed.
11. The motion is opposed, first, by the first and second Defendants and to this end, Lydia Kathae, the official secretary of the first Defendant has sworn a replying affidavit dated October 26, 2022 which has more than fifteen (15) annexures and a further affidavit dated April 5/4/2023 which has more than seven annexures. In summary, the official secretary replies as follows.
12. Firstly, the Plaintiff's suit land is within the first Defendant's area and not at Peniel Estate and therefore subject to the governing by laws of controlled development for Upper Kapiti Residents, which was approved by the physical planning office.
13. Secondly, in zone "C" where the Plaintiff's suit plot is situated, the permitted development is only 3 levels, that is to say, ground floor and 2 floors and minimum size of 1 bedroom, yet the Plaintiff is putting up a 5 storeyed building.
14. Thirdly, the first Defendant has contested the licences issued to the Plaintiff since they stand to lose if the Plaintiff proceeds with the project as this will cause congestion in the estate and devalue the first Defendant's members' investments.



15. Fourthly, the Defendants have sought audience with the Plaintiff with a view to settling the dispute amicably but she has evaded them and chosen to ignore their pleas for a harmonious resolution.
16. Fifthly, the interim order dated October 14, 2022 has deprived the first and second Defendants of their right to seek legal redress against the illegal actions of the Plaintiff.
17. Sixthly, the Plaintiff has increased the pace of construction of the project so as to ensure that it is complete before the case is concluded. For the above and other reasons, the Defendants pray for the lifting of the orders dated October 14, 2022.
18. The third Defendant has filed grounds of opposition dated November 5, 2022 which can be summarized as follows.

Firstly, the application is a misnomer, an afterthought, an abuse of the court process, misleading on facts as against the 3rd Defendant, lacks merit, is frivolous and vexatious.

19. Secondly, the application intends to interfere with the mandate of the third Respondent in ensuring compliance with the set building procedures and adhering to the terms of the permits given.
20. Thirdly, there are no acts of omission or commission complained of against the third Defendants and no prejudice has been shown to be suffered by the Plaintiff that cannot be remedied if the orders sought are not granted.
21. Finally, no cause of action lies as against the third Defendant and no basis has been laid for grant of the orders against the third Respondents
22. Counsel for the plaintiff filed written submissions dated August 2, 2023. She identified three issues for determination as follows.

- i. Whether the zoning guidelines are regular and binding upon the Plaintiffs?
- ii. Whether the third Defendant is justified in withdrawing the approvals granted to the Plaintiff?
- iii. Whether the Plaintiff is entitled to the reliefs sought in the plaint?

At the time of writing this ruling in late August, no submissions had been received from the Defendants' counsel.

23. I have carefully considered the notice of motion in its entirety including the grounds in support, the affidavits and the annexures by all sides as well as the grounds of opposition.

I have also considered the submissions by the Plaintiff's counsel, the three issues raised therein as well as the law cited therein.

On the first of the Plaintiff's issues, I find that it is too early to determine whether the zoning guidelines are regular and binding upon the Plaintiff. This is because this matter is still at an interlocutory stage. It is only at the trial that evidence will be adduced after which the court will make a determination. As of now, the pleadings are not even closed. It is therefore premature to make any finding on the said issue.

24. On the second issue of whether the third Defendant is justified in withdrawing the approvals granted to the Plaintiff, I find that such a question would only be answered in this court if an appeal had been



preferred by an aggrieved party under Section 72 (4) of the *Physical and Land Use Planning Act* (Act No. 13 of 2019) which provides as follows:-

“Any party aggrieved with the determination of the County Physical and Land Use Planning Liaison Committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days”.

There being no appeal as per the above provision, such an issue as identified by the Plaintiff’s counsel cannot arise.

25. Since this application is about a temporary injunction I find that the issues that arise are the three famous ones enunciated in the case of *Giella –versus- Cassman Brown* (1973) E.A. 358. They are:-
- i. Whether the Plaintiff has established a prima facie case with a probability of success?
 - ii. Whether the Plaintiff will suffer irreparable loss that cannot adequately be compensated with an award of damages?
 - iii. If the court is not sure of the above, in whose favour does the balance of convenience tilt?

26. I find that the Plaintiff has not established a prima facie case with a probability of success. The reason for this is simple. Under Section 72 of the *Physical and Land Use Planning Act*, it is not envisaged that a party aggrieved by a decision made by the County Physical and Land Use Planning Liaison Committee will commence a case in any other manner than through an appeal.

It is no wonder that while this case is pending before this court, it has also been handled by NEMA, NET and the County Government of Kajiado. This in my view is not proper. The Plaintiff should only come to this court after exhausting all other avenues relating to enforcement.

Order 4 Rule 1(f) of the Civil Procedure Rules provides as follows;

“The plaint shall contain the following particulars –

- (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint”.

In paragraph 24 of the plaint dated October 13, 2022, the plaintiff has made this averment. This averment cannot be true because the same dispute was pending before the County Government of Kajiado as can be seen from the letter dated October 11, 2022 written by Gitau and Tumu Advocates to the Director Physical Planning, Kajiado County and it had not been resolved.

Under Section 57 (5) of the Act it is provided as follows;

“A County Executive Committee Member may revoke development permission if the applicant has contravened any provision of this act or conditions imposed on the development permission for any justifiable cause”.

27. Regarding the second issue, I find that the Plaintiff has not proved that she stands to suffer irreparable loss that cannot be adequately compensated by an award of damages. If the plaintiff cannot prove that she has a prima facie with a probability of success, she also cannot prove that she will suffer irreparable loss. Irreparable loss cannot be proved without a strong case. A strong case is a prerequisite to proving loss.



28. On the third issue, I find that the balance of convenience does not tilt in favour of the Plaintiff. Let her comply with the planning laws and come to this court as a last resort after exhausting all avenues laid out in Act No. 3 of 2019 (*Supra*).

For the above stated reasons, I find no merit in Notice of Motion dated October 13, 2022 and I dismiss it in its entirety.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF SEPTEMBER, 2023.

M.N. GICHERU

JUDGE

