



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 173 OF 2019

JOEL RADUMA RAMOGO.....1ST PLAINTIFF/APPLICANT

MARY ATIENO ONDORO.....2ND PLAINTIFF/APPLICANT

VERSUS

INTEGRITY HOLDINGS LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated 20th November 2019, by the Plaintiffs/ Applicants seeking for the following orders;

a) That pending the hearing and determination of this suit, this Honorable court be pleased to issue an order of injunction to restrain the Defendant, its servants, workmen, licensees agents or any other person acting on their own behalf or on behalf of the defendant from howsoever continuing any works of building and construction, rebuilding, excavating, renovating, plastering, masonry works, concrete works, finish works, roofing, screeding, installation of windows, doors and or fixtures and or continuing any forms of construction works whatsoever on title Number DAGORETTI/ KINOO/5214, and spreading debris or interfering with plaintiffs and their tenant peaceful entitlement, possession and enjoyment of Title Number DAGORETTI/KINOO/6181.

b) That the OCS - Kinoo Police Station does assist in enforcement of any orders issued herein.

c) That the cost of this application be borne by the Defendant.

The Application is premised on the grounds that the Plaintiffs/Applicants are the registered owners of the suit property having acquired it in **2016**, and developed the same. That the Defendant/ Respondent is the registered and beneficial owner of **L.R Dagoretti/Kinoo/5214**, which is adjacent to the Plaintiffs/ Applicants property which it acquired in **2018**. That the Defendant/ Respondent is continuing to construct a block of residential flats on its said land without any properly approved designs and in a manner that has caused complete blockage of light to the Plaintiffs/ Applicants part of the premises. Further that the Defendant's/ Respondent's construction has also caused water leak to the Plaintiffs/Applicants premises thereby causing severe cracks and the water is causing flooding into the Plaintiffs/ Applicants units. That the Defendants/ Applicants shoddy construction is posing grave danger to the Plaintiffs/ Applicants premises.

That the Plaintiffs/ Applicants had intensively borrowed to finance the construction and as such the lack of tenants due to the Defendants/Respondents actions is causing great prejudice and they stand to lose their investments of over **Kshs. 80,000,000/=** and other properties charged to secure financing of the instant development. That it is in the interest of Justice that the Application be allowed.

In her Supporting Affidavit, **Mary Atieno Ondoro**, averred that she has authority to swear the Affidavit on behalf of the other plaintiff. That they are the registered owners of title no. **DAGORETTI/KINOO/6181**, and they constructed a total of **32 residential flats**, comprising of one and two bedroom and that construction was funded by various loans and sale of various properties which they co-own situated in Western Kenya. That she had severally talked to the Defendant/Respondent purported Director **MR CHARLES KURIA** to stop the constructions and consider changing the designs of the construction but he had totally ignored the request. That on **15th NOVEMBER 2019**, she reported the matter to Kikuyu Sub County offices in charge of planning and development who only called for a site meeting on **8th NOVEMBER 2019**, but failed to appear at all. Due to Defendants/Respondents actions, she said that at least six tenants had moved out and no one is interested in taking up houses there causing them to lose income amounting to **Kshs 140,000/=** monthly.

The Application is opposed vide a Replying Affidavit sworn on **16th December 2019**, by **Charles Kuria** the Defendant's/ Respondent's Director. It was his contention that the orders sought by the Plaintiffs/ Applicants are misplaced, unwarranted, prohibitive and ought not to be granted. That most projects are funded through loans and the Plaintiffs/ Applicants is not a unique case and their action to charge their matrimonial homes are not in any way connected to the Defendant's/ Respondent's deeds.

That the Defendant/Respondent is the beneficial owner of **L.R No. Dagoretti/Kinoo/5214**, next to the Plaintiffs/ Applicants. It was his contention that any blockage is a direct consequences of the Plaintiffs/ Applicants having failed to take cognizance of future developments. That he started his construction after securing approvals from the County Government of Kiambu. Further that the boundary wall which the Plaintiffs/ Applicants blame for blocking light was constructed as per the building approvals. That Plaintiffs/ Applicants have no capacity to ascertain what a poorly supervised and totally shoddy construction is. Further that the Plaintiffs/ Applicants lighting problems emanated from changing their approved designs of balconies and windows and at no particular time has his construction been stopped by Sub County authorities. That tenants paying monthly rent and who do not hold a tenancy agreement with the Plaintiffs/ Applicants for fixed duration cannot be considered as income lost. That the Court should not be inclined to grant any orders as his construction is fully up and only minor finishing works are ongoing.

The Plaintiffs/ Applicants filed a Supplementary Affidavit sworn by **Mary Atieno Ondoro** on **14th January 2020**, and averred that it is improbable that any County Authority could have approved the Defendant's/ Respondents construction or building plans without an Environmental Impact Assessment report, NEMA licenses and approvals, structural and mechanical plans by qualified engineers. That the Architectural plans attached in the Replying Affidavit only shows that five floors were to be built, but on the ground, the construction has gone up to seven floors. That the issues of water leaking into their premises and repainting premises have been discussed severally with **Mr. Kuria**, and he agreed to take corrective measures.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court having carefully considered and evaluated the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law finds that the issue for determination is **whether the Applicants are entitled to the injunctive orders sought**.

In determining whether or not the Plaintiffs/ Applicants are entitled to injunctive orders, the Court is guided by the principles as set out in the case of **Giella ...Vs... Cassman Brown (1973) EA 358** and as was reiterated in the case of **Nguruman LimitedVs... Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

Before the Court makes a determination on whether or not, it should grant the injunctive orders sought, it notes that the Defendant/ Respondent in its submission dated **10th November 2020**, submitted that the Orders sought by the Plaintiffs/ Applicants cannot be enforceable as the Application has been overtaken by events and therefore ought to be dismissed for lack of practical purposes as the building has been built to completion. The Court notes that the Plaintiffs/ Applicants sought for injunctive orders to restrain the Defendant/Respondent from continuing with the Construction, rebuilding amongst other works. That the Plaintiffs/ Applicants produced in evidence photographs of an unfinished building.

It is trite that he who alleges must prove. While the Court is cognizant of the fact that the orders were sought on **20th November 2019**, and this Ruling is set to be delivered on **15th April 2021**, and being that there were no interlocutory orders, the building might have been completed, there is no evidence of such completion. Further the Court also notes that the injunction was against the peaceful occupation of their land by the Plaintiffs/ Applicants and thus it cannot find that the Application has been overtaken by events without any evidence to support the same.

On whether the Plaintiffs/ Applicants have established a prima facie case;- A prima-facie case was described in the **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean;-

“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in doubt that the Plaintiffs/ Applicants are the registered owners of **L.R Dagoretti/Kinoo/6181**, in which they have built residential houses. The Plaintiffs/ Applicants have averred that the Defendant/ Respondent who is the registered owner of **L.R Dagoretti/Kinoo/ 5214**, commenced construction and interfered with the peaceful occupation of their tenants as the same has blocked part of their premises and denied several units any form of lights. That the shady constructions has leaned dangerously on their premises and caused cracks and caused flooding which interfered with their property.

The Defendant/ Respondent acknowledged that there were minimal damages that might have occurred to the Plaintiffs/ Applicants property at the initial stages and he employed mitigating factors.

The Court has also seen the text messages that suggests that indeed the Defendant/Respondent's construction did interfere with the Plaintiffs/ Applicants building and the photographs evidence of the same. Every person has a right under the Constitution to peaceful and quiet enjoyment of their rights and any actions that interferes with the same is therefore an infringement of these rights.

The Defendants/ Respondents having interfered with the Plaintiffs/ Applicants quiet and peaceful use and possession of their property, would only mean that the Plaintiffs/ Applicants have established a prima facie case with a probability of success as there exists a right that has allegedly been infringed.

On whether the Plaintiffs/ Applicants will suffer irreparable loss;- *'Irreparable loss'* was described in the case of Paul Gitonga Wanjau... Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, as *simply injury or harm that cannot be compensated by damages and would be continuous*. In the Case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR, the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

Apart from interference with the Plaintiffs/ Applicants quiet and peaceful possession of the suit property by causing slippage and leaking flood, the Plaintiffs/ Applicants have also accused the Defendant/ Respondent of building without necessary approvals and building more floors than what was approved in its Architectural designs. The Court has seen the said Architectural designs produced by the Defendant/ Respondent in evidence and notes that indeed what was approved was five floors and what the Defendant/ Respondent's building as per what produced as photographic evidence is 7 floors. Further apart from the Architectural drawing no other approval has been produced in evidence. These allegations have not been rebutted by the Defendant/ Respondent and in as much as the Court recognizes that it ought not to make definitive findings at this stage, the said allegations have not been refuted and the Court finds no reason to find otherwise.

If indeed the Defendant/ Respondent is building without the necessary approvals and further if they are going beyond the approved floors, it therefore follows that the Plaintiffs/ Applicants who are adjacent to them may suffer irreparable loss that may not be compensated by way of damages as the same may be the cause of the damages caused to their building. The Court therefore finds and holds that if any further constructions would continue assuming any other, then the risk of the Plaintiffs/ Applicants suffering irreparable loss is high and the Defendant/ Respondent ought to be enjoined.

On the third limb of *if the Court is in doubt then it ought to determine the matter on the balance of convenience*, the Court is not in doubt at all. Even so the balance of convenience always tilts in favour of maintaining the status quo. For avoidance of doubt the status quo in this case will be the condition the Defendant's/Respondent's building is in at the time of the Ruling

Having now carefully considered the *Notice of Motion Application dated 20th November 2019*, brought by the Plaintiffs/Applicants herein, the Court finds it merited and the same is allowed entirely in terms of *prayers no. 3 and 5* of the said Application .

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF APRIL 2021.

L. GACHERU

JUDGE

15/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiffs/ Applicants

Mr. Kimani for the Defendant/Respondent

L. GACHERU

JUDGE

15/4/2021