



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 128 OF 2019**

**SKEETER KWAMBOKA.....PLAINTIFF**

**VERSUS**

**WATER RESOURCES MANAGEMENT AUTHORITY.....DEFENDANT**

**AND**

**OASIS PARK SELF-HELP GROUP *suing through* JOHN MUTINDA...1<sup>ST</sup> INTERESTED PARTY**

**SYOKIMAU RESIDENTS ASSOCIATION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

What is before court for determination is the Plaintiff's Notice of Motion application dated the 25<sup>th</sup> November, 2019 where she seeks the following orders:

**1. Spent**

**2. That the Defendant/Respondent by themselves, their Agents/servants and/or employees be restrained by way of temporary injunction of this Honorable Court from trespassing, demolishing and/or causing damage or in any other way interfering with the suit property known as LR. 12715/254/026 SYOKIMAU pending the Hearing and Determination of this Application.**

**3. That the Defendant/Respondent by themselves, their Agents/servants and/or employees be restrained by way of temporary injunction of this Honorable Court from trespassing, demolishing and/or causing damage or in any other way interfering with the suit property known as LR. 12715/254/026 SYOKIMAU pending the Hearing and Determination of the suit herein.**

**4. That the costs of this Application be in the cause.**

The application is premised on the grounds on the face of it and the supporting affidavit of SKEETER KWAMBOKA where she deposes that she is the registered proprietor of land parcel number LR. 12715/254/026 SYOKIMAU hereinafter referred to as the 'suit land'. She explains that prior to construction of her maisonettes on the suit land, she obtained requisite approvals from the relevant authorities. She claims on 4<sup>th</sup> November, 2019, the Defendant entered into the suit land and earmarked the property for demolition. She insists no notice was issued to her in respect to the demolition and the acts of the Defendant amount to trespass. She contends that the purported demolition of her property is based on the assumption that her maisonettes is debris blocking the natural water channel of river Sabaki despite the said maisonettes being at the legally stipulated distance from the river. She reiterates that unless the Defendant is restrained from trespassing and demolishing her property, she stands to suffer loss and damage. Further, the Defendant will suffer no prejudice whatsoever if the application is allowed.

The Defendant in its submissions claim to have opposed the application by filing a replying affidavit sworn by ROBINSON KIMARI but this was not in the court file.

1<sup>st</sup> Interested Party, SYOKIMAU RESIDENTS' ASSOCIATION opposed the application and filed a replying affidavit sworn by JULIET ISAAC WAMIRI its Chairperson where she deposes that the instant application is frivolous, abuse of the due process and devoid of merit. She contends that the instant application and suit should be dismissed for being res judicata as the issues herein were dispensed with in Machakos ELC 57 of 2017. She states that the Plaintiff's application is overtaken by events and should be dismissed. She avers that the Plaintiff has not adduced any evidence of the requisite approvals from the Defendant. She claims the suit land is among properties on the drainage channel of Sabaki River being LR Nos. 12715/228 and 12715/289 which were subject of Machakos High Court Petition 149 of 2012 in which there are existing orders barring development therein, that the Plaintiff was aware of, before she commenced development.

She reiterates that the issue of construction on the water channel on Sabaki River has been subject of objections by resident members of the Interested Party since 2011 and the 1<sup>st</sup> Respondent issued an order requesting the Plaintiff to restore water channel to its original state only for her to file Nairobi ELC No. 1037 of 2015 which was later dismissed.

The 2<sup>nd</sup> Interested Party, OASIS PARK SELF-HELP GROUP opposed the application by filing a replying affidavit sworn by JOHN MUTINDA its Chairman who deposes that the dispute herein started when the Plaintiff built maisonettes on the suit land which led to the interference of a natural water channel known as Sabaki stream. Further, subsequent to the construction, there was increased flooding in the area during the rainy season culminating in their making a report to TANATHI WATER SERVICE BOARD and the MUNICIPAL COUNCIL OF MAVOKO in order to find a solution to the drainage problem. He contends that the report was availed to the Plaintiff and other developers in the neighboring plots in order to entice them to carry out their construction without obstructing the water channel. He avers that the Plaintiff and other developers in surrounding plots failed and or refused to adjust their construction activities and instead continued dumping in the water channel and raising their grounds to unacceptable levels thus blocking the water flowing downstream. Further, this interfered with their right to clean and health environment. He claims the Plaintiff has failed to annex the requisite approvals and failed to demonstrate whether she obtained the vital including mandatory approvals from National Environmental Management Authority; County Physical Planner; Water Resources Management Authority; National Construction Authority and putting up a site with project name, contractor as well as professionals involved. He reiterates that the Plaintiff is undeserving of the orders sought and that the construction in question has been subject to litigation way back in the year 2012. Further, the Defendant herein, on 4<sup>th</sup> October, 2015 required the Plaintiff to bring down the developments on the suit land which was obstructing the water channel but she proceeded with the construction and cannot seek the court's indulgence for her own misfortune. He confirms that the 2<sup>nd</sup> Interested Party has been involved as a Petitioner in a suit with relatively similar facts being Petition No. 149 of 2012 wherein the Court held that the 2<sup>nd</sup> Interested Party's right to a clean as well as healthy environment had been infringed upon. He states that the Plaintiff proceeded to file Machakos ELC Case No. 57 of 2017 Skeeter Kwamboka Vs WARMA which has a similar application as the present one. Further, the said application was neither allowed nor were orders issued for preservation of suit land and the suit was subsequently dismissed. He reaffirms that the Plaintiff is becoming a vexatious litigant and undeserving of the orders sought.

The Plaintiff SKEETER KWAMBOKA filed a supplementary affidavit reiterating her averments and insisting the suit was dismissed on a technicality for failing to extract and serve Summons to Enter Appearance upon the Defendant, and not on merit. She insists she obtained all the requisite approvals for construction prior to putting up the maisonettes on the suit land. Further, she constructed the maisonettes on the suit land sold to her and at no point did she divert the Sabaki stream nor obstruct it. She claims she was not privy to the case and the suit land was not among those involved in the Petition as indicated. She reiterates that her construction on the suit land has not diverted nor obstructed the natural flow of the Sabaki Stream and have not in any way infringed on the 2<sup>nd</sup> Interested Party's right to a clean and healthy environment. Further, that destroying her property for reasons that she somehow obstructed the natural flow of the Sabaki Stream without consideration of a trial and expert witness will highly prejudice her and her life long investment.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Plaintiff's Notice of Motion application dated the 25<sup>th</sup> November, 2019 including the respective affidavits, annexures and revalling submissions, at this juncture, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the hearing and determination of this suit.

The Plaintiff in her submissions reiterated her averments and contended that she had established a prima facie case with a probability of success. Further, that she will suffer irreparable harm if the injunction does not issue and balance of convenience tilts in her favour. To support her arguments she has relied on the following decisions: ***Giella Vs Casman Brown***; ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) 1KLR 125***; ***J M Gichanga Vs Cooperative Bank of Kenya Limited (2005) eKLR***; ***Pius Kogo V Frank Kimeli Tenei (2018) eKLR***; ***Cyanamid Co. Vs Ethicon Limited (1975) All ER 504*** and ***Exclusive Estates Ltd Vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No. 62 of 2004***.

The Defendant in its submissions insist the Plaintiff has not established a genuine and arguable case that her activities are not obstructing the Sabaki Water course or that she was not issued with notices to stop obstructing the said water course. Further, that the Plaintiff failed to comply with the stop order issued on 4<sup>th</sup> October, 2015 and 7<sup>th</sup> December, 2017 respectively. It states that the injury that the Plaintiff may suffer by removal of constructions that are obstructing the Sabaki Water Course is measurable and compensable by an award of damages should the Plaintiff's suit succeed. Further, the balance of convenience is in favour of not granting an injunction. To buttress its averments, it relied on the following decisions: ***Giella Vs Casman Brown (1973) E.A 358***; ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) 1KLR 125***; and ***Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) eKLR***.

The 2<sup>nd</sup> Interested Party in its submissions insist the Plaintiff is attempting to engage parties herein in unending rounds of litigation. Further, that the instant suit is res judicata as the decision in Machakos ELC Case No. 57 of 2017 is yet to be set aside. It reiterates that the Plaintiff has not satisfied the requirements for grant of an interlocutory injunction. To support its arguments, it relied on the following decisions: ***Giella Vs Casman Brown (1973) E.A 358***; ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) 1KLR 125*** and ***Mohammed Dado Hatu V Dhadho Gaddae Godhana & 2 Others (2017) eKLR***.

In line with the principles established in the case of ***Giella Vs Casman Brown (1973) E.A 358*** as well as the definition of a prima facie case as set in the decision of ***Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) 1KLR 125***, I will proceed to decipher whether the Plaintiff has established a prima facie to warrant the orders as sought.

It is not in dispute that the Plaintiff is the registered proprietor of the suit land wherein she has constructed maisonettes. What is in dispute is the Plaintiff's claim that the Defendant seeks to interfere and has marked her property for demolition claiming she has obstructed the Sabaki Water Course which fact she denies. She denies being served with a notice to that effect and insists she obtained the requisite approvals

before undertaking construction of the maisonettes. I have had a chance to peruse the annexures in the respective affidavits and I note the Plaintiff had actually filed Nairobi ELC 1037 of 2015 (Machakos ELC 57 of 2017) where she sought injunctive reliefs against the Defendant that had served her with a notice dated 4<sup>th</sup> October, 2015 to clear debris from the site on suit land or risk demolition of her property on said suit land to clear way for the Sabaki stream natural water channel. In the affidavit in support of her application dated the 19<sup>th</sup> October, 2015 in Nairobi ELC 1037 of 2015 (Machakos ELC 57 of 2017), she admitted that she had earlier done a trench for the water unfortunately a neighbor refused to do the same which would otherwise render the trench useless. Further, she admits having been issued with a notice, which fact she denies in the instant suit. In her affidavits, she claims to have obtained all the necessary approvals to construct the maisonettes on the suit land but has failed to furnish court with any single one. I note this matter has previously been litigated upon but at this juncture I do not want to deal with whether the matter is res judicata or not as the Plaintiff contends that the previous suit was dismissed on a technicality. Be that as it may while looking at the documents presented by the Defendant and Interested Parties including past pleadings, it is my considered view that their averments are not baseless. Further, I note the Plaintiff was actually served with a notice dated 4<sup>th</sup> October, 2015 at the point of construction and she cannot now feign ignorance.

Based on the facts as presented while associating myself with the above cited judicial authorities, I find that the Plaintiff has failed to establish a prima facie case with a probability of success to warrant the orders sought. In relying on the parameters set in the case of ***Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012***, where it was held that if a party fails to establish a prima facie case, the court need not proceed to deal with the other two limbs and I will decline to do so.

In the circumstance, I find the Notice of Motion application dated the 25<sup>th</sup> November, 2019 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**