



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 284 OF 2018**

**ANDREW OMBOTO.....1<sup>ST</sup> PLAINTIFF**

**FREDERICK OSIRO OMONDI.....2<sup>ND</sup> PLAINTIFF**

**BRENDA SABWA..... 3<sup>RD</sup> PLAINTIFF**

**MIKE NGWENO BARAZA..... 4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MWALIMU NATIONAL INVESTMENT**

**CO-OPERATIVE SACCO LIMITED.....1<sup>ST</sup> DEFENDANT**

**BOARD OF DIRECTORS**

**MWANICOS ACADEMY.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs are residents of Nyayo Estate Embakasi and proprietors of parcels comprised in land reference numbers (L.R. No.) Nairobi/Block 140/088/039, 140/088/034 and 140/088/033. The 1<sup>st</sup> Defendant is the proprietor of L.R. No. Nairobi/Block/140/85 while the 2<sup>nd</sup> Defendants run Mwanicos Academy, a kindergarten erected on L.R. No. Nairobi/Block/140/85 which is adjacent to the Plaintiffs' property.

2. The Plaintiffs filed suit on 6/6/2018, seeking a declaration that the Defendants' construction of classrooms and an ablution block on Nairobi/Block 140/85 is illegal. They also seek a demolition order against the Defendants, a permanent injunction as well as general and exemplary damages.

3. The Plaintiffs' case is premised on the grounds that the Defendants began construction of a multi-storey building for classrooms and an ablution block on L.R. No. Block/140/85 which is adjacent to their homes without consultation. The Plaintiffs aver that the construction amounts to change of user of land since the Defendants intend to change a nursery school into a primary school. The Plaintiffs contend that the Defendants violated Section 52 of the Physical Planning Act which requires that notices for change of user of property must be published in at least two local dailies, one in English and another one in Swahili, and should be displayed at the offices of the area Chief.

4. The Plaintiff's aver that the Defendants failed to publish the change of user in local dailies inviting objections, comments or reservations from the general public to the proposed change of user and also failed to display any notices regarding the change of user at the Embakasi Chief's office contrary to Section 52 of the Physical Planning Act. The Plaintiffs further aver that the Defendants failed to place a site notice on the construction site and that the construction is not in compliance with Section 59 of the Environmental Management and Coordination Act which requires publication of the environmental impact assessment report.

5. The 1<sup>st</sup> Plaintiff gave evidence. He stated that his property is adjacent to the Defendants' property, where the Defendants operate a nursery school. He stated that he became aware of the Defendants' construction in February 2018 when one of the residents in the estate brought up the issue of the ongoing construction. He inquired from the vice chairperson of the estate's umbrella body known as Nyayo Estate Residents Association whether the residents' association was aware of the construction going on in the adjoining land and was informed that the association did not know about it.

6. He stated that the building for the proposed classrooms and school toilets is less than two metres from the perimeter wall separating his home and the school, and that once constructed, the school toilets will be a metre from his kitchen, dining room and bedroom which poses a

health risk to him, his family and other residents. Further, that it will diminish the value of his house. He stated that the Defendants failed to furnish the residents of Nyayo Estate with the approvals they obtained for the construction of the building. The 1<sup>st</sup> Plaintiff produced several documents including photographs and measurements of the distance from the boundary wall to the construction. He insisted that he was never consulted over the environmental impact assessment and maintained that procedure was not followed.

7. The Defendants' Chairman, Gabriel Muthwale gave evidence for the defence. He testified that the 2<sup>nd</sup> Defendant holds a certificate of registration of schools dated 10/06/2005 authorising it to run a school with classes going up to standard eight. He averred that the Defendants informed and consulted the Plaintiffs about the construction works and that they applied for and obtained approvals for change of user from the relevant authorities before commencing the development. He stated that the Defendants complied with all the requirements under the Physical Planning Act and published a notice of change of user in two local dailies. Further, that they placed a site notice on the land, obtained a license from the National Environment Management Authority and a certificate of compliance from the National Construction Authority. He maintained that the Defendants had left the requisite two metres between the wall and the construction. He urged that the Defendants stand to suffer irreparable harm should the project be discontinued.

8. Mr. Gabriel Muthwale produced documents in evidence including registration of the school and change of user notices in the newspapers. He admitted on cross examination that one of the newspaper notices stated that the notice was for change of user from residential to educational facility, a nursery school. He also admitted that they did not publish a notice at the Chief's office. He stated that an environmental impact assessment of the project was conducted through a consultant. He stated that he knew the people who filled the site analysis questionnaires and that the questionnaires contained at pages 13, 14, 15 and 16 of the Defendants' documents were filled by the Defendants' employees while the one at page 17 was filled by the Defendants' employee who reside in Nyayo Estate even though he did not know exactly where she resided. He did not know where court 88 was, but knew that the school bordered a block of flats. The Plaintiffs reside in court 88.

9. On re-examination, Mr. Muthwale stated that the suit land had never been a residential plot but was planned for a nursery school and that the change of user was from nursery school to nursery and primary school. He further stated that the newspaper made an error when it printed that the change of user notice was from residential to educational and that the error was corrected later. However, he did not produce the corrected notice in his evidence.

10. Parties filed submissions which the court has considered. The Plaintiffs submitted that the Defendants did not comply with the requirements of the Physical Planning Act and the Environmental Management and Coordination Act. They relied on the cases of **Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015] eKLR**, **Wainaina Kenyanjui & 2 others v Andrew Ng'ang'a [2013] eKLR** and **County Government of Kitui v Sonata Kenya Ltd & 2 others (2018) eKLR**. They also relied on Legal Notice Number 150 of 2006. The Plaintiffs submitted that the Defendants' project will permanently and adversely affect the Plaintiffs' properties through property value degradation, noise pollution, congestion, lack of sunlight and that it will also affect the water and sewerage reticulation system. They urged that a mandatory injunction would be the appropriate remedy in this case.

11. The Defendants filed written submissions emphasising that they carried out public participation and interviewed the people who would be affected by the proposed construction. They submitted that all stakeholders were consulted but that it was not possible to consult everyone since it was not practically possible due to the number of houses in the estate. They further contended that the Plaintiffs should have taken their case before the National Environmental Tribunal and that Section 59 of the Environmental Management and Coordination Act relied on by the Plaintiffs can only be invoked if there is reason to believe a project has shortcomings. They relied on the case of **ELC Case No. 52 of 2015 Hosea Kiplagat & 6 others v NEMA & 2 Others** in which the court made a distinction between a project report and an EIA study report. They further submitted that they erected a site board, sought and paid for all necessary approvals and that the project is being carried out by duly registered professionals. The Defendants urged that the injunction should be discharged since they have suffered losses and stand to suffer irreparable loss if it continues to be in force.

12. The issue for determination is whether the Defendants met the requirements under the Physical Planning Act and the Environmental Management and Coordination Act before commencing the construction work on the land adjoining the Plaintiffs' houses. Section 52 of the Physical Planning Act states that every notice under any of the provisions of the Act shall be published in the *Gazette*, except notices published under Sections 49 and 50, which shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs.

13. The Defendants produced questionnaires in which the respondents all stated that the proposed development would have no adverse impact on the environment; that the proposed project would create job opportunities; and that they neither had concerns nor objections to the proposed project. The Defendants' witness admitted during the trial that the questionnaires were filled by their own employees including one who resides in Nyayo Estate and that none of them resides in court 88 that borders the Plaintiffs' school.

14. The Defendants tendered evidence of publication of two notices. One notice was published in *The Star* of 9-10/7/2016 which stated that the owners of Block/140/85 located at Nyayo Estate, Nairobi City County, wished to change the use of the plot from nursery to nursery and primary school. Payment for the publication was made on 8/7/16. The second notice was published earlier in *The Standard* of 23/5/2016 and indicated that the owners of Block 140/85 located at Nyayo Estate, Nairobi City County, wished to change the user of the plot from residential to educational facility (Nursery School). The receipt for payment of the publication is dated 14/4/16.

15. The certificate of registration of schools produced by the Defendants does not indicate the suit property on which the school is situated. The certificate cancelled the previous one being No. NUR/250/2002. The Defendants did not produce the previous certificate of registration. The Defendants applied to the Nairobi City County for development permission on 15/07/2016 to change the user of Nairobi/Block 140/85 from nursery to nursery and primary school. The notification of approval given by the Nairobi City County on 28/09/2016 gave several conditions including compliance with Sections 36, 41 and 52 of the Physical Planning Act. The Defendants placed notices in *The Standard* and *The Star* newspapers in May and July 2016 before applying to the Nairobi City County for approval for the change of user. The Nairobi City County gave approval on 28/09/2016, the Defendants should have caused the proposed change of user to be published in at least two local dailies in English and Kiswahili after obtaining approval from the Nairobi City County.

16. The Court finds that the Defendants did not do proper consultation as required by law since the people living in the court with flats adjacent to the school are the ones who should have filled the questionnaires because they will be affected by the Defendants' project. Having the Defendants' own employees fill the questionnaires can only point to mischief on the part of the Defendants and was intended to give misleading information to the authorities in order to obtain approvals and licenses to carry out the project without following the law.

17. Section 52 of the Physical Planning Act provides that the notices under the Act should be published simultaneously in at least two local dailies. The Defendants did not publish the two notices simultaneously and, further, both publications were in the English language yet Section 52 requires one notice to be done in Swahili. The two notices produced by the Defendants are for different changes of user, one is for change of user from nursery school to nursery and primary schools while the second one is for change of user from residential to educational use. The Defendants' witness admitted at the trial that the Defendants did not put up a notice at the Chief's office. These lead to the conclusion that the Defendants did not comply with Section 52 of the Physical Planning Act.

18. The Court has considered the evidence tendered by the parties and their submissions and finds that the Plaintiffs have proved their case on a balance of probabilities. The court declares that the Defendants' construction of the building on L.R. No. Nairobi/Block/140/85 which is adjacent to the Plaintiffs' property is illegal as the Defendants failed to adhere to proper procedures laid down in the law.

19. The Court directs that the construction put up by the Defendants on Nairobi/Block/140/85 which is adjacent to the Plaintiffs' houses will be demolished and issues a permanent injunction against the Defendants. The Plaintiff will have the costs of the suit. The court declines to grant the Plaintiffs damages.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of July 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

No appearance for the Plaintiffs

Mr. Omari for the Defendants

Mr. V. Owuor – Court Assistant