



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 238 OF 2017

HASSAN SAID SALIM MBARAK

AHMED SAID SALIM MBARAK.....PLAINTIFFS

-VS-

AWADH MOHAMED

SALIM MOHAMED.....DEFENDANTS

RULING

1. The Applications under consideration are the Notice of Motion dated 28th June, 2017 by the Plaintiffs, the Notice of Motion dated 11th July, 2017 by the Defendants, the Notice of Motion dated 2nd August, 2017 by the Plaintiffs and the Notice of Motion dated 7th August 2017 by the Defendants.

PLAINTIFFS' APPLICATION DATED 28TH JUNE 2017

2. By a Notice of Motion dated 28th June 2018 brought under Order 40 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Article 40 of the Constitution and the inherent power and jurisdiction of the Court, the Plaintiffs are seeking an order of injunction restraining the Defendants, their servants, agents, workers, proxies, relatives, representatives and/or any other person however from interfering with construction work, harassing and/or intimidating workers thereon, trespassing thereon, interfering with possession thereto plus developments and apertures thereon on all the premises known as **PLOT NO.85/XLVI/MI** pending the hearing and determination of this suit. The Application is based on the grounds in the face of the motion and supported by the affidavit of Hassan Said Salim Mbarak, the 1st Plaintiff sworn on 28th June 2017. The Plaintiffs aver that they are the registered beneficial owners and holders of an indefeasible title to property in all the premises known as **PLOT NO. 85/XLVI/MI** situated in Mzizima area, Mombasa County in which they have commenced and proceeded to construct a storied building. That as a prerequisite to such developments and as per statutory requirements they applied for and obtained approval of the said construction from among others, the National Environment Management Authority, the National Construction Authority the County Government of Mombasa and all other relevant statutory bodies.

3. The Plaintiffs aver that to be sure and concise that the construction shall be within the parameters of the Suit Property, they contracted M/s Edward Kiguru Land Surveyors who certified that the project was within the confines of the boundary of the Suit Property and that the construction has been kept within the confines of the said boundaries and respected all easements, way-leaves and rights of passage. It is the

Plaintiff contention that out of the blue and in complete disregard of the law and usurping the powers and mandate of the said statutory bodies, the Defendants did issue ultimatums, demands and notices to the Plaintiffs which are injurious to the development and null and void *ab initio*. While conceding that the Defendants are their neighbours, the Plaintiffs state that there has been no encroachment, dumping, prevention of passage way, easements or way-leaves. The Plaintiffs further state that on several occasions prior to and after issuance of the ultimatums, notices and demands, the Defendants have harassed the workers on site trespassed onto the site and incited neighbours to invade the suit premises to the great detriment, loss and damage of the Plaintiffs. The Plaintiffs aver that the state of the structure on the suit premises is on a timeline and structured guidelines to be adhered to, hence any stoppage or interference would mean re-doing, re-building and disapproval which would burden the Plaintiffs. They add that immense resources have been deployed up to and until the current scenario hence the illegal actions/omissions of the Defendants ought to be enjoined.

4. The Application is opposed by the Defendants through a Replying Affidavit sworn by Awadh Mohameed the 1st Defendant, on 7th July 2017 in which he deposes that the approvals for the 5th to 7th floors of the Plaintiffs' constructions are incomplete and cannot be applied or deemed to apply retrospectively.

He further deposes that when the Plaintiffs started construction of a four storey building in December, 2016, the Defendants instructed a surveyor to carry out a survey and they received confirmation that the Plaintiffs' building has encroached onto **PLOT NO.86/XLVI/MI**. He avers that not all necessary approvals have been obtained and that the Plaintiffs have completely failed to abide by their statutory and environmental construction obligations.

He further avers that the subject construction has had a detrimental effect on and is a nuisance to the 1st Defendant, his family, neighbours, the environment and the structure of his house and has given particulars.

5. The Defendants deny interfering, intimidating or harassing the Plaintiffs or their employees but through their advocate only wrote demand letter and letters to the relevant bodies raising their concerns and issues. It is the Defendants contention that it was within their constitutional and legal rights to pursue their concerns through the said bodies which are mandated to deal with the respective issues and the application herein is tantamount to asking the court to enjoin the Defendants from exercising their legal rights. The Defendants further contend that the Plaintiffs' construction is illegal and therefore cannot use excuses of timelines or other factors to justify the same or change its illegal nature. According to the Defendants, the Application is brought in bad faith and is calculated to use the court orders to stop the Defendants from raising concerns which emerge from the said construction hence tantamount to an abuse of the Court Process. Relying on legal advice, the Defendants state that they believe the Plaintiffs have not met the threshold for being granted injunction orders and urged the Court to dismiss the Application with costs.

DEFENDANTS' APPLICATION DATED 11TH JULY 2017

6. By an Application dated 11th July 2017 and filed on even date, and brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, the Defendants are seeking Temporary Injunction stopping the Plaintiffs, their agents, servants, employees and/or any other persons however from constructing or from causing any further developments on **PLOT NO.85/XLVI/MI** pending the hearing and determination of the counter-claim herein and that the court conducts a site visit on **PLOT NO.86/XLVI/MI** and **PLOT NO.85/XLVI/MI** prior to hearing and determination of the application herein. The Application is premised upon the affidavits of Awadh Mohamed, the 1st Defendant sworn on 11th July 2017 and on 29th July 2017 and 8th March 2018 as well as the grounds in the face of the motion.

7. Briefly, the Defendants contend that the Plaintiffs have illegally constructed an eight storey building and have encroached on the Defendants' property known as **PLOT NO.86/XLVI/MI**. They further

contend that the Plaintiffs have illegally conducted the construction of the building in derogation of the Physical Planning Act and the Physical Planning (Building and Development)(Control) Rules by failing to make a provision for legally required distance between two adjacent buildings. The Defendants have listed the alleged illegalities, issues and detriments and aver that they have been greatly prejudiced by the said construction. The Defendants state that they have sought redress from the relevant authorities, namely, the National Construction Authority, National Environmental Management Authority and county Government of Mombasa. That though the National Construction Authority directed the Plaintiffs to stop the construction, they have refused, failed and neglected to do so. It is the Defendants contention that the Plaintiffs have come to court with dirty hands and obtained temporary Injunction yet they are the parties on the wrong.

Further, the Defendants argue that continued construction will cause more prejudice to them unless the injunctive orders sought are granted. They also beseech the Court to visit the subject of this suit urgently lest the Plaintiffs pre-empt and negate the purpose of this suit by rectifying all the issues and concerns raised by the Defendants and create a defence that all documents and construction are in order. The Defendants have attached a copy of survey report, photographs and copies of letters to the authorities referred to hereinabove as well as a report by National Construction Authority.

PLAINTIFFS' APPLICATION DATED 2ND AUGUST 2017

8. By a Notice of Motion dated 2nd August 2017 and filed on even date and brought under Section 19 of the Environment and Land court Act, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, the Plaintiffs are asking the court to review and set aside the orders issued in favour of the Defendants on 1st August 2018. The Application is based on the grounds in the face of the Notice of Motion and supported by the affidavit of Hassan Said Salim sworn on 2nd August 2017. It is the Plaintiffs contention that the Defendants misled the court into issuing orders restraining the Plaintiffs from constructing on the Suit Property. The Plaintiffs aver that they obtained approval for the project to include the 5th to 7th floors and attached a copy of the certificate of compliance issued by the National Construction Authority and Certificate of variation by NEMA. The Plaintiffs have denied that the construction poses any danger or inconvenience and added that in any event, the construction has been completed save for minor finishing touches. The Plaintiffs aver that as a result of constant interference by the Defendants, their clients who invested in the project are demanding refund of Kshs.32,000,000 which the Plaintiffs are liable to pay unless the project is finished within the contractual period.

9. The Application is opposed by the Defendants through the replying affidavit sworn by Awadh Mohamed and filed on 27th September 2017 in which they maintain that the construction is illegal and aver that there are specific orders from the National Construction Authority and the County Government of Mombasa suspending the construction and have attached copies of the notices. The Defendants accuse the Plaintiffs of using the court process and orders to overrule the mandate of the said bodies and asked the court to be cautious and defer issuing orders which affect the mandate of those bodies. The Defendants state that no evidence has been shown by the Plaintiffs in support of the alleged demand for refund of Kshs.32,000,000. The Defendants aver that irrespective of the status of construction, the same ought to be stopped as its legality is pending determination in court and if found to have contravened the law, the same will have to be demolished.

DEFENDANTS APPLICATION DATED 7TH AUGUST 2017

10. The Application dated 7th August 2017 by the Defendants seeks reinstatement of the orders issued on 1st August 2017 which had been vacated by the Court following the Plaintiff's application dated 2nd August 2017. The Application is based on the grounds set out in the face of the motion and supported by the affidavit of Salim Mohamed sworn on 7th August 2017. Generally, the facts are same as those in the Defendants application dated 11th July 2017 together with the supporting affidavit dated 11th July 2017 and supplementary affidavit sworn on 26th July 2017. It is the Defendants contention that the construction was stopped by the National Construction Authority and the County Government of Mombasa, facts the

Plaintiffs failed to disclose to the court. The Defendants have annexed copies of a report by the National Construction Authority, copies of letters by the Defendants advocates to the County Director of Planning and Enforcement notice dated 4th August 2017 suspending the approved plans on **PLOT NO.85.XLVI/MI.**

11. The Application is opposed by the Plaintiffs through a replying affidavit sworn by Hassan Said Salim Mbarak on 29th September, 2017 in which he deposes that the Defendants misled the court as the construction was duly approved to include 5th to 7th floors and that the main construction is complete.

12. The Applications were canvassed by way of written submissions which were duly filed by the advocates for both parties. I have considered the applications, the affidavits in support and against and the rival submissions made as well as the authorities cited. The only issue for determination is whether this court should grant the order for an injunction to stop the Defendants from interfering with the construction on **PLOT NO.85XLVI/MI**, or an order to stop the construction as sought by the Plaintiff. The Applications dated 2nd August 2017 and 7th August 2017 are already spent.

13. It is not in dispute that the Plaintiffs and the Defendants are neighbours owning plots adjoining each other. The Plaintiffs are owners of the property known as **PLOT NO.85/XLVI/MI** while Defendants are the owners of **PLOT NO. 86/X/VI/MI**. Whereas the Plaintiffs have constructed a building on their plot, the Defendants allege the said construction has encroached on their plot and that the same has been put up without the necessary approvals and in contravention of various legal requirements. The Plaintiffs, however, maintain that they have obtained approvals from all the relevant bodies and have denied the Defendants allegations and accuse the Defendants of interfering with their construction.

14. The Plaintiffs in support of their application dated 28/6/2017 attached photographs showing the building which according to them was at the final stages of construction. They have also annexed copies of approvals and survey report. Indeed in their demand letters dated 22nd June 2017 and 23rd June 2017 through their advocates, the Defendants admit that the building as at that time had reached 7 storeys. There is no dispute therefore that the construction the subject of claim herein has reached almost completion stage.

15. The Defendants arguments are centred on the point that the building has been constructed in an unsafe manner and has also encroached onto their property causing some damage. The Plaintiffs answer to this is that the construction is within their plot and that approvals were given for the construction.

There is clearly a dispute as to whether the construction is within the confines of the Plaintiffs **PLOT NO.85/X/VI/MI** or it has encroached on the Defendants **PLOT NO.86/XLVI/MI**. There is also a dispute as to whether approvals for the construction were sought and obtained from the relevant bodies. The Plaintiffs and the Defendants have given conflicting evidence. For the court to determine who is right between the parties, it will clearly need more evidence.

16. The orders sought in the Application herein are of Temporary Injunctions and the courts apply the established principles as laid down in **Giella – v- Cassman Brown & Co. Ltd (1973) EA 358**. At the interlocutory stage, the court is not concerned with the merits or demerits of the case itself as filed in the suit and counter-claim. These principles are that:

1. The applicant must show a prima facie case with a probability of success

2. The applicant must show that he would suffer irreparable injury which would not normally be compensated by an award of damages.

3. When the court is in doubt it will decide the application on the balance of convenience.

17. The procedure followed is to decide the issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party and where the

dispute turns on a question of fact about which there is conflict of evidence, the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. See **R. -V-FULHAM RENT TRIBUNAL EX-P. ZEREK (1951) 2KB 1.**

18. Quite evidently, the acts complained of by the Defendants must have commenced sometime back and have now reached near completion. The Defendants allege that the construction was being done without approvals from the relevant bodies. However, the same bodies have given conflicting reports, either in favour of the Defendants or in favour of the Plaintiffs. There is also no evidence of what action those bodies took in the event of violation by the Plaintiffs. From the facts before the court, there is no showing that the Plaintiffs have, prima facie, acted illegally. The Plaintiffs' action may very well be held, after full hearing, to have been lawful and not in breach of any of the Defendants' rights. The Defendant's application for injunction has clearly been instituted late in the day after the acts complained of have taken place and have neared completion. The only course open to the Defendants is to sue for damages which they have done through their counter-claim. That being so, the order seeking to restrain the Plaintiffs is clearly not capable of being granted at this stage.

19. The construction by the Plaintiffs has already pointed out has nearly reached completion. As I pointed out earlier the court would need more evidence on the issue whether or not the said construction has encroached on the Defendants plot. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, in my view that Plaintiffs have established a prima facie case with a probability of success against the Defendants. In my view, it is clear that the Plaintiffs have shown their right to undertake the construction without interference by the Defendants. As regards irreparable damage, I have taken the view that the damage the Plaintiffs will be subjected to by the Defendants interference will be enormous that cannot be quantified in damages as the Plaintiffs who are about to complete the construction have timelines to meet. The balance of convenience, if I had doubt, would tilt in favour of the Plaintiffs who commenced the construction without hindrance and are now nearing completion.

I am of thus satisfied that the facts as presented in this case demonstrate that the Plaintiffs have satisfied the threshold for granting of an interlocutory injunction.

20. Upon hearing the four applications herein, and arising from the above reasons, the final orders of this court are as follows:

- a) The Notice of motion dated 28th June 2017 is allowed in terms of prayer 3 thereof.**
- b) The Notice of Motion dated 11th July 2017 is dismissed.**
- c) The Notice of Motion dated 2nd August 2017 is already spent.**
- d) The Notice of Motion dated 7th August 2017 is already spent.**
- e) Considering the circumstances of this case, each party to bear their own costs.**

It so ordered

Delivered, signed and dated at Mombasa this 5th July, 2018.

C. YANO

JUDGE