



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. E003 OF 2021

JASON EDWARD MATUS.....1ST PETITIONER

CATHERINE ROSEMARY BOND.....2ND PETITIONER

VERSUS

SAMIT GEHLOT.....1ST RESPONDENT

INTEX CONSTRUCTION.....2ND RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

CITY COUNTY GOVERNMENT OF NAIROBI

SPRING VALLEY RESIDENTS ASSOCIATION.....INTERESTED PARTIES

RULING

1. Through the amended notice of motion dated 16/2/2021, the Petitioners sought a conservatory order of injunction to prevent, stop, discontinue or restrain the Respondents or anyone claiming under them from carrying out construction of the double-storey dormitory block comprising 10 bedrooms and 10 bathrooms, and a double-storey multi-dwelling block comprising 2 apartments on the ground floor and first floor with 3 bedrooms and 2 bathrooms in each apartment, or any other developments including alterations and extensions to the existing house on a portion of the property known as land reference number (L.R. No.) 7158/148 along Bendera Lane in Upper Spring Valley Estate in Nairobi City County (“the Suit Property”), without compliance with the legal requirements for public participation or contrary to the Nairobi City Development Ordinances and Zone Regulations of 2004, the Physical Planning Act, Part VI of the Environment Management and Coordination Act (EMCA) and the Constitution of Kenya. The Petitioners sought these orders pending hearing and determination of the petition which they urged the court to certify as urgent so that it can be heard on priority basis.

2. The application was made on the grounds that the Petitioners had presented a *prima facie* case with high probability of success and that unless it was urgently heard, the Petitioners and the public who are reside in Upper Spring Valley Estate where the developments are being carried out, would suffer irreparable loss. The Petitioners contended that the Respondents had threatened or intended to commence construction of a double storey dormitory block and a double storey dwelling house comprising apartments without obtaining the requisite approvals under the EMCA, the Physical Planning Act and without involving the relevant stakeholders in the preparation of or obtaining of approvals for the proposed development in the controlled area known as Upper Spring Valley Estate in Nairobi.

3. The Petitioners claimed that the Respondents had contravened fundamental requirements under Article 69 of the Constitution and part VI of EMCA by failing to engage in public participation or to involve the relevant stakeholders including the Petitioners and 3rd Interested Parties in preparation of the proposed development which is deleterious and harmful to the environment. The Petitioners contended that the proposed development would have adverse, deleterious and irreparable environmental and social impacts on the surrounding area which had not been taken into account through public participation or in any other manner and mitigated by the Respondents as required by EMCA and the Physical Planning Act.

4. The petition was supported by the affidavit which the 2nd Petitioner swore on 15/2/2021. She averred that upon service of the petition on the Respondent and the Interested Parties on 12/2/2021, she was informed by the tenant in her property that the Respondents erected a notice board behind the gate of the 1st Respondent’s property where the developments are being carried on 13/2/2021. That on conducting due

diligence, she discovered that the 2nd Respondent was a construction company in Kenya with the 1st Respondent being its managing director. She averred that the notice board was erected with changes on the purported client and the proposed project with the aim of defeating the instant petition.

5. The 2nd Petitioner maintained that the alleged alterations or extensions on the existing house were statutory developments which must comply with EMCA, the Physical Planning Act and that approvals of the 1st and 2nd Interested Parties must be obtained which must involve prior public participation of the stakeholders who comprised of the Petitioners and the Third Interested Party. She averred that the notice board did not give particulars of the statutory approvals and added that neither the 1st Petitioner nor she were consulted on the abuse before the development commenced.

6. She deponed that the Chairman of the 3rd Interested Party had advised her that the Respondents did not carry out any stakeholder or public participation to consider views on the proposed project on the Suit Property. She maintained that the impugned project did not comply with the law and that it was illegal with tremendous hazardous environmental effects which violates or threatens to violate their right to a clean environment. She attached a copy of the signpost erected at the Suit Property which reads that the project relates to alteration and extension of existing house. She attached photographs showing excavation and the building of a foundation on the Suit Property. She invited the court to look at the supporting affidavit filed earlier with the petition.

7. The 1st Respondent swore the replying affidavit in opposition to the application in which he deponed that he was a director of the 2nd Respondent, which is the legal owner of the suit land measuring 3.4 acres described as L.R. No. 7158/158. He deponed that the 2nd Respondent had enjoyed its right to the Suit Property since its acquisition as the indefeasible owner and that it had complied with the laws by payment of rates and rent. He deponed that he was not in any way personally responsible for the actions of the 2nd Respondent. He stated that he had been informed that the 2nd Respondent had a right to acquire and own property in accordance with Article 40 of the Constitution and that no limitations could be imposed on its ownership and the use of its property without the due process of law being followed.

8. He averred that in exercise of its rights over its property, the 2nd Respondent made an application in accordance with the Physical Planning Act, the County Government (Adoptive By Law) (Building) Order 1968 L N 15/69 and the City of Nairobi (Building) By Laws 1948 G N 313/1939 to the 2nd Interested Party on 9/12/2020 for approval to make alterations to the existing dwelling house by submitting plans showing the extent of alterations to be made to the existing dwelling house.

9. He averred that after consideration of that application, the 2nd Interested Party issued approval number CPF–AU412 to the 2nd Respondent requiring it to commence the proposed works within 12 months of the date of the approval. He added that the 2nd Respondent also procured approval from the National Construction Authority being approval number 5312741571033, to undertake the works on its property. He averred that the proposed development was well within the four storey threshold set by the 2nd Interested Party for the Spring Valley area. He attached the guide from the 2nd Interested Party.

10. He contended that if the Petitioners were dissatisfied with the decision of the 2nd Interested Party the proper procedure was for them to initiate proceedings under the Physical Planning Act to the Liaison Committee before approaching this court for redress. He contended that in view of the 2nd Respondent's ownership of the Suit Property and its engagement with the relevant authorities for permission, the Petitioners had no right against the 2nd Respondent to warrant presentation of the instant application. He maintained that the 2nd Respondent had the right to make the approved alterations to the existing dwelling house on its property and that it was misleading and irresponsible of the Petitioners to allege that it did not have valid approvals. He averred that the Petitioners were under a misapprehension that the 2nd Respondent was under a duty to consult them and engage them in its use of its property. He was of the opinion that the Petitioners were misguided in their quest to have the 2nd Respondent held responsible for the acts of administrative agencies.

11. The 1st Respondent averred that the proper procedure for the Petitioners was to initiate complaints to the Interested Parties or judicial review proceedings in court. He averred that presentation of these proceedings required the 3rd Interested Party's authority which had not been provided to the court. He added that the Petitioners had not shown that they initiated any complaint with the 1st and 2nd Interested Parties for them to sanction the 2nd Respondent.

12. He contended that the Petitioners had not demonstrated with reports or reliable findings that the works by the 2nd Respondent are in any way adverse, deleterious or likely to cause harm to the environment. Further, that there was no evidence that the alterations to the existing dwelling house would adversely impact the water supply, sewerage, population, existing infrastructure or waste management system to the detriment of the residents. He deponed that the information given by the Petitioners was not true and that the 2nd Respondent had valid approvals for the alterations to the existing dwelling house. He argued that the Petitioners had presumed and arrogated to themselves knowledge of the extent and character of the works by the 2nd Respondent and the legal requirements pertaining to those works which relate to modification of the existing structure. He argued that the proceedings by the Petitioners did not disclose any cause of action against the 2nd Respondent and did not show the likelihood of success in providing the allegations against the 2nd Respondent pertaining to improperly procuring of licenses.

13. The 2nd Interested Party filed grounds in opposition to the application. It contended that the Petitioners had commenced these proceedings without exhausting the relevant statutory provisions of the law and specifically that there was a clear procedure under the Physical Planning Act on how disputes of this nature ought to be resolved. It contended that in issuing the necessary approvals it acted within the confines of the law and that if the court were to allow the application it would amount to the court interfering with the principle of separation of powers. It urged the court to dismiss the application as lacking merit.

14. Parties filed submissions which the court has considered. The Petitioners submitted that the application disclosed a *prima facie* case and that they had satisfied the legal and evidential threshold in the case of **Board of Management of Uhuru Secondary School v City County**

Director of Education and 2 other [2018] eKLR where the court held that a party seeking a conservatory order was only required to demonstrate that he had a *prima facie* case with a likelihood of success and unless the court granted the conservatory order there was danger that it would suffer prejudice as a result of the violation or threatened violation of the Constitution.

15. The Petitioners relied on Articles 42, 69 and 70 of the Constitution together with Section 3 (1) of EMCA and urged that they were seeking to restrain the Respondents' activities in respect of the proposed development on the Suit Property which violated provisions of the law. They contended that the Respondents were required to obtain an Environmental Impact Assessment license from the 1st Interested Party pursuant to Section 58 of EMCA. They argued that going by the public notice on the Respondents' property which mentioned alterations to the existing dwelling house, they would be categorised as small scale rehabilitation, maintenance or modernizations under Rule 1 (k) of the second schedule to EMCA. They argued that the proposed multi-storey dwelling constitutes projects under Rule 2 and so far as they are out of character with the surrounding and or any structure with scales not keeping with the surrounding which is zoned by the 2nd Respondent as a low density residential one family house.

16. The Petitioners submitted that the replying affidavit did not attach evidence of approvals or licenses from the 1st Interested Party. They maintained that no public participation or consultation was undertaken.

17. The Petitioners submitted that the jurisdiction to redress violation of the right to a clean and healthy environment under Articles 22, 23 and 70 of the Constitution as well as Section 3 of EMCA was the preserve of the court pursuant to Article 162 of the Constitution. The Petitioners relied on the decision in **J. S. Muiru and 2 Others v Tigoni Treasures Limited and 2 Others [2018] eKLR** where the court held that public participation was a critical requirement in safeguarding the right to a clean and healthy environment.

18. The Petitioners contended that upon service, the Respondents embarked on hurried construction activities with the intent to defeat this petition. They relied on the photos taken of the development being undertaken by the Respondents on the Suit Property. They urged that the damage to the environment would be irreversible and that the precautionary principle was applicable in this case to prevent environmental degradation. The Petitioners submitted that the right to a clean and healthy environment was a public right which outweighed the private right to use land under Article 40 of the Constitution. The Petitioners submitted the case law relied on by the Respondents was inapplicable in this case which deals with the right to a clean and healthy environment.

19. The 2nd Interested Party submitted that the Petitioners should first have lodged a complaint or an appeal against the decision of the Chief Officer, Urban Planning to the County Physical and Land Use Planning Liaison Committee concerning the Respondents' development pursuant to Section 61 (3) of the Physical and Land Use Planning Act, 2019. Further, that once the County Physical and Land Use Planning Liaison Committee makes a decision a party dissatisfied with it has the right to appeal to the court under Sections 61 of that Act. It added that the National Environmental Tribunal established under EMCA had powers under Section 129 to determine complaints by a person aggrieved by the grant of a licence or permit or the refusal to grant a license or permit. They argued that the Petitioners should have lodged their complaints with the appropriate forum while maintaining that the approvals given were properly issued. The 2nd Interested Party urged the court to dismiss the application based on the fact that the Petitioners had not exhausted the avenues provided under the Physical and Land Use Planning Act 2019 and EMCA.

20. The Respondents submitted that the Petitioners had failed to satisfy the requirements for grant of orders of injunction. Further, that the 2nd Respondent was the registered proprietor of the Suit property on which it was undertaking extensions to an existing dwelling house which was approved by the 2nd Interested Party. Further, that it had complied with the Physical Planning Act. The Respondents submitted that the Petitioners were relying on hearsay without any evidence to show that the 2nd Respondent's works were adverse, deleterious or likely to harm the environment. The Respondents submitted that the 2nd Respondent had proprietary rights over the suit land under Article 40 of the Constitution.

21. The Respondents contended that there were no letters of complaint written by the Petitioners to the Interested Parties or Respondents seeking information on the alterations being undertaken to an existing house to ascertain that it was not the number of storeys described by the Petitioners.

22. The Respondents further submitted that the issues which the Petitioners raised fell within the remit of administrative law and that the primary issue was whether the licences and permits granted to the 2nd Respondent conformed to legislation. The Respondents urged that the balance of convenience tilted in favour of the 2nd Respondent as owner of the Suit Property who obtained approvals from the 2nd Interested Party to undertake the works of extending an existing dwelling house on its property. They added that as owner, the 2nd Respondent should not be deprived of the right to use and enjoy its property.

23. The issue for determination is whether the court should grant the conservatory orders sought by the Petitioners. The question is, do the Petitioners have a *prima facie* case with probability of success in the petition? The Respondents contended that that the presentation of these proceedings required the 3rd Interested Party's authority which the Petitioners had not been provided to the court. The court does not agree with this contention. Article 22 of the Constitution allows the Petitioners to institute proceedings in court where they allege that their rights have been infringed, denied or are threatened.

24. The Respondents contended that they had a right to acquire and own property in accordance with Article 40 of the Constitution and that no limitations could be imposed on the 2nd Respondent's ownership of and use of its property without the due process of law being followed. If the court understood the Petitioners' claim correctly, they were not challenging the Respondents' ownership of the Suit property but were contesting the Respondents' development of their land which they argued would violate their right to a clean and healthy environment. The right to property under Article 40 of the Constitution is not absolute as can be gleaned from Article 24 of the Constitution on the limitation of rights and fundamental freedoms. The use of land by an owner is also subject to various laws including the laws relating to planning and environmental considerations under the Physical and Land Use Planning Act, 2019 which repealed the Physical Planning Act, and EMCA respectively.

25. The Petitioners deponed that after effecting service on the Respondents a notice board was erected on the Suit Property where the developments were being carried out on 13/2/2021. This confirms that the Petitioners and the residents there were not aware about the developments the Respondents were carrying out on the Suit Property. That also means that the Petitioners could not possibly have challenged the approvals under EMCA or the Physical and Land Use Planning Act, 2019 which the Respondents claimed that they obtained from the 1st and 2nd Interested Parties for the development. The court notes that the approvals which the Respondents contended that they obtained for the alterations being undertaken to an existing house were not exhibited by the Respondents.

26. The court notes that the guide for Nairobi City Development Ordinances and Zones prepared by the Department of the City Planning of the City Council of Nairobi which the Respondents produced in evidence gave the type of development allowed for Upper Spring Valley as low density residential one family house with the minimum area of the land being 0.2 hectares.

27. The Respondents maintained that they were undertaking extensions to an existing dwelling house which they claimed was approved by the 2nd Interested Party. Looking at the photographs which the Petitioners produced of the developments being undertaken by the 2nd Respondent on the Suit Property, it is evident that what is being erected is the foundation of a new building without any sign of an existing dwelling house nearby that is being extended as the Respondents contended. This lends credence to the Petitioners' concerns that the development being undertaken by the Respondents may well be a dormitory block comprising many bedrooms, bathrooms and several apartments. The Petitioners have established that they have a *prima facie* case with a probability of success.

28. The court grants a conservatory order of injunction to restrain the Respondents or their agents from carrying out any construction of the block comprising bedrooms, bathrooms and apartments, including any alterations and extensions to the existing house on L.R. No. 7158/8 along Bendera Lane in Upper Spring Valley Estate in Nairobi City County without compliance with public participation legal requirements or contrary to Nairobi City Development Ordinances and Zones Regulations, 2004, Physical Planning Act pending hearing and determination of this petition. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF MAY 2021

K. BOR

JUDGE

In the presence of: -

Mr. Oscar Litoro for the Petitioners

Mr. J. Impano holding brief for K. Mutea for the Respondents

Ms. T. Katana holding brief for George Kithi for the 2nd Interested Party

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Interested Party