REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 14 OF 2020

SYOKIMAU RESIDENTS ASSOCIATION.....PLAINTIFF

VERSUS

BRISK INTERNATIONAL LIMITED.....1ST DEFENDANT

THE COUNTY PHYSICAL PLANNER,

MAVOKO SUB-COUNTY .....2ND DEFENDANT

THE COUNTY GOVERNMENT OF MACHAKOS.....3RD DEFENDANT

AND

THE NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. In the Notice of Motion dated 21st February, 2020, the Plaintiff has prayed for the following reliefs:

> ***a. That a temporary injunction be issued against the 1st Defendant/Respondent by itself, its agents, servants and/or representatives stopping all construction works on the suit property pending the hearing and final determination of this suit.***
>
> ***b. That the Officer Commanding Station, Mlolongo Police Station be directed and/or to authorized to ensure the above orders are enforced.***
>
> ***c. That the Plaint, this Application and the Supporting Affidavit together with any ex-parte order this Honourable Court may deem fit to grant, be served on the Defendants/Respondents and the Interested Party for inter-partes hearing within fourteen (14) days.***
>
> ***d. That costs of this Application be in the cause.***

2. The Application is supported by the Plaintiff's Chairman who has deponed that the Interested Party planned for public hearings and invited affected persons for a public hearing in respect to the development of parcel of land known as L.R. No. 13323/117, 118, 119 and 120 *(the suit property)* and that instead of waiting for the recommendation of the Interested Party, the 1st Defendant has commenced and continues to develop the suit property to the prejudice of the Plaintiff's members.

3. When the issue of developing the suit property was raised with the 2nd Defendant, it was deponed that the 2nd Defendant issued an enforcement notice pursuant to the Physical and Land Use Planning Act requiring the 1st Defendant to restore the suit property in its original condition and not to carry out development on the suit property and that the 1st Defendant continued with the impugned development of the suit property.

4. The Plaintiff's Chairman finally deponed that the continued development of the suit property by the 1st Defendant is intended to curtail the Plaintiff's members' and other residents' rights to access to community facilities and therefore suffer irreparable loss.

5. In reply, the 1st Defendant filed an Application dated 30th May, 2020 and sought to have the interim orders of injunction set aside. The 1st Defendant's Director deponed that he purchased the suit property from United Insurance Company for Kshs. 2,000,000 in the year 2016; that the 1st Defendant's Application for approvals met all the requirements and that the 1st Defendant took out a commercial loan to develop the

suit property.

6. In his Affidavit in reply to the Plaintiff's Application, the 1st Defendant's Director deponed that the suit properties were designated as commercial properties; that the 1st Respondent applied and paid for approvals for the development plans and that the Syokimau Farm Limited, the initial proprietor of the suit property, granted him approvals for development of the suit property.

7. In the Further Affidavit, the Plaintiff's Chairman deponed that there is nothing in the annexture pointing to approvals for development issued by Syokimau Farm Limited; that even if there were such approvals, the same is subject to approval by the 2nd Defendant/Respondent which is tasked with regulating development within the jurisdiction where the suit property is situated and that the 1st Respondent had the option of seeking the intervention of the court to stop the proceedings by the Interested Party.

8. It was deponed by the Plaintiff's Chairman that from the list of allotees of the various plots allocated by Syokimau Farm, L.R. No.12617/267 was not allocated to any person having been surrendered for public use; that the alleged developments cited by the 1st Defendant were initiated before the intervention of the Plaintiff and that the 2nd Defendant suspended development on the L.R. No. 12715/267 which comprise the suit property.

9. In his submissions, the Plaintiff's advocate submitted that the 1st Defendant in its Replying Affidavit claims that it applied and paid for the approval for the development plans; that no evidence has been tendered of approved development plans and that all approvals are subject to the approval by the 2nd Defendant. Counsel relied on Section 72 of the Physical and Land Use Planning Act which provides as follows:

> *"A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that:*
>
> *a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or*
>
> *b) any condition of a development permission granted under this Act has not been complied with." (Emphasis added)*

10. It was submitted that on that ground alone, the Plaintiff/Applicant has established a *prima facie* case with probability of success; that from the 1st Defendant's proposed sub-division of L.R. No. 12715 comprising the entire parcels of land within what was known as *"Syokimau Farm,"* it is clear that L.R. No 12715/267 was designated for public use and that this is collaborated by the "*Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District"* issued on December 2011.

11. According to the Plaintiff's counsel, the fact that L.R. No. 12715/267 was subsequently sub-divided and new titles issued, including one for the suit property, does not negate that such title is held subject to the interest of the Government, which interest crystallized upon approval of the sub-division of L.R. No. 12715 with the conditional of surrender of L.R. No. 12715/267 for public utility.

12. Counsel for the Plaintiff submitted that in the instant case, the 1st Defendant has chosen to proceed with the construction without development permission from the 2nd Defendant and that if the 1st Defendant proceeds with construction, it will not only render otiose the determination of the complaint by the Interested Party, but the members of the Plaintiff will be denied access to the use of the suit property designated for public facilities.

13. On his part, the 1st Defendant's counsel submitted that all the necessary approvals were obtained from the County Government of Machakos; that the 1st Defendant has shown the commercial buildings that are coming up in the neighbourhood of the suit property and that the suit property is private land having been sold to the 1st Defendant by United Insurance Company.

14. It was submitted that the 1st Defendant is the registered proprietor of the suit property; that the 1st Defendant took a loan to finance the development of the suit property and that unless the interim injunctive orders granted by this court are not vacated, the 1st Respondent will suffer irreparable damage that cannot be compensated by damages.

15. This suit was commenced by way of a Plaint. In the Plaint, the Plaintiff has sought for the following order:

> *a) A permanent injunction against the 1st Defendant or its agents stopping all construction works on property Land Reference Numbers 13323/117, 118, 119 and 120 (original number 12715/267).*

16. In the meantime, the Plaintiff has sought for an interim injunction stopping the development of the suit property. The test for granting of an interlocutory injunction was considered in the ***American Cyanamid Co. vs. Ethicon Limited (1975) A AER 504*** case in which the court provided that for an injunction to issue, the Applicant must satisfy three (3) elements, namely:

> *i) There must be a serious/fair issue to be tried;*
>
> *ii) Damages are not an adequate remedy;*
>
> *iii) The balance of convenience lies in favour of granting or refusing the Application.*

17. These are the same grounds that had been postulated earlier on in the case of ***Giella vs. Cassman Brown (1973) EA 358*** as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

18. What amounts to a *prima facie* case was explained in ***Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** as follows:

> *"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

19. In ***Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR,*** the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

> *"…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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*

20. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

21. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation *(See **the Nguruman case**)*.

22. The Plaintiff's prayer in the Application dated 21st February, 2020 is seeking to stop the 1st Defendant from developing the suit property. The Application is premised on two grounds. Firstly, that the 1st Defendant has not obtained building permission from the 2nd and 3rd Defendants and secondly, that the suit property is public land.

23. The 1st Defendant has not denied that it was served with an enforcement notice dated 3rd February, 2020 by the 3rd Defendant. In the said notice, the 3rd Defendant stated that the 1st Defendant was carrying out development on the suit property without development permission from the County Government of Machakos. The Enforcement Notice further required the 1st Defendant to restore the suit property to its original condition.

24. Although the 1st Defendant has deponed that he paid to the 3rd Defendants the requisite fee for permission to develop the suit property, the approved building plans were not placed before the court. Section 72 of the Physical and Land Use Planning Act provides as follows:

> *"A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that:*
>
> *a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or*
>
> *b) any condition of a development permission granted under this Act has not been complied with."*

25. To the extent that the 1st Defendant does not have the approved development plans from the 3rd Defendant, it is my finding that the Plaintiff has established a *prima facie* case to the extent that the development of the suit property was being undertaken by the 1st Defendant without the requisite approval of the 3rd Defendant.

26. However, considering that the Plaintiff is not challenging the 1st Defendant's title in the Plaint, and having prayed in the Plaint that the injunction restraining the 1st Defendant should issue pending the determination of the legality of the 1st Defendant's title by the National Land Commission, I shall not delve into the issue of whether, *prima facie*, the suit property is public land or not. It is the National Land Commission or this court, once called upon to do so, which shall make that decision.

27. For those reasons, I allow the Plaintiff's Application dated 21st February, 2020 as follows:

> ***a) Pending the hearing and determination of the suit, the 1st Defendant, its agents, servants and or representatives is hereby***

restrained from construction works on Land Reference Numbers 13323/117, 118, 119 and 120 (Originally L.R. No. 12715/267).

b) The issue of the propriety of the titles of Land Reference Numbers 13323/117, 118, 119 and 120 (Originally L.R. No. 12715/267) to be determined by the National Land Commission, or by this court, upon amendment of the pleadings.

c) Parties are at liberty to apply.

d) Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 4TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE