



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. E077 OF 2021

HOME BRIDGE LIMITED..... PLAINTIFF/ APPLICANT

VERSUS

TATU CITY LIMITED.....DEFENDANT/ RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **21st July 2021**, brought by the Plaintiff/Applicant seeking for orders that;

- 1. That this Honourable Court do grant a temporary injunction restraining the Defendant/Respondent either by itself or through its Directors, Servants or Agents from interfering with the construction, sale occupation and quiet possession of Block 18 – Lifestyle Heights Estate erected on a portion of Precinct 4B-2 forming part of Land Reference No. 28867/1 pending the hearing and determination of this suit***
- 2. That the costs of this Application be provided for***
- 3. That this Honourable Court do grant further or any other orders that it may deem fit to grant.***

The Application is premised on the grounds that the Plaintiff/ Applicant entered into a lease agreement dated **20th July 2016**, and **22nd August 2016**, respectively with the Defendant/Respondent as Lessee and Lessor respectively to lease unit **No. L4 -01 and L4-02**, measuring **30 acres** or thereabouts being Precinct **4B-2**, forming part of **L.R 28867/1**. That the Lease provides that the Defendant/ Respondent has an obligation to incorporate **Precinct Owners Association** and various **Properties Owner Association**, for every Precinct to operate and manage matters specific to the respective precincts. Further, that the Defendant/ Respondent is governed by a Master Declaration of Covenants conditions and restrictions dated **30th July 2014**, between the Defendant/Respondent and **Tatu City Property Owners Association**. That the Master Declaration establishes a **Development Control Committee(DCC)**, appointed by the Defendant/ Respondent with an obligation to issue approvals of any final construction drawings and specifications before commencement of any construction, and/or improvement of any parcel.

That the Plaintiff/ Applicant obtained the necessary approvals from the **DCC** for **L.R 4B-02**, vide a letter dated **15th November 2016**, and approval of parcel **No. L4-01** vide letter dated **18th February 2019**, erected on a portion of **Precinct 4B-2**, forming part of **L.R 28867/1**. That the Plaintiff/ Applicant further obtained approvals from the **County Government of Kiambu**, in accordance with the Lease and the Master Declaration. That subject to the said approvals, the Plaintiff/ Applicant commenced construction of **Block 18-Lifestyle Heights Estate**, which is at an advanced stage of development. Further, that the Plaintiff/ Applicant advertised and commenced the sale of the units of **Block 18**, which sale is by way of **off plan** and therefore any interference with the construction, sale, occupation and quiet possession of **Block 18**, will occasion financial loss to third parties. That despite obtaining approvals, the **DCC** issued a **Stop Order** vide a letter dated **9th March 2021**, halting the construction of **Block 18**. That the Plaintiff/ Applicant has invested colossal sums of money into the purchase, construction and development of the suit property, making it the largest project in **Tatu City**. That the Defendant's / Respondent's allegations that the Plaintiff/ Applicant has failed to get **DCC** approvals are misguided and an afterthought. Further that the said **Stop Order**, is malicious and intended to occasion loss to the Plaintiff/ Applicant and it is therefore not plausible under what circumstances the approved drawings were purportedly cancelled.

That the Defendant/ Respondent has acted in breach of the Plaintiff/ Applicant's legitimate expectation as the **Stop Order** was issued after the approval had been granted by the Defendant/ Respondent. That the Defendant/ Respondent's actions are in **bad faith** and **intended to hurt** the development project. The decision is unreasonable and meant to deprive the Plaintiff/ Applicant of its lawful right of the use of the property.

That the Plaintiff/ Applicant commenced construction following the advice, assurance and subsequent approvals by the Defendant/ Respondent and therefore the Defendant/Respondent cannot be allowed to allege that the construction was without approval.

In his Supporting Affidavit, **Peter Murage Karoki**, the Director of the Plaintiff/ Applicant averred that the Plaintiff/ Applicant by way of a letter dated **5th July 2021**, issued a demand to the Defendant/ Respondent to lift the **Stop Order**; However, the Defendant/ Respondent has refused to make good the Applicant's claim. That it is in the interest of justice to ensure that the underlying claim is not rendered nugatory and otherwise superfluous by the mischievous actions of the Defendant/ Respondent, and thus it is only fair that the Orders sought are granted.

The Application is opposed and the Defendant/ Respondent filed a Replying Affidavit sworn by Alex **Kahu Kamuhia**, on **9th August 2021** who is the **DCC** Chairman, and who averred that **Clause 1.4**, of the Master Declaration provides for among other purposes protection of the investment of the owner of each parcel against such improper development and undesirable use of surrounding parcels, as will depreciate the value of the remaining parcels. Further, that **Clause 8.3**, of the Master Declarations, provide that the **DCC** has a right to disapprove any final construction drawings/ Specifications for failure to comply with the Master Declaration. That **Clause 6.7.4**, of the Lease required that the Plaintiff/ Applicant to ensure that erection or alteration or extension made on any building is in accordance with the building plans submitted and approved in writing first by the **DCC** and thereafter the **Kiambu County Government**.

That on **15th November 2016**, the **DCC** approved the Plaintiff's/ Applicant's building plans reference number **201611-15-4B-02-LH** subject to approval by the **Kiambu County Government**. That the Defendant's/Respondent's property is adjacent to **Kijani Ridge** and **clause 6.7.2**, provides that the Plaintiff/Applicant shall ensure that the building constructed would not in any way devalue the neighboring properties and specifically does not block or overlook the properties in **Kijani Ridge**. That during the review of the approval, the Plaintiff/ Applicant explained that in order to comply with **Clause 6.7.2**, the building blocks adjacent to **Kijani Ridge** would have a **ground floor**, plus additional levels within the profile rising towards the South. Further, that under **Clause 8(1)**, of the approval, the Plaintiff/ Applicant was required to ensure that any modification of the building plans were approved by the **DCC** in writing before such modifications were effected. That the Plaintiff/ Applicant requested and was granted an approval of the amended plans by the Defendant/ Respondent on **18th February 2019**.

That the Plaintiff/ Applicant in breach of its obligations under the **Master Declarations** and the leases proceeded to construct ground floor plus four floors contrary to the approved plans. That via an email date **4th March 2021**, the **DCC** informed the Plaintiff/ Applicant that it had noted the ongoing constructions and requested for the designs for the new block for review, Further that by a letter dated **8th March 2021**, the **DCC's** architect gave its observations on the project and confirmed that all the Plaintiff/ Applicant building blocks next to **Kijani Ridge**, ought to be a minimum of four floors and on **9th March 2021**, the **DCC** issued a **Stop Order** on the construction, until the requisite **DCC** and statutory approvals were procured and requested the Plaintiff/Applicant to submit the reviewed designs for approvals.

Further that by a letter dated **11th March 2021**, the Plaintiff/ Applicant informed the Defendant/ Respondent that it had complied with all approvals and requested for a meeting to amicably resolved the dispute. That on **12th March 2021**, the Defendant/ Respondent reiterated that no drawings to increase floors were submitted to the **DCC**, and by a letter dated **16th March 2021**, the Plaintiff's/ Applicant's Contractor confirmed that it will comply with the said **Stop Order**, and requested for a meeting for review session of the design amendment. Further, that on **24th June 2021**, the Defendant/ Respondent informed the Plaintiff/ Applicant that the design and letters of the building were significantly different from the architectural design and letters submitted to the **DCC** and the Defendant/ Respondent instructed its Advocates to issue a **demand notice** for violation of the Building Plans. That the Defendant/ Respondent cannot be held liable for damages, and/or losses incurred by the Plaintiff/ Applicant from advertising and offering for sale. That the Plaintiff/ Applicant is not deserving of any injunctive orders as the same would have the effect of allowing a construction to continue contrary to the building plans as approved.

The Plaintiff/ Applicant filed a Supplementary Affidavit sworn by **Peter Murage Karoki** on **6th August 2021**, who averred that sometimes in the year **2018**, the Plaintiff's/ Applicant's submitted revised building plans in respect of the suit property to **DCC** for approvals and that the same were an amendment to the **2016**, approved plans and by the amendment, the Plaintiff/Applicant proposed to build five floors, comprising of the ground floor plus four floors, instead of the previously approved ground floor plus three floors. That the **DCC** gave its approvals on **13th February 2019**, and the said amended building plans were submitted to **Kiambu County Government** and through its letter dated **19th October 2019**, the County Government approved the plans and the Applicant's proceeded with the construction.

The Applicant filed a Further Affidavit sworn on **16th August 2021**, by **Bob Oyugi**, the Plaintiff's/Applicant's **Project Architect**, who averred that the Applicant fully adhered to the requirement stipulated under **Clause 6.7.4**, of the Master Declaration by submitting the plans for approval. That the Defendant/ Respondent granted full and unconditional approval of the building plans as submitted by the Plaintiff/Applicant and no issue of obstruction was raised and in the impugned **Stop Order**, no issue of obstruction was raised. That if obstruction was an issue, the same ought to have been raised during inspection and review of the building plans by the **DCC**, when the amendments were submitted.

That the annexures produced by the Defendant/ Respondent in its Replying Affidavit, related to the initial drawings submitted by the Applicant for discussions and review in respect of which the approval was issued in **November 2019**. That the said drawings are not approval drawings. That the amendment submitted by the Applicant in 2019, sought the **DCC** approvals to construct an additional floor on **blocks 11,12,18,19 & 20**, and the Plaintiff/Applicant was allowed an additional level. That the building plans produced by the Defendant/ Respondent are not the **final building plans**, and were just **working documents**, subject to amendments and revisions. That the letters issued by the Defendant/ Respondent and the **Stop Order**, were mere afterthought, and the Construction of the new level on **Block 18** was done with the **DCC** approvals. That the amendments did not in any way change the architectural design.

The Defendant/ Respondent also filed a Further Replying Affidavit sworn by **Peter Njoroge Mwaura**, on 25th August 2021, and averred that the invoice from the **Kiambu County Government** was paid before the DCC issued its approval on 18th February 2019. That by submitting the Architectural Plans directly to the **Kiambu County Government**, the Plaintiff/ Applicant violated and breached the requirements of the approval letter since the DCC was required to submit the architectural plans on their behalf. That there are 3 sets of building plans in question and the DCC was only aware of two sets of building plans that were submitted to the DCC for approval. That the **Stop Order** was issued after the Plaintiff/ Applicant had commenced construction, and it was clear that the construction in **Block 18**, was not in accordance with the building plans approved by the DCC. That the approval letters issued in 2016, and 2019, were based on submitted sets of building plans that showed the elevation of the various blocks and that the DCC is allowed to review the building plans from time to time. That if there were any other amendments made, the same ought to have been submitted to the DCC for approval before the Plaintiff/ Applicant could commence construction. That the DCC did not approve construction based on the drawings produced as annexures **PMK 10 and PMK 11** on the Plaintiffs/ Applicants Supplementary Affidavit.

That the DCC approved the modifications of **Block 18** to include one additional floor, from ground floor plus by converting the terrace to habitable floor, Further that the DCC would not approve working drafts as alleged, and the DCC is mandated to issue **Stop Orders** for offending Developments and the Notice of Violation and **Stop Order** issued on 9th March 2021, require the Plaintiff/ Applicant to stop all construction and submit the revised designs of **Block 18** for review and it is incorrect for the Plaintiff to state that the issue of architectural designs is a new issue. That the **Stop Orders** were issued to ensure that the low density precinct of **Kijani Ridge** was not negatively impacted by the Construction of **Block 18**, contrary to the approved building plans.

The Plaintiff/Applicant filed a 2nd Further Affidavit sworn on 3rd September 2021, by **Bob Oyugi**, who averred that the Applicant made payment in respect of the amended plans before 18th February 2019, when the DCC issued its approval. That in the absence of a precondition for the DCC to present the building Plans for approval on behalf of the Applicant, the Applicant was entitled to lodge the approved plans, with the County approval and having obtained the DCC approval, there was nothing unusual with the Applicant lodging the amended plans with the County Government for approval. That the building plans, submitted to the DCC for approval in 2018 and which were approved on 18th February 2019 were the exact same plans that were submitted to the **County Government of Kiambu**; That the terrace was already an existing floor by itself and hence the addition on additional floor could only have been a floor above the terrace.

That the impugned **Stop Order** was issued twelve months after the construction works had began on the suit property and the issue of height being raised when the building is 90% done and substantially sold to third parties is in bad faith and the Applicant has not violated the provisions of the Lease. That the Applicant has demonstrated that it had all the requisite approvals before commencing the construction and also come to Court with clean hands.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings in general, the instant application, the affidavits filed together with the annexures thereto and the relevant provisions of law and finds that the issue for determination is **whether the Plaintiff/ Applicant is entitled to the injunctive orders sought**.

The Plaintiff/ Applicant has sought for temporary injunctive orders and he is entitled to either grant or denial of the same at this interlocutory stage. At this stage, the Court is not called upon to determine disputed facts and or facts that ought to be determined at the main hearing on the basis of contradictory Affidavits evidence. . . All that the Court is required to do is to determine whether the Applicant is deserving of the Orders sought. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that: -

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, and which have also been reiterated in other determinations. See the case of **Kibutiri...Vs... Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that: -

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

The Applicant is first required to establish that it has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“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”.

Further a prima facie case was defined by Mustill J in The Ledersachsen [1983] 2 Lloyd's Rep 600 at page 605 to be a good and arguable case which connotes one which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50% chance of success”.

It is not in doubt that the Defendant/ Respondent is the owner of L.R 28867/1. Further, it is not in doubt that the Plaintiff/

Applicant purchased some units, being a portion of a precinct forming part of the said property. It is thus not in doubt that the suit property forming the dispute in the instant suit is owned by the Plaintiff/ Applicant, being a Lessee of the said property. This would automatically mean that the Plaintiff/Applicant has an interest in the said suit property.

In the case of *Mrao(supra)*, a prima facie case is defined to mean that ...*that there exists a right which has apparently been infringed*. The Court noted and found that the Plaintiff/ Applicant herein has a right over the suit property, given that it is a Lessee of the said property. The Plaintiff/ Applicant has contended that according to the sale agreement with the Defendant/ Respondent, it was allowed to construct on the suit property subject to the approvals of the DCC. This approval according to the Plaintiff/Applicant was sought and granted, but the Defendant/ Respondent has now sought to serve it with a Stop Order. From the events that have unfolded, it is evident that a tribunal properly directing itself would find that a right in this case for the Plaintiff to construct on the suit property has allegedly been breached. Therefore, the Court finds and holds that the Plaintiff/Applicant has established a prima facie case, with a probability of success.

The principles as set out in the locus Classicus of *Giella ...Vs... Cassman Brown* are sequential in nature and therefore upon establishing a prima facie case, the Plaintiff/ Applicant is further required to show that it will suffer irreparable harm that cannot be compensated by way of damages. In the case of *Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015*, an irreparable injury was defined as *simply injury or harm that cannot be compensated by damages and would be continuous*.

Further in the Case of *Niaz Mohammed Janmohamme ...Vs... Commissioner for Lands & 4 Others (1996) eKLR*, the Court held that: -

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Again in the case of *Muiruri vs Bank of Baroda (Kenya Ltd (2001) KLR 183 at Page 188*, the Court held that;

“besides disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

The Plaintiff/Applicant has allegedly sold the units herein off plan to 3rd parties and the loss that would be incurred if the construction is stopped at instance stage would not adequately be compensated by an award of damages as besides the Plaintiff/Applicant, said 3rd parties would be affected both psychologically, emotionally and financially.

It is clear that the Plaintiff/Applicant had sought for and was granted approval by first the DCC and secondly the **Count Government of Kiambu** to commence Construction on the suit property. By a subsequent Amendment by the Plaintiff/Applicant which sought to include on the building plans another floor, the said amendment was approved by the DCC. However, therein lies the point of dispute by the parties. While the Plaintiff/ Applicant has averred that it was allowed to

add more floors above the terrace, it is the Defendant's/ Respondent's contention that the terrace was supposed to be turned into another floor and that the building plans submitted by the Plaintiff/ Applicant as annexure **PKKK 11** in Plaintiff's Supplementary Affidavit is not the building plans that the DCC approved.

The Defendant/ Respondent in its submissions has invited the Court to determine whether the Plaintiff/ Applicant is in breach of its contractual duties and whether the Defendant/ Respondent had a right to issue stoppage orders. A perusal of the Amended Plaintiff filed by the Plaintiff/ Applicant reveals that the issue of the **Stop Order** is at the core of the suit. Whether or not the building plans were the one approved and or the **stoppage order** was legal, are issues that go to the merit of the suit. As noted above, this Court is unable to determine the said issues at this interlocutory stage as these issues can only be determined when the Court is in position to take evidence from the parties and then weigh the said evidence adduced and thereafter come up with a conclusive finding.

What is not in dispute is that approvals were granted, and for the Court to determine which approvals were granted, the same would be done during the main hearing. However, it is clear that the Plaintiff/ Applicant was building units that are **off plan**. The Contention by the Plaintiff/ Applicant that the said units have already been sold to **third parties** has not been rebutted by the Defendant/Respondent. Further it has not been rebutted that the said construction is 90% done. This Court takes **Judicial Notice** of the costs of construction and the kind of labour involved. Further, the Court takes cognizance of the fact that whenever a construction is halted or stalled, there are financial repercussions together with the wear and tear of buildings that have been left incomplete. There is also an issue of Contracts entered into between the Plaintiff/ Applicant and the third parties. It is the Court's considered view, that in view of the fact that there were approvals that had been granted to the Plaintiff/ Applicant and the only issue is to what extent, if the construction is stopped and after the trial, the Court finds in favour of the Plaintiff/ Applicant, then the Plaintiff/Applicant it would have suffered irreparable injury, which cannot adequately be compensated by an award of damages.

The Court is also called upon to decide where balance of convenience lies. In the case of Pius **Kipchirchir Kogo ...Vs... Frank Kimeli Tenai (2018) EKLK** which defined the concept of balance of convenience as:

*‘The meaning of balance of convenience in favor of the plaintiff' is that if an injunction is not granted and the Suit is **ultimately decided in favour of the plaintiffs**, the inconvenience caused to the plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is*

really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the Defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the Plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

*This Court is not in doubt. However, keeping in mind the above analysis, it is the Court's considered view that the prejudice that would befall the Plaintiff/Applicant if the injunction Orders are **not granted** far outweigh that which would befall the Defendant/ Respondent as all that would be required in order for the Defendant/ Respondent to fulfil their rights if the Court was to find in its favour is that the Court would Order the Plaintiff/ Respondent to demolish the said extra floor. The Defendant/Respondent would not suffer any prejudice if the injunctive orders are granted. The Court finds and holds that the balance of convenience lies in favour of the Plaintiff/ Applicant herein.*

*The Upshot of the foregoing is that the Court finds and holds that the Plaintiff/ Applicant has met the **threshold** for grant of the injunctive orders sought and the Applicant is consequently entitled to the Orders of injunction as sought in the instant application. Consequently, the Court finds and holds that the **Notice of Motion application** dated **21st July 2021**, by the Plaintiff/ Applicant **is merited** and the same is allowed entirely with costs to the Applicant herein.*

It is so ordered

Dated, signed and Delivered at Thika this 24th day of September, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy