



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 391 OF 2019

ANDREW OMBOTO & 3 OTHERS.....APPLICANTS

=VERSUS=

BOARD OF TRUSTEES,

NATIONAL SOCIAL SECURITY FUND & 6 OTHERS.....RESPONDENTS

RULING

1. The Plaintiffs/Applicants are house owners within various Courts of Nyayo Estate, Embakasi. On 4th December 2019, the applicants filed a suit against the Defendants/Respondents. The Applicants contemporaneously filed a Notice of Motion dated 4th December 2019 in which they sought the following orders.

1. Spent

2. That this Honourable court be pleased to issue temporary injunctive orders restraining the 4th Respondent from proceeding with construction of six (6) base transceiver stations within Nyayo Estate, Embakasi in property comprised Title No. Nairobi/140 (Courts 117,295, 328, 480, 566 and 12) pending the hearing and determination of this suit.

3. That this Honourable Court be pleased to issue temporary injunctive orders that the purported sublease issued to the 4th Respondent by the 1st Respondent in contravention of the Sectional Properties Act of 1987 be revoked pending the hearing and determination of this suit.

4. That this Honourable Court be pleased to issue permanent injunction that the purported sublease issued to the 4th Respondent by the 1st Respondent in contravention of the Sectional Properties Act of 1987 be revoked pending the hearing and determination of this suit.

5. That the 2nd Respondents be compelled to produce the suit property owner's corporation known as the owners ,Sectional Plan No.3, registration details, Sectional Plans, its memorandum and Articles , particulars of its past and present office bearers and all the pertinent records of the same.

6. That this Honourable Court be pleased to issue temporary injunctive orders revoking approvals/licenses issued to the 1st Respondents by the 5th, 6th and 7th Respondents for construction of the base transceiver stations pending hearing and determination of this suit.

7. Any other relief that this Honourable Court may deem fit to grant.

8. Costs of this application be provided for.

2. In or around July 2016, the 1st Respondent approved a sub-lease touching on courts Nos.117, 295, 328, 480, 566 and 812 in favour of the 4th Respondent who was to construct six bases stations to be leased out to various network providers at a fee. When the 4th Respondents moved to the ground to start construction of the base stations, the Applicants moved to court and filed the present application. The Applicants contend that the 1st Respondent contravened the Sectional Properties Act by purporting to grant the 4th Respondent sub-leases without their authority; that the 1st Respondent did not comply with the then Physical Planning Act (Now repealed) on change of user and that the 1st Respondent has failed to operationalize the Owners Corporation as per the provisions of the Sectional Properties Act.

3. The Applicants further contend that the 4th Respondent did not comply with the provisions of the Environment Management and Coordination Act (EMCA) regarding Environmental Impact Assessment Studies. The Applicants therefore argue that as a result of non-compliance with law, they will be exposed to harmful radiation from the masts which will be put up if the construction of the base stations were to continue. They further argue that the prices of rent for houses next to the base stations will depreciate in value as they will not attract tenants. They further argue that it is not necessary to construct six transceiver base stations as one transceiver base station has a coverage of 35 kilometres.
4. The applicants' application has been opposed by the 1st Respondent based on a replying affidavit sworn on 27th January 2020. The 1st Respondent contends that the applicants' application has no merit, is misconceived, frivolous and vexatious. The 1st Respondent contends that it is a stranger to the 2nd and 4th Applicants and that the 2nd, 3rd and 4th applicants have not granted authority to the 1st Applicant to swear on their behalf.
5. The 1st Respondent argues that it has titles for court numbers 117, 328, 480 and 566 while titles for court No. 295 and 812 are being pursued. The 1st Respondent has registered Sectional Plans per Court. The 1st Respondent further argues that there were challenges of network within the estate. The Residents Association known as Nyayo Estate Residents Association (NERA) engaged it for a solution. Negotiations were done which involved the residents. The telephone service providers visited the estate and identified suitable sites. There was an Environmental Impact Assessment Licence given by NEMA.
6. The 1st Respondent states that the construction of the base stations is for the benefit of the residents and that the Applicants never complained to the Liaison Committee under Physical Planning Act (Now repealed) or to the National Environment Tribunal (NET) and that this suit and application is an afterthought.
7. The 2nd and 3rd Respondents opposed the Applicant's application based on grounds of opposition filed on 20th January 2020. The 2nd and 3rd Respondents contend that the applicants' application is an abuse of the process of the Court.
8. The 4th Respondent opposed the Applicants' application based on a replying affidavit sworn on 28th January 2020. The 4th Respondent contends that there are other similar proceedings going on in the lower court in Chief Magistrate Civil case No.4336 of 2018 where the lower court issued an injunction against the 4th Respondent. This injunction is subject of ELC Appeal No.66 of 2018. The proceedings in the Lower Court were filed by residents of Nyayo Estate.
9. The 4th Respondent had obtained an Environmental Impact Assessment Licence from NEMA after all the necessary steps had been followed. The construction of the base station received approval from all the relevant players. The request for improvement of telephone network came from the residents and that there will be no harmful effects of radiation as alleged.
10. The 5th Respondent did not file any replying affidavit and this fact was confirmed during the hearing of the application. The 6th Respondent stated in a replying affidavit sworn on 15th January 2020, that its duty is to licence operators in accordance with the law and that they had granted a licence to Kenya Towers Limited which was later acquired by the 4th Respondent. The 6th Respondent has no interest in the properties the subject of this suit and that they cannot be faulted as they complied with the law.
11. The 7th Respondent in an interesting replying affidavit sworn on 29th January 2020 denied ever receiving any Environmental Impact Assessment Project Report from the 4th Defendant with respect to construction of six base transceiver stations on LR Nairobi/140 or even issuing an Environmental Impact Assessment Licence to the 4th Defendant regarding the same property. The 7th Respondent therefore argues that there is no licence to be revoked as prayed for by the Applicants.
12. I have carefully considered the applicants' application as well as the opposition to the same by the Respondents. The only issue for determination is whether the Applicants have established a prima facie case to warrant issuance of injunctive orders in the manner prayed for together with other related reliefs they seek at this interlocutory stage.
13. The Applicants do not want some six base stations to be constructed. The six base stations were to be constructed in each of the six courts comprising of Nyayo estate. Contrary to the allegation by the applicants that there was no Environmental Impact Assessment Licence given, the 4th Respondent has annexed a copy of an EIA licence which was granted on 29th September 2017. Though this licence relates to property described as LR No. 9042/179 , the courts listed thereunder are the same courts which are listed in the Applicants' application for a property described as LR No Nairobi/140. To me it does not matter that the licence has quoted LR 9042/179 . What matters are the courts to which the base stations were to be erected. I am not surprised that NEMA in their reply denied issuing a licence in respect of LR Nairobi /140 but what they failed to state is that in a licence exhibited in previous proceedings, there was a licence given and the same court numbers are mentioned.
14. The same residents of Embakasi were consulted as required by the relevant laws. Some members of the Estate have even moved to the NET on appeal. There are also appeal proceedings which have been filed before the Environment and Land Court arising from an order granted in the lower Court against the construction of the base stations. This therefore means that the applicants have filed these proceedings which are actually an abuse of the process of the court. The four are residents of Nyayo Embakasi Estate . They cannot isolate themselves from the other residents and file their own proceedings. During the hearing, there was an argument by their counsel that they cannot be tied down to a Residents Association which they do not recognize. If this were to be the case, courts will be inundated by cases because the estate carries over 2000 Residents.
15. The Physical Planning Act (Now repealed) provided a mechanism for lodging of any complaint to the Liaison Committee. If at all there was any change of user and I have not seen any evidence, then any grievances the Applicants had had to be channelled to the Liaison Committee. This is the case with grant of an EIA Licence. If NEMA granted an EIA Licence then the applicants would have appealed to the

NET and not file these proceedings. If the Court were to grant some prayers in the manner sought, it should amount to determining the dispute at interlocutory stage. I therefore find no merit in this application which is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 12th day of March 2020.

E.O.OBAGA

JUDGE

In the Presence of :-

Mr Sabula for Plaintiff,

M/s Munyingi for M/s Mbabu for 1st Defendant,

Mr Gituma for 5th Defendant, Mr Giche ha for 4th Defendant and

Mr Ratemo and M/s Mudibo for 6th Defendant

Court Assistant: Hilda

E.O. OBAGA

JUDGE