



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO 90 OF 2018

MUTHITHI INVESTMENTS COMPANY LIMITED.....1 ST PETITIONER

MARBLE ARCH HOTEL LIMITED.....2 ND PETITIONER

=VERSUS=

THE NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

RULING

1. On 24/12/2019, **Muthithi Investments Company Limited** and **Marble Arch Hotel Limited** (the petitioners) brought a petition in which they sought the following orders against the Nairobi City County Government (the respondent):

- a) *A conservatory order permanently restraining the respondent whether by itself, its servants, agents or otherwise, howsoever, from in any way trespassing upon demolishing, taking possession or interfering with the petitioner's business and quiet possession of the properties known as LR No 209/11100 (IR 47666) and LR No 209/11843 (IR No 57355) located within the Nairobi Central Business District.*
- b) *A declaration that the enforcement notice issued by the respondent on 21st December, 2018 is null and void.*
- c) *An order quashing the enforcement notice issued by the Respondent on 21st December 2018.*
- d) *Damages on account of trespass and destruction of property.*
- e) *Costs of this suit.*

2. Simultaneous with the petition, the petitioners brought a notion of motion dated 22/12/2018 seeking a temporary conservatory order restraining the respondent against trespassing upon, demolishing, taking possession of or interfering with the petitioners' hotel business and quiet possession of **Land Reference Number 209/11100** comprised in **Title Number I.R 476600** and **Land Reference Number 209/11843** comprised in **Title Number I.R No 57355**. The said application is one of the two applications which are the subject of this ruling.

3. The second application is the notice of motion dated 8/4/2019 through which the petitioners seek an interim order allowing them to restore the *status quo* in relation to the perimeter wall round Land Reference Number 209/11100, which the applicants contend was illegally demolished by the respondent. Alternatively, the petitioners want an order compelling the respondent to approve its development plans relating to the perimeter wall. Further, in the alternative, the petitioners want the court to issue a mandatory injunction compelling the respondent to restore the perimeter wall.

4. The case of the applicants is that the 1st petitioner is the registered proprietor of Land Reference Number 209/11100 and Land Reference Number 209/11843, both located within the Nairobi Central Business District (**the suit properties**). The 2nd petitioner owns and runs a hotel by the name **Marble Arch Hotel** on Land Reference Number 209/11843. The 1st petitioner has been in possession of Land Reference Number 209/11100 since December 1995 when it purchased it. It subsequently fenced and improved the property which is currently used as a private parking by Marble Arch Hotel. On 20/12/2018, the Governor of the respondent phoned Mr Mike Maina Kamau, a director of the two petitioners, abused him, and threatened to demolish the developments on the two properties and take possession of the two properties. On the same day, agents of the respondent went to Land Reference Number 209/11100 and marked on the developments thereon the word "illegal" and threatened to demolish them and take possession of the property. At 6.00 pm of the same day, agents of the respondent demolished the brick wall and structures on the said property. On 21/12/2018, officers of the respondent visited Marble Arch Hotel which is on Land Reference Number 209/11843 and marked thereon the word "illegal". Further, on the same day, officers of the respondent served on the petitioners an enforcement notice dated 21/12/2018 alleging that the hotel premises constituted an illegal development constructed without approval of the respondent.

5. The petitioners contend that they acquired all the necessary approvals and licences for the developments on both properties and have

complied with all the relevant laws. It is the position of the petitioners that the threatened demolition is illegal and baseless in law. Further, the petitioners contend that unless stopped by the court, the respondent's officers would continue with their unlawful actions.

6. The two applications came up for hearing on the following dates: 12/2/2019; 23/5/2019; 4/7/2019; 18/11/2019; 5/2/2020; and 2/3/2020. On each of the six occasions, counsel for the respondent asked for adjournment to enable the respondent file responses and submissions to the two applications. Despite being accommodated by the court, the respondent did not bother to file the responses. Similarly, the respondent did not bother to file submissions. Effectively, therefore, the two applications were argued without any formal opposition from the respondent.

7. The petitioners filed written submissions dated 12/11/2011. On the notice of motion dated 22/12/2018, the petitioners submitted that the facts set out in the affidavit in support of the motion had not been traversed or disputed. Counsel added that the petitioners had demonstrated that the 1st petitioner was the registered proprietor of the suit properties and there were no competing interests in the two properties. It was argued that the 1st petitioner's interests in the suit properties was protected under **Section 26 of the Land Registration Act**. Relying on the decision in **Virende Ramji Gudka & others v Attorney General [2014] eKLR**, counsel submitted that the petitioners were entitled to full protection of the law, and that the respondent had no right to erect notices or enter into or engage in wanton destruction of the suit properties. Counsel argued that unless a restraining order was issued, the respondent was intent on trespassing upon, demolishing and illegally taking possession of the properties.

8. Counsel for the petitioners added that the petitioners had invested heavily on the suit properties and stood to suffer irreparably if the respondent was not restrained. Lastly, counsel submitted that the balance of convenience tilted in favour of protecting the suit properties and the hotel business pending the hearing and determination of the suit.

9. On the notice of motion dated 8/4/2019, counsel submitted that, having illegally demolished its perimeter wall, the respondent had declined to approve its development plans relating to a new perimeter wall, on the ground that the property was a public utility plot. Counsel added that Section 38 of the Physical Planning Act did not out-rightly oust the jurisdiction of this court to entertain disputes relating to approval of development plans. Counsel argued that the petitioners had demonstrated that special circumstances existed warranting grant of a mandatory injunction. Relying on the Court of Appeal decision in **Nation Media Group & 2 Others v John Harum Mwau [2014] eKLR**, counsel urged the court to grant the application.

10. I have considered the two applications together with the evidential materials and submissions placed before the court. I will make brief pronouncements on the two applications sequentially in the order in which they were brought.

Notice of Motion dated 22/12/2018

11. Through the notice of motion dated 22/12/2018, the petitioners seek an interim conservatory order restraining the respondent against trespassing upon, demolishing, taking possession or interfering with the petitioner's hotel business and quiet possession of the suit properties pending the hearing and determination of the petition. Despite the court bending backwards on no less than six occasions to allow the respondent the opportunity to respond to the application, the respondent did not respond to the application. Consequently, the application is unopposed. The only question falling for determination in the application, therefore, is whether the applicant has satisfied the criteria upon which an interlocutory restraining (injunctive) order is issued. The criteria is well settled. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that unless the injunctive order is issued, he stands to suffer irreparable damage that cannot be indemnified through an award of damages. Lastly, should the court have doubts relating to the above two limbs, the application is to be determined on a balance of convenience [see **Giella v Cassman Brown (1973) EA 358**]. Lastly, at this interlocutory stage, the court does not make definitive findings or conclusive pronouncements on the issues before it.

12. At this interlocutory stage, the petitioners in this petition have demonstrated that the 1st petitioner is the registered proprietor of the suit properties. They have also demonstrated that Land Reference Number 209/11843 is developed and the development thereon are operated as a hotel under the name **Marble Arch Hotel**. The hotel is operated by the 2nd petitioner. The respondent did not put forth any evidential or legal basis upon which it is engaging in the impugned activities. In the absence of any controverting evidence or any form of legal justification, the court is satisfied that the applicants have satisfied the requisite criteria. In the circumstances, the court is obliged to preserve the affected titles, the developments thereon, and the businesses operated thereon. If the respondent has any legitimate claims to the two titles, there are legal avenues for ventilating those claims.

13. Consequently, in the absence of any opposition, I will grant prayers 3, 4 and 5 of the notice of motion dated 22/12/2018.

Notice of Motion dated 8/4/2019

14. Through the notice of motion dated 8/4/2019, the petitioners pray that pending the hearing of the petition, an order be issued allowing the petitioners to restore the perimeter wall round Land Reference Number 201/11100 without the requisite approvals. In the alternative, the petitioners pray that an order be issued directing the respondent to approve the petitioners development approval application submitted to the petitioners on 7/3/2019. Further, the petitioners seek a mandatory order against the respondent compelling the respondent to restore the perimeter wall.

15. The application was filed when the now repealed Physical Planning Act was still in force. The said Act was repealed by the **Physical and Land Use Planning Act of 2019** which came into force on 5/8/2019. The key grievance of the applicants in the application dated 8/4/2019 is that the respondent illegally demolished the perimeter wall erected round Land Reference Number 219/11100. With a view to erecting a fresh perimeter wall, the petitioners submitted a development approval application to the respondent, and the respondent rejected that application. Without the approval neither, the petitioners nor the respondent can erect another wall.

16. Both the repealed **Physical Planning Act** and the current **Physical and Land Use Planning Act** contain elaborate mechanisms on how disputes relating to development approvals are to be handled. Under the repealed **Physical Planning Act**, the first port of call would be the

Liaison Committee, followed by the Provincial Liaison Committee. This court only exercised review/appellate jurisdiction over decisions of the Provincial Liaison Committees. The current **Physical and Land Use Planning Act** contains a similar elaborate framework on how development approval disputes are to be handled at various stages. Although there is no clear framework in the Act relating to the review and appellate jurisdiction of this court, it is clear from the evidential materials placed before me that the redress mechanism in both the repealed Act and in the new statute have not been exhausted by the applicants.

17. It would therefore be premature for this court to invoke its jurisdiction under the Constitution and under the Environment and Land Court Act at this interlocutory stage without clear evidence that the redress mechanisms provided in the statutes have been exhausted by the applicants. Consequently, I decline to grant the orders sought in the notice of motion dated 8/4/2019 in relation to the intended development.

18. The petitioners sought the alternative remedy of a mandatory injunction requiring the respondent to erect another wall. Erection of a wall is a development which requires development approval. In the circumstances, the mandatory order sought by the petitioners would not issue in the absence of an approved plan or in the absence of a court order compelling the respondent to approve the petitioners' development plan.

19. The net result is that the petitioner's notice of motion dated 22/12/2018 is allowed in terms of prayers 3, 4 and 5. The petitioner's notice of motion dated 8/4/2019 is declined.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of :-

Mr Anzala and Mr Obuya for the Petitioners

Mr Kinyanjui for the Respondent

June Nafula - Court Clerk