



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 127 OF 2017

SHAINAZ JAMAL.....1ST PLAINTIFF

EUSEBIO SUDI ABURILL.....2ND PLAINTIFF

ROSE MURUNGA.....3RD PLAINTIFF

JACINTA WANJIHIA.....4TH PLAINTIFF

RAMESH PATEL.....5TH PLAINTIFF

HARPREET KULAR.....6TH PLAINTIFF

CHARLES KIMANI.....7TH PLAINTIFF

JAMES KAHUMBURA.....8TH PLAINTIFF

KENNEDY TOROITICH.....9TH PLAINTIFF

=VERSUS=

ABDULRASUL MANJI1ST DEFENDANT

TAZMIN ZAHIR MANJI.....2NDDEFENDANT

JUDGMENT

Introduction

1. Parties to this suit are owners of residential villas erected on Land Reference Number 1870/III/140, known as Prestige Villas Estate, located along Brookside Drive, Westlands, Nairobi. Prestige Villas Estate has a total of 14 Residential Villas. The defendants own Villa Number 14. The plaintiffs contend that in September 2016, the defendants embarked on construction works with the intention of creating two new entrances to the defendants' Villa, with the resultant effect of altering the original design of Villa Number 14 and encroaching on and/or blocking what the plaintiffs describe as the common parking area. This suit challenges the said works.

2. Through a Complaint dated 22/2/2017, the plaintiffs seek a permanent injunction restraining the defendants, their agents and servants against alienating or interfering with the common car park area on Land Reference Number 1870/III/140. They also seek a permanent injunction restraining the defendants and their agents and servants against altering the original design of Villa Number 14 and against altering the entrance to Villa No. 14.

Plaintiff's Case

3. The case of the plaintiffs was that the defendant's construction of the two new entrances to their villa would encroach and or block the common parking area used by the residents of the Estate. They further contended that the development had an impact on the villas in the estate in that it would reduce the common parking area used by the residents of the Estate. They further contended that the development had an impact on the villas in the estate in that it would devalue the villas.

Defendant's Case

4. The defendants responded to the claim through a defence dated 1/8/2017. Their case was that they were the owners of Villa Number 14

within Prestige Villas Estate. In 1994, with the consent of Prestige Developers Limited (**the developer**), they sought approvals from the City Council of Nairobi to build a carport, a wall, and a gate, on Villa Number 14. The Council approved their development plans and they proceeded to undertake the development. On 17/5/2016, they obtained approvals from the City Council to carry out renovations on their Villa. The renovations began in August 2016. The renovations included works within the interior of their Villa as well as works on the road inside their Villa together with the carport which had asbestos. The defendants contended that the works did not in any way affect the common areas or alter the original design of the Estate. They urged the Court to dismiss the plaintiffs' suit.

Plaintiff's Evidence

5. The plaintiffs called Eusabio Sudi Aburili who testified as PW1. He adopted his witness statement dated 22/2/2017 as part of his sworn evidence-in-chief. In summary, his evidence was that he owned Villa Number 12 within Prestige Villas Estate. All the plaintiffs were residents and property owners within the Estate. In September 2016, the defendants sealed off the gate to Villa Number 14 and created two new entrances to the Villa, with the effect of encroaching and/or blocking the common parking area. The defendants had ignored the plaintiffs' objection. The developments were wrong and illegal on the following grounds: (a) they affected the common parking area for the residents of the estate; (b) due to addition of the two entrances, the parking area had been encroached on, given that one cannot park at or near the two new entrances; and (c) the construction works were done without necessary approved plans and were carried out in contravention of the **City County By-Laws and the Physical Planning Act**. He produced 10 Exhibits.

6. During cross-examination by Ms Janmohamed, counsel for the defendants, he stated that he owned Villa Number 12 jointly with Natasha Lawrence Brown. They bought the Villa in 2015. He started living in the Estate in 2014 as a tenant. The key grievance of the plaintiffs was that the defendants had attempted to change the face of the estate by removing the gate of Villa 14 from its original position and creating different gates, thereby affecting the common parking. He did not know if the plan the plaintiffs were relying on (exhibit 8) was registered. He was not able to pinpoint any endorsement on the plan denoting its registration.

7. At the request of counsel for the defendant, the witness was stood down and the court made a site visit to the estate. During further cross-examination subsequent to the site visit, PW1 reiterated that their main concern was that the main entrance to Villa Number 14 belonging to the defendants. The defendants had altered their main entrance and their Villa now had a different entrance. He added that change of the entrance had altered the outlook of the estate and one cannot park a car at the new entrance. He got exhibit 8 from a Mr Harunani. Exhibit 8 was not registered. The plaintiffs were not able to access the registered plan of the estate. The registered leases contained details of the registered plan. His title documents indicated that it was issued pursuant to the plan registered in Volume D1 Folio 367/774 File DXXV and that is the plan they were contesting. On the registered plan, the area of Villa Number 14 was different from the rest. According to the registered plan, the contested yard was part of Villa Number 14. When he bought his property, there were two entrances serving Villa Number 14 and the contested area was being used as a common area. They were allowed to use the contested area. Usage of the area was a courtesy extended to the residents. There was no operational management company at the time one of the two gates serving Villa Number 14 was closed. The management company had since been operationalized.

8. In re-examination, he stated that there were two alterations which necessitated the filing of this suit. The first alteration related to closure of the main gate. The second alteration related to creation of a gate on the rump. The rump was a common area.

Defendant's Evidence

9. The 1st defendant testified as DW1. He adopted his written statement dated 13/11/2018 as part of his sworn evidence-in-chief. In summary, his evidence was that the 2nd defendant was his wife. They owned Villa Number 14 which they purchased in 1992 from Prestige Developers Limited. In 1994, they obtained approval of the City Council of Nairobi and consent of the developer to build a carport, a wall and a gate on Villa Number 14 and they proceeded to build the carport, wall and gate. In 2016, they decided to let their Villa to their nephew who was expecting a baby in April/May 2017. They also decided to block the garden driveway which is inside their property. In November 2016, they were granted a permit by the Nairobi City County to effect alterations relating to the front boundary wall; creation of a service entrance; and changes to the roof of the carport. In January 2017, they put up a project signage and proceeded to make the alterations as per the approved plans. They also carried out renovations works inside their Villa.

10. DW1 added that the above works were limited to the garden drive and carport which were inside their property; did not affect the common areas for the residents; and did not alter the original design of the estate as alleged by the plaintiffs. He added that the only entrance which had been created is a service emergence exit which did not encroach the common parking area. All the renovations and alterations were made pursuant to approvals from the County Government. He produced 4 exhibits, among them, a copy of the registered plan for the estate and an approval dated 22/11/2016.

11. During cross-examination, he stated that the design of the 14 Villas in the Estate is the same in terms of buildings but not in terms of area. He bought his Villa at a higher sum. He asked for that specific Villa because of the extra land. He was only given a copy of the registered plan. He uses the entrance on the rump. The entrance which he blocked was never used because it was problematic due to its angle. The gates to the other houses were still the same. If a resident were to park outside his current gate, he won't be able to exit his parking. He did not have in court the written consent of the lessor in relation to the alterations made in 2017. The letter at page 14 of their bundle related to alterations made in 1992. At the time of making the alterations of 2017, the developer was not available and the management company was not operational. They got approval from the Nairobi City County Government. There were two sets of approvals; one related to the external works and the other related to internal works. They received two enforcement notices from the County Government.

12. In re-examination, he stated that they applied for and obtained all the necessary approvals pursuant to which they effected the works. By the time the second enforcement notice shown to him was written, they had finished the works. The County Government did not pursue the enforcement notice. The developer had never complained about the works. Other Villa owners had made alterations without issues. The plan he had exhibited was the registered plan. The closed gate was always closed due to the angle of the gate, a vehicle could not use it.

Plaintiff's Submissions

13. The plaintiffs filed written submissions dated 10/12/2019 through the firm of Mwamuye Kimathi & Kimani Advocates. Counsel itemized the following as the four issues falling for determination in this suit: (i) Whether the defendants have done material construction on the suit property by making alterations and additions to Villa Number 14 with the effect of creating a new entrance to the Villa, encroaching and/or blocking the common parking used by the plaintiffs/Residents of the Estate; (ii) Whether the consent and/or approval of the plaintiffs/Residents, Lessor and the Physical Planning Department of Nairobi City County was sought by the defendants prior to the construction, alteration and additions to Villa Number 14. (iii) Whether the construction, alterations and additions to Villa Number 14 by the defendants have denied the plaintiffs/Residents peaceful and quiet enjoyment of their common parking area and whether the Villas in the Estate risk being devalued due to the alteration of the original design of the Estate; and (iv) Who should bear the costs of the suit

14. Counsel submitted that the plaintiffs had demonstrated that the defendants undertook illegal works on their Villa; blocked the main entrance to their Villa; altered the design of their Villa and blocked the common parking used by the other residents of the Estate. Counsel added that the carport was part of the common parking area and was illegally annexed by the defendants. It was further argued that had the defendants purchased the carport as part of their Villa, the purchase price of their Villa would have been higher than the amount they paid.

15. Counsel for the plaintiffs further submitted that the alterations made by the defendants were illegal because barely three months after the defendants were issued with the approval, the Physical Planning Department of Nairobi City County Government, vide a letter dated 3/3/2017, disapproved and/or revoked the building plans on the ground that the survey plan presented by the defendants was not authentic.

16. It was further submitted that the new entrance created by the defendants had altered the original design of their Villa and the implication of that alteration was that the Estate risked being devalued because uniformity of the Villas no longer existed in the Estate. Counsel added that blockage of the original gate using a masonry wall encourages parking by visitors and other residents on the common access road next to the blockade entrance, thereby obstructing other owners. Counsel argued that this also poses a danger and is an inconvenience to the owner of Villa No 1 who is directly opposite Villa No 14. Lastly, counsel urged the court to award the plaintiffs costs of the suit.

Defendants' Submissions

17. The defendants filed written submissions dated 7/2/2020 through the firm of M/s Archers & Wilcock Advocates. The introduction part of the said submissions focused on the substantive claim and defence in this suit. The subsequent parts of the submissions bearing the following subtitles focused on matters that I do not think were relevant to the substantive issues in this suit: (i) *Prima facie* Case; (ii) Irreparable Injury that cannot be compensated in damages; and (iii) Balance of Convenience. The arguments presented under the above three limbs would be relevant to an application for an interlocutory injunctive relief. They are not relevant when the court is rendering a final determination in a suit.

18. Counsel for the defendants submitted that the plaintiffs had failed to prove their case on a balance of probabilities. Counsel argued that in 1994, the lessor and the City Council consented to and approved the defendants' approved development plans relating to a carport, a wall and a gate on their villa and the defendants proceeded to implement the approved developments. Counsel added that on 17/5/2016, the defendants obtained approval of the Nairobi City County to carry out renovations on Villa Number 14. Further, counsel argued that the impugned works were carried out with the approval of the County Government and did not affect the common areas of the residents. Counsel added that the works did not alter the original design of the estate.

19. Lastly, counsel urged the court to reject the plaintiffs' suit because they had sought injunctive orders without any other substantive relief.

Analysis & Determination

20. I have considered the pleadings, evidence and submissions presented in this suit. I have also considered the relevant legal framework and jurisprudence. Parties did not frame and agree on a common statement of issues to be determined by the court. In my view, the following are the five issues that emerge from the pleadings, evidence and submissions in this suit: (i) whether the alteration works made to Villa Number 14 by the defendants between 2016 and February 2017 were approved by the Nairobi City County Government under the Physical Planning Act (now repealed); (ii) Whether the absence of the lessor's written consent rendered the said alterations illegal; (iii) whether the said alterations have encroached and/or blocked the common parking area used by the residents of Prestige Villas Estate; (iv) Depending on the court's findings on issues (i), (ii), and (iii) above, are the reliefs sought by the plaintiffs available?; and (v) what order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the five issues in the order in which they are itemized.

21. The first issue is whether the alteration works made to Villa Number 14 by the defendants between 2016 and February 2017 were approved by the Nairobi City County Government. This suit was provoked by the said alterations. The defendants contended in their amended plaint that the alterations were illegal and were effected despite an enforcement notice dated 29/9/2016. It was the evidence of PW1 that although the defendants eventually got an approval dated 22/11/2016, the said approval was revoked on 27/2/2017 and an enforcement notice dated 7/3/2017 was served on the defendants.

22. On his part, DW1 testified that they obtained an approval dated 22/11/2016 and proceeded to execute the works as per the approved building plans. When shown the revocation letter dated 3/3/2017, he stated that the development had been completed by the time of the said revocation. He added that the County Government did not pursue the enforcement notice which was issued subsequent to the letter dated 3/3/2017.

23. What emerges from the evidential materials presented to the court is that, at the time the impugned alterations were implemented, there was a valid approval in place, dated 22/11/2016. To that extent, the said developments cannot be said to have been implemented without approval. Secondly, the repealed Physical Planning Act did not have any legal framework for revocation of a duly granted approval. What

the Act provided under Section 33 was a framework for any person aggrieved by a development approval to challenge the decision through an appeal to the Liaison Committee. That is what the plaintiffs were supposed to do instead of bringing this suit. There is no evidence to suggest that they pursued that redress mechanism.

24. Given that the impugned developments (alterations) were effected on the basis of a valid subsisting approval at the time of implementation, and the plaintiffs did not challenge the approval through the redress mechanism stipulated under Section 33 of the repealed Physical Planning Act, the court has no proper basis for subsequently declaring the developments as illegal. It is therefore my finding that the said alterations were legally implemented pursuant to the approval dated 22/11/2016.

25. The second issue is whether the absence of the lessor's written consent rendered the said alterations illegal. The estate was developed in the early 1990s. The defendants' lease is dated 5/5/1992 and was registered on 7/5/1992. Recital Clause Number (i) (a) defined "lessor" as follows:

"the lessors shall include the successors in title and the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created"

26. Clause 3(v) of the lease contained the following framework relating to the reversionary interest in the mother title:

"v) Upon all the Villas being sold and the lease with respect to each and everyone of them being registered in favour of the lessees and subject to payment by the lessees of the proportionate share of the costs and legal charges occasioned thereby, the lessors will transfer the reversionary interest under the property into the limited liability company to be registered by all the lessees as equal shareholders therein"

27. What emerges from the evidence before court is that, at the time the impugned developments were implemented, all the Villas had long been sold, and the developer who was the original lessor was no longer on the ground and was no longer running the day-to-day affairs of the Estate. However, the owners of the Villas had not incorporated and/or operationalized the management company as contemplated in Clause 3(v) of the lease. Consequently, there was no lessor from whom the defendants were to obtain the written consent contemplated under Clause 1 (xiii) of their lease. In the circumstances, it would be irrational for this court to find that the said developments were illegal. It was the collective duty of the plaintiffs, together with the defendants, to incorporate and operationalize the management company. It is noted that upon delivery of this court's ruling on the plaintiffs' interlocutory application, in which the court noted that the missing link was the management company, the plaintiffs took cue and, incorporated and operationalized the management company.

28. In light of the above evidential circumstances, it is my finding that the absence of the written consent of the lessor did not render the material alterations illegal.

29. The third issue is whether the material alterations have encroached and/or blocked the common parking area used by the residents of Prestige Villas Estate. The court made a site visit to the estate and viewed the two gates. Further, the court has examined the parallel site plans produced and relied on by the rival parties. The site plan which the plaintiffs relied on is not the registered site plan. The site plan produced by the defendants is the registered site plan; it is the site plan upon which the lease titles relating to all the villas was generated. It shows that the land size and the land shape of the defendant's Villa (Villa Number 14) is bigger and different from the rest. Secondly, the two impugned gates are pedestrian gates. They are not vehicular gates. One of the gates leads to the defendants' carport and is inside the defendants' property. The other gate connects the defendants' garden to the common area. The plaintiffs did not challenge the alterations creating the gates through the mechanism provided under the now repealed Physical Planning Act. The defendants explained, and the court agrees with them based on the actual observations during the site visit, that there was genuine safety need for closure of the original gate which connected the garden of Villa Number 14 to the common area. Similarly, based on the court's observation during the site visit, it was noted that the inconvenience caused to the plaintiffs by the pedestrian gate connecting the garden of Villa Number 14 to the common area, is minimal and does not constitute an encroachment or a blockage as contended by the plaintiffs. That is the finding of the court on the third issue.

30. In light of the above findings, it follows that none of the reliefs sought by the plaintiffs is available in the circumstances of this suit.

31. Lastly, all the parties to this suit are residents of Prestige Villas Estate. The dispute giving rise to this suit arose largely because parties to this suit did not promptly take the initiative to incorporate and/or operationalize the management company contemplated in their respective lease titles. They collectively, through that default, contributed to the current litigation. In the circumstances, I will not condemn any of them to bear the others costs of this suit.

Disposal Orders

32. In light of the above findings, I make the following disposal orders in this suit:

a) The plaintiffs' suit is dismissed for lack of merit

b) Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Ms Kemunto for the defendants

Mr Ogye holding brief for Mr Kimani the Plaintiffs

Court clerk - June Nafula