



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 316 OF 2016

PYRAMID BUILDERS LIMITEDPETITIONER

VERSUS

KOOME MWAMBIA, MARIBEL LARSON and JEREMY NGUNZE (being sued on their own behalf and on behalf of Kunde Road Residents Welfare Association).....RESPONDENTS

AND

COUNTY GOVERNMENT OF NAIROBI1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY2ND INTERESTED PARTY

RULING

INTRODUCTION

[1] The petitioner, a registered proprietor of a parcel of land LR No. 330/485 along Kunde Road, Nairobi situate in an area of the County Government of Nairobi where the respondent association has membership and which intends to develop the said property with 6 No. town houses with associated facilities and amenities has sued the respondent for alleged obstruction to the petitioner’s said project through its objections to the statutory bodies charged with approving such developments and thereby causing a delay in the commencement of the petitioner’s construction and seeks orders primarily to restrain the respondent from preventing it from proceedings with the construction. The City Government of Nairobi which granted a change of user necessary for the development and the Environmental Management Authority which approved the development by grant of an Environmental Impact Assessment Licence are sued as Interested Parties.

[2] The Petitioner asserts its right to property and complains that despite approvals granted by the Interested Parties, the petitioner continues to face objections and interference by the respondent on the ground of lack of sufficient public participation prior to the grant of the approvals and therefore seeks by

the Petition dated 22nd July 2016 final orders as follows:

“PETITIONERS PRAYER SOUGHT DATED 22ND JULY, 2016

i. A declaration that your petitioner’s right as guaranteed under Articles 36,39 and 40 of the Constitution have been breached and/or violated by the respondents, malicious, frivolous and vexatious objections to the approval process for development of LR. No. 330/485 along Kunde Road – Thompson Estate, Nairobi.

ii. A permanent injunction restraining the respondent from interfering with the petitioner’s development on property LR No 330/485 along Kunde Road Thompson Estate Nairobi

iii. A declaration that the respondent has breached and violated article 3 and article 22 of the constitution of Kenya by its interference on the right to property, freedom of association and movement of the petitioner.

iv. Costs.”

INTERLOCUTORY APPLICATION

[3] By a Notice of Motion dated 22nd July 2016, the petitioner seeks an interlocutory relief pending the hearing and determination of the Petition in terms as follows:

“NOTICE OF MOTION DATED 22ND JULY 2016

1. This application be certified as urgent and heard ex parte in the first instance.

2. Pending the hearing and determination of this application, the petitioner/applicant be allowed and/ or be at liberty to continue with the development and construction activities on LR No 330/485 along Kunde Road – Thomson Estate Nairobi.

3. Pending the hearing and determination of the amended Petition hereto, the petitioner/applicant be allowed and/ or be at liberty to continue with the development and construction activities on LR. No 330/485 along Kunde Road – Thomson Estate Nairobi.

4. Costs to be provided for.”

[4] The court did not grant prayer 2 of the Notice of Motion before the hearing of the application and what comes up for consideration is Prayer 3 of the Notice of Motion, pending the hearing of the Petition.

[5] The application was based upon grounds set out in the Notice of Motion as follows:

“GROUNDS THAT

(a) The Petitioner is the registered proprietor of LR No 330/485 long Kunde road – Thomson Estate Nairobi.

(b) The interested parties have given ALL statutory approval for the petitioner to carry out the intended developments.

(c) In spite of the aforesaid approvals the respondents have threatened to stop or interfere with the construction thus interfering with the petitioners rights to enjoy property.

(d) The respondents as private citizens are blatantly violating the petitioner’s constitutional rights and against the spirit of Article 3 of the Kenyan Constitution.

(e) That the respondent's threat is actuated by malice, ill motive and bad faith as the petition in exercise of her freedom of association has refused to ascribe to the aspirations of the resident's association that represents some of the property owners in this estate where the petitioner's property is situate. ”

RESPONSES

[6] The respondent filed Grounds of Opposition dated the 5th August 2016 and a Replying Affidavit of Edward Mwongo, a committee member of the Respondent sworn on 4th August 2016.

[7] For the 2nd Interested Party a replying affidavit sworn by its Compliance Officer Francis Chwanya on 4th August 2016 was filed.

[8] For the 1st Interested Party County Government a Notice of Appointment of Advocate was filed without any response to the Petition or the Application.

The Petitioner's Case

[9] At the hearing of the Application on 8th August 2016, Counsel for the parties – Mr. Wangila for the Petitioner, Mr. Muriithi for the Respondent, Mr. Wango for the 1st Interested Party and Mr. Wabwoto for the 2nd Interested Party - made oral arguments and ruling was reserved.

[10] The Petitioner's case is that it has all the necessary approvals for it to undertake the proposed development of town houses but the respondent has unreasonably objected to its developed and by numerous complaints to various statutory bodies charged with approving such developments caused a delay of the petitioners project and the petitioner fears that owing to its unrelenting objection to the project the respondent will prevent the developer from commencing the works, and therefore seeks the court intervention to ensure that the respondent does not interfere with its works. Despite the pendency of an appeal challenging the grant of approvals filed after the petition herein, the petitioners argued that a **chese in action** cannot override existing rights; that a party who is pursuing a right cannot override an existing right. The petitioner concluded that in the absence of a finding that impugns the approvals the petitioners, the petitioners ought to be at liberty to carry on with the construction.

[11] The petitioner further complained that the respondent had made access to the property difficult by gate fees imposed for entering into the area where the property is situated. At paragraphs 31-42 of the supporting Affidavit of Abdiladif Ismail, the petitioner's case for the grant of interlocutory order sought is set out as follows:

“AFFIDAVIT OF ABDILADIF ISMAIL DATED 22ND JULY 2016

31. That the petitioners even before hardly commencing its project on the subject property faces the risk of having its freedom of movement violated as the respondent together with other adjacent property owners, have threatened to deny the petitioners access to the estate in flagrant breach of the constitution. (Annexed and marked “PB 9” is a letter from the owners of adjacent property within area warning the petitioner about how to go about its projects)

32. That the unjustified delays have certainly hampered the petitioner's right to property as state agencies such as the interested parties continue to be misdirected and compelled to consider objections that are not envisaged in law and which actions perpetuate violations to the petitioner by the respondent.

33. that the respondent, has equally frustrated the petitioner's attempts to pay service charge/gate fees with the intent to deny the petitioner access to the subject property knowing very well that an access road is an easement that every property owner in Kenya is entitled to (Annexed and marked as “PB 10” are the petitioners emails requesting for service charge amounts comprised as gate

pass fee).

34 That the petitioner has also obtained necessary permission to commence demolition works on the subject property and to cut trees (annexed and marked as “PN 11” authority from the 1st interested party”)

35. That the 1st and 2nd interested parties as state agencies mandated to protect the petitioner’s rights continue to entertain, such frivolous, malicious and vexatious objections resulting in delaying the petitioner from promptly commencing with the development on her property.

36. That the respondent and other would be interested party must be restrained from their acts of malicious, unfounded, illegal and vexatious interference with the respondent’s duties that stifles the petitioner’s right to property.

37. That it is a dereliction of duty to uphold and defend the constitution and serious violation of the petitioner’s rights by unreasonably delaying the issuance of approvals and licences by the interested parties that would enable the petitioner to develop its property.

38. That the respondent has shown absolute disdain and the unfounded objections to the petitioner’s project and it is not in doubt that they will continue to disrupt the smooth progress of the petitioner’s development.

39. That it is not in doubt that the petitioners, proposed project/ development continued to face imminent risk of future interference by the respondent and occasion further delays in the completion of this project that is financed through high premium loans from financial institutions.

40. That there is imminent risk that the vexatious, malicious and frivolous objections by the respondent and others would-be interested parties will not cease and if not restrained the petitioner runs the risk of being unable to complete their project on schedule so as to settle the huge financial obligations with his financiers.

41. That the risk of further delay of the project by the invalid objections of the respondents must be put in check and restrained at all cost.

42. That having failed to succeed in their objections, the respondent’s objections in the project should be declared vexatious, malicious and frivolous and should not be a basis of any further delay to the petitioner’s project.”

The Respondent’s Case

[12] The respondent opposed the petition and grant of the conservatory order on the grounds, principally, that the petitioner had not established a *prima facie* case and that the petition would not be rendered nugatory even if the conservatory was not granted. The Grounds of Opposition filed by the Respondent were in the following terms:

“GROUNDS OF OPPOSITION DATED 5TH AUGUST 2016

1. The respondent has not infringed and/or threatened the infringement of any of the petitioner’s constitutional rights and freedoms.
2. The applicant has not discharged its burden of proof in support of its application.
3. The applicant does not have a *prima facie* case with a likelihood of success.
4. The doctrine of proportionality militates against the grant of the orders sought since the

petitioner has not established that there is any prejudice to be occasioned to it if the orders are not issued.

5. The application and the orders sought seek to interfere, infringe and curtail the respondent's (and other members of the respondent) constitutional rights under article 10,42 and 47 of the Constitution of Kenya and the right to be heard.

6. The application and the orders sought seek to interfere, infringe and curtail the protection guaranteed to the respondent and every member of the respondent under articles 69 and 70 of the constitution of Kenya

7. The application is mot and amounts to abuse of process.”

[13] On the merits, the case of the respondent emerges from several paragraphs of the replying affidavit of Edward Mwongo as follows:

“AFFIDAVIT OF EDWARD M MWONGO DATED 4TH AUGUST 2016

11. It is evident that:

a. The approval had been granted on 18th August 2015.

b. The response to the issues raised by the petitioner in the letter of 4/8/2015 was made by the petitioner on 17th November 2015.

c. The change of user approval could only have been made upon receipt of a response from the petitioner and upon investigations by the 1st Interested Party. The 1st Interested Party did not investigate the queries raised under section 26 of the Physical Planning Act.

d. the process for obtaining the Change of User was flawed. The respondent has challenged the process by way of appeal to the Nairobi Physical Planning Liaison Committee appeal as confirmed by the appeal produced herein marked Exhibit EM2

27. I am aware that that all public instructions are mandated by law to observe due process and enshrine national values including transparency, accountability and fidelity to the law and the Constitution in execution of their duties and mandates.

28. Paragraph 38, 39, 40 and 41 of the Supporting Affidavit are denied and have no basis. The petitioner has not brought forth any evidence of threat, real or imagined that may arise by either the respondent or other interested parties. The petitioner is put to strict proof thereof.

30 The respondent has consistently advocated for the sustainable use and preservation of the environment. The petitioner is going to cause damage and stress to the roads, water and sewer facilities, destroy plant cover and increase the built-up area thereby causing poor storm drainage as currently witnessed in the area.

31. The adverse effects mentioned in paragraph 32 above run afoul the pre-ambule and substantive provisions of the Constitution and no mitigation has been offered by the Petitioner meaning the effects of the development shall have irreversible effects.

34. The respondent stands to suffer great prejudice in the event the orders are granted as the respondent's constitutional right to challenge the Petitioner's attempt to violate the right to a clean and healthy environment will be curtailed.”

[14] During oral submissions before the court, the respondent's counsel submitted that the petitioner did

not discharge its evidential burden to produce evidence of any policy of the respondent as regards user of land and of any objection and interference by the respondent with regard to construction of the development **after** the grant of approvals. It was contended that under Article 24 of the Constitution, the right to property is not absolute and that **before** the grant of the approvals, the respondent had pursuant to its constitutional right to challenge and public participate in the approval process, made various complaints relating to right to clean and healthy environment under Article 42 of the Constitution.

[15] It was further submitted that upon approval the respondent had filed appeals, respectively dated 1st August 2016 and 2nd August 2016, to the Physical Planning Liaison Committee of the 1st Respondent and the National Environment Tribunal, respectively seeking, principally, reversal of the approval for the change of user and the revocation of the grant of Environmental Impact Assessment Licence for the development.

[16] The respondent concluded that to grant the petition and application as sought would be to defeat the constitutional rights of the petitioner's members to challenge the user of land in pursuit the right to a clean and healthy environment, that the petition was a question of land use rather than of right to property and the proper court should be the Environment and Land Court not the Constitutional and Human Rights Division of the High Court.

The 1st Interested Party's Case

[17] The 1st Interested Party did not file a response by the time the matter came for hearing of the interlocutory application as the official of the County Government who dealt with the matter was said to be on leave, However, Counsel for the 1st Interested Party submitted that as the Respondent did not challenge the petitioner's case with regard to grant of approval by the 1st Interested Party, it did not wish to stand in the way of the petition for reason of lack of a replying affidavit on its part. Counsel also submitted that the 1st Interested Party was not opposed to the grant of the order for construction of the development as prayed by the petitioner.

The 2nd Interested Party's case

[18] The 2nd Interested Party also did not oppose the petitioner's application and it's case is simply that it had complied with the law in processing and granting the development approval by an Environmental Impact Assessment Licence and supported the petitioner's case to be allowed to proceed without interference by the respondent as set out in paragraphs 3-10 of the Replying Affidavit of Francis Chwanya as follows:

"AFFIDAVIT OF FRANCIS CHWANYA DATED 4TH AUGUST 2016

3. *That true to the petitioners assertion, the National Environment Management Authority has licensed the Construction of six town houses, a development project being undertaken by the petitioner having received the Environmental Impact Assessment (EIA) project report for purposes of consideration for issuance of an EIA license. (Attached and marked as FCI is a copy of a letter dated 6th July 2016 acknowledging receipt of the said EIA project report to attest as much).*

4. *That in the spirit of collaboration with Lead agencies and undertaking due diligence, the 2nd interested party vide its letter dated 9th June 2016 wrote to the relevant lead agencies seeking their views on the proposed project, (Annexed and marked as FC2 us a copy of the letter to attest as much).*

5. *That no objection was received by the 2nd interested party in respect to the proposed project within 21 days from the lead agencies, none of the lead agencies responded objecting to the proposed project.*

6. That the 2nd Interested party did undertake a site visit and prepared a site visit report which ascertained inter alia that the proposed project had obtained a change of user approval from single dwelling residential units and that the proposed project would not pose any environmental risks.

7. That in exercise of its statutory mandate, the 2nd interested party's officers proceeded to reviewed the EIA project report and found that it had provided comprehensive and adequate measures to mitigate any negative impacts on the environment.

8. That after being satisfied that the petitioner's proposed project had met all the legal requirements for issuing an EIA license, the 2nd interested party issued an EIA license for the project subject to various conditions to be met by the proponent (**attached and marked as FC3 is a copy of the license issued to the petitioner to attest as much**).

9. That the 2nd interested party followed all the laid down rules and procedures before issuing the EIA license.

10. That I am advised by our advocates on record, advice which I verily believe to be true that that there has been a recent attitude by residents associations to condemn duly approved development projects, condemnations which come under the disguise of lack of public participation even in instances where sufficient public participation took place."

ISSUE FOR DETERMINATION

[19] The issue for determination is whether a conservatory order permitting the petitioner to proceed with construction on its parcel of land, the suit property herein, will be made in this matter despite the pendency of appeals by the Respondent from statutory approvals for the development granted by the County Physical Planning Department and the National Environmental Management Authority.

DETERMINATION

[20] The conservatory order sought is in terms that –

5. ***“Pending the hearing and determination of the amended Petition hereto, the petitioner/applicant be allowed and/ or be at liberty to continue with the development and construction activities on LR. No 330/485 along Kunde road – Thomson Estate Nairobi.”***

Principles for grant of Conservatory Orders

[21] I have considered the principles for the consideration of conservatory orders as arguability of the petition, risk of prejudice or likelihood of the petition being rendered nugatory and balance of public interest. See ***Kyalo Kamina v. The Senate and Ors., Nairobi Pet. No. 334 of 2016.***

Arguability of the petitioner's case

[22] Looking at the inherent merit of the petitioner's case, it appears to me that although the contest between the petitioner and the respondent concerns the use of the petitioner's land, upholding the respondent's objection would devalue the petitioner's interest in the property and, accordingly, its right to property would be correspondingly affected.

[23] Although, the respondent as an association of residents has a constitutional right under Article 22 (2) (d) of the Constitution to seek to represent the members in enforcement of Article 42 right to clean and healthy environment, and therefore to challenge any user that offends their right to clean environment, it appears to me that the grounds of the objection are really based on a preference of the type of houses for the area rather than a scientific findings of effect of the development to the environment for the area.

[24] Accordingly, while the respondents have a right to a clean and health environment, their objection to the petitioner's development on what may be considered aesthetic reasons that the proposed land does not accord to their set land use policy, is a clear derogation of the petitioner's right to property. The Article 24 constitutional limitation to the Bill of Rights must be based on a law which is justifiable in a democratic society.

[25] It has not been shown by the respondent who have a special burden of proof under section 112 of the Evidence Act that the Petitioner's right to property has been limited by any law on land use zoning. The respondents objection to the proposed development is based on its policy against multi-dwelling houses in the area where the property is situate. On a balance of probabilities, despite denial of existence of such a policy by the respondent, the court finds it as proved from the following materials:

a. The Respondent's Letter of Objection dated and set out in full below stated as follows:

“Our objection is based on the fact that the proposed construction will impact on the residents of Kunde Road Estate and KRRWA negatively, by opening up the estate to other such developments which would introduce multiple dwelling houses within a predominantly single dwelling neighborhood, thereby defeating the purpose and efforts by members as stipulated in the KRRWA by-laws (submitted earlier to the Nairobi City Council for approval and adoption).”

b. The finding of the Environment and Land Court in dismissing a Petition filed by the Respondent challenging a similar project in *Koome Mwambia & 3 Ors v. Deshun Properties Company Limited & 4 Ors.* (2014) eKLR at p.3:

“It is also averred by the petitioners that the zoning regulations under section 56 of the Urban Areas and Cities Act, 2011 under zone 4, all the properties and developments along Kunde Road and Thompson Estate be single dwelling units/flats upto a maximum of 4 story's sitting on a minimum acreage of 0.05Ha. It is averred that in line with conserving the unique features of all the properties, the association developed a policy for all the members to reserve the place for single dwelling units only. It is the petitioner's claim that the 1st respondent without obtaining any development approval from the 3rd respondent or undertaking an environmental impact assessment (RIA) study and obtaining the EIA license from the 4th respondent began demolishing the single unit building with a view of constructing a tower containing 82 flats thereon in breach of sections 30(1), 32, 36 of the Physical Planning Act and Section 58 of the Environmental Management and Coordination Act, 1999.”

[26] On its part the petitioner herein has demonstrated that its development is within the zoning laws for the area, hence the approval by the Physical Planning Department of the County Government and licence by the National Environmental Management Authority (NEMA) attached to the application as PB1 and PB7 in the supporting affidavit.

[27] Before there is a successful challenge through the respondent's appeals of the approval for change of user and the grant of Environmental Impact assessment Licence by NEMA, the petitioner is entitled to develop its property in accordance with its right to property under the Constitution. Clearly, the petitioner has an *arguable* case with probability of success at the trial as regards any post approval interference with its right to develop the property including the restriction as to access to the property by requirement of gate fees and any other conditions for access to its property.

Risk of Prejudice

Delayed commencement of the development project.

[28] From the respondent's letters dated 11th August 2011 with the same content by addressed under separate cover to the Town Clerk and the Director of Planning at the City Council of Nairobi, it is clear

that the dispute as to development has been on for the last five years. The letters were in the following terms:

“KUNDE ROAD RESIDENTS WELFARE ASSOCIATION

11th August 2011

The Town clerk

City Council of Nairobi

P. O Box 30075

NAIROBI.

Dear sirs

PETITION AGAINST CONSTRUCTION OF TOWN HOUSES ON L.R. NO 330/483 ON KUNDE ROAD

We the Committee members on behalf of the residents of Kunde Road Residents Welfare Association (KRRWA) being legally registered by the Ministry of Cooperative Development Reg. No 21006 and being in Beneficial ownership, Occupation and in Possession of several parcels of land located at Valley Arcade – Mbaazi/Kunde/Hundred roads do hereby make a collective objection against the construction of Town Houses on L.R No.330483. See attached environmental Impact Assessment NEMA document circulate to our residents on behalf of Mr. Russel Onyango proposing to undertake the development.

Our objection is based on the fact that the proposed construction will impact on the residents of Kunde road Estate and KRRWA negatively, by opening up the estate to other such developments which would introduce multiple dwelling houses within a predominantly single dwelling neighborhood, thereby defeating the purpose and efforts by members as stipulated in the KRRWA by-laws (submitted earlier to the Nairobi City Council for approval and adoption).

Further to the foregoing, the construction of the town houses would cause a strain on the available amenities and services in addition to other negative effects including environmental effects.

We herewith attach a petition from the members of the Kunde road Residents Welfare Association stating their objection to the proposed development.

Yours sincerely

Terry Jones - Chairman

Dorothy Thenya – Vice chairman

Jeremy Ngunze – treasurer

Krishna Granier – Secretary

Eng. Edward M Mwongo – Committee Member

Chris Mensah Committee member

Koome Mwambia – Committee Member”

[29] It cannot be said that a delay of a construction project of Town houses for five years by reason of objection is not prejudicial to the owner developer. A further delay in the construction after the developer has obtained necessary approvals is to escalate the prejudice without any basis in law. The respondents having not secured any orders for stay of the project after the grant of the approvals pending the consideration of their appeals are not entitled to resist the petitioner's move to commence development upon grant of leave. The mere pendency of appeals from the grant of the approval for change of user and the Environmental Impact Assessment licence would not suffice.

Likelihood of interference by the Respondent

[30] In the supporting Affidavit sworn by Abdiladif Ismail on the 22nd July 2016, the petitioner details the fear of likely interference in its development project by the Respondent as follows:

"AFFIDAVIT OF ABDILADIF ISMAIL DATED 22ND JULY 2016

31. *That the petitioners even before hardly commencing its project on the subject property faces the risk of having its freedom of movement violated **as the respondent together with other adjacent property owners, have threatened to deny the petitioners access to the estate in flagrant breach of the constitution.** (Annexed and marked "PB 9" is a letter from the owners of adjacent property within area warning the petitioner about how to go about its projects)*

33. *That the respondent, has equally frustrated the petitioner's attempts to pay service charge/gate fees with the intent to deny the petitioner access to the subject property knowing very well that an access road is an easement that every property owner in Kenya is entitled to (Annexed and marked as "PB 10" are the petitioners emails requesting for service charge amounts comprised as gate pass fee)."*

[31] The respondent states that it has not interfered with the petitioner's construction post grant of the approvals and that it had merely appealed from the grant of the approvals. However, from the various letters of the respondent to the authorities charged with granting the approvals for proposed development objecting to the grant, it is clear that the respondent is viciously opposed to the development proposed to be undertaken by the petitioner, and, on a balance of probabilities, I would agree that the respondents may attempt to stall the developments by all means including restricted gate access in the hope of a successful appeal in the meantime. An example of the letters is the undated circular letter by the Respondent to its members urging them to support a petition for stoppage of the development and return by the 14 June 2016, (which date is amended to Sunday 12 June) shortly before the grant of the NEMA licence on 18th July, 2016, in the following terms:

"KUNDE ROAD RESIDENTS AND WELFARE ASSOCIATION

Dear Residents:

*Attached is the Social Site Assessment (part of the EIA report) for the proposed building side at #36 of Six townhouses. It represents the official position of the Kunde Road Residents and Welfare Association Committee opposing the project based on many factors including environmental impact, as well as the impact it will have on the safety and tranquility of our neighborhood. We have been asked to respond as a community and have filled it in based on our official KRRWA position. If you are in agreement with us, please fill out your personal details and sign it as soon as possible, and return it to the Committee **Secretary at house #66** directly (please do not ask Peter to do this as we want to handle these personally). We have a deadline so we ask that you return these by ~~June 14 2016~~ Sunday 12 June (**do it now while you're thinking about it**)*

We cannot stress the importance of your support in the continuing fight against multi-dwelling development in this neighbourhood and we thank you for giving this your immediate attention

Kind regards

Your KRRWA Committee”

[32] There are fears of interference by another association of residents namely “Kaputei Gardens Association” whose letter demanding the stoppage of construction by the petitioner is in the following words:

“Our Ref: MG/GEN/KAPUTEI/2016

20th July 2016

Pyramid Builders

P O Box 17575-00500

Nairobi – Kenya

Tel +254720150988

Attention Abdi Ismail

Dear Sir

RE: NUISANCE CONCERNS BY THE KAPUTEI GARDENS COMMITTEE TO VARIOUS CONSTRUCTION ONGOING IN AND AROUND THE PREMISES

I write to you as the Chairman of the Kaputei Gardens Association, the members of association have instructed me to address you here as follows:

The members of the Kaputei Gardens Association wish to make a complaint various concerns held about the construction works being undertaken in and within the proximity of their premises.

In particular, it is their concern that the said developments are a nuisance to the members for the following reasons:

- 1. The infrastructure of the Kaputei Gardens particularly the roads are damaged as a result of the heavy trucks and materials that frequent the premise.*
- 2. There is a dust buildup that has become a safety and health concern to the residents thereon;*
- 3. That the development if continued In its current form will result in serious environmental and scenic destruction to the premises of Kaputei Gardens; and*
- 4. That in spite of the notable evidence and presence of these factors and concerns raised, you have not taken any measures to mitigate these effects;*

It is our demand that you immediately cease all construction on site and address these issues in consultation with the Kaputei Gardens Association to avoid being a further nuisance and destruction to the residential estate.

Should we not hear from you within the next five days and there has been no improvement, the management Committee will have no option but to seek legal action to cause you to desist from the construction work being carried out. And we will also deny you access to the estate.

Kindly contact us to discuss further this matter in order to reach an amicable solution. We look forward to your cooperation in this matter.

Yours faithfully,

Ahmed Mahmoud”

[33] Although the said Kaputei Gardens Association has not been joined as a party in this suit, a declaration of the petitioner’s right to the property will be a judgment *in rem* and it would bind all persons. In the interlocutory stage a conservatory order as sought allowing the petitioner to commence with its construction in accordance with an environmental licence issued by the National Environment Management Authority (NEMA) in charge of environmental management it must be taken that the authority considered the concerns of the said association before granting the licence. In according the said association a right to be heard on the matter, the Court will direct that the petition be served on the association which shall be joined herein as an interested Party.

Balance of convenience and public interest considerations

[34] In accordance with Articles 20 of the Constitution, the court has to balance several constitutional values and principles of the constitution and the interests of the parties as follows:

- a. Article 10 value and principle of the rule of law requires that the right to property of the petitioner be upheld subject to any limitation by any law relating to the process and requirement of land use zoning approval and environmental impact assessment licence.
- b. The grant of approval and licence for the petitioner’s development project by the responsible statutory bodies is prima facie evidence of compliance by the petitioner with the applicable rule of law requirements.
- c. The respondent and any other person, including the Kaputei Residents association are entitled under Article 42 of the constitution to a clean and healthy environment and for that purpose to pursue lawful redress where aggrieved before or after the grant of approval and licence, by appeal or Article 70 proceedings and the court cannot therefore restrain their right to approach any lawful forum for the determination of their objection, complaint or concern even if this inevitably led to a delay of the proposed development.
- c. The petitioner as a property owner has a right to access its property and the restriction to such access by gate fee and other conditionalities imposed by an association to which it is not a member appears to limit that right must in accordance with Article 24 of the Constitution find a basis in law.
- d. The respondent as an association of member residents of the area may be entitled to levy fees for the maintenance of a security gate and related amenities for their estate.

[35] Utilizing this criteria, it appears to the court that the order sought by petitioner is justified in that the petitioner fears that interference by the respondents and others of the Petitioner’s right to undertake construction on its property in accordance with approval and licence granted by the responsible statutory authorities is imminent in view of the antecedents of the strong objection to the project and the existence of gate fee requirements of the respondent and others.

[36] The balance of the public interest concerns appears to me to be that the petitioner is permitted to proceed with its construction development on its property for which it has in accordance with the principle of the rule of law obtained necessary approval and licence. In upholding the respondent’s right to a clean and healthy environment and to take proceedings in pursuit of that right the respondent cannot be restrained from taking any lawful action. In the interlocutory stage, the petitioner without requirement of becoming a member thereof, shall pay any reasonable gate fee levied for the administrative costs of providing security to the area where its property is situate. In the final judgment, he Court after hearing the petition may make such orders as to the payment or refund of the gate fees paid during the pendency of the petition.

CONCLUSION

[37] It appears to the Court, without deciding at this interlocutory stage, that the petitioner as the registered owner of the suit property is entitled in accordance with the constitutional right to property to utilize its property subject to the statutory provisions on land use, and the respondent and others are entitled to the right to a clean and healthy environment and for that purpose to a right to access any lawful forum for determination of such right. The petitioner's right to develop the property having already crystallized by the grant of necessary land use approval and licence, it is entitled to a conservatory order fashioned in accordance with Article 23 (3) of the Constitution to fit the circumstances of the case. Should the approval or licence be revoked by the appeals therefrom or other lawful proceedings, the Court will make further orders as the circumstances may require.

ORDERS

[38] Accordingly, for reasons set out above, the court makes a Conservatory Order as sought in the Notice of Motion dated 22nd July 2016, subject to the payment of any gate fees levied by the respondent for maintenance of the security gate and service. There shall be liberty to apply as to the reasonableness of the said fees and other conditions for access. For the expeditious disposal of the dispute, the petition shall be fixed for hearing on priority basis.

[39] Costs in the cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF SEPTEMBER, 2016.

.....

JUDGE

Appearances

Ms. Wangila instructed by M/S Abib & Associates, Advocates for the Petitioner.

Mr. Muriithi instructed by M/S Kimathi & Muriithi Associates, Advocates for the Respondent.

Mr. Wango instructed by M/S E. Omotii & Company, Advocates for the 1st Interested Party.

Mr. Wabwoto, Advocate for the 2nd Interested Party.

Mr. Kazungu - Court Assistant.