REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CIVIL NO. 1126 OF 2013

KENSALT LIMITED.....1ST PLAINTIFF

SUPPLIES AND SERVICES LTD.....2ND PLAINTIFF

-VERS.US-

CITY COUNCIL NAIROBI.....1ST DEFENDANT

WILFRED MASINDE.....2ND DEFENDANT

RULING

1. The Plaintiffs by an application dated 12th September, 2013, seek an interlocutory injunction to restrain the Defendants either through themselves or through their agents and or servants from demolishing, destroying or in any other way interfering with the Plaintiff's construction or reconstruction of the duly approved boundary wall around the property known as LR No. 209/11410, LR No. 209/11624, LR No. 209/11250, LR No. 209/11125 and LR No. 209/12110.

2. The Plaintiffs who are associate companies claim to be the registered proprietors of LR No. 209/11410 and LR No. 209/12110. The Plaintiffs state further that the construction of the boundary walls were approved by the 1st Defendant who has now turned around and is busy demolishing any wall constructed by the Plaintiff. The Plaintiffs' application is supported by the affidavit of Rajendra O. Thakkar sworn on 12th September, 2013. Annexed to the said supporting affidavit are copies of the title documents namely Grant number IR 67926 and IR 68428. There is also annexed to the same affidavit a copy of the Notification of Approval of Development Permission issued by the 1st defendant on 9th February, 2012. Also exhibited were photographs of the contentious boundary wall with portions thereof demolished. The Plaintiffs' application was also predicated on the grounds stated on the face of the application.

3. The application was opposed vide a Replying Affidavit sworn by Rose K. Muema, the Chief Officer in charge of Urban Planning & Housing Department of the 1st Defendant. The 1st Defendant contended through the Replying Affidavit that the approvals for construction of the walls were obtained through the presentation by the Plaintiff of forged documents. The deponent

also contended that the "subject matter of this suit are the same as in Nairobi High Court case ELC No. 493 of 2012".

4. At the brief oral hearing of the application on 9th February, 2015 the Plaintiffs' counsel reiterated the position that the Plaintiff is the registered owner of the amalgamated properties and entitled to erect a boundary wall thereon. Counsel argued that the Plaintiffs simply wanted to secure their property and had obtained the appropriate approvals from the 1st Defendant. Counsel further submitted that the existence of ELC No. 493 of 2012 (Nairobi) did not affect the Plaintiff's claim in the instant suit as the current litigation had nothing to do with ownership of the property but only the question as to whether or not the erection of the boundary wall could be continued and the Defendants restrained from demolishing the wall. The Plaintiffs submitted further that the Plaintiffs had made out a genuine prima facie case on the basis of the titles exhibited as well as the approvals to develop granted by the 1st Defendant who had no reason to renege on the same.

5. The Defendants on the other hand, through Counsel relied on the Replying Affidavit already referred to in paragraph 3 of this Ruling and submitted that the Plaintiffs had not shown a prima facie cases and further that the Plaintiffs stood to lose nothing if an injunction was not granted.

6. I have considered the parties respective submissions. I have also carefully perused all the documents filed herein. I must on the outset point out that at this stage of the litigation my duty is limited to ascertaining if the Plaintiffs have established that they have a prima facie case with a probability of success. I must also answer the question as to whether in the absence of an injunction the Plaintiffs stand to suffer beyond reparation. Finally in the event of doubt on any of the two questions, I must determine in whose favour the balance of convenience tilts. All these principles were enunciated in in the case of **Giela –v- Cassman Brown & Co. Ltd [1973] E.A 358**. The principles are however not exhaustive. As an injunctive relief is an equitable relief the totality of the circumstances including the conduct of the parties must be reviewed and considered: see **Bonde –v- Steyn [2013] 2 EA 8**.

7. I start by making reference to suit No. ELC 493 of 2012. That case was instituted by Gorvas Holdings Ltd. The Plaintiffs herein were impleaded alongside the Commissioner of Lands, the Registrar of titles and the Director of Survey. The core of that suit as the Plaintiff's counsel herein correctly pointed out is the issue of ownership of three parcels of land namely LR No. 209/11278, LR No. 209/12110 and LR No. 209/11410. I have handled ELC 493 of 2012 and made an interlocutory determination. The Plaintiffs in ELC 493 of 2012 and the Plaintiffs herein both claim ownership to the land parcel of land. In the epilogue of my ruling rendered on 28th November, 2014 I stated as follows:

> *"It is pretty obvious from the facts before the court that ultimately there will have to be an order made for the cancellation of one title or another. It is also pretty obvious that to resolve this dispute there will have to be made an order for resurvey and reparcellation of the parcels of land. That will mean substantial changes of ownership. It would not be advisable for such ownership to be asserted and conveyed as the suit is still pending.*
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> *"To ensure that the ends of justice is not defeated, I would allow both Applications by the Plaintiff and issue the following orders:-*

8. The effect was that The Plaintiffs herein, who were the 1st and 2nd Defendants in ELC 493 of 2012, were restrained on 28th November, 2014 by this court from inter alia, erecting a perimeter wall or undertaking any development on LR No. 209/11410, LR 209/12110 and LR No. 209/11278. Yet that is what the Plaintiffs now seek to undertake and seek this court's assistance in prohibiting any person including the Defendants herein from interfering with such of the Plaintiffs undertaking. I certainly would have stopped there and dispatched the Plaintiffs in light of the

ruling of this court on 28th November, 2014. This court truly should be in the fore in ensuring that its orders are obeyed and adhered to. It should not be seen to do, the converse. It should not abet or aid in any disobedience of its own or any other court's orders.

9. The Plaintiffs have however indicated that ELC 493 of 2012 had all to do with ownership and not boundary or perimeter walls. It is apparent from the orders which obtained in ELC 493 of 2012 even if at an interlocutory stage that the issue of perimeter or boundary walls has also been addressed in ELC 493 of 2012. One would be tempted to invite the widely recognized doctrine of *res judicata* but nay it may be argued and correctly so that the Defendants herein were not party to the proceeding in ELC 493 of 2012 and that none of the parties therein were litigating on the Defendants behalf. It is consequently, for that reason and no other that I feel constrained difficult as it may be, to assume that ELC 493 of 2012 does not exist and consider the current application on its merits.

10. The Plaintiffs submitted that they hold an approval from the 1st Defendant. They stated that the Defendants have no reason to interfere with their construction works as besides the approval, the Plaintiffs are their registered proprietors of the suit property. In support the Plaintiffs exhibited copies of the title documents. The Defendants retort was that the approval was obtained without appropriate material disclosure and on the basis of forged documents. The Defendants also submitted that the suit property is the subject of a dispute in court and made reference to ELC 493 of 2012.

11. It is evident that the Plaintiffs have not made out a prima facie case for the following reasons.

12. True the Plaintiffs could be having and holding on to title documents. Those titles are however the subject of a challenge. By its letter of 24th October, 2012 the Commissioner of Lands offices raised doubts and issues on how LR No. 209/11410 and LR No. 209/12110 were created to overlap 209/11278. That is certainly a matter of fact which the court should not ignore at this interlocutory stage even if the Plaintiffs seek to invoke the provisions of **Section 26** of the **Land Registration Act, 2012**.

13. Secondly, I take note of the undoubted fact that the approval granted by the 1st Defendant herein for development of a boundary wall was conditional upon two factors: (i) the Construction of the boundary wall or any building was not to encroach onto the road reserve and (ii) the subject plots did not constitute part of a disputed land or public utility. These two conditions were appended to the approval of development permission granted by the 1st Defendant to the Plaintiffs on 9th February, 2012 (RGT01). In my view a breach of both or any one of these conditions meant that the approval or permission for development would be withdrawn at the option of the 1st Defendant. If that was to happen and in this case, in view of the existence of ELC 493 of 2012, it happened, the 1st Defendant was perfectly entailed to renege on its earlier permission granted to the Plaintiff. The permission to construct was given on a disputed land. The 1st Defendant had reason to stop the construction. I am satisfied that the prima facie case sought to be established by the Plaintiff would then fall like a sand-castle it has.

14. For the reasons flowing above, I would deny the Plaintiffs the injunctive orders they now seek. The application dated 12th September, 2013 is dismissed with costs to the Defendants.

Dated, signed and delivered at Nairobi this 10th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiff/Applicant

.....for the Defendants/Respondent