REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 610 OF 2014

MOSES MUEMA MAVOKO….....1ST PLAINTIFF

VERSUS

FRAKASH NAVNITAL BAROT.....….....1ST DEFENDANT

APCONS RESOURCES LIMITED ……..……. 2ND DEFENDANT

RULING

The plaintiff by a notice dated 16th May 2014 brought under Order 40 Rules 1,2 and 3 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act seeks the following substantive orders:

1. That the Honourable court be pleased to grant an injunction restraining the Defendants/Respondents together with their agents and or servants from constructing industrial or light industrial or godowns or in any manner whatsoever constructing any buildings which are not residential on the property known as **Athi /River block 1/8** until hearing of the suit.
2. That the Honourable court be pleased to grant an injunction restraining the Defendants/Respondents together with their agents and/or servants from drilling a borehole on the property known as **AthiRiver/Athi River Block 1/8** unless within the approved radius from the plaintiff's borehole until the interparty hearing of the application.

The plaintiffs application is predicated on the grounds set out on the body of the application and the affidavit sworn in support by **Moses Muema Mavoko** on 24th April 2014. The plaintiff inter alia sets out the following grounds in support of the application:-

1. That the area where both the plaintiff's and Defendant's properties are is a residential and agricultural zone.
2. The plaintiff has already constructed his residential home on his property and other neighbours too and the Defendants want to construct a factory without any change of user and without the consent of the plaintiff and other residents.
3. The plaintiff has also drilled a borehole which is fully operational and if the defendant drills a borehole which he intends to it will drain the plaintiff's water.

4. The plaintiff will suffer irreparable loss and damages which cannot be compensated by damages and have shown a prima facie case to warrant the orders they seek.

The plaintiff in the supporting affidavit depones that he is the registered owner of land title **Athi River/Athi River Block 1/5** and has been in occupation of the said property since 2004 and has constructed a residential house thereon. The plaintiff states that the Defendants property Title number **Athi River/Athi River Block 1/8** borders the plaintiffs property and that the Defendants have constructed a perimeter wall and that the plaintiff has commenced construction of godowns and further intends to put up a factory contrary to the permitted user of the property. The plaintiff avers that the permitted user of the properties within the locality is residential cum agricultural and states that if the Defendants are allowed to construct commercial buildings it will adversely affect the plaintiff's property rights and thus seeks an order of injunction stopping the Defendants from continuing with their illegal and unauthorized constructions. The plaintiff asserts that the Defendants have not obtained any change of user and no notification of change of user from agricultural cum residential to commercial or industrial has been given.

The plaintiff further states that the Defendants intend to drill a borehole on their property 20 to 25 metres from the plaintiffs borehole. The plaintiff contends the drilling of a borehole on the Defendants property would impact and affect his borehole as it would not be within the required distance and radius from his borehole and avers that the Defendants should be restrained from proceeding with drilling of a borehole without the necessary authorizations from the appropriate authorities.

The Defendants oppose the plaintiff's application and filed grounds of opposition dated 1st July 2014 as well as a replying affidavit sworn on 1st July 2014 by **Prakash Navmital Barot** the 1st Defendant herein. The Defendants set out the following grounds in opposition to the plaintiff's application.

1. **That the plaintiff's claims are not anchored in law and that the Applicant's pleadings do not demonstrate a reasonable cause of action against the Respondents.**
2. **That the application is brought in vacuo and lacks factual and legal substratum.**
3. **That the plaintiff/Applicant has not satisfied the threshold requirements for grant of injunction under Order 40 of the Civil Procedure Rules 2010.**
4. **That the Applicant who is a neighbour of the 2nd Respondent is using the court process to interfere with the quiet enjoyment and possession of the 2nd Respondent's property without any colour of right.**
5. **That the 2nd Respondent's developments on the suit property are lawful, approved and sanctioned as by law required by the relevant authorities.**
6. **That the constitutional right of the 2nd Respondent to acquire and own property and impliedly its lawful usage by itself will be encroached by the injunctive or other orders sought.**
7. **That the alleged right to water is not the absolute right of the plaintiff/Applicant and his refusal to give water to the 2nd Respondent disentitles him from the exercise of the court's discretion in his favour.**
8. **That to stop any developments by the Respondents will result in huge losses for which the plaintiff/Applicant has not given any undertaking or offered any security or demonstrated his capability to pay for any losses and damages that may result due to the court action.**
9. **That the plaintiff/Applicant has not tendered filed or given an undertaking to pay losses nor disclosed his ability to pay the said damages or losses.**
10. **That the Application is without merit and ought to be dismissed with costs.**

The 1st Defendant in his replying affidavit affirms that he is a director of the 2nd Defendant who is the registered owner of the land parcel **Athi River/Athi River Block 1/8** as per the Title Deed issued on 29th May 2014 annexed and marked **"PNB-14**". The 1st Defendant avers that the plaintiff's suit in as far as it relates to the activities being carried out by the 2nd Defendant on the said property cannot raise any cause of action against the 1st Defendant in his individual capacity as the 1st Defendant is only a promoter and

subscriber of the 2nd Defendant's company which has a distinct and separate legal capacity from the 1st Defendant. Thus the 1st Defendant contends the plaintiff's suit as against him is unsustainable and that the same ought to be struck out.

On the claims by the plaintiff against the Defendants the Defendants state that all the necessary authorizations and approval for change of user of the suit property from agricultural to commercial was sought and obtained.

The Defendants got the previous owner **Daniel Mutuku Mbevi** at the time of the sale transaction to the Defendants to apply for development permission and change of user as per the application annexed and marked "**PNB-6**". As per the application change of user from agricultural to commercial was sought and the developments intended were to include shopping stores, convenient stores and shops. The application for development permission Form PPA1 submitted under the Physical Planning Act Cap 286 Laws of Kenya attached the plans and the drawings for the intended developments and included staff residential, Gatehouse, Godowns and offices. The notification of the application for change of user was carried in the Standard Newspaper as required and invited the public to forward any objections in writing to the Administrator, Mavoko sub-county within 14 days of the notice.

The Defendants change of user was approved by the Mavoko Town Planner and notification of approval given vide Form PPA 2 on 4th February 2014 as per annexture marked **"PNB-9**". The Defendants further received notification of approval of development permission to build godowns on **Athi River /Athi River Block 1/8** on 27/5/2014 on interalia the following conditions:-

1. Submission of structural/civil engineers drawings to the County Engineer or his appointed representatives for approval before commencement of works.
2. Renewing of approval if construction is not started within 12 months and not completed within 24 months.
3. Undertaking and **E1A** and obtaining **NEMA** authorization.

The Defendants state that as the approval for the construction of godowns required the 2nd Defendant to carry out an Environment Impact Assessment (**EIA**) study to get the approval of the National Environment Management Authority (**NEMA**) the 2nd Defendant at the time the plaintiff filed the suit was in the process of applying for the **NEMA** licence.

As relates to the drilling of a water borehole in the 2nd Defendants property the 2nd Defendant states that it has a legal right to drill one as long as it obtains the necessary approvals and authorizations from the relevant authorities. The 2nd Defendant asserts it has a right to enjoy the rights of ownership of its property as long as it is within the law. The Defendant state that the area where both the plaintiff's property and the 2nd Defendant's property are located has been Zoned Commercial as is evidenced in the survey map obtained from the Machakos Lands registry annexed and marked "**PNB-15**" which shows the first two rows of plots adjacent to Mombasa Road have been designated/Zoned commercial. The plaintiff's and the 2nd Defendant's properties are on the 2nd row.

In the premises it is the Defendants contention that the plaintiff cannot demonstrate or show that he has a prima facie with a probability of success to warrant the court to grant him the order of temporary injunction sought and urges that the plaintiff's application to be dismissed.

The parties Advocates made oral submissions before the court on 24th October 2014 in support of their clients respective cases. **Mr. Mutinda** Advocate for the plaintiff in his submissions stated that the plaintiff's concern was that the Defendant was constructing something which was not approved and argued that the approved change of user was from agricultural to commercial and he contended that godowns did not fall under commercial user and essentially fall under industrial user which is not what was approved. **Mr. Mutinda** submitted that godowns do not fit what is envisaged as "**commercial use**" under section 30(5) and (6) of the Physical Planning Act Cap 286 Laws of Kenya.

Section 30(5) and (6) of the Act provides:-

> **(5) Subject to subsection (7) no licensing authority shall grant, under any written law, a licence for commercial or industrial use or occupation of any building, or in respect of any premises or land, for which no development permission had been granted by the respective local authority.**

(6) For the purposes of subsection (5)-

> **(a) Commercial use includes shops, offices, hotels, restaurants, bars, kiosks, markets and similar business enterprises and trade but does not include petroleum filing stations,**
>
> **(b) Industrial use includes manufacturing, processing distilling and brewing, ware housing and storage, workshops and garages, mining and quarrying and other similar industrial activities including petroleum filling stations.**

Subsection (7) provides:-

> **(7) No local authority shall grant a development permission for any of the purposes mentioned in subsection(5) without a certificate of compliance issued to the applicant by the director or an officer authorized by him in that regard.**

It is the plaintiffs submission that what the 2nd Defendant wants to do in his property amounts to an industrial activity and if the 2nd Defendant is allowed to proceed with an industrial activity the plaintiff will be adversely affected and hence the need for the Defendants to be restrained. **Mr. Mutinda Advocate** further submitted that the Defendants did not comply with section 52 of the Physical Planning Act as pertains to the publication of the application for change of user as the notices were not published in the manner provided in the local dailies.

Mr. Bowry Advocate for the Defendants in response to the submissions made on behalf of the plaintiff submitted that the plaintiff has not demonstrated he has a prima facie case with any probability of success. He contended that the Defendants have demonstrated there was compliance with section 52 of the Physical Planning Act as notification of the application for change of user was carried in the Standard Newspaper and objections were invited from the members of the public. **Mr. Bowry** submitted that the 2nd Defendant has shown that every approval required for change of user and for development permission was duly given. He further submitted that the 2nd Defendant is entitled to make use of its land in whatever manner as long as it is in accordance with the law. He contends that godowns cannot be categorized in the category of industrial user as they indeed are analogous to shops.

Mr. Bowry submitted further that the intervention by the plaintiff has the effect of frustrating the 2nd Defendant's project and the stoppage of the works is occasioning the 2nd Defendant losses/damages and that the balance of convenience militates against granting the injunction in favour of the plaintiff.

I have considered the plaintiff's application, the affidavit in support and in opposition together with all the annextures and the submissions by counsel for the parties. As far as I have been able to understand this matter, it appears to me that the primary issue is whether or not the change of user and the development permission granted to the Defendants by the Mavoko Sub County was appropriately given. The physical Planning Act Cap 286 under part V sections 29-40 provide for control of development.

Section 29(a) and (c) of the Act vests the power and authority to control development in the local authorities.

Section 29(a) and (c) provide thus:-

29. subject to the provisions of this Act, each local authority shall have the power:-.

(a) to prohibit or control the use and development of land and buildings in the interest of proper and orderly development of its area,

(c) to consider and approve all development applications and grant all development permissions,

Section 30 makes provision for the obtaining of development permission and makes it an offence to commence any development without obtaining a development permission.

Section 30(1) provides:-

No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.

Under section 31 of the Act an applicant for development permission is required to make the application in the prescribed form and the application is required to be accompanied by such plans and particulars as are necessary to indicate the purposes of the development. Under section 32 the Local Authority, when considering the development application may consult officers or authorities:-

a. Director of survey,
b. The Commissioner of Lands,
c. The Chief Engineer (Roads) Ministry of Public Works and Housing.
d. The chief public Health Officer of the Ministry of Health.
e. The Director of Agriculture
f. The Director of Water Development,
g. The Director of livestock Development
h. The Director of Urban Development
i. The chief Architect Ministry of Public works and Housing
j. The Director of Forests, and
k. Such other relevant authorities as the Local Authority deems appropriate.

The import of section 32 is that the Local Authority has its disposal an array of technical persons to consult in case of need.

Any person aggrieved by a decision of the liaison committee as established under section 8 of the Act, may appeal against such decision to the National Liaison Committee under Section 15 of the Act.

I have set out the various provisions of the Physical Planning Act to illustrate that an elaborate procedure exists under the Act for Approval by Local authorities for change of user and for development permission. My view is that on change of use and development permission issues, the procedure set out under the Act must be exhausted before a party can have recourse to the High court. The composition of the Liaison Committees illustrates the technical competencies that are available within the committees and further section 32 empowers the Local Authorities to tap other competencies in case of need when considering the applications before them. This in my view is the reason why there is a requirement for parties to exhaust the approval process set out under the Act since the committees are technically equipped to process and handle the applications.

In the matter before me the Defendants have demonstrated that they have sought approvals for development permission and change of user in accordance with the Act and such approvals have been given. The plaintiff had the opportunity to object to the application for change of user and/or development permission which he did not. The plaintiff's argument that the construction of godowns would constitute industrial user of the property which was not approved in my view is rather far fetched. The 2nd Defendant in his submission of building plans indicated that he was intent on constructing godowns. There was no indication that the 2nd Defendant was setting up a factory, manufacturing or processing plant which prima facie would have rendered the user industrial. The local authority in their wisdom approved the construction of godowns meaning they accepted the user was within commercial use that they had approved. They nonetheless subjected the approval to construct godowns to a EIA

report and the issuance of a **NEMA** licence. The 2nd Defendant is yet to carry out the EIA study to be able to obtain the **NEMA** licence. The plaintiff no doubt will have an opportunity to participate at the public forum to be conducted by **NEMA** to determine whether a **NEMA** licence should be issued. At such forum the plaintiff will be able to raise his concerns if he has any.

The drilling of the borehole is in my view a non issue as no decision has been made one way or the other by any relevant authority. For the 2nd Defendant to drill a borehole it has to seek and obtain the necessary permission from the appropriate body established under the water Act. The 2nd Defendant cannot be restrained from making the application for permission to drill a borehole. As the owner of the property he has every right to make the application whether or not it will be granted permission to drill a borehole that is not a decision the court can speculate on as the authorizing body has its criteria that it uses to approve or not to approve the drilling of a bore hole. The plaintiff no doubt shall have an opportunity to air his views when the process of approval shall be undertaken and like in the case of the other approval there is provision for appeal to the tribunal Board established under the Water Act.

The upshot is that I am not satisfied the plaintiff has demonstrated he has a prima facie case with a probability of success. The plaintiff has not met the threshold established in the case of **GIELLA –VS-CASSMAN BROWN & CO.LTD (1973) EA 358** for the grant of interlocutory injunction. As I have no doubt no prima facie case has been established I will not consider the second limb of the conditions for grant of an injunction that an applicant needs to satisfy before the court can grant a temporary injunction that he will suffer irreparable damage or harm that cannot be compensated by an award of damages unless the injunction is granted. The conditions for grant of injunction are sequential such that if the first condition of establishing a prima facie case with a probability of success fails then no injunction can be granted. The plaintiff has failed to demonstrate he has a prima facie case with a probability of success.

I accordingly therefore hold that the plaintiffs Notice of Motion dated 16th May 2014 lacks any merit and the same is hereby ordered dismissed with costs to the Defendants.

Ruling dated, signed and delivered this…**14th**…..day of…**November**……2014.

J. M. MUTUNGI

JUDGE

In the presence:

Mr. Gachingo for Mutinda……for the Plaintiffs

Mr. Bowry..……...for the Defendants