



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1099 OF 2016

SANDALWOOD LENANA LIMITED.....PLAINTIFF

VERSUS

CHIEF EXECUTIVE, NAIROBI COUNTY.....1ST DEFENDANT

NAIROBI CITY WATER & SEWERAGE LTD.....2ND DEFENDANT

DIRECTOR GENERAL NEMA.....3RD DEFENDANT

BAYSIDE LIMITED.....4TH DEFENDANT

RULING

The plaintiff is the registered owner of all that parcel of land known as L.R No. 1/1161 situated along Lenana Road, Kilimani, Nairobi on which it has constructed a block of apartments (hereinafter referred to as “the suit property”). The 4th defendant is the registered owner of all that parcel of land known as L.R No.1/761 also situated along Lenana Road, Kilimani, Nairobi (hereinafter referred to as “Plot No.761”). The plaintiff’s and the 4th defendant’s parcels of land are adjacent to each other. The dispute giving rise to this suit came about when the 4th defendant commenced the construction of a sewer line from Plot No.761 along the frontage of the suit property to a public manhole adjacent to the suit property. The plaintiff objected to the said project for various reasons.

In its plaint dated 8th September, 2016, the plaintiff sought a prohibitory injunction restraining the 4th defendant from constructing and/ or building a new sewer line on the frontage of or around the suit property, a mandatory injunction requiring the 4th defendant to fill the trenches it had dug in front of and around the suit property for the purposes of putting up the said sewer line, a prohibitory injunction restraining the 1st, 2nd and 3rd defendants from issuing any approvals to the 4th defendant to build a new sewer line in front of and around the suit property, a declaration that the approvals granted by the 1st, 2nd and 3rd defendants to the 4th defendant to up the said sewer line were unlawful and a mandatory injunction to compel the 1st, 2nd and 3rd defendants to cancel the said approvals.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 8th September, 2016 seeking among others the following orders:

- a) A prohibitory injunction restraining the 4th defendant from further constructing, extending and or in any manner whatsoever putting up a private sewer line in front of and around the suit property pending the hearing and determination of this suit.
- b) An injunction to restrain the 1st, 2nd and 3rd defendants from issuing any permits and or approvals to the 4th defendant to construct and or put up a private sewer line in front of and around the suit property pending the hearing and determination of this suit.
- c) A declaration that the approvals and or permits granted to the 4th defendant by the 1st, 2nd and 3rd defendants to the 4th defendant on 24th April 2015, 16th June 2016 and 1st July 2016 were unlawful and void ab initio.
- d) An order compelling the 4th defendant to fill back the trenches it had dug and to level the ground around and along the suit property.
- e) Liberty to apply.

The plaintiff’s application was opposed by the defendants and the same was argued on 20th March, 2017. In a ruling that was delivered on

13th October, 2017, the court dismissed the plaintiff's application. The court held that the plaintiff had not established a prima facie case with a probability of success against the defendants and that it had also not demonstrated that it stood to suffer irreparable injury which could not be compensated by an award of damages if the orders it had sought were not granted.

What is now before the court is the plaintiff's application brought by way of Notice of Motion dated 9th November, 2017 seeking a stay of execution of the orders made on 13th October, 2017 pending the hearing and determination of its appeal against the same to the Court of Appeal. The application was brought on the grounds that the plaintiff was dissatisfied with the said orders and has preferred an appeal against the same to the Court of Appeal. The plaintiff contended that the effect of the orders made by the court on 13th October, 2017 was to permit the 4th defendant to proceed with the construction of the sewer line that the plaintiff had objected to and that if the stay was not granted, the plaintiff stood to suffer substantial loss since its business would be brought to a halt. The plaintiff averred further that its intended appeal to the Court of Appeal had reasonable chances of success and that the same would be rendered nugatory unless the stay order sought was granted.

The application was opposed by the 4th defendant through grounds of opposition dated 16th July, 2018. The 4th defendant contended that the orders made by the court on 13th October, 2017 merely dismissed the plaintiff's application for injunction and as such were not capable of being stayed. The 4th defendant contended further that the plaintiff's application did not satisfy the requirements of Order 42 Rule 6 of the Civil Procedure Rules. The application came up for hearing on 20th October, 2018 when the plaintiff's advocate Mr. Nyakundi relied entirely on the plaintiff's affidavit in support of the application and urged the court to allow the same. Mr. Nyakundi argued that the court has jurisdiction to grant conservatory orders pending the hearing of an appeal to the Court of Appeal against its decision. Mr. Balala who appeared for the 4th defendant also relied entirely on the 4th defendant's grounds of opposition in his submissions.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition that was filed by the 4th defendant in opposition to the application. Finally, I have considered submissions by the parties' respective advocates. I am in agreement with the 4th defendant that the plaintiff's application has no merit. As I stated at the beginning of this ruling, what gave rise to the orders made on 13th October, 2017 was the plaintiff's application for injunction dated 8th September, 2016. The orders made by the court on 13th October, 2017 dismissed the plaintiff's said application and did no more. The court did not make any order requiring any party to do or refrain from doing anything. I am in agreement with the contention by the 4th defendant that such order is not capable of being stayed. In the case of Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [20008] eKLR, the Court of Appeal stated as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

The same reasoning was applied by Makhandia J. (as he then was) in the case of Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, where he stated as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.”

For the foregoing reasons, the plaintiff's application for stay is not for granting. The application is dismissed with costs to the 4th defendant.

Delivered and Signed at Nairobi this 17th day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nyakundi for the Plaintiff

N/A for the 1st Defendant

Mr. Mulinge for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

Catherine-Court Assistant