



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 317 OF 2018

(CONSOLIDATED WITH NAIROBI ELC CASE NO 320 OF 2018)

DIPENKUMAR MAVANI.....1ST PLAINTIFF

ELIZABETH NZANI WACHIRA.....2ND PLAINTIFF

JOE MUIGAI.....3RD PLAINTIFF

MEHWOOD REHMAT KHAN.....4TH PLAINTIFF

ADAN KANCHORO MULATA (suing as officials and representatives of

DIK DIK GARDENS RESIDENTS ASSOCIATION.....5TH PLAINTIFF

=VERSUS=

SULTAN PALACE DEVELOPMENT LIMITED.....1ST DEFENDANT

CHINA JIANGXI INTERNATIONAL KENYA LTD.....2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....1ST INTERESTED PARTY

WATER RESOURCES MANAGEMENT AUTHORITY....2ND INTERESTED PARTY

NAIROBI CITY COUNTY.....3RD INTERESTED PARTY

NATIONAL LAND COMMISSION.....4TH INTERESTED PARTY

RULING

Introduction

1. Sultan Palace Development Limited (hereinafter referred to as “**the Proprietor**”) own Land Reference Numbers 209/11/609/2 - 6 and Land Reference Numbers 209/11609/9 – 17 (a total of 14 parcels of land) located in Kileleshwa, Nairobi (**the suit properties**). Dik Dik Gardens is a residential estate in the same neighbourhood. Dik Dik Gardens Residents Association is a neighbourhood association in the same neighbourhood.

2. On 12/7/2018, Dik Dik Gardens Residents Association through its representatives brought a suit, to wit, **Nairobi ELC Civil Suit Number 317/2018** against Sultan Palace Development Limited and others, seeking, *inter alia*, a permanent injunction restraining them against developing the suit properties. The Association contended that three wetlands existed within three of the suit properties.

3. Simultaneous with the plaintiff initiating the said suit, the Association brought a notice of motion application dated 12/7/2018 (**the 1st application**) seeking the following prayers:

b) That a temporary injunction be and is hereby granted restraining the respondents by themselves, their agents or servants from encroaching, constructing upon or otherwise dealing in any way with the property known as Land Reference Number 209/116009/2-7 & 209/11609 Nairobi pending the hearing and determination of this suit.

c) That a permanent injunction be and is hereby granted restraining the respondents by themselves, their agents or servants from encroaching, constructing upon or otherwise dealing in any way with the property known as Land Reference Numbers 209/11609/2-7 & 209/11609/9-17 Nairobi.

d) The 4th interested party be and is hereby directed to gazette the suit property as a riparian.

e) That any alleged documents issued to the respondent be and is hereby cancelled in respect to development of the suit property.

f) That any person in occupation or at the behest and with the acquiescence of the respondents be and is hereby evicted from the suit property.

g) That the respondents do pay costs and all expenses that may be incurred in demolishing and removing all structures already erected by the defendants upon the suit property.

h) That the officer commanding station at Kileleshwa be and is hereby ordered to enforce and supervise orders (b, c, and f) above

i) That the costs of this application and interest be and is hereby granted to the applicant.

j) That this honourable court be and is hereby ordered to grant any order it may deem fit and just.

4. The said application is one of the two applications under consideration in this ruling.

5. On 18/7/2018, Sultan Palace Development Limited (the proprietor) similarly brought **Nairobi ELC Civil Case Number 320/2018** against officials and trustees of Dik Dik Gardens Residents Association seeking the following orders:

a) A declaration that the defendants have contravened the plaintiff's right to property under Article 40(1) and all other relevant provisions of the law.

b) An order of permanent mandatory injunction restraining the defendants, either by themselves, their agents, employees and or servants or anyone acting at their behest from denying the plaintiff either by itself, its agents, employees and or agents from accessing the plaintiff's parcels of land known as Land Reference Numbers 2019/11609/2-6 and Land Reference Numbers 209/11609/9-17.

c) An order of permanent mandatory injunction restraining the defendants either by themselves, their agents, employees and or servants or anyone acting at their behest from entering into and or interfering in any manner with the plaintiff's ownership, quiet possession and use of the parcels of land known as Land Reference Number 2019/11609/2-6 and Land Reference Number 209/11609/9-17.

d) An order directed to the defendants to grant the plaintiff either by themselves, their agents, employees and or servants access through Dik Dik Gardens Estate gate and barrier.

e) An order that the Officer Commanding Station, Kileleshwa Police Station, to enforce prayer (b), (c) and d above and assist to maintain the peace.

f) General damages for trespass on land

g) Any further relief that this honourable court deem fit to grant.

h) Costs of, and incidental to this suit.

6. The proprietor contended that it purchased the suit properties in 2016. It further contended that the officials of the Association were unlawfully blocking it from accessing its properties.

7. Together with the plaint initiating Civil Suit Number 320/2018, the proprietor brought a notice of motion dated 17/7/2018 seeking the following orders:

1) That this application be and is hereby certified as urgent and heard ex-parte in the first instance.

2) That the defendants/respondents either by themselves, their agents, employees and or servants or anyone acting at their behest be restrained and prohibited from entering into and or interfering in any manner with the plaintiff's ownership, quiet possession and use of parcels of land known as Land Reference Number 209/11609/2-6 and Land Reference Number 209/11609/9-17 pending the hearing and determination of this application interparties.

3) That the defendants/respondents either by themselves, their agents, employees and or servants or anyone acting at their behest be restrained and prohibited from entering into and or interfering in any manner with the plaintiff's ownership, quiet possession and use of parcels of land known as Land Reference Number 209/11609 and Land Reference Number 309/11609 pending the hearing and determination of this suit.

4) *That the defendants/respondents either by themselves, their agents, employees and or servants herein be ordered to grant access to the plaintiff's/applicants' employees, agents and or servants onto the plaintiff's parcels of land known as Land Reference Number 209/11609 2-6 and Land Reference Number 209/11609 9017 pending the hearing and determination of this application interpartes.*

5) *That the defendants/respondents either by themselves, their agents, employees and or servants herein be ordered to grant access to the plaintiff's/applicant's employees, agents and or servants onto the plaintiff's parcels of land known as Land Reference Number 209/11609 2-6 and Land Reference Number 209/11609 7-17 pending the hearing and final determination of this suit.*

6) *That in the alternative, an order of status quo meaning that the plaintiff/applicant is an continues to be in possession, use and control of the parcels of land known as Land Reference Number 209/11609 2-6 and Land Reference Number 209/116099-17 pending the hearing and final determination of this suit.*

7) *An order that the Officer Commanding Station Kileleshwa Police Station to enforce the above mentioned orders and assist to maintain the peace.*

8) *That the costs of this application be provided for.*

8. The said notice of motion dated 17/7/2018 is the second application under consideration in this ruling. This ruling therefore relates to the two applications.

9. On 15/10/2018, this court consolidated the two suits and designated Nairobi ELC Civil Suit Number 317/2018 as the lead file. The court further directed that the notice of motion dated 12/7/2018, brought in ELC 317/2018, and the notice of motion dated 17/7/2018, brought in ELC Civil suit Number 320/2018 would be heard and disposed together.

Case of the Association

10. The Association's application was supported by the affidavit of Adan Kanchoro Mulata sworn on 12/7/2018. The case of the Association was that the Water Resources Management Authority (the **2nd interested party**) had vide a report dated February 2017 confirmed the existence of three wetlands on three of the proprietor's parcels of land; namely Land Reference Numbers 11609/2, 209/11609/3 and 209/11609/4. They added that the 2nd interested party had further confirmed that access to the portions of the three parcels which were not wetlands was through the wetlands and had recommended revocation of the Titles in respect of the three parcels. They further contended that the proprietor had failed to hid the 1st interested party's notice requiring them to stop destroying vegetation on the three parcels. He urged the court to issue the injunctive orders against the proprietors.

Case of the Proprietor

11. The proprietor's application was supported by the affidavit of Lui Tiangai sworn on 17/7/2018. The case of the proprietor was that it was the registered proprietor of fourteen (14) residential parcels of land within Dik Dik Gardens Area of Kileleshwa, adjacent to Kenya High School. It contended that the Association had blocked them from accessing their properties by erecting a gate and barrier at the main entrance to their properties. They added that the Association had completely denied them access to their properties. They further stated that the actions of the Association was an infringement of their right to property under Article 40 of the Constitution. They urged the court to issue the interim orders against the Association.

Case of the 2nd Interested Party

12. The case of the Water Resources Management Authority was contained in the affidavit of Mohammed Shuria sworn on 16/10/2018. It contended that the Authority made two different findings on the suit properties. In the first finding made in 2015, the Authority noted that the parcels shown to the Authority did not have a wetland but there were features of water resources that needed to be protected. In the subsequent report prepared in February 2017, the Authority took the position that there existed three distinct wetlands within three of the parcels owned by the proprietor and recommended that the Department of Survey undertakes comprehensive survey aimed at gazetting the wetlands.

Submissions

13. The Association filed their submissions on 31/10/2018. They submitted that they had capacity to prosecute the notice of motion as representatives of the Association under the Societies Act of Kenya. They relied on Articles 22 (1) (d), 42, 70 and 159 (2), (d) and (e) of the Constitution. Reliance was also placed on the case of Michael **Otieno Nyaguti v Jack Ranguma & 4 Others [2017] eKLR** where it was stated that any person whether with or without a personal interest has a right to move the court where a right or fundamental freedom has been denied, violated or infringed or is threatened.

14. The Association further submitted that they published a caveat emptor notice relating to the suit properties because a notice of sale was issued misrepresenting the fact that the suit properties had been approved for multi-dwelling units without their consultation and that developing the suit properties would be illegal and against the development ordinances and zone regulations issued by the 3rd interested party. It was further submitted that the proprietor was issued with a notice to stop destroying vegetation on the suit properties and submit all relevant approvals to the 1st interested party for inspection and verification but they had failed to adhere to the notice and had instead, cleared the suit properties and constructed a fence and a site office. They relied on **Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125** where a *prima facie* case was defined as a case which discloses existence of a right which has been infringed by the opposite party.

15. The Association further submitted that its members stood to suffer irreparable harm and damages by the fact that damage to the environment affects the public. They further submitted that destruction of the wetland would be harmful to the residents. They added that construction of apartments or town houses will result to flooding as the rivulets will be destroyed. On the issue of balance of inconvenience, it was argued that the inconvenience would be greater on the residents than on the proprietor because destruction of the riparian area will affect majority of Nairobian who depend on the Nairobi River. It was further argued that in exercising judicial discretion, the court should consider the public interest as opposed to individual interests. Reliance was placed on the case of **Republic v Kenya National Commission on Human Rights Exparte Uhuru Kenyatta HC Misc. App. No.86 of 2009**.

16. The 1st proprietor filed written submissions on 31/10/2018. It submitted that the Association had not established a prima facie case with a probability of success because it had not shown which right had been infringed by the 1st proprietor. It was further submitted that if the injury suffered is repairable, the court need not issue an interlocutory injunction. Reliance was placed on the case of Lucy **Wangui Gachara v Minudi Okemba Lore [2015]e KLR**.

17. It was further argued that the ownership and boundaries of the suit premises were not contested by any of the parties. The proprietor added that it purchased the suit properties and no portion of the suit properties had been declared a riparian reserve. The proprietor contended that Sections 25 and 26 of the Land Registration Act gives the proprietor an absolute and indefeasible title to the suit properties and therefore, the Association cannot be said to have a prima facie case with a probability of success against it.

18. The 2nd interested party filed its submissions on 1/11/2018. It submitted that the proprietor should be restrained from developing the suit properties because any development will adversely affect the wetlands in the suit properties as per the report made in February 2017 pursuant to a letter from the 1st interested party dated 15/12/2016. The 2nd Interested Party further submitted that there was a stop order issued to the proprietor pursuant to Rule 8 of the Water Resources Management Rules, 2007, to stop all construction works and restore the site to its original state and ensure that all relevant authorizations are obtained before any works commence on the suit properties. It was argued that the stop order issued by the 2nd interested party was still in force and the defendants should therefore comply with those orders. It was further argued that the stop order had not been challenged under Section 144 of the Water Act, 2016 and Rule 8 (5) of the Water Resources Management Rules.

19. Finally, it was submitted that the proprietor was aware that the suit properties should not be developed in any manner by virtue of the fact that there are three streams traversing them.

Determination

20. I have considered the two applications together with the evidence presented by the parties in support and against the rival applications. I have also considered the relevant legal framework and principles that guide this court's jurisdiction to grant an interlocutory injunction. That criteria was spelt out in **Giella v Cassman Brown (1973) EA 358**. Firstly, an applicant is required to demonstrate a prima facie case with a probability of success. Secondly, the applicant is required to demonstrate that in the absence of an injunction, he stands to suffer irreparable injury that cannot be indemnified through an award of damages. Thirdly, if the court is in doubt of either of the above or both, the plea for an interlocutory injunction is to be determined on the balance of convenience.

21. It is also a settled principle that at the stage of disposing an interlocutory application for injunction, the court does not make definitive or conclusive findings. The platform for definitive and conclusive findings is the judgment which comes after trial. I will accordingly be guided by the above principles when making determinations relating to the two applications.

22. The single issue for determination in the rival applications is whether the respective applicants have satisfied the above criteria for grant of interlocutory injunctive orders as sought. I will make my determination in the order in which the rival applications were filed.

Application by the Association.

23. The application by the Association seeks both interlocutory and final orders. Prayers (c), (d), (f) and (g) constitute final orders. Without saying much, final orders such as the ones sought by the Association are given after full trial; not in an interlocutory application that is brought pending the substantive hearing and determination of a suit. I will therefore reject the plea for final orders at this stage. What remains for determination in the Association's application therefore are prayers (b), (h) and (i) of the application. Prayer (b) seeks a temporary injunction restraining the respondents by themselves and their agents against encroaching on or developing Land Reference Numbers 209/11609/2-7 and 209/11609/9-17. Prayer (h) seeks an order directing the Officer Commanding Kileleshwa Police Station to enforce the order. Prayer (i) seeks costs of the application.

24. The Association contends that the proprietor owns fifteen (15) parcels in the Estate. On its part, the proprietor contends that it owns only fourteen (14) parcels. It is therefore common ground that the proprietor's ownership is not disputed save for the above minor discrepancy. It is also common ground that the suit properties are registered as private land within the meaning of Article 64 of the Constitution.

25. What prompted the Association to bring the application is clearance of vegetation on the suit properties. The Association was apprehensive that the proprietor intended to embark on development of the suit properties. The Association is opposed to development of the suit properties because three out of the fifteen parcels allegedly contain wetlands. In my view, this application is premature and unreasonable. It is premature because it has been brought against a registered proprietor of land without regard to the due process stipulated under the law. The elaborate licensing and approval framework under the Physical Planning Act and the Environment Management Co-ordination Act provide a mechanism through which the Association is afforded the opportunity to ventilate concerns such as those raised in this application. Secondly, as things stand now, only three out of the fifteen parcels are alleged to contain elements of wetlands. The Association nonetheless wants the proprietor to be restrained against "encroaching, constructing upon or otherwise dealing in any way with" all the fifteen parcels it owns. That in my view is unreasonable. The Association's concerns can adequately be addressed at the stage of approval so that, where necessary, the approved development plans take into account the concerns raised by the Association. To block a registered proprietor at this stage, at the behest of fellow proprietors who have themselves equally developed their properties, would be in my view, unreasonable and

unjust. It does appear that the proper approach to this issue would be to let the Association raise its concerns during the licensing and approval process. If the concerns are found by the regulatory bodies to be legitimate, the proprietor will be called upon to put in place adequate mitigating measures to address the Association's concerns. To injunct the proprietor against initiating any development project on the fifteen or fourteen parcels at this point would not be fair.

26. The Water Resources Management Authority has not been useful in the resolution of this dispute. Firstly, in 2015 it took the position that there was no wetland on the suit properties. It made an about turn in 2017 and contended that there were three wetlands on three of the fifteen parcels. Strangely, it has not presented evidence of any statutory measure taken by it to gazette the wetlands within the framework of Section 22 of the Water Act 2016. If indeed there are wetlands on three out of the 15 parcels, one would expect the Water Resources Management Authority to initiate a process for acquiring and gazetting the affected parcels of the private lands as wetlands within the framework of Section 22 of the Act. Instead of discharging its statutory mandate, the 2nd interested party appears to have chosen to be partisan in this dispute.

27. The totality of the foregoing is that the court is not satisfied the applicants in the notice of motion dated 12/7/2018 have satisfied the criteria for grant of the orders sought in the application. My view is that their concerns are premature. As and when the time for licensing comes, they will have the opportunity to ventilate their concerns in relation to the three parcels which allegedly contain elements of a wetland. Secondly, final orders such as those sought under prayers (c), (d), (f) and (g) are unavailable at this stage. I therefore decline to grant the orders sought by the Association against the Proprietor in the Notice of Motion dated 12/7/2018.

Proprietor's Application dated 17/7/2018

28. In the application dated 17/7/2018, the proprietor seeks an order restraining the Association against interfering with its ownership, quiet possession and use of Land Parcel Numbers LR 209/11609/2-6 and Land Reference Number 209/11609 9-17. The Proprietor contends that it is the registered proprietor of the suit properties. It adds that the Association, through its agents, has blocked it from accessing its properties. In my view, prima facie, the Association is engaging in illegal activities. It has no right to block the proprietor from accessing its properties in Dik Dik Gardens Estate. Its actions may very well be construed to constitute an infringement on the proprietor's right to property. That right is protected by the Constitution. A breach of that right in the circumstances of this case may not, in my view, be adequately indemnified through an award of damages. The effect of the blockage is that the proprietor cannot access the properties for the purpose of initiating legitimate development projects on the properties. For this reason, I will allow the notice of motion dated 17/7/2018 in terms of prayers 3, 5 and 7.

Disposal Orders

29. In light of the above findings, the Association's notice of motion dated 12/7/2017 is dismissed. The Notice of Motion dated 17/7/2018 by Sultan Palace Development Limited is allowed in terms of prayers 3, 5 and 7. Sultan Palace Development Limited shall have costs of the two applications. No award of costs is made in relation to the Interested Parties.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Gikara for the 1st and 2nd Respondents- Sultan Palace Development Limited and China Jiangxi International Kenya Limited

Mr Ngugi for Dik Dik Respondents Association

Mr Wasonga for the 3rd Interested Party

Mr Kuloba for the 2nd Interested Party.

June Nafula - Court Clerk