REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 193 OF 2018

IKM

IMM *suing through their mother and next friend* **SMK.....1ST PLAINTIFF**

SARAH WANGUI P. GICHANGA.....2ND PLAINTIFF

FREDRICK MUSYOKI KIIO.....3RD PLAINTIFF

GEORGE NYARIGOTI MOSE.....4TH PLAINTIFF

NAOM MORAA NYAKWANYA NYARIGOTI.....5TH PLAINTIFF

MOSES AGUMBA OMEDO.....6TH PLAINTIFF

MOHAMMED OSMAN OMAR.....7TH PLAINTIFF

VERSUS

KITONGI INVESTMENTS LIMITED.....1ST DEFENDANT

BRYAN KISAINGU MUTINDA.....2ND DEFENDANT

COLLINS KIVILA MUTINDA.....3RD DEFENDANT

RULING

1. In the Application dated 5th October, 2018, the 1st Plaintiff on behalf of the minors, is seeking for the following orders:

> ***a. The court be pleased to grant a temporary injunction against the Defendants, their servants, employees or agents or otherwise howsoever from undertaking [from undertaking], continuing with, overseeing, managing any construction on Phase IV of property L.R. No. 20521 I.R No. 74204 pending the hearing and determination of this suit.***
>
> ***b. The costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that BMK *(deceased)* died on 1st May, 2012; that during the distribution of the deceased's Estate, the minors in this matter were given four (4) housing units each in Phase III of South Park Estate which is on Land Reference Number [xxxx] and that she is registered as Lessee on behalf of the said minor's.

3. The 1st Plaintiff has deponed that on 11th September, 2018, the 1st Defendant's shareholders agreed on the following issues: Transfer of undeveloped land in Phase IV to the 2nd and 3rd Defendants; acquisition of separate titles for Phase I, II and III; change of user of the undeveloped Phase IV from residential to school and revisionary interest in the 1st Defendant to the homeowners of Phase I, II and III.

4. The 1st Plaintiff deponed that the shareholder of the Defendants' company cannot make the deliberations stated above because the sub-leases on Land Reference No. [xxxx], I.R [xxxx] have already been registered against the title and that after registering the sub-leases, the sub-lessees became the owners of the suit property by virtue of being shareholders of the Investment Company.

5. It is the Plaintiffs' case that the building plans in respect of the suit land have already been registered and that the title of L.R. No. [xxxx] is a complete document for registration of the sub-leases.

6. The 1st Plaintiff finally deponed that any purported sub-division of the suit land will be contrary to the Agreement between the Plaintiffs and the Defendants' Company; that there is already a provision for a school in the registered building plans; that the Defendants have already commenced ground breaking for construction of the school and that the sub-lessees are the beneficial owners of the suit land.

7. The 2nd Plaintiff *(in the Amended Plaint)* filed an affidavit in which she deponed that she is a sub-lessee and the owner of Maisonette number 35 on L.R. No. [xxxx]; that her consent has not been sought for the suit property to be sub-divided and that she supports the orders being sought by the Plaintiffs. The 2nd Plaintiff annexed on her Affidavit the Lease Agreements between the 2nd-7th Plaintiffs *(Plaintiffs in the Amended Plaint)* and the Defendants.

8. The Defendants filed an Application dated 24th October, 2018 in which they sought to set aside the ex-parte orders granted by the court in favour of the Plaintiffs in support of the Application. The 2nd and 3rd Defendants deponed that they are the Directors of [Particulars Withheld] Day Care and Kindergarten Limited, which is an entity through which they are developing a primary school. It was the deposition of the Defendants that the entire of Phase IV of the suit land was jointly and absolutely vested upon them vide a Certificate of Confirmation of Grant issued on 22nd December, 2015 in the matter of the Estate of the late B M K.

9. According to the Defendants, there are no building plans upon which the Plaintiffs' case is predicated; that the Lease Agreements provided that the Lessor shall not be bound by the layout of the development of the Maisonettes as may be shown on any plans; that the majority of the shareholders of the 1st Defendant and the members of South Park Estate resolved that Phase IV of the suit property should be issued with a separate title from the other Phases of the suit property and that a school should be built on the land, subject only to the school finding a separate access road.

10. It is the Defendants' case that the Ministry of Lands and Physical Planning gave its consent for the sub-division of the suit land; that the Plaintiffs' sole interest in the suit land are the two Maisonettes on Phase III and that the undeveloped portions of Phase IV are owned by the 2nd and 3rd Defendants.

11. The 1st and 2nd Defendants deponed that by way of an advertisement in the Daily Newspaper of 18th June, 2018, the 1st Defendant duly published a proposal for extension of user of the suit property from residential use to include educational use; that the Plaintiffs never raised any objection with regard to the same and that they have taken a school development loan from Equity Bank of Kshs. 21,000,000 which is accruing interest to finance the construction of the school.

12. The 2nd and 3rd Defendants deponed that they purchased L.R. No. [xxxx/x] which is adjacent to the suit land to serve as an Access road to the proposed school; that the works for this construction of the school commenced on 5th October, 2018 and that the continued delay of the construction of the school will occasion them damages beyond which pecuniary award may not be adequate.

13. The 2nd and 3rd Defendants finally deponed that the proper forum and process for the challenge of a decision of change of user is stipulated in the Physical Planning Act; that the sub-lease Agreements relied on by the Plaintiffs have entrenched Mediation and Arbitration Agreements and that the Plaintiffs should exhaust the applicable dispute resolution mechanism as provided for in the law and the Agreements.

14. The Plaintiffs' advocate submitted that by virtue of the sub-leases entered into between the Plaintiffs and the 1st Defendant, they are the beneficial owners of L.R. No. [xxxx/x] whose reversionary interest lies with Kitongi Investments Management Company of which they will be the shareholders; that any changes to the nature of the development ought to be approved by the sub-lessees as the owners of the suit land and that they bought their homes having studied the plans and well aware that the portion for schooling is provided for in Phase III.

15. On the issue of the jurisdiction of this court, the Plaintiffs' advocate submitted that the issue before this court is the breach of the Sale Agreements and sub-leases which the Plaintiffs entered into with the Defendants; that the Agreements expressly state that the Defendants ought to ensure that consent is sought from the sub-leases before any changes to the development of the suit land can be made and that there are no prayers in the main suit which request for the court to evaluate the permissions given by the relevant administrative bodies.

16. The Plaintiffs' advocate submitted that there are instances where the court can proceed to issue orders even where there exists alternative remedies. Counsel submitted that the orders of injunction should issue.

17. The Defendants' advocate submitted that the Plaintiffs' suit is an attempt to circumvent the statutory procedures bestowed and reserved upon the Machakos County Government Physical Planning Department and NEMA in hearing objections to developments; that the Plaintiffs are inviting the court to supplement itself into the authority of the two statutory establishments and that in light of Section 10 (a), 10(b), 13(1) and 15 of the Physical Planning Act, this court does not have jurisdiction to deal with the dispute.

18. Counsel submitted that before embarking on the construction of the school on Phase IV of the suit property, the Defendants applied for and obtained development permission, extension of user and approval of its building plans from the Machakos County Government and that the proposal for extension of user was advertised in the newspaper. According to the Defendants' counsel, the Plaintiffs have not made out a prima facie case with chances of success, neither have they shown the irreparable loss that they shall suffer.

Analysis and findings:

19. This suit was initially filed by one Plaintiff, on behalf of two minors. However, on 10th December, 2018, the Plaintiff enjoined six (6)

more Plaintiffs in the suit by way of amending the Plaint.

20. It is not in dispute that the 1st Defendant is the registered proprietor of land known as L.R. No. 20521 measuring approximately 4 Ha on which housing developments known as South Park Estate have been constructed.

21. The evidence before the court shows that when one of the shareholders of the 1st Defendant died, the two minors, vide Nairobi P & A Cause No. 1868 of 2012, were given eight (8) housing units in Phase 3 of the suit land as beneficiaries of his Estate. The 2nd-7th Plaintiffs are owners of various Maisonettes located on the suit property having purchased the same from the 1st Defendant.

22. The genesis of the dispute herein arose when on 11th September, 2018, the shareholders of the 1st Defendant, together with some sub-lessees met and agreed to have L.R. No. [xxxx] sub-divided and transfer the undeveloped land in Phase IV to the 2nd and 3rd Defendants; to have separate titles for Phase I, II and III and to change the user of the undeveloped Phase IV from residential to school. The meeting further resolved to have revisionary interest in Kitungi Investment Management Company Limited to the homeowners of Phase I, II and III.

23. It would appear from the documents produced by the Defendants that before meeting of 11th September, 2018 was held, they had already procured the consent to sub-divide L.R. No. [xxxx] from the Ministry of Land and Physical Planning. This is shown in the letter from the Ministry dated 8th August, 2018. Indeed, the County Government of Machakos also approved the proposed sub-division of L.R. No. [xxxx] vide its letter dated 27th August, 2018.

24. The documents before the court also shows that before the meeting of 11th September, 2018 between the Defendants and some sub-lessees, the Defendants applied for extension of user from residential to include educational use of L.R. No[xxxx]. After advertising in the newspaper of 18th June, 2018, the change of user of L.R. No. [xxxx] from residential to include Educational use was approved by the County Government of Machakos on 28th June, 2018.

25. After the change of user of L.R. No. [xxxx] to include Educational use was approved, the Defendants applied for and obtained a Licence from NEMA to construct seventeen (17) classrooms on ground floor and thirty six (36) classrooms on the first floor with associated facilities. The said licence was issued on 18th September, 2018.

26. In the meantime, the Defendants purchased L.R. No. [xxxx/x] from one Yahya Abbias Mohammed to serve as an Access Road to the school and also to be used in the expansion of the school. The Agreement between the said Yahya and the Defendants' Company, St. Bakhita School Limited, is dated 5th June, 2018.

27. On 3rd July, 2018, the Defendants entered and procured the services of a project architect in respect of the construction of the school. The Defendants then entered into a formal Agreement dated 28th September, 2018 with a contractor to build the school on the suit land. The Plaintiffs are now seeking to stop the construction of the school pending the hearing of the suit land.

28. The first issue that I should determine is whether this court has jurisdiction to determine this dispute.

29. It is true that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed (*See the Speaker of the National Assembly vs. The Hon. James Njenga Karume, Civil Application No. 92 of 1992.)*

30. It is also true that under Section 33(3) of the Physical Planning Act, the first stop for anyone who is aggrieved by the decision of the County Government Planning Department is the Liaison Committee, to which an Appeal is provided for. The said Section states as follows:

> ***"Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under Section 13."***

31. Sections 10, 13, 15(1) and (4) of the same Act provide for the procedure of progressing with Appeals from the Liaison Committee to the National Liaison Committee before appealing to the High Court (ELC).

32. However, the Plaintiffs herein are not challenging the approvals that the Defendants obtained for the change of user of Phase IV from residential to school use, or the License that was granted to them by NEMA. Rather, the Plaintiffs are seeking for a declaratory order that L.R. No. [xxxx] should be developed as per the building plans registered and for specific performance for the delivery on the terms of the sub-leases executed by the 1st Defendant in their favour.

33. The Plaintiffs' case is that they are the beneficial owners of L.R. No. [xxxx] whose reversionary interest lies with an Investment Company; that any changes to the nature of the development ought to be approved by the sub-lessees as the owners of the suit property and that the sub-divisions of the suit land without their consent will interfere with their rights as the registered proprietors.

34. To the extent that the Plaintiffs' case is hinged on whether the Defendants have breached the various sub-leases that they signed with the Plaintiffs, it does not matter that indeed the relevant approval to develop the disputed land were given by the County Government of Machakos and NEMA. Indeed, the Plaintiffs' claim goes beyond the issue of the approvals that the Defendants obtained from the said bodies. The Plaintiffs' claim includes the purported sub-division of the suit property into four (4) portions and the issuance of separate titles. Consequently, it is only this court that can determine those cross-cutting issues, and not the Liaisons Committees established under the Physical Planning Act and NEMA.

35. Indeed, because of the cross-cutting issues that have been raised by the Plaintiffs in relation to the suit property viz-a-viz the Plaintiffs' sub-leases, the court cannot deny the Plaintiffs a remedy on the ground that there is an alternative remedy provided for under the Physical Planning Act and the Environmental Management and Co-ordination Act (EMCA). The Defendants' objection in respect of the jurisdiction of this court to hear the Plaintiffs' claim is therefore dismissed.

36. Although the sub-leases provide that any dispute arising out of the sub-leases should be referred to mediation or arbitration, this court has the statutory duty, in appropriate cases, to give orders of injunction or preservation awaiting the determination of the issues arising out of the sub-leases by the arbitrator or mediator. Section 7(1) of the Arbitration Act provides as follows:

> ***"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."***

37. Consequently, this court has the requisite jurisdiction to deal with the Application for injunction.

38. The principles applicable in the grant of an order of injunction are well settled. The Plaintiffs are required to establish a prima facie case with chances of success; show that they are likely to suffer irreparable injuries which would not be adequately compensated by damages; and if the court is in doubt, it will decide the Application on a balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358).*

39. It is not in dispute that the 1st Defendant, together with the Management Company, Kitongi Investment Management Company Limited, entered into several Leases with more than 70 sub-lessees, including the Plaintiffs herein. The first paragraph of all the Leases provide as follows:

> ***"The Lessor is registered as proprietor as lessee of the land (herein after defined) and has erected or is erecting a total of one hundred and twenty (120) Maisonettes (more or less) on the land, which Maisonettes comprise of the Estate (hereinafter defined) on the land and are more particularly delineated and described on the building plans registered at the Registry of Documents at Nairobi in Volume D1 Folio 25/418 File MMXII and Volume D1 Folio 25/419 File MMXII."***

40. The Leases have defined *"building plans"* to mean architectural plans of the Estate of which the *"Lessees have seen and understood."* In the said Leases which were duly registered against the title of L.R. No. [xxxx], the 1st Defendant and the Management Company, at Clause 4.1, covenanted as follows:

> ***"4.2 Reversionary Interest within sixty (60) days of all the one-hundred and twenty (120) leases of the Maisonettes being registered in favour of the respective present and future purchasers and of the last of the shares in the Management Company being transferred the Lessor will begin the process of transferring the reversionary interest in the said land known as Land Reference No.*** [xxxx]***, Athi River, to the Management Company and from the date of transfer of the said reversionary interest all obligations and like benefits contained therein on the part of the Lessor will vest in and be carried out by the Management Company."***

41. The Plaintiffs' interest is in respect of the Maisonettes standing on L.R. No. [xxxx] and the reversionary interest in the said land, through the Management Company. This reversionary interest was to vest to all the owners of the 120 Maisonettes, whose interests are registered against the mother title of L.R. No. [xxxx].

42. Consequently, and by virtue of the sub-leases, the Plaintiffs and the other sub-lessees are beneficial owners of L.R. No. [xxxx] through the Management Company. That being the case, any changes to the nature of the title for L.R. No. [xxxx] and developments ought to be approved by the sub-lessees.

43. Considering that the Defendants have admitted that they agreed with a few sub-lessees to change the nature of the title for L.R. No. [xxxx] by sub-dividing it into four (4) portions, and changing the user of one of the portions from residential to school, the interests of the other sub-lessees, including the Plaintiffs over the suit properties is likely to be affected.

44. Indeed, the Lease Agreements clearly described, by way of a registered plan, the nature of the houses to be built on the suit land, and how the whole land was to be managed by the sub-lessees. It is on that basis that the Plaintiffs agreed to purchase or own the suit land.

45. The evidence before the court shows that the Defendants obtained approvals to have the suit land sub-divided, with the concomitant result that the entries on the mother title for L.R No. [xxxx] would be effected, without consulting the Plaintiffs and the other sub-lessees. Indeed, the approvals to sub-divide the suit land into four (4) portions was obtained way before the purported meeting of 11th September, 2018. This action by the Defendants drastically changes the nature of the Leaseholds that informed the Lease Agreements that the Plaintiffs entered into with the Defendants.

46. Consequently, the failure by the Defendants to get the approval of all the sub-lessees to change the nature of the title of L.R No. [xxxx], contrary to the Agreements that they entered into with the Plaintiffs and the Plaintiffs' legitimate expectation gives credence to my conclusion that the Plaintiffs have established a prima facie case with chances of success.

47. Indeed, unless and until the Defendants produce the building plans for the whole land showing that the plan has always provided for a school on Phase IV of L.R. No. [xxxx], it will prejudicial to the Plaintiffs and the other sub-lessees, to change the nature of the title for L.R. No. [xxxx] by having a separate title for the said land without the approval of the sub-lessees. Like conjoined twins, the Defendants' interests and the interests of the Plaintiffs are fussed to the title of L.R. No. [xxxx].

48. If the Defendants resolve to sub-divide the suit land into Phase I, II, III and IV and different titles issued is not temporarily stopped by the court, the Plaintiffs are likely to lose the revisionary interests in the entire suit property as guaranteed in the sub-leases and the respective Sale Agreements. Consequently, the Plaintiffs are likely to suffer irreparable injury that cannot be quantified in monetary terms.

49. For the above reasons, I allow the Plaintiffs' Application dated 5th October, 2018 with costs and dismiss the Defendants' Application dated 24th October, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE