



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 23 OF 2018

SUNSHINE VILLAS LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KISUMU.....1ST DEFENDANT

CITY MANAGER, COUNTY GOVERNMENT OF KISUMU...2ND DEFENDANT

RULING

1. The Plaintiff seeks vide the motion dated 30th April 2018 for temporary injunction restraining the Defendants by themselves or agents from ***“further demolishing, damaging, alienating or in any other way interfering with or dealing with the Plaintiff’s property, development or construction on Kisumu/Municipality/Block 13/302 until the hearing and final determination of this suit,”*** and costs. The application is based on the eleven (11) grounds on its face and supported by the affidavits sworn by Suresh Patel on the 30th April 2018 and 8th May 2018, and further affidavits of Kassim Shivaz and Samuel Ouma, both sworn on the 8th May 2018.

2. The application is opposed by the Defendants through the replying affidavit sworn by Doris Ombara, the City Manager and the 2nd Defendant, on the 4th May 2018.

3. The application came up for directions on the 9th May 2018, when Counsel for both sides agreed to file and exchange written submissions. That subsequently, the learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 23rd May 2018 and 25th July 2018 respectively.

4. The issues for determination by the court are, first whether the Plaintiff has established a prima facie case with a probability of success for temporary injunctive order to issue at this interlocutory stage; and secondly who pays the costs of the application.

5. The Court has carefully considered the grounds on the motion, the supporting, further and replying affidavits, the written submissions by both Counsel and come to the following findings.

a) That the Plaintiff, vide the plaint dated the 30th April 2018, claims ownership of land parcel Kisumu Municipality/Block 13/302, the suit land. The Plaintiff has annexed a copy of the Certificate of Lease issued in their favour on the 10th July 2012. The Defendant on the other hand have through their defence dated 5th May 2018 alleged that the title is subject to some ongoing investigations by a task force involving the National Land Commission and various Departments of the 1st Defendant. That however, none of the parties has so far availed to the court the outcome of the task force investigations, and in the absence of any evidence that the title held by the Plaintiff, as per the Certificate of Lease issued on the 10th July 2012, has been successfully impugned by competent authority, the court is obligated to take the Plaintiff as the absolute and indefeasible owner of the leasehold interest defined thereon as required by **Section 26 (1) of the Land Registration Act No. 3 of 2012.**

b) That the Plaintiff has prima facie shown that it had sought and obtained the various statutory approvals and licenses for the development on the suit land, including from the Defendants. That however, the Defendants later revoked their approval for the developments vide their letter dated the 23rd April 2018 giving the reason at paragraph 3 as follows; ***“...you are hereby informed of our decision to revoke the approval plan for the wall and the building for reasons that the said development is being undertaken on road reserve/dispute parcel.”*** That the letter further asked the Plaintiff ***“to pull down the development so far executed on the plot and revert the land to its initial state”*** in 48 hours ***“failure to which we shall on our own demolish the same at your own risk as to costs and penalties incidental thereto.”*** That from the Plaintiff’s depositions, the demolition commenced on the Sunday, the 29th April 2018, and the details are set out in the further affidavits of Suresh Patel, Kassim Shivaz and Samuel Ouma, which depositions have not been challenged or rebutted through supplementary affidavits, it is highly probable that the demolition was being conducted, and or directed by the Defendants.

c) That while the Defendants may have had good or plausible reasons to revoke the approvals it had given for the Plaintiff's development, they do not appear to have given the Plaintiff an opportunity to present its position, and be heard before the demolition of the structures, which had been erected with the Defendants' prior approval, commenced. That had the parties met with, or through their duly appointed and authorized professional representatives, they would probably have determined with certainty whether the structures erected thereon were on public infrastructures, and the extent of encroachment, if any. That such a determination would have enabled the parties, and the court for that matter, to determine what part or portion of the structures erected thereon need to be demolished, and further ensure that the exercise is carried out with civility. The in any case the Defendants' officials who had processed the approvals are expected to have satisfied themselves that the Plaintiff had exhibited title to the suit land that the proposed development was to be confined only within it.

d) That further to the finding in (c) above, if the dispute is on ownership of the suit land, then the person(s) contesting the Plaintiff's title need to be identified and to present their claim to the National Land Commission, or a court of competent jurisdiction to determine the matter. That until the Plaintiff's title is successfully challenged and impugned legally, then it is protected under **Article 40 of the Constitution and Section 26 of the Land Registration Act No. 3 of 2012.**

e) That while the Plaintiff has shown the court that they deserve the temporary injunction order they seek, the court is of the view that any further development and or construction or continuation of the development should be carried out only after a confirmation is obtained from the County Land Registrar and Surveyor that the development or construction being carried out is confined within the suit land. That any portion of the development or construction that is found to be outside the suit land should not be continued pending the hearing and determination of the suit.

6. That flowing from the above, the court finds merit in the Plaintiff's motion dated 30th April 2018 and orders as follows;

a) That a temporary injunction be and is hereby issued restraining the Defendants, their officers, servants, agents or any other person/entity affiliated/associated with them or acting through or under their instructions from further demolishing, damaging the Plaintiff's development or construction on Kisumu Municipality/Block 13/302 pending the hearing and determination of this suit.

b) That before any further development or construction is undertaken or continued, the Plaintiff do obtain a confirmation from the County Land Registrar and Surveyor that the said developments or construction being undertaken on the suit land are confined within the said plot. That the parties be at liberty to have their own surveyors observe the exercise.

c) That costs be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Oduor for Maganga for Plaintiff

Mr. Mweisigwa for Yogo for defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE