



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 340 OF 2011

DIASTA INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

NILESH DEVAN KARA SHAH.....1ST DEFENDANT

RATILAL DEVAN KARA SHAH.....2ND DEFENDANT

HASWHIN DEVAN KARA SHAH.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....5TH DEFENDANT

RULING

The plaintiff brought this suit on 11th July, 2011 through a plaint of the same date. The plaint was amended on 17th July, 2012. In the amended plaint, the plaintiff sought several reliefs against the defendants which included:

1. A permanent injunction restraining the 1st, 2nd and 3rd defendants from proceeding and/or continuing with the construction of a ten (10) storeyed shop and office block or any other construction of a similar size and/or nature on all that parcel of land known as L.R No. 209/7584 (hereinafter referred to as “the suit property”).
2. A permanent injunction restraining the 1st, 2nd and 3rd defendants from applying for and/or obtaining occupational certificates from the 4th defendant in respect of the said building and particularly the two (2) extra floors.
3. An order directing the 1st, 2nd and 3rd defendants to demolish the two (2) additional floors constructed on the said building contrary to law and relevant regulations.
4. General damages.
5. A declaration that the rights of the plaintiff, its tenants, occupants of its property and neighbours to a clean and healthy environment have been and/or are likely to be contravened and that they need protection.
6. A declaration that the 4th and 5th defendants’ approvals of the 1st, 2nd and 3rd defendants’ building plans was irregular and/or unlawful and therefore the 1st, 2nd and 3rd defendants’ building on the suit property is illegal and the same should be demolished at the defendant’s costs.

The plaintiff’s case as set out in the amended plaint is that; the plaintiff is the registered owner and occupier of all that parcel of land known as L.R No. 1870/IX/184 (hereinafter referred to as “the plaintiff’s property”) whereas the 1st, 2nd and 3rd defendants are registered as joint proprietors of the suit property. The plaintiff’s property and the suit property are adjacent to each other. Sometimes in 2008, the 1st, 2nd and 3rd defendants submitted building plans to the 4th defendant for approval in respect of a proposed construction of shop and office apartments on the suit property. The 4th defendant reviewed the said plans and approved the same. The approved plans were for a proposed construction of shop and office apartments consisting of eight (8) floors including basement and ground floors. Subsequently, the 1st, 2nd and 3rd defendants conducted environmental impact assessment study and submitted environmental impact assessment project report to the

5th defendant in respect of the said project on the suit property. During the environmental impact assessment study, the plaintiff as the owner of one of the properties next to the project site was invited to submit comments on the development. The 5th defendant after considering the said environmental impact assessment project report approved the project and issued the 1st, 2nd and 3rd defendants with the Environmental Impact Assessment Licence (EIA License) on 28th April, 2009. The said license was issued based on the environmental impact assessment report that was submitted to the 5th defendant by the 1st, 2nd and 3rd defendants which contained the comments which the plaintiff and its neighbours who own properties adjacent to the suit property had given.

The plaintiff contended that after the 1st, 2nd and 3rd defendants were issued with EIA License, they commenced construction of what turned out to be a building comprising of ten (10) floors including the ground floor and basement contrary to the building plans approved by the 4th defendant and the EIA License issued by the 5th defendant. The plaintiff contended that the 1st, 2nd and 3rd defendants added two (2) additional floors to the proposed building without approval and/or authorization. The plaintiff averred that the two (2) additional floors required another environmental impact assessment and that the same were put up without consultations with the plaintiff and other owners of the properties adjacent to the project site as required by law. The plaintiff averred that the 1st, 2nd and 3rd defendants also failed and/or refused to comply with the EIA License that was issued to them by the 5th defendant by carrying out construction outside the time given in the said license. The plaintiff averred that it lodged a complaint with the 4th and 5th defendants against the 1st, 2nd and 3rd plaintiff's transgressions aforesaid but they failed to take any action against them thereby allowing the 1st, 2nd and 3rd defendants to continue with the said illegal activities. The plaintiff contended that it was justifiably apprehensive that the 1st, 2nd and 3rd defendants' building posed a great and imminent danger and harm to its building which is adjacent to the suit property and also exposed the tenants on its property and workers to grave danger and harm since the building was not properly planned and approved as required by law.

The plaintiff averred that the additional two (2) floors of the building on the suit property were not approved by the 4th and 5th defendants and that the 5th defendant issued to the 1st, 2nd and 3rd defendant a certificate of variation of EIA License on 8th December, 2011 irregularly with a view to cover-up the illegalities enumerated above. The plaintiff averred further that the 1st, 2nd and 3rd defendants' building was put up contrary to the 4th defendant's building by-laws, rules, regulations and zoning policies which rendered the approval of the original plan for the construction of an eight (8) floor building unprocedural and illegal.

From the record, I have only seen a defence filed by the 5th defendant on 23rd August, 2012. There is no defence on record by the 1st to 4th defendants. Interlocutory judgment was entered for the plaintiff against the 1st, 2nd and 3rd defendants on 12th March, 2014. An application by the 1st, 2nd and 3rd defendants to set aside that judgment filed on 14th May, 2015 was allowed on 10th October, 2017. It appears that even after the said judgment was set aside, the 1st, 2nd and 3rd defendant did not file their statement of defence.

Together with the plaint, the plaintiff had filed an application by way of Notice of Motion dated 11th July, 2011 seeking among others, a temporary injunction restraining the 1st, 2nd and 3rd defendants from carrying out construction of a ten (10) storeyed shop and office block or any other construction of a similar size or nature on L.R No. 209/7584 ("the suit property") pending the hearing and determination of the suit. The plaintiff's application was heard and stayed by the court in a ruling that was delivered on 18th February, 2013. In staying the application, the court held that in respect of the complaints which the plaintiff had with regard to the approval or non-approval of the building plans by the 4th defendant, the plaintiff should have filed an appeal to the relevant Liaison Committee established under the Physical Planning Act, Chapter 286 Laws of Kenya before coming to court while complaints regarding the EIA License should have been the subject of an appeal in the first instance to the National Environment Tribunal established under the Environmental Management and Co-ordination Act, Chapter 387 Laws of Kenya before the matter could be brought to court. The plaintiff's application was stayed so that the plaintiff could exhaust the alternative remedies that were available to it under the said statutes.

What is now before the court is the 1st, 2nd and 3rd defendants' application brought by way of Notice of Motion dated 21st November, 2013 seeking an order that the plaint filed herein by the plaintiff be struck out and the suit against the defendants dismissed with costs. The application which was brought under order 2 rule 15 1(d) of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, 2010 was brought on the grounds that in the ruling that was delivered by the court on 18th February, 2013, the court held that the plaintiff had brought this suit prematurely before exhausting the alternative statutory dispute resolution mechanisms that were available to it under the Physical Planning Act and the Environmental Management and Co-ordination Act. The 1st, 2nd and 3rd defendants contended that instead of the plaintiff complying with the procedures for dispute resolution which were identified by the court, the plaintiff wrote a letter of complaint to the Chairman of the Public Complaints Committee established under the Environmental Management Co-ordination Act which was copied to the Chairman of the Nairobi Physical Planning Liaison Committee. In his affidavit in support of the application, the 3rd defendant contended that in the event that the plaintiff wished to appeal to the Liaison Committee, it should have done so by filling and filing Form P.P.A 8 or P. P. A 9 under the Physical Planning Act. The 3rd defendant averred that as far as its complaints against the 5th defendant were concerned the plaintiff was supposed to appeal to the National Environment Tribunal. The 3rd defendant averred that the plaintiff had failed once again to follow the correct procedure in agitating the grievances that it had against the defendants. The 3rd defendant averred that despite having been reminded to comply with the directive by the court, the plaintiff had failed to do so.

The plaintiff opposed the application through grounds of opposition and notice of preliminary objection both dated 26th September, 2016. I have not seen a copy of the notice of preliminary objection on record. In its grounds of opposition, the plaintiff contended that:

1. The application is incurably defective, incompetent and an abuse of the process of the court.
2. The applicants having failed to enter appearance and file a defence had no *locus standi* to bring the application.
3. The application brought under order 2 Rule 5(1) of the Civil Procedure Rules, 2010 had no basis.

4. The applicants are guilty of material non-disclosure.

The application was heard by way of written submissions. The 1st, 2nd and 3rd defendants/applicants filed their submissions on 16th July, 2018 while the plaintiff/respondent filed its submissions in reply on 4th February, 2018. I have considered the 1st, 2nd and 3rd defendants' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties. The 1st, 2nd and 3rd defendants' application was brought principally under order 2 Rule 15(1) (d) of the Civil Procedure Rules which provides as follows:

“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

(d) it is otherwise an abuse of the process of the process of the court.”

In the book, Pleadings, Principles and Practice by Sir Jack Jacob and Ian Goldrein, the authors have stated that:

“An action is an abuse of the process of the court where it is “pretenceless” or “absolutely groundless” and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted.”

In D. T. Dobie & Company (K) Ltd. v Joseph Mbaria Muchina & Another (1982) KLR1, Madan J. A. stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

I have at the beginning of this ruling set out the plaintiff's case. There is no doubt that the amended plaint dated 17th July, 2012 raises weighty issues which traverses environmental law, physical planning and violation of fundamental rights guaranteed under the constitution. The plaintiff's suit cannot be said to be pretenceless or absolutely groundless. As I have stated earlier, the 1st, 2nd and 3rd defendants are yet to file their defence to the plaintiff's claim. I am in agreement with the plaintiff that without a defence on record, there is no basis on which the 1st, 2nd and 3rd defendants can attack the merit of the plaintiff's claim.

In their application, the 1st, 2nd and 3rd defendants relied heavily on the ruling of the court made on 18th January, 2013 on the plaintiff's interlocutory application for injunction. It must be appreciated that in its ruling of 18th January, 2013, the court was only dealing with an interlocutory application. The court was not called upon and was not expected to make a final determination on the merit of the plaintiff's claim against the defendants. The findings that were made by the court during the interlocutory proceedings are not binding upon the trial court. The 1st, 2nd and 3rd defendants cannot therefore rely on the said ruling as a basis for striking out the plaintiff's suit. The fact that the court stayed the interlocutory application having arrived at the conclusion that there were alternative statutory remedies available to the plaintiff does not render this suit an abuse of the process of the court. The suit was not stayed and the plaintiff is not barred from abandoning the injunction application and proceeding with the hearing of the main suit.

As I have stated earlier, the plaintiff's complaint is not limited to issues of physical planning and environmental impact assessment procedures. The plaintiff has also raised issues relating to a breach of a right to clean and healthy environment which only this court can redress. Whether or not the plaintiff would be able to prove the alleged breach is another thing. In the absence of a defence to the claim by the 1st, 2nd and 3rd defendants, there is no basis upon which the court can say that the plaintiff's claim cannot succeed.

Due to the foregoing, I find no merit in the 1st, 2nd and 3rd defendants' application dated 21st November, 2013. The application is dismissed with costs to the plaintiff.

Delivered and Dated at Nairobi this 18th day of July 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Kamande h/b for Mr. Nyachoti for the Plaintiff

Mr. Dar for the 1st, 2nd and 3rd Defendants

N/A for the 4th Defendant

N/A for the 5th Defendant

C.Nyokabi-Court Assistant