THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL CASE NO.243 OF 2018

PETER KAHENYA KINYANJUI (CHAIRMAN)

STANLEY WANIANINA NGUGI(TREASURER)

CHHRISTOPHER MWAURA NGUGI(SECRETARY)

Being officials of

EBENEZER WELFARE ASSOCIATION.....1ST PLAINTIFF/APPLICANT

NGOMORI (CHAIRMAN)

ALLAN NJOROGE TREASURER

JAMES I. NGARI (VICE SECRETARY) Being

officials of PLAINVILLE ASSOCIATION.....2ND PLAINTIFF/APPLICANT

VERSUS

DAVID WANYOIKE.....1ST DEFENDANT/RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....2ND DEFENDANT/RESPONDENT

COUNTY GOVERNEMNT OF KIAMBU.....3RD DEFENDANT/RESPONDENT

NATIONAL ENVIRONMENTAL MANGEMENT

AUTHORITY.....4TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **1ST October 2018** by the Plaintiffs/Applicants seeking for;

1. ***An temporary conservatory injunction be issued restraining the 1st Defendant/Respondent, his employees, servants, agents or any other person claiming through him from engaging in any further or other building works, construction, delivery of construction materials or in any other way, further developments whatsoever on property known as L.R No. 17564/434 L.R No. 17564/434 pending the hearing and determination of this suit.***
2. ***The Costs of tis Application be provided for.***

The Application is premised on the grounds that the 1st Defendant/

Respondent has commenced the construction of flats/high density residentials without the necessary approvals and authority by the 2nd, 3rd andt4th Defendants/Respondents. Further that the lease to the area in which the 1st Respondent is constructing is restricted to one dwelling unit and unless the said construction is stopped, it will severely and irredeemably breach the conditions on the lease and will alter the nature and character of the Estate and the neighborhood to the detriment of the Applicants. That it is in the interest of justice and fairness that the

Orders sought be granted.

In his **Supporting Affidavit** the Chairman of the 1st Plaintiff/Applicant averred that the 1st and 2nd Plaintiff/Applicants are two neighborhoods Associations presiding over the adjoining and adjacent estates. He further averred that the two estates encompasses other several parcels of land that are within the proximity and it is an area that is homogeneous and continuous estate. It was his contention and that the 1st Defendant/Respondent has always been a member of the 1st Plaintiff/Applicant and has been active in the enforcement of its objectives of the bylaws and use of the land. He listed the objectives of the Plaintiffs'/Applicants' Association and averred that the leases for the area have special conditions that have restricted the land and buildings to be

used for only private dwelling house in addition to the fact that the 3rd Defendant/Respondent has designated the area as low density residential area and users generally provided for are those of single family residences and for a person to put u commercial structures, he would require as a condition precedent approved change of user by the 3rd Defendant/ Respondent in consultation with the Plaintiffs/Applicants.

He averred that the 1st Defendant/Respondent is the registered proprietor of **L.R No. 17564/434,** at Juja town and among the borderline of **Ebenezer Estate** and **Plainsville Estate Welfare Juja** . He further alleged that the 1st Defendant/Respondent has commenced without any lawful authority the construction of a flats/High density flats in contravention of the lease conditions, without the necessary approvals. He averred that in any case, the approvals have in them the requirement for public and stakeholder participation and by its nature, the Plaintiffs/Applicants have a legitimate expectation to be involved and it is contribution obtained before such land uses are allowed by the 2nd, 3rd or 4th Defendants/Respondents.

He averred that the 4th Defendant/Respondent in assessing the Environmental Impact of the development ought to have involved and heard the concerns of the Plaintiffs/Applicants as a key stakeholder. It was his contention that the 1st Defendant/Respondent had done the development to the extent he is in the process of putting up the 3rd floor and their efforts of seeking intervention from the 2nd and 3rd Defendants/

Respondents have not been successful. He further alleged that 2nd

Defendant/Respondent visited the premises and marked it with an X evidence of non-compliance, but 1st Defendant/Respondent has continued with the construction. He further averred that it is a requirement of law that all residents adhered to all the construction and development standards. He thus averred that unless stopped, they are apprehensive that the development will severely affect the environment and neighborhood and breach the terms of the lease granted to the 1st Defendant.

The Application is opposed and the 1st Defendant/Respondent, **David Wanyoike** filed his **Replying Affidavit** dated **15th October 2018**, and denied that the Plaintiffs/Applicants preside over the land on which members are comprised of. He averred that the Plaintiffs/Applicants were formed for purposes of providing security and other welfare issues and that the functions and objectives of the Plaintiffs/Applicants do not extend to the mandate of overseeing of private entities. He further averred that he did not have any lease issued either by the plaintiffs or by the Government that contains the condition of use of his land and that the Plaintiffs/Applicants exhibit **ES01** refers to lease over a property owned by **Kibute Housing Cooperative Society** and not the Plaintiffs.

He denied being the registered owner of the suit property and averred that since he is not the registered owner, the Plaintiffs/Applicants cannot lay any claim against him. He averred that he has been advised by his Advocates that every person has a right to own and use land in whichever way that is not in contravention of the law and in a way that is not inconsistent with the rights of other people. He alleged that the Plaintiffs/Applicants have not shown any way that he has contravened the law or affected any of their rights and the allegation of public participation is a flawed argument which is not based on any known law or legal principles. He further averred that he has been advised by his Advocates that it is not in all developments that the 4th Defendant/Respondent must give an Environmental Impact Assessment Licence. He averred that there is no evidence of the compromise or prejudice that will be occasioned in the area due to any construction and the allegations that there will be increased insecurity is a fallacy.

He further averred that he is a member of **Kibute Housing Cooperative Society,** and it has issued him with a share certificate and has not attached any conditions of development and as such there is no prejudice occasioned to the Plaintiffs if the Application is dismissed.

The 2nd Defendant/Respondent also through its Manager, **Stephen Mwilu** filed a **Replying Affidavit** dated **5th November 2018** and averred

that it has not issued any compliance certificate in regards to the construction project on the parcel of land known as **L.R No. 87507/1 Plot No. 7/434,** Juja and as such the ongoing works on the said parcel of land are illegal and as such they should stop immediately. He further averred that the approval process of any construction project is undertaken by the local authorities/County Government and it only registers construction works once a construction project has been approved by the relevant local authority. He averred that on the **5th of September 2018**, it received a complaint via email from the Plaintiffs/Applicants in regard to a construction project taking place within its estate.

On the **6th of September 2018,** its Investigations officers visited the site and established that there were no ongoing construction works on the site and there were signs to suggest that the construction had been stalled for quite some time and the investigating officers suspended the construction works as the site was non complaint as it lacked **National Construction Authority** registered contractor, sign board showing all the approvals, safety signs on the site, personal protective equipment, **National Construction Authority** compliance certificate, **National Construction Authority** accredited skilled workers and supervisors. That after suspension the 1st Defendant/Respondent was advised to register the project using the online platform with the 2nd Defendant/Respondent and

comply with other requirements before the project could be approved. He further averred that the 1st Defendant/Respondent has initiated the project registration application process with the 2nd Defendant/Respondent in regards to the construction works on the suit property. He averred that he has been advised by the 2nd Defendant's/Respondent's Advocate that its mandate is limited to compliance with construction laws and does not extend to change of land use and therefore the Plaintiffs Application lacks merit and it is therefore frivolous and bad in law and the same ought to be dismissed.

The 3rd Defendant/Respondent filed its **Replying Affidavit** through **Nicholas Waweru Wanjiru** Ag. Director-Building Inspection and Outdoor Advertising, who averred that the 3rd Defendant/Respondent is mandated under the Physical Planning Act to grant development permission and approve change of user and development plans. It was his contention that on the **15th of October 2018**, they received an Application for development permission from one **David Kamau** and payment receipt was issued and on **16th October 2018,** an invoice for regularization of architectural plans was issued to the said **David Kamau.** He further averred that the said Applications were received after the filing of the instant suit and no Application was received before the filing of the suit and that the said payment of Rates Clearance Certificate was issued on **31st October 2018.**

He contended that the Physical Planning Act gives the 3rd Respondent 30 days within which to make a decision or whether or not to give development permission upon receipt of an Application. He further averred that it's in the process of making a determination and that no development permission has been issued by the 1st Defendant/Respondent.

The 4th Defendant/Respondent did not file any response to the instant **Notice of Motion**. The application was canvassed by way of written submissions which the Court has carefully read and considered. The Court too has considered the pleadings in general, the annextures thereto, the relevant provisions of law and the cited authorities and renders itself as follow;-

The principles that will guide the court in deciding whether to grant or not to grant the orders of injunction sought are set out in the case of **Giella…Vs…Cassman Brown Co. Ltd 1973 EA 358** and later repeated in other judicial pronouncements. See the case of **Kibutiri…Vs… Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

> ***"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be***
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> ***granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award***
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> ***of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420."***

This Court will first determine whether the Applicants herein have established a *prima-facie* case with probability of success at the trial or have they established that their rights have been infringed?In the case of **Mrao …Vs… First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eKLR)** defined a prima facie case in the following

terms;

> ***"A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".***

It is evident that the 1st Respondent has put up a flats in the said area on the suit property which the Plaintiffs operate as a Welfare Group. Further it is also not in doubt, a fact which the 1st Defendant has not disputed that he is a member of the said welfare and has been participating in their activities and therefore he is aware of the objectives and the requirements of the members.

The Plaintiffs/Applicants have alleged that this area falls under a zoning category of single dwelling house and before a party seeks the

change of user, the party must first seek for permit from the relevant authorities and also get various licenses. It is not in doubt that both the Plaintiffs and the 1st Defendant/Respondent are members of the same Cooperative and unless otherwise it is safe to conclude that they hold the same lease. This Court has seen the lease and it has a special condition wherein under **condition No.3** it is stated;

> ***"The land and building shall always be used for on private dwelling house (excluding a Guest House)"***

From the above statement, it clear that as per the lease any party is only required to put up a private dwelling house and the same has been designated as a low density area. Though the 1st Defendant has alleged that he bears no such lease, he has not produced any other lease to the contrary and being that whoever alleges must prove, he has failed to prove this and in the absence of evidence of existence of a contrary lease, this Court finds that the lease produced is the one issued to the parties.

The 2nd and 3rd Defendants/Respondents have also averred that they did not issue the 1st defendant with any change of user nor have they granted him any permission to build. It was their contention that the 1st Defendant only sought for approval after the suit has been filed and no such approval has been granted as it had 30 days to determine the same. It is therefore not in doubt that the construction being undertaken by the 1st Defendant/Respondent was unlawful as it did not meet the special conditions in the lease nor did it meet the requirements required by law as per various Acts, and the fact that before any development is approved, it has to adhere to relevant laws and also take into account

the zoning areas. See the case of **James Irungu Mwangi & 2 others v Laban Macharia Muiruri & another [2017] eKLR** wherein the Court cited with approval the case of ***Kiriinya M. Mwenda…Vs…Runda Water Ltd & Another (2014) eKLR***, where the Court held that:-

> ***"….I wish to point out that the petitioner's right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them".***

From the above analysis, this Court finds that the Plaintiffs/Applicants have established a *prima facie* case as the lease contains a special condition that the 1st Defendant/Respondent ought to have adhered. The 1st Defendant/Respondent failed to adhere the same and therefore the Plaintiffs'/Applicants' rights have been infringed on by his conduct. See the case of **James Irungu Mwangi & 2 others v Laban Macharia Muiruri & another (supra)** where the Court held that;

> ***"Equally in this case, though the 1st Defendant is a holder of a Certificate of Lease for Thika Municipality Block 22/113, the same is subject to the special conditions contained in the Lease for Thika Municipality Block 22 and Clause 3 is very clear that the development on the specific parcels of land are single dwelling houses. That would only change if there is evidence availed to the contrary or if there is evidence that the zoning category has now changed.***
>
> ***For the above reasons, the Court finds that the Plaintiffs/Applicants have established that they have a prima-facie case with probability of success at the trial and that their right to own property in a zoning area of single dwelling house has now been infringed by construction of multi-dwelling units in this zone."***

On the second limb, the Court has to determine whether the

Plaintiffs/Applicants will suffer irreparable loss which cannot be adequately compensated by an award of damages. The Plaintiffs/Applicants have averred that construction of the flats by the 1st Defendant/Respondent will affect the environment and neighborhood as the sewerage and portable drainage will be affected compromising the serenity of the neighborhood and social amenities are not adequate. It is this Court's opinion that in the event the Plaintiffs/Applicants would be successful in future, the loss they would have undergone would not adequately be compensated by an award of damages. See the case of ***Olympic Sport House Ltd …Vs… School Equipment Centre Ltd HCC No. 190 of 2012,*** where the court held that:

> ***"Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction"***

On the third limb, the Court finds that the balance of convenience

herein would tilt in favour of maintaining the ***status quo*** and the ***status quo*** herein is what existed before the 1st Defendant/Respondent began construction of the disputed multi-dwelling units. See the case of ***Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000***, where the Court held that:-

> ***"The purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act".***

Having now carefully considered the instant ***Notice of Motion*** dated ***1st October 2018*** *the Court finds it merited and it is allowed entirely in terms of prayers* ***No.3 and 4*** *with costs to the Plaintiffs/Applicants herein*.

It is so ordered

Dated, Signed and ***Delivered*** at ***Thika*** this ***25th day of October, 2019***.

L. GACHERU

JUDGE

25/10/2019

In the presence of

Mr. Odhiambo holding brief for Mr. Mwangi for Plaintiffs/Applicants

Mr. Mutiso for the 2nd Defendant/Respondent

M/S Njiru holding brief for Mr. Mureithi for 1st Defendant/Respondent and holding brief for M/S Sakami for the 4th Defendant/Respondent

M/S Cheserek holding brief for M/S Mbugua for 3rd Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

25/10/2019