



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 441 OF 2017

LENKISHON KIMIREI MAIKA.....1ST PLAINTIFF

KOSGEI CHIRCHIR KOLIL.....2ND PLAINTIFF

LUKA CHEMWETICH ROTICH.....3RD PLAINTIFF

VERSUS

A.M. KALIO.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from continuing with construction of a building said to be being constructed contrary to building rules, laws and regulations; no prima facie case established; application dismissed)

1. The plaintiffs and the defendant herein are neighbors who own plots that are adjacent to each other in Kiamunyi area, Nakuru County.

2. The plaintiffs commenced these proceedings through plaint filed on 22nd November 2017. Together with the plaint, the plaintiffs filed Notice of Motion dated 20th November 2017 seeking the following orders:

1. Spent.

2. Spent.

3. That the honourable court be pleased to stop and injunct the respondent by himself, his servants, employees, workers and or authorized agents from continuing with the ongoing construction on LR No. Njoro/Ngata Block 1/788 in any way whatsoever pending the hearing and determination of this suit.

4. That the costs of this application be provided for.

3. The application is supported by an affidavit sworn by the 1st plaintiff. It is deposed in the affidavit that the 1st plaintiff owns parcel of land known as Njoro/Ngata Block 1/789, the 2nd plaintiff owns Njoro/Ngata Block 1/795 while the defendant owns Njoro/Ngata Block 1/788. All these plots are

adjacent to each other, measure approximately the same size and are located in the same residential neighborhood. Out of the four plots, three had been developed with bungalows while the 3rd plaintiff's plot had a maisonette developed on it. All the parties have been residing on the plots until August 2017 when the defendant demolished his bungalow and started constructing a four (4) storey apartment block. The plaintiffs and their families still reside on their plots.

4. Being inconvenienced by the defendant's new building in terms of privacy, noise and construction debris, the plaintiffs raised objections with the defendant, physical planning department and the National Construction Authority (NCA) and physical planning department. At the offices of NCA and physical planning department, the plaintiffs learnt that the defendant had obtained approval for a two (2) storey building. NCA suspended work on the project but construction later resumed.

5. The plaintiffs commissioned a firm of architects who did a report listing various regulatory shortcomings of the defendant's project. The plaintiffs complain that the structure being put up by the defendant is a huge commercial building which is being squeezed into a small plot. As a result, the topography and scenery of the area will permanently change. The plaintiffs as neighbors, are prejudiced by the project in terms of security, privacy, population, adequate parking space as well as the nature of the defendant's future tenants.

6. The plaintiffs further state that the wall of the defendant's building under construction is right on the boundary between the defendant's plot and the 1st plaintiff's plot yet the later has not consented to that situation. Further, the plaintiffs state that the building being constructed by the defendant is contrary to all existing building rules, laws and regulations. The plaintiffs annexed copies of their title deeds, a report by Design Spec Limited dated 28th October 2017, complaint letter dated 13th July 2017 addressed to County Planner Nakuru and National Construction Authority letter dated 11th September 2017. Accordingly, the plaintiffs seek injunction as prayed in the application.

7. The defendant opposed the application through his replying affidavit filed on 29th November 2017. He stated that he is indeed the registered owner of the parcel of land known as Njoro/ Ngata block 1/788, a property which he acquired in the year 2008. At the time he purchased it, it had a three-bedroom house. The property neighbors the 1st Plaintiff's property. Though the 2nd and 3rd plaintiffs are known to the defendant, they are not his immediate neighbour.

8. The defendant further stated that he has other neighbors who have constructed rental apartments such as bed sitters which are occupied by tenants yet nobody has ever complained about those developments.

9. Regarding the construction, the defendant stated that he sought approval for change of user of the property from single dwelling to multi dwelling units or flats. Notice of the application was published in the Standard Newspaper of 19th May 2016. There being no objection, the County Government approved the application through Notification dated 21st November 2016. He further obtained authorization from the National Environment Management Authority. He then proceeded and completed the shell of the first phase of the project.

10. When the second phase started the 1st plaintiff lodged a complaint with the County Government to the effect that the defendant was; using substandard material and that the building would be unsafe. The County Government Commissioned an Integrity Report which confirmed the safety and integrity of the project. The defendant has since continued with the construction with several visits from both the County Government and NCA who have all given the building a clean bill of health.

11. Prior to commencing the construction, the defendant had demolished the house he was living in on the property with a view to completing one of the units for occupation by his family. As a result of the present application, the defendant has had to live in rented premises. The defendant further stated that he has had to commercially borrow large sums of money for the project and it is therefore unfair and expensive to issue an injunction against him as interest continues to accrue. He annexed copies of the Notice published in the Standard Newspaper of 19th May 2016, Notification of Approval for

Development Permission dated 24th October 2017, Letter from County Government of Nakuru dated 13th October 2017, Acknowledgment of Receipt of Environmental Impact Assessment Project Report dated 17th March 2017 and Internal Memo dated 1st September 2017 from County Engineer Nakuru County approving the integrity report from Engineer Peter Mbuchi.

12. The application was argued by way of written submissions. The defendant's submissions were filed on 19th December 2017 while the plaintiffs' submissions were filed on 20th December 2017. I have considered the application, the affidavits filed, as well as the submissions.

13. In an application interlocutory injunction, for the application to succeed the applicant must establish a prima facie case with a probability of success. If no prima facie case is established the application fails. Beyond establishing a prima facie case, the applicant must show that he will suffer irreparable damage if an injunction is not granted. Lastly, if the court is in doubt as to whether there will be irreparable damage then the court should determine the application on a balance of convenience. These principles set down in the well-known case of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358** and were recently restated by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**.

14. The phrase *prima facie* case was defined by Bosire JA in the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

So what is a prima facie case? I would say that in civil cases it is a case in 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.

..... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

15. The plaintiffs' complaint against the construction by the defendant is summarized at paragraph 24 of the supporting affidavit: that the building is being constructed contrary to building rules, laws and regulations. According to plaintiffs the breach of the building laws has resulted in or is manifested in the defendant constructing a huge building in a small parcel of land with the result that the area, scenery and topography will permanently change; that there will be crowding, insecurity, loss of privacy, inadequate parking space, that construction is of a 4 storey building instead of a 2 storey one as per approvals and that there was no change of user.

16. The defendant responded to the plaintiffs' allegations by stating that he obtained the necessary regulatory approvals. Among others, he annexed a copy of the Notice of Application for Change of User published in the Standard Newspaper of 19th May 2016, Notification of Approval for Development Permission dated 24th October 2017, letter from County Government of Nakuru dated 13th October 2017 forwarding copy of approved building plans and Integrity Report by Engineer Peter Mbuchi. The plaintiffs did not challenge this evidence by way of any further affidavit.

17. Under **Section 8 of Part 2 of the Fourth Schedule of the Constitution of Kenya 2010** as read with **Section 29 of the Physical Planning Act No.6 of 1996**, control of development is the function of County Governments. **Section 29 of the Physical Planning Act No.6 of 1996** states:

29. Powers of local authorities Subject to the provisions of this Act, each local authority shall have the power—

(a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;

(b) to control or prohibit the subdivision of land or existing plots into smaller areas;

(c) to consider and approve all development applications and grant all development permissions;

(d) to ensure the proper execution and implementation of approved physical development plans;

(e) to formulate by-laws to regulate zoning in respect of use and density of development; and

(f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

18. Further, under **Section 30** of the Act, no person shall carry out development within the area of a local authority without a development permission granted by the local authority. The Act defines “development” as follows:

(a) the making of any material change in the use or density of any buildings or land or the subdivision of any land which for the purpose of this Act is classified as Class “A” development; and

(b) the erection of such buildings or works and the carrying out of such building operations, as the Minister may from time to time determine, which for the purposes of this Act is classified as Class “B” development

19. From the material placed before the court, it is not disputed that approval for development permission was granted to the defendant by the County Government of Nakuru on 24th October 2017. Prior to that, a building plan submitted by the defendant was approved at meeting of the Technical Committee of the County Government on 11th October 2017. If the terms of the approvals have not been complied with then there are remedies for addressing such a situation under the **Physical Planning Act**. There is no allegation by the plaintiffs that such remedies have been exhausted or have failed.

20. The court cannot substitute itself for the County Government so as to determine the technical aspects of compliance or non-compliance with approvals. Other than their letter dated 13th July 2017, I have also not seen any evidence from the plaintiffs indicating that they made any follow up on their complaint with the County Government. The same applies to NCA. I have not seen any follow up to the letter dated 11th September 2017 from NCA. In these circumstances, the court is left to draw the conclusion that both the County Government and NCA have not seen or have not been shown any reason to pursue the matter further. If that be the case, there would be no reason for the court to impeach the defendant’s project.

21. The plaintiffs seek judgment in the plaint for “an order of demolition of the building put up by the defendant on LR No. Njoro /Ngata Block 1/788.” In view of the nature of the relief sought by the plaintiffs, it really matters not whether or not the plaintiffs are granted an interlocutory injunction since if the plaintiffs’ suit succeeds, the building will be demolished whether fully constructed or whether construction is stopped at its present state through an injunction. The plaintiffs do not lose anything if an injunction is not granted since they still can have their desired outcome if the suit is determined in their favour.

22. As was observed in the case of **Mr Rao** (supra), a prima facie case is more than an arguable case. It is not enough for the plaintiffs to raise issues or arguments. The evidence they present must show an infringement of a right and that their case has a likelihood of success at trial. In **Nguruman** (supra) the court stated:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an

urgent necessity to prevent the irreparable damage that may result from the invasion

23. In view of the foregoing discussion, I am not persuaded that the plaintiffs have shown an infringement of their rights by the defendant and that their case is likely to succeed at trial. Simply put, they have not established a *prima facie* case with a probability of success. Notice of Motion dated 20th November 2017 is therefore dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 31st day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Otieno holding brief for Mr. Gai for the plaintiffs/applicants

Mr. Musembi for the defendant/respondent

Court Assistants: Gichaba and Lotkomoi