REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.496 OF 2017

PATRICK MWANGI NDAMBURI……..……..1ST PLAINTIFF/APPLICANT

TITUS MUREITHI KATHURIMA…….....……....2ND PLAINTIFF/APPLICANT

(Suing on their behalf and on behalf of

the members of Green Valley Court Welfare Group)

-VERSUS-

REGISTERED TRUSTEES,

PARKLANDS BAPTIST CHURCH…….…..1ST DEFENDANT/RESPONDENT

REGISTERED TRUSTEES,

MEMBLEY BAPTIST CHURCH…..…….2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants who have sued on their behalf and on behalf of members of ***Green Valley Court Welfare Group,*** filed their ***Statement of Claim*** on ***2nd May 2017,*** and prayed for various orders. Among the orders sought are:-

> ***a) A mandatory injunction restraining the Defendants, their agents, servants, employees or any person acting under its authority from establishing, operating and/or in any other way carrying on the business of a school known as Membley Baptist Christian Schools on LR.No.14870/121, situated in Green Valley Court, Membley Estate, off Thika Road.***
>
> ***b) An order compelling the Defendant to pull down, remove and clear all those structures making up the school premises including but not limited to classrooms, kitchen, ablution block and the other facilities comprising the school.***

Simultaneous to this ***Plaint***, the Applicants filed a ***Notice of Motion*** application dated ***7th April 2017*** and sought for the following orders:-

> ***1) Spent.***

2) Spent.

3) That pending the hearing and determination of the suit filed herewith, this Honourable Court be pleased to restrain the Defendants/Respondents, their agents, servants, employees or any person acting under its authority by a way of an injunction from establishing, operationalizing and/or in any other way carrying on the business of a school known as Membley Baptist Christian Schools on LR.No.14870/121 situated in Green Valley Court, Membley Estate off Thika Road.

4) That an order do issue directing the Defendants to pull down, remove and clear all those structures making up the school premises including but not limited to classrooms, kitchen, ablution block and the other facilities comprising the school.

5) That the Plaintiffs/Applicants be at liberty to apply for any further orders as may be deemed necessary by this Honourable Court.

6) That the costs of this application be provided for.

This application is premised on the grounds stated on the face of the application and on the ***Supporting Affidavit*** of ***Patrick Mwangi Ndamburi.*** The grounds in support are:-

1) That the 1st Defendant and/or the 2nd Defendant have established a school known as Membley Baptist Christian Schools on LR.No.14870/121, situated in Green Valley Court, Membley Estate, off Thika Road.

2) That Green Valley Court, the estate within which the Defendants/ Respondents have established a school, is a court zoned strictly for residential purposes and development.

3) That the development of the school is a violation of the conditions attached to the mother title over the property on which the school is situated.

4) That the establishment and operation of Membley Baptist Christian Schools within the court is a blatant breach of the planning regulations for the area.

5) That the Defendants/Respondents herein did not obtain a change of user of the property as required by the law before they established the school.

6) That if at all the Defendants/Respondents did obtain the requisite change of user, the same was obtained illegally and irregularly as the local community was neither notified nor consulted by the Defendants/Respondents about the intended change of user before the same was granted by the relevant county authority.

7) That the Defendants have established a school without obtaining all the necessary approvals including but not limited to NEMA approvals and approvals from the County Government of Kiambu.

8) That the establishment and operation of the said schools has put further strain on the already stretched public resources such as security, road infrastructure and the continued operation of the school would lead to a complete breakdown of these resources to the disadvantage of the area residents.

9) That the establishment of the schools has caused nuisance to residents who have been deprived of their right to quiet possession and peaceful enjoyment of their residential properties.

10) That the presence and operation of the school would increase noise pollution in generally quiet and serene environment as well as causing congestion on the estate roads thereby

occasioning undue hardship and irreparable damage to the residents of the area.

In his supporting affidavit, the deponent ***Patrick Mwangi Ndamburi***, one of the officials of ***Green Valley Court Welfare Group***, and who was authorized to swear the same by the other members reiterated the contents of the grounds in support of the application and further averred that the Applicants only saw a poster put up by the Defendants/Respondents outside ***Membley Baptist Christian Schools,*** indicating that the school would commence ***on 4th January 2017***. Further that the said school was established without the Defendants' obtaining approval for change of user from the ***County Planning Department,*** before establishing the said school. Further that before the said change of user was granted, the Defendants ought to have invited recommendations regarding the proposed change of user from members of the public including the area residents. He further averred that he was informed by his advocates that the Defendants/Respondents were also required to put up public notices regarding the proposed change of user in two local dairies inviting objection from the public within a period of not less than 14 days. Further that the Defendants/Respondents were required to place a notice on the property indicting the intention to change its user within the same period.

It was his allegations that the establishment of the school has caused nuisance to the residents who have been deprived of their right to quiet possession and peaceful enjoyment of their residential properties. He urged the Court to allow the instant application.

This application is contested and ***Micah Maina Mwangi***, the Chairman of the Board of Trustees of ***Membley Baptist Church***, the 2nd Defendant averred that he had been authorized to swear the said affidavit. He contended that the church, 2nd Defendant sits on ***0.275Ha (church plot***) known as ***LR.No.14870/121,*** but the church has acquired more plots for use as parking and play field which has brought the total area occupied by the church to be ***2.5 acres***. He also contended that the said church plot was acquired by the church in ***2005,*** for the purpose of setting up a church and that upon registration of the 2nd Defendant, it executed a sale agreement with the seller (***Daykio Plantations Ltd***) in the ***year 2014,*** and the said plot was sold as a '**church plot'**. The deponent further denied violation of any special conditions attached to the mother title or any other title.

It was his further allegations that in the ***year 2004***, the Defendants got approval from the ***District Health Officer***, to construct a multipurpose structure within the church compound, and the said structure has been used as Sunday School Classes for the last ***8 years***. He admitted that the 2nd Defendant considered establishing a school in the said church compound in the ***year 2016***, when the members of the church ratified that decision. It was his contention that the church carried out a survey involving the membership of the church but the Plaintiff did not raise objection nor was there any objection from any of the residents and therefore the school was launched on ***4th January 2017***.

It was his contention that the Defendants did not require any change of user to establish the school within the church compound. He also admitted that in early ***January 2017***, the church put up a signage which was meant to convey the message to the members of the public that the church was starting a school. However, the Plaintiffs raised their objection vide a letter from their advocate dated ***8th January 2017***. He also contended that due to the said objection, the Defendants and Plaintiffs formed a mediation team which team has held several meetings and they had made tremendous progress until when this case was filed. He also averred that an ***Environment Audit***, was conducted in the months of ***April*** and ***May*** and forwarded to ***NEMA*** offices on ***14th June 2017***. It was therefore his contention that the filing of this case was in bad faith on the point of the Plaintiffs and he urged the Court to dismiss the instant application with costs.

The Plaintiffs/Applicants filed a further supporting affidavit and the deponent averred that the property was sold as a '***church plot'*** but not a school plot. Further that the approval by the District Health Officer was for the construction of a multipurpose building and not a fully-fledged school such as the one set by the Respondents herein. Further that the Defendant had not complied with the requirements for establishment of a school before establishing the said school, but only initiated the process after they had opened the school. The Court was therefore urged to allow the instant application as prayed.

The application was canvassed by way of written submissions which submissions this Court has carefully read and considered. The Court has also considered the pleadings in general, the annextures thereto and the relevant provisions of law and renders itself as follows;-

There is no doubt that the 2nd Defendant herein is the owner of the ***LR.No.14870/121,*** having purchased the same from ***Daykio Plantations Ltd*** on ***13th May 2014,*** and the said plot was described as a ***'church plot'***.

There is also no doubt that this plot lies within the larger ***LR.No.14870,*** which was subdivided and several resultant plots created. These resultant plots are owned by several owners who have built their residential homes. The Plaintiffs/Applicants have alleged that the said area where the sub plots fall is zoned as for residential purpose and development only. There is also no doubt that in the ***year 2004***, the Defendants got approval from the ***District Health Officer*** for construction of ***multipurpose structure*** within the church compound. Therefore if such approval was given by the District Health Officer, it was for construction of multipurpose structure but not a school.

There is also no doubt that the Defendants have established a school within the church compound and which was to open its door on ***4th January 2017***. The establishment of the said school has been objected by the Plaintiffs/Applicants and thus this suit. It is evident from the Defendants averments that a survey was carried out involving its membership on the establishment of the school. The Defendants have alleged that about 90% of its members supported the said establishment. However it is evident that the said survey was not carried out to all the residents neighbouring the church where the alleged school was to be established and specifically members of ***Green Valley Court***. Though the Defendants have alleged that the Plaintiffs did not object during the carrying out of the survey, it is evident that the survey was on the members only but not the neighbouring residents. Further these members of the church are the same ones who gave the green light to establish the school in ***November 2016*** and could therefore not oppose the establishment of the said school.

It is not in doubt that the owners of the other sub plots neighbouring the 'church' have formed themselves into a ***Welfare Group*** known as ***Green Valley Court Welfare Group***. The said ***Welfare Group*** was registered on ***2nd October 2015***, as per the ***Certificate of Registration*** produced in court as ***PMN1***.

The Applicants have objected to the establishment of this school and have urged the Court to restrain the Defendants from further running of the said school. The Defendants have vehemently opposed the instant application.

The above being the undisputed facts, the Court finds that the issue for determination herein is ***whether the Applicants are deserving of the orders sought.***

From the onset, the Court will take into account that the Applicants herein have sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of ***Agip (K) Ltd…Vs…Maheshchandra Himatlal Vora & Others, Civil App No.213 of 1999***, where the Court of

Appeal held that:-

> ***"Grant of an injunction being discretionary, the appellate court only interferes in exceptional circumstances though it will not hesitate to do so if the exercise is based on wrong principles".***

Further the Court will also take into account that at this interlocutory stage, it is not mandated to delve into substantive issues and make finally concluded views of the issues in dispute. However, the Court is only mandated to determine whether the Applicants are deserving of the orders sought based on the usual criteria. See the case of ***Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the court held that:

> ***"In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria…."***

The criteria to be considered by the Court is the one laid down 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 HCCC No.3398 of 1980 (1981) KLR 390, where the Court held that:-

> ***"The conditions for granting a temporary injunction is 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 granted, unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award 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.***

The Applicants have also sought for mandatory injunction which ordinarily is not granted at the interlocutory stage. However, the said order of mandatory injunction can only be granted in very special or exceptional circumstances. See the case of ***Kheira Omar Maalim …Vs…New Look***

Estates Ltd & Another, Nairobi HCCC No.156 of 2008, where the Court held that:-

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be readily remedied or if the defendant attempted to steal a march on the Plaintiff, a mandatory injunction will be granted at the interlocutory application…. moreover, before granting a mandatory injunction, the court ought to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted that being on a different and higher standard than was required for prohibitory injunction. (see Halsbury's Laws of England, 4th Edition Volume 24 Para 948)".***

This Court in determining whether the Applicants are deserving of the orders sought will be guided by the principles set out in the above cited cases.

On the prayer for temporary injunction, the Applicants needed to

establish that they have a *prima facie* case with probability of success. In the case of ***Mrao Ltd…Vs… First American Bank***, the Court held that:-

> ***"A prima-facie case means more than an arguable case. It means that the evidence must show infringement of a right and probability of success of the Applicant's case at the trial".***

Further in the case of ***Habib Bank Attorney General Zurich…Vs…***

Eugene Marion Yakub, Civil Appeal No.43 of 1982 (Nairobi), probability of success was described as follows:-

> ***"Probability of success means the Court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at that stage since proof is only required at the hearing stage".***

Have the Applicants herein established that they have a *prima-facie* with probability of success?

What is not in doubt is that the Plaintiffs/Applicants are not challenging the Defendants title to the suit property. The Plaintiffs are challenging the establishment of a school in an area that they allege is zoned

for residential purposes **only** and that their input was not sought in the establishment of the said school. In the ***Mrao Case (supra),*** it was held that the Applicant must show infringement of a right and probability of success of its case at the trial.

There is no doubt that the Defendants have established a school at their property which was initially purchased as a ***'church plot'.*** The Applicants have alleged that the establishment of the said school will infringe on their right to ***quiet possession*** and ***privacy*** which they had not anticipated when they purchased their respective residential plots. The Applicants alleged that the school was established before an ***Environmental Impact Assessment (E.I.A)*** was undertaken and if it was undertaken, it was done clandestinely without informing the Plaintiffs/Applicants herein. Indeed the Defendants have averred that they only carried a survey within their membership. They did not carry the alleged survey within the whole of the neighbourhood of the allegedly established school. Further, the Defendants admitted that the approval for the construction of the buildings on the church compound was for a multipurpose structure, but not specifically for use as a school or classrooms. The Defendants also admitted that the said multipurpose structure has been used for 8 years for Sunday School Classes. The Court will take Judicial Notice that Sunday School Classes are only operational on Sundays but not on an everyday basis. The Defendants therefore cannot equate Sunday School Classes to a conventional school. At least the Defendants ought to have sought the views of the residents before the establishment of such school within their neighbourhood.

Though the Defendants have alleged that the facts herein are similar to the ones in the case of ***Membley Park Residents Association.....Vs.....The Presbyterian Foundation (2017) eKLR***, this Court distinguishes the said facts herein in that in the ***Membley Park Residents*** case the construction of the classrooms had allegedly began in ***2015***. However in this case, the structure housing the classes was constructed a long time as multipurpose structure but not to house a school and/or classrooms. Therefore the residents would not have opposed the construction of a multipurpose structure for the church because the intention then was not known that later the said structure would be converted for use as classrooms. The school herein was established in ***2017***, and the Plaintiffs/Applicants did object to the said establishment vide their advocate's letter dated ***8th January 2017***. Certainly, the facts herein and in ***Membley Park Residents*** case are different.

The Court is cautious that at this stage, it is not supposed to delve into substantive issues that would certainly come up in the main hearing. However, the Court is alive to the fact that where there is evidence of infringement of a right, then injunction must be issued to protect the rights of such applicant. The Plaintiffs/Applicants have alleged that their rights to quiet and peaceful enjoyment of occupation of their properties have been infringed by establishment of a school in the purely residential zone. The school did not exist before. So the Defendants cannot allege that the children's right to education has been violated or infringed. See the case of ***Stephen Juma & Another.....Vs.....Executive Committee Sugar Growers Association, Kisumu HCCC No.5 of 2005, where the Court held that:-***

> ***"The purpose of injunction is to protect an immediate threatened or contravened right which if no injunction is granted, the applicant would suffer irreparable loss and the hearing of the matter would be an exercise in futility".***

Having now carefully considered the available evidence, the Court finds and holds that the Applicants have established that they have a *prima facie* case with probability of success.

On the second limb of whether the Applicants will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the Applicants' infringed rights to quiet and peaceful environment is cardinal to their enjoyment of their right to property. The Defendants have introduced a school without involving the neighbouring residents. The Defendants have also sought to ratify their actions after the matter was filed in court. Even without going to the merit of the main suit, the Court finds that the Applicants' right to peaceful environment has been violated. The Applicants would therefore suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb of if the Court is in doubt to decide on the balance of convenience, the Court finds that

the balance of ***convenience*** herein tilts in favour of keeping things in *status quo* and the *status quo* is what existed before the school in dispute was established. It is trite 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. 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 available evidence, the Court finds that the balance of convenience herein tilts in favour of maintaining the *status quo* and the *status quo* herein is what existed before the establishment of the school in dispute.

On prayer No.4, the Applicants have sought for a mandatory injunction. That the Defendants should be compelled to pull down the school and clear the debris. However, this is the same order prayed for in the main suit. This prayer is a final order and if it is granted at this stage, then it will have the effect of bringing this suit to a finality at the interlocutory stage. That would not be proper because there are no special circumstances in existence to warrant such a drastic measure. See the case of ***The Headmaster, Kiembeni Baptist Primary & Another…Vs…The Pastor of Kiembeni Baptist Church, Mombasa HCC App.No.103 of 2004***, where the Court held that:-

> ***"When dealing with an application for interlocutory injunction, it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing of evidence". (See Mbuthia…Vs…Jimba Credit Finance Corporation & Another (1988) KLR 1)***.

Further the structures that are being used as classrooms were in existence long before the school was established. The said structure was allegedly approved as a multipurpose structure which can be used for other purpose than just housing classrooms. For the above reasons, the Court finds that no good reasons have been advanced to warrant this Court to order that the structure in issue should be pulled down. There are no special circumstances herein to warrant grant of mandatory injunction. See the case of ***Locaball International Finance Ltd…Vs…Agro Export & Others (1986) 1 ALL ER 901***, where the Court held that:-

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, the court had to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted, that being a different and higher standard than was required for a prohibiting injunction". See Halsbury's Laws of England (4th Edition) Volume 24 para.948.***

In the instant case, the issues raised are ***not*** very clear and simple ones which ought to be decided at once. The matter needs to go for full trial to establish whether the Defendants have met all the requirements for establishment of a school in the disputed area and whether there was an ***Environmental Impact Assessment*** (EIA) carried out and whether the Plaintiffs/Applicants were granted an opportunity to express their views on the establishment of the disputed school.

For the above reasons, the Court finds that the Applicants are not deserving of the mandatory orders sought.

Having now carefully considered the instant ***Notice of Motion*** application dated ***7th April 2017***, and the written submissions filed, the Court finds the said application merited in terms of prayer No.3 of the said application. Consequently, the said prayer is allowed wholly. However, prayer No.4 is declined at this juncture. The Applicants are also entitled to costs of the application.

Further, the parties are directed to prepare the main suit for hearing expeditiously. In that regard, the parties herein to comply with Order 11 within the next ***60 days,*** from the date hereof and thereafter set the matter down for Pre-trial Conference before the Deputy Registrar of this court.

It is so ordered.

Dated, Signed and ***Delivered*** at Thika this **16th** day of ***February*** **2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Anyonje for Plaintiffs/Applicants

Mr. Businge holding brief for Mr. Mugo for Defendants/Respondents

Lucy- Court clerk.

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

L. GACHERU

JUDGE

16/2/2018