REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC CASE NO. 88 OF 2017

IN THE MATTER OF:ARTICLE 40 OF THE CONSTITUTION ON THE PROTECTION OF THE RIGHT TO PROPERTY;

IN THE MATTER OF:ARTICLE 42 OF THE CONSTITUTION ON THE PROTECTION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT; AND

IN THE MATTER OF: ENFORCEMENT NOTICE UNDER THE PHYSICAL PLANNING ACT IN RESPECT OF STRUCTURES ERECTED ON L. R. NO. 9104/226.

BETWEEN

LINDA TELLES……..…...…..APPLICANT

AND

THE DIRECTOR OF PLANNING, COMPLIANCE AND ENFORCEMENT,

THE NAIROBI COUNTY GOVERNMENT……..……..…RESPONDENT

WALTER KUONI…….....1ST INTERESTED PARTY

ELENA KUONI…….....2ND INTERESTED PARTY

GEORGE ROBINSON ORR……...…..3RD INTERESED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)……..……..4TH INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY…….....5TH INTERESTED PARTY

JUDGEMENT

1. The Applicant filed the Notice of Motion dated 15/5/2017 seeking an order of mandamus to compel the Respondent to commence demolition of the illegal structures on plot Number 9104/226 on Daisy Drive in

Nairobi belonging to the 1st and 2nd Interested Parties pursuant to Section 39 (1) of the Physical Planning Act and Nairobi City County Enforcement Note 026 of 3/3/2016. She also sought an order of prohibition directed at the 1st and 2nd Interested Parties to cease the unauthorised constructions on their plot; and a declaration condemning the Respondent to compensate her for the losses she incurred including expenses for property damage and related expenses.

2. The Applicant filed the Amended Notice of Motion on 26/7/2017 vide which she joined George Robinson Orr, the National Environment Management Authority (NEMA) and the National Construction Authority as the 3rd, 4th and 5th Respondents to the suit respectively. In it she seeks the following orders: -

a. An order of mandamus to compel the Respondent to commence demolition of illegal structures on the 1st and 2nd Interested Parties' property including the guard house on the Applicant's boundary wall;

b. An order of prohibition directing the 1st and 2nd Interested Parties to cease all unauthorised constructions on their plot;

c. A declaration condemning the 1st and 2nd Interested Parties to compensate the Applicant for all loses and related expenses incurred by the resultant property damage including the damage to the boundary wall;

d. An order of mandamus to compel the 1st and 2nd Interested Parties to conduct an environmental impact assessment before any further construction is carried out on their property which should address the implications of the storm water, swimming pool backwash, sewerage and soak away pit before pollutants are discharged into the environment since Gigiri where the property is to be found is not connected to the city's sewerage system;

e. An order of mandamus compelling the 3rd Interested Party to facilitate storm water drainage from the 1st and 2nd Interested Parties' property through his plot L.R. No. 9104/228 into the Karura forest subject to the relevant approval with the prompt and just compensation being paid to the 3rd Interested Party by the 1st and 2nd Interested Parties. If approval to discharge storm water into the nearby Karura forest is denied and it has to pass through the wayleave on the Applicant's property, the Applicant reserves the right to appoint the contractor to undertake the work and approve the designs with the costs being borne by the 1st and 2nd Interested Parties;

f. An order of mandamus compelling the 4th Interested Party to provide an assessment of environmental implications of the developments including the 3 level 8 bedroom maisonette being constructed on the 1st and 2nd Interested Parties' property;

g. An order of mandamus to compel the 5th Interested Party to prove that it granted approval to the 1st and 2nd Interested Parties before they commenced the construction on their property; and

h. Any additional orders and that costs be provided for.

3. The Applicant was born in Singapore and is an American national. She decided to settle in Kenya and bought the property known as L.R. No. 9104/224 in 2000 where she has been living with her husband for over 16 years. The 1st and 2nd Interested Parties own the property known as L.R. No. 9104/224 which neighbours the Applicant's home on the upper side.

4. The 3rd Interested Party was the original owner of L.R. No. 9104/225 which he caused to be subdivided as a result of which plot numbers 226, 227 and 228 were created. He sold plot number 226 to 1st and 2nd Interested Parties and plot number 227 to someone else who is not a party to these proceedings. He

retained and currently resides on plot number 228. The 3rd Interested Party was served but he did not participate in the proceedings.

5. The 4th Interested Party is a body created by law to ensure that development policies, plans, programs and projects undertaken in Kenya incorporate environmental considerations. The 5th Interested Party is a creature of law tasked with the responsibility of overseeing the construction industry and coordinating its development in Kenya.

6. The Applicant's claim is that the 1st and 2nd Interested Parties have illegally built structures on their plot which are causing structural damage to her boundary wall. The Applicant is apprehensive that the damage will be aggravated by storm water runoff and the discharge of backwash from the 1st and 2nd Interested Parties' swimming pool. She claims these structures pose environmental risks to her and to her property and will lead to the depreciation of the value of her property. She also claims that the structures on the 1st and 2nd Interested Parties' property pose an imminent risk to her property and her right to the enjoyment of her property; and that she will incur the huge financial burden of repairing the damage to her property if the illegal structures are not demolished.

7. The Applicant claims that the Respondent's Director of Planning, Compliance and Enforcement issued enforcement note number 026 on 3/3/2016 directing the 1st and 2nd Interested Parties to demolish the illegal structure on their land within 7 days which has not been done to date. The Applicant delivered a demand notice to the Respondent on 27/4/2017 requesting it to exercise its mandate under Section 39 (1) of the Physical Planning Act to demolish the 1st and 2nd Interested Parties' illegal structures but it never took any action.

8. She claims that the Respondent has exhibited total laxity in controlling and regulating the illegal structures which are in breach of the Nairobi County Physical Planning bylaws, the Physical Planning Act, the Building Code and the rule of law. The Amended Notice of Motion is supported by the Applicant's further affidavit sworn on 26/7/2017.

9. The Applicant's other complaints can be summed up as follows:

a) NEMA was negligent in exempting the 1st and 2nd Interested Parties from undertaking the environmental impact assessment;

b) The 1st and 2nd Interested Parties grossly understated the cost of their proposed house at Kshs. 26 Million yet it will cost approximately Kshs. 59,925,600/=. The Applicant procured the services of a quantity surveyor to prepare the estimate of Kshs. 59,925,600/=;

c) The 1st and 2nd Interested Parties' septic tank is uphill;

d) The proposed swimming pool may discharge contaminated water with chemicals into her compound;

e) She may be forced to abandon her property one day if there is heavy downpour and large volumes of water flow into her land from the 1st and 2nd Interested Parties' land;

f) The value of her property which she estimates to be Kshs. 300 Million, will depreciate if the 1st and 2nd Interested Parties' are allowed to continue with their construction;

g) That the levelling by the 1st and 2nd Interested Parties' of their land with soil and murram has weakened her boundary wall and they should rebuild it at the cost of Kshs. 50 Million; and

h) The 1st and 2nd Interested Parties' have caused her agony, worry, uncertainty, anxiety, anguish

and mental torture which she finds hard to erase from her memory and now seeks compensation for injurious affection to the tune of Kshs. 25 Million.

10. Save for the 3rd Interested Party, all the parties filed their responses to the application. The Respondent filed its replying affidavit sworn by Timothy Illako on 13/10/2017. The 1st and 2nd Interested Parties relied on the replying affidavit sworn by the 1st Interested Party on 21/6/2017, a further replying affidavit he swore on 10/8/2017 and a further supplementary affidavit sworn by him on 7/9/2017. The 4th Interested Party filed its replying affidavit on 12/9/2017, it is sworn by Zephaniah Ouma. The 5th Interested Party filed its affidavit which was sworn by Stephen Mwilu on 7/9/2017. The Applicant swore an affidavit in response to the 1st and 2nd Interested Parties' further replying affidavit which was filed in court on 30/8/2017.

11. The parties agreed that a site visit was necessary before the hearing could proceed. The court visited the site on 19/7/2017 in the presence of the Applicant, the 1st Interested Party, their respective advocates and officials of the Respondent. The court directed the Respondent to prepare a report after the site visit. That report was filed in court by the Respondent's advocate owing to the fact that the Respondent was undergoing changes and reorganising its legal department and its officials could not swear the Affidavit. The site visit took place before the 3rd, 4th and 5th Interested Parties were added to the suit.

12. In response to complaints lodged by the Applicant, the Respondent vide its letter of 8/3/2016 directed that the 1st and 2nd Interested Parties could proceed with works on the ground and submit satisfactory building plans on the re-siting of the guard house. It further directed that the main house to be constructed must be a single dwelling house which should correspond with the approved Architectural Plan No. CPF AH 663. The Respondent directed that the matter of storm water drainage system should be solved in consultation with neighbours. The Respondent gave approval on 31/5/2016 for the 1st and 2nd Interested Parties to relocate the gate house.

13. The Applicant claims that the relocation of the guard house from the 1st and 2nd Interested Parties entrance violates the Physical Planning Act since it is in close proximity to her boundary wall. She has expressed doubt as to whether it is a guard house due to its design. She avers that the guard house will compromise her personal security and safety. She is apprehensive that the 8-bedroom house will require an increased number of workers including gardeners, house helps, swimming pool attendant, caretaker and cleaners. She fears this will introduce a significant level of insecurity since the workers cannot be controlled. She also takes issue with the 1st and 2nd Interested Parties development urging that it does not comply with the ground coverage of 25% and that the development does not conform with the plot ratio as set out in the Nairobi bylaws. The suit land is in Gigiri area which falls under zone 13 set aside for low density development of one family.

14. She argues that in as much as the Respondent approved the site plan, further approval from NEMA should have been sought. She also argues NEMA did not conduct a site visit and that the exemption NEMA granted to the 1st and 2nd Interested Parties was not a licence to build. She accuses NEMA of negligence in failing to scrutinise the building plans and detect that the size of the development far exceeded the plot ratio of 25% and that there was no provision made for effluent treatment yet there was a swimming pool in the plan.

15. The 1st and 2nd Interested Parties maintained that they had no knowledge of enforcement note number 026 and only learnt about it from the Applicant's letter. They were only aware of enforcement notice number 5658 dated 22/2/2016 which required them to remove the guard house and submit satisfactory architectural plans for the Respondent's approval. The notice indicated that they could appeal against the notice to the Respondent's Liaison Committee. They appealed and were invited for a hearing by the Respondent on 3/3/2016. They later obtained all the necessary approvals for the re-siting of the guard house. The Director of Urban Planning approved the building plans on 2/4/2015.

16. The 1st and 2nd Interested Parties contend that the Applicant's claim is grounded on enforcement note

number 026 which the Respondent has denied issuing. They maintain that the structures they have erected on their land were put up with the prior approval of the Respondent, and the 4th and 5th Interested Parties.

17. In answer to the contention by the Applicant that the 1st and 2nd Interested Parties' guard house is built on her boundary wall, the 1st and 2nd Interested Parties aver that the relocated guard house is built off the Applicant's boundary wall leaving a distance of 2-8 centimeters in accordance with the local Building Code and the Respondent's rules and requirements.

18. The 1st and 2nd Interested Parties contend that the Applicant's wall encroaches onto their land since the block coping on the boundary wall overlaps onto their property. They deny that the Applicant's boundary wall is being damaged by runoff rain water from their structures and swimming pool. They blame the Applicant for not making provision on her side for the runoff water. They aver that the construction of her boundary wall was done in a substandard manner and not in consonance with the approved plans. They contend that the height of the wall is much higher than normal and that it ought to have been reinforced with beams.

19. Attempts by the 1st and 2nd Interested Parties to resolve the issue of storm water drainage have not borne any fruits. They blame the Applicant for adamantly refusing to allow access for the use of the wayleave on her land. She has also declined to enter into discussions on the drainage of the storm water from their land which slopes downhill. The storm water should naturally flow downwards towards the river which is next to the Applicant's plot but it is blocked by the Applicant's boundary wall. Consequently, the 1st and 2nd Interested Parties were forced to build 4 storm water soakaways on their property.

20. The 1st and 2nd Interested Parties aver that before they commenced construction, they consulted a NEMA expert who submitted all building plans and approvals to NEMA. After studying the plans and documents submitted, NEMA concluded that the 1st and 2nd Interested Parties were not required to carry out an environmental impact assessment of their proposed project. NEMA gave conditions which they duly complied with.

21. The 5th Interested Party gave its approval to the 1st and 2nd Interested Parties vide its letter of 22/10/2015, subject to payment of a construction levy. The 1st and 2nd Interested Parties obtained the approval from the Environment and Forest Section of the Respondent to cut down some trees and prune others to create space for the construction of their proposed house. They aver that they are environmentally conscious and where possible, they have preserved trees and will diligently replace the trees they cut down on their plot.

22. On the issue of drainage storm water, the 1st and 2nd Interested Parties maintain that no compensation is due to the Applicant since the wayleave for the drainage of storm waters from the plots uphill was constructed on the Applicant's land. The 1st and 2nd Interested Parties argue that the wayleave should serve their plot as well as plot number 227 owned by Mr. Han. Currently the storm water from Mr. Han's property flows into the 1st and 2nd Interested Parties' plot. The 1st and 2nd Interested Parties approached the 3rd Interested Party to grant them a wayleave for storm water who neither refused nor agreed to give the wayleave.

23. On the contention that the 1st and 2nd Interested Parties were putting up a multiple dwelling house, the 1st and 2nd Interested Parties maintain that they are putting up one family dwelling house to accommodate their 2 young adult children and a grandmother and that it is designed as a multi-generational house which will grant privacy to the members of this family. They contend that they have complied with the regulations specified in the zoning guide for Gigiri area.

24. In the report filed by the Respondent which was prepared by the Director of the Planning, Compliance and Enforcement Department of the Respondent, Mr. Justus Mwendwa Kathenge following the site visit, the Respondent confirms that any storm water from the plots abutting on Daisy Drive should

drain downwards to Rua Ruaka River along the plot owned by the Applicant.

25. The Respondent confirmed that there is a 3-meter-wide drainage wayleave running downwards along the Eastern boundary of the Applicant's plot. That wayleave connected plot numbers 9104/224 and 9104/225 for purposes of draining storm water to the river. The subdivision process of plot number 9104/225 which resulted in plot numbers 9104/226, 227 and 228 ought to have taken the existence of the drainage wayleave into consideration.

26. The Respondent confirms that the 1st and 2nd Interested Parties obtained its approval to construct one domestic dwelling house including a guard house, swimming pool and boundary wall through plan registration number CPF AH 663. The plot measures 0.2197 hectares which includes the 6-meter-wide access neck. The Respondent confirms that the proposed development by the 1st and 2nd Interested Parties on L.R. No. 9104/226 meets the requirements in terms of plot size and typology for Nairobi City County Development Zone 13 which covers Gigiri, Kitisuru, Ridgeways and Garden Estate.

27. The Respondent's technical officers discovered on 22/2/2016 when they visited the site that the guard house had been placed contrary to the approved plan. The Respondent issued an enforcement notice number 5658 requiring the 1st Interested Party to submit amended drawings to reflect the changes effected. The amendments were approved on 31/5/2016 vide plan registration number CPF AK 802. The Respondent avers that the enforcement notice was complied with and is not enforceable anymore.

28. The Respondent also confirms that the building structures of the 1st Interested Party conforms to its regulations and the building code which stipulate plot sizes, development typology and Siting Space about Buildings. The main house observes the 2.4 meter requirement for site spaces on the boundary wall. Section 18 (3) waives this requirement for garages and other out buildings that are not attached to the main house such as guard houses. The Respondent confirms that the current guard house at the lower end of access neck of the 1st Interested Party's plot complies with the building code.

29. The Respondent confirms that when the project commenced a dispute arose from the Applicant over real and potential flooding of her compound due to seepage of water through the Applicant's upper boundary wall bordering the 1st Interested Party's plot. The Applicant also feared that there will be the weakening of the wall and possible collapse in the event that there was heavy down pour and flooding on the upper plots.

30. The Respondent established that plots numbers 9104/226 and 227 and landlocked in terms of draining storm water. This was caused by an oversight during the subdivision and survey process of plot no. 9104/225 to create these plots. The oversight led to non-provision of a drainage wayleave to serve plot numbers 9104/226 and 227 and connect them with the drainage wayleave located on the eastern edge of the Applicant's plot. In the Respondent's view, a 3-meter-wide drainage wayleave should have been done from the end of plot number 9104/227 to run along the 1st Interested Party's plot on the eastern edge and into the 3rd Interested Party's plot number 9104/228 which will then drain into the existing wayleave on the Applicant's land to direct the water into the Rua Ruaka River. The omission during the subdivision was caused by the private consultants of the 3rd Interested Party while preparing the scheme and survey. The Respondent opines that the omission ought to be rectified as this will not in any way change the sizes of the plots as the beacons will remain intact.

31. In its replying affidavit, the 4th Interested Party states that the dispute between the plaintiff and the 1st Interested Party over the project was only brought to its attention when it was joined as a party to these proceedings. The 4th Interested Party confirms it received the 1st and 2nd Interested Parties' request for permission to construct an 8-bedroom maisonette made up of three levels on the suit property. The application was accompanied by the approved designs and other documents from the Respondent.

32. In light of the fact that single dwelling houses are considered to have little or insignificant impact on the environment, and considering that they are not classified among those that require an environmental

impact assessment licence under the law, the 4th Respondent issued a letter confirming that the 1st and 2nd Interested Parties' project was not subject to the process of environmental impact assessment licensing under the law. The exemption it gave was conditional upon fulfillment of 13 requirements enumerated in the letter of exemption which included ensuring compliance with the requirements of the Respondent's planning departments before commencement of work and compliance with the laws, bylaws and guidelines issued for development of such a project. It also required giving appropriate notices to the neighbours to limit the nuisance that may be posed to them.

33. NEMA maintains that it was not made aware of the dispute before these proceedings were commenced and could not therefore scrutinise and interrogate the project to determine if what had been approved was what was being constructed. NEMA believes the dispute falls within the purview of the Physical Planning Act which is why most of the correspondence was exchanged with the Respondent. The project plans that were approved were for a domestic building not a multi-dwelling maisonette for rental purposes as the Applicant alleges. NEMA argues that it is not responsible for the grant of any approval and designs and expects applicants and developers to submit duly approved documentation to facilitate its decision making. In arriving at its decisions, NEMA relies on the other agencies documents approvals or licenses which it expects to have been properly issued under the law.

34. The 5th Interested Party which in furtherance of its mandate, promotes and ensures quality assurance in the construction industry requires an owner of construction works to make an application for registration following which it issues a compliance certificate. It confirms it received the 1st and 2nd Interested Parties application for registration of their construction works on their plot together with the necessary documents and approvals from both the Respondent and 4th Interested Party.

35. After evaluation and assessment of the documents, it approved the 1st and 2nd Interested Parties project vide its letter dated 22/10/2015. Being satisfied that the 1st and 2nd Interested Parties had met the requirements for project registration and were compliant, it proceeded to register their project. Having complied with Section 31 of National Construction Authority Act and Regulation 25 of the National Construction Authority Regulations of 2014 and upon payment of the levy, it issued a certificate of compliance for project registration number 531011560242 to the 1st and 2nd Interested Parties.

36. The Applicant wrote to the 5th Interested Party on 13/7/2017 asking the authority to confirm whether the registration number displayed on the sign board in respect of the 1st and 2nd Interested Parties' project was authentic and genuine. Before the 5th Interested Party could respond, the Applicant sought the court's leave and joined the 5th Interested Party to these proceedings. The 5th Interested Party denies knowledge of enforcement note number 026 alleged to have been issued by the Respondent.

37. The issues for determination can be summed up as follows:-

i. Did the Applicant seek leave before filing the application for judicial review?

ii. Did the 1st and 2nd Interested Parties obtain the necessary approvals to commence the construction on their property?

iii. How should the issue of the storm water be dealt with? Should an order of mandamus be issued against the 3rd Interested Party to compel him to facilitate drainage of the storm water from the 1st and 2nd Interested Parties' land through his plot into the Karura Forest or should it be channeled to Rua Ruaka River through the wayleave on the Applicant's land?

iv. Should the court issue an order of mandamus to compel the Respondent to demolish the structures on the 1st and 2nd Interested Parties' plots including the guard house? Should the court also prohibit the 1st and 2nd Interested Parties from continuing the constructions on their plots?

v. Should the court grant a declaration that the 1st and 2nd Interested Parties ought to compensate the Applicants for all losses and related expenses resulting from the damage caused by the 1st Interested Party including the destruction to her boundary wall?

vi. Did the 4th and 5th defendants fail to carry out their duties as alleged by the Applicants? If they did not, should the court grant orders of mandamus to compel them to undertake their duties?

vii. Has the Applicant proved that she is entitled to the orders she seeks?

38. The Applicant and the 1st, 2nd, 4th and 5th Interested Parties filed submissions in the case. The Applicant filed her skeleton submissions on 13/9/2017 and also filed talking points on 5/12/2017. The Respondent filed its submissions on 28/9/2017. The 1st and 2nd Interested Parties filed skeleton submissions on 7/9/2017 and supplementary skeleton submissions on 2/10/2017. The 5th Interested Party filed its skeleton submissions on 21/9/2017. The 4th Interested Party filed its submissions on 29/9/2017.

39. The 1st, 2nd, 4th and 5th Interested Parties urge that the Applicant's claim must fail for failing to seek and obtain leave under Order 53 of the Civil Procedure Rules which enjoins an applicant to first seek the court's leave before filing the substantive judicial review application. While the court agrees with that position, it is of the view that that objection should have been taken up at the onset. The matter having proceeded to full hearing, the court is inclined to render its decision on the merits of the case.

40. Section 31 (2) of the Physical Planning Act provides that an application for development permission shall be accompanied with such plans and particulars as are necessary to indicate the purpose of the development and show the use and density. The Respondent, the 4th and 5th Interested Parties maintain that they complied with their statutory mandate. The Respondent denies issuing enforcement note 026 but admits issuing enforcement notice number 5658 to the 1st and 2nd Interested Parties when its offices discovered that the guard house had been sited contrary to the approved plan. It maintains that the 1st and 2nd Interested Parties subsequently complied with its directions and it approved the new plans.

41. The 1st and 2nd Interested Parties basically adopt the submissions of the Respondent on the issue of the plot ratio in relation to the project and the zonal requirement. They contend that the technical committee can allow a plot ratio which exceeds 10% and that their proposed projects will cover a plot ratio 26.5% which is within the permitted limit. They submit that they have fully complied with the zoning requirements set by the Respondent.

42. The 1st and 2nd Interested Parties' plot is on the upper side of the Applicant's plot and storm water from their land would naturally flow downwards into the Applicant's plot. The original parcel no. 9104/225 which was owned by the 3rd Interested Party had its drainage wayleave on the eastern boundary of the Applicant's land directing water towards River Ruaka. The subdivision of parcel no. 9104/225 failed to take cognizance of this fact.

43. The Applicant accesses her plot through the road off Daisy Drive that has well-tended lawn grass and is lined with palm trees. She uses the road exclusively and put up a boundary wall which is now adjacent to the 1st and 2nd Interested Parties plot. The 1st and 2nd Interested Parties use a separate driveway that runs parallel to the Applicant's boundary wall. At their entry, the 1st and 2nd Interested Parties' have put up a guardhouse close to the Applicant's wall. They had to move the wall of the guardhouse when the Applicant complained about her boundary wall. The Respondent gave its approval for the re-siting of the guardhouse and approved the 1st and Interested Parties' building plans.

44. The 1st and 2nd Interested Parties argue that the Applicant's prayer to have their guard house demolished by the Respondent is frivolous and unsubstantiated and should be dismissed. They claim that they deserve the right to take further action against the Applicant since her wall encroaches onto their land.

45. They urge the court to take cognizance of the fact that a wayleave was provided for draining storm water into the river prior to the subdivision that resulted in the creation of their plot. They urge the court to find that there is an easement which is defined under the Land Act as a non-possessory interest in another's land that allows the holder to use the land to a particular extent; or requires the proprietor to undertake an act relating to the land, or restricts the proprietor's use to a particular extent but does not include a profit.

46. When the court visited the site it noted that the land slopes from Daisy Drive and any storm water would drain towards Rua Ruaka River which is on the edge of the Applicant's plot. There is a 3-meter-wide drainage wayleave running along the eastern boundary of the Applicant's plot which was intended to drain water from plot number 224 and 225 into the river. When L.R. No. 9104/225 was subdivided to create plot numbers 226, 227 and 228, no provision was made for the drainage of storm water. The 1st and 2nd Interested Parties contend that the 3rd Interested Party who was the original owner of the land before it was subdivided ought to provide a wayleave for the two landlocked properties uphill.

47. The 1st and 2nd Interested Parties argue that they ought not to bear the costs of providing for the drainage of storm waters from their land as prayed by the Applicant. They submit that an easement has arisen out of necessity since their plot is landlocked. They urge that under Section 149 of the Land Act, in determining a dispute concerning the existence of a public right of way, the court may make an order on any condition it thinks fit on the extent of the use of the easement and whether that use exceeds what is reasonable or permitted under the terms of the grant of the easement.

48. They urge that since there is need for an easement to be constructed out of necessity, the access by the adjoining land owners to the 3rd Interested Party's land and Applicant's land should be facilitated by the Respondent and 3rd Interested Party and that all the stakeholders including the Applicant should establish and work out the works required for the construction of a wayleave whose costs should be borne by the 3rd Interested Party owing to his omission to provide for the water drainage when he subdivided the land. They rely on the case of **Ruth Wamucii Kamau v. Monicah Mirae Kamau,** Civil Appeal No. 45 of 1993 in which the court observed that once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation this tenement respectively come. They urge that the easement would continue to exist because of the necessity of draining storm water into the river.

49. Section 98 of the Land Registration Act stipulates how an easement is created by an instrument in the prescribed form by which an owner grants an easement over the land or part of it to the owner of another parcel of land for the benefit of that other land. The instrument creating the easement must specify the nature of the easement and any conditions subject to which it is granted; the period for which it is granted; the part of land burdened by the easement; the land to benefit from the easement and shall include a plan that sufficiently defines the easement.

50. The court notes that no easement created in this format exists between the Applicant and the 1st and 2nd Interested Parties. Section 138 of the Land Act which falls under Part X on easements and analogous rights, describes the nature of easement and what the rights capable of being created by an easement do not include. Section 137 states that Part X shall apply to all easements made or coming into force on or after the commencement of the Act. The date of commencement for this statute was 2nd May 2012. This part would not therefore apply to the 1st and 2nd Interested Party's circumstances as they argue.

51. The Respondent submits that it issued an enforcement notice on 3/3/2016 pursuant to Section 38 of the Physical Planning Act to the 1st and 2nd Interested Parties to rectify the issues set out in the notice that arose from the construction on their property. Once they rectified the wrongs pointed out in the notice, there was no further justification for the Respondent to enforce the notice. An enforcement notice under Section 38 must specify the conditions that have been contravened in relation to the development permission and measures required to be taken within the period specified in the notice to secure compliance with the conditions. The Respondent maintains that it does not owe any duty to the Applicant

since where a notice to rectify a nuisance is served, it ceases to be enforceable once it is corrected as the 1st Interested Party did.

52. It argues that an order of mandamus must command no more than the party against whom it is sought is legally bound to perform. The Respondent further argues that the Applicant has no proprietary rights over the plot owned by the 1st and 2nd Interested Parties. It submits that it ought not be used by the Applicant to settle private affairs between neighbours and that the current application is vexatious. It further argues that it was wrongly sued by the Applicant.

53. As against the 4th Interested Party, the Applicant seeks to have an order of mandamus compelling the 1st and 2nd Interested Parties to conduct an environmental impact assessment before any further construction is carried out on their property. The 4th Interested Party's response to this is that Section 58 of the Environmental Management and Coordination Act outlines the process for application for an environmental impact assessment license for projects specified in the Second Schedule to the Act. A special issue of the Kenya Gazette Supplement number 127 was issued on 19/8/2016 which deleted the 2nd schedule to the Act and substituted it with a list of projects classified as low, medium or high risk that must be subjected to the process of environmental impact assessment. Single dwelling residential units are excluded from the list and do not therefore require an environmental impact assessment license under the law.

54. Consequently, the 4th Interested Party wrote to the 1st and 2nd Interested Parties advising them that their proposed project did not require an environmental impact assessment license under the law. The 4th Interested Party submits that it has no mandate to demand or subject all single dwelling residential houses to an environmental impact assessment. Further, it submits that the conditions it gave the 1st and 2nd Interested Parties were duly complied with.

55. The 4th Interested Party maintains that it is not responsible for the grant of approvals for designs and plans. A person proposing to undertake a project is expected to submit documentation showing that the other agencies required by law to give their approval have given their approvals or licenses within the law. NEMA relies on such approvals in making its decisions. The 4th Interested Party submits that the Applicant has not proved that it failed to fulfill its legal duty for the court to intervene and grant the order of mandamus sought against it.

56. The Respondent and the Interested Parties submit that the court ought not to issue the orders of mandamus sought to compel the Respondent to commence demolition of the illegal structures on the 1st and 2nd Interested Parties' land and to compel the 5th Interested Party to prove it granted approval to the 1st and 2nd Interested Parties to commence construction on their plot.

57. They argue that an order for mandamus can only be issued when the court is satisfied that the respondent has a legal duty which an applicant expects the respondent to fulfill and the respondent has failed to do so. An order of mandamus cannot issue against a person or authority for the performance of a duty they are not mandated or obliged to perform. The court intervenes where there is an abuse of discretion, or where the discretion is exercised for improper purposes, or where the decision maker breaches the duty to act fairly or fails to exercise the statutory discretion reasonably. It will also intervene where the decision maker acts in a manner that frustrates the purpose of the statute donating the power or where the decision maker fetters the discretion given or fails to exercise that discretion. Where the decision maker is irrational and unreasonable, the court will also intervene (see the decision of Nyamu J. in **Republic v. Minister for Home Affairs and others, ex-parte Sitamze** in Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323).

58. The court is inclined to agree with the Respondent that the Applicant has failed to show that she deserves the order of mandamus to compel the Respondent to commence demolition of the structures on the 1st and 2nd Interested Parties' property including the guard house. The Applicant has failed to show that the 4th and 5th Interested Parties have a legal duty which she expects these Interested Parties to fulfill

and they have failed to fulfil. The 4th Interested Party has established that there was no legal requirement for the 1st and 2nd Interested Parties to undertake an environmental impact assessment before commencing the construction of their house. The Respondent and 5th Interested Parties have demonstrated that they duly approved the 1st and 2nd Interested Parties' project and that the proposed development conforms to their requirements.

59. The court finds that the 1st and 2nd Interested Parties obtained the necessary approvals to commence the construction on their property. The 1st and 2nd Interested Parties produced photographs showing the space between the Applicant's boundary wall and their guard house. The Respondent confirms that it gave approval for re-siting of the guard house. The guard house is not on the Applicant's boundary wall.

60. The Applicant developed her plot circa 2000 and built a double-storey house on it. Plot number 9104/226 remained undeveloped for a long time and had a lot of vegetation. A dispute arose when the 1st and 2nd Interested Parties bought this plot, cleared the vegetation and started developing it. The issue of storm water is pertinent and must be addressed. The valuation report prepared by Keriasek & Co Ltd instructed by the Applicant mentions the fact that drainage preventive measures must be undertaken. It is in the best interest of the Applicant that provision for draining storm water is made to avoid flooding in her compound.

61. From the submissions made, the court understands the Applicant's claim against the 1st and 2nd Interested Parties as being based on private nuisance. *Burnett- Hall on Environmental Law*, 2nd edition describes private nuisance as a tort in respect of interference with rights in respect of land which may affect the land itself, or the claimant's use or enjoyment of that land, or rights connected with the land. Lord Hoffmann observed in **Hunter v Canary Wharf** [1997] A.C. 655 that in the case of nuisances of sensible personal discomfort the action was not for causing discomfort to the person but for causing injury to the land. The land had not suffered injury but its utility had been diminished by the existence of the nuisance. The occupier is entitled to an injunction and compensation for the unlawful threat to the utility of his land.

62. *Burnett- Hall on Environmental Law* observes at page 162 on material damage to property, the rule that has developed is that if the defendant is aware or ought to be aware of the risk of damage to his neighbour's property and fails to take reasonable steps to prevent it, he is liable for the consequences of that risk eventuating. Generally speaking, the nuisance will arise from something which emanates from the defendant's land and injuriously interferes with a neighbour's use or enjoyment of their land.

63. The question the court needs to consider is whether the 1st and 2nd Interested Parties' user of their land has been unreasonable as to unduly interfere with the comfortable and convenient enjoyment by the Applicant of her land. The court has to take into account all the circumstances of the case and there must be unreasonable use of the land by the 1st and 2nd Interested Parties.

64. The topography of the land in question is such that it slopes downwards towards River Ruaka and the wayleave placed to drain the storm water from the plots on the upper side is on the Applicant's land. The Applicant built her house on her land when the 1st and 2nd Interested Parties plot was undeveloped and full of vegetation. When the 3rd Interested Party subdivided plot no. 9104/ 225 provision was not made for the drainage of storm water coming from the plots on the upper side towards the river which is next to the Applicant's land.

65. The onus to prove that she is entitled to damages against the 1st and 2nd Interested Parties fell on the Applicant. The court finds that the Applicant failed to prove that she is entitled to the sum of Kshs. 50 Million which she seeks for rebuilding her boundary wall. The Applicant did not prove on a balance of probability that she is entitled to damages of Kshs. 25 Million for agony, worry, anxiety, anguish and mental torture against the 1st and 2nd Interested Parties.

66. Lord Millett observed in **Southwark LBC v Mills** [2001] A.C. 1 at page 20 that it is not enough for a

landowner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. Further, that the governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him.

67. Lawton L.J. stated in **Kennaway v Thompson** [1981] 1 Q.B. 88 that the neighbour who is complaining must remember too that the other man can use his property in a reasonable way and there must be a measure of give and take and live and let live.

68. The 1st and 2nd Interested Parties are entitled to develop their plot which is L.R. No. 9104/226 and they also enjoy rights over their property which are protected under Article 40 of the Constitution and Section 25 of the Land Registration Act. The court is unable to find evidence that the use by the 1st and 2nd Interested Parties of their land is so unreasonable as to unduly interfere with the comfortable and convenient enjoyment by the Applicant of her land. They too need to enjoy their land and use their property in a reasonable way. The court is inclined to agree with the statement of Lawton L.J in **Kennaway v Thompson** that there must be a measure of give and take and live and let live on the part of the Applicant.

69. The court agrees with the recommendation of the Respondent that a 3-meter-wide drainage wayleave should have been done from the end of L.R. No. 9104/227 to run along the 1st and 2nd Interested Parties' plot number L.R. No. 9104/226 on the eastern edge and into the 3rd Interested Party's plot number 9104/228 which will then drain into the existing wayleave on the Applicant's land and direct the storm water into the Rua Ruaka River.

70. An order of mandamus is issued against the 3rd Interested Party to compel him to facilitate the drainage of the storm water from the 1st and 2nd Interested Parties' land through his plot to be channeled to Rua Ruaka River through the wayleave on the Applicant's land. Since the omission to provide for the drainage of storm water was occasioned by the oversight of the 3rd Respondent's consultants during the subdivision of L.R. No. 9104/225, the costs of providing for the drainage of the storm water from plot numbers 9104/226 and 9104/227 will be borne by the 3rd Interested Party.

71. The court declines to grant prayers 1, 2, 3, 4, 6, and 7 sought in the Applicant's Amended Notice of Motion dated 26/7/2017 and only allows prayer number 5 in terms of the preceding paragraph.

72. Each party will bear its own costs.

Dated and delivered at Nairobi this 12th day of March 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Effendy for the 1st and 2nd Interested Parties

Ms. Marindich for the 4th Interested Party

No appearance for the Applicant, Respondent, 3rd and 5th Interested Parties

Mr. V. Owuor- Court Assistant