



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
THIKA LAW COURTS
ELC CASE NO.527 OF 2017
(FORMERLY KERUGOYA ELC. NO.170 OF 2015)

JAMES IRUNGU MWANGI.....PLAINTIFF/APPLICANT
NAOMI NJOKI NJOROGE.....PLAINTIFF/APPLICANT
MONICA MURINGI GACHAU (Suing as the Chairman,
Secretary and Treasurer of White Sisters
Neighbourhood Welfare Group).....PLAINTIFF/APPLICANT

-VERSUS-

LABAN MACHARIA MUIRURI.....1ST DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF KIAMBU..2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs’/Applicants’ *Notice of Motion* application dated **29th December 2015**, brought pursuant to various provisions of law and have sought for the following orders:-

- 1. That pending the hearing and determination of this suit an injunction order be issued against the Defendants jointly, their servants and/or anyone acting under their direction from continuing to construct a multi-dwelling residential units (flats) on LR.No.Ngoingwa Block 22/13 also known as Thika Municipality Block 22/113, and or otherwise interfering with the Plaintiffs’ right to quiet possession and enjoyment of the properties situated within LR.Ngoingwa Block 22 also known as Thika Municipality Block 22.***
- 2. That the Officer Commanding, Thika Police Station be directed to assist and ensure compliance by the Defendants with any orders issued in this Court.***
- 3. That the cost of this application be borne by the Defendants***

The application is premised on the following grounds:-

1. That the 1st Defendant is wrongfully and unlawfully constructing multi-dwelling residential units (flats) on LR.No.Ngoigwa Block 22/13 also known as Thika Municipality Block 22/113, which suit land adjoins the Plaintiffs developments which are all single dwelling residences in accordance with the user thereof, approved plans and zoning laws promulgated by the 2nd Defendant.

2. That Plaintiffs and their members were and continue to be owners of parcels of land within Ngoigwa Block 22 also known as Thika Municipality Block 22.

3. That all members have developed their respective parcels of land by first obtaining approval from the 2nd Defendant or its predecessors under the *Physical Planning Act* and the same has always been approved for one private dwelling house (excluding a guest house), which building should not cover more than 50% of the land or local authority.

4. That the 1st Defendant, the owner of LR.No.Ngoigwa Block 22/13 also known as Thika Municipality Block 22/113, commenced to construct a development within his parcel consisting a multi-dwelling residential units (flats) in total disregard or ignorance of the user of the land and the zoning laws that have been promulgated by the 2nd Defendants and of which the Plaintiffs have been constrained to obey.

5. That the said construction is a blatant abuse of legal process as given the user determined and the zoning laws in force, the construction puts paid the huge investment made by the Plaintiffs who have all constructed residential house which are single dwelling units.

6. That it is clear from the *Physical Planning Act* that the 2nd Defendant has the power to control or prohibit the use and development of land in the interests of proper and orderly development of its area and in the process have regard to the amenities and conveniences of the community generally and to the proper planning and density of development and land use.

7. That the Plaintiffs will suffer incalculable and irreparable loss if the Defendants are not restrained.

Further, it is supported by the *Affidavit* of **James Irungu Mwangi**, **Naomi Njoki** and **Monicah Muringi Gachau**, who are officials of **White Sisters Neighbourhood Welfare Group** for the residents of **Ngoigwa Block 22** also known as **Thika Municipality Block 22**. It was their averments that the **Welfare Association** advocates for a clean environment and act in the best interest of the residents of **Ngoigwa Block 22**. They further averred that all members of **Ngoigwa Block 22** have developed their respective parcels of land by first obtaining approval from the 2nd Defendant or its predecessors under the *Physical Planning Act* and the same has always been approved for one private dwelling house.

They also alleged that on or about the month of **April 2015**, the 1st Defendant who is the owner of **LR.No.Ngoigwa Block 22/13**, also known as **Thika Municipality Block 22/113**, commenced construction of a development on his parcel of land consisting of multi-dwelling residential units (Flats) in total disregard or ignorance of the use of the land and the zoning laws that have been promulgated by the 2nd Defendant and which the Plaintiffs have been constrained to obey. It was their further contention that they took issue with the 2nd Defendant and the construction stopped only for the same to resume on or about **22nd December 2015** and the same continues unabated.

They further contended that the said construction is blatant abuse of the legal process and the zoning laws in force. Though the 2nd Defendant has power under the *Physical Planning Act* to control and prohibit use and development of the land in the interest of proper and orderly developments of its area, it has failed to do so in this case. It was also their contention that the Plaintiffs/Applicants had legitimate expectation that the laws governing development in their area would apply uniformly to all that once any change to the laws and/or use of land is contemplated, appropriate **Notice** ought to be widely circulated to

all members who would be reasonably expected to be affected.

It was their further contention that the amenities such as sewer and water services in the area are likely to be severally affected given that the system in place is to cater for single dwelling units/flats. It was further contended that the construction by the 1st Defendant is in blatant disregard to **Environmental Management and Co-ordination Act** in that no **Notice** of the intended construction, its proportions and extent was divulged to the Plaintiffs being the persons directly affected so that their comments and input ought to have been sought prior to approval (if any).

It was their further contention that the Defendants actions have deleterious consequence on the property right of the Plaintiffs and if the multi-residential dwelling units/flats are allowed to stand, the same will greatly reduce the aesthetic appeal of the Plaintiffs/Applicants premises, cause nuisance to the quiet residents of **Ngoigwa Block 22**, and seriously reduce the value and appeal of the Plaintiffs'/Applicants' homes. They urged the Court to allow the application in the interest of justice.

The 1st Defendant filed a **Notice of Preliminary Objection** dated **3rd February 2016**, which **Notice of Preliminary Objection** was determined vide a **Ruling** delivered on **21st April 2017** and the same was dismissed with costs.

The 1st Defendant opposed the **Notice of Motion** via his **Replying Affidavit** dated **16th October 2017**, and averred that he is the registered proprietor of **LR.No.Thika Municipality Block 22/113**, and admitted to have put a development comprising of a multi-dwelling residential units/flats on the said parcel of land which construction he commenced in the **year 2014**. He also averred that before putting up the said development, he duly applied for and obtained all necessary permission/

approvals from the relevant authorities. That his architectural and structural plans were approved by the **Municipal Council of Thika** and was duly issued with a notification of approval by the said **Municipal Council**. He contended that when he began construction, an officer from the 2nd Defendant duly visited the site regularly to supervise and ensure that the development was continuously in adherence of the terms and conditions granted to him. He therefore followed the due process of putting up his development as required.

He therefore alleged that through the aforesaid approvals, it was his legitimate expectation that his construction was in accordance with the law and would progress to conclusion. He also alleged that the Plaintiffs' actions of filing of this suit is actuated by pure malice because of his progress and the Plaintiffs just want to initiate unlawful demolition of his house. It was his contention that other owners on the said **Ngoigwa Block 22** have also constructed multi-dwelling residential units and some of the said developments have gone upto 4th floor and yet no suits have been filed against them. Therefore the Plaintiffs by this suit have shown open bias against him in seeking demolition of his property while other residents have put up similar developments without objection from the Plaintiffs.

Further that no report by any professional has been placed before the court to prove that his development is not fit for multi-dwelling purposes. He urged the Court to disallow the instant application with costs. He also contended that his right to property is constitutionally protected and his development has costed him a lot financially and an Order of demolition would gravely be unjust and draconian at this stage.

The Plaintiffs/Applicants filed a further affidavit and averred that though the 1st Defendant is the registered owner of his parcel of land, the same is subject to zoning laws as promulgated by the 2nd Defendant and its predecessors as well as the **Physical Planning Act**. It was also averred that sufficient **Notice** ought to have been accorded to persons who may be affected by a development by placing such **Notices** on the land and other

public places which the 1st Defendant failed to do so.

Further that the members of the Plaintiffs/Applicants having developed their land parcels with single

dwelling residential homes have a legitimate expectations to maintain their environment and development in accordance with the approved plans and use indicated by the appropriate authority, the 2nd Defendant. The Applicants also contended that despite the Court Order issued stopping construction, the 1st Defendant has continued with the said construction despite several **Notices** on him to stop the said construction.

They also denied that their application has been actuated by any malice but by the illegal actions of the Defendants herein and also predicated by the belief firmly anchored in law that any development must be conducted within the law and upon proper **Notices** to persons reasonably expected to be affected by such development. They further urged the Court to allow the instant application.

Though the 2nd Defendant **Entered Appearance** and filed a **Statement of Defence**, it did not participate in the instant **Notice of Motion**.

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

There is no doubt that the Plaintiffs/Applicants are representing

various residents who own and live in **LR.No.Ngoingwa Block 22** also known as **Thika Municipality Block 22**. There is also no doubt that the 1st Defendant also owns a parcel of land in **LR.No.Ngoingwa Block 22**, which is described as **Thika Municipality Block 22/113**, as per the copy of his Certificate of title attached to the **Replying Affidavit**.

There is also no doubt that the Plaintiffs'/Applicants' members have put up a single dwelling units on their respective parcels of land. However, the 1st Defendant herein who owns **Thika Municipality 22/113**, has put up a multi-dwelling units/flats which is contrary to what the other residents have constructed. The Plaintiffs/Applicants have alleged that according to the zoning laws, this area of **Ngoingwa Block 22**, is supposed to accommodate only single dwelling units and not multi-dwelling units as constructed by the 1st Defendant.

The 1st Defendant has averred that the 2nd Defendant did approve his architectural and structural plans and their officials have been inspecting and supervising the construction. Therefore, he denied that he has gone against the **Physical Planning Act**, but alleged that this application is actuated by malice. Though the 2nd Defendant did not participate in this instant application, it alleged in its defence that after the 1st Defendant commenced construction of multi-dwelling residential units, it served him with a **Planning Enforcement Notice** dated **24th April 2015**, which the 1st Defendant managed to have it successfully quashed in **JR.Misc.Appl. No.186 of 2015**.

Therefore from the above **Statement of Defence** by the 2nd Defendant, it seems like it was also opposed to construction of multi-dwelling residential units on the 1st Defendant's parcel of land **Thika Municipality Block 22/113**.

The above are the undisputed facts. The Applicants/Plaintiffs have sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised rationally and judicially. See the case of **Giella...Vs...Cassman Brown & Company Ltd 1973 EA 358**, where the court held that:

“The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Further, it is very evident that at this interlocutory stage, the court is not supposed to deal with the disputed facts with finality or conclusively, especially relying on affidavit evidence. The Court is only

supposed to determine whether the Applicants are deserving of the injunctive orders sought basing that on the usual criteria. See the case of **Edwin Kamau Muriu...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 principles that will guide the court in determining whether the

Applicants are deserving of the Orders sought are the ones laid in the case of **Giella...Vs...Cassman Brown** 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 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 therefore needed to establish that they have a *prima-facie* case with probability of success at the trial. *Prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“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”.

Have the Plaintiffs/Applicants herein established that they have a *prima-facie* case with probability of success at the trial and that any of their right has been infringed?

As the Court pointed out earlier, it will not deal with the disputed facts conclusively. It is evident that the 1st Defendant has put up a multi-dwelling residential units(flats) on his parcel of land **Thika Municipality Block 22/113**, which falls within the **Thika Municipality Block 22**, where the Plaintiffs/Applicants operate as a Welfare Group. The Plaintiffs/

Applicants have alleged that this area falls under the zoning category of single dwelling units (houses) with each dwelling house not covering more than 50% of the area. Indeed the Court has seen the Lease for **Thika Municipality Block 22**, which is marked as **annexture JNM-2**. Under **Special Condition No.3**, it is stated:-

“The land and building shall only be used to cover one private dwelling house excluding a guest house and the building shall not cover more than fifty per centum of the area of the land...”

Therefore from the above statement, it is clear that **Thika Municipality Block 22**, where the Plaintiffs/Applicants land and the 1st Defendant fall is zoned as a low density area which area is only meant to have one private dwelling house on each parcel of land. On whether the zoning pattern has changed or not, that would be left to be determined at the main trial when the 2nd Defendant is supposed to call evidence on the current zoning category of **Thika Municipality Block 22**.

However, it is evident that the 1st Defendant has put up a multi-dwelling residential units in which the Plaintiffs/Applicants herein have objected. The 2nd Defendant did admit in its defence that it issued the 1st Defendant with an Enforcement Notice but the said Notice was quashed in **JR Misc.No.186 of 2015**.

However, the quashing of the said **Enforcement Notice** was not a licence to continue putting up multi-dwelling units in an area that is assumed to be for single dwelling units.

Before the issue of whether the 1st Defendant can put up multi-dwelling units in this zone is determined, the Court finds that the *status quo* should be maintained and the *status quo* herein is what existed before the 1st Defendant started the disputed construction.

The 1st Defendant has also alleged that he was issued with a **Notification of Approval**. Indeed the Court has seen the said **Notification** dated **10th February 2014**, but the same was first indicated as permission to build multi-dwelling residential units (flats) 10 in number on a land situated in **Mangu**. However, **Mangu** is cancelled to read **Ngoingwa Block 22/113**. Though the 1st Defendant has alleged that the indication of '**Mangu**' was a typographical error, the Court finds that is an issue that can be adequately addressed by a witness from 2nd Defendant and not the 1st Defendant herein. There is indeed doubt as to whether the **Notification of Approval** dated **10th February 2014** is for '**Mangu**' area or **Ngoingwa Block 22/113**, which is the parcel of land owned by the 1st Defendant herein.

The 1st Defendant has also alleged that there are other developments of multi-dwelling units on this **Ngoingwa Block 22**, and which developments the Plaintiffs/Applicants herein have not opposed. However, there was no evidence to connect the photographs attached to his **Replying Affidavit** with **Thika Municipality Block 22**. The said allegations can only be addressed in the main trial wherein the 1st Defendant will call evidence to support these allegations and confirm that indeed the photographs are for multi-dwelling units within **Ngoingwa Block 22**.

Again though the 1st Defendant is the owner of the **Thika Municipality Block 22/113**, it is apparent that development on his suit property has to adhere to the relevant laws dealing with approval of development and also has to take into account the zoning laws. The Court will be persuaded by the findings in 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".

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 whether the Plaintiffs/Applicants will suffer irreparable loss which cannot be adequately compensated by an award of damages, it is evident that the construction of multi-dwelling units will restrain the social amenities of the area and even affect the environmental management of the area. Even if the 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 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 29th December 2015, the Court finds it merited and it is allowed entirely in terms of prayers No.4 and 5 with costs to the Plaintiffs/Applicants herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of June 2018.

L. GACHERU

JUDGE

In the presence of

M/S Kamau holding brief for Mr. Gachau for Plaintiffs/Applicants

M/S Cheserek holding brief for Mr. Magara for 1st Defendant/Respondent

M/S Cheserek holding brief for Mr. Ranja for 2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

25/6/2018

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

L. GACHERU

JUDGE

25/6/2018