REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 245 OF 2018

DEEPAK HARAKCHAND DODHIA.....PLAINTIFF

= VERSUS =

ANMOL LIMITED.....1ST DEFENDANT

SUPERFIT STEELCON LIMITED.....2ND DEFENDANT

AND

DIRECTOR OF PHYSICAL PLANNING.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY....3RD INTERESTED PARTY

RULING

1. The 1st defendant is the proprietor of Land Reference Number 1870/1/303 situated along General Mathenge Drive, Westlands, Nairobi (the **suit property**). The plaintiff contends that he was at all material times the occupier and beneficial owner of **Maisonette Number 3** situated on Land Reference Number 1870/1/478 (the **adjacent property**) which abuts the 1st defendant's property. On 23/10/2015, the National Environment Management Authority (**2nd Interested Party**) issued Environmental Impact Assessment Licence (EIA Licence) Number 00298996 to the 1st defendant to build twenty four units of residential apartments on the suit property. Subsequently, on the 1st defendant's application, on 15/1/2016, the 2nd interested party issued the 1st defendant with a Certificate of Variation of the EIA Licence permitting the alteration and modification of internal spaces to increase the number of apartments from twenty four units to forty eight units. Upon obtention of requisite licences from other regulatory bodies, the 1st defendant contracted the 2nd defendant to undertake construction works. Implementation of the project took off smoothly.

2. When the project reached level 13, the plaintiff brought this suit through a plaint dated 24/5/2018, contending that due to the defendants' negligence, large quantities of debris were escaping from the suit property, falling onto the adjacent property and causing substantial damage to the adjacent property. The plaintiff further contends that the development is being undertaken in blatant violation of the provisions of the Physical Planning Act, the Environmental Management and Co-ordination Act (the EMCA), the Environmental (Impact Assessment and Audit) Regulations 2003 (the EIA Regulations, and the Local Government (Adoptive By-Laws) Building Order 1968 (the Building Code).

3. The plaintiff further contends that his fundamental right to a clean and healthy environment is being and/or is likely to be denied, violated, infringed or threatened by the development, contrary to Articles 42, 69 and 70 of the Constitution. He contends further that his fundamental right to privacy is being or is likely to be denied, violated, infringed or threatened by the development contrary to Article 31 of the Constitution. He adds that as a result of the aforesaid breaches and negligence, he has suffered loss and damage.

4. Consequently, the plaintiff seeks, among other prayers: a declaration that the development is illegal; permanent injunctive order stopping the development; a declaration that his fundamental right to a clean and healthy environment is being or is likely to be denied, violated, infringed or threatened; an order for compensation against the 1st defendant; a mandatory order compelling the defendant to demolish the development; and general and special damages.

5. Together with the plaint, the plaintiff filed a Notice of Motion dated 24/5/2018 seeking an interim order restraining the defendants, their agents, servants and/or employees against proceedings in any manner whatsoever with construction of the residential development on the suit

property, pending the hearing and determination of this suit. The application was supported by the plaintiff's affidavit sworn on 24/5/2018. The application is opposed by the 1st defendant through a replying affidavit sworn by the 1st defendant's director, Sunit Shah on 7/6/2018. It is similarly opposed by the 2nd defendant through an affidavit sworn on 8/6/2018 by its director, Ashwin D Madhaparia. The Director of Physical Planning, Nairobi City County Government, responded to the application through an affidavit sworn by the Directorate's Senior Building Inspector, Fredrick Ochanda Ondari, on 25/6/2018. The National Construction Authority similarly responded to the application through a replying affidavit sworn by its Regional Manager, Stephen Mwilu. That application is the subject of this ruling.

Case of the Applicant

6. The applicant's case is that in the last three years of residency in the adjacent property, there was always peace and tranquility. The subject development commenced in 2016 or thereabout, without protection of the adjoining land from the construction activities on the suit property. As a consequence of the defendant's negligence, the plaintiff's premises has on several occasions suffered substantial structural damages leading to water leakage, extensive damage to the ceiling and cracks on the walls and floor surface. Further, as a result of the defendants' negligence, his premises suffered broken tables and wardrobe, and broken window panes, and his house now looks old, dilapidated and in dire need of repair and painting. Despite raising concerns, his grievances have not been addressed by the defendants and/or the interested parties. He has had to seek alternative accommodation because the adjacent property has been rendered unsafe to live in. His search at the Nairobi City Planning Office has revealed that the County Government approved the construction of an eleven storey structure and now the defendants are on the thirteenth floor and it appears more floors will be added.

7. Further, the applicant's case is that the development is not in conformity with the law and it is not sustainable because the existing infrastructure is not equipped to handle the impact of the development. The development is going to diminish basic entitlements such as the right to a clean and healthy environment. The defendants are in breach of planning and developmental laws, policies and regulations. Lastly, the applicant contends that unless the defendants are restrained by this court and the development is stopped, he stands to suffer irreparable loss and harm.

Case of the 1st Respondent

8. The case of the 1st respondent is as set out in the following summary. The 1st respondent is the registered proprietor of the suit property on which it is about to complete the impugned development. Contrary to the applicant's contentions, the 1st respondent obtained all the requisite approvals prior to commencing the development. The City County Government duly granted an approval for change of user of the suit property from single dwelling to multi-dwelling (apartments). The 1st respondent caused an environmental impact assessment audit to be conducted leading to the preparation of a report which in turn led to the grant of an EIA licence by the 2nd interested party. The 1st respondent duly obtained approval from the County Government to construct an additional twenty four units on the suit property. Similarly, the 1st respondent duly obtained a Certificate of Variation of the EIA Licence, approving the additional twenty four units. Once all the requisite approvals were granted, the 1st respondent proceeded to implement the project without any hitches or injuries occasioned to the adjacent houses and the 1st respondent has complied with the county zoning laws, rules and regulations. The variations were sanctioned by structural engineers who certified that the structure was not compromised in any way. The project is not implemented arbitrarily, negligently, unprocedurally and or unilaterally.

9. The 1st respondent further contends that the applicant has been to the project severally and is fully aware that the project has a file for inspection containing all the approvals. The applicant is not the 1st respondent's immediate neighbour on either sides of the property and only shares a connecting corner with the suit property. The other neighbours have not complained. He further contends that the project is nearing completion and it would be irreparably prejudicial to the 1st respondent if the project stalled considering the amount of human labour and monetary capital injected into the project so far. The apartments have already been purchased and stoppage of the project will affect third party purchasers. The project is being implemented through financing from Diamond Trust Bank Kenya Limited which has created a charge on the title together with the project under implementation. Any restriction on the completion of the project will cause irreparable damage to the 1st respondent. The entire neighbourhood is full of similar developments sanctioned by the regulatory authorities.

Case of the 2nd Respondent

10. In summary, the case of the 2nd respondent is as summarized below. The 2nd respondent is a contractor duly licenced and duly certified. In April 2016, the 1st respondent awarded the 2nd respondent a contract to erect the residential apartments. The 2nd respondent has at all times carried construction works with utmost skill and professionalism as required by the relevant laws, regulations and licences. Since the commencement of the project, complaints by the neighbours have always been attended to promptly by the defendants and resolved amicably. The applicant has no proprietary interest in the adjacent property and lacks the *locus standi* to stop the development on the suit property. If any damage is established to the adjacent property and attributed to the impugned project, the same can be assessed and indemnified by way of damages in monetary terms.

Case of the 1st Interested Party

11. The case of the Director of Physical Planning in the Nairobi City County Government is that the defendants obtained all the necessary approvals for the project. The 1st defendant duly obtained approval for change of user and the said approval permitted the 1st respondent to construct the subject apartments. The office of the 1st interested party duly approved building plans for one basement and 15 levels vide Plan Registration Number CPF AH 828 and CPF A0389. The office of the 1st interested party has inspected the project and is satisfied that the implementation of the plan is compliant with the granted approvals and the building is now at 13th floor against the approved 15 levels. The issue of falling debris on the applicant's house and the alleged nuisance is a site safety issue which does not fall within his ambit and should be addressed by the 3rd interested party.

12. The 1st interested party further contends that a thorough examination of the documents exhibited by the 2nd respondent confirms that the documents are authentic and were issued by the office of the Director of Physical Planning. He adds that since his records show that due process was followed in procuring relevant approvals for the project, he supports the case of the 1st and 2nd respondents. Lastly, he

contends that the plaintiff's claim is frivolous, vexatious and a waste of the court's time.

Case of the 3rd Interested Party

13. The case of the 3rd interested party is that its statutory mandate is to oversee the construction industry and coordinate its development. It is the body mandated to promote and ensure quality assurance in the construction industry.

14. The 3rd interested party states that it received a complaint dated 30/3/2017 from the applicant's advocates alleging damage to his property and urging the 3rd interested party to order immediate stoppage of construction works until the 2nd respondent acknowledges the damage and enters into a binding undertaking to compensate the applicant. It carried out a visual inspection of the adjacent property which revealed that the development had affected the adjacent property and noted substantial cracks, floor tile damage, seepage on the upper ceiling and interference to the structural strength and foundation of the house. It also inspected the site on 8/6/2017 to carry out quality assurance and found the site to be non-compliant due to lack of safety signs. Consequently, it issued a suspension notice and directed the 1st respondent to provide wire meshing on site and safety mechanisms to block debris against falling on the adjacent properties, including the applicant's property, to ensure safety in the environs. Upon subsequent inspection on 5/8/2017, it verified that the 2nd respondent had put in place wire meshing nets and safety mechanisms and proceeded to lift the suspension notice.

15. The 3rd interested party adds that on 18/5/2018 it received a letter from the 2nd respondent regarding an incident where a wall on the 13th floor collapsed causing stones to fall through the safety nets onto the roof of a neighbouring low rise building. It investigated the incident and established that the site was compliant with regard to statutory and regulatory approvals and that the incident of the fallen stones was an accident. Lastly, it states that it advised the 2nd respondent to reinforce the mesh netting and seal the loose connections, to carry out regular inspection of the netting and provide it with a copy of the settlement agreement with the applicant.

16. The National Environment Management Authority (2nd interested party) did not participate in the present application.

Submissions by the Applicant

17. Mr Singh Gitau submitted on behalf of the applicant. Counsel argued that the subject development is unauthorized and is being implemented without supervision by regulatory bodies. He further submitted that the development was to go up to eleven levels but the original plan has been changed to forty eight apartments. He contended that NEMA collected public views and the County Government approved implementation of an eleven floor building but the 1st defendant was now constructing forty eight floors. Counsel faulted the respondents for failing to exhibit the approved plans.

18. Counsel further submitted that there was no Impact Assessment Report on the forty eight floors that were under construction. He contended that an EIA licence cannot be issued without compliance with Regulation 4(1) which relates to environment impact assessment. He added that public participation is mandatory under Regulation 17.

19. Counsel further submitted that under the Physical Planning Act, no development can proceed without approval. He argued that any development which does not comply with the provisions of the Act is null and void and ought to be discontinued. On the plaintiff's *locus standi*, counsel submitted that Article 69(g) of the Constitution confers *locus standi* on the applicant. He added that the applicant had not been indolent because all along he thought the development would go up to eleventh floor. Mr Singh Gitau relied on the English Case of **Ryland v Fletcher**

Submission by the 1st Respondent

20. Mr Rimui submitted on behalf of the 1st respondent. Counsel submitted that the application did not satisfy the criteria in **Giella v Cassman Brown (1973) EA 358 Giella v Cassman Brown (1973) EA 358.** Counsel stated that the 1st respondent obtained all the requisite approvals and licences before embarking on the project. He made reference to the approvals and licences annexed to the replying affidavit of Sunit Shah.

21. Counsel further submitted that from inception, the project was to have fifteen floors and a basement and nothing has changed in the terms of the number of levels of the project. He contended that the only change that happened was with respect to the layout of the fifteen floors to the extent that the fifteen floors would have forty eight units as opposed to twenty four units. He contended that this particular change was duly approved and licenced by the regulatory bodies. He submitted that the allegation of lack of approvals was false. He further submitted that the defendants and the regulatory bodies had confirmed that all the requisite approvals and licences were in place.

22. Mr Rimui further submitted that the applicant had been indolent because the construction is nearly completion, with only two floors to go. He argued that the plaintiff having stated on oath that he has moved out of the adjacent property, any injury proved can be indemnified thought an award of damages. Counsel added that the balance of convenience dictated against issuance of the injunctive order as such order would adversely affect third party purchasers, financing banks and contractors.

Submissions by the 2nd Respondent

23. Mr Isindu submitted for the 2nd Respondent. He argued that the applicant lacks *locus standi* because the owner of the adjacent property is one Narandra Kumar Kanji. He contended that the plaintiff had not established an interest in the adjacent property and he had confirmed on oath that he no longer resides in the adjacent property.

24. Counsel further submitted that the 2nd respondent, as a contractor, had explained its role in the project and had exhibited all the requisite licences authorizing it to carry out the works. He added that there are several neighbouring properties and none of the owners of those

properties had complained against the project. He further submitted that the plaintiff was either a tenant or a licensee and he had confirmed that he had already moved out. He argued that this being the case, the remedy available to him upon proof of a cause of action is damages. He urged the court to dismiss the application.

Submissions by the 1st Interested Party

25. Mr Maina submitted for the 1st Interested Party. He stated that the 1st Interested Party received an application and approved a development consisting of one basement and fifteen levels and that there has never been any amendment or changes made in respect of the levels. He added that the approvals exhibited by the defendant indeed emanated from the County Government's Physical Planning Department. He further submitted that the project was fully compliant in so far as approvals by the 1st Interested Party are concerned.

Submissions by the 3rd Interested Party

26. On behalf of the 3rd Interested Party, Ms Gatugi submitted that the mandate of the 3rd Interested Party is to oversee construction industry and that the 3rd Interested Party ensures that registered professionals, necessary approvals and registered contractors are in place before any construction commences. She stated that the subject project was registered by the 3rd Interested Party. She added that on 8/6/2017, the 3rd Interested Party issued a suspension notice on safety grounds and it subsequently lifted the notice after it was satisfied that adequate safety mechanisms had been put in place. She added that the 3rd Interested Party continues to inspect the site to ensure quality assurance.

Response by the Applicant

27. In brief response, Mr Gitau submitted that the plaintiff/applicant was a tenant who was directly affected by the project. He added that both the Constitution and the EMCA grant the applicant *locus standi*. He argued that the EIA Report alluded to thirteen floors and any change of floors required a fresh EIA report. Lastly, he submitted that there ought to have been public participation when the changes were contemplated.

Issues & Determination

28. I have considered the tenor and import of the Notice of Motion dated 24/5/2018, the parties' rival affidavits and submissions, the relevant legal frameworks, and the guiding principles on the key questions in the application. The broad issue falling for determination in this application is whether the applicant has satisfied the criteria for grant of an interlocutory injunctive order as spelt out in **Giella v Cassman Brown (1973) EA 358.** In summary, the applicant was required to demonstrate a prima facie case with a probability of success. Secondly, he was required to demonstrate that if the injunctive order is not granted, he would stand to suffer injury that cannot be adequately indemnified through an award of damages. Lastly, were the court to be in doubt, the application would be decided on a balance of convenience.

29. At this point, the court is not required to make definitive or conclusive findings on any of the questions that fall for determination because that jurisdiction is reserved for the trial court. All that the court is required to do is to examine the materials placed before it and pronounce itself on whether those materials disclose a prima facie case with a probability of success.

30. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

> **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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.**

31. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

> **The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.**

32. From the materials placed before the court, the dispute in this suit stems from an ongoing development by the 1st defendant on the suit property. The 2nd defendant is the contractor engaged by the 1st defendant to execute the works. The project was licensed by the National Environment Management Authority (NEMA) through EIA Licence Number 0029896 issued on 23/10/2015. Subsequently, on 15/1/2016, NEMA issued to the 1st defendant a Certificate of Variation of Environmental Impact Assessment Licence authorizing the alteration and modification of the internal spaces of the project to increase the number of apartment units from twenty four (24) to forty eight (48) units. Similarly, through a letter Ref CPD/DC/LR No 1870/1/303 dated 10/11/2015, the Nairobi County Government's Urban Planning Department approved the construction of 48 units of flats on the suit property. The National Construction Authority has similarly tendered evidence and

submissions to the effect that the project is compliant in so far as its mandate is concerned. The project is licensed to contain a basement and fifteen levels. At the time of hearing this application on 26/6/2017, the 2nd defendant was doing level 13 and only two levels remained to be done.

33. The plaintiff/applicant contends that he was a tenant who resided in the adjacent property but he has been constrained to seek alternative residency firstly because of the debris that often fell from the upper levels of the ongoing project; and secondly, because of the compromised state of the demised adjacent property. He contends that the ongoing construction infringes on his constitutional right to a clean and healthy environment and the right to privacy. For the above reasons, he seeks an injunctive order stopping the construction works pending the hearing and determination of this suit. He contends that the approval by NEMA and Nairobi County Government's Directorate of Physical Planning were issued irregularly because there was no public participation and relevant impact assessment reports in relation to the variation.

34. A number of questions were raised in relation to the applicant's right to agitate for an injunctive order stopping the project. The first question relates to the applicant's *locus standi*. Without making definitive pronouncements as earlier cautioned, there is no gain-saying that Articles 22, 42 and 70 of the Constitution of Kenya 2010 and Section 3 of EMCA have broadened the scope of *locus standi* in environmental disputes leveraged on threats to the right to a clean and healthy environment. In Kenya's current constitutional framework, a litigant bringing an action to safeguard the right to a clean and healthy environment need not demonstrate personal injury or personal loss in order to sustain a cause of action. It is for this reason that I hold the view that, whether a tenant or a public interest litigant, the applicant does have *locus standi* to bring suit to challenge any threat to the right to a clean and healthy environment.

35. The second question which arises in this application is whether the injunctive order should be issued on the ground that the approvals currently in place were procured unprocedurally. Licensing by NEMA is a statutory exercise that is regulated by the EMCA. The EMCA provides a mechanism for challenging an EIA licence and any variation certificate issued subsequent to the licensing. A challenge against an EIA licence or against a certificate of variation of the EIA licence is required to be ventilated through an appeal to the National Environment Tribunal (the NET) under Section 129 of the EMCA. If the appellant is dissatisfied with a decision of the NET, the law gives him a second bite at the cherry by way of an appeal to this Court. Regrettably, this procedure was not followed and both the EIA licence and the variation certificate remain in force.

36. Similarly, a challenge against a building approval by the physical planning regulator is supposed to be ventilated through the Liaison Committee established by the Physical Planning Act. An appeal against a decision of the Liaison Committee would lie to this Court. This statutory mechanism was similarly not utilized by the applicant.

37. The net result is that the applicant has invited this Court to exercise its original jurisdiction without exhausting the statutory mechanisms availed by Parliament for the resolution of disputes relating to EIA licensing and physical planning approvals. Without making any conclusive pronouncement, and while appreciating that in a proper case this Court can properly exercise its original jurisdiction and issue preservatory injunctive order in disputes of this nature, I do not think adequate reasons have been given why the mechanism provided in EMCA and in the Physical Planning Act have been ignored.

38. The third question which arises for consideration relates to the proportionality of the injunctive order vis-à-vis the damage which the applicant alleges to be exposed to. The applicant contended that as a tenant, he has been constrained to seek alternative residency. On their part, the 1st and 2nd respondents contended that the project is fully licensed and compliant. They added that they were at the tail-end of the construction exercise. Thirdly, they contended that an injunction would result into breaches of third party contracts involving works contractors, financiers and purchasers. Taking into account the above circumstances, I am firstly, of the view that, any injury suffered by the applicant can adequately be indemnified through an award of damages because the applicant has stated that he was a tenant and he has since relocated to a different residence. Secondly, for the same reasons, I am of the view that the balance of convenience does not favour the stoppage of a multi-million project which is nearing completion, particularly in a scenario where all statutory approvals are in place and have not been challenged in the manner stipulated by the statutes.

39. My decision is equally informed by the case of the National Construction Authority. The Authority has asserted that the project is compliant and that as a quality assurance regulator in the construction industry, it continues to make routine quality assurance inspection of the project to ensure that the safety of the public is secured.

40. In light of the above reasons, the court is not satisfied that the applicant has satisfied the criteria for grant of an interlocutory injunctive order. The net result is that the plaintiff's Notice of Motion dated 24/5/2018 is declined. Costs of the motion shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Dondo holding brief for Mr Singh Gitau Advocate for the plaintiff

Mr Rimui Advocate for the 1st defendant

Mr Isindu Advocate for the 2nd defendant

Ms Getugi for the 1st & 3rd Interested Party

Ms Halima Abdi - Court clerk