



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 588 OF 2017

PATRICK MATHENGE.....1ST PLAINTIFF

MARYANNE ATIBU.....2ND PLAINTIFF

GLADYS CHEMUTAI.....3RD PLAINTIFF

ERIC JAOKO.....4TH PLAINTIFF

STEPHEN ISABOKE.....5TH PLAINTIFF

KENNETH ROTICH.....6TH PLAINTIFF

(All suing as officials of BOSTO ROAD RESIDENTS

ASSOCIATION (REGISTERED AS BOGANI

ROAD KAREN RESIDENTS ASSOCIATION) .

VERSUS

RESILIENT INVESTMENT LIMITED.....1ST DEFENDANT

STANLEY KAMAU KIRAGU.....2ND DEFENDANT

ERIC BBUY MAINA.....3RD DEFENDANT

RULING

Through the application dated 18/9/2017, the Plaintiffs who reside in Bosto Road Residential Area, off Comboni Road, off Langata South Road Karen, seek a temporary injunction to restrain the Defendants from developing a hospital on L.R. No. 12778/212 (“the Suit Property”) which they claim is designated for residential use pending the hearing and determination of this suit. They also seek a permanent injunction to restrain the Defendants from carrying out developments and building a hospital on the Suit Property and drilling a borehole for commercial purposes and carrying out the water vending business until this suit is heard and determined.

The application is supported by the affidavit sworn by the 1st Plaintiff who claims to be the chairman of Bosto Road Residents Association. He depones that the Bosto Road Residential Area is designated as a residential area and is therefore, planned, developed and zoned as such. Besides being residents, the Plaintiffs own residential properties within Bosto Road Area. The 2nd and 3rd Defendants jointly own L.R. No. 12778/212 while the 2nd Defendant is registered as proprietor of L.R. No. 12778/213. The Plaintiff’s aver that the Defendants are illegally carrying out commercial development, that is, a water borehole on L.R. No. 12778/212 and that they are running a borehole water vending business on the land.

The Plaintiffs contend that although the signage and approvals for the development denoted as NCC Ref: CPF953 on L.R. No. 12778/212 reads residential house, the sheer size and the structure show that it is not a residential house and must be a hospital. The Plaintiffs contend that the development of the hospital and the water vending business by the Defendants contravenes the requirements of the National Environment Management Authority (“NEMA”) and that there was no public participation by the residents of Bosto Road off Comboni Road in the approval. They claim that the Defendants illegal commercial activities have caused and continue to cause great injury and damage to

the Plaintiffs which cannot be compensated by damages. They aver that those illegal commercial activities are a serious nuisance to the Plaintiffs who have been deprived of the right to quiet possession and enjoyment of their residential properties. Further, that the bowser lorries are dangerously driven posing a threat to the children in the estate and that they are usually parked on the exit road causing obstruction on the road.

The 2nd Defendant swore the replying affidavit in opposition to the application for injunction. It was filed in court on 28/9/2017. He states that he is the director of the 1st Defendant. He erected a residential house on L.R. No. 12278/213 in which the 3rd Defendant, who is his son, resides with his family. He states that there was a borehole on L.R. No. 12278/213 which was licensed by NEMA. He avers that he is duly licensed to sell water to neighbours in Karen and that there are many boreholes in the neighborhood due to the perennial water shortages in Karen, Nairobi.

He maintained in his affidavit that he is constructing a domestic residential unit on L.R No. 12778/212 and that the development was duly approved by the Nairobi City Council Urban Planning Department vide plan registration Number CPF-AL953. He attached copies of the NEMA license together with the license from the Nairobi City County for the drilling of the borehole and distribution of water. He denied that Bosto Road Residents Association was registered or that it had locus to institute this suit. He urged the court to dismiss the application for having failed the test in *Giella v. Cassman Brown* [1973] EA 358.

The 1st Plaintiff swore a supplementary affidavit on 2/11/2017 in which he denies that the 2nd Defendant is a director of the 1st Defendant.

The court has looked at the licenses issued by the Nairobi City County by NEMA authorising the 1st and 2nd Defendants to drill and distribute water. Mr. Juma who urged the application on behalf of the Plaintiff argued that there was a huge structure coming up on the Defendants' plot and that although it was approved as a residential building, the residents believe that it is a hospital being erected within a residential area. The residents expressed concern that there was no change of user of the land and that they were not given a chance to express their views before the change of user was allowed. The other concern was that there are many water bowsers coming in and leaving the area which interfere with the resident's quiet occupation of their properties.

Mr. Thangei who appeared for the Defendants maintained that the building being put up by the Defendants complies with the approvals given by the Nairobi City County and that it is a single residential house. He submitted that the Defendants obtained approvals to drill and carry out the water vending business in the suit land. The borehole having dried up, there was no nuisance since the water vending business by the Defendants had stopped. Counsel urged that the Defendants are entitled and have a right under Article 40 and Sections 24 and 25 of the Land Registration Act to use and enjoy their properties which right cannot be taken away by speculative neighbours.

The 3rd Defendant attended court and stated that he had seen the building plans. He supported the application. He confirmed that the 2nd Defendant is his father. The Plaintiffs' counsel urged that rights under Article 40 of the Constitution are subject to the enjoyment of the rights of others.

The issue the court has to determine is whether the Plaintiffs have a prima facie case against the Defendants with a probability of success. The Defendants averment that the drilling of water and the water vending business at the suit property had stopped was not challenged by the Plaintiffs. If indeed the water vending business is no longer being carried out on the land, then the nuisance complained of by the Plaintiffs as being caused by the water bowsers must have ceased altogether.

The court has also looked at the 2nd Defendant's approved building plans. The plans show that it is a residential house comprising amongst others bedrooms, common study room, family room, kitchen, lounge and a gazebo. The Plaintiffs did not provide evidence to show that indeed what is being developed on the Defendants' land is a hospital and not a residential house. If indeed the Defendants are putting up a hospital on the land yet the County Government granted approval for the development of a dwelling house, then the Plaintiffs can petition the County Government of Nairobi to issue an enforcement notice for the demolition of the structure under the Physical Planning Act.

The Plaintiffs have failed to establish a prima facie case with a probability of success. The application dated 18/9/2017 is dismissed with costs to the 1st and 2nd Defendants.

Dated and delivered at Nairobi on 10th July 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Katile holding brief for Mr. Juma for the Plaintiffs

Ms. Kimaru holding brief for Mr. Thangei for the Defendants

Mr. V. Owuor- Court Assistant