



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1593 OF 2016**

**GEOFFREY MUNGAI THIONGO..... PLAINTIFF**

**VERSUS**

**ELSIE RIDGE LIMITED.....1<sup>ST</sup> DEFENDANT**

**SICHUAN HUASHI.....2<sup>ND</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**NATIONAL CONSTRUCTION AUTHORITY.....4<sup>TH</sup> DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT.....5<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff brought this suit on 19<sup>th</sup> December, 2016 seeking the following relief against the defendant:

1. An order stopping the 1<sup>st</sup> and 2<sup>nd</sup> defendants from carrying out further construction on the 1<sup>st</sup> defendant's parcel of land known as LR No. 15005/12 beyond the initial approved four (4) floor above the ground.
2. An order that the 3<sup>rd</sup> defendant carries out a fresh and credible environmental impact assessment exercise involving the plaintiff and the residents of Spring Valley.
3. An order that the 3<sup>rd</sup> defendant issues a stop notice to the 1<sup>st</sup> and 2<sup>nd</sup> defendants pending a comprehensive environmental impact assessment.
4. An order against the 3<sup>rd</sup> and 4<sup>th</sup> defendants to give a report on the general safety of the project in relation to the plaintiff's residential house and Spring Valley in general.
5. Compensation for any loss the plaintiff may suffer as a result of the project.
6. An order for the 5<sup>th</sup> defendant to furnish the court with approved plans of the project.
7. Any other or further relief that the court may deem fit to grant.

In his plaint dated 19<sup>th</sup> December, 2016, the plaintiff averred that he is the registered owner of two (2) parcels of land known as LR No. 15005/7 and LR No. 15005/8 both located in Spring Valley Estate, Nairobi (hereinafter referred to as "the plaintiff's properties"). The plaintiff averred that he had developed the plaintiff's properties by putting up one storey residential house thereon on which he lives with his family. The plaintiff averred that when he was purchasing the said properties in 2002, he was assured by the 5<sup>th</sup> defendant that Spring Valley Estate was zoned as low density residential area. The plaintiff averred that sometimes in November, 2016, he learnt from the 5<sup>th</sup> defendant that the 1<sup>st</sup> defendant had applied for and obtained an approval to develop a parcel of land adjoining the plaintiff's properties known as LR No. 15005/12 with 20 duplex 3 bedroom residential houses. The plaintiff averred that he confirmed this development when he noticed that a four (4) storey building with over 35 residential units were being constructed on the said adjoining parcel of land. The plaintiff averred that although he was the next door neighbour to the 1<sup>st</sup> defendant's project on the adjoining parcel of land, he was not involved in any

environmental impact assessment exercise in relation to the project.

The plaintiff averred that when he inquired from the 3<sup>rd</sup> defendant whether the project had been licensed, he was shown a document dated 21<sup>st</sup> July, 2015 purporting to be a license that was issued to the 1<sup>st</sup> defendant for the project.

The plaintiff averred that further inquiries that he carried out revealed that the 3<sup>rd</sup> defendant had received an environmental impact assessment report on the project on 5<sup>th</sup> December, 2015 and as such the 1<sup>st</sup> defendant could not have been issued with a license on 21<sup>st</sup> July, 2015. The plaintiff averred that, whereas the 5<sup>th</sup> defendant had granted to the 1<sup>st</sup> defendant approval for the construction of twenty (20) 3 bedroom duplex four (4) level houses on LR No. 15005/12, the 3<sup>rd</sup> defendant had purported to grant to the 1<sup>st</sup> defendant a license for 40 units 3 bedroom duplex four (4) level houses on LR No. 15005/12 and LR No. 15005/13. The plaintiff averred that as at the time of coming to court, the 1<sup>st</sup> and 2<sup>nd</sup> defendants had erected a building nine (9) floors above ground contrary to the approved four (4) floors. The plaintiff averred that the 1<sup>st</sup> defendant had not furnished any evidence that he had been allowed to construct more floors in addition to the approved 4 floors on LR No. 15005/12 and LR No. 15005/13. The plaintiff averred that even if the 1<sup>st</sup> defendant had received approval to construct buildings of more than four (4) floors, the approval would be invalid for want of public participation and fresh environmental impact assessment. The plaintiff also averred that the 1<sup>st</sup> defendant's project contravened the zoning requirements for Spring Valley area. The plaintiff averred that the project was being undertaken without the necessary approval and licenses and that his privacy had been compromised. The plaintiff also averred that the project was a source of dust and noise pollution and infringed on his right to natural light and clean air.

Together with the plaint, the plaintiff filed a Notice of Motion application dated 19<sup>th</sup> December, 2016 under certificate of urgency seeking a temporary injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from continuing with any further construction, development or excavation on LR No. 15005/12 and LR No. 15005/13 until they obtained and furnished the court with an Environmental Impact Assessment License issued by the 3<sup>rd</sup> defendant in respect of the project and a written report on the measures taken to address the plaintiff's concerns.

The plaintiff's application that was brought under certificate of urgency was placed before the Duty Judge who certified the same as urgent and granted interim injunction restraining further construction by the 1<sup>st</sup> and 2<sup>nd</sup> defendants pending the hearing of the application inter partes.

Upon being served with the application and the said order, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants responded to the same by filing counter-applications and notices of preliminary objection. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not respond to the application. The 1<sup>st</sup> defendant filed three (3) applications by way of Notice of Motion dated 11<sup>th</sup> January, 2017, 31<sup>st</sup> January, 2017 and 14<sup>th</sup> February, 2017 respectively. The 2<sup>nd</sup> defendant filed an application by way of Notice of Motion dated 11<sup>th</sup> January, 2017 and preliminary objection dated 11<sup>th</sup> January, 2017. The 5<sup>th</sup> defendant filed a preliminary objection dated 30<sup>th</sup> January, 2017.

On 17<sup>th</sup> February, 2017 the plaintiff's Notice of Motion application dated 19<sup>th</sup> December, 2016 and the 1<sup>st</sup> defendant's Notice of Motion application dated 14<sup>th</sup> February, 2017 were compromised and the court made the following orders by consent:

1. "That the injunction issued herein on 19<sup>th</sup> December, 2017 be and is hereby discharged.
2. That the 1<sup>st</sup> defendant shall supply the plaintiff with all the documents in its possession touching on the approval of the project on LR No. 15005/12 and L.R No. 15005/13, Spring Valley, Nairobi.
3. That the 1<sup>st</sup> defendant is at liberty to continue with construction.
4. That the matter shall be mentioned on 20<sup>th</sup> March, 2017 for further directions."

This court was of the view that the said order of 17<sup>th</sup> February, 2017 compromised the entire suit and that what remained was the issue of costs only. However, when the matter came up for mention on 20<sup>th</sup> March, 2017, the plaintiff informed the court that the 1<sup>st</sup> defendant had not furnished it with some of the documents which it was required to supply pursuant to the consent order of 17<sup>th</sup> February, 2017. The 1<sup>st</sup> defendant's advocate told the court that the 1<sup>st</sup> defendant needed more time to avail the documents that had not been supplied to the plaintiff. The court adjourned the matter to 12<sup>th</sup> June, 2017 to give the 1<sup>st</sup> defendant time to furnish the plaintiff with the said documents. When the matter came up on 16<sup>th</sup> February, 2018 the plaintiff's advocate informed the court that the 1<sup>st</sup> defendant was yet to comply fully with the order of 17<sup>th</sup> February, 2017 as it had not supplied the plaintiff with all the documents that they were supposed to supply under the order of 17<sup>th</sup> February, 2017. The 1<sup>st</sup> defendant's advocate informed the court that it wished to pursue prayer 5 in its Notice of Motion application dated 11<sup>th</sup> January, 2017. The 2<sup>nd</sup> defendant's advocate also informed the court that the 2<sup>nd</sup> defendant wished to pursue some aspects of its Notice of Motion application dated 11<sup>th</sup> February, 2017. The court directed that the two (2) applications by the 1<sup>st</sup> and 2<sup>nd</sup> defendants be heard by way of written submissions. It is these applications which are the subject of his ruling.

In its application dated 11<sup>th</sup> February, 2017, the 1<sup>st</sup> defendant sought the following principal reliefs:

1. That the order made on 19<sup>th</sup> December, 2016 be set aside and the plaintiff's Notice of Motion application dated 19<sup>th</sup> December, 2016 be dismissed with costs to the 1<sup>st</sup> defendant.
2. That the plaintiff's suit be struck out for being an abuse of the process of the court.

The application that was supported by the affidavit of the 1<sup>st</sup> plaintiff's director, Bryan Ligale was brought on the grounds that the plaintiff had earlier instituted an appeal at the National Environmental Tribunal (NET) being NET Appeal No. 193 of 2016 against the 1<sup>st</sup> and 3<sup>rd</sup> defendants in respect of the issues which are the subject of his complaint in the present suit which appeal was dismissed and the 1<sup>st</sup> defendant allowed to continue with construction on LR No. 15005/12 and L.R No. 15005/13. The 1<sup>st</sup> defendant contended that the plaintiff had failed to disclose to the court the existence of the said appeal and its dismissal by NET in violation of order 4 Rule 1 (f) of the Civil Procedure Rules. The 1<sup>st</sup> defendant contended that if the plaintiff was dissatisfied with the decision of NET, its recourse was to appeal against the same and not to file a fresh suit. The 1<sup>st</sup> defendant contended further that the plaintiff failed to disclose that the 1<sup>st</sup> defendant had obtained all the requisite approvals for the project and complied with the terms thereof. The 1<sup>st</sup> defendant contended further that the plaintiff's suit was *res judicata* and should be struck out since the issues raised in the suit had been raised and determined by NET.

In its Notice of Motion dated 11<sup>th</sup> January, 2017, the 2<sup>nd</sup> defendant sought the following main orders;

1. That the plaintiff's Notice of Motion dated 19<sup>th</sup> December, 2016 be dismissed with costs and all consequential or injunctive orders issued pursuant thereto be discharged forthwith.
2. That the plaintiff does furnish security for the costs of the 2<sup>nd</sup> defendant in the sum of Kshs.22,304,138/= within 14 days of the order by the court.
3. That pending the provision of security by the plaintiff, all further proceedings by the plaintiff be stayed.
4. That the court be at liberty to make any other order in interest of justice and does summon the plaintiff for cross-examination.

The 2<sup>nd</sup> defendant's application that was supported by the affidavit of its managing Director, Wang Jian Zhong was brought on the grounds that the plaintiff committed perjury by stating on oath in its verifying affidavit that there had never been previous proceedings between the parties over the same subject matter. The 2<sup>nd</sup> defendant contended that this statement was false in that the parties had earlier been involved in NET Appeal No. 193 of 2016 which was dismissed on 16<sup>th</sup> November, 2016. The 2<sup>nd</sup> defendant contended that the plaintiff was guilty of serious material non disclosure. The 2<sup>nd</sup> defendant contended further that since the plaintiff had failed to give an undertaking as to costs, it should be ordered to furnish security for costs.

The two (2) applications were opposed by the plaintiff through affidavits sworn by the plaintiff and the plaintiff's advocate, Moses Maina Karuga on 26<sup>th</sup> January, 2017. In his affidavit, the plaintiff denied any wrong doing in filing this suit after the dismissal of his appeal by NET. The plaintiff contended that the dismissal of the said appeal was not a bar to the suit herein. The plaintiff contended that the appeal before NET was only between him and the 1<sup>st</sup> and 3<sup>rd</sup> defendants. He averred that the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were not parties to the NET appeal. The plaintiff averred that the appeal before NET was dismissed on a preliminary objection by the 1<sup>st</sup> defendant and that the same was not determined on merit. The plaintiff averred that NET found that the appeal was time barred and could not be entertained. The plaintiff averred that NET also made a finding that the 1<sup>st</sup> defendant was not the proper party to be sued because the Environmental Impact Assessment License he was challenging was issued to John Ligale and Bryan Ligale and not to the 1<sup>st</sup> defendant. The plaintiff contended that upon considering the material that was placed before NET, his advocates on record reached a conclusion that when the 1<sup>st</sup> defendant commenced construction on LR No. 15005/12 and LR No. 15005/13 it had not obtained Environmental Impact Assessment License. The plaintiff contended that the foundation of the present suit is materially different from the proceedings that took place before NET and that the suit herein has been brought under different provisions of the law. The plaintiff contended that failure to mention the proceedings before NET in the plaint was an oversight that he attributed to the hurried manner in which the suit was filed. The plaintiff averred that this court has jurisdiction to hear and determine this suit. The plaintiff denied that the suit is *res judicata* and that the same is vexatious and amounts to an abuse of the court process. In his affidavit, the plaintiff's advocate aforesaid reiterated most of what is deposed in the plaintiff's affidavit that I have referred to. The said advocate stated that failure to mention the proceedings before NET in the plaint was neither malicious nor calculated to obtain undue advantage. He attributed that failure to inadvertence which he regretted.

The two applications were heard by way of written submissions. The 1<sup>st</sup> defendant filed its submissions on 17<sup>th</sup> March, 2017. The 2<sup>nd</sup> defendant filed its submissions on 15<sup>th</sup> March, 2017 while the plaintiff filed his submissions in reply on 5<sup>th</sup> October, 2017. I have considered the 1<sup>st</sup> and 2<sup>nd</sup> defendant's applications and the submissions filed in support thereof. I have also considered the replying affidavits and submissions filed by the plaintiff in opposition to the applications. This is my view on the matter. As the 1<sup>st</sup> defendant has conceded, most of the prayers sought in its application dated 11<sup>th</sup> July, 2017 have been overtaken by events as they were directed at the interim order made on 19<sup>th</sup> December, 2016 which has since been vacated. The prayers left for consideration by the court are those seeking the dismissal of the plaintiff's Notice of Motion application dated 19<sup>th</sup> December, 2016 and the striking out of the suit. As I have mentioned earlier, the plaintiff's Notice of Motion dated 19<sup>th</sup> December, 2016 and the 1<sup>st</sup> defendant's Notice of Motion dated 14<sup>th</sup> February, 2017 were comprised through the consent order that was made on 17<sup>th</sup> February, 2017.

In my view, there is nothing left in that application by the plaintiff to be prosecuted or dismissed. In the circumstances, I find no merit in the 1<sup>st</sup> defendant's prayer seeking the dismissal of the said application. That leaves the prayer seeking the striking out of the suit. Again, I am not persuaded that valid grounds have been advanced to warrant the striking out of the plaintiff's suit.

I am not satisfied that this suit is *res judicata* or that the dismissal of NET Appeal No. 193 of 2016 barred the plaintiff from instituting the present suit which in my view raises several other issues which were not raised before NET and which NET had no jurisdiction to determine. The principles upon which this court exercises its discretion in applications for striking out pleadings are now well settled. I am not in agreement with the 1<sup>st</sup> defendant that this suit is a candidate for striking out. It has not been demonstrated that the suit is frivolous, vexatious or an abuse of the process of the court. There is also no evidence that the suit discloses no reasonable cause of action against the

1<sup>st</sup> defendant. For the foregoing reasons, I find no merit in the 1<sup>st</sup> defendant's Notice of Motion dated 11<sup>th</sup> January, 2017.

With regard to the 2<sup>nd</sup> defendant's Notice of Motion dated 11<sup>th</sup> January, 2017, prayers 2 and 6 have been overtaken by events and were abandoned by the 2<sup>nd</sup> defendant in its submissions. The prayer that remained for consideration by the court was that seeking security for costs in the sum of Kshs.22,304,138/=. As was held in the case of Keary Developments Ltd. v Tarmac Construction Ltd. and Another (1995) 3 ALL ER 534 that was cited by the 2<sup>nd</sup> defendant, the court has a complete discretion whether to order security and as such the court would consider all the circumstances of the case before making or refusing to grant the order. Security for costs is not ordered as a matter of course. A proper basis must be laid for it. In my view, the first hurdle that an applicant for security for costs has to surmount is that, he must furnish proof that the respondent would not be able to pay his costs in the event that he is successful in the suit.

I have noted from the material on record that the plaintiff has stated on oath that he owns two (2) parcels of land known as LR No. 15005/7 and LR No. 15005/8 situated at Spring Valley, Nairobi. I have noted from the certificate of title for the two parcels of land that are annexed to the plaintiff's affidavit that was sworn on 19<sup>th</sup> December, 2016 in support of the application of the same date that the two parcels of land are charged to NIC Bank Ltd. to secure a loan of Kshs.65,000,000/=. This means that the said parcels of land are valued at about Kshs.65 million. The 2<sup>nd</sup> defendant has admitted in its submissions that the plaintiff is the registered owner of these two parcels of land. The 2<sup>nd</sup> defendant has contended however that the plaintiff may not be able to pay the costs of this suit which is estimated at Kshs.22,304,138/=. The 2<sup>nd</sup> defendant has not laid any basis for this averment. The plaintiff is a Kenyan resident within the jurisdiction of the court. The plaintiff has placed evidence before the court that he owns two parcels of land which are valued at over Kshs.60 million. The evidence before the court in my view shows that the plaintiff is a person of means. I find no basis for the 2<sup>nd</sup> defendant's claim that the plaintiff would be unable to meet the costs of the suit. As I have stated earlier, I am not satisfied that the plaintiff's case is frivolous. On the material before me there is no evidence that the housing project being undertaken by the 1<sup>st</sup> defendant with the 2<sup>nd</sup> defendant as the building contractor was approved by the 3<sup>rd</sup> and 5<sup>th</sup> defendants. The photographs before the court show that the apartments being put up by the 1<sup>st</sup> and 2<sup>nd</sup> defendants are nine (9) floors above the ground. The Environmental Impact Assessment Licence dated 21<sup>st</sup> July, 2015 and the approvals that were given for the project by the 5<sup>th</sup> defendant show that the apartments were not to exceed 4 floors. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have not placed before the court the 3<sup>rd</sup> defendant's license and the 5<sup>th</sup> defendant's approval for the nine (9) floor apartments they are putting up. I am of the view that the plaintiff's claim has fair prospects of success and that it would be unfair to prevent the plaintiff from pursuing the claim by an order for security for costs.

In the final analysis, I find no merit in the 2<sup>nd</sup> defendant's application for security for costs dated 11<sup>th</sup> January, 2017. The upshot of the foregoing is that the two (2) applications before me by the 1<sup>st</sup> and 2<sup>nd</sup> defendants both dated 11<sup>th</sup> January, 2017 fail and the same are dismissed with costs to the plaintiff.

**Delivered and Dated at Nairobi this 20<sup>th</sup> day of September 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Karuga for the Plaintiff

Mr. Lubulelah h/b for Mr. Wangila for the 1<sup>st</sup> Defendant

Mr. Lubulelah h/b for Mr. Gichuhi for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

N/A for the 5<sup>th</sup> Defendant

Catherine Court Assistant