



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC SUIT NO. 24 OF 2018

ERIC OCHIENG.....PLAINTIFF

VERSUS

FREDRICK AILA ONYANGO.....1ST DEFENDANT

BENTER OKONG'O NGOLO.....2ND DEFENDANT

RULING

1. Eric Ochieng, the Plaintiff, through the notice of motion dated 8th May 2018 seeks for temporary injunction restraining the “1st Defendant/Respondent”, Fredrick Aila Onyango, “whether by himself, his agents, servant or any person claiming through him from carrying on with or undertaking construction works in Land reference no. L.R. No. Kisumu/Kogony/885, 887 and 889, which were amalgamated top (sic) give rise to L.R. No. Kisumu/Kogony/7786, pending the hearing and the determination of this suit.” The application is based on the nine (9) grounds marked(a) to (i) on its face summarized as follows;

- a) That the Defendants have commenced some developments on their land in breach of the Physical Planning and National Construction Acts that has caused serious security threat to the Plaintiff and his property.
- b) That the Defendants did not carry out Environmental Impact Assessment or did not involve the Plaintiff and other neighbours before commencing the development.
- c) That the constructions are being carried out at night.
- d) That the NEMA license No. NEMA/EIA/PSL/4839 is for renovation for a Medical facility comprising of causality, theatre, maternity, pharmacy, Laboratory, intensive care unit wards and associated facilities and amenities at a cost of Kshs. 615,803,550.80.

2. The application is supported by the affidavits sworn by Eric Ochieng, the Plaintiff, on the 8th May 2018 and 29th May 2018 in which he among others depones as follows;

- a) That he has lived with his family on Kisumu/Kogony/5051 where his residential home is secured by a perimeter fence.
- b) That the Defendants who own Kisumu/Kogony/7786, are constructing a hospital complete with a morgue that is almost annexed to our property and anyone can easily access our property through the new development by simply climbing onto the roof of our property and climbing down or jumping into my compound.
- c) That his enquiry from the County Government of Kisumu through his advocates whether the Defendants’ development has been approved, among others, has not been responded to.
- d) That he was not invited to make representation on the Defendants project environmental and Impact Assessment report.
- e) That the Defendants development “looks shaky” and the architectural and technical drawings as well as the works, are being undertaken by unauthorized and unqualified persons and without professional guidance.
- f) That after obtaining the Projects Environmental Impact Assessment report from NEMA, he found that the google map and photo log attached indicated the Project site to be next to Thesha Hotel which is about three (3) kilometers from the actual site. That the Environmental Impact Assessment Report and license issued thereof are for a project at a different site and location.

g) That the list of people who filled the questionnaires attached to the Environmental Impact Assessment Report do not come from the neighbourhood of the project and are therefore a fraud.

h) That the alleged errors in using the word “renovation” instead of “construction” and giving the project value in the NEMA licence at Kshs. 48,000,000/= and Kshs. 646,775.05, in the National Construction Authority letter dated 28th March 2018, leads to reasonable suspicions.

3. The application is opposed by the Defendants through the replying affidavit sworn by the 1st Defendant on the 20th May 2018 in which he deponed to the following among others;

a) That their project do not include a morgue.

b) That their development has left a two (2) meter wide space all round from the plot boundaries and do not therefore pose any security threats to the Plaintiff or his property. That further they have security personnel and dogs to guard the materials, machinery and equipment’s at the site.

c) That the Plaintiff had been furnished with the projects documents in Kisumu C.M Environment and Land Case No. 178 of 2018.

d) That during the Environmental Impact Assessment Report exercise, the neighbors and members of the public were interviewed and the license issued. That the Plaintiff lives and works in Nairobi and hence was not present for interview.

e) That the initial NEMA license had erroneously described the works as renovations instead of constructions but the correction has been carried out.

f) That their architectural and technical drawings and works have been done and carried out by qualified and licensed experts.

g) That they have obtained the requisite approvals from the County Government of Kisumu for the development and change of user and it has continued to “inspect, assess and record the progress of the construction.”

h) That they have applied for the compliance certificate from the National Construction Authority (NCA) and the same is under evaluation.

i) That they have applied and obtained the certificate of compliance under the Physical Planning Act Chapter 286 of Laws of Kenya.

j) That the Defendant stands to suffer irreparable harm if the project is not carried out , or is discontinued, as their financiers will only find the project after the works reach a certain level.

4. The application came up for hearing on the 30th May 2018 when directions on filing and exchanging written submissions were given. That the learned counsel for the Plaintiff and Defendants filed their submissions dated 10th September 2018 and 13th September 2018 respectively.

5. The following are the issues for determination by the Court;

a) Whether the Plaintiff has established a prima facie case with a probability of success for the temporary injunction order to issue at this interlocutory stage.

b) Who pays the costs.

6. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence and annexures thereto by both sides, the written submission and cited case law by both Counsel and come to the following determinations;

a) That the Plaintiff is reportedly the registered proprietor of Kisaumu/Kogony/5051. That the said plot is adjacent and borders Kisumu/Kogony/7786, which is an amalgamation (combination) of Kisumu/Kogony/885, 887 and 889 registered in the names of the Defendants.

b) That the basis upon which the application is brought can be summarized as follows; that the Defendants are carrying out a development on their plot without obtaining the statutory licenses and or approvals; that the project drawings and works are not professionally done and that the development, that includes a morgue, is almost annexed to his property posing a security threat to the Plaintiff and his property.

c) That the Defendants have responded by availing copies of NEMA license No. NEMA/EIA/PSL/483,9, issued on the 15th June 2017, for construction of a medical facility on plot L.R. No. Kisumu/Kigony/885, 887 and 889; practicing certificates of Engineer Atai, Wambua (Qs), Architect William O. Kumo; certificate of registration for Earth Generation Contractor Limited, County Government of Kisumu letter dated 25th September 2017 conveying the approval for development on plot L.R. No. Kisumu/Kogony/885, 887 and 889 and the conditions thereof, Letter dated 23rd May 2017 conveying provisional approval of

amalgamation and change of user from Agricultural to Institutional Hospital for Plot Nos. Kisumu/Kogony/885, 887 and 889 and the conditions thereof, letter of consent for amalgamation by Land Control Board dated 4th October 2017, building inspection sheet, National Construction Authority (N.C.A) letter dated 28TH March 2018 confirming that Earth Generation Contractors online application for compliance certificate is under evaluation and would be issued in due course, among others.

d) That the Plaintiff has through the supplementary affidavit at paragraph 14 taken issue with the projects costs, that is, whether it was “Kshs. 48,000,000/=” or “Kshs. 646,775.05/=”. The Plaintiff has also annexed a copy of the Projects Environmental Impact Assessment Report which is 49 pages and taken issue with Plate 2, which shows what he calls Thesha Hotel which is reportedly about three (3) Kilometers from the Project location. The Plaintiff also referred to clause 2.6 of the Report which is sub-headed “**Neighbouring facilities**” and which provides as follows;

“2.6. Neighbouring facilities. The site is located opposite Kisumu International Airport about 600 M east of the airport round about on Plot No. Kisumu/Kogony/885, 887 and 889 in Kogony Location, Kisumu Town Sub County in Kisumu County measuring approximately 0.31, 0.09 and 0.20 Hectares respectively. The site is neighbored by a hotel and residential buildings and homesteads and the Kisumu Highway and railway line to the South.”

e) That whereas it is true that clause 1.1 of the conditions to the NEMA license gives the estimated costs of the project as Kshs. 48,000,000/= and the National Construction Authority letter of 28th March 2018 at paragraph one places the development amount at Kshs. 646,775,050.80 and not Kshs. 646775.05 claimed by the Plaintiff, the differences in the figures does not change the apparent fact that project had received the approvals and licenses from not only NEMA and National Construction Authority but also the County Government of Kisumu contrary to the Plaintiff’s claims. That the differences in the project costs would on its own not be the basis of granting injunction in this case.

f) That though the Plaintiff’s position is that the NEMA license may be for a project next to Thesha Hotel, which is about 3km from the site of the construction, the heading of the Environmental Impact Assessment Report he annexed to the supplementary affidavit and marked “**EO-1**” leaves no doubt that the project is on land parcels Kisumu/Kogony/885, 887 and 889. That fact is apparent on the heading of the said report, paragraph one of the Executive Summary and paragraph 2.2 of Chapter Two under the sub-heading of “**Location of the Project.**” That indeed the Plaintiff has in his pleadings and affidavit evidence confirmed that the project is being undertaken on the plots adjacent to his homestead that borders his property. That the relevance of the photo in plate 2 may be pursued during the main hearing.

g) That the NEMA license dated the 15th June 2017 contains several conditions on general (clause 1.1 to 1.10), construction (clause 2.1 to 2.19), operational (clause 3.1 to 4.4), and decommissioning (clause 5.1 to 5.2). That clause 2.16 requires the construction activities to be undertaken during the day. That should the Plaintiff have evidence that the Defendants have failed to comply with any of the conditions thereof like by carrying out the construction works at night contrary to clause 2.6, then the proper authority or forum to seek redress for action from on first instance is the National Environmental Management Authority (NEMA).

h) That the Plaintiff’s claim that the Defendants project drawing and works are not professionally done has not been supported by an expert evidence. That the Defendants have responded to the claim by availing the copies of practicing certificates of the various experts engaged in the project, inspection sheet and laboratory test Reports for the cubes which on the face of it, challenges the Plaintiffs claim appear not to be based on facts.

i) That the available evidence confirms that the confined development being carried out by the Defendants is within their plots and has not enclosed onto the Plaintiff’s property. That so long as the Defendants adheres to the conditions set out in the approvals and or licenses issued by the statutory authorities, then they should not be unreasonably hindered. That needless to state, the Defendants have a duty to ensure the development does not pose a security threat to the neighbouring persons and properties, including the Plaintiff and his property. That the Defendants have in their disposition given details of the security arrangements at the project site and that has not been disputed. That the Court therefore finds that the Plaintiff has failed to prove the development being carried out will pose a security threat to him and his property.

7. That in view of the foregoing, the court finds no merit in the Plaintiff’s notice of motion dated 8th May 2018. That the application is therefore dismissed with costs and the interim order in terms of prayer 2 granted on the 16th May 2018 is hereby vacated.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Owani for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE