



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 225 OF 2017

PETER GICHUKI KING'ARA.....PLAINTIFF

VERSUS

SPRING HILL PARK LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI CITY.....2ND DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....3RD DEFENDANT

RULING

1. On 31/3/2017, the plaintiff, Peter Gichuki Kingara through a plaint dated 31/3/2017 brought this suit seeking the following orders against the defendants:

a. A permanent injunction to restrain the first defendant from erecting any structure or further structures on Land Reference Number 209/14990/22 or carry any further construction thereon, excavation and erecting any apartment thereon.

b. A mandatory injunction compelling the 2nd and 3rd defendants to inspect and report to the court the structural soundness and fitness of the existing construction and to enforce the Physical Planning Act and Building Code in regard to open space built up area ratio and to further report on the encroachment by the 1st defendant on other private property whilst constructing.

c. Permanent injunction restraining the 1st defendant from conduction any further excavation along its common boundary with the plaintiff Land Reference Number 209/14990/21 and /or interfering with the plaintiffs power house and gate house or any portion of the plaintiff's property as presently preserved and existing.

d. An order directing the Director of Survey to forthwith resurvey the land Reference Number 209/14990/21 and Land Reference Number 209/14990/23 in accordance with the current physical boundaries borne out by the existing masonry wall and to issue new Deed Plans that accord with the current occupation by the plaintiff.

e. A declaration that the plaintiff is in adverse possession of Land Reference Number 209/14990/20 to the extent that he has occupied the same over the last 15 years any space held within his masonry perimeter wall, having occupied such space for a period of nearly 15 years nec vim nec clam and nec precaria.

f. Any other or further relief the court may consider applicable

g. Costs of this suit.

2. Together with the plaint, the plaintiff presented a notice of motion application dated 31/3/2017 seeking the following interlocutory orders:

1. That this application be certified urgent and be heard exparte in the first instance.

2. That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the 1st defendant whether by itself, its foreman their employees, servants and/or agents or otherwise, howsoever from further proceeding and/or continuing with the construction of the 12 storey apartment or any other constructions of similar size and and/or structure on Land Reference Number 209/14990/22.

3. The pending the hearing and determination of this suit, a temporary injunction restraining the 1st defendant from conducting any further excavation along its common boundary with the plaintiff and/or interfering with the plaintiff's power house and gate house or any portion of the plaintiff's/applicant's property as presently preserved and or physically constituted.

4. That a mandatory injunction do issue compelling the 2nd and 3rd defendants to inspect and report to the court the structural soundness and fitness of the existing construction and to enforce the building code in regard to open space built up area ratio and encroachment on other private property by the 1st defendant whilst constructing.

5. That this honourable court do declare that the plaintiff and other neighbours rights to clean and healthy environment have been and/or are likely to be contravened and that the said plaintiff and neighbours needs protection from the wanton acts of the 1st defendants.

6. That costs of the application be borne by the defendant.

3. The said application was supported by the plaintiff's affidavit sworn on 31/2017. The application was opposed by the 1st defendant through a replying affidavit sworn on 13/4/2017 by Daniel Ojijo Agili and grounds of opposition dated 12/4/2017. The 2nd defendant opposed the application through a replying affidavit sworn on 29/5/2017 by John Ojwang. The 3rd defendant similarly opposed the application through an affidavit sworn on 27/4/2017 by Sophie N Mutemi. The said application is the subject of this ruling.

4. The applicant's case is that Land Reference Numbers 209/14990/21, 209/14990/22 and 209/14990/23 were surveyed out of one parcel which previously belonged to Teleposta Pension Scheme Registered Trustees (the Trustees). The trustees sold the three properties to different purchasers on subdivision. During the subdivision and transfer of the three properties, there was a mixed up of titles and registered survey plans in that what was assigned to the three purchasers in the titles did not march with the parties' respective plots on the ground. To resolve the mix-up, the parties agreed to exchange titles. Consequently, transfers by way of exchange were duly registered. Land Reference Number 209/14990/22 which had been registered in the name of the plaintiff was transferred on exchange basis to Stephen Mutuku Nzonzi and Fidelina Mueni Sila and Land Reference Number 209/14990/21 was transferred to the plaintiff. The mismatch between the registered survey plans and the actual plots held by the three property owners was thus resolved. The applicant contends that the actual boundaries of what the parties held on the ground did not change.

5. The applicant further contends that upon transfer of Land Reference Number 209/14990/22 to the 1st defendant, the 1st defendant begun construction works on the property, consisting of 12 additional units. He contends that the 1st defendant brought down his boundary wall, refused to reconstruct it and threatened to bring down his power house and gate house. He contends that the material project will change the face of the neighbourhood and curtail his enjoyment of the property he owns. He adds that approval of the building plans by the 3rd defendant was procured unprocedurally. Further, he contends that the 3rd defendant had failed in its statutory mandate of ensuring compliance by the 1st defendant.

6. The case of the 1st defendant is that Spring Hill Park Limited is a joint venture vehicle created by the directors of Sigimo Enterprises Limited, Stephen Mutuku Nzonzi and Fidelina Mueni Nzonzi, for the purpose of developing residential apartments on Land Reference Number 209/14990/22. He further contends that an EIA licence was issued by NEMA in respect of the project and the 2nd defendant similarly granted change of user and building approvals.

7. The 1st defendant further contends that the plaintiff's boundary wall had encroached into the 1st defendant's property and the 1st defendant agreed with the plaintiff to demolish the encroaching wall but the plaintiff blocked the demolition of the encroaching wall. It is the 1st defendant's case that after exchange of titles, parties embarked on ascertainment of proper boundary positions and the plaintiff was duly informed through a letter dated 13/4/2010 that his boundary wall had encroached into Land Reference Number 209/4990/22. Further, the 1st defendant contends that the change of user and approval by the 2nd defendant was procedurally procured.

8. On its part, the 2nd defendant confirms that it is aware of the impugned project and that it duly licensed the project after the project proponent had satisfied all the requirements. It states that change of user was approved by the Town Planning Committee on 27/6/2013 after it had been established that due notice had been published and exhibited and there was no objection to the change of user. It denies the contention that the development will change the face of the neighbourhood.

9. The case of the 3rd defendant is that on 25/11/2014, the NEMA County Office in Nairobi received an EIA report from Stephen Mutuku Nzonzi and Fidelina Mueni Sila and after the relevant requirements and procedures had been satisfied, EIA licence No. 0024469 was issued on 21/1/2019 to Stephen Mutuku Nzonzi and Fidelina Mueni Sila. The position of the 3rd defendant is that the project belongs to Stephen Mutuku Nzonzi and Fidelina Mueni Sila. It further contends that no EIA licence was issued to the 1st respondent in respect of the project and there has been no transfer of the licence which was issued to Stephen Mutuku Nzonzi Sila. It adds that the 1st defendant has applied for variation of EIA Licence No. 0024469 issued on 21/1/2019 to Stephen Mutuku Nzonzi and Fidelina Mueni Sila to include additional 10 more units but the said application had not been processed. The 3rd defendant contends that it is the duty of the 1st defendant to prove that it has complied with all the laws and has all the necessary approvals from the 2nd and 3rd defendants before proceeding with construction.

10. In submissions, Ms Kimere for the applicant submitted that the 1st defendant had shown complete and utter disregard for the law and utter contempt for the plaintiff's constitutional right to live in and enjoy his property. She added that the actions of the 1st respondent violated the plaintiff's right to a clean and healthy environment. Secondly, she argued that the 2nd and 3rd respondents had failed to play their oversight role and had allowed the 1st defendant to violate building laws and regulations. She submitted that the plaintiff had lived in the suit premises from 2003 and there had never been any issue relating to boundaries. She added that unless an injunction order is issued, the 1st defendant would render the plaintiff's premises uninhabitable.

11. In response, Mr Kariuki for the 1st defendant submitted that the plaintiff orally consented to the bringing down of the perimeter wall on the understanding that the 1st defendant would re-erect the wall and the plaintiff had come to court without affording the 1st defendant the

requisite time to re-erect the wall. He added that the wall had encroached onto the 1st defendant's property. Mr Kariuki added that the development was taking place on the defendant's property and was duly licensed and approved under the relevant statutes. He argued that no evidence had been tendered to support the plea for a mandatory injunction or to question the structural soundness of the development. He contended that the plaintiff was using this case to perpetuate his encroachment.

12. Ms Mageto, counsel for the 2nd defendant, submitted that change of user was duly applied for, processed and approved in the prescribed manner. She further submitted that the construction licence was properly issued, and prior to commencement of construction works, an advertisement board was erected at the site bearing relevant information about the project. Counsel added that for a mandatory injunction to issue, there must be special and exceptional circumstances and the case must be one which is clear.

13. I have considered the application together with all the materials placed before the court by the parties. I have also considered the parties' respective submissions, cited authorities and applicable jurisprudence on the key questions in the application. Two questions fall for determination. The first question is whether the applicant has satisfied the criteria for grant of an interim injunction as sought in the 2nd and 3rd limbs of the application under consideration. The 2nd question is whether the applicant has satisfied the criteria for grant of a mandatory injunction in terms of prayer 4 of the application.

14. The criteria upon which ordinary interim injunction is granted was spelt out in **Giella v Cassman Brown & Co. Limited (1972) EA 358** and is well settled. In summary, an applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that in the absence of the injunctive order, he stands to suffer irreparable damage that cannot be indemnified through an award of damages. Thirdly, if the court is in doubt, the application is to be determined on a balance of convenience. At this stage the court does not make any definitive or conclusive findings and pronouncements on issues in contest. Conclusive findings and pronouncements are reserved for the final judgment after trial.

15. The applicant's first key grievance is that the 1st defendant has encroached onto his property and has demolished his boundary wall and is excavating in his land. The 1st defendant's response to this complaint is that the plaintiff is the one who had encroached onto the 1st defendant's property and he was all along aware of the encroachment. I have deeply reflected on the allegation and counter allegation of encroachment. Without saying much about the subject of encroachment, what emerges from the allegation and the counter allegation is that there is a boundary dispute between the plaintiff and the 1st defendant. Regrettably, neither of the two parties caused the Land Registrar to determine the boundary within the framework of Section 18 of the Land Registration Act. Section 18(2) of the Act precludes this court from exercising jurisdiction over boundary disputes until the boundaries have been determined by the Land Registrar in the prescribed manner. This court is therefore not the proper primary forum for resolution of boundary disputes.

16. The second key grievance of the applicant relates to the licences which the 2nd and 3rd defendants issued in respect of the project. He contends that the 3rd defendant failed in its duty of ensuring that the EIA for the impugned project met the standards set out in the Act. He faults the 2nd defendant for failing to ensure that the approved plans catered for 30% open space. In my view, the Environment and Management & Coordination Act (the EMCA) provides a framework for challenging NEMA licences. Similarly, the Physical Planning Act provides a legal framework on how grievances relating to change of user and approval of building plans are to be ventilated. There is no evidence that the applicant has exhausted the mechanism provided under the two statutes. No explanation has been tendered to explain why the mechanisms provided under the two statutes cannot be utilized by the applicant in the first instance. In my view, it is not appropriate for the applicant to unjustifiably disregard the redress mechanism put in place by Parliament.

17. On mandatory injunction, the applicant seeks an order compelling the 2nd and 3rd defendants to inspect and report to the court on the structural soundness and fitness of the impugned project. The principles upon which a mandatory injunction is issued were set out in the English case of **Locabail International fiancé Ltd v Agro-Export and Another (1986) All ER 901**. A mandatory injunction is granted in special circumstances and only in clear cases either where the court feels the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could easily be remedied.

18. In the present application, the mandatory order sought relates to the structural soundness of the impugned project and is directed against NEMA and the County Government of Nairobi. The National Construction Authority which is mandated by the statute to ensure quality assurance of all constructions is not a party to this suit. I do not think NEMA is the right statutory body to be compelled to undertake structural quality assurance inspection of buildings. For this reason, I do not think the applicant has satisfied the criteria for grant of a mandatory injunction.

19. Prayer number 5 of the notice of motion seeks a final order. That being the case, I cannot grant a final order at this point. That plea will await full trial and determination of the issues.

20. The totality of the foregoing is that the applicant has failed to satisfy the criteria for the grant of the orders sought in the notice of motion dated 31/3/2017. Consequently, the notice of motion application dated 31/3/2017 is declined. The respondents shall have costs of the application.

21. Lastly, I have observed that the EIA licence in respect of the suit property appears to have been assigned to the 1st defendant by the grantees. This issue was not taken up by the applicant. I would have made some pronouncements on that issue had the applicant raised it. For the reason that it was not raised as an issue, I have refrained myself against discussing it or resting my decision on it.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

June Nafula - Court Clerk