



REPUBLIC OF KENYA



**KENYA LAW**  
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**Vaghadia & 2 others v Darul Naeem Apartments Limited & another (Environment & Land Case E005 of 2023) [2024] KEELC 80 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 80 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE E005 OF 2023**  
**SM KIBUNJA, J**  
**JANUARY 24, 2024**

**BETWEEN**

**NILESH GOPAL VAGHADIA ..... 1<sup>ST</sup> PLAINTIFF**  
**CHETAN GOPAL VAGHADIA ..... 2<sup>ND</sup> PLAINTIFF**  
**HEMLATA GOPAL VAGHADIA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**DARUL NAEEM APARTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**HUSAMUDIN TAYABARI NANABHAI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling appertains to the above three different applications dated 17<sup>th</sup> September 2023, 10<sup>th</sup> November 2023 by the plaintiffs and 29<sup>th</sup> November 2023 by the 2<sup>nd</sup> defendant, that will hereafter be referred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> application respectively.
2. The 1<sup>st</sup> application by the plaintiffs sought for the following:
  1. That this application be certified as urgent and be heard ex-parte in the first instance for purposes of granting the prayers sought and giving directions on the hearing of the application.
  2. That pending inter partes hearing of this application, an order of immediate stoppage of the construction work and any further development on property Plot No. Mombasa/ Block Xxi/191/Mombasa Island until the defendants erect effective, approved and appropriate barriers and safety nets as required by the Law and abate the continuing nuisance.
  3. That pending inter partes hearing of this application, the defendants do forthwith secure and safeguard the plaintiffs' property Plot No. Mombasa/Block Xxi/190/Mombasa Island by erecting and continuously maintaining upon their property Plot No. Mombasa/ Block



Xxi/191/Mombasa Island effective approved and appropriate barriers on the construction as required by the Law and construction industry guidelines.

4. That after the inter partes hearing of this application, a permanent injunction be issued restraining the defendants jointly and severally by themselves, their workmen, servants and or agents or otherwise howsoever, from causing any further nuisance of any kind and or allowing any kind of debris, cement dust, dust, noise, wet and dry cement or any other material whatsoever from the property Plot No. Mombasa/Block Xxi/191/Mombasa Island from affecting or from falling into the plaintiffs' property Plot No. Mombasa/Block Xxi/190/Mombasa Island.
5. That the Honourable Court be pleased to give directions and any other order on the hearing of this application and the claim herein as it may deem fit.
6. That the costs of this application be provided for.

The application is based upon the thirteen (13) grounds on its face and supported by the affidavit of Nilesh Gopal Vaghadia, the 1<sup>st</sup> plaintiff, sworn on the 17<sup>th</sup> September 2023. The record shows that the court certified the application as urgent on the 25<sup>th</sup> September 2023, granted prayer 3 pending inter partes hearing of the application, and issued directions on service and filing of replies. During the mention of 11<sup>th</sup> October 2023, the learned counsel for the parties informed the court that the parties were in discussion and were likely to settle the suit. The matter was placed for mention on the 13<sup>th</sup> November 2023, but no settlement was recorded.

3. The plaintiffs next filed the 2<sup>nd</sup> application dated the 10<sup>th</sup> November 2023 seeking for;
  1. That this application be certified as urgent and be heard ex-parte in the first instance for proposes of granting the prayers sought herein and giving directions on the hearing of the application.
  2. That the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant's directors and principal officers be arrested and be committed to jail for disobedience of the court order issued by this court on 25<sup>th</sup> September 2023.
  3. That pending the inter partes hearing of this application, this Honourable Court do issue an order of immediate stoppage of the construction work and any further development on property Plot No. Mombasa/Block Xxi/191/Mombasa Island until the defendants purge the contempt by abating the continuing nuisance.
  4. That this Honourable Court be pleased to give directions and any other order on the hearing of this application and the claim herein as it may deem fit.
  5. That costs of the application be provided for.

The application is premised on the eleven (11) grounds on its face and supported by the affidavit of Nilesh Gopal Vaghadia, the 1<sup>st</sup> plaintiff. The record confirm that the court certified the application as urgent on the 14<sup>th</sup> November 2023 and granted prayer 3 in the interim. The court also gave directions on service, filing of replies and set it down for inter partes hearing on the 27<sup>th</sup> November 2023. On that date the counsel for the plaintiffs submitted that service had been effected on the 14<sup>th</sup> November 2023, and as no replies had been filed, the application be treated as unopposed and allowed. In an extempore ruling, the court granted the application and ordered that "... the prayers sought in the notice of motion are hereby allowed in terms of prayer 3 with costs in the cause. In addition, prayer 2 is also allowed but instead of warrants of arrest, the summons to be issued for the 14<sup>th</sup> December 2023."



4. The 2<sup>nd</sup> defendant filed the 3<sup>rd</sup> application seeking for the following prayers:
  1. That this application be certified urgent and be heard ex-parte in the first instance for purposes of granting the prayers sought herein and giving directions on the hearing of the application..
  2. That pending hearing and determination of this application inter partes, this court be pleased to stay the orders of 27<sup>th</sup> November 2023 and issued on the 28<sup>th</sup> November 2023 and summons to show cause to Sabrina Jelani Haji Badawi, Fatma Jelani Haji Badawi & Jelani Bosire Haji Badawi of 27<sup>th</sup> November 2023 and issued on 28<sup>th</sup> November 2023 and all consequential orders arising therefrom.
  3. That this Honourable Court be pleased to review and ultimately set aside the orders of 27<sup>th</sup> November 2023 and issued on the 28<sup>th</sup> November 2023 and summons to show cause to Sabrina Jelani Haji Badawi, Fatma Jelani Haji Badawi & Jelani Bosire Haji Badawi of 27<sup>th</sup> November 2023 and issued on 28<sup>th</sup> November 2023.
  4. That this Honourable Court be pleased to order that the plaintiff notice of motion dated 10<sup>th</sup> November 2023 be heard on its merits with the 2<sup>nd</sup> defendant having leave to respond to the same within the time frames as shall be ordered by the Court.
  5. That this Honourable Court be at liberty to grant any further orders it deems fit.
  6. That costs of this application be provided for.

The application is based on the thirty five (35) grounds on its face and supported by the affidavits of Jelani Haji Bosire Badawi, a director with the 2<sup>nd</sup> defendant, sworn on the 29<sup>th</sup> November 2023 and 13<sup>th</sup> December 2023. On the 30<sup>th</sup> November 2023, the court certified the application as urgent and gave directions on service and filing of replies. The court also fixed the application for hearing on the 14<sup>th</sup> December 2023.

5. The application is opposed by the plaintiffs through the replying affidavit of Nilesh Gopal Vaghadia, 1<sup>st</sup> plaintiff, sworn on the 12<sup>th</sup> December 2023.
6. On the 14<sup>th</sup> December 2023, the learned counsel for the plaintiffs and 2<sup>nd</sup> defendant made their oral submissions which the court has considered. The court also heard the three (3) directors to the 2<sup>nd</sup> defendant who had attended court in compliance with the summons issued on the 27<sup>th</sup> November 2023. The court then extended the orders of 25<sup>th</sup> September 2023 and 27<sup>th</sup> November 2023 and directed the 2<sup>nd</sup> defendant's directors to come to court on the ruling date. The warrant of arrest for the 1<sup>st</sup> defendant was also issued.
7. The issues for determination by the court in respect of the three (3) applications are as follows:
  - a. What is the effect of the defendants failing to file any replies to the applications dated the 27<sup>th</sup> September 2023 and 10<sup>th</sup> November 2023 despite evidently being served and evidence of service being filed.
  - b. Whether the 2<sup>nd</sup> defendant has made a reasonable case for review of the orders of 27<sup>th</sup> November 2023 and whether it should be allowed to defend the application dated the 10<sup>th</sup> November 2023.
  - c. Whether the defendants should be committed to jail for disobeying the court orders.
  - d. What orders are fair and just to issue in the circumstances of this suit.



e. Who pays the costs in each of the three (3) applications?

8. The court has carefully considered the grounds in each of the applications, affidavit evidence filed, submissions by counsel, the interview with the three (3) directors of the 2<sup>nd</sup> defendant, the record and come to the following findings:

a. From the pleadings filed herein, the 2<sup>nd</sup> defendant is constructing a fifteen-storey building on Mombasa/Block Xx1/191/MN belonging to the 1<sup>st</sup> defendant. That property neighbours Mombasa/Block XX1/190/MN that belongs to the plaintiffs. The plaintiffs' lamentation is that the wet cement and other debris falling from the defendants' construction site are causing damages in their compound, cars and other surfaces of the house, that face the ongoing construction. Furthermore, the plaintiffs are afraid of the serious risks posed on all the occupants residing on their property because of the falling debris and dust, in addition to the nuisance caused by the noise from the ongoing construction. That concern led to the filing of this suit seeking inter alia stoppage of construction work, order for defendants to erect effective and appropriate barriers on their property to safe guard the plaintiffs' properties, permanent injunction, damages and costs. The plaintiffs also filed the 1<sup>st</sup> application dated the 17<sup>th</sup> September 2023. The defendants though served, have not to date filed any replies as required under Order 51 Rule 14 of *Civil Procedure Rules*. The 2<sup>nd</sup> defendant has not applied through the 3<sup>rd</sup> application to set aside the order of 25<sup>th</sup> September 2023 or to be allowed to file reply to the application dated the 17<sup>th</sup> September 2023. The court granted prayer 3 on the 25<sup>th</sup> September 2023 that is in the following words;

“ 3. That pending inter partes hearing of this application, the defendants do forthwith secure and safeguard the plaintiffs' property Plot No. Mombasa/Block Xxi/190/Mombasa Island by erecting and continuously maintaining upon their property Plot No. Mombasa/Block Xxi/191/Mombasa Island effective approved and appropriate barriers on the construction as required by the Law and construction industry guidelines.”

That order is still in force and for avoidance of doubts, it was extended on the 14<sup>th</sup> December 2023 when the ruling date was fixed. There is therefore nothing to stop the court from treating the application dated the 17<sup>th</sup> September 2023 as unopposed and granting it as prayed.

b. Prayer 4 of the 1<sup>st</sup> application is however premature in view of the decision in the case of *Kenya Power & Lightning Company Ltd v Sheriff Molan Habib* (2018) eKLR where the court observed with regards to a permanent injunction that:

“ It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

That prayer will have to wait for the final settlement of the main suit either through the parties' settlement or court order.

c. From the information given to the court by the learned counsel for the plaintiffs and 2<sup>nd</sup> defendant on the 11<sup>th</sup> October 2023, the parties had started discussions on how to settle this



suit. However, that effort seems to have failed as the plaintiffs subsequently filed the contempt application dated the 10<sup>th</sup> November 2023. The court granted prayer 3 that is in the following words;

“That pending the inter partes hearing of this application, this Honourable Court do issue an order of immediate stoppage of the construction work and any further development on property Plot No. Mombasa/Block XXI/191/Mombasa Island until the defendants purge the contempt by abating the continuing nuisance.”

That despite the serious repercussions of a contempt application, the defendants did not file any replies, or attend court on the 27<sup>th</sup> November 2023 when it was coming up for inter partes hearing. The court therefore granted the application and ordered that;

“... the prayers sought in the notice of motion are hereby allowed in terms of prayer 3 with costs in the cause. In addition, prayer 2 is also allowed but instead of warrants of arrest, the summons to be issued for the 14<sup>th</sup> December 2023.”

The 2<sup>nd</sup> defendant has through the 3<sup>rd</sup> application sought to have that order reviewed and set aside and to be allowed to defend the application dated 10<sup>th</sup> November 2023.

- d. In the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR the Court of Appeal cited with authority the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR which stated;

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”

The Court of Appeal also cited the case of *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR where the court held as follows:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically, general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

- e. For the court to exercise its discretion to review or set aside the orders of 27<sup>th</sup> November 2023 and to grant leave to the 2<sup>nd</sup> defendant to defend the application dated the 10<sup>th</sup> November 2023, the 2<sup>nd</sup> defendant needed to satisfy the threshold under Order 45 Rule 1 of the *Civil Procedure Rules*, by among others establishing the new and important matter of evidence that they could not have reasonably brought to the attention of the court, or mistake or error apparent on the record or other sufficient reason. I have perused the affidavits filed in support of the 3<sup>rd</sup> application by the 2<sup>nd</sup> defendant and considered the submissions by their counsel and I am of



the view that they have not met that threshold. That it goes without saying that the defendants have a right to go on with their constructions, but must do so in a way that does not injure the plaintiffs' suit land, properties and persons therein who have equal rights to quietly enjoy the use of their property. The plaintiffs cannot be faulted for seeking the court's orders as they did, vide the application dated the 17<sup>th</sup> September 2023, and to seek for contempt orders vide the application dated the 10<sup>th</sup> November 2023, when the defendants failed to adhere to the orders issued on the 25<sup>th</sup> September 2023.

- f. The court is mandated by section 3A of the *Civil Procedure Act*, section 13 (7) of the *Environment and Land Court Act* and section 3(3) of the *Environmental Management and Coordination Act* to make orders that it deems fit and just. In the order of 25<sup>th</sup> September 2023 I granted inter alia the prayer that the defendants place barriers which will effectively secure and safeguard the plaintiffs' property as they carry on with the construction. It has been reported to the court, and reiterated in the subsequent documents filed that the parties and their representatives held a meeting on the plaintiffs' property and agreed that the defendants would take steps, including putting up a canopy roof which was clear enough to allow sunlight, but avoid debris from falling onto the plaintiffs vehicles and property. When the plaintiffs did not see the agreement being complied with, they sought the stoppage orders as afore stated. In reply to the application, counsel for the 2<sup>nd</sup> defendant wrote a letter to the plaintiffs' counsel demonstrating that they had partially complied by placing the scaffolding and a canopy of mabati roof, but they did not finish due to the rains that were experienced in Mombasa in November making the scaffolding slippery.
- g. In the 3<sup>rd</sup> application dated the 29<sup>th</sup> November 2023, the 2<sup>nd</sup> defendant has reiterated that it erected the canopy but the heavy rains made it impossible to fully comply. It has also stated that the costs of complying with the stoppage order has been escalating. He alluded that the plaintiffs are more interested in pursuing the claim rather than engaging the 2<sup>nd</sup> defendant in settling the issues. The three directors of the 2<sup>nd</sup> defendant who had earlier been summoned to show cause, reiterated the application claiming that they stopped construction in late November and the costs are financially draining. I am of the view that with good will and legal support from the learned counsel, the parties herein can still sit down as they did after the initial order of 25<sup>th</sup> September 2023 was made, and come up with an understanding on how to effectively secure the plaintiffs' property from the falling cement, debris and nuisance emanating from the defendants construction on the 1<sup>st</sup> defendant's plot. The parties should also discuss how to deal with the other concerns including cracks on the plaintiffs' house walls and concrete compound, sinking of the pillars of the main gate and the defendants carrying out construction work past the regulated working time. The parties may also discuss the issue of damages incurred and or leave it to be dealt with in the main suit.
- h. The 3<sup>rd</sup> application is indicated to have been brought pursuant to sections 1A, 1B and 3 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. Considering prayers 3 and 4 seeks for setting aside the ex-parte order of 27<sup>th</sup> November 2023 and to be allowed to defend the application dated the 10<sup>th</sup> November 2023, Order 51 Rule 15 of the *Civil Procedure Rules* on setting aside of such order should have been cited. In the case of *Ochola Kamili Holdings Ltd v. Guardian Bank Ltd* [2018] eKLR, the court stated that:

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to the matter pertinent to the suit does not meet the approval of the court which



granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter .... Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

- i. In this case, the 2<sup>nd</sup> defendant has failed to place before the court reasonable explanations as to why it failed to file replies to the applications dated the 17<sup>th</sup> September 2023 and the 10<sup>th</sup> November 2023 and to present a draft reply that they would be proffering to the court for the court’s to form an opinion on. The 2<sup>nd</sup> defendant has also not in any way shown or suggested that the plaintiffs were to blame in any way for their failure to file replies. It can only be concluded that the 2<sup>nd</sup> defendant made a deliberate decision not to defend the applications.
9. In balancing the fundamental right and freedoms of all the parties enshrined under Articles 40 and 42 of the Constitution of Kenya and with the jurisdiction vested by section 7 of the Environment and Land Act, No. 19 of 2011, section 3 of the Environmental Management and Coordination Act Chapter 387 of Laws of Kenya and also guided by the principles in Article 24 (1) and 60 (1) of the Constitution, and with the aim of according the parties herein an opportunity to settle the dispute between them first, and so as to fast track the hearing and determination of this suit in case the parties fail to settle, the court finds and orders as follows:
- a. The application dated the 17<sup>th</sup> September 2023, not having been opposed to date, is hereby marked compromised through an order that the defendants to continue securing and safeguarding the plaintiffs’ property, Mombasa/ Block Xxi/190/MN, by erecting and continuously maintaining upon their property, Mombasa/Block Xxi/191/MN, effective and appropriate barriers on the construction as required by law and construction guidelines, so as to prevent debris and other items falling onto and causing damage on the plaintiffs’ property, pending the hearing and determination of this suit.
  - b. That the 2<sup>nd</sup> defendant’s notice of motion dated the 29<sup>th</sup> November 2023 is without merit and is hereby dismissed.
  - c. That the summons to the 2<sup>nd</sup> defendant’s directors is hereby suspended to allow the parties an opportunity to discuss all the issues in dispute and report to court on a date to be fixed. The parties may consider subjecting themselves to court annexed mediation.
  - d. That the costs in all the three applications be one of the issues to be discussed, and if no settlement is arrived at, it be in the cause.
  - e. That a mention date be fixed.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:



Plaintiffs :M/s Kibe.

Defendants: Mr. Khalid For 2<sup>Nd</sup> Defendant.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

