



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MILIMANI LAW COURTS, NAIROBI**  
**ELC CASE NO.674 OF 2015**

GODFREY LUMANYI NAMUMBASTSI.....1<sup>ST</sup> PLAINTIFF

LINET M.OMBOKO.....2<sup>ND</sup> PLAINTIFF

VERSUS

JAMES MWANGI.....1<sup>ST</sup> DEFENDANT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY .....2<sup>ND</sup> DEFENDANTS

NATIONAL CONSTRUCTION AUTHORITY.....3<sup>RD</sup> DEFENDANTS

**RULING**

**INTRODUCTION**

1. The applicants are a married couple who are registered as joint owners of **LR Nos.Ngong/Ngong/34557** and **34558**. The two properties are adjacent to **LR No. Ngong/Ngong/33003** which is owned by the first Respondent. The second Respondent is a body established under the *Environmental Management and Co-ordination Act Cap 387* and its mandate is set out under Section 9 of the Act. The third Respondent is a body established under the National Construction Authority Act. Its mandate is provided under Section 5 of the Act.

2. The applicants filed a Notice of Motion dated **10<sup>th</sup> November 2015**, in which they are seeking the following reliefs ;-

**a) Spent**

**b) That pending the hearing and determination of this application, the Honourable Court be pleased to compel the first Defendant/Respondent or his servants, agents ,third parties to reconstruct the collapsed holding perimeter wall between the plaintiffs' two plots and the first defendant's plot.**

**c) That pending the hearing and determination of the main suit herein, the Honourable court be**

*pleased to order the second and third defendants to oversee, supervise, manage and or deal in all ways appropriate to ensure the construction of the holding perimeter wall bordering the applicant's plot and the first respondent's plot is carried out in a proper workmanship and within the set down principles of building and construction.*

*d) That the costs of this application be borne by the first, second and third Respondents.*

### **APPLICANTS CONTENTION.**

3. The applicants contend that their two properties are on the upstream side bordering the first Respondent's plot on the lower side of the gently sloping area where the three properties are located. That the first Respondent prepared the ground on his plot in preparation of putting up a block of flats. He later on built a perimeter wall round his plot which perimeter was to act as a holding wall between their plots and that of the first Respondent's plot.

4. The applicants further contend that because of the poor workmanship, the wall erected by the first Respondent collapsed exposing the applicants family to danger. The applicants fear that if heavy rains were to come, it might expose their properties to a landslide thus endangering their lives and exposing them to loss. It is on this basis that they are seeking the prayers in the current application.

### **FIRST RESPONDENTS' CONTENTION.**

5. The first Respondent contends that he was the first to commence construction of a block of flats and that to ensure privacy, he put up a perimeter wall round his property. That the applicants came about two years later and constructed on their properties. That during the levelling of the ground, they accumulated soil behind his perimeter fence hence leading to weakening of the fence which finally collapsed. That the applicants had failed to properly direct rain and storm water on their land which further aggravated the situation leading to collapse of the perimeter wall.

6. The first Respondent further contends that he had tried to reason with the applicants over the issue of the wall but that the applicants became adamant and rushed to court to file this suit after he issued a demand letter intimating that he was going to seek compensation from the applicants. That the applicants cannot obtain the orders they are seeking at interlocutory stage as to do so will be tantamount to condemning him unheard.

### **SECOND RESPONDENT'S CONTENTION**

7. The second Respondent contends that the applicants have misconceived its role and that its role is not to supervise structural integrity of buildings or walls and as such, the prayers against it are untenable.

### **THIRD RESPONDENT'S CONTENTION**

8. The third Respondent contends that its mandate is spelt out in the Parent Act under which it is established and its mandate does not extend to supervising construction of buildings or walls. That its mandate is regulatory in nature and as such, it cannot be compelled to supervise construction of projects carried out by private entities.

### **ANALYSIS**

9. I have gone through the applicants application, the supporting documents as well as the opposition to the same by the Respondents. I have also gone through the submissions filed in support of the respective cases of the parties herein. The applicants are contending that what the first Respondent constructed was a retention wall to hold the ground which had been affected by the excavation to pave way to construction of the block of flats by the first Respondent. On the other hand, the first Respondent contends that what he built was a perimeter fence to keep off trespassers and enhance his property which he had developed.

10. That applicants blame the first Respondent for constructing a retention wall without following the required standards hence its collapse. The first Respondent on the other hand blames the applicants for accumulating backfill material behind his wall hence weakening it causing its collapse. The first Respondent also blames vehicles delivering materials to the applicant's plots for occasionally hitting his wall while ascending the applicant's properties.

11. The applicants seek to compel the second and third Respondents to supervise the re-construction of the collapsed wall to the required standards. The prayers sought by the applicants are mandatory in nature. They are the same prayers the applicants are seeking in their statement of claim with an additional prayer for general damages. The issue which then emerges for determination is whether the applicants have made out a case for grant of mandatory injunction at interlocutory stage.

12. Paragraph 948 in *Halsbury's Laws of England Volume 24* sets out circumstances when a mandatory injunction can be granted at interlocutory stage. It goes thus:-

***“Mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will normally not be granted. However, if the case is clear, and one which the court thinks ought to be decided at once, or if the action done is a simple and summary one, which can be easily remedied or if the defendant attempts to steal a march on the Plaintiff....a mandatory injunction will be granted on an interlocutory application”.***

13. In the instant case, it is clear that there are serious contested facts which have to be ascertained. For instance there is the issue of whether what was constructed by the first Respondent was a perimeter wall as he alleges or whether it was a retention wall to hold insitu the exposed soil of the applicants land as they allege. There is also the issue of whether the collapse of the wall was due to substandard work as alleged or it was due to the applicants accumulating debris and soil from their side coupled with improper discharge of rain water and storm water as alleged by the first Respondent.

14. There is also the issue of whether the mandates of the second and third Respondents extend to supervisions of construction of boundary walls as the applicants want them compelled to do. What is before the court is not a simple matter which can be decided at once or in a summary manner. From what has been placed before me one cannot say that the first Respondent was trying to steal a march against the applicants. A mandatory injunction can only be issued at interlocutory stage when on material placed before the court, the order can be granted and at the end of the trial, the court would find that it was justifiable to have given it in the first place.

15. In **Kenya Airports Authority vs Paul Njogu Mungai & Other (1997) eKLR** the Court of Appeal Judges dealt with a similar case in which a mandatory injunction had been sought at interlocutory stage. The Judges referred to the principles set out in the case of **Shephard Homes Vs Sandham (1970) 3 WLR** as adopted in the case of **Locabail International Finance Vs Agro Export & Others (1988) ALL ER 901** where Mustill J said at page 906:-

***“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case”.***

16. As I said hereinabove, the applicant's prayers in the application are the same as in their claim save for a prayer for general damages for breach of right to safe environment. It would therefore not be in order for the court to grant these reliefs at interlocutory stage in absence of special circumstances.

17. In the Kenya Airports Authority case (supra) the judges of Appeal held that the principles for grant of temporary mandatory injunction are the same which are applied for temporary injunctions. I have examined the materials placed before me by the applicants. I do not think that the applicants have demonstrated that they have a prima facie case with probability of success against the respondents. A

prima facie case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125** as follows:-

*“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”.*

18. On the basis of the above analysis I find that the applicant’s application for a temporary mandatory injunction cannot be allowed. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** on this **20th** day of **February, 2017**

**E.O .OBAGA**

**JUDGE**

In the presence of :-

Mr Muigai for Mr Namada for the Plaintiffs/Applicants

M/s Njuguna for the 1<sup>st</sup> Defendant/Respondent

Court Assistant: Hilda

**E.O .OBAGA**

**JUDGE**