



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 127 OF 2017

1. SHAINAZ JAMAL

2. EUSEBIO SUDI ABURILI

3. ROSE MURUNGA

4. JACINTA WANJIHIA

5. RAMESH PATEL

6. HARPREET KULAR

7. CHARLES KIMANI

8. JAMES KAHUMBURA

9. KENNEDY TOROITICH.....PLAINTIFFS/APPLICANTS

=VERSUS=

1. ABDULRASUL MANJI

2. TAZMIN ZAHIR MANJI.....DEFENDANTS/RESPONDENTS

RULING

Introduction:

1. Parties to this suit are owners of residential villas erected on Land Reference Number 1870/III/140 known as Prestige Villas, located along Brookside Drive, Westlands, Nairobi. Prestige Villas Estate has a total of 14 Residential Villas. The Defendants own Villa No. 14. The Plaintiffs contend that in September 2016, the Defendants embarked on construction works with the intention of creating two new entrances to the Defendants' Villa, with the resultant effect of altering the original design of Villa No. 14 and encroaching on and/or blocking what the Plaintiffs describe as the common parking area. This prompted the Plaintiffs to write a demand letter through their Advocates requiring the Defendants to remove the structures. It is this action by the Defendants which triggered this suit.

2. Through a Plaint dated 22/2/2017, the Plaintiffs seek a permanent injunction restraining the Defendants and their agents and servants against alienating or interfering with the common car park area on Land Reference Number 1870/III/140. They also seek a permanent injunction restraining the Defendants and their agents and servants against altering the original design of Villa Number 14 and against altering the

entrance to Villa No. 14.

3. Together with the Plaintiff, the Plaintiffs lodged a Notice of Motion dated 22/2/2017 seeking the following interim orders, among others:

3. That the Honourable court be pleased to grant a permanent injunction restraining the Defendants, their agents and/or servants from alienating or interfering with the common car park area and altering the original design of Villa Number 14 in the Estate on Land Reference Number 1870/III/140 pending hearing and determination of this suit.

4. That the Honourable Court be pleased to grant a temporary injunction restraining the Defendants, their agents and/or servants from altering the original design of Villa Number 14 in the Estate and not to block the original entrance and not to provide a new entrance to their Villa pending hearing and determination of their application.

5. That the Honourable court be pleased to grant a permanent injunction restraining the Defendants, their agents and/or servants from altering original design of Villa Number 14 and not to block the original entrance of the said Villa and not to provide a new entrance to their said Villa in the Estate pending hearing and determination of the suit.

This Ruling relates to that particular Notice of Motion by the Plaintiffs dated 22/2/2017.

The Application

4. The said Application is supported by an Affidavit sworn on 22/2/2017 by Eusebio Sudi Aburili. The Deponent contends that the construction complained of affects the common parking area for the residents and owners of the 14 Villas in Prestige Villas Estate. Secondly, the creation of two new entrances to Villa No. 14 encroaches on the common parking area. Thirdly, the construction works are being undertaken without the requisite approvals under the Nairobi City County by Laws and Physical Planning Act. Fourth, the additions and alterations will completely alter the original design of the Estate and cause devaluation of the Plaintiffs' residential villas. Lastly, if the construction is allowed to proceed, the residents of the Estate will be denied their quiet enjoyment and use of the common parking area.

5. The First Defendant did not file any papers in response to the Application. The Second Defendant opposes the Application through a Replying Affidavit sworn by her on 3/3/2017. She deposes that, together with her husband, Zahir Abdulrasul Manji, they are the joint owners of Apartment Number 14 situated within Prestige Villas Estate. She further contends that the "Abdulrasul Manji" named as the 1st Defendant is her late father-in-law and not her co-owner husband whose full name is Zahir Abdulrasul Manji. She further deposes that Villa Number 14 is rented to her nephew, Karim Manji, whose wife is expecting a baby in April/May 2017. For this reason, they decided to have a bigger garden by blocking some entrance which she contends has not been in use. She further contends that construction works undertaken by her and her husband do not affect the common areas in the Estate. She further asserts that the only entrance created by them is a "service entrance/emergency exit" which does not encroach on the common car park. She denies any alteration of the original design of Villa 14.

Submissions

6. Parties made oral submissions in open court on 9/3/2017. Mr. Ngare, counsel for the Applicants submitted that the material construction would interfere with the common parking area and is in violation of the registered site plan attached to each Lease. He further submitted that the creation of two new entrances to the Defendants' villa through the common area will restrict the Plaintiffs' right and access to the common area. He added that the approvals attached to the Defendants' Replying Affidavit do not authorize construction of a boundary wall or creation of new entrances to Villa Number 14; they authorize maintenance works and expressly prohibit alterations or additions to the structures and plans on the ground. He submitted that the Defendants embarked on construction works without involving Residents of the Estate. On the issue of the 1st Defendant's name, he submitted that the 1st Defendant is

alive and that the omission of his first name “Zuhir” is of no legal consequence.

7. Ms Janmohammed, counsel for the 2nd Defendant impugned the Affidavit attached to the Notice of Motion on the ground that whereas it was purportedly sworn on 22/2/17, the court rubberstamp on it and on the suit papers herein bear 21/2/2017 as the date of filing the affidavit. Secondly, she attacked the Application on the ground that the full names of the first defendant was not captured. She argued that without the first name Zahir, the person named in the suit papers would be the 2nd Defendant’s father in law, Abdulrasul Manji. Thirdly, she submitted that the Plaintiffs’ Application does not satisfy the threshold for grant of an interlocutory injunction as spelt out in **Giella Vs- Cassman Brown**.

Determination

8. I have carefully considered the material placed before court in support of and against the Application. I have also considered the able rival submissions by counsel for the parties. The gravamen of the Plaintiffs’ case is that the Defendants as co-owners of a leasehold interest in a gated and restricted residential estate are undertaking construction works whose effect is to change the registered site plan of the Estate and interfere with their access to and use of the common areas within the Estate. They are offended by that conduct and seek restraining orders against the Defendants.

9. The issue for determination in this Application is whether the Applicants have satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the Plaintiff must establish that they have a prima facie case with a probability of success; that they will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.

10. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

“ 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.”

11. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

12. Before I pronounce myself on the key question in this Ruling, I would make some observations about two issues raised by counsel for the 2nd Defendant, Ms Jahmohammed. The first issue is the inconsistency in respect of the date on the rubber stamp viz-a-vis the date when the supporting affidavit was sworn. The second issue is the failure to capture the full name of the first defendant.

13. From the court record, the official receipt issued to the Applicants at the time of filing both the Plaintiff and the Application bears 22/2/2017 as the date of filing both the Plaintiff and the present Application. However, the court rubber stamp on the court papers bear 21/2/17. I take judicial notice of the fact that the date on the court registry rubber stamp is changed manually every morning. The inconsistency could have arisen from the Registry staff's failure to change the rubberstamp date on the morning of 22/2/2017. It would be inappropriate to reject the affidavit in those circumstances.

14. On the issue of the 1st Defendant's name, it is clear from Paragraphs 4 and 5 of the Plaintiff that the Defendants have been sued in their capacity as owners of Villa No. 14 erected on LR NO. 1870/III/140. Ownership of Villa No. 14 is not contested. It is also clear from court papers that the dispute before court relates to construction works by the Defendants. The 1st Defendant's full name is "Zahir Abdulrasul Manji". He has been sued under the name "Abdulrasul Manji". In my view, guided by Article 159 of the Constitution of Kenya, the omission to capture the 1st Defendant's full name or omission of a prefix of his name is not fatal to the Plaintiffs' suit. Secondly, it does not expose the Defendants to any prejudice or injustice. I would add that the 1st Defendant's decision to ignore the court papers while aware that he has been sued and served with court papers in his capacity as co-owner of Villa No. 14 is ill-informed.

15. From the material presented to this court, Land Reference Number 1870/III/140 (hereinafter referred to as "**the suit property**") is comprised in Title Number 54743. On this land are erected 14 residential villas. The villas were erected and titled on the basis of a site plan duly approved and registered by relevant authorities. Several long term leases were issued, one for each residential villa, on the basis of the registered site plan. The leases have been registered as instruments of title capable of formal transfer and mortgage. The set-up at Prestige Villas Estate, from the material presented to the court, is what is commonly referred to as a gated community estate.

16. The phenomenon of gated community is increasingly becoming a common feature in Kenya's housing sector. Where the housing units in a gated community are developed by a single developer on a title held on leasehold basis, often the practice has been that the reversionary interest in the mother title is transferred to the management company upon sale of all the units, The Management Company ultimately becomes the Lessor. The management company manages the gated estate. Each owner of a unit is a shareholder in the management company by virtue of the unit he owns. The share certificate becomes part of the title to the unit. Indeed Clause 3 (v) of each of the registered leases contemplates this scenario and provides as follows:

"upon all the villas being sold and the Leases with respect to each and everyone of them being registered in favour of the Lessees and subject to payment by the Lessees of the proportionate share of the costs and legal charges occasioned thereby the Lessors will transfer the reversionary interest under the property into the limited liability company to be registered by all the Lessees as equal share holders therein."

17. Parties have not presented to the court any specific framework of regulations put in place by the lessor to guide subsequent construction works within the Estate. In those circumstances, I have resorted to the regulatory framework within the Leases in seeking to answer the key question in this dispute. In this regard, I have looked at the Leases attached to the Affidavit in Support of the Application. I have also looked at the Lease attached to the 2nd Defendant's Replying Affidavit. All the Leases contain identical framework of rights, covenants, terms, conditions, obligations and benefits accruing to the title owners.

18. The clause on rights and benefits in the Defendants' Lease (Pages 3 and 4) provides that the Lease confers upon the Defendants, among others, "**the right to use in common with the owners and occupiers of all other villas and their visitors the gardens pleasure grounds drives paths and forecourts forming part of the property subject to such reasonable rules and regulations for the common enjoyment thereof as the lessor may from time to time prescribe**".

19. The clause on covenants in the same Lease imposes a covenant on each villa owner/lessee "**not to make any alterations in the said villa without the approval in writing of the Lessor to the plans and specifications thereof and to make such alterations only in accordance with such plans and**

specifications when approved”.

20. In my view, in the transition period, the Lessor contemplated in the Leases is the developer. Upon sale of all the Villas, the Lessor contemplated in the Leases is the limited liability company envisaged to be incorporated for the purpose of holding the reversionary interest under Clause 3 (V). Each villa owner would be a shareholder in the lessor company/management company. That Lessor is the missing link in the present scheme of operations in Prestige Villas Estate.

21. Secondly, I have carefully examined the approval granted to the Defendants by the Nairobi City County Government through a letter dated 17th May 2016. It is captioned: **“Authority for welding shelves, painting, floor, tiling and roof repairs on Plot NO. 1870/III/140 along Brookside Drive, Westlands.”**

22. Paragraph 2 of the Letter provides as follows:

“Authority is hereby granted to carry out the above maintenance works on the referenced plot subject to you having received consent for the same from the Landlord.”

Paragraph 4 of the Letter provides as follows

“This letter granting permission to undertake the said repairs does not authorize alterations or additions to the structure and/or plans. Further, only soft paint colours should be used externally. This letter does not grant authority to change the user of the premises or interfere with any tenancy agreement between or among parties to the premises.”

23. The question that arises in the circumstances of this case is whether or not one villa owner has the liberty to alter the original site plan, even if the alteration is merely for the purpose of creating an alternative exit to his villa, without seeking concurrence of the other villa owners. I am persuaded, on the basis of the totality of the framework of rights, benefits, covenants, obligations, conditions and terms contained in the instruments of title (the leases) alluded to in the forgoing paragraphs that, a villa owner within this kind of set up may not undertake works that alter the original registered site plan without seeking the consent or concurrence of the owners of other villas in the estate. In the absence of the lessor, consent of each of the other villa owners should be obtained. Any such alterations should be preceded by a new approved and registered site plan in accordance with the construction sector regulatory legal frameworks. I am similarly persuaded that the injury that may be suffered by the villa owners as a result of one villa proprietor unilaterally undertaking construction works that alter the original registered site plan and create private entrances through a common parking area is not one that can be adequately quantified and remedied through an award of damages.

24. It does appear to me, from the Letter dated 17/5/2016 attached to the 2nd Defendant’s Affidavit, that the authority granted to the defendants was restricted to the execution of maintenance works on their villa. It expressly prohibited them against undertaking “alterations or additions to the structure and/or plans”

25. The upshot of the foregoing is that I am satisfied that the Plaintiffs have established a prima facie case with a probability of success. I am also satisfied that damages would not be an adequate remedy in the unique circumstances of the dispute before court. Consequently, I make the following orders in disposing the Plaintiffs’ Notice of Motion dated 22/2/17.

(a) Pending the hearing and final determination of this suit, the Defendants, their agents and or servants are hereby restrained against altering the original design of Villa Number 14 comprised in the Lease registered as Title Number 55492/1 situated in Prestige Villas Estate, Brookside Drive, Westlands, Nairobi.

(b) Pending the hearing and final determination of this suit. The Defendants, their agents and servants are hereby restrained against blocking the original entrance and or creating a new

entrance to Villa Number 14 comprised in the Lease registered as Title Number 55492/1 situated in Prestige Villa Estate.

(c) The Plaintiffs shall amend the Plaint within 14 days to capture the 1st Defendant's full name as contained in the Lease attached to the 2nd Defendant's Affidavit.

(d) The Defendants shall file their statements of defence forthwith to facilitate pre-trial and date fixing with a view to expeditiously disposing this matter.

(e) A mention date shall be given at the time of reading this Ruling, for the purpose of confirming compliance.

Dated, signed and delivered at Nairobi on 27th day of April 2017.

B M EBOSO

J U D G E

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk