



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 313 OF 2015

SALIM YAHYA ABDALLA.....PLAINTIFF/APPLICANT

-VERSUS-

ABED GENERAL FURNITURE AND CONSTRUCTION LIMITED

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

THE COUNTY GOVERNMENT OF MOMBASA....DEFENDANTS/RESPONDENTS

RULING

1. The applicant/plaintiff moved this Court vide notice of motion dated 18th November 2015 seeking the following orders: -

1) Spent

2) Spent

3) That pending the hearing and determination of this suit the 1st Defendant/Respondent, by itself and/or its Directors, Developers, Contractors, Tenants, Lessees, Licencees or whoever be restrained by a temporary injunction from erecting or continuing to erect the current up-coming structure/or continuing to erect the current up-coming structure/building on Title sub-division number IMN/1282 and from each of them to respectively occupying it or putting it into any commercial use.

4) That this honourable Court be pleased to order the 2nd and 3rd Defendants/Respondents to compile and submit an Assessment and Evaluation Reports on the suitability of the up-coming commercial structure and file the same in Court for construction during the hearing of this suit and not to good occupiers and use licences till this suit is heard and determined.

5) That the costs of this Application be awarded to the Plaintiffs/Applicants.

2. The application is supported by the several grounds listed on the face of it and the supporting & further affidavit sworn by the applicant. The application is opposed by the three Respondents via the replying affidavits sworn by each of them.

3. Only the applicant & the 1st defendant filed written submissions in arguing the application. The

applicant has submitted that prayer 1 & 2 of the application has been overtaken by events. The applicant submits that the 3rd defendant did not execute its mandate until the applicant filed this suit. That some of the offending actions were only stopped after the applicant moved the Court. The applicant urged the Court to make an order allowing for the demolition of the wall encroaching on impala road. The applicant submits that if the orders are not granted, the 1st defendant may in future use the building as a factory.

4. The 1st defendant submitted that the plaintiff has not satisfied the three principles for granting of injunction. Its basis of submission being that it obtained all the requisite approvals/permits, that it is not building a factory and that there is a clear distance between the perimeter wall and the road. The 1st defendant posed the question whether the Court should grant an anticipatory injunction at this stage. The 1st defendant besides the case of **Giella vs Cassman Brown** cited the case of Joyce Mukubi vs Equity Building Society & Another (2005) ECLR where the Court stated that “where the remedy does not lie in equitable relief then damages would suffice.”

5. I have considered the pleadings filed together with the annexed documents in support of and against the application. I have also analysed the submissions rendered and the case law cited. In an application such as this, the applicant is expected to demonstrate either of the three principles i.e. prima facie case or irreparable harm or that the balance of convenience tilts in his favour to merit the orders of temporary injunction.

6. From his own pleadings the applicant states that the 1st defendant was constructing a factory on a residential area hence the reason he filed this suit. That subsequent to the pleadings being served on the Respondents, there were steps taken that partially changed the subject of the dispute. For instance that the 2nd & 3rd Respondents told the 1st Respondent not to construct a factory in the area. The 1st Respondent has also deposed that it will use the premises only as a showroom as its factory is located in Mtwapa. The only fear the applicant has is futuristic i.e. that the 1st Respondent may later change its mind and use the premises as a factory.

7. The second substantive issue in my view is whether to issue an order of demolition of a wall that is alleged to have encroached on impala road. First this sounds as a prayer for mandatory injunction. Yet the applicant has only sought for temporary orders of injunction. Further the applicant has only annexed photos to both his affidavit to demonstrate the alleged encroachment stating thus in paragraph 11 of further Affidavit **“annexed herewith is a photograph showing the encroachment and narrowing of impala road marked SYA 7.”** For all intents and purposes, a photograph and an internal memo annexed as **SY4** cannot be used as proof of encroachment at this stage. The applicant is ably represented by counsel and ought to know steps to take to avail satisfactory evidence on which a Court can be convinced to grant such an order.

8. The 1st defendant having stated on oath that it is not using and has no intention of using the premises as a factory in my view allays the fears the applicant may have had at the time of filing this application. Further in annexure **SYA – 5** to the supporting affidavit, the opinion of the applicant was sought as is required before the 2nd defendant issued a licence. The questionnaire clearly stated the 1st Respondent proposed project was intended as a furniture showroom. The questionnaire was filled and signed on 28.10.2015 by the applicant. This was before the applicant filed this suit. His claim that action was only taken after this suit was filed is not true.

9. Further the 3rd defendant has deposed that it gave the approvals after sorting out the applicant’s complaints. That it is within the 3rd Defendant’s Integrated Strategic Urban Development Plan for the county to adopt user trend towards commercial along links road and that there are several existing commercial developments along links road. The 1st defendant’s development is not the only commercial development along this road.

10. In light of these facts I come to the conclusion that there is no basis laid for this Court to grant the

orders as sought since the 1st Respondent has annexed licences issued by 2nd and 3rd Respondents. There is also no proof that the applicant will suffer any irreparable loss and no case was made for granting of the mandatory order for demolition of the wall at an interlocutory stage. The issue of the wall is better resolved by hearing the parties substantively or upon presentation of expert evidence given as the case may be. The issue of the premises being used as a factory in the future can be dealt when this Court will make final orders after hearing both parties. The application is hence dismissed with no order as to costs.

Dated, signed and delivered at Mombasa this 12th day of April 2017

A. OMOLLO

JUDGE