



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
IN THE ENVIRONMENT AND LAND COURT

ELC. CASE NO. 125 OF 2017

MEMBLEY PARK RESIDENTS ASSOCIATION.....PLAINTIFF/APPLICANT

VERSUS

THE PRESBYTERIAN FOUNDATION.....DEFENDANT/RESPONDENT

RULING

The Plaintiff herein *Membley Park Resident Association* has brought this Notice of Motion dated **21st February 2017**, against the Defendant, the *Presbyterian Foundation* and has sought for the following orders:

- a. THAT pending interpartes hearing of this application a temporary injunction be issued against the Defendant, their servants and/or anyone acting under their direction from any further development of the suit property situate in Jerusalem Court, Membley Estate.*
- b. THAT pending interpartes hearing of this application a temporary injunction be issued against the Defendant, their servants and/or anyone acting under their direction from operating a church or school in any other way interfering with the Plaintiff's members quiet possession of their properties situate in Jerusalem Court, Membley Park Estate.*
- c. THAT pending hearing of this suit a mandatory injunction order be issued against the Defendants compelling the defendants whether by themselves their servants, employees or agents otherwise howsoever to pull down any and all structures they have erected or caused to be placed on the suit property situate in Jerusalem Court, Membley Park Estate.*
- d. THAT the officer commanding Ruiru Police Station be directed to assist and ensure compliance by the Defendant with any Orders issued by this Court*
- e. THAT the cost of this application be borne by the defendant*

The application is supported by the grounds stated on the face of the application and on the affidavit of *Antony Kivuti Mwikaria*.

These grounds are:-

- 1. THAT the defendant has developed a church and a commercial school on their property Land Reference Number 14870/510 which is situate in a controlled, single dwelling, residential area.*

2. THAT the commercial development will adversely affect the social and physical amenities for the residents negatively.

3. THAT the construction is open violation of Planning Enforcement Notices issued by the County Government of Kiambu, Planning Department.

4. THAT the conduct of the respondent is borne of impunity and unlawful, that it contravenes the land use and physical planning regulations of the neighbourhood.

5. THAT the Plaintiff's members stand to suffer irreparable harm unless this court intervenes promptly.

6. THAT the actions of the Defendant are unlawful and wrong and warrant the timely intervention of this Honourable Court.

In his supporting Affidavit, **Antony Kivuti Mwikaria** averred that the Plaintiff is a Welfare Association for the residents of **Membley Park Estate, Ruiru, Kiambu County**. He also averred that sometime in **2015**, the Defendant was registered as the owner/proprietor of all that property known as Land registration **No. 14870/510** situated in **Jerusalem Court, Membley Park Estate Ruiru** as evidenced by **AKM3**. He also averred that all properties in **Jerusalem Court, Membley Park Estate** are subject of among other special conditions contained in the grant registered as **No. IR 511103/1**. Further that all properties situate in **Jerusalem court, Membley Park Ruiru** are zoned as purely residential as per annexures **AKM 5a and 5b**. It was his contention that sometime in the year **2015**, and without approval from the County Government of Kiambu, the Defendant erected a structure on its property which they unlawfully proceeded to use as a fully-fledged church branded as **"PCEA Ridges Church"** as evident from annexure **AKM7**. It was his further contention that the said church has caused **congestion, noise, pollution** and poses a **security threat** and if the school is allowed to begin operation on a residential area, it will cause untold inconveniences to the residents of **Jerusalem Court and Membley Park Estate** as whole. Therefore the Defendants actions have deleterious consequences on the property rights of members of the Plaintiff and if the Development are allowed to stand, they will greatly reduce the aesthetic appeal of the Plaintiff's members' properties, **cause nuisance** to the quiet enjoyment of the residents of **Jerusalem Court, Membley Park Estate** and seriously reduce the value and appeal of the Plaintiff's members homes. The Plaintiff urged the Court to allow the application.

The application is contested. **Samuel Gatheru Kanyoro**, the property Officer of the **Presbyterian Foundation** swore a **Replying Affidavit** and averred that the Defendant bought the plots at **Membley Estate** in the year **2014** and constructed a temporary building for worshipping in. Further that in the year **2015**, the Church endeavored to put up a school. He also averred that the church submitted the drawings of the school to the County Government of Kiambu and the same were duly approved. Further that the Church built a one storeyed block of classes with an aim of admitting students in the **January 2017**. It was his contention that the said Block of classes is complete and no construction is going on or any of the three plots, that belong to the church. He also contended that since the year **2014**, nobody in **Membley Estate** opposed the construction of the temporary church and the permanent structure that house the school. He further contended that the development of the church and the school has so far costed **Kshs. 40,000,000/=**. Further that the move by the Plaintiff to stop the operationalizing of the school is oppressive as there are other churches operating within Membley Estate such as the **Catholic Church, ACK Church** and **Focus Academy**.

He also averred that the demand by the Plaintiff has caused a lot of damage and waste as it has cost the school a whole term and that there are no incidents of insecurity in the area since the school was built. The Defendant/Respondent urged the Court to disallow the application.

The Plaintiff also filed a further affidavit and reiterated that the defendant has changed the use of the property from residential to commercial without obtaining the relevant change of use approval and as per law and which would have included proper notification of the adjacent home owners.

The application was canvassed by way of written submission. The Law Firm of *Muhoro and Gitonga Advocates* for the Plaintiff filed their Written Submissions on **10th April 2017**, and urged the Court to allow the application. They relied on the case of *Giella Vs Cassman Brown & Company Limited (1973) E.A 361*, where the court held that:

“First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

On behalf of the Defendant, the Law Firm of *Ndungu Mwaura & Company Advocates* filed their written submission on **11th May 2017**, and urged the Court to dismiss the instant application with costs.

This court has now carefully considered the instant Notice of Motion, the annexures, thereto and the pleadings in general. The Court has also considered the Written Submissions and the relevant provisions of Law and the Court makes the following findings.

The applicant has filed this Motion under **Order 40 Rules 1,2,3 and 4** of the Civil Procedure Rules which provides that where **“any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the Defendant threatens, or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be destructed or delayed in the execution of any decree that may be passed against the Defendant in the Court the Court may order or grant a temporary injunction to restrain such act”**

From the facts of this case, the Plaintiff herein is a Welfare Association for the residents of **Membley Park Ruiru**, whereas the Defendant is the registered owner of the **L.R.No 14870/510** situated in **Jerusalem Court, Membley Park Estate**.

The Defendant being the registered owner of the suit property, then by dint of section **26(1)** of the Land Registration Act, it is deemed to be the **absolute and indefeasible** owner subject to the **encumbrances, easements, restrictions** and **conditions** contained or endorsed in the certificate.

Further as an absolute and **indefeasible** owner of the suit property Sections **24** and **25** of the **Land Registration Act confers** rights to such an owner which can only be defeated through operation of the Law. Section **24(a)** of the Land Registration Act provides that

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all right and privileges belonging or appurtenant thereto”

Further section **25(1)** of the same Act provides that:-

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenance belonging thereto, free from all the interest and claim whatsoever –“

It is alleged that the Defendant herein has put up a church and a school in its suit property which is contrary to the conditions contained in the Grant and without approval from the County Government of Kiambu. However, the Defendant has alleged they indeed put up the development as alleged by the Plaintiff/applicant but with approval from the county Government of Kiambu. The Defendant annexed a letter dated **23rd January 2015**, from the County Government of Kiambu approving its proposed development on Plot **No 14870/510**, Ruiru which is the suit property owned by the Defendant. Indeed the said letter is an approval for the proposed development. Though the Plaintiff has annexed an Enforcement Notice dated **24th January 2017**, by County Government of Kiambu to the Defendant herein, the said Notice is not by the Plaintiff and the said County Government of Kiambu is not a party to

the suit or a complainant to the fact that the Defendant has continued to construct on the suit premise even with the existence of the Planning Enforcement Notice. The Plaintiff herein cannot file the suit on behalf of the County Government of Kiambu.

Further the Plaintiff have alleged that the Defendant has breached the condition contained on the Grant being Interlalia.

“The Land and building shall only be used for residential purposes excluding guest house”

The Plaintiff quoted the said grant **No LR .511103/1** which was marked as annexure **AKM4**. However, the Grant was issued by the **Commissioner of Lands** and not the Plaintiff herein. The Chief Land Registrar or the **National Land Commission** who are the successors to the Commissioner of Lands are not parties to this suit. They have not complained that the Defendant has breached the special conditions on the Grant. Further the issue of whether the special conditions were breached or not is a matter of evidence which cannot be decided at this Interlocutory stage. As was held in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988)KLR1**, that

“in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weight the relative strength of the parties cases,”

In the instant matter, the court cannot hold at this stage that indeed the Defendant has breached the special conditions on the Grant without hearing evidence of the relevant witnesses especially witnesses from the Ministry of Lands. It is also evident that the Defendant has put up a building that houses the stated classes. The said building was not built in a day. The Defendant alleged that it started the development and construction in the year **2015** and was ready to commence classes in **January 2017**. Where was the plaintiff when the Defendant put up the building and finished the classes? Why didn't the Plaintiff seek for injunction during the construction of this building. Why wait until now?.

The purpose of injunction is to injunct or prevent an intended action. Injunctions are not issued when an event has already occurred. The Defendant has alleged that the Plaintiff's application is activated by **“malice”** see the case of **Mavoloni Company Ltd Vs Standard Chartered Estate Management Ltd ,Civil Application No 266 of 1997 (Nairobi)**, where the Court held that:-

“An injunction cannot be granted once the event intended to be injuncted has been overtaken by events The applicant must come to court with clean hands.”

The Court has considered the facts and circumstances of this case and finds that the Plaintiff/Applicant has failed to establish the threshold for grant of both temporary and mandatory injunction as prayed in the Notice of Motion dated **2nd February 2017**.

For the above reasons the Court finds the instant Notice of Motion is not merited. The same is **dismissed entirely with costs** to the Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered on 25th May 2017.

L. GACHERU

JUDGE

25/5/2017

In the present of

Mr. Gitonga for Plaintiff/Applicant

No appearance for Defendant/Respondent

Court Clerk: Rachael

Court: Ruling read in open court in the presence of Mr. Gitonga for Plaintiff and absence of Advocate for the Defendant/Respondent.

L. GACHERU

JUDGE

25/5/2017