Kimani & another v Superior Homes (Kenya) PLC & another (Environment & Land Case E053 of 2023) [2024] KEELC 14 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 14 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E053 OF 2023

A NYUKURI, J

JANUARY 17, 2024

BETWEEN

BENSON MUSILA KIMANI ..... 1ST PLAINTIFF

JAMES WAMBUA MASAI ..... 2ND PLAINTIFF

AND

SUPERIOR HOMES (KENYA) PLC ..... 1ST DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS ..... 2ND DEFENDANT

RULING

1. Before court is a Notice of Motion dated 7th November 2023 filed by the plaintiff seeking the following orders;

   a. Spent

   b. Spent

   c. That upon hearing and determination of this application, this Honourable Court be and is hereby pleased to issue an order for injunction restraining the 1st defendant/respondent, its servants, employees and/or agents from proceeding or howsoever continuing to excavate, build/construct and/or erect buildings and/or structures within parcel of land known as LR No. 27409, Green Park Estate, cluster 5 within Green Park Estate, Mavoko Sub-County, Machakos County, which do not comply with the original development plan of the houses sold to the applicants and the estate which estate is for single dwelling houses until this suit is heard and determined.

   d. That in the alternative to prayer two above, an order of status quo be issued against the 1st defendant/respondent, its servants, employees and/or agents from proceeding or howsoever continuing to excavate, build/construct and/or erect buildings and/or structures within the

parcel of land known as LR No. 27409, Green Park Estate, cluster 5 within Green Park Estate, Mavoko Sub-County, Machakos County which do not comply with the original development plan of the houses sold to the applicants and the estate which estate is for single dwelling houses.

e. That the costs of this application be paid by the 1st defendant/respondent.

2. The application is anchored on the grounds on its face together with the affidavit sworn by the applicants/plaintiffs Benson Kimani and James Wambua Masai on 7th November 2023. The applicants' case is that they are owners of houses Nos. SD1058E and SD1040E situated in cluster five within Green Park Estate which they purchased from the 1st defendant vide sale agreements dated January 2022 and 2018 respectively.

3. They stated that before purchasing their houses, the 1st defendant's employees represented and marketed the developments in Green Park Estate asserting that the estate will purely consist of villas, bungalows and maisonettes of ground and 1st floor residential houses erected on a specified height and built on a particular size of land. That from the time they purchased their houses up to now, Green Park Estate purely consists of the residential houses described above. They maintained that it was an express and implied term of the sale agreements that the 1st defendant who is the developer will maintain the unique standard and style of houses within Green Park Estate as represented to the applicants and that they purchased their respective houses on the basis of the existing designs, structure, style and standard of life, serenity, nature and environment within Green Park Estate cluster five.

4. The applicants' complaint is that in the first week of October 2023, without their knowledge, consultation, or approval, and in violation of the original development plans, the 1st defendant started excavating foundations on LR. No. 27409 (suit property) with a view of developing a multi-dwelling apartment adjourning the applicants houses within cluster five of Green Park Estate. They stated that on 17th October 2023, the 1st defendant attempted to regularize their unlawful construction by sending through Whatsapp messaging application, to members living in cluster five, asking them to attend a meeting on the same date at 6 p.m. at Sandowner Hotel within the estate. That due to the short notice and work commitments, the applicants were unable to attend.

5. That the 1st defendant's CEO one Shiv Arora and employees of Gem Management Company Limited, the company managing the affairs of the estate were in attendance at the meeting and it was disclosed that the 1st defendant intended to construct a three floor apartment on the suit property. That this meeting aborted for lack of quorum. They stated that the 1st defendant has not held any other meeting to seek the views of the residents in regard to the construction of apartments on the suit property.

6. They asserted that the 1st defendant erected a sign board showing that their construction was approved by the County Government of Machakos and NEMA. They held the view that those alleged approvals were unlawful and unprocedural as their participation was not sought and for failure to comply with the existing original development plans within the estate.

7. They stated further that the 1st Defendant's conduct amounts to unilateral, illegal and fraudulent change of user on LR. No. 27409 (suit property) which is contrary to the original plan. They stated that the management company did not approve the construction in dispute and the members thereof including the applicants were not consulted.

8. That they also learnt that the mother title had been used to secure a loan of over a half a billion Kenya shillings between 2021 and 2022, putting their properties at risk. They stated that unless the orders sought are granted they stand to suffer irreparably on their right to privacy and ownership of houses. They attached sale agreements for house numbers SD1058E and SD1040E; photographs of excavated

site on the suit property; photographs of the sign post by the 1st defendant; letter from Coulson Harney LLP dated 25th October 2023; a reminder dated 1st November 2023; and CR 12 dated 29th May 2023.

9. The application was opposed. The 1st defendant filed a preliminary objection dated 29th November 2023, contending that this court lacks jurisdiction to hear and determine this matter as the suit offends the provisions of Section 80 of the *Physical and Land Use Planning Act*, 2019 and Section 129 of the Environmental Management and Coordination Act 1999. They argued that the applicants had not exhausted the dispute resolution mechanisms available to them.

10. In addition, the 1st defendant through their Chief Executive Officer, one Shiv Arora, swore a replying affidavit dated 29th November 2023. He deponed that the suit is a mere challenge to approvals issued by the 2nd defendant and NEMA and that therefore they must be referred to the County Physical and Land Use Planning Liaison Committee and National Environment Tribunal.

11. He deponed further that the 1st defendant is the developer of Green Park Estate, a master planned gated community with over 500 completed and occupied homes together with amenities including schools, a hotel with conference facilities, a restaurant and bar, a swimming pool, a gym, wedding grounds, a football turf, a retail strip mall and a retirement village. That since inception of the estate, the 1st defendant has continued to improve the estate to ensure quality standard of living for the residents and continues to do so, as there are still future projects yet to be implemented.

12. According to the 1st defendant, as part of the estate's development projections, on or about July 2023, the 1st defendant commenced construction of multi-dwelling apartment building in accordance with its quality standards and in compliance with the law. That prior to the developments the 1st defendant commenced consultative meetings with owners of the estate to explain the intended project and receive their views. He deponed that on 17th October 2023, for purposes of collecting views the management company of the 1st defendant to wit Gems Management Limited sent out formal communication to all the owners scheduling a meeting on 17th October 2023.

13. He stated that on 17th October 2023, quorum was not sufficient to conduct the day's business and that the management company called off the meeting but still accorded the owners opportunity to share their views outside a physical meeting session. He stated that the 1st defendant did not receive any objecting views to the project until the 24th October 2023 when they received a demand letter from the plaintiffs. He stated that it was only the plaintiffs who objected to the project.

14. He denied the allegation that their advocate received a reminder or communication by email and alleged that the email address used by the plaintiff was a wrong email address. He maintained that in regard to public participation, what is key is that a reasonable opportunity is afforded to members of public and interested parties to know about the issues and have an adequate say. Further, that the legal standard for public participation is not meant to usurp the technical role of relevant Government agencies, but to enrich views collected regarding the project.

15. He denied the allegation that the 1st defendant had deviated from the original plans and stated that the luxurious standard of living in the estate has been maintained by the defendant. He further denied allegations that the project would deny the applicants the right to a clean and healthy environment. He denied the assertion that the 1st defendant had used the mother title to obtain loan and stated that the blame for delay in issuance of titles to the applicants was on the lands registry.

16. He stated that the applicants had failed to meet the threshold for grant of the orders of injunction, status quo and declarations and that the 1st defendant has a right under Article 40 of *the Constitution*

of Kenya 2010 to enjoy the use of their property. They attached an invitation for the meeting of 17th October 2023 and a response to a demand letter.

17. In a rejoinder, the applicants swore a replying affidavit dated 4th December 2023 in opposition to the 1st defendant's preliminary objection. They contended that this court has jurisdiction to hear and determine this suit under Section 13 (3) of the *Environment and Land Court Act* on issues relating to environmental planning, protection of the environment and land use and planning. He stated that the issues raised extend beyond environment and planning issues and extends to use of the mother title by the 1st defendant for a debenture, without the plaintiffs' knowledge or consent and approval of the management company.

18. They deponed that the 1st defendant had not demonstrated existence of approval of plans and NEMA licence, which would be subject to Section 80 of the *Physical and Land Use Planning Act*, 2019 and Section 129 of EMCA. That they moved the court after the 1st defendant failed to supply them with the above approvals and licences as they are non existent, and that therefore the preliminary objection is not based on the facts.

19. They held the view that Section 80 of the *Physical and Land Use Planning Act*, 2019 is only applicable where a decision to approve a development plan exists and the applicants have been involved in the planning and decision making but are dissatisfied with such decision. They maintained that in this case, they were not involved in any way with the alleged planning that led to the current construction of multi-dwelling apartments by the 1st defendant. That having not participated in the decision relating to planning, leading to the current development they do not know the nature of the decision arrived at and are strangers to any such decision; hence cannot appeal a decision they are not aware of. That as the management company did not participate in any meeting, there was no resolution approving construction of multi-dwelling apartments.

20. They further stated that their efforts to obtain development plans relating to the current multi-dwelling apartments from the 1st defendant vide their demand letter of 24th October 2023 did not bear any fruits. That the failure to provide building plans by the 1st defendant confirmed none existence of the same which brings this suit within the jurisdiction of this court. That hence the 1st defendant is estopped from relying on Section 80 of the *Physical and Land Use Planning Act* 2019.

21. As regards the applicability of Section 129 of EMCA, they stated that they do not know whether NEMA granted a licence to the 1st defendant and if it did, when the same was granted. That they have sought for the same from the 1st defendant in vain, hence they cannot appeal a decision they are not aware of.

22. They pointed out that the 1st defendant had by their letter dated 14th November 2023 admitted that they intend to develop a multi-dwelling apartment on the suit property, yet the estate purely consists of quarter villas, bungalows and maisonettes. They attached their letter dated 24th October 2023 and a letter dated 14th November 2023 by the 1st defendant's counsel.

23. On 13th December 2023, the court directed that both the preliminary objection and the application dated 7th November 2023 shall be heard together. Parties were granted the liberty to file written submissions. On record are two sets of submissions filed by the applicants on 5th December 2020 and two sets of submissions filed by the 1st defendant/respondent on 8th December 2023.

24. Despite service, the 2nd defendant/respondent did not enter appearance or file any response to the application or submissions.

Applicants' submissions

25. In regard to the preliminary objection, counsel for the applicants submitted that the preliminary objection herein lacks merit as the issues raised go beyond the mandate of the statutory bodies under Section 80 of the *Physical and Land Use Planning Act* 2019, and Section 129 of EMCA.

26. Counsel submitted that Article 162 (2) (b) of *the Constitution* as read with Section 13 (3) of the *Environment and Land Court Act* places original jurisdiction on this court to determine matters relating to environmental planning, protection of the environment and violation of proprietary use of land as enshrined in the reversionary interest accorded to the management company and matters of land use planning. Counsel argued that the plaintiffs have faulted the lack of approval for development of multi-dwelling apartment by the management company and the illegal use of the mother titles to secure loans of about a half a billion Kenya shillings, a fact not disputed by the 1st defendant. Counsel argued that the 1st defendant did not attach the approvals by the 2nd defendant or licence from NEMA and that therefore this dispute cannot be subject to Section 80 of the Physical Planning and Land Use Act, 2019 and Section 129 of EMCA.

27. Reliance was placed on the cases of Paolo Di Maria & 5 Others v. Alice M. Kuria & 5 Others Malindi ELC No. 46 of 2021 and Taib Investments Limited v. Fahim Salim Said & 5 Others [2016] eKLR, for the proposition that in the absence of a approval or denial of approval or licence from NEMA there can be nothing to appeal.

28. On the merits of the application counsel submitted that the only information known to the applicants regarding approval of plans for multi-dwelling apartments by the 1st defendant is the information placed on the construction notice board in annexture 3 and that the applicants have no information on the decisions of the 2nd defendant and NEMA and that they were not consulted prior to commencement of the dwelling apartments. Counsel maintained that the applicants assertion that the disputed construction commenced on the first week of October is not disputed while the consultative meeting was scheduled for 17th October 2023 but the same did not take place. Counsel contended that there is no evidence of consultation yet the 1st defendant was going ahead with the disputed developments. Counsel faulted the 1st defendant's argument that the development would improve the living standards of the estate on the basis that no expert report was produced to support that allegation.

29. On whether the applicants are entitled to the orders sought counsel submitted that the applicant had proved their case as the 1st defendant did not dispute the assertion that prior to the applicants' purchase of their respective houses, the estate was comprised of villas, bungalows and maisonettes. According to counsel, the 1st defendant unilaterally decided to construct multi-dwelling apartments in violation of the original development plans. Reliance was placed on the case of Issa Ahmed & Others v. Mohamed Al Sawe for the proposition that residents in a community ought to maintain certain standards and quality of life.

1st defendant/respondent's submissions

30. Counsel for the 1st defendant submitted in regard to the preliminary objection, that this court has no jurisdiction to hear and determine this suit as it is based on alleged environmental hazards and building approvals. Counsel argued that where there is a forum provided to address a concern in *the Constitution* or statute, a party must first exhaust those options before approaching the court. Reliance was placed on the cases of Speaker of National Assembly v. James Njenga Karume [1992] eKLR and Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1.

31. It was submitted that the suit challenged approvals of building plans and grant of licence by the 2nd defendant and NEMA respectively hence by virtue of Sections 80 of the Physical Planning and Land Use Act 2019 and Section 129 of EMCA the bodies with the jurisdiction to hear and determine the dispute herein is not this court, but only the County Physical and Land Use Planning Liaison Committee and the National Environment Tribunal respectively. In buttressing this argument, counsel referred the court to the cases of Eaton Towers Kenya Limited v. Kasing'a & 5 Others and Daniel Kariuki Mbugua & 8 Others v. Joseph Njenga Wachaiyu & 4 Others [2022] eKLR.

32. Counsel argued that it was not true that the applicants had not seen the decisions of NEMA and the County Physical Planning and Liaison Committee as they admitted the same in paragraph 14 of their supporting affidavit. Counsel argued that the case of Paolo Di Maria & 5 Others v. Alice M. Kuria & 5 Others, ought to be distinguished from this case since in that case; NEMA denied issuing any licence.

33. On the parameters for a preliminary objection, counsel relied on the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 969 and argued that the court should "assume to be true" the arguments regarding approvals issued to the 1st defendant. Reliance was placed on the case of Benson Ambuti Adega & 2 Others v. Kibos Distillers Ltd & 5 Others [2020] eKLR on the doctrine of exhaustion of local remedies.

34. On whether the application herein was merited, counsel submitted that the applicants had not met the threshold for grant of temporary injunction set out in the celebrated case of Giella v. Cassman Brown & Co. Ltd [1973] EA 358.

35. On whether the applicants had demonstrated a prima facie case, counsel argued that the applicants' suit was based on assertions that the 1st defendant's project was in violation of original development plans and that this allegation was not proved.

36. On the issue of public participation, counsel relied on the case of Mui Coal Basin Local Community [2015] eKLR and Kenya Human Rights Commission v. Communication Authority of Kenya & 4 Others [2018] eKLR and argued that public participation does not require everyone to give their views or that their views will be taken as controlling and that public participation is not meant to usurp the technical role of office holders. Counsel argued that the applicants conceded that the 1st defendant called for a meeting and considered calling another meeting but before the next meeting could be called, this suit was instituted.

37. Counsel contended that the applicants failed to fault NEMA and the County Physical Planning Liaison Committee, and that therefore they had failed to establish a case against the 1st defendant.

38. On the question of irreparable harm, counsel argued that the applicants had not demonstrated the same and the nature of the loss or injury had not been proved. Counsel relied on the case of Paul Gitonga Wanjau v. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR to contend that irreparable loss should show substantial loss that cannot be atoned by damages. Counsel submitted that the balance of convenience tilted in favour of the 1st defendant.

39. Counsel contended that the 1st defendant was entitled to the right to peacefully enjoy the use of their property under Article 40 of *the Constitution* of Kenya 2010 and referred to the case of Chief Land Registrar & 4 Others v. Nathan Tirop Koech & 4 Others [2018] eKLR. Counsel argued that there was no justification to interference with the 1st defendant's use of the suit property.

40. Counsel argued that the 1st defendant had expended significant amounts of time and money in developing the project and has contractual obligations towards third parties and that therefore they

would suffer grave injustice if the application is allowed. Counsel argued that the project would generate revenue for the Government of Kenya and employment opportunities for Kenyans.

Analysis and determination

41. The court has carefully considered the preliminary objection and the application herein and two issues arise for consideration, namely;

    a. Whether the preliminary objection is merited.

    b. Whether the applicants have met the threshold for grant of injunction and or status quo order.

42. A preliminary objection is a pure point of law raised on the pleadings on the basis that the facts relied upon are not disputed by the parties. In the case of Mukisa Biscuits Manufacturing C. Ltd v. West End Distributors Ltd [1969] EA 696, the court held as follows;

> "A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Example are an objection to the jurisdiction of the court or a plead for limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration."

In the same case, Sir Charles Newbold P. stated as follows;

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and on occasion confuse the issue, and this improper practice should stop."

43. The crux of the 1st defendant's preliminary objection is that the applicants suit faults issuance of building approvals by the 2nd defendant herein and the grant of licence by NEMA for construction of multi-dwelling apartments on the suit property by NEMA. According to the 1st defendant, the applicants should have exhausted administrative remedies provided in Section 80 of the *Physical and Land Use Planning Act* 2019 and Section 129 of the Environment Management and Coordination Act (EMCA). The applicants/plaintiffs have denied existence of decisions of the 2nd defendant and NEMA and state that if such decisions existed, they did not participate in such decision making process and are not aware of the same. The 1st defendant countered by arguing that in paragraph 14 of the applicants' supporting affidavit, the applicants conceded to the existence of decisions by the 2nd defendant and NEMA and the court should assume that those decisions exist.

44. I have considered paragraph 14 of the replying affidavit of the applicants sworn on 7th November 2023 and they state that at the time of commencing excavations, the 1st defendant erected a signboard on the suit property indicating that the intended development was approved by the 2nd defendant vide approval No. MVK/2014/07/23 and by NEMA vide approval No. NEMA/EIA/PLS/26193. Having considered the contents of paragraph 14 of the applicants' affidavit, I find nothing in that paragraph to suggest that there exists decisions by the 2nd defendant and NEMA appeallable under Section 80 of the Physical Planning and Land Use Act 2019 and Section 129 of EMCA. The applicants were merely reporting what was written on the signboard and not whether what was on the signboard was indeed what had happened. Therefore, I disagree with the 1st defendant's submissions that the applicants admit the existence of decisions by the 2nd defendant and NEMA.

45. The owner of the preliminary objection is the 1st defendant and under Section 107 of the *Evidence Act*, a party who desires a decision in their faovour, bears the burden of proving their allegations. It was therefore incumbent upon the 1st defendant to demonstrate that there exists decisions by the 2nd defendant and NEMA which ought to have been appealed against before the County Physical Planning and Land Use Liaison Committee and NET respectively. They ought to have provided those decisions in view of the applicants' denial of their existence. The applicants having sworn in their further affidavit that they sought for the said decisions from the 1st defendant in vain, and the 1st defendant having failed to attach the same to their replying affidavit, the only logical conclusion that this court can make is that the same do not exist. This is because, by raising the preliminary objection herein based on the said alleged decisions, the 1st defendant is acutely aware that the same are material documents upon which they seek to have this suit struck out, yet they have not provided the same. In addition, no defence has been filed by the 1st defendant for the court to deduce undisputed facts. In the premises, I find and hold that the preliminary objection herein is based on disputed facts and therefore the same lacks merit and is dismissed.

46. On the merits of the application, Order 40 Rule 1 of the Civil Procedure Rules provides that a court has power to grant temporary injunction where there is a danger of any disputed property being wasted, damaged, alienated, disposed or removed in circumstances that may defeat or obstruct the plaintiff from executing a decree which may eventually be made in their favour.

47. Principles for grant of temporary injunction are well settled. The applicant must prove the following;

    a. Establish a prima facie case with chances of success.

    b. Demonstrate that they stand to suffer irreparable injury that may not be compensated in damages if the injunction is not granted.

    c. Where the court is in doubt as to whether the likely injury is irreparable, the court ought to decide the application on the balance of convenience. (See Giella v. Cassman Brown Co. Ltd [1973] EA 358).

48. In the case of Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal held as follows;

> "In an interlocutory injunction application the applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which vest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

49. A prima facie case is a case in which a claimant has demonstrated that there exists a right which has ostensibly been violated by the defendant which calls for a response from the latter. In the case of Mrao

Ltd v. First American Bank of Kenya Ltd [2003] eKLR the Court of Appeal described a prima facie case in the following terms;

> "In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

50. In the instant application, the applicants' case is that at the time of purchasing their respective houses, the representations made by the 1st defendant was that the residential houses to be build on the suit sectional property would be villas, bungalows and maisonettes consisting of ground and first floors only. They complained that the 1st defendant had violated this agreement and contrary to approved plans, they had began constructing three-floor apartments without consulting or obtaining consent of the applicants to vary the approved plans.

51. The applicants have asserted that the 1st defendant's departure from the approved plans is a breach of the contracts between themselves and will compromise and violate their privacy and pose serious health hazards including dust, sound pollution, cracking of walls due to excavations; mosquito invasion due to flooding; pressure on existing water supply scarcity, sewerage system, air circulation; serenity; natural view and also prejudice their right to a clean and healthy environment. It is clear that the properties herein are sectional properties and therefore this dispute is governed by the *Sectional Properties Act*.

52. I have considered agreements produced by the applicants, and it is clear that both applicants purchased detached maisonettes from the 1st defendant. The agreements also refer to approved plans which are said to be available for inspection at the 1st defendant's site offices. While the 1st defendant has asserted that the intended development of apartments on the suit property fits the high quality of life within the estate and that it is in compliance with the law; they have not denied the applicants' assertions that construction of apartments on the suit property would be contrary to the approved plans of the estate which was the basis of the agreements herein. In addition, the applicants contend that the intention to construct apartments on the suit property was a change of the initial approved plan without consulting them. In response, the 1st defendant did not deny that the meeting called on Whatsapp platform on 17th October 2023 gave less than one day's notice and therefore it is doubtful whether public participation in the change of the approved plans ever took place hence that matter ought to be interrogated further as public participation is one of our national values and principles of governance enshrined in Article 10 (2) (a) and which binds all state and non state actors in decision making whenever such actors apply or interpret the law or *the Constitution* or implement public policy decisions.

53. Considering that the agreements between the applicants and the 1st defendant were premised on approved sectional plans, and the fact that the applicants purchased maisonettes while the 1st defendant has not shown that the intended apartment construction would be in accordance with the approved plans, coupled with the fact that the notice for consultative meeting was issued less than a day before the scheduled meeting which aborted, I am satisfied that the applicants have demonstrated a prima facie case with chances of success.

54. On whether the loss likely to be suffered by the applicants is irreparable, I note that the applicants have stated that putting up apartments on the suit property will affect the already scarce water supply, sewerage system, air circulation, serenity, natural view and affect their right to a clean and healthy environment. In my view of the above, I agree with the applicants that they stand to suffer irreparable loss that may not be compensated in damages, if the injunction is not granted.

55. On where the balance of convenience tilts, the fact that it is not disputed by the 1st defendant that so far there are no apartments on the suit property where there are over 500 houses and the applicants having both purchased maisonettes, my view is that the balance of convenience tilts in favour of the applicants.

56. In the premises, I am satisfied that the application dated 7th November 2023 is merited and the same is allowed in the following terms;

    a. That an order of temporary injunction be and is hereby granted restraining the 1st defendant/respondent, their servants, employees and/or agents from continuing to excavate, construct or erect buildings within the parcel of land known as LR. No. 27409, Green Park Estate, Cluster 5, within Green Park Estate, Mavoko Sub-County, Machakos County, which do not comply with the original development plan of the houses sold to the applicants and the estate which is for single dwelling houses until this suit is heard and determined.

    b. The costs of the application shall be borne by the 1st defendant/respondent.

57. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE