



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 238 OF 2014

TWIGA CONSTRUCTION COMPANY.....1ST PLAINTIFF

ALLIED INDUSTRIES LIMITED..... 2ND PLAINTIFF

=VERSUS=

DIRECTOR OF PHYSICAL PLANNING NAIROBI CITY COUNTY.....1ST DEFENDANT

COUNTY SECRETARY..... 2ND DEFENDANT

NATIONAL LAND COMMISSION..... 3RD DEFENDANT

FOX GROVE LIMITED.....INTERESTED PARTY

RULING

1. This is a ruling in respect of two separate notices of motion which are interrelated. The first notice of motion is dated 4th March, 2014 and the second one is dated 7th September, 2016. Both motions were brought by the Plaintiffs/ Applicants. When the first motion was placed before the Court, orders of maintenance of status quo were granted in favour of the applicants. Subsequent to the grant of those orders, a third defendant, was enjoined in the suit. This defendant had written a letter to the applicants raising concerns that the Applicants had blocked a Public access road and had encroached on riparian section of Ruaka river. This is what necessitated the Applicants to file the notice of motion dated 7th September, 2016 so as to bring it under the orders of Status quo which had been given on 15th April, 2016.

2. The Applicants are all limited liability companies incorporated under the Companies Act. The two are sister companies. The first Applicant owns LR No. 29/6/26. The second applicant owns LR No. 11880/2. The two properties are opposite each other and are separated according to the applicants by a way leave where power lines and sewer lines pass as well as storm water drainage systems. The applicants have erected a barrier gate for security reasons. This barrier gate is however accessible to Public service providers like the Kenya Power & Lighting company limited and Nairobi water and Sewerage company limited.

3. The Applicants contend that the first respondent has issued an enforcement notice against the second applicant requiring it to demolish a perimeter wall which has blocked a public access road. The applicants contend that the first respondent's action is illegal as they have not blocked

any access road. The Applicants contend that what is between the two properties is a way leave and that the constructions which they carried on were approved by all the relevant authorities including the National Environment Management Authority (NEMA).

4. The Applicants application of 4th March, 2014 has been opposed by the first and second respondents through a replying affidavit of J. K. Bareh sworn on 9th May, 2014. The first and second respondents contend that the applicants have not exhibited any approval plans as claimed in the Supporting affidavit. That there is no survey map annexed as alleged. That the Applicants are guilty of non-disclosure and that the applicants application is contradictory in that they claim that they have not constructed on the area in dispute yet they are seeking injunctive orders to stop demolition.

5. The Applicant's application of 4th March, 2014 is also opposed by the Interested Party Fox grove Limited based on a replying affidavit by Praful G. Godhia sworn on 19th March, 2015. The deponent of this affidavit contends that the Interested party is the owner of LR No. 11880/10 which neighbours the two parcels owned by the Applicants. That the applicants have constructed a wall which has blocked a Public access road. The blocked road is the one which the Interested party uses to access its property.

6. The Interested Party further contends that the road which has been blocked exists as shown in Deed plan number 326436 attached to the certificate of Title of its property. The Interested party contends that if the blocked road is not opened, its property will remain landlocked.

7. As I said hereinabove, the two applications are interrelated and there was no need for the Interested party to respond to it as it had already responded to the Notice of Motion of 4th March, 2014. It is only the third Respondent National Land Commission (NLC) who filed grounds of opposition to the Notice of Motion dated 7th September, 2016 because it had not been enjoined into this suit as at the time the Notice of Motion dated 4th March, 2014 was filed. The third respondent opposes grant of the orders sought by the Applicants.

8. I have carefully considered the applicants two applications as well as the opposition to the same by the respondents. The applicants are basically seeking injunctive orders against the respondents. What is not disputed is that the applicants have blocked the way between its properties and that of the Interested party. It does not matter whether that is a Public access road or a way leave. The issue which needs to be considered is whether the applicants have a right to block the same.

9. Though the Applicants claim that they got approvals to construct from the relevant authorities, there is no such approvals exhibited in their affidavit in support of the applications. What was annexed to the Supporting Affidavit in support of Notice of motion dated 4th March, 2014 is a building Plan which is not approved and does not relate to the disputed way. There is nothing shown to prove that either Kenya Power and Lighting company limited or Nairobi Water and sewerage company limited allowed the applicants to construct a wall. The certificate of variation of Environmental impact assessment licence by NEMA was in respect of Construction of 14 go downs and not construction of a perimeter wall to block the access road or way leave whatever the case.

10. An injunction is an equitable remedy and whoever comes to Court has to come with clean hands. **See Elijah Kipng'eno Arap Biir -vs- Kenya Commercial Bank Limited (2001) eKLR** where Justice Ringera J as he then was stated as follows:

“And it must always be remembered that an injunction is an equitable remedy. It may be denied to an applicant whose conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.”

11. The Applicants herein have claimed that they had the necessary approvals to erect the wall. They have failed to prove that they had any. The Applicants claim that they erected the wall for the security of their go downs. The Applicants cannot block a public way for their own sake. This is unfair to the interested party who is entitled to access his property. An injunction will not be granted to aid a party who has gained unfair advantage to retain that position.

12. Even on consideration of Principles for grant of temporary injunctions, I do not see what prima facie case the Applicants have against the Respondents. If the Applicants had shown that they had permission to erect whatever they have erected on the way, that would have been a different matter altogether. The way things are, I do not find any merits in both applications which are hereby dismissed with costs to the Respondents and the Interested Party .

It is so ordered.

Dated, signed and delivered at Nairobi on this 21st day of June, 2017.

E. O. OBAGA

JUDGE

In the Presence of:

..... Advocate for Applicants

..... Advocate for Respondents

.....Advocate for Interested party

Court Assistant;