



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO.13 OF 2016

JOHN MAINA APPELLANT

-VERSUS-

**STANLEY NDUATI & 4 OTHERS (Suing as the officials and Representatives of
Kays Welfare Association) 1ST RESPONDENT**

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

***(Being an appeal from the ruling of the Honourable Chief Magistrate Mrs. L. Komingoi delivered on
20th May 2016 in Thika CMCC No.43 of 2016)***

JUDGMENT

1. By a plaint dated 26th January, 2016 Stanley Nduati, Rosemary Ngotho, Julius Njoroge and Daniel Muna (hereinafter jointly and separately known as the plaintiffs, in their capacity as officials of Kays Welfare Association (hereinafter referred to as the Association) instituted a suit in the lower court to wit Thika CMCC No.43 of 2016 seeking to permanently restrain John Maina (hereinafter referred the 1st defendant/ Appellant), from constructing any commercial house in plots number 26680/24 and 26680/27 without their consent.
2. The respondents also sought to restrain the County Government of Kiambu (hereinafter referred to as the 2nd/defendant/respondent), from authorizing any change of user in respect of the parcels of land herein.
3. Simultaneously with the plaint, the plaintiffs brought the notice of motion of even date to *inter alia* restrain the defendant/appellant from carrying out the development he had began on the parcels of land herein, pending the *inter partes* hearing of the application and the suit.
4. The application was premised on the grounds that the defendant/appellant had breached the Associations' Rules and Regulations concerning the nature of developments its members could effect on their properties. The defendant/appellant was also accused of constructing a commercial dwelling in an area planned as a residential area without first obtaining change of user hence infringing the rights of the members of the Association by exposing them to security threats.
5. The application was supported by the 2nd defendant/respondent's Director of Physical Planning, John Mbau, who deposed that the defendant/respondent had received various complaints from the plaintiffs concerning the developments that were being effected by the defendant/appellant on the suit properties.

6. It was pointed out that in discharge of its mandate, the defendant/respondent through its officers, had visited the suit properties and established that the developments the defendant/appellant was carrying out were contrary to what was approved. As a result, the defendant/respondent had issued the defendant/appellant with enforcement notices.

7. In reply and opposition to the application, the defendant/applicant had, inter alia, deposed that he was not bound by the Rules and Regulations of the Association as he was not a member of the Association; that he was not constructing a commercial dwelling; that the plaintiffs had no power to interfere with his developments and that the Association was an illegal entity engaging in extortion, blackmail and interfering with his privacy and security.

8. The defendant/appellant further contended that by asking him to submit his development plans to them for approval, the plaintiffs were usurping the powers of the defendant/respondent.

9. Concerned that grant of the orders sought might occasion him losses, the defendant/appellant urged the court to order the 1st respondents to furnish security of Kshs. 1,000,000/= for payment of the damages he was likely to suffer.

10. The prayer for security for costs was later on formalized by filing the motion dated 3rd February, 2016.

11. In reply to the issues raised in the defendant/appellant's replying affidavit, the plaintiffs through the further affidavit of Daniel Muna maintained that the defendant/appellant was a member of the Association and as such bound by the Rules and Regulations of the Association.

12. The plaintiffs further deposed that ownership of property at Kays Estate rendered the defendant/appellant a member of the Association by default.

13. When the matter came up for hearing, counsel for the plaintiffs, **Mr. Kanyi**, relied on the grounds on the face of the application and on the affidavits sworn in support thereof. He pointed out that both the plaintiffs and the defendant/appellant have standard sale agreements with clauses binding each and every person who buys a plot within the estate (Kay Estate). He reiterated the plaintiffs' contention that by buying a plot at the estate by default, one became a member of the Association and as such bound by the Rules and Regulations of the Association.

14. Counsel for the plaintiffs maintained that under the sale agreement, any purchaser of a plot within the estate was obligated to:

(i) put up a dwelling unit;

(ii) submit the approvals of the dwelling unit to seller or his agent for approval;

(iii) to put up one residential house intended for one family and a servant quarter.

15. Maintaining that the appellant failed to comply with the special conditions in the sale agreement and in the certificate of lease, counsel for the plaintiffs pointed out that the plaintiffs complained to the defendant/respondent, which through its Director of Physical Planning confirmed that the development the defendant/appellant was undertaking was not approved. He further pointed out that the 2nd respondent issued the appellant with enforcement notices.

16. Concerning the building plans submitted by the defendant/appellant to the plaintiffs, he stated that they did not tally with what was approved by the defendant/respondent. He further pointed out that the Association is registered and contended that the appellant participated in the affairs of the Association as its patron.

17. Maintaining that the development being undertaken by the appellant is not what is contemplated in the

sale agreements and certificate of lease, Mr. Kanyi informed the court that the Association seeks to have controlled developments in the estate and asserted that by buying plots in the estate, the defendant/appellant bound himself to the terms and conditions in the sale agreement.

18. In view of the foregoing, he urged the court to stop the developments.

19. Concerning the appellant's application dated 3rd February, 2016 for security for costs, he submitted that security for costs can only be sought where no *prima facie* case is established. Because the defendant/respondent had stopped further development, he submitted that there was no basis for asking for security for costs.

20. On behalf of the defendant/appellant, **Mr. Mbichire**, reiterated the defendant/respondent's contention that the Association lacked *locus standi* to interfere with the defendant/appellant's developments because it is not the company contemplated in the sale agreement. He pointed out that the defendant/appellant denied the allegation that he was constructing a commercial house and submitted that the plaintiffs did not prove that the house the defendant/respondent was putting up was commercial.

21. Pointing out that the house was at roofing stage, Mr. Mbichire submitted that the house risked being spoilt if the orders sought were granted.

22. On whether the appellant was a member of the Association, he submitted that no evidence capable of proving that fact was produced.

23. Arguing that the developments the defendant/appellant was effecting are governed by the Physical Planning Act, he faulted the plaintiffs for using the powers of the defendant/respondent to control the developments the defendant/respondent was undertaking.

24. According to counsel for the defendant/appellant it is not the duty of the court to enforce enforcement notices.

25. Concerning the application for security, he submitted that the appellant has suffered losses which he is desirous of recovering from the respondents.

26. In a rejoinder, counsel for the plaintiffs submitted that any party aggrieved can bring a claim and maintained that the plaintiffs' suit is merited as they are likely to suffer damage. He further submitted that an order for security for costs cannot be premised on an illegality.

27. Upon considering the cases of the respective parties the trial magistrate observed:

“I have considered the applications and the affidavits together with the annexures. I have also considered the submissions of both counsels. The issues for determination are:

1. Whether Kays Welfare Association is registered?

2. Whether the 1st defendant is bound by its constitution?

3. Whether the plaintiffs ought to furnish security to the tune of Kshs. 1 million?...”

28. The trial magistrate returned a positive verdict to issue (1) and (2) and a negative verdict to issue (3).

With regard to the 1st and 2nd issues she observed:

“The plaintiffs have annexed a certificate of registration. The said Kays Welfare Association is duly registered with the Registrar of Societies. They have also annexed the Constitution and the minutes of the meetings held. The 1st defendant (read appellant) is shown to have attended some meetings. The plaintiffs bring this suit on behalf of the other members of the

estate. I find that the plaintiffs have *locus standi* to institute this suit. the sale agreements have been exhibited by both the plaintiffs and the 1st defendant. The certificates of lease contain special conditions that the owners should construct only residential houses. The 1st defendant does not dispute this. The plaintiff's contention is that the 1st defendant is constructing premises for commercial purposes contrary to the special condition in the lease.

I have gone through the said agreement. each member was to construct a single dwelling house with servant quarters. The plaintiff's have annexed photographs of the 1st defendant's premises under construction. A casual look shows that this is not single dwelling unit for one family. The plaintiffs are members of Kays Estate their intention was to have a certain group of people to reside there. They are entitled to enjoy their investment.

I find that they have demonstrated that everything will change if the construction is allowed to go on.

I find that the plaintiffs have established a *prima facie* case against the 1st defendant. In the affidavit of John Mbau the director of physical planning of the 2nd defendant informs that the plaintiffs made various complaints to his office with regard to the 1st defendant's construction. He also stated that the 1st defendant was undertaking a development which was complete contrast with what was approved. They have served the 1st defendant with enforcement notices. I find that this supports the plaintiffs case. I find that the plaintiffs have satisfied the conditions set out in the case of *Giella v. Cassman Brown*. I find merit in the application dated 26/1/2016 and I grant the orders sought..."

29. Concerning the appellants application for security for costs, the trial magistrate held:

"...the 1st defendant has failed to demonstrate that the plaintiffs may not be able to pay him damages should he succeed..."

30. Consequently the trial magistrate restrained the appellant from further constructing the building or depositing further building materials on the parcels of land herein, pending the hearing and determination of the suit. She also awarded the respondents the costs of the application.

31. Aggrieved by the decision of the trial magistrate, the appellant appealed to this court on sixteen (16) grounds as follows; **'The learned trial magistrate erred by':-**

- 1. Framing issues that were not pleaded;**
- 2. Holding that the appellant was bound by the Associations constitution;**
- 3. Holding that the appellant was a member of the Association;**
- 4. Equating the Association with the company/agency prescribed in the agreements for sale for individual plots of land;**
- 5. Holding that the Association had *locus standi* to institute the suit herein;**
- 6. Failing to find that the appellant's building plans were approved for a single dwelling house by the 2nd respondent;**
- 7. Failing to find that the appellant would incur and was incurring losses and damage as a result of exposure of the wooden roof to extreme weather;**
- 8. Basing her ruling on matters not pleaded and extraneous strange information which was unsubstantiated;**

9. Failing to appreciate that as the registered proprietor of the parcels of land in question the appellant's rights were only limited to the conditions of his certificate of lease;

10. Holding that the Association had established a *prima facie* case because its intention was to control the group of people who resided there;

11. Holding that the respondents had demonstrated that everything would change if the construction was allowed to go on without any evidence to back the finding;

12. Considering evidence which was obtained when the matter was pending before the court (affidavits and letters of the 2nd respondent's Director of Physical Planning).

13. Finding that the respondents had satisfied the conditions for grant of an injunction;

14. Dismissing the appellant's application for security for damages;

15. Concluding that the appellant was a member of the 1st respondent;

16. Not relying on any authority and/or basis whilst giving her ruling.

32. The appeal was disposed of by way of written submissions.

The Appellant's submissions

33. In the submissions filed on behalf of the defendant/appellant, it is *inter alia* contended that registration of the Association was not an issue at all. It is admitted that the Association was registered but contended that the Association could not dictate terms on none members or have *locus standi* to demand approval of constructions by plot owners unless he/she is their member in writing and therefore bound by its constitution.

34. The learned trial magistrate is said to have misdirected herself by holding that the minutes of the Association's meetings showed that the defendant/appellant was a member of the Association yet none of the minutes bore the defendant/appellant's signature.

35. Concerning the contention that the appellant was the Association's patron, it is contended that no such post existed in the Association's Constitution.

36. With regard to grounds 2, 3, 4 and 5 it is submitted that the trial magistrate's determination that the defendant/appellant was bound by the Association's Constitution led to the conclusion that the defendant/appellant was bound by the dictatorial terms of the Association's Constitution.

37. On whether the defendant/appellant was a member of the Association, it is contended that the Association did not prove that fact as no list of members was availed to court to ascertain the membership of the Association. The Association is also said to have failed to prove that the defendant/appellant attended its meetings by say producing an attendance list signed by the defendant/appellant. The trial magistrate is also said to have failed to provide reasons for holding that the defendant/appellant was a member of the Association.

38. It is further contended that the Association is not the entity envisaged in the purchase agreement or certificate of lease. According to the appellant, the seller never established the entity contemplated in the sale agreements. The Association is said to have irregularly taken upon itself the authority to dictate and police the activities of the plot owners without their consent or knowledge. The trial magistrate is faulted for failing to determine the issue as to whether the Association was the entity contemplated in the sale agreements held by the defendant/appellant and the Association's members.

39. Because there are so many illegal entities and gangs in estates which dictate payment of levies by plot

owners for construction and dumping of construction materials, it is submitted that the trial magistrate should have held that the Association is not the entity envisaged in the agreements of sale held by the parties to the dispute herein.

40. The plaintiff's officials are also said to have failed to avail their certificates of lease to court to ascertain whether they were *bona fide* residents of the estate. It is contended that there is a possibility that the court legitimized an illegal entity to take charge of the estate and interfere with the rights of plot owners to develop their lands.

41. Arguing that the orders granted may set a bad precedent as such entities may utilize them to interfere with the rights of ownership and occupation of land as well as curtail construction and development, the defendant/appellant submits that the court erred by issuing the impugned orders.

42. Terming the last clause in the Associations prayer for permanent injunction unconstitutional, the defendant/appellant contends that issuance of the injunctive orders legitimized the Association's unlawful actions.

43. According to the defendant/appellant, the trial magistrate should have sustained his objection concerning the Association's *locus standi* to institute the suit against him.

44. The trial magistrate is further said to have failed to distinguish the approved drawings from the photographs of the building thus wrongly holding that it was commercial in nature. The plaintiffs are said to have failed to produce evidence capable of showing that the structure was commercial.

45. Wondering whether the plaintiffs' complaint was premised on the size of the structure or the defendant/respondent's failure to obtain approval, the defendant/appellant faults the trial magistrate for holding that a casual look of the structure showed that it was not a single dwelling for one family.

46. The trial magistrate is faulted for having failed to recognize the real intention of the plaintiffs in bringing the application.

47. With regard to grounds 7, 8 and 9 the trial magistrate is faulted for having failed to take into account that the respondents cannot be subjected to individual liability for the losses to be incurred.

48. Based on **Section 23** of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed), the case of **Virenda Ramji Gudka & 3 others v. Attorney General (2014) e KLR**, **Section 26** of the Land Registration Act, 2012, it is submitted that the only limitations that would have affected the defendant/appellant's ownership and rights on the land are the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. It is further contended that special condition No.3 in the certificate of lease presented to the learned trial magistrate, was in consonance with the approved plans.

49. In the case of **Virenda Ramji Gudka & 3 others v. Attorney General** *supra* it was observed:

“..the 1st plaintiff upon registration of the grant in his favour under the provisions of section 23 of the Registration of Titles Act Cap 281 Laws of Kenya (repealed) became the proprietor of the suit property and the absolute and indefeasible owner of the land and his title could only be challenged on ground of fraud to which he is proved to be a party.”

50. The trial magistrate is said to have failed to take into account the principle espoused in the case of **Mat International Terminal Limited v. Multiple ICD (K) Ltd & 3 others (2012) e KLR** when granting the injunction hereto.

51. Arguing that his application for security for payment of such damages as he may suffer was merited, the defendant/appellant contends that granting the injunction without an undertaking for payment of damages was detrimental to the him as it left him exposed to irreparable losses owing to exposure of the

project to extreme weather conditions.

52. On grounds 10 and 11, the trial magistrate is said to have failed to consider the nature of the complaint. In this regard, it is contended that the respondents did not indicate in their pleadings or submissions that their intention was to control specific persons from occupying the estate or that the appellant's project would hinder enjoyment of their investments.

53. The plaintiffs' complaint is said to have been that the appellant did not submit his development plan for them to approve; the structure the appellant was putting up was a commercial building; the structure the appellant was putting up contravened the Association's by-laws; the appellant had not applied for change of user; construction of the structure would infringe on their rights; the structure would pose security threat to neighbours and that the relevant authorities had not acted on their complaint. The trial magistrate is faulted for failing to analyze those complaints.

54. Arguing that the plaintiffs did not show the interest they had in the suit properties and that they did not tender evidence capable of showing that the structure therein was commercial in nature or how its construction infringed on their rights or what damage they would suffer, it is contended that the plaintiffs did not meet the conditions for issuance of an injunction as espoused in **Giella v. Cassman Brown (1973)E.A 358** and the principles set in **Mrao v. First American Bank of Kenya Limited & 2 Others (2003) KLR 125**.

55. On grounds 12 and 13, the learned trial magistrate is faulted for having relied on the evidence of the 2nd respondent's director of Physical Planning which was obtained way after the suit was filed.

56. Terming the said evidence an afterthought and malicious, the defendant/appellant contends that he is a stranger to it as the enforcement notices referred therein were never served on him.

57. The learned trial magistrate is further said to have failed to take into account that the defendant/respondent did not indicate that the structures were commercial in nature. It is submitted that the comments endorsed on the enforcement notices cannot be equated to condemning the appellant for building a commercial house.

58. It is further contended that the balance of convenience tilted in favour of the defendant/appellant who demonstrated that he was the owner of the parcels of land hereto and had commenced developments therein on the basis of duly approved plans and stood to suffer irreparable damage if the injunction was not discharged.

59. The learned trial magistrate is also said to have failed to consider the provisions of **Section 30(1)** of the Physical Planning Act, Cap 286 Laws of Kenya. Arguing that the Act stipulates criminal sanctions as opposed to civil sanctions for violation of development plans, the defendant/appellant contends that the courts cannot monitor buildings which do not conform to set standards.

60. It was argued that enforcement notices are meant to compel compliance with the approved plans and that issuance of an injunction curtails the process of enforcement as the developer cannot conform with any changes as prescribed by the relevant authority without the suit being concluded.

61. It was further argued that the injunction issued is an hindrance to the defendant/respondent's mandate of overseeing enforcement of notices it issues. According to counsel for the defendant/appellant, the injunction only served to paralyze operation of the law.

62. The learned trial magistrate is said to have failed to take into account the defendant/appellant's contention that the court is not mandated to be a housing Tribunal. As such, it lacks jurisdiction to supervise constructions.

63. Based on the cases of **Nyayo Embakasi Residents Association v. National Social Security Fund & Another** and **Koome Mwambia v. Deshum Properties Co. Ltd** it is submitted that the

defendant/appellant's development having been approved in compliance with the Physical Planning Act, Cap 286 laws of Kenya, the plaintiffs' recourse, if any, should have been through the appeal process and procedure established under the said Act.

64. On ground 14, it is reiterated that the respondents did not tender evidence capable of proving that the defendant/appellant was a member of the Association. The trial magistrate is said to have failed to address herself to the question as to who are the other members of the Association yet their authority was required for the institution of the suit.

65. With regard to ground 15, the trial magistrate is faulted for having not relied on any authority in support of her ruling. The ruling is said to be lacking basis for asserting that the respondents had satisfied the conditions set in the case of **Giella v. Cassman Brown** *supra*.

66. On ground 16, the ruling is said to be based on matters not pleaded and extraneous strange information which was not substantiated. It is further submitted that there is variance between the prayers sought in the plaint and the application.

67. Terming the application defective, based on a number of decided cases, the defendant/appellant urges the court to allow the appeal, set aside or discharge the order for injunction, dismiss the suit in the lower court with costs to him and award him the costs of the appeal.

Plaintiffs/Respondents' submissions

68. On behalf of the plaintiffs/respondents a brief background of the dispute herein is given and submitted that the trial magistrate was justified in issuing an injunction to stop the constructions because they were illegally being undertaken.

69. The defendant/appellant is said to have failed to obtain the requisite approvals in respect of one of the projects while in respect of the other project, he deviated from the approved plans.

70. It is submitted that as persons affected by the developments, the plaintiffs/respondents had *locus standi* to bring the suit to protect their right to a healthy Environment which is guaranteed under **Article 70(3)** of the Constitution and **Section 3(4)** of the Environmental Management and Co-ordination Act (EMCA).

71. It is reiterated that the defendant/appellant had violated the special conditions in the certificate of lease and their respective sale agreements, which conditions despite not being the company or agent contemplated in the sale agreements, the plaintiffs/respondents were entitled to enforce.

72. It is reiterated that by signing the sale agreement with the said limitations the defendant/appellant bound himself to its terms.

73. It is reiterated that the evidence adduced sufficed to show that the appellant was a member of the Association and its patron.

74. The developments the defendant/appellant was effecting were termed a nullity for want of the requisite approvals based on the case of **Wainaina Kinyanjui & 2 Others v. Andrew Nganga (2013)e KLR.**

75. Concerning the contention that the Association was not the entity contemplated in the sale agreements, it is submitted that the court did not hold that the Association was that entity. The Association is said to have arisen from a need gap following failure by the seller to form the company contemplated in the sale agreements.

76. Because there was evidence that the appellant had violated the development plans issued to him, it is submitted that the trial magistrate cannot be faulted for having halted the developments because the

defendant/respondent had also halted them.

77. According to the plaintiffs, allowing the constructions to proceed would defeat the purpose of the suit.

78. With regard to the prayer for security of costs, it is submitted that the defendant/appellant did not prove that the respondents would be unable to pay the damages if awarded.

79. Concerning the contention that the trial magistrate erred by considering the evidence of the defendant/respondent on the ground that it was obtained during the pendency of the suit, it is submitted that the time the evidence was obtained is immaterial. According to the respondent, what is material is the substance of the evidence.

80. With regard to the contention that contravention of development plans attracts criminal sanctions, the counsel for the plaintiffs agrees with the appellant's submissions on that issue but explained that civil remedies were invoked to stop the violations and preserve status quo and to stop further infringement of rights and breaking of law.

81. The authority of **Nyayo Embakasi Residents V. NSSF** supra, is said to be distinguishable in that in the circumstances of this case the defendant/appellant had no approved plans and/or had departed from the approved plans.

82. It is reiterated that the appellant is building a commercial house and that allowing him to do so would pose security threat to the respondents.

83. Based on the case of **Kiriinya M. Mwendia v. Runda Water Limited & Another** (2014) e KLR, it is conceded that the defendant/appellant has a right to own and develop his property but contended that his rights are not absolute. In enjoying such rights, it is submitted that, the defendant/appellant should have regard to the rights of his neighbours.

84. Maintaining that the lease agreement and the certificate of lease makes it clear that the area is zoned as a residential area, the plaintiffs/respondents urge the court to dismiss the appeal with costs and allow the injunction to remain in force pending hearing and determination of the suit. The plaintiffs/applicants also urge the court to award them the costs of the appeal.

Analysis and determination

85. From the pleadings, evidence and submissions by the respective parties, I find the issues for determination to be:

(i) Whether the Association has *locus standi* to bring and prosecute this suit?

(ii) Whether the Association has power to control the nature of developments being effected on the appellant's parcels of land?

(iii) Whether the court is the right forum for resolving the dispute between the Appellant and the Respondents's?

(iv) Subject to the outcome of issue No.(iii), whether the respondents have made up a case for being issued the orders sought?

(v) What orders should this court make?

86. On whether the Association had *locus standi* to bring and prosecute this suit, the evidence on record to wit the Associations Constitution shows that the Association was formed to *inter alia* ensure that plot owners at Kay Estate meet their obligations under their agreements for sale of plots. Membership to the Association is open to any plot owner at Kays over the age of eighteen.

87. Whereas the appellant contests his membership to the Association, the evidence on record shows that he had submitted himself to the authority of the Association by presenting to them copies of his house plans (see paragraph 8 of the appellant's replying affidavit sworn on 3rd February, 2016).

88. The appellant's action of submitting to the authority of the Association fits well with the obligation imposed on him by the agreement of sale he signed with the seller. The agreement *inter alia* provides:

“The seller hereby covenants and agrees with the seller as follows:-

a. To submit plans elevations and sections of dwelling house and other buildings proposed to be erected (showing also drainage fencing and gate) and a general specification of the materials and construction of the said buildings for approval by the seller or its agent. Until such plans have been approved by the seller or its Agent in respect thereof all proposed works, the purchaser shall not commence to build or do any work in connection therewith. The approved plans shall not be departed from nor shall any alterations be made to the said dwelling house and other buildings without the consent of the seller or its Agent first had and obtained. Attached to this Agreement are sample designs and building guidelines, of expected housing development...”

89. Although no evidence was led capable of showing that the Association was the Agent contemplated under the agreement of sale for purposes of enforcing the obligations imposed on buyers of plots in Kay Estate, the defendant/appellant included, the respondents as beneficiaries of obligations imposed on buyers of plots in the estate and as persons likely to be affected by the actions of the defendant/appellant had a right to move the court for determination of the question as to whether the defendant/appellant's actions and omissions were lawful.

90. The agreement executed between the defendant/appellant and the seller contained conditions that cannot be said to be for the benefit of the seller but for the benefit of would be residents of Kays estate which the plaintiffs are.

91. The mere fact that the seller did not incorporate the company contemplated in the sale agreement and/or appoint the agent contemplated under the Act did not take away the defendant/appellant's obligations under the sale agreement.

92. I hasten to point out that the defendant/appellant had obligations imposed by the Physical Planning Act and the Environmental Management and Co-ordination Act (EMCA). The evidence adduced before the trial court and in particular, the testimony of the defendant/respondent's director of physical planning to the effect that the project the defendant/appellant was implementing was different from the one approved (in respect of one of the plots) and that the development on the other plot was not approved sufficed to show that the projects the defendant/appellant was undertaking were illegal.

93. As was observed in the case of Wainaina Kinyanjui & 2 others v. Andrew Ng'ang'a (2013) e KLR:-

“the law regards the effects of development on the private rights of others as a material consideration in the granting of development permission, and that is why there are elaborate provisions on the consultation and the participation by those who may be affected by a development in the Physical Planning Act...It is also clear from the provisions of section 30 of Physical Planning Act and section 58 of the Environmental Management and Co-ordination Act that approval is required to be given before the commencement of any development or material change of use of land, and not after such change has occurred. I must add that one of the main reasons for this prior approval is to address and mitigate the issues and objections like the ones now being raised by the plaintiff in this court before such development or user commences.”

94. In the circumstances of this case, there is evidence that the defendant/appellant did not meet his

obligations both under the sale agreement and the said statutes.

95. Whilst I agree with the defendant/appellant's contention that the appellant's have no mandate in approval of development plans, it is clear from the above cited provisions of the law that their views ought to be sought and taken into consideration before development projects are approved.

96. In the case of **Wainaina Kinyanjui & 2 others** *supra*, because the respondent was found to be in breach of the relevant planning and environmental laws, the court held that the plaintiff had established a *prima facie* case to warrant the grant of an order of temporary injunction.

97. There being evidence that the appellant did not fulfil his legal obligations while undertaking the impugned development, I find and hold that the trial magistrate did not err by finding that the plaintiffs' had established a *prima facie* case for issuance of the orders sought.

98. Concerning the contention that the court is not the proper forum for settling the dispute preferred before it, I begin by pointing out that the appellant did not raise that issue before the lower court.

99. Whilst its true that courts are not the right forum to settle disputes arising from development projects, in the first instance, the appellant who neither raised that issue before the lower court nor brought himself within the purview of **Section 38** of the Physical Planning Act (by filing an appeal against the enforcement notice) cannot be heard to say that the court should not have pronounced itself on the dispute brought before it.

100. The foregoing notwithstanding, being of the view that the sanctions provided under the Physical Planning Act are not meant to indefinitely prevent developments from being undertaken, I am of the view that the injunction issued should not have been pending the hearing and determination of the suit but pending compliance with the enforcement notices issued by the 2nd respondent and/or until the appellant complied with his legal obligations under the Physical Planning Act and the Environmental Management and Co-ordination Act.

101. Before I conclude this judgment, I wish to comment on clause (b) to the schedule to the sale agreements executed between the seller and the parties to this dispute which imposes an obligation on the purchasers:-

“To construct only one residential house intended for one family and a servant's quarter provided that houses with more than two floor will not be allowed.”

102. Whereas the clause is clear on the issue of floors, it does not give a criteria for ascertaining that the house is residential and intended for one family. Issues abound as to whether the criteria will be the size of the house or the size of the family for which the house is being constructed.

103. Given the African concept of a family, which includes an extended family, it may not be easy to determine whether or not a house is commercial merely on the basis of its size.

104. In the circumstances of this case, I note that the respondents led no evidence capable of proving that the house was commercial. In my view, the plans *per se* were not sufficient evidence for holding that the house being implemented by the appellant was not a dwelling unit meant for one family!

105. In fact, the documents relied on by the respondents show that they were not sure whether the appellant was constructing the house contemplated in the sale agreement hence the observation-“**the estate members were not happy as they still did not confirm that they were not flats**”. See annexure **DM F**.

106. The trial magistrate should, in my view, have sought for expert evidence before concluding that the defendant/appellant was not constructing a residential house for one family.

107. With regard to the defendant/appellant's plea for security for payment of damages should he succeed in the case urged against him, I agree with the trial magistrate that the appellant did not prove that the plaintiffs/respondents may not be able to pay him such damages as may be awarded to him if he succeeds in the case urged against him.

108. The upshot of the foregoing is that the appeal succeeds to the extent contemplated herein above, that's to say:-

(i) The plaintiffs' did not prove that the appellant was building a commercial house;

(ii) The trial magistrate should have tied the injunction to fulfillment by the appellant of the obligations imposed on him by the law and/or the enforcement notice issued by the 2nd respondent.

109. As the respondent has partially succeeded in his appeal, he shall have half the costs of the appeal.

110. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 14th day of June, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Muchira for the appellant

Mr. Kanyi for the respondent

Court assistant - Esther