



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. NO 270 OF 2009**

**NORKAN INVESTMENTS LIMITED.....PLAINTIFF**

**-VS-**

**CITY COUNCIL OF NAIROBI..... 1<sup>ST</sup> DEFENDANT**

**DAVID MBERIA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, being registered as owner since 1974 of Land Reference Number 2248/6 situate off Langata road, filed a suit against the defendants on the 10<sup>th</sup> June 2009 seeking the following orders;-

- a) An order for permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, their agents or howsoever from trespassing onto the plaintiff's property LR NO 2248/6.
- b) An order for permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering, in any way whatsoever with the plaintiff's development and construction of LR NO 2248/6.
- c) An order for permanent injunction to restrain the 2<sup>nd</sup> defendant from demanding a bribe from the plaintiff or from using the 1<sup>st</sup> defendant or its officers to restrain or interfere with the plaintiff's development of LR NO 2248/6.
- d) Damages for trespass
- e) Costs and interest.

2. The Plaintiff avers that in 2008, it set out to develop a shopping mall on the property and obtained from the 1<sup>st</sup> defendant all the requisite consents including *inter alia* change of user, building plan approvals, structural drawing approvals, hoarding approval, occupation certificate and site construction board. That pursuant to the approvals being obtained, it proceeded to commission a contractor namely Seyani Brothers to construct the said shopping mall. In advancing its case, the plaintiff states that one area Councillor, David Mberia, the 2<sup>nd</sup> defendant herein, did demand and solicit a bribe to allow the property to be developed and on the plaintiff's refusal, used the officers of the 1<sup>st</sup> defendant to wrongfully interfere with the plaintiff's right to develop the said property. It has particularized the wrongful interference as follows;

- a) Having an unlawful enforcement notice stopping work issued on the 5<sup>th</sup> May 2009 allegedly on grounds that the plaintiff had not obtained planning permission to develop the property.

- b) Demanding a bribe of Kshs. 500,000/- so that plaintiff would be allowed to develop the property.
- c) Trespassing onto the plaintiff's property and instructing the plaintiff to cease construction and confiscating the plaintiff's building and structural plans.
- d) Verbally and without due cause issuing demands that the plaintiff cease developing the property.

3. That because of the 2<sup>nd</sup> defendant's particularized actions, the 1<sup>st</sup> defendant on the 5<sup>th</sup> May 2009 issued an enforcement notice stopping the work on the grounds that the plaintiff had not obtained permission to develop the property. The plaintiff's case was therefore premised on an apprehension that the 1<sup>st</sup> defendant acting in concert with the 2<sup>nd</sup> defendant will illegally trespass onto the property to stop the plaintiff from developing the property without due cause.

4. In resisting the claim, the 1<sup>st</sup> defendant denies that the plaintiff obtained all the requisite approvals in 2008 necessary for the development of a shopping mall on LR No. 2248/6. Further it states that it lawfully entered onto the property to confirm if all the requisite approvals were available and were being adhered to and therefore such entry in its view does not amount to trespass. That it was its duty and right to issue the enforcement notice and denies that it was moved by the 2<sup>nd</sup> defendant to do so. That the matters complained of by the plaintiff were done by the 1<sup>st</sup> defendant in its discharge of its duties in law and not as a result of collusion with the 2<sup>nd</sup> defendant as insinuated by the plaintiff. That thereafter they have not taken any further action against the development. That the suit is premature and irregular under the Physical Planning Act and seek to have it struck out at the appropriate time.

5. The 2<sup>nd</sup> Defendant on his part while denying the plaintiff's claims stated that as the area councilor of Langata ward where the plaintiff's property is situated, he did have every right to inquire from the 1<sup>st</sup> defendant whether or not developments within his ward were properly approved and such inquiry did not amount to an act of collusion with the 1<sup>st</sup> defendant or its officers. He further reiterated and confirmed that as the person who had caused the 1<sup>st</sup> defendant to carry out investigations into the plaintiff's developments he had every right to accompany the 1<sup>st</sup> defendant's officers to the site in question and such visit did not amount to trespass. That he did that as the area councilor, as a citizen and as an area resident. He denied in totality the actions of wrongful interference as particularized in the plaint.

6. When this suit came up for hearing on the 23<sup>rd</sup> March 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were absent. The Learned Counsel for the Plaintiff, Mr. Gitau Singh informed the Court that the parties were duly served with the day's hearing notice. The Court record indicates that the defendants were served with the hearing notice on the 6<sup>th</sup> February 2017 and there is an acknowledgement to that effect from the Law firm of Otieno Ragot & Company advocates on the 6<sup>th</sup> February 2017 at 4.15 pm. The Court having been satisfied that service of the hearing notice on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been effected, the hearing proceeded ex parte.

7. At the hearing, the plaintiff called one witness Mr Trevor Kanja, one of the directors of the plaintiff company. He produced his witness statement and list of documents filed on the 16<sup>th</sup> October 2012 and implored the Court to adopt them as his evidence.

8. In his evidence the witness stated that before the plaintiff commenced construction of the shopping mall (the development) the plaintiff sought and obtained the following documents from the 1<sup>st</sup> defendant;-

- a) Change of user dated the 1<sup>st</sup> December 2008. See minutes of the Town Planning Committee dated 6<sup>th</sup> February 2006.
- b) NEMA approval dated 27<sup>th</sup> November 2008.
- c) Building plans approved vide registration No EO 00651.

- d) Structural drawings approved on the 9<sup>th</sup> January 2009.
- e) Hoarding and scaffolding licence dated 29<sup>th</sup> April 2009.
- f) Occupation certificate dated 24<sup>th</sup> July 2008.
- g) Site construction board dated 24<sup>th</sup> July 2008.

9. The witness further stated that the plaintiff entered into a construction contract with Seyani Brothers to construct the mall for Kshs. 778,664,469.30 on the property. That the contractor took possession of the site on the 20<sup>th</sup> March 2009. He annexed photographs showing the ongoing developments on the site.

10. He testified that soon thereafter the local councilor of the area , one Mr David Mberia visited his office and requested for a bribe of Kshs. 500,000/- failing which he would frustrate the construction. That on refusal to give the alleged bribe, the plaintiff was served with an enforcement notice on the 5<sup>th</sup> May 2009. He annexed a copy of the said enforcement notice. On presentation of the documents to the 1<sup>st</sup> and 2<sup>nd</sup> defendants the plaintiff was informed to proceed with the constructions.

11. That again on the 5<sup>th</sup> June 2009, the said 2<sup>nd</sup> defendant accompanied by the 1<sup>st</sup> defendant assistant Director , enforcement without notice or reason trespassed onto the plaintiffs site and removed the original structural and building plans that the builders were using. He has annexed a signed visitors book with the comment as thus;

“We have taken copies of approved plans to City Hall for verification on any issues”

12. The witness affirms that there has not been any appeal to the Liaison committee against the approvals obtained by the plaintiff. That the 2<sup>nd</sup> defendant has been aware of the developments as early as January 2009 and has exhibited an unhealthy interest in it and is determined to stop the construction. It was the plaintiff’s apprehension that unless the defendants are restrained they will frustrate the plaintiff’s development occasioning great harm and loss to the plaintiff as it has borrowed funds to construct from CFC Stanbic Bank Limited in the region of Kshs 778,664,469.30.

#### Issues, analysis and determination

13. At the close of the plaintiffs case the learned counsel for the plaintiff filed detailed written submissions which I have carefully considered in arriving at this decision. The plaintiff filed a list of 11 issues which the Court has condensed into 4 as follows;

Whether the Plaintiff is entitled to the order of permanent injunction?

Whether the defendants trespassed to the plaintiff’s premises?

Whether the plaintiff is entitled to any damages?

Who pays the costs of the suit?

14. Whether the Plaintiff is entitled to the order of permanent injunction restraining the defendants whether by themselves their agents or howsoever from trespassing onto the plaintiff’s property?. It is on record that on the 10.6 2009 the plaintiff sought an order for injunction restraining the defendants whether by themselves their agents or howsoever from trespassing onto the plaintiff’s property pending the hearing and determination of the suit. The learned Judge Msagha Mbogoli J delivered a ruling on the 9th July 2010 as follows;

“I am of the view in this case, special circumstances exist to grant permanent injunction orders against the

defendants as prayed in the plaint. Accordingly, the plaintiff's application succeeds and orders shall issue restraining the defendants from interfering with the construction and/or trespassing onto the plaintiff's property. The plaintiffs shall also have the costs of this application".

15. The facts as presented to the learned Judge above who issued the permanent injunction are the same as presented before me on trial. The prayers in the plaint are the same prayers in the application for the injunction. The nature of the relief sought if granted (was granted) was an end in itself. The order has not been appealed, set aside, stayed or varied. At the time of the trial, I learnt that the construction was of the project is long completed. In the circumstances, therefore the order of permanent injunction as prayed in the plaint and rightly granted in the application by the learned Judge is considered settled. It does not require any disturbance and so I order.

Whether the defendants trespassed to the plaintiff's premises.

16. The 2<sup>nd</sup> Defendant is alleged to have gone to the premises of the plaintiff where construction was going on and required to see the documents relating to the ongoing construction. It is also alleged that at the same time he demanded to be paid a bribe. In his defense the 2<sup>nd</sup> defendant says he went to the premises as a Councillor of the area in which the construction was taking place. That he was concerned that the construction may be unauthorized by the 1<sup>st</sup> defendant and may affect adversely the residents of the ward that he represented, which was Langata, then. It is noteworthy that the 2<sup>nd</sup> defendant did not attend Court to give evidence on his statement of defence and therefore his statement remains untested by evidence on trial.

17. The Plaintiff's evidence as led by its Managing Director remains unchallenged. The evidence is that the 2<sup>nd</sup> defendants as the Councilor at the 1<sup>st</sup> defendant attended a committee meeting at which licenses given to the plaintiff were discussed and approved by the 1<sup>st</sup> defendant. It follows therefore that the 2<sup>nd</sup> defendant was at all material times aware that the plaintiff had been licensed to carry out the construction. There was no justification for the 1<sup>st</sup> defendant to enter the premises of the plaintiff and purport to inspect or stop the works. His action under this heading amounts to trespass.

18. As for the allegations in respect to the bribe, the plaintiff witness did not lead any evidence on balance of probability or at all to show that the 2<sup>nd</sup> defendant made such a demand. There was no proof on a balance of probability that a demand for a bribe was made to the plaintiff.

19. The plaintiffs claim against the 1<sup>st</sup> defendant is that the officers of the 1<sup>st</sup> defendant were not justified to enter his premises accompanied by the 2<sup>nd</sup> defendant and stop the construction works. The evidence of the plaintiff's witness is that the 1<sup>st</sup> defendant had a record of the licenses issued to it and that upon receipt of the complaint from the 2<sup>nd</sup> defendant ought to have consulted their own records and inform the 2<sup>nd</sup> defendant that they had licensed the plaintiff to carry out the construction work on the premises. It is the plaintiff's case that the 1<sup>st</sup> defendant did not need to go the plaintiff's premises to stop the works being carried out thereat.

20. The 1<sup>st</sup> Defendant in its defense retorted that it had the statutory power to enter and inspect the suit premises at will and stop any constructions therein if it is not satisfied that proper licensing had been given by it. The 1<sup>st</sup> defendant concludes that it did not trespass on to the plaintiff's premises because it entered there under a statutory power. On further analysis of the plaintiffs evidence the 1<sup>st</sup> defendant statement of defense would be valid if the 1<sup>st</sup> defendant as the custodian of the records relating to the construction of the suit premises would have justified its actions by checking in its records prior to going to the suit premises and requiring the plaintiff to produce any licenses that the 1<sup>st</sup> defendant does not find in its records. The 1<sup>st</sup> defendant did not attend the hearing and give evidence relating to this verification. The 1<sup>st</sup> defendant appeared to only have been influenced by the complaint or inquiry of the 2<sup>nd</sup> defendant. Such actions do not justify proper administrative actions by the 1<sup>st</sup> defendant and amount to the 1<sup>st</sup> defendant abusing its office.

21. The trespass committed on the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants was unacceptable and it obviously caused the plaintiff unnecessary apprehension on the fate of the construction works given that it borrowed heavily (Kshs 778, 664,469.30) and therefore the timely construction was key to them. I have taken into account that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had records relating to the construction and there was no need to go to the premises in search of the licences. The works were substantial which if affected in circumstances that were unjustified would place the plaintiff into worry anxiety and loss. Given that the works stopped for 8 days, it follows that it affected them.

22. Unlike in the case of **Yellow Vs Morley (1910) 27 TLR 20** that states that even if trespass is minor or de minimis in nature it is still actionable. That trespass is actionable *per se* that is to say the plaintiff can claim even though it did not suffer any damage. The case cited is distinguishable from this one as in the instant case it suffered stoppage of the works for 8 days as a result of the trespass.

23. I conclude that this is tantamount to trespassing to the plaintiff's premises. The evidence of the plaintiff is that construction works were stopped on the 5th June and resumed on the 12th June. For those days that the construction stopped, though compensation would be validly given to the plaintiff for stoppage of the construction for 8 days, the plaintiff did not lead any evidence or give any guide on the amount of damages if any suffered by it during the period the construction had been stopped. The plaintiff did not also give any guide on the assessment of damages on trespass by the 1st and 2nd defendant or the losses relating to the stoppage of the construction. It was the responsibility of the claimant to show the quantum of loss relating to the 8 days of construction stoppage and the damages suffered for the trespass.

24. The 1<sup>st</sup> and 2<sup>nd</sup> defendants should pay the costs of the suit. They trespassed onto the premises without justification causing stoppage of works and this case was filed as a consequence of their unjustified actions.

25. My final orders are that judgment is entered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows;

- a) An order for permanent injunction restraining the 1st and 2nd defendants whether by themselves, their agents or howsoever from trespassing onto the plaintiff's property LR NO 2248/6.
- b) Damages for trespass is declined
- c) The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall pay the costs of the suit.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> SEPTEMBER 2017.**

**J. G. KEMEI**

**JUDGE**