

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 757 OF 2016

HIGHBURY PROPERTIES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

RULING

The plaintiff commenced this suit by way of a plaint dated 4th July, 2016. Together with the plaint, the plaintiff filed a Notice of Motion application of the same date under Order 51 Rule 1 and Order 40 of the Civil Procedure Rules and, section 1A,1B and 3A of the Civil Procedure Act seeking, a temporary injunction restraining the defendant or any other person by themselves, their servants, agents and/or employees from demolishing structures on, evicting, trespassing upon or interfering with the plaintiff's quiet possession of all those parcels of land known as L.R No 209/138/59 and L.R No 209/138/60 (herein after referred to as "the suit properties") located on Price Road Nyamakima within Nairobi County pending the hearing and determination of this suit. The plaintiff also sought an injunction to restrain the defendant from interfering with the developments which were being carried out by the plaintiff on the suit properties in accordance with the approved plans, CPF AI 941 and CPF AI 945 pending hearing of the suit.

The plaintiff's application was supported by an affidavit sworn by Anne Karanu, a director of the plaintiff. In the said affidavit, she stated that the plaintiff was the registered owner of the suit properties. She annexed as exhibits "AN1" and "AN2" copies of Grant No. IR98059 and Grant No. IR98060 in proof of the plaintiff's ownership of the said properties. She stated that upon purchase of the suit properties, the plaintiff engaged an architect who prepared development plans and forwarded the same for approval to the defendant. The said plans were approved by the defendant on 29th September, 2015. The plaintiff thereafter applied for and obtained development approval from the National Environment Management Authority (NEMA) on 8th March, 2016. She annexed copies of the approved plans and a receipt dated 8th March, 2016 for Kshs. 209,000/- issued by NEMA as exhibits "AN3", "AN4" and "AN5" respectively. Ms. Karanu stated further that after obtaining the necessary approvals, the plaintiff embarked on developing the suit properties. She stated that despite the plaintiff having obtained all the requisite approvals, the defendant's officers engaged in acts of harassment against the plaintiff's workers on site by arresting them and demanding that they stop construction on the suit properties. She stated that the defendant's officers had also demanded money from the plaintiff. She stated that on 30th June, 2016 the defendant's officers went to the suit properties and put marks on the structures thereon which they intended to demolish without a formal enforcement notice having been issued to the plaintiff. She annexed photographs showing the said marks that had been put by the defendant on the buildings on the suit properties as exhibit "AN6". Ms. Karanu stated that the defendant's conduct aforesaid violated the plaintiff's fundamental right to own property and the plaintiff was apprehensive that the defendant would go ahead with the threatened demolition of the buildings on the suit properties an act that would subject the plaintiff to irreparable loss. She urged court to allow the application in the interest of justice.

The application was opposed by the defendant through grounds of opposition dated 11th July 2016. The defendant denied having approved the plaintiff's development plans. The defendant contended that the developments being carried out by the plaintiff on the suit properties were illegal and as such the defendant owed no duty or obligation to the plaintiff in respect thereof. The defendant contended that the

documents produced by the plaintiff in proof of the alleged approval of its development plans were not genuine. The defendant contended that the plaintiff had not met the conditions for the grant of the orders sought and urged the court to dismiss the application.

The application was argued by way of written submissions. The plaintiff filed its submissions on 13th December, 2016 while the defendant filed its submissions on 3rd August, 2016. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the defendant and the parties' respective submissions. What is before me is an application for interlocutory injunction. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was held in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) Eklr the Court of Appeal stated as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

I am satisfied on the material before me that the plaintiff has met the threshold for granting the orders sought. The plaintiff has established that it is the registered owner of the suit properties. The plaintiff has also established that the construction works being undertaken on the suit properties were approved by the defendant. The plaintiff has placed before the court evidence showing the said approval. The defendant did not file an affidavit in response to the plaintiff's application. The averments of fact in the affidavit in support of the plaintiff's application were therefore not controverted. In its grounds of opposition, the defendant contended as I have mentioned above that it did not approve the developments being carried out on the suit properties. The defendant contended that the material placed before the court by the plaintiff in proof of its alleged approval of the said project was not authentic. These averments were factual in nature. The defendant did not place any material before the court in support of the same. Section 107 of the Evidence Act, Chapter 80 Laws of Kenya provides that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The defendant did not place any evidence before the court in proof of its allegations against the plaintiff. I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. I am also satisfied that the plaintiff is likely to suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. The defendant has not denied that it intends to demolish the structures which have been put up by the plaintiff on the suit properties. The plaintiff would no doubt suffer irreparable harm if the defendant carries out the threatened demolition. Having come to the conclusion that the plaintiff has established a prima facie case and that it stands to suffer irreparable injury which cannot be compensated in damages, it is not necessary for me to consider the balance of convenience.

The upshot of the foregoing is that the plaintiff's application dated 4th July 2016 is well founded. The same is allowed in terms of prayers 3 and 5 thereof. The plaintiff shall have the costs of the application.

Delivered and Signed at Nairobi this 15th day of September, 2017

S. OKONG'O

