



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1099 OF 2016**

**SANDALWOOD LENANA LIMITED.....PLAINTIFF**

**VERSES**

**CHIEF EXECUTIVE, NAIROBI COUNTY.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY WATER & SEWERAGE LTD.....2<sup>ND</sup> DEFENDANT**

**DIRECTOR GENERAL NEMA.....3<sup>RD</sup> DEFENDANT**

**BAYSIDE LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff is the registered owner of all that parcel of land known as L.R No. 1/1161 situated on Lenana Road, Kilimani, Nairobi on which it has constructed a block of apartments (hereinafter referred to as the suit property”). The 4<sup>th</sup> defendant is the registered owner of all that parcel of land known as L.R No.1/761 also situated on Lenana Road, Kilimani, Nairobi (hereinafter referred to as “Plot No.761”). Plot No. 761 is adjacent to the suit property. The dispute between the plaintiff and the 4<sup>th</sup> defendant has arisen over a sewer line which the 4<sup>th</sup> defendant is constructing from Plot No.761 along the frontage of the suit property to a public manhole adjacent to the suit property. The plaintiff has contended that the suit property is served by a sewer line which is at the back of the property which also serves the neighbouring properties. The said sewer line also empties into the same manhole adjacent to the suit property. The plaintiff has contended that the said manhole leaks most of the time and has become a perennial health hazard as a pool of sewer which forms after such leakage flows to the suit property. The plaintiff has contended that it has incurred a lot of expenses to repair the said manhole to save its tenants on the suit property from unpleasant smell and risk to their health. The plaintiff has contended that the leaking of the said manhole is as a result of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s dereliction of duty. The plaintiff’s problem with the sewer line being put up by the 4<sup>th</sup> defendant is that the same is being laid beside fresh water pipes along Lenana Road next to the suit property. The plaintiff has contended that the project which involves construction of additional five manholes around the suit property would result in over congestion of the already leaking manhole to which the plaintiff’s sewer line is connected thereby worsening the sewer leakage to the suit property. The plaintiff has contended that it was illegal, malicious and unjust for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to approve the construction of the said sewer line. The plaintiff has contended that it was not consulted before the said approval was given and that Kilimani area where Plot No. 761 owned by the 4<sup>th</sup> defendant and the suit property are situated is already served with a sewer line and as such it was not necessary for the 4<sup>th</sup> defendant to put up another sewer line to serve its property. The

plaintiff has contended that the creation of a new sewer line that runs adjacent to the suit property would affect the value of the property due to possible health hazards posed by irritating foul smell from punctured sewer lines and leaking manholes.

In its plaint dated 8<sup>th</sup> September, 2016, the plaintiff has sought a prohibitory injunction restraining the 4<sup>th</sup> defendant from constructing and or building a new sewer line at the frontage or around the suit property, a mandatory injunction requiring the 4<sup>th</sup> defendant to fill the trenches it has dug at the frontage and around the suit property for the purposes of putting up a new sewer line, a prohibitory injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from issuing any approvals to the 4<sup>th</sup> defendant to build a new sewer line at the front and around the suit property, a declaration that the approvals granted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 4<sup>th</sup> defendant to up the said sewer line are unlawful and a mandatory injunction to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cancel the said approvals.

Together with the plaint, the plaintiff filed an application by way of a Notice of Motion dated 8<sup>th</sup> September, 2016 seeking among others the following orders;

- a) A prohibitory injunction restraining the 4<sup>th</sup> defendant from further constructing, extending and or in any manner whatsoever putting up a private sewer line at the front and around the suit property pending the hearing and determination of this suit.
- b) An injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from issuing any permits and or approvals to the 4<sup>th</sup> defendant to construct and or put up a private sewer line at the front and around the suit property pending the hearing and determination of this suit.
- c) A declaration that the approvals and or permits granted to the 4<sup>th</sup> defendant by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 4<sup>th</sup> defendant on 24<sup>th</sup> April, 2015, 16<sup>th</sup> June, 2016 and 1<sup>st</sup> July, 2016 were unlawful and void ab initio.
- d) An order compelling the 4<sup>th</sup> defendant to fill back the trenches it has dug and level the ground around and along the suit property.
- a) There be liberty to apply.

The application was brought on the grounds set out on the face thereof and on the affidavit, further affidavit and further Supplementary Affidavit sworn by Jane Ng'ang'a on 8<sup>th</sup> September, 2016, 24<sup>th</sup> November, 2016 and 9<sup>th</sup> March, 2017 in which she reiterated the contents of the plaint and the history of the plaintiff's dispute with the defendants which I have highlighted at length at the beginning of this ruling. It is not necessary for me to reproduce the same here.

The Plaintiff's application was opposed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants through separate replying affidavits. The 2<sup>nd</sup> defendant opposed the application through a replying affidavit sworn by Wellington Ndegwa sworn on 14<sup>th</sup> February, 2017. The 2<sup>nd</sup> defendant contended that the plaintiff's application is vexatious and unmeritorious. The 2<sup>nd</sup> defendant contended that due process was followed before approval was given to the 4<sup>th</sup> defendant to construct the sewer line in contention. The 2<sup>nd</sup> defendant contended that the 4<sup>th</sup> defendant's proposal to construct the contested sewer line was approved after it satisfied all requirements. The 2<sup>nd</sup> defendant stated that it considered among others the status and accessibility of the receiving sewer line to establish whether or not it will be able to accommodate the expected flow from the proposed line and whether there would be any operational challenges as a result of connecting a new line before the approval was given. The 3<sup>rd</sup> defendant filed replying affidavit sworn by Josey Njoki Mukiri on 30<sup>th</sup> January, 2016. The 3<sup>rd</sup> defendant stated that the 4<sup>th</sup> defendant furnished them with Environment Impact Assessment Project Report on or about 26<sup>th</sup> February, 2015 for consideration for the purposes of issuance of an Environment Impact Assessment (EIA) License. Upon receipt of the said project report,

the 3<sup>rd</sup> defendant wrote to the relevant lead agencies seeking their views on the same. The 3<sup>rd</sup> respondent received a response from the 1<sup>st</sup> defendant only. In the exercise of its own due diligence, the 3<sup>rd</sup> defendant's officers visited the site of the project and prepared its own report. It was after it was satisfied that the proposed project had met all the requirements for issuing EIA license that the 3<sup>rd</sup> defendant issued the license to the 4<sup>th</sup> defendant for the project which license was subject to various conditions which were to be met by the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant contended that the 4<sup>th</sup> defendant's project had complied with all the necessary environmental regulations and guidelines.

The 4<sup>th</sup> defendant filed grounds of opposition and a replying affidavit in opposition to the application. In its grounds of opposition, the 4<sup>th</sup> defendant contended among others that the plaintiff has failed to show a cause of action against the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant also challenged the jurisdiction of the court to entertain the suit which it contended is based solely on environmental issues. The 4<sup>th</sup> defendant's replying affidavit was sworn by its director, Fathudin Ali Mohamed. The 4<sup>th</sup> defendant admitted that it is the owner of Plot No. 761. The 4<sup>th</sup> defendant admitted further that it is constructing a twelve (12) storey office block on the property. The 4<sup>th</sup> defendant stated that before commencing the project, it obtained approval from the 1<sup>st</sup> defendant and a license from the 3<sup>rd</sup> defendant. The 4<sup>th</sup> defendant stated that the EIA license by the 3<sup>rd</sup> respondent was issued after adequate public consultation and participation. The 4<sup>th</sup> defendant contended that the sewer line which was serving Plot No. 761 had inadequate capacity and could not serve the development on Plot No. 761 once completed. The 4<sup>th</sup> defendant contended further that the said sewer line was passing through a private property which was to be developed by the owners in the near future. The 4<sup>th</sup> defendant contended that if the said plot is developed, Plot No. 761 would be cut off the sewer line. The 4<sup>th</sup> defendant stated that as a result of the foregoing factors, it required a sewer line that would serve its property adequately and one that would not pass through private property. The 4<sup>th</sup> defendant applied to the 2<sup>nd</sup> defendant for approval of a privately developed sewer extension to serve Plot No. 761. It submitted design drawings for the sewer extension works which were duly approved by the 2<sup>nd</sup> defendant. It subsequently sought and obtained permit from the 1<sup>st</sup> defendant to open public highway for the purposes of the said sewer extension. The 4<sup>th</sup> defendant stated that it also obtained permission from Kenya Urban Roads Authority to undertake the said sewer extension on a road reserve. The 4<sup>th</sup> defendant contended that the sewer line extension complained of by the plaintiff neither passes through nor touches the suit property. The 4<sup>th</sup> defendant contended that the said sewer line passes approximately 1.5 meters from the suit property. The 4<sup>th</sup> defendant contended that there was nothing unusual for water and sewer lines to run near each other in high population density areas. The 4<sup>th</sup> defendant stated that the existing manhole to which the sewer extension would be connected which the plaintiff has claimed to be faulty will be made good by the 4<sup>th</sup> defendant as part of the sewer extension works. The 4<sup>th</sup> defendant contended that the sewer line extension which has been approved by the 2<sup>nd</sup> defendant is the most cost effective connection to an existing sewer line.

The application was argued orally before me on 20<sup>th</sup> March, 2017. I have considered the application together with the three affidavits which were filed in support thereof. I have also considered the defendants' affidavits in reply to the application. Finally, I have considered the submissions which were made before me by the parties' respective advocates. What the Plaintiff is seeking in its application is a temporary prohibitory and mandatory injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, an applicant for an 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 which was cited by the 4<sup>th</sup> defendant, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 which was also cited by

the 4<sup>th</sup> defendant and went further to state 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.”*

In contrast, an applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. The principles which the court apply in applications for interlocutory mandatory injunction were set out in the case of Locabail International Finance Limited vs. Agro-Export (1988) 1 All ER 901, where the court stated that:

*A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.*

In the case of Shepherd Homes Ltd. –vs. Shandahu [1971] 1 Ch.304, Meggery J. had this to say on interlocutory mandatory injunctions:

*“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.*

On the material before the court, I am not satisfied that the plaintiff has met the threshold for granting the orders sought. It is not contested that the sewer line extension works complained of by the plaintiff are being undertaken by the 4<sup>th</sup> defendant on a road reserve. Save for the driveways to the suit property which the 4<sup>th</sup> defendant was to open up when constructing the said sewer line and which the 4<sup>th</sup> defendant was obliged to make good or repair under the approval that it was granted by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff has not indicated in what manner the said sewer extension works have interfered with the enjoyment of its rights over the suit property. I am in agreement with the submission by the 4<sup>th</sup> defendant that the plaintiff’s application is grounded on speculation. The plaintiff’s claim that the sewer line extension being constructed by the 4<sup>th</sup> defendant is likely to be punctured and that the additional manholes being constructed are likely to leak and spew sewage on the suit property is a mere speculation. The plaintiff has not placed any evidence before the court in proof of those allegations. The fact that the current manhole to which the plaintiff’s sewer line is connected is leaking does not mean that the additional manholes being built by the 4<sup>th</sup> defendant will similarly leak. The 4<sup>th</sup> defendant has given a reasonable explanation why it has decided to construct a new sewer line extension to its property. The 4<sup>th</sup> defendant has demonstrated that it followed the due process in acquiring all the necessary approvals, permits and licenses before commencing the construction of the said sewer line extension. The plaintiff has contended that the said approvals, permits and licenses were issued unlawfully. I have no solid evidence before me in support of this contention. What I have is the plaintiff’s word against the 4<sup>th</sup>

defendant's word. The issue as to the validity of the said approvals, permits and licenses will have to await the full hearing of the case. The much I can say at this stage is that the plaintiff has not established on a prima facie basis that the said approvals, permits and licenses were granted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 4<sup>th</sup> defendant illegally. I have noted that in prayer 2 of the application, the plaintiff has sought an injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from issuing any permits or approvals to the 4<sup>th</sup> defendant in respect of the said sewer line extension. This order cannot be granted. The plaintiff exhibited the approvals, permits and a license which have been granted to him by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in respect of the said sewer line. The court cannot restrain an act which has already taken place.

In prayer 3 of the application, the plaintiff has sought declaratory order. The same order has been sought in prayer (d) of the plaint. I am in agreement with the submission by the defendants that the court cannot grant this order at interlocutory stage. The same will have to await full hearing. From what I have set out above, it is my finding that the plaintiff has not established a prima facie case against the defendants. The plaintiff has also not demonstrated that it will suffer irreparable injury which cannot be compensated in damages unless the injunction sought is granted. The prayer for a declaration as I have already pointed out is not available to the plaintiff at this stage.

The upshot of the foregoing is that the Plaintiff's application dated 8<sup>th</sup> September, 2016 has no merit. The application is dismissed with costs to the defendants.

**Delivered and Signed at Nairobi this 13<sup>th</sup> day of October 2017**

**S. OKONG'O**

**JUDGE**

Ruling read in open court in the presence of:

Mrs. Owino	for the Plaintiff
Mr. Mac Ronald for Kithi	for the 1 <sup>st</sup> Defendant
Mr. Kiprono	for the 2 <sup>nd</sup> Defendant
No appearance	for the 3 <sup>rd</sup> Defendant
Mr. Balala h/b for Mr. Owino	for the 4 <sup>th</sup> Defendant
Catherine	Court Assistant