



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 515 OF 2016

MANUBHAI VELJI VARSANI.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. On 24/8/2016, the plaintiff/applicant, brought a Notice of Motion dated 23/8/2016 seeking the following orders:

“1. That the application herein be certified urgent.

2. That service of the application be dispensed with at the first instance.

3. That the honourable court do grant temporary orders of injunction restraining the defendant whether by itself, servants, employees, workers or agents from trespassing, encroaching, invading and or interfering with the peaceful and quiet enjoyment, use and occupation of land parcel number LR No. 209/7609 situate at Parklands, Nairobi until hearing and determination of this application and suit.

4. That the honourable court do grant temporary orders of injunction restraining the defendant whether by itself, servants, employees, workers or agents from trespassing, encroaching, invading upon LR 209/7609 so as to carry out any sewerage rehabilitation, repairs or works or any works or repairs for that matter pending hearing and determination of this application and suit.

5. That the costs of this application be borne by the defendant/respondent.”

2. The application is supported by an affidavit sworn by the applicant on 23/8/2017. The applicant contends that he is the registered owner of Land Reference Number 209/7609 [the suit property] measuring approximately 0.1510 hectares and situate in Nairobi County. He further contends that the defendant has threatened to “trespass, encroach and or invade” the suit property ostensibly to carry out rehabilitation works on sewer lines. In his view, the said rehabilitation works will cause prejudice to him and his family and will subject him and his family to poor living conditions, ranging from “periodic water shortages, sewer blockages, exposure to hazardous waste and intermittent and varying levels of construction noise”. The applicant further states that the respondent has not served upon him any valid notice, permit or approval plan allowing them to execute the said works. He contends that in the absence of the notice, permit and approval plans, the intended rehabilitation works on the sewerage line would constitute an act of trespass and the court ought to issue a temporary injunction restraining the respondent

against undertaking the said rehabilitation works. Lastly, the applicant contends that he stands to suffer irreparably should the court fail to issue a restraining order.

3. The respondent has opposed the said application. The respondent's case is that in November 2015, Parklands Mosque & Madrasa, owner of Land Reference Number 209/17039 which is adjacent to the plaintiff's property LR No. 209/7609, sought and obtained permission from the respondent to construct a sewer connection to their properties along Third Parklands Avenue. In May 2016, the respondent notified the plaintiff about the proposed works which would run along the applicant's suit property and wayleave adjacent to LR No. 209/17039. The respondent contends that the applicant was duly notified through a letter dated 5/5/2016.

4. The respondent further contends that servants and agents of the respondent have a right to enter on any land or premises to which regulations of the respondent apply for the purpose of exercising any right conferred on the respondent to execute and maintain works or take other action and such right accrues upon expiry of a 48 hour notice. In this regard, the respondent states that the plaintiff was served with sufficient entry notice on 5/5/2016 and the said notice expired on 8/5/2016. The respondent further contends that the plaintiff has persisted in hindering and obstructing the defendant from carrying out works on the said sewer line in contravention of the law.

5. The application was canvassed through written submissions. In written submissions dated 13/4/2017, counsel for the plaintiff argued that the respondent was proceeding to execute the alleged rehabilitation works without serving a valid notice upon the plaintiff. Counsel submitted that in the absence of a proper notice, the plaintiff is completely kept in the dark regarding their safety, sanitation and peaceful enjoyment of the suit property. Counsel further submitted that in the absence of notice, the respondent's actions are illegal, unlawful, unprocedural and irregular and do infringe on the plaintiff's right to use, occupy and quietly enjoy the suit property.

Determination

6. The issue to be determined in the present application is whether the applicant has established a case for grant of an interim injunction. The principles upon which an interlocutory injunction is granted were spelt out in ***GIELLA V CASSMAN BROWN, (1973) EA 358***. First, the applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it ought to decide the application on a balance of convenience.

7. The plaintiff's ownership of LR No.209/7609 is not disputed. In paragraph 5 of Duncan Ogambi's Replying affidavit, the defendant contends that the material works are being undertaken by Parklands Mosque and Madrasa, owners of LR No. 209/17039, **[the third party]**. The defendants further contend that upon approval of the third party's request to construct a sewer connection to their property, the defendant duly notified the plaintiff through a letter dated 5/5/2016. The said letter reads as follows:

“... ”

RE: SEWER CONNECTION TO SERVE PLOT LR 209/17039 ON THIRD PARKLAND AVE.

This is to notify you that the company has approved a sewer connection to serve the above mentioned property.

Since the sewer wayleave is within your property, Ms Parklands Mosque and Madrasa have been advised to ensure that the disturbed grounds are reinstated to your satisfaction at their cost. The work is scheduled to commence on 15th may 2016.

Your assistance and cooperation will be highly appreciated.

...”

8. I have carefully considered the regulatory framework governing the respondent’s execution of its public mandate in the management of water and sewerage in the Nairobi City County. There is no gainsaying that a court of law should exercise caution when considering an application for injunctive orders against an entity mandated to execute public works, particularly when the entity discharges a mandate that safeguards public health.

9. In the present application, no materials have been placed before the court to suggest that the offensive works are public works being undertaken by the respondent on behalf of a public body. All that the respondent has put forth is a letter indicating that a third party intends to enter the plaintiff’s property to execute some work. Similarly, no evidence of statutory notice has been availed to show that the respondent intends to execute a public mandate within the plaintiff’s property. Where appropriate, such notice would be accompanied with approved plans. It does appear that indeed the plaintiff has been kept in the dark about the nature, magnitude and impact of the intended works. The relevant regulatory framework requires that the respondent serves notice of intended public works.

10. In light of the foregoing, I am satisfied that the plaintiff has made out a *prima facie* case. The suit premises is occupied as dwelling premises. Injury to be occasioned by the construction of a sewer line through the suit property without adhering to the laid down regulatory requirements is not the type of injury that would be adequately indemnified through an award of damages.

11. Consequently, I make the following orders in disposing the plaintiff’s notice of motion dated 13/5/2016:

a. Pending the hearing and determination of this suit, the defendant is hereby restrained by itself, its servants and agents from entering into and/or carrying out works on the plaintiff’s piece of land in LR No. 209/7609 without fully complying with the regulatory framework governing execution of such works.

b. The plaintiff shall have costs of this application.

Dated, signed and delivered at Nairobi on this 13th day of October, 2017.

B M EBOSO

JUDGE

In the presence of:

Advocate for the Plaintiff

Advocate for the Defendant

Halima Abdi: Court Assistant