



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO 23 OF 2017

JOSEPH MUREITHI GICHU..... PLAINTIFF

VERSUS

1. OBUYA OTIENO RITZAU T/A

BAMBURI COMMUNITY HIGH SCHOOL.....1ST DEFENDANT

2. ERIC OTAMBO.....
.....2ND DEFENDANT

3. COUNTY GOVERNMENT OF
MOMBASA.....3RD DEFENDANT

4. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH DEFENDANT

RULING

1. By a Notice of Motion Application dated 2nd February 2017 and brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, Section 3 of the Environmental Management and Co-ordination Act No.8 of 1999 and Articles 42 and 70 of the Constitution of Kenya, the Plaintiff/Applicant is seeking orders:

1) Spent

2) **THAT an Order of Temporary Injunction be issued to prevent, stop, or restrain and/or discontinue any acts of omission or commission by the Defendants themselves or through their agents, servants, employees, proxies or tenants that perpetuate the throwing and/or disposing of waste that litters denigrates and is harmful to the environment on sub division PLOT NO.9901/3/SECTION II MN MTOPANGA, BAMBURI pending hearing and determination of this Application.**

3) **THAT an order of Temporary Injunction be issued to prevent, stop, and or restrain the 1st and 2nd Defendants by themselves or through their agents, servants, employees, proxies or tenants from continuing with acts and omissions in the Suit Property that constitute noise pollution within the meaning of the Environmental Management and Co-ordination and Article 42 of the Constitution of Kenya pending hearing and determination of this Application.**

4) That an order of Temporary Injunction to compel the public officers of the 3rd and 4th Defendants to take measures to prevent and discontinue any acts of commission or omission that litters denigrates and is harmful to the environment perpetuated by the 1st and 2nd Defendants and or their agents, servants, employees, proxies, tenants on and against occupants of sub division plot NO.9901/3/SECTION II MN MTOPANGA, BAMBURI pending hearing and determination of this Suit.

2. The Application is based on the grounds:

a) That the Plaintiff is entitled to peaceful enjoyment and quiet possession of the PLOT NO.9901/3/SECTION II MN MTOPANGA, BAMBURI.

b) That the 1st and 2nd Defendants are creating a health hazard on PLOT NO.9901/3/SECTION II MN MTOPANGA, BAMBURI which is detrimental to the Plaintiff, by disposing all manner of waste on it.

c) That the 1st and 2nd Defendants are producing excessive noise and vibrations on their plot through high voltage music drumming and worship both during the day and night hours.

d) That the Defendants herein are acting in fragrant disregards to the Plaintiffs right to a clean and healthy environment.

e) The Defendants are engaging in acts that are harmful to the environment.

f) The 3rd and 4th Defendants are acting in complete disregard of their statutory obligation and have become accomplices to the other Defendants' breaches.

g) The 1st and 2nd Defendants are running a school and church in an environment that is purely residential much to the prejudice of the residents.

h) The Defendants' actions are causing a depreciation and loss of value of the Plaintiff's properties due to noise and dirt.

i) The 1st and 2nd Defendants herein have acknowledged littering and causing a nuisance to the Plaintiff.

j) The 3rd Defendant has acknowledged that the Defendant structure/building is not authorized or certified to be there and that the 1st and 2nd Defendants are engaged in environmental degradation but has done nothing about it.

3. There is also filed an affidavit in support of the Application sworn by Joseph Mureithi Gichu, the plaintiff sworn on 2nd February 2017 and a Supplementary Affidavit dated 12th May 2017 in which he has deposed that he is the registered owner of the Suit Property and thus entitled to quiet possession and peaceful enjoyment thereof, while the 2nd Defendant has at all material times to this suit been the registered owner of PLOT NO.9905/SECTION II/MN while the 1st Defendant runs a school and allows several churches to conduct their services during the day and overnight in the said school during weekend on a storied building on the said land. The Plaintiff deposes that in disregard to his right to a clean and healthy environment as provided for under the Constitution and the Law, the 1st and 2nd Defendants either by themselves, their agents, servants, proxies or tenants are throwing or disposing waste and garbage on his plot and therefore exposing him to unhygienic and hazardous environment as a result of which he has suffered injury, loss and damage. The Plaintiff has further deposed that the Defendants have caused and permitted excessive noise and vibration from the said Defendants' premises which have interrupted the Plaintiff's quiet occupation and enjoyment of his premises.

4. The Application has been opposed by the Defendants. The 1st Defendant filed a Reply Affidavit dated 2nd June 2017 in which he has deponed that the Plaintiff is a neighbour with whom they have had a bad relationship on several occasions that have even resulted into frivolous criminal cases before the police and the courts. The 1st Defendant has also deponed that there is already a pending suit between him and the Plaintiff, to wit, **Mombasa CMCC No.901 of 2011, Joseph Mureithi Gichu –V- Obuya Otieno Ritzau** in which the Plaintiff had filed an Application seeking similar orders as in this case. The 1st Defendant has therefore denied the Plaintiffs allegations.

5. The 2nd Defendant filed a Replying Affidavit sworn by himself on 31st March 2017 in which he has deposed that he has leased his premises to the 1st Defendant and therefore the 1st Defendant is answerable and should be held responsible for the acts complained of. The 2nd Defendant has denied any liability for the breach and nuisance caused by the 1st Defendant on the Plaintiff's premises. On their part the 3rd Defendant filed grounds of opposition dated 5th April 2017 in which it contends that the orders sought by the Plaintiff in paragraph 4 of the Motion is tantamount to a Mandatory injunctive Order that ought not be granted at the interlocutory stage in the absence of special circumstances. The 4th Defendant filed a Replying Affidavit sworn by Stephen Wambua, the County Director of Environment, Mombasa County dated 29th March 2017 in which he has deposed, inter alia, that the acts complained of are under the Constitution and the Law devolved functions which are supposed to be implemented by the 3rd Defendant.

6. The Application was canvassed by way of Written Submissions. The Plaintiff filed his Submissions on 31st May 2017 while the 1st Defendant filed his on 4th April 2017. The 2nd Defendant filed his submissions on 10th July 2017 while the 4th Defendant filed theirs on 4th July 2017.

7. I have duly considered the Application, the Affidavits on record, the grounds of opposition and the submissions filed as well as the authorities cited and the law. Article 42 of the Constitution of Kenya provides as follows:

“ 42 Every person has the right to a clean and healthy environment which includes the right –

a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated under Article 69; and

b) To have obligations relating to the environment fulfilled under Article 70

Article 70 of the constitution provides as follows:

70 (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) on application under Clause (1), the Court may make any order, or give any directions, it considers appropriate –

a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

c) to provide compensations for any victim of a violation of the right to a clean and healthy environment.

(3) for the purposes of this Article, an applicant does not have to demonstrated that any person has incurred loss or suffered injury.

8. Section 87 of the Environmental Management and Co-ordination Act No.8 of 1999 provides, inter alia, that no person shall discharge or dispose of any waste in such manner as to cause pollution to the environment or ill health to any person.

9. The Application is seeking both prohibitory and mandatory injunctions. I now have to determine whether the Plaintiff has satisfied the conditions for grant of interlocutory injunctions. In the celebrated case of **Giella –V- Cassman Brown & Co Ltd (1973) EA 358**, the Applicant must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and in the event of doubt, the court will decide on the balance of convenience.

10. In the case of **Mrao –V- First American Bank Of Kenya Limited & 2 Others (2003)KLR 125** a *prima facie* case was described as follows:

“...a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.... ”

With regard to mandatory injunction in the case of **Kenya Breweries Ltd and Another –V- Washington Okeyo (2002) eKLR**, the Court of Appeal had occasion to discuss and consider the principles governing grant of mandatory injunctions and held that the test was as correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition Paragraph 948 which reads:

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff, a mandatory Injunction will be granted on an interlocutory Application.”

Also in the case of **Locabail International Finance Ltd –v- Agro export & another (1986) ALL ER 901** at Page 901, it was stated:

“A mandatory Injunction ought not to be granted on an interlocutory application in the absence of special circumstance, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required of a prohibitory injunction.”

11. The issue for determination is whether in the circumstances of this case the plaintiff would be entitled to the reliefs sought some of which are indeed in the nature of a mandatory injunction which, when granted, would virtually dispose of some substantive part of the suit at the interlocutory stage.

12. The plaintiff has accused the 1st and 2nd Defendants for causing a nuisance to him and thus violating his rights to a clean and healthy environment by disposing all matter of waste on the Plaintiff’s plot as well as causing noise pollution. Whereas the 2nd Defendant has denied liability and stated that the 1st Defendant should be held responsible for the breach, the 1st Defendant has denied dumping any waste on the Plaintiff’s land and further denied causing any excessive noise or vibrations. The 2nd Defendant is the owner of the premises occupied by the 1st Defendant. In his *replying affidavit* and submissions, the

impression one gets from the 2nd Defendant's arguments is that the acts complained of have been committed but the 1st Defendant is responsible for it. In my view, this assertion supports the Plaintiff's contention that his rights have been violated. The Plaintiff has shown photographs of the alleged garbage. This therefore calls for the Court's intervention.

13. In my view, the Applicant has demonstrated that he has a *prima facie* case with a likelihood of success and that unless the Court grants the conservatory orders sought in prayer 2 of the notice of Motion, there is real danger that he will continue to suffer prejudice as a result of the violation of his rights to a clean and healthy environment. The Applicant no doubt, stands to suffer irreparable damage if the nuisance is not stopped. If I had doubt in the matter, the balance of convenience tilts in favour of the Applicant as the law requires the preservation of a clean and healthy environment.

14. With regard to prayers 3 and 4 of the Application the court cannot at this stage ascertain the level of noise pollution alluded to or the refusal by the 3rd and 4th Defendants to carry out their statutory duties as required by law. In my view, these are issues that will require some further interrogations during the trial. Further, the Court has not been furnished with enough information to make a substantive finding on the same. It is therefore my conclusion that the Applicant has not presented a case that is clear and of special circumstances to warrant the grant of mandatory injunction at this interlocutory stage. There are too many uncertainties to allow for the grant of those orders as this is most certainly not a clear case. I decline to grant prayers 3 and 4 of the application.

15. In the end, I only allow orders in terms of prayer 2 of the Notice of Motion dated 2nd February 2017.

16. Costs of the Application shall abide the result of the main suit.

Orders accordingly.

Ruling dated, signed and delivered at Mombasa this 7th day of December 2017

C. YANO

JUDGE