



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 1172 OF 2014

SHEILA MWENDWA KAMINCHIA.....PLAINTIFF

VERSUS

THOMAS KIMINTA PRINSLOO.....1ST DEFENDANT

DENNIS COURT MANAGEMENT LIMITED.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th August 2014 in which the Plaintiff/Applicant seeks orders that the 1st and 2nd Defendants be restrained from infringing on the Plaintiff/Applicant's right to a clean and healthy environment by causing pollution by way of cigarette smoke to get into the Plaintiff's apartment pending the hearing and determination of this suit. She also seeks for an order compelling the 3rd Defendant to ensure the nuisance in form of cigarette smoke emanating from the 1st and 2nd Defendant's apartment is abated pending the hearing and determination of this suit. She also seeks to be excused from paying service charge to the 3rd Defendant/Respondent in the duration during which the nuisance emanating from the 1st and 2nd Defendants/Respondents continues unabated.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Sheila Mwendwa Kaminchia, sworn on 28th August 2014 in which she averred that she is the owner and occupant of Apartment No. A8 located within Denis Court Apartments, Denis Pritt road, Kilimani (hereinafter referred to as the "Plaintiff's Apartment") while the 1st and 2nd Defendants are the owners of Apartment No. A6 located within Denis Court Apartments, Denis Pritt road, Kilimani (hereinafter referred to as the "Defendants' Apartment"). She averred further that the Defendants' Apartment is located directly below the Plaintiff's Apartment. She averred that she moved into the Plaintiff's Apartment on or about January 2012 and enjoyed quiet possession and user thereof. She further averred that on or about December 2013, the Defendants/Respondents let out the Defendants' Apartment to a tenant who is not known to her after which the Plaintiff's Apartment was and continues to be intermittently engulfed by a vexatious smell of second hand cigarette smoke which she established emanates from the Defendants' Apartment. She added that as a result, the Plaintiff's Apartment reeks of second hand cigarette smoke and has become uninhabitable, unhealthy and an unbearable environment to live in. She added that as a result her health has been affected adversely and she has suffered pain and injury. She also stated that since the nuisance began, she has experienced

constant headaches, abdominal pains, sore throat and burning sensation in her eyes, aching on her sides, loss of appetite, thinning and breakage of her eyebrows and hair. She stated further that she has been compelled to seek medical attention as a result of the nuisance. She annexed a letter from Nairobi Hospital in support of that assertion. She added that her doctor opines that no medication will give her relief from the health complications that she is experiencing so long as she continues to be exposed to the nuisance complained of. She further averred that she has complained to the 1st and 2nd Defendants/Respondents about the nuisance occasioned by their tenant vide a letter authored by her advocates dated 30th July 2014 but the said Respondents have not taken any steps to have the nuisance complained of abated. She added that she also wrote to the 3rd Defendant/Respondent through her advocates on 19th June 2014 complaining about the nuisance and urging it to take up its obligations under the lease to ensure that the nuisance is abated but that the 3rd Defendant/Respondent has neither replied to her letter nor taken any action to ensure that the nuisance is abated. She stated further that she also raised the issue during a meeting of the owners of Denis Court Apartments held on 6th January 2013 where the parking bay was designated as a smoking area but the tenant in the Defendants' Apartment has not been using it for smoking. She stated that unless the court intervenes, she will continue to suffer disturbance of user and quiet possession of the Plaintiff's Apartment as well as grave and irreparable harm to her health.

The Application is contested. The 1st Defendant, Thomas Kiminta Prinsloo, filed his Replying Affidavit sworn on 20th April 2015, in which he averred that it is true that he and the 2nd Defendant/Respondent who is his wife own the Defendants' Apartment. He stated that there is another pending suit being **ELC No. 727 of 2012** involving the same parties and same issue of cigarette smoke, a suit which has since been consolidated with this present suit. He added that the institution of this suit manifests absolute bad faith and ill will on the part of the Plaintiff/Applicant and is aimed at harassing them for reasons and motives best known to the Plaintiff. He stated further that the Defendants' Apartment was let out by their agent to Alaa Salah Mohamed on 10th December 2013 but he has since moved out. He further stated that the Plaintiff has not placed any evidence in court to demonstrate that the alleged cigarette smoke emanates from the Defendants' Apartment and in addition, no particulars of instances or of days when the alleged nuisance is alleged to have occurred have been shown. He added that neither he nor the 2nd Defendant reside in the Defendants' Apartment and it is inconceivable how they should be held responsible for the alleged acts of nuisance committed by the occupant to whom they have let out the Defendants' Apartment. He added further that the alleged acts of nuisance complained of are of a personal nature over whose conduct they have no control and for which they have not received or stand to receive any benefit therefrom and consequently, they cannot be held vicariously liable for occurrence of the same. They further stated that this Application is an attempt by the Plaintiff/Applicant to circumvent the well-known principle of environmental protection which is polluter-pays principle pursuant where to legal obligations arising from environmental law violations as may be proved are borne by the offender. He further added that the current tenant living in the Defendants' Apartment does not smoke and neither does any member of his household. He further indicated that this suit and Application are premature as the Plaintiff did not serve him with a demand or notice of intention to sue and further that the Plaintiff did not seek audience with him or raise any complaint with him or their appointed agent with respect to the matters complained of. He further added that his current tenant who is living in the Defendants' Apartment informed him that he does not smoke and that the Plaintiff has not made any attempts whatsoever to draw to the attention of the tenant of the alleged acts of nuisance complained of. He stated that in light of this, this suit manifests extreme bad faith and deep sense of intolerance on the part of the Plaintiff. He added that while he does not dispute the Plaintiff's right to a healthy and clean environment, the matters deponed to in the Supporting Affidavit as to the effect of the alleged second hand cigarette smoke on the health and wellbeing of the Plaintiff are self-serving and wildly speculative and the allegations have been sensationally made without backing of any scientific evidence in substantiation thereof. He further stated that as owners of the Defendants' Apartment, they have not authorized the commission of the alleged acts of nuisance, that in fact the tenancy agreement signed between them and the tenant expressly oblige the tenant to refrain from doing such acts which may occasion nuisance, annoyance or inconvenience to the occupiers of any neighboring premises and furthermore, the agreement enjoins the tenant to observe such rules and regulations established by the management company for the benefit of all the occupants of the estate. He concluded by stating that the conduct of the Plaintiff/Applicant in dealing with the matter at hand has been grossly disproportionate and inappropriate

in the circumstances and the same is calculated at intimidating and harassing his tenants into vacating the Defendants' Apartment.

Both the Plaintiff/Applicant and the 1st and 2nd Defendants filed their written submissions.

I am required to determine whether the Plaintiff/Applicant is entitled to an order of temporary injunction pending the hearing and determination of this suit which he seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus 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.”

In this case, the Plaintiff claims that the Defendants have occasioned a nuisance to her by the emission of cigarette smoke from the Defendants' Apartment into the Plaintiff's Apartment thereby infringing on her right to a clean and healthy environment. She has stated that as a result of that nuisance, she has suffered from the ailments enumerated above. Nuisance involves the unreasonable interference with another's use and enjoyment of land. Private nuisance seeks to protect a landowner from interference with his or her use and enjoyment of land, and in so doing seeks to balance the competing claims of landowners by ensuring that one landowner's use of his or her land does not unduly subordinate the rights of adjoining landowners. The prayer for injunction is based on nuisance. The nuisance pleaded by the Plaintiff/Applicant is one that unduly interferes with the comfortable and convenience enjoyment of the Plaintiff's Apartment. Proof of the nuisance is necessary before the Plaintiff/Applicant can succeed on this ground. Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case with high chances of success at the main trial? In answering that question, I will in no way make any final position on this issue which is, as far as I can tell, the main issue for determination at the trial of this suit. At this interlocutory stage, the only evidence brought forth by the Plaintiff/Applicant is the statement in her Supporting Affidavit that second hand cigarette smoke emanates from the Defendants' Apartment and enters into the Plaintiff's Apartment which is located above. The Plaintiff/Applicant has not demonstrated that this is the factual position. In fact, the Plaintiff/Applicant does not know who lives in the Defendants' Apartment and whether or not they are smokers. To the contrary, the 1st and 2nd Defendants deponed that the tenant in occupation of the Defendants' Apartment is a non-smoker. The Plaintiff/Applicant did not respond to that allegation and the court is left with no otherwise than to take that as the factual position at this interlocutory stage. In addition, the Plaintiff/Applicant has not been able to rule out that the alleged cigarette smoke could be emanating from a different apartment altogether. That being the position, I find no evidence to prove such nuisance in this case. Accordingly, I find that the Plaintiff/Applicant has not established a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha**

Education Society (2001) 1 EA 86 as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 19TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE