



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 354 OF 2015

KOMO CHEGE & 6 OTHERSPLAINTIFFS/APPLICANTS

VERSUS

JOSEPH WANJIKU MWANGI & 15 OTHERS.....DEFENDANTS/RESPONDENTS

NAKURU TEACHERS HOUSING COOPERATIVE LIMITED....INTERESTED PARTY

RULING

(Application for injunction; principles to be applied; defendants erecting garages in residential area; complaint by plaintiffs that this is against the physical plan; argument that the plaintiffs cannot demonstrate personal loss; injunction over a case of public interest; no need to demonstrate personal loss not compensatable by way of damages; enough that an illegality is shown; County affirming that the zone is a residential area; application for injunction allowed).

1. This suit was commenced by way of plaint filed on 17 December 2015. The plaintiffs and 1st to 15th defendants were all members of Nakuru Teachers Housing Co-Operative Society, named as Interested Party, and through their membership, they came to own various plots all carved out of the land parcels L.R No. 11964/9, 10 and 11. The plaintiffs now own the Plot Numbers 399, 426, 331, 342, 442, 375 and 502 respectively all from Nakuru Municipality Block 30. The 1st to 15th defendants on the other hand own the Plot Numbers 494, 503, 500, 507, 513, 512, 510, 383, 384, 377, 316, 317, 344, 505 and 372 respectively. The complaint of the plaintiffs is that the 1st - 15th defendants have erected and/or attempted to put up garages within their (defendants') parcels of land which the plaintiffs claim is illegal and contrary to the prevailing physical plan. It is averred that the 16th defendant, the County Government of Nakuru, has neglected and/or refused to enforce its laws and procedures. In the suit, the plaintiffs want the defendants restrained by orders of injunction from putting up and/or erecting garages in the plots that they own.

2. Together with the plaint, the plaintiffs filed an application for injunction which is the subject of this ruling. In the application, the plaintiffs want the defendants restrained from putting up/erecting garages and/or from carrying out garage activities in the plots that they own, pending hearing and determination of this suit. The plaintiffs also want orders to restrain the County Government of Nakuru from issuing licences or approvals allowing the carrying out of garage activities within the defendants' plots. The application is supported by the affidavit of the 3rd applicant. He has deposed inter alia that the area is residential and that the garages are being put up contrary to the user of the area and the plan of the County Government. Their demand to have the garages pulled down have been frustrated. It is deposed that on 16

December 2015, a group of over 100 mechanics led by the Member of the County Assembly (MCA) of Nakuru West, threatened to burn their (plaintiffs') houses. It is averred that the alleged illegal activities are a serious health hazard and a threat to security.

3. The County Government of Nakuru as the 16th respondent, filed a Statement of Defence and a Replying Affidavit sworn by Joseph Motari, the County Secretary. He has deposed that the County Government is aware that some persons have illegally developed unapproved garages in the area. The County Government has made several visits in the area to collect information on who has put up the illegal structures but they were stopped by irate residents. The however marked the structures with an 'X' to show that they are illegal structures. He has averred that since the people who put up the structures are unknown, the County Government is unable to issue an enforcement notice under the Physical Planning Act. He has deposed that the County Government has not sanctioned the structures in issue and according to them the same are illegal. He has in fact asked that the court issues an order for the demolition of the said structures to bring sanity to the residential area. He has stated that the Block 30, where these parcels are situated, is only for residential and not industrial purposes, and at no time has the County Government approved any change of user.

4. The case against the 9th and 10th defendants was subsequently withdrawn.

5. The 1st to 8th and 11th to 15th defendants filed defence and a reply to the application through the Replying Affidavit of Samuel Nganga Karanja, the 5th respondent. He has deposed that they have leased the plots to 3rd parties who are carrying out legal businesses in the plots. He has stated that the businesses being carried out are not contrary to the user of the area and that the County Government has in fact been issuing business permits to their lessees. He has averred that the applicants have not annexed any document to demonstrate that they own any properties in close proximity to their (defendants') plots. He has stated that the plots are situated in a commercial area and not residential area as alleged by the plaintiffs. According to him, the businesses carried out by their tenants is not in any way a security threat or health hazard to the plaintiffs. He is also aware of other persons carrying on businesses in the area who have not been sued by the plaintiffs. He has asked that the application be dismissed with costs.

6. Mr. Morintat for the applicants urged me to allow the application. Ms. Wanjala for the 16th respondents did not actually oppose the application. She submitted that the County Government has not permitted the erection of the garages in issue and submitted that the same are illegal structures under the Physical Planning Act. She only asked for directions on the prayer seeking to injunct the County Government from issuing licences in the event that a proper application is brought for change of user.

7. Mr. Katithi for the 1st - 8th and 11th -15th respondents, submitted that the plaintiffs have not shown that they own any property in the area nor have they detailed accounts of the how the activities complained of inconvenience them. He submitted that the County Government has issued business permits for the complained activities. He submitted that granting the orders sought will be determining the matter with finality and that what are being sought are mandatory orders.

8. I have considered the matter. What is before me, as far as I can see, is an application for an interlocutory injunction seeking to stop certain activities in named parcels of land, pending hearing and determination of the suit. The activities complained off are the putting up of garages or allowing the operation of garages within the land parcels in issue. It is of course the position of the plaintiffs that the area in question is a residential area and that there has been no change of user to commercial, or any change of user allowing the plots in the area to be used as garages. This position is supported by the County Government of Nakuru who actually had intended to pull down the structures in issue.

9. The respondents opposing this application have not demonstrated that the area is not a residential area. They have stated that the area is commercial, but given the deposition by the County Secretary that the area is zoned as a residential area, they needed to file some concrete evidence to show that the area is commercial. They have not. The only item they have annexed is a Single Business Permit for one George Obare Oroka which is alleged to be within the suit premises. I have looked at the Business Permit which shows that the Plot is 8/500. The plots in issue in this case are in Block 30 and not Block 8. I doubt

whether that Business Permit is for any of the properties in issue. But even if it were, and assuming that the said person is a lessee from one of the defendants, it cannot be said that the mere issuance of a Business Permit to him, is an authentication that the area in dispute is zoned to be a garage. A Business Permit does not override the mandatory provisions of the Physical Planning Act.

10. Neither am I swayed by the arguments that the plaintiffs have not shown by documentation that they own any plots within the area or have not shown how the activities of the defendants inconvenience them. The plaintiffs need not own any plot to complain about an illegal user of land. Neither do they need to demonstrate any personal inconvenience. It is enough that they allege that there are illegal activities going on which are against the plan of the County Government. If they own no plots, the suit can as well be considered as a public interest litigation and one need not demonstrate any personal loss or personal inconvenience.

11. To succeed in an application for injunction, a party needs to demonstrate a prima facie case and loss that may not be reparable by an award of damages. If in doubt the court will consider the balance of convenience. These principles were set out in the case of *Giella vs Cassman Brown (1973) EA 358*. I do not have much quarrel with these principles which are fairly time tested. However, I do not think that an injunction cannot be allowed in all cases where personal loss not compensatable by an award of damages is not demonstrated. If this were the case, any public interest litigation would be bound to fail for the parties may never demonstrate any personal loss. In my view, it is enough that a party has demonstrated an illegality which needs to be stopped for the sake of the public. The public has an interest in the manner in which the physical plan of a County, or any area for that matter, is being followed. If planning was to be cast away as being irrelevant, what we will end up with is a haphazard and unhealthy environment. Every resident has a duty to follow the zoning of an area. One ought not be selfish at the expense of the public good.

12. In this application, the plaintiffs have demonstrated, prima facie that the 1st - 8th defendants and 11th - 15th defendants are permitting their plots to be used in a manner that is not permissible according to the physical plan of the area. They have demonstrated a prima facie case with a probability of success. I have no reason not to allow the application for injunction and stop any operation of any garage or the erection of any garage within the Block 30 area without first there being planning approval. On the injunction sought against the County Government not to issue any licence, the same is allowed but the County cannot be stopped from reviewing any application for change of user, and licence may be issued if a change of user is allowed. But such change or extension of user must comply strictly with the provisions of the Physical Planning Act, and the affected public must be engaged for their input.

13. I allow this application and make the following orders pending hearing and determination of this suit :-

(a) That all garages or other related activities within the plot numbers 494, 503, 500, 507, 513, 512, 510, 383, 384, 377, 316, 317, 344, 505 and 372 being the plots in issue in this suit must stop forthwith.

(b) That the 1st - 8th and 11th - 15th defendants/respondents are hereby stopped from permitting any person to engage in the business of a garage or other related activity within their aforesaid plots and must ensure that all such activities cease forthwith.

(c) That the 16th respondent is hereby restrained from granting any approval for the operation of a garage or other related activity within the subject properties owned by the 1st - 8th and 11th - 15th respondents unless and until a change of user is granted which must be in conformity with the Physical Planning Act and with the consultation of the plaintiffs.

(d) The costs of this application shall be shouldered by the 1st - 8th and 11th - 15th respondents.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 9th day of March , 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Morintat for plaintiffs/applicants

Mr Katithi present for 1st - 8th and 11th-15th defendants.

N/A on part of M/s E. Wanjala advocates for 16th defendants

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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