



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO. 9 OF 2015

CHARLES ONGADI NYAMBUGA.....1ST
APPLICANT

ERIK DILERUD2ND
APPLICANT

ALICE OYUGI MAGANYA3RD
APPLICANT

OLIVER SOREN OTIENO.....4TH
APPLICANT

PHILIP ODERA ONYANGO.....5TH
APPLICANT

JOSEPH ODHIAMBO GOGA.....6TH
APPLICANT

THOMAS GODFREY MACHENERI.....7TH
APPLICANT

EMMA ADHIAMBO
OTIENO.....8THAPPLICANT

LOICE ASEWE OCHANDA.....9TH
APPLICANT

PHELIX AGUREY OSONGO.....10TH
APPLICANT

VERSUS

CALEB ODHAIMBO OGUIYA.....1ST
RESPONDENT

DIRECTOR OF CITY PLANNING.....2ND
RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....3RD
RESPONDENT

RULING

1. By notice of motion dated 19th January 2015, the **nine Plaintiffs** who will hereinafter be referred to as **1st to 9th Applicants** prays that **Caleb Odhiambo Oguya**, the 1st Defendant and hereinafter referred to as the 1st Respondent, be restrained by himself or his agents from construction or continuing with construction on land parcel **13432/10 and 11, Kisumu Municipality** pending the hearing and determination of this suit. The application is based on nine grounds on its face among them being that the 1st Respondent's construction is against the zoning policy of the area, not approved by National Environment Management Authority and had obtained the licence irregularly, illegally and unprocedurally. The application is supported by the affidavit of **Charles Ongadi Nyambuga**, sworn on 19th January 2015.
2. The Applicants counsel appeared before the court *ex parte* on 21st January 2015 and obtained interim orders in terms of prayer 2 of the notice of motion. The application is opposed by the 2nd and 3rd Defendants hereinafter referred to as 2nd and 3rd Respondents through the grounds of opposition dated 13th February 2015 and replying affidavit of **Eveline Auma Otieno**, City Planner Kisumu City, sworn on 18th February 2015. They contend that the development was approved pursuant to the Kisumu Structural Plan of 1983 to 2013. The 1st Respondent also opposed the application through the replying affidavit of **Caleb Odhiambo Oguya**, sworn on 21st April 2015, in which he deponed that he had obtained all the relevant approvals and licences from both the County and National Governments for the construction project. He further deponed that the neighbours, including the Applicants, were given an opportunity to have their say during the **NEMA** report preparation.
3. The counsel for the parties filed written submissions on the application. That of the Applicants counsel, dated 4th December 2015, was filed on the same date.

The counsel for the 1st, 2nd and 3rd Respondents filed theirs on 15th December 2015.

4. The following are the main issues for the determination of the court;

- a) Whether the Applicants have established a *prima facie* case for issuance of an injunction at this interlocutory stage with a probability of success.

- b) Who pays the costs.

5. The court has carefully considered the grounds on the Notice of Motion, the affidavit evidence by all parties, submissions by counsel and come to the following conclusions;

- a) That though the Applicants and the 1st Respondent own properties in the same neighbourhood, the former are unhappy with the development the latter has commenced on his property on the basis that it is against the zoning policy of the area and lacks the requisite approvals.

- b) That the Respondents have disputed the Applicants contention, indicating that all the necessary approvals have been obtained and therefore the restraining order should not be granted.

- c) That the court is not expected to pronounce itself with finality on any issue of fact and law at this interlocutory stage. However if the court was to allow the construction to continue, and after taking evidence of all the parties make a finding for the Applicants, it will be too expensive on the part of the 1st Respondent to undo the development. On the other side, if the restraining order is issued and the court finally rule against the Applicants, the 1st Respondent would have recourse in damages.

- d) That having considered the two compelling scenarios, the court finds that this is a suitable case for issuing temporary orders of injunction as damages would not be an adequate remedy for the Applicants and the balance of convenience tilts to their favour.

- e) That so as not to delay the finalization of this suit, the parties should move with speed and comply with order 11 of the Civil Procedure Rules within the next 30 days to enable the main suit be set

down for hearing.

6. That having found as above, the court grants the notice of motion dated 19th January 2015 in terms of prayer 3 with costs in the cause.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Plaintiff/Applicant Absent

Defendant/Respondent Absent

Counsel Mr Onyango for Plaintiffs/Applicants

Mr Nakyeuwe for Mr Rodi for 2nd and 3rd Defendants/respondents

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18/5/2016

S.M. Kibunja J

Oyugi court assistant

parties absent

Mr Onyango for the plaintiffs/Applicants

M/S Nakyeuwe for Rodi for 2nd and 3rd Defendants/Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

Court: Ruling delivered in open court in presence of Onyango for Plaintiffs/Applicants and M/S Nakyeuwe for Rodi for 2nd and 3rd Defendant/Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016