REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. PETITION NO. 975 OF 2012

IN THE MATTER OF ARTICLES 19,20,22,23,35,42,47,64,69,70 & 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE ABOVE ARTICLES OF THE CONSTITUTION

AND

IN THE MATTER OF Environmental Management and Coordination Act, 1999 and the

Physical Planning Act, Chapter 286 of the Laws of Kenya

BETWEEN

ERIK SUNDE AND ZUENA HASSAN……...……..PETITIONERS

VERSUS

THE CITY COUNCIL OF NAIROBI……...……1ST RESPONDENT

MWINYI MOHAMMED MAE…….……..……..2ND RESPONDENT

PALM HOMES LIMITED……3RD RESPONDENT

SHARRIF ALWY…….……..4TH RESPONDENT

JUDGMENT

Petitioners' Case

The Petitioners brought this suit by way of a Petition and Supporting Affidavit dated and filed on 12th October 2012 in which they stated that they are the joint registered proprietors of the parcel of land

known as Land Reference Number 3734/475 measuring 0.780 acres or thereabouts located along Njumbi Road in Lavington, Nairobi (hereinafter referred to as the "Property"). They produced a copy of their title deed as proof of this assertion. They further stated that the Property lies adjacent to the parcel of land known as Land Reference Number 3734/476 measuring 0.758 acres or thereabouts and registered in the name of the Second Respondent (hereinafter referred to as the "Suit Property") which is currently being developed by the Third Respondent.

They stated that the First Respondent has granted approval for development of six residential units on the Suit Property. They asserted that part of the structures being built on the Suit Property have a great risk of encroaching onto the Property because only 10 to 35 centimeters have been left from the borderline, which is in contravention of the approved plans which indicate that there should be a space of 2.5m from the borderline to the walls and that further they are in contravention of Rule 18 of the Local Government (Building Order) Order 1968 (the "Building Code") which proscribes side spaces of 8 feet or as directed by the First Respondent. The Petitioners further stated that no provision has been made for construction of a perimeter wall. The Petitioners stated further that they were not informed of the change of user of the Suit Property from single dwelling to multi-dwelling and neither were they informed what development was intended on the Suit Property to enable them to air their views. They stated that they came to learn of some of the details upon receipt of the Environmental Impact Assessment Report from the National Environmental Management Authority (NEMA) in early September 2012. They stated further that they did inform the First Respondent of their objections both as individuals and as members of the Njumbi Road Residents Association (the "Association") but the same were neither responded to nor considered by the First Respondent. They contended that the construction on the Suit Property was proceeding without an EIA License and that the EIA Report submitted to NEMA stated that there were no objections by neighboring residents which was untrue. The Petitioners contended that no public consultations were carried out at the time of conducting the EIA or before the submission of the EIA Report. They further stated that they together with some other members of the Association obtained questionnaire forms and strongly objected to the construction and submitted them to the Second and Third Respondents, which were not considered or submitted to NEMA. The Petitioners asserted that both the properties fall under Zone 5 of the Development Ordinances and Zones Guide (the "Zonal Regulations") made by the First Respondent but that the constructions do not conform to the Zonal Regulations in that the Suit Property should not cater for six units as the minimum plot area for a unit in accordance with the Zonal Regulations is 0.2 Ha which translates to one unit. In the Petitioners' view, the multi-storey town houses being built on the Suit Property are therefore in contravention of the Zonal Regulations. The Petitioners further complained about the noise levels emanating from the Suit Property which was a nuisance to their quiet enjoyment of the Property. They stated further that the dust and other particles emanating from the construction have been blown onto the Property which constitutes further disturbance and interference.

For the above reasons, the Petitioners prayed for the following reliefs:

1. A declaration that the approval of the developments on the Suit Property by the First Respondent are illegal, null and void.
2. A declaration that the approval of the developments on the Suit Property constitute an infringement of the Petitioners' constitutional rights provided by Articles 35, 40, 42, 47, 69 and 70 of the Constitution of Kenya, 2010.
3. A permanent injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from proceeding with any construction on the Suit Property which does not comply with the relevant laws including the provisions of the Physical Planning Act and the applicable Zonal Regulations.
4. An injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from encroaching, threatening to encroach, trespassing or threatening to trespass or interfering in any manner whosoever with the Property.
5. An order for damages for trespass and/or encroachment on the Property against the Second and Third Respondents.
6. An order for costs of this Petition.

1st Respondent's Case

The First Respondent filed the Replying Affidavit by Karisa Iha, its Director of Legal Services, sworn on 8th November 2012 in which he averred that the First Respondent is in charge of planning development within the City of Nairobi which entails granting development permission, approving change of user applications, approving building plans, among other statutory duties under the **Physical Planning Act, the Town Planning Act** and the **Local Governments Act** (now repealed). He stated that the contents of the Petition were false for the reason that the Petitioners did not object to the applications within the notice period given but at a later stage when the construction was underway where they complained against the contractor on site on very flimsy reasons. He further averred that the Town Clerk dispatched on several occasions officers from Public Health, City Inspectorate and City Planning to verify the complaints brought by the Petitioners outside the notice period and after all the approvals had been granted but found the allegations to be false and malicious. He confirmed that the contractor was in compliance with the conditions approved by the First Respondent. He further averred that contrary to the false allegations contained in the Petitioners' affidavit, the Petitioners were provided with all the documents held by the First Respondent at their request. He confirmed that the First Respondent received an application of change of user of the Suit Property from single dwelling to multi-dwelling. He further averred that as required by law, the First Respondent caused an advertisement to be published in the local dailies namely Daily Nation of 15th July 2011 and the Standard of the same date in which they invited any objections to be lodged with the First Respondent within the specific notice period. He further averred that there was also visible signage placed at the gate of the Suit Property which is next to the entrance of the Property clearly showing there was an application to change the user of the Suit Property. He averred that no objection to the change of user was received from the Petitioners or any other person. He averred further that after the lapse of the notice period, an application for development permission was lodged on 2nd August 2011 upon payment of the development fee of Kshs. 60,000/- which application was approved by the Town Planning Committee of 4th August 2011 subject to conditions appearing in the Notification of Approval of Development Permission dated 12th August 2011. He further indicated that building plans were subsequently submitted for approval by the architect, the late Joel E.D. Nyaseme upon payment of a sum of Kshs. 111,690/- comprising of approval fee of Kshs. 33,930/- occupation certificate fee of Kshs. 19,000/-, infrastructure levy fees of Kshs. 41,760/- and construction site board fee of Kshs. 17,000/-. He confirmed that the Building Plan Reg. No. CPF AA034 was approved under REF: CPD/DC/LR. NO. 3734/476/jn dated 1st March 2012. He further averred that the developer applied for an Environmental Impact Assessment Licence from NEMA and confirmed having received a copy of a letter dated 18th June 2012 from NEMA approving the project study report submitted by the developer for the proposed town houses on the Suit Property. He further confirmed that the developer paid Kshs. 7,500/- on 8th March 2012 for toilet/septic tank construction and Kshs. 17,565/- on 4th April 2012 for building plans and that a certificate of structural design was approved on 23rd April 2012. He added that the contractor submitted an indemnity form which was approved on 23rd April 2012. He stated further that the First Respondent has not failed in its policing duties and that it has ensured that all conditions imposed on the developers have been complied with. He further stated that the First Respondent was implementing a new zoning policy that takes into account socio-economic circumstances of land use in a city like Nairobi where housing is a major challenge especially in decent high end residential units adding that it was their policy to encourage investments in housing. He further indicated that the area that the Petitioners reside is no longer the same as it was decades ago, that multiple dwellings have been erected and that the proposed development by the Second, Third and Fourth Respondents is in keeping with the general trend in the area and denying them approval when they have complied with all the requirements will be an infringement of their right to equal treatment. He further added that the processing of application for development permission can only be objected to within the notice period and that objections cannot be entertained at the convenience of the Petitioners. He stated that the First Respondent owes a duty to the applicants as well who must get their approvals within the time set by law provided that they comply with and observe the approval conditions and the law. In light of this, he prayed for the Petition to be dismissed for lack of merit.

3rd Respondent's Case

The Third Respondent filed the Replying Affidavit of Hussein Mohamed Shariff, its director, sworn on

15th November 2012 in which he averred that the Petition does not disclose any or a reasonable cause of action for actual or apprehended violation of the Petitioners' fundamental rights and freedoms capable of invoking the jurisdiction of this court. He further stated that the Suit Property whose original user was a single dwelling residential house was changed to multiple dwelling houses after an application for change of user which was duly approved as required by law. He further averred that prior to the granting of change of user, the 3rd Respondent advertised its said application for change of use to the public at large via advertisements published in the Friday July 15th, 2011 editions of both the Daily Nation and the Standard newspapers as well as a public notice board which was erected at the gate of the Suit Property. He added that if the Petitioners were genuinely aggrieved by the aforesaid decision of the 1st Respondent, it was open to them to timeously challenge the said decision within the time allowed which they failed to do. He added that the Petitioners therefore forfeited their right to challenge the change of user and this court is precluded from investigating the propriety or otherwise of the said change of user. He further averred that after obtaining the change of user, the 3rd Respondent retained a firm of architects, Joel D. Nyaseme, to design modern environmentally advanced 6 town houses sensitive to the location together with all related amenities which plans were submitted to the 1st Respondent and approved on 1st March 2011. He further added that the 3rd Respondent then applied for an Environmental Impact Assessment Licence from NEMA which application was approved by NEMA vide its letter of 18th June 2012 on the terms and conditions set out therein. He also stated that the 3rd Respondent confirmed its agreement to the said conditions and an EIA licence was issued by NEMA on 18th October 2012. He then stated that the Petitioners and the Association have usurped the statutory powers and duties of the 1st Respondent and the present proceedings are a continuation of those unlawful albeit mistaken beliefs of the Petitioners. He denied that they have encroached on the Property, pointing out that the entire construction is being carried out entirely within the Suit Property in adherence to the approved building plans in strict compliance with the terms and conditions of the 1st Respondent. On those grounds, he asserted that the Petition is an abuse of the court process and prayed that it be dismissed with costs for lack of merit.

4th Respondent's Case

The 4th Respondent, Sharrif Alwy, filed his Replying Affidavit sworn on 3rd December 2012 in which he averred that he is the site manager of the construction on the Suit Property and had participated in all stages of planning including making applications for development permission, hiring consultants for professional services and the contractor on site. He added that since the beginning of 2012, there has been a big notice board right at the boundary of the Property and the Suit Property clearly indicating that the Respondents have asked for change of user from one dwelling house to multiple dwelling houses. He confirmed that the 1st Petitioner was among the first people to inquire about the nature of the development and all explanations were made to him at various stages. He further added that the Association including the Chairman, Secretary and Treasurer inspected the site and nature of development where all explanations were made by the project consultants. He also mentioned that the 1st Petitioner had a quarrel and disagreement with one of the drivers and other workers of the contractor which quarrel ended up in Muthangari Police Station. He further averred that the war on the site by the Petitioners on the development is driven by intolerance and not infringement of the Petitioners rights. He also stated that the construction complained of is within the Suit Property and they did not and will not trespass on the Property and are constructing a perimeter wall on the boundary beacon to beacon which will protect the Petitioners from anything that may escape from the Suit Property. He also stated that 5 out of the 6 houses under construction have already been sold to people whose money has been expended on the construction.

Petitioners' Responses

In response to the Respondents, Erik Sunde filed his Further Affidavit sworn on 14th November 2012 in which he averred that objections against the developments on the Suit Property were made in their letter dated 20th July 2011 within the notice period, specifically within 5 days of the notices published on 15th July 2011. He noted that this letter together with their other letter dated 4th April 2012 was not responded

to by the First Respondent. He added that the notices published in the newspapers on 15th July 2011 did not, in any event, constitute notification in accordance with section 41 of the Physical Planning Act. He further refuted the statement by the First Respondent that the documents held by it regarding the developments were availed to them. He further refuted the statement that a huge signage was put up next to the Property on the change of user but conceded that a site board has been erected besides the Suit Property in or about May 2012 which gave very limited information on the developments. He also averred that the Notification of Approval of Development Permission dated 12th August 2011 was given subject to procurement of an Environmental Impact Assessment Licence (**section 36** of the **Physical Planning Act**), consultation with and notification of the adjacent owners (**section 41**) and publication of the notice in the Gazette Notice and daily newspapers (**section 52**) and subject to compliance with approved zoning policy which conditions were not complied with by the Respondents. He added that it was illegal and improper for the First Respondent to fail to stop the development and to go ahead to approve the Building Plans on 1st March 2012 when the conditions it had imposed when granting the change of user had not been complied with. He also stated that it was not true that the development on the Suit Property were in tandem with the character of the surrounding area as the multi-unit multi-storied development thereon was the first of its kind on Njumbi Road. He added that the First Respondent had not given details of the alleged similar developments on neighboring properties including their plinth area, the plot ration and ground coverage so as to determine whether the developments comply with the Zoning Regulations. He noted that the First Respondent has not responded to the issues they raised regarding the contravention of the Zoning Regulations or commented on the Zoning Regulation Policy he annexed. He further stated that it was improper for the First Respondent to justify its action on the basis of implementing a new zoning policy that takes into account the socio-economic circumstances of land use. He noted that there is no new policy in place and no such policy has been produced. He noted further that the zoning policy cannot be reviewed without reviewing and increasing the capacity of existing amenities and also without following due procedure including consultation with the affected residents. He further added that the First Respondent has not responded to the facts concerning non-compliance with the dimensions set out in the approved building plans including the requirement on the distance to be kept from the borderline. He stated further that he was aware that the EIA Licence was issued by NEMA on 18th October 2012 being more than 6 months after the constructions commenced.

Zuena Hassan also filed her Further Affidavit sworn on 5th December 2012 in which she reiterated the contents of the Further Affidavit filed by her co-Petitioner Erik Sunde.

Issues for Determination

1. Did the approval of the developments on the Suit Property by the First Respondent comply with Articles 35, 40, 42, 47, 69 and 70 of the Constitution of Kenya, 2010 and the provisions of the Physical Planning Act and the applicable Zonal Regulations?
2. If not, should the court issue a permanent injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from proceeding with any construction on the Suit Property that is not in compliance with the laws cited in no. 1 above?
3. Should the court issue an injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from encroaching, threatening to encroach, trespassing or threatening to trespass or interfering in any manner whosoever with the Property?
4. Should the court issue an order for damages for trespass and/or encroachment on the Property against the Second and Third Respondents?
5. Who should bear the costs of this Petition?

Determination

1. **Did the approval of the developments on the Suit Property by the First Respondent comply with Articles 35, 40, 42, 47, 69 and 70 of the Constitution of Kenya, 2010 and the provisions of the Physical Planning Act and the applicable Zonal Regulations?**

The gist of this suit is that the Petitioners seek to challenge the approvals given by the First Respondent to the Second, Third and Fourth Respondents for the development of 6 multi-storied town houses on the Suit Property. In effect, the Petitioners seeks to have those approvals declared null and void. The specific reasons given by the Petitioners for objecting to those approvals are given in their Petition as follows:

a. Failure on the part of the Second, Third and Fourth Respondents to adhere to the approved building plans by leaving a space of only 10 to 35 centimeters to the borderline instead of at least 2.5 meters;
b. Failure to leave a side space of at least 8 feet as provided for in Rule 18 of the Local Government (Building Order) 1968,
c. Failure to leave space for the construction of a perimeter wall on the Suit Property;

d. Failure to inform the Petitioners of the change of user.
e. Failure to inform the Petitioners of the nature of development intended to be put up on the Suit Property;
f. Failure of the First Respondent to respond to the Petitioner's objections to the development;
g. Failure to conduct public consultation at the time of the Environmental Impact Assessment;
h. Failure to comply with the Zonal Regulations; and,
i. Failure to control the noise levels and dust emanating from the development on the Suit Property.

The Second Respondent annexed a copy of his Application for Development Permission dated 1st August 2011 lodged with the First Respondent and a copy of the Notification of Approval of Development Permission dated 12th August 2011 (hereinafter referred to as the "Development Approval") which the Petitioners are disputing. The Development Approval states that it was approved by the Town Planning Committee of the First Respondent held on 4th August 2011. It approved the change of use of the Suit Property from single to multi-dwelling units and required, inter alia, for the submission of satisfactory building plans within one year. It is conceded by the parties that building plans for the disputed development were subsequently submitted to the First Respondent which proceeded to approve the same, thereby giving rise to this Petition.

The Development Approval is stated to have been issued by one J. K. Barreh for the Director of City Planning & Architecture Department of the First Respondent. **Section 13(1)** of the **Physical Planning Act (Cap 286)** provides as follows:

> **"Any person aggrieved by a decision of the Director concerning any physical development or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed."**

Section 15(1) of the same statute provides as follows:

> **"Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed."**

Section 15(4) of the same statute provides as follows:

> **"Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court."**

The Petitioners contend that the First Respondent did not comply with **Articles 35, 40, 42, 47, 69 and 70 of the Constitution of Kenya, 2010** and the provisions of the **Physical Planning Act** and the applicable Zonal Regulations. However, the Petitioners themselves have not shown the court that they followed the laid down procedure set out above in the **Physical Planning Act** for challenging the validity of the Development Approval. The Petitioners did not lodge an appeal against the Director's decision to the

Nairobi Liaison Committee or subsequently to the National Liaison Committee. In fact, the Petitioners instead came directly to this court. **Section 15(4)** of the **Physical Planning Act** provides that the Petitioners could only lodge an appeal to this court after they have approached the Nairobi Liaison Committee and subsequently the National Liaison Committee. My finding is therefore that the Petitioners have no right of audience before this court as they failed to follow the procedure laid down in law for challenging a decision of the Director concerning any physical development plan such as the Development Approval.

2. **If not, should the court issue a permanent injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from proceeding with any construction on the Suit Property that is not in compliance with the laws cited in no. 1 above?**

Considering my finding in regard to no. 1 above, it follows that the Petitioners are not entitled to an order of permanent injunction directed at the Second, Third and Fourth Respondents as prayed.

3. **Should the court issue an injunction to restrain the Second, Third and Fourth Respondents either by themselves, their servants, agents and or representatives from encroaching, threatening to encroach, trespassing or threatening to trespass or interfering in any manner whosoever with the Property?**

It is the contention of the Petitioners that parts of the structures being constructed on the Suit Property have a great risk of encroaching onto the Property with only 10 to 35 centimeters being left from the borderline. The Petitioners contend that there is a great risk of further encroachment if the buildings are developed to completion as the plastering of the walls, the roof overhang, window frames, grains and rain gutters among other parts of the houses will cause additional encroachment. The Petitioners further contend that no provision has been made for the construction of a perimeter wall as no space has been left between the Property and the Suit Property yet the building plans approved by the First Respondent indicate that there should be a distance of 2.5m from the borderline which is not being complied with by the Second and Third Respondents. In defence, the Respondents have stated that the developments they are undertaking on the suit property are completely within the Suit Property and do not in any way encroach into the Property as alleged by the Petitioners.

The Survey Report by Covenant Geo-Survey Systems produced by the Petitioners had the following finding:

> "The plot L.R. No. 3734/476 has within it two (2) apartments under construction. Though they are entirely within the confines of the cadastral boundary one is just 15cm to 35cm from the borderline with L.R. No. 3734/475."

This position taken by the Petitioners' Surveyors finds support in a further Survey Report dated 29th September 2014 filed with the consent of the parties by Mr. B.K. Gitonga for the Provincial Surveyor Nairobi who, while referring to the Suit Property and the Property, made the following conclusion:

> **"The discrepancy of the distance from E7 to E6 is as a result of the extended wall from E62 to E7 and E60 to E6 thus there is no encroachment between the two plots."**

Arising from these positions taken by the two surveyors, my finding on this issue is that the development being carried out in the Suit Property by the Second, Third and Fourth Respondents is entirely within the confines thereof and does not in any way encroach into the Property as alleged or at all. My finding on the alleged encroachment or risk of encroachment is that the Petitioners have not succeeded in proving the same.

4. **Should the court issue an order for damages for trespass and/or encroachment on the Property against the Second and Third Respondents?**

Following my finding in no. 3 above, no damages may issue as there is no trespass or encroachment into the Property by the Respondents.

5. **Who should bear the costs of this Petition?**

In the light of the foregoing, I hereby dismiss this Petition with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MAY 2016.

MARY M. GITUMBI

JUDGE