



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELCC NO. 1329 OF 2015

AGGREY OGUTU..... PLAINTIFF

VERSUS

DANIEL KAMAU MWANGI.....1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

ROSE WAIHERA MWANGI.....3RD DEFENDANT

RULING

What I have before me is the Plaintiff's Notice of Motion application dated 20th January 2016 in which the Plaintiff has sought a temporary injunction to restrain the 3rd Defendant from carrying out or continuing with the construction on all that parcel of land known as LR No. Kajiado/Kaputiei-North/8980(hereinafter referred to as "the suit property") pending the hearing and determination of this suit. The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the Plaintiff on 20th January, 2016. The Plaintiff's case against the Defendants is that, the Plaintiff is the registered owner of all that parcel of land known as LR No. Kajiado/Kaputiei- North/8984 (hereinafter referred to as "Plot No. 8984") while the 3rd defendant is the registered owner of the suit property. The Plaintiff has put up on Plot No. 8984 a single residential building. Plot No. 8984 is adjacent to the suit property. The Plaintiff has contended that Plot No. 8984 and the suit property are situated in an area known as Upper Valley Estate at Kitengela Town within the jurisdiction of the 2nd Defendant. The Plaintiff has contended that Upper Valley Estate has been zoned for single dwelling houses by the 2nd Defendant. The Plaintiff has contended that the 3rd Defendant has commenced the construction on the suit property of a high-rise multi-dwelling Single roomed rental houses in breach of the 2nd Defendant's zoning regulations and without obtaining the requisite approvals from the 2nd Defendant and National Environmental Management Authority ("NEMA"). The Plaintiff has contended that the 3rd Defendant is in the circumstances putting up an illegal structure which is a danger not only to the environment but also to the Plaintiff whose residence is adjacent to the suit property. The Plaintiff's complaint against the 2nd Defendant is that it has failed and/or refused to stop the 3rd Defendant from continuing with the construction of the said illegal structure. The 1st Defendant on the other hand is said to be the one in charge of the construction of the subject building on the suit property on behalf of the 3rd Defendant who is residing out of the country.

The Plaintiff's application is opposed by the 1st and 3rd Defendants through separate replying affidavits sworn on 10th February 2016. In his affidavit, the 1st Defendant has stated that he is neither the owner of the suit property nor the contractor who is constructing the building on the suit property. The

1st Defendant has stated that he has been wrongly joined in this suit. On her part, the 3rd Defendant has admitted that she is the owner of the suit property and that she is the one putting up the structure complained of by the Plaintiff. The 3rd Defendant has denied that the building which she is constructing on the suit property has not been approved by the 2nd Defendant. She has denied further that she has failed to obtain license from NEMA in respect of the said project. The 3rd Defendant has annexed to her affidavit what she has referred to as approved plan for the said building and the environmental impact assessment report that she had submitted to NEMA for the project. The 3rd Defendant has stated that she started construction of the structure on the suit property before the Plaintiff had put up his residence on Plot No. 8984 and that the Plaintiff's complaint against her development started when she commenced construction on the part of the suit property which does not border the Plaintiff's residence.

I have considered Plaintiff's application together with the affidavit filed in support thereof. I have also considered the 1st and 3rd Defendants' affidavits in opposition to the application. What I need to determine is whether the Plaintiff has met the conditions for granting a temporary injunction. In the case of **Giellavs. Cassman Brown and Co. Ltd (1973) E.A 358**, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable harm which cannot be compensated in damages if the injunction is not granted. In the case of **Mrao Limited vs. First American Bank of Kenya Ltd and 2 Others (2003) KLR 125**, a prima facie case was described as **"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."** The Plaintiff has challenged the development which the 3rd Defendant carrying out on the suit property on several grounds. The first ground is that the said development is not approved by the 2nd Defendant under the provisions of the Physical Planning Act, Chapter 286 Laws of Kenya. The Plaintiff has also contended that the 3rd Defendant has not obtained environmental impact assessment license from NEMA for the development. The last ground of attack is that the 3rd Defendant is putting up a high rise multi-dwelling rental premises in an area reserved for single dwelling residential houses.

In her response, the 3rd Defendant has not denied that she was required to obtain approval from the 2nd defendant and NEMA before commencing the ongoing construction works on the suit property. The 3rd Defendant's contention is that she has obtained all the requisite approvals and licenses. On the issue of zoning, the 3rd Defendant's contention is that what she is undertaking is the extension of the building which she had put up before the Plaintiff had built his single dwelling house on Plot No. 8984. The 3rd Defendant has contended that the Plaintiff who had all along been aware of her development on the suit property has no reason to complain about the same.

I am convinced from the material before me that the 3rd Defendant had not obtained the requisite approvals from the 2nd Defendant and **NEMA** as required by law for the development that she is undertaking on the suit property. The architectural plans which are annexed to the 3rd Defendant's affidavit as part of annexure **"RWM1"** are not approved. They are stamped **"has been recommended for approval by the DISTRICT PHYSICAL PLANNING OFFICER"**. There is no evidence that these plans were approved by the 2nd Defendant as required by the Physical Planning Act. With regard to NEMA approval, the 3rd Defendant has annexed to her affidavit a copy of the Environmental Impact Assessment Project Report which was presented to NEMA on 5th February 2016 after the filing of this suit. There is no evidence that NEMA approved the report and issued Environmental Impact Assessment license for the project.

I am in agreement with the Plaintiff that a building which is being constructed without approval under the Physical Planning Act and a license from NEMA is illegal and a danger to both the environment and the public. On the issue of zoning, there is no evidence before me that the area where the suit property and Plot No. 8984 are situated has been zoned for single dwelling houses by the 2nd defendant. The mere fact that 2nd Defendant approved the Plaintiff's plan for a single dwelling house does not mean that the area is reserved exclusively for single dwelling houses.

From what I have set out above, I am satisfied that the Plaintiff has established a prima case against the 3rd Defendant on the issue of legality of the development that she is putting up on the suit property. I am also satisfied that the Plaintiff stands to suffer irreparable harm which cannot be compensated in damages if the orders sought are not granted. As I have stated above, an illegal structure is a danger both to the environment and to the public. The structural integrity of such structures is unknown. The Plaintiff's apprehension that the 3rd Defendant's building on the suit property may collapse is not fetched. The environmental damage posed by the said structures is also unquantifiable. I am satisfied in the circumstances that the plaintiff has satisfied the condition for grant of interlocutory injunction.

In the final analysis and for the foregoing reasons, I hereby grant injunction against the 3rd Defendant in terms of prayer 3 of the application. The injunction shall last until the hearing and final determination of the suit or until the 3rd Defendant obtains approved plans from the 2nd defendant and Environmental Impact Assessment License from NEMA for the project whichever comes earlier. The 3rd Defendant shall be at liberty to apply upon obtaining the said approval and license. The cost of the application shall be paid by the 3rd Defendant.

Delivered and Signed at Nairobi this 1st day of July, 2016

S. OKONG'O

JUDGE

In the presence of

Ms. Dundu holding brief for Oguttu

for the Plaintiff

Mr. Njiraini

for the Defendants

Kajuju

Court Assistant