



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCC NO. 1135 OF 2015**

**MARTHA KARWIRWA ANTONY.....PLAINTIFF**

**VERSUS**

**JOHN S. KAURRAI.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KAJIADO.....2<sup>ND</sup> DEFENDANT**

**RULING**

What I have before me is the Plaintiff's Notice of Motion application dated 6<sup>th</sup> November 2015 in which the Plaintiff has sought a temporary injunction to restrain the 1<sup>st</sup> Defendant from continuing or repeating the nuisance i.e the emission of offensive and noxious human effluence, pestilential smells and vapour into and about the plaintiff's parcel of land known as LR No. 17589, IRN 6095 situated at Ongata Rongai Township or committing of any nuisance of a like kind in respect of the Plaintiff's said property pending the hearing and determination of this suit. The Plaintiff also sought a mandatory injunction to compel the 2<sup>nd</sup> Defendant to fulfill its mandate under the Public Health Act by ensuring that the 1<sup>st</sup> Defendant stops the nuisance complained of and takes necessary measures to remedy the nuisance already committed and to stop further nuisance from occurring 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 6<sup>th</sup> November 2015. 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. LR No. 17589, IRN 6095 situated at Ongata Rongai Township (hereinafter referred to as "the suit property") while the 2<sup>nd</sup> Defendant is the registered owner of the parcel of land known as LR. No. N/N/151 (hereinafter referred to as "Plot No.151"). Plot No. 151 is situated adjacent to the suit property. The Plaintiff is in the process of putting up on the suit property a seven storey commercial building. The Plaintiff has contended that the 1<sup>st</sup> Defendant has caused and/or permitted offensive and noxious human effluence, pestilential smells and vapour emanating from his Plot No. 151 to empty into and to be on and about the suit property which emission has constituted constant and continuing nuisance on the suit property. The Plaintiff has contended that the emission of the effluence complained of has been occasioned by poor waste disposal and/or management system on the part of the 1<sup>st</sup> Defendant. The Plaintiff has contended that as a result of the said nuisance, the suit property has been defiled and rendered unhealthy and unfit for use and occupation for its intended purposes. The Plaintiff has contended that the 2<sup>nd</sup> Defendant's Public Health Department has failed, neglected or willfully ignored to take decisive action against the 1<sup>st</sup> Defendant. The Plaintiff has accused the 2<sup>nd</sup> Defendant of dereliction of statutory and obligations imposed upon it by the Public Health Act.

The Plaintiff's application is opposed by the 1<sup>st</sup> Defendant through a replying affidavit sworn

on 9<sup>th</sup> December 2015. In his affidavit, the 1<sup>st</sup> Defendant has admitted that he is the owner of Plot No. 151. The 1<sup>st</sup> Defendant has also admitted that Plot No. 151 is adjacent to the suit property. The 1<sup>st</sup> defendant has denied however that he has been emitting offensive and noxious human effluence, pestilential smells and vapour in to the suit property as claimed by the Plaintiff. The 1<sup>st</sup> Defendant has stated that the 2<sup>nd</sup> Defendant has failed to set up a sewerage system for the residents of Ongata Rongai and as such the residents, he included, have to do with septic tanks for the disposal of their sewerage effluence and other solid waste. The 1<sup>st</sup> Defendant stated that he uses underground septic tank constructed on Plot No. 151 to dispose of the sewerage and other solid waste. The 1<sup>st</sup> Defendant has stated that during heavy rains, the septic tank which he has installed on Plot No. 151 gets clogged up causing in the process, the offensive and noxious smell complained of by the Plaintiff.

The 1<sup>st</sup> Defendant has stated that the effluence emission complained of by the Plaintiff occurred during the El Nino rains. He has stated that the problem of the septic tanks clogging up and overflowing during heavy rains is affecting all residents of Ongata Rongai and that the problem is beyond his control. The 1<sup>st</sup> Defendant has stated that the responsibility of fixing sewerage system rests with the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has stated that the orders sought by the Plaintiff if granted would prejudice him greatly. The 2<sup>nd</sup> Defendant did not respond to the application.

The application was argued by way of written submissions. I have considered application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> Defendant's affidavit in opposition to the application. What I need to determine is whether the Plaintiff has met the conditions for granting a temporary prohibitory and mandatory injunction. In the case of **Giella vs. 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.”**

In the case of **Shepherd Homes Ltd. –vs.-Sandham [1971] 1 ch.304**, Meggery J. had this to say on interlocutory mandatory injunctions;

**“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.**

In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction;

**“ is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly”.**

The Plaintiff's complaint is that the 1<sup>st</sup> Defendant has failed to employ proper waste disposal methods and as a result, he has allowed its sewage to flow freely from Plot No. 151 to the suit property. The Plaintiff has placed evidence before the court showing the flow of sewage from Plot No. 151 to the suit property. Although the 1<sup>st</sup> Defendant has denied the Plaintiff's claim that he is emitting effluence into the suit property, he has not denied the photographs that have been exhibited by the Plaintiff which show clearly that the suit property has been affected by the sewage from the 1<sup>st</sup> Defendant's premises. The 1<sup>st</sup> Defendant has also not denied a notice that was served upon him by the 2<sup>nd</sup> Defendant demanding that he

exhausts his filled up septic tank.

From the material before me, I am satisfied that the Plaintiff has established a prima facie case of nuisance against the 1<sup>st</sup> Defendant. I am also satisfied that the Plaintiff stands to suffer irreparable harm which cannot be compensated in damages if the order of prohibitory injunction sought is not granted. I am satisfied in the circumstances that the Plaintiff has satisfied the conditions for grant of interlocutory prohibitory injunction. With regard to the mandatory injunction sought by the Plaintiff, I am of the view that the Plaintiff has not established a case that would justify the grant of the order. I am not convinced from the material before me that the 2<sup>nd</sup> Defendant has refused to enforce the provisions of the Public Health Act. The Plaintiff has annexed to her affidavit in support of the application, a notice that was served upon the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant under among others, the Public Health Act a few months before this suit was filed demanding that 1<sup>st</sup> Defendant does attend to his filled up septic tank. The Plaintiff has not informed the court as to what happened after the said notice was served. I am not persuaded that the Plaintiff has demonstrated a clear case against the 2<sup>nd</sup> Defendant that would justify the issuance of a mandatory injunction at this interlocutory stage.

In the final analysis and for the foregoing reasons, the Plaintiff's Notice of Motion dated 6<sup>th</sup> November 2015 succeeds in part. The same is allowed in terms of prayer 3 thereof. The costs of the application shall be paid by the 1<sup>st</sup> Defendant.

**Delivered and Signed at Nairobi this 4<sup>th</sup> day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Moindi h/b for Mungla      for the Plaintiff

N/A      for the 1<sup>st</sup> Defendant

Kajuju      Court Assistant