



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 949 OF 2014

DANSON NDEGWA PLAINTIFF

(Suing as the Chairman of Jacob Chege drive neighbours association)

VERSUS

RAPHAELA ANSELMINA RUGGIERI.....1ST DEFENDANT

TERESA CARELLA.....2ND DEFENDANT

DAVIDINA PAPPALAROLO 3RD DEFENDANT

(Being sued as the officials of the Daughters of St. Anne)

RULING

The plaintiffs by an Amended Notice of Motion dated 22nd July 2014 prays for the following orders:

1. That pending the hearing and determination of this application the Defendant/Respondents by themselves, their servants, agents or otherwise however be restrained by way of an interim temporary injunction from excavating the plaintiff's roads that are only meant to access and service land reference number 1160/347 and 1160/348 as well as interfering and threatening the peace and security within the plaintiff's community.
2. That pending the hearing of the suit the Defendants be restrained by way of a mandatory injunction from gaining access and or excavating the plaintiff's roads that are only meant to access and service land reference number 1160/347 and 1160/348 as well as interfering and threatening the peace and security within the plaintiff's community.
3. That the Deputy County Commissioner, Langata Sub County OCS Hardy Police Station and the area chief enforce the above orders pending inter-parties hearing of the application/suit.

The plaintiff's application is supported on the annexed supporting affidavit by **Danson Ndegwa** sworn on 22nd July 2014. The brief facts of the plaintiffs case are that following the subdivision of **L.R.NO.1160/51** several subplots were carved out of it among which were subplots **L.R.NO. 1160/347** and **L.R.1160/348**. An access road, which is the subject matter in this suit, was created to service these

two subplots as per the annexed copy of the Deed plan no.113650 marked “DN1”. The **Jacob Chege drive neighbours association** claim the access road was never intended to serve as a public road of access but rather was meant to serve the two properties **L.R.NO.1160/347** and **L.R.NO.1160/348**. The plaintiff’s state the Defendants property resulted from the subdivision of a different property from **L.R.NO.1160/51** and thus the Defendants road of access is different from the one they now wish to claim.

The plaintiffs aver that theirs is a controlled development and opening up of the access road serving land parcels **L.R.NO. 1160/347** and **1160/348** to be utilized by the Defendants and other members of the public will affect their estate as a controlled development. The plaintiffs contend the Defendants have no right to use the access road as the same did not emanate out of the subdivision that gave rise to the Defendants property.

The Defendants oppose the application by the plaintiffs and have filed an affidavit in reply sworn on 17th September 2014 by **Sr. Birikti Tehvoldebrehan Hagos**. The Defendants state they are the Registered Trustees of the “**Daughters of Saint Ann Registered Trustees**” as per the certificate of incorporation annexed and marked “**BT-1**”. The Defendants state that in the year 2012 they applied for change of user of its premises **L.R.NO.1160/259** from residential to institutional (primary school) and that the Nairobi City Council duly approved the change of user. Annexed is a copy of the application and approval marked “**BT-2**” and “**BT-3**” respectively. The Defendants further state that the approval for change of user was granted inter alia on the condition that the main entrance to the school be made from the road at the back of the Defendants plot as per condition (ix) in the letter of approval dated 20th June 2012.

The Defendants further aver that **NEMA** gave its approval to the construction of the school in June 2013 as per the **NEMA Environmental Impact Assessment Licence** dated 17th June 2013 annexed and marked “**BT-4**”. The Defendants state that following issuance of the **NEMA** license they commenced construction of the school which was complete and was to admit children from January 2015. The Defendants state that the construction of the road of access had been completed and annex photographs marked “**BT-5**” to illustrate the fact. The Defendants deny hiring any vigilante groups to use force against the plaintiffs as alleged.

The plaintiffs filed a further affidavit in response to the Defendants replying affidavit sworn by **Danson Ndegwa**, the Chairman of the neighbourhood association on 23rd October 2014. While the plaintiffs acknowledge the Defendants were granted a change of user it is the Defendants averment that the Defendants misrepresented facts to both the City Council of Nairobi and **NEMA** to obtain the approval and the license respectively. The plaintiff assert that the Defendants have no access road at the back of **L.R.NO.1160/259** and maintain the Defendants could only have an access if they and their neighbour each surrendered a 9m road to form an access road of 18 m as required under the law. The plaintiffs have annexed survey maps marked “**DN2**” and “**DN3**” to illustrate there is no access road at the back of the Defendants plot. The plaintiffs state at the time of instituting this suit there was no road as suggested by the Defendants and only a bushy reserve demarcated parcel **L.R.NOS.1160/347** and **1160/348** and that the area was excavated by the Defendants by the time the suit was being filed. The plaintiffs state during the period of construction of the school the Defendants were using the **Bogani Road Access** and not the **Jacob Chege Drive access**. The Defendant’s had placed their construction Board at the entrance off **Bogani Road** and not on **Jacob Chege Drive**. The plaintiffs in the further Affidavit reiterate the Defendants obtained the approval and license by misrepresenting that there was an access road to their property through the back which was not the case.

The parties filed written submissions to ventilate their respective positions. In the plaintiffs submissions dated 18th November 2014 the plaintiffs reiterate the facts of the case as pleaded in their affidavits and submit that the Defendants are not entitled to access their land reference number 1160/259 through the access from **Jacob Chege Drive** as that access is intended to serve **L.R.NOS.1160/347** and 1160/348 and is a cul-de-sac. The access was created out of the subdivision of **L.R.NO.1160/51** and the Defendants parcel **L.R.NO.1160/259** did not result from this subdivision and was thus not in contemplation when the access was created. The plaintiffs further submit theirs is a gated community development and that the

Nairobi City Council acknowledge this fact as the City Council has even allowed the plaintiffs to erect manned barriers to secure their estate.

The plaintiffs submit they have satisfied the conditions for grant of a temporary injunction to entitle them to the order of injunction sought. The conditions are the same well known conditions articulated in the case of **Giella-vs- Cassman Brown Co. Ltd (1973) EA 358** and have been restated in numerous suits since then. The conditions are that the applicant has, to firstly demonstrate a prima facie case with a probability of success and secondly, it has to be shown or demonstrated that irreparable harm which would not be adequately compensated by damages would result if the injunction would not be granted and, thirdly in case of doubt, the matter may be determined on consideration of the balance of probabilities.

The Defendants filed their submissions in response dated 5th December 2014 and filed in court on 10th December 2014 and equally reiterate the facts as set out in their filed replying affidavit. The Defendants submit they acted within the law as they obtained the requisite approval for change of user and development permission from the Nairobi City Council which approval was on the express condition that the main entrance to the school was to be made from the road at the back of the parcel of land. The Defendants further submit they applied for and were granted permission by the Nairobi City Council vide letter of 22nd August 2013 to upgrade and improve the existing public road at the back of the parcel of land as per the plaintiffs annexure “DN-5” in the further affidavit. The Defendants further submit they applied for and were granted building permission from the Nairobi City Council in June 2013 and further that they were issued the **NEMA** License to undertake the project development on 17th June 2013 and avers that the plaintiffs did not challenge the change of user and/or the Development permission or the **NEMA** License either under the Physical Planning Act, Cap 286 Laws of Kenya or the Environmental Management and Co-ordination Act (**EMCA**) as provided under the law.

The Defendants submit the plaintiffs allegations of misrepresentation and/or fraud on the part of the Defendants are misplaced as the plaintiffs have not pleaded fraud or misrepresentation in the plaint and the same remain baseless and unsubstantiated. The Defendants state they have completed the construction of the school and the disputed road of access has been opened up with the assistance of the City Council Officers. The Defendants further submit from the survey maps exhibited by the plaintiffs it is evident that there is a 18 metres wide road that runs from **Masai Road to Bogani Road, Karen-Nairobi**. The Defendants argue **Masai Road** and the access road are public roads which fact the plaintiffs have acknowledged when they applied to the City Council of Nairobi to be permitted to erect barriers which permission was granted on terms vide the City Council’s letter of 9/10/2014 which clearly point to the roads being classified as public roads and not private roads. The Defendants have referred the court to the case of **Homescope Properties Ltd & Another –vs- David Gachuki & others (2014) eKLR** to support the proposition that unless a road is designated as a private road it remains a public road for use by all members of the public.

The issue for determination is whether on the basis of the material and evidence availed by the parties the plaintiffs have satisfied the conditions for the grant of an interlocutory order of injunction. There is no dispute that the Defendants are the registered owners of land parcel **L.R.NO.1160/259** and that before the commencement of this suit their access was from **Bogani Road**. From the plaintiffs exhibit marked “DN2” annexing the survey plan incorporating **L.R.NO.1160/259**, it is evident that the Defendants parcel of land does not abut the **Bogani Road** as another land parcel **L.R.NO. 1160/258** is adjacent to it and abuts **Bogani Road**. The Defendants plot has an access running the full length of **L.R.NO.1160/258** to **Bogani Road** which access would be either 6 metres or thereabouts. It is this access the plaintiffs state the Defendants should use for the access of the school that has been constructed in the Defendants land parcel. Considering there would be multi user of the access once the school is running and in session it is in my view understandable why the Nairobi City Council while giving approval for the construction of the school conditioned the approval on the access being from the road at the back of the Defendants parcel of land. Without doubt if the access was to remain off the **Bogani Road** the same would in all probability accommodate single lane access whereas perhaps access to and from the school would require a double lane to cater for entry and exit.

The Nairobi City Council approved the construction of the school on the Defendants land subject to the main entrance to the school being from the road at the back of the Defendant's parcel of land. The road being referred to no doubt is the access road between **L.R.NOS.1160/347** and **1160/348** as it abuts the Defendant land parcel at the back. This road is not a culdesac as claimed by the plaintiffs. The road could not also have been created to service **L.R. NO.1160/347** and **L.R. NO. 1160/348** as these plots are infact served by the road joining **Masai Road to Bogani Road** which serves the other plots belonging to the plaintiffs members. Infact the access road had not been opened up or developed and was as admitted by the plaintiffs bushy explaining why the Defendants sought approval from the Nairobi County Government to develop the same. The Defendants have stated that the access road runs through in a straight line to join **Bogani road** though no evidence has been furnished to support this assertion. Without a complete and updated survey map showing all the adjacent plots the court is not in a position to verify whether such an access exists and runs through to **Bogani Road**.

The Defendant/Respondent has submitted that the plaintiffs ought to have appealed the decision granting the Defendants change of user and/or permission to develop their property as an institution (primary school) under the provisions of the Physical Planning Act Cap 286 Laws of Kenya. Section 13 (1) of the Act provides for appeals to the liaison committee and provides:-

13.(1) Any person aggrieved by a decision of the Director concerning any physical development plan 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 of the Act provides for appeals from the liaison committee and to the High Court.

Section 15 provides:-

15.(1) 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.

(2) The National Liaison Committee may reverse, confirm or vary the decision appealed against,

(3) -----

(4) 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 plaintiff in the present matter did not as far as I am able to ascertain appeal against the decision of the Director City Planning, to the liaison Committee as provided under the Physical Planning Act and the institution of the present suit in all probability is premature. The Physical Planning Act provides an elaborate procedure for seeking redress where a person is aggrieved by the decision of a local authority and in my view before a party can have recourse to the High Court the procedure provided under the Act should be exhausted. The plaintiffs referred the court to the case of **Republic -vs- Director of City Council of Nairobi & 12 others (2013) eKLR where W.K. Korir, J** in an action challenging the decision of the Director of City Planning noted that the applicant had not appealed the decision to the liaison committee and observed that:-

“Judicial review is a weapon of last resort which can only be used where illegality, irrationality and procedural unfairness can be established. The Act clearly provides the procedure for seeking redress where one is aggrieved by the local authority”.

The learned Judge in the same case cited with approval the holding by the Court of Appeal in the case of **Speaker of National Assembly -vs- Karume (2008) IKLR (EP) 425** where the judges stated:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by parliament, that procedure should be strictly followed----“,

The Defendants in the present matter have maintained that the change of user was properly given and that the disputed road of access is a public road within the meaning of section 2 of the Public Roads and Roads of Access Act, Cap 399 Laws of Kenya. The reason why the Physical Planning Act has set up the Liaison Committees with such wide representation as appears under the Act is so that it has diverse competencies to deal with all aspects of planning within the local authorities. The court in my view would be usurping the roles of these vital organs which are statutorily provided under the Act were it to assume original jurisdiction to deal with matter.

In my view the City Council of Nairobi in giving approval for change of user and attaching the conditions that it did appears to have been alive to the road network within the area. The City Council was aware that the Defendants had an access via **Bogani Road** but that was only for single residential premises but following change of user to allow for **“educational purposes”** that meant there was need for alternative access to accommodate the traffic. Considering that planning and development keep on evolving depending with circumstances the approval by the City Council of the change of user may not necessarily have been irregular, illegal or irrational to invite the intervention of the court. The plaintiffs have not demonstrated or shown that the City Council’s decision to grant the change of user was irregular, illegal or unlawful. The City Council of Nairobi has authority and mandate to give approvals for change of user and grant development permission. In case the approval had an issue the physical Planning Liaison Committees under the Act would be best placed to deal with the matter and not the court.

The Defendants have infact completed the building of the school as per the development plans approved by the City Council and they have opened up and developed the access road as is evident from the photographs annexed to the Defendants replying affidavit and cannot therefore be prevented from doing that which they have already done. The plaintiffs may have an arguable case but I am not persuaded they have demonstrated they have a prima facie with a probability of success. At any rate having regard to the circumstances of the case the balance of convenience in my view tilts in favour of the Defendants who acting on the approvals that they obtained have put up a fully pledged school and have in further compliance of the conditions attached to the change of user incurred expense in improving and opening up the road of access as identified to them by the City Council of Nairobi.

In the premises therefore I decline to grant the orders sought in the plaintiffs notice of Motion dated 22nd July 2014. I however direct that each party shall bear their own costs of all the application.

Ruling dated signed and delivered this...27thday of.....**March**.....2015.

J. M. MUTUNGI

JUDGE

In presence of:

Mr. Kiarie..... For the Plaintiff

N/A..... For the Defendants