



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 540 OF 2014

VITALIS PETER LUKIRI.....PLAINTIFF

VERSUS

GEORGE ODONGO OGWANG'DEFENDANT

RULING

The Application

The application before the court is a Notice of Motion dated 7th May 2014 filed by the Plaintiff pursuant to Order 40 Rule 1(a) of the Civil Procedure Rules and sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act. The Plaintiff is seeking a temporary injunction to restrain the Defendant from further construction of flats and the gate being constructed on Ngong/Ngong/25753 (hereinafter referred to as the suit property), pending the hearing and determination of this suit.

The application is supported by the Plaintiff's supporting affidavit sworn on 7th May 2014, wherein he avers that he is the registered and beneficial owner of land title number Ngong/Ngong/26512 where he has constructed his residential house, and he exhibited a copy of a certificate of official search dated 24th April 2014. The Plaintiff contends that the Defendant owns the suit property which is directly opposite his house, and is separated by a 6 meter wide road which serves as the only access road from the main road to his house.

According to the Plaintiff, the said access road is behind the Defendant's parcels whose access is from the front. The Plaintiff contends that the estate is in rows and that residents are required to access their properties from their frontages and not from behind. The Plaintiff avers that the Defendant's residential house is built on the suit property whose gate is on the frontage of the plot and directly opposite his property.

It is the Plaintiff's averment that the Defendant is in the process of erecting 8 commercial apartments on the suit property and that he is constructing a gate on the backside of the property which he intends to use as the main access of the rental apartments contrary to the estate rules, whose copy was exhibited. The Plaintiff contends that the gate being constructed on the suit property is directly in his frontage and the gate to his home. According to the Plaintiff, the Defendant is building the gate to the flats on the back of the suit property and not on the frontage, in order to avoid inconvenience to himself from his potential tenants and their vehicles.

The Plaintiff alleges that the Defendant has not obtained the requisite approvals including change of user to enable him construct a commercial multi-dwelling development in a single dwelling designed area. Further, the Plaintiff contends that the Defendant has not obtained the mandatory National Environment

Management Authority approvals for construction of the commercial units.

While stating that there is no sufficient parking space to accommodate the Defendant's tenants' vehicles, the Plaintiff contends that there is danger of vehicles being parked on the road outside his gate thereby creating a great security threat, obstruction and inconvenience. It is the Plaintiff's averment that on 15th January 2014, he was attacked by armed robbers while driving towards his home, and the Plaintiff contends that the robbers could have been hiding in the Defendant's incomplete apartments.

According to the Plaintiff, the Defendant refused to comply with directions issued by the Kajiado North District Land Dispute Tribunal on 24th August 2011 requiring him to comply with the estate rules, utilize his road reserve, create parking for his tenants and also obtain the requisite approvals. A copy of the tribunal's proceedings has been exhibited.

The Plaintiff in a further affidavit sworn on 4th November 2014 avers that the estate rules annexed in his supporting affidavit are binding since they were approved by the residents. It is the Plaintiff's averment that the Land Disputes Tribunal at Ngong made findings that were binding to the effect that the Defendant uses his road and parking with his tenants as in the mutation form so as to avoid interfering with other people's security. The Plaintiff also contends that the Defendant was required to obtain approval from the relevant authorities for the change of user as well as to comply with the estate's rules and regulations.

The Plaintiff further contends that the Defendant has installed drainage pipes on the frontage of his property which are a great health hazard to him and the entire neighborhood and photographs marked VL 1(a) - (d) were exhibited. According to the Plaintiff, the Defendant had not controverted the fact that he had not obtained the relevant approvals from respective authorities to enable him put up commercial apartments on the property. It is the Plaintiff's averment that the Land Dispute Tribunal has a mandate under section 29 of the Physical Planning Act to regulate use and development of land and further, that the Defendant was in contravention of Article 69(2) of the constitution which requires individuals to co-operate with state organs and law as governing matters related to land.

The Response

The Defendant in a Replying Affidavit sworn on 3rd June 2014 states that he is the absolute owner of land title number Ngong/Ngong/25752 which is the suit property as evidenced by annexed copies of title dated 2nd October 2001, and that the Plaintiff is his neighbor. The Defendant contends that he was among the first people who occupied the area in the year 2001 and that the gates in his properties existed on both ends even before the Plaintiff bought his land in the year 2010 thereabout.

While stating that there is no registered resident's association in the area and that residents have always mobilized themselves to tackle common problems like water and security, the Defendant contends that the allegations by the Plaintiff that there are regulations governing residents in the estate are false. The Defendant avers that the allegations by the Plaintiff that the area is regulated in terms of development and by the residential rules have no foundation in law and in fact. It is the Defendant's contention that the residents have been constructing multi-dwelling structures in the area and further, that the Plaintiff has let out one of the premises constructed near the gate of his property and the Defendant has annexed photographs showing developments in the area.

The Defendant states that his two properties have two access roads on both ends and a mutation form for Ngong/Ngong/16061 dated 22nd November 2000 has been exhibited. It is the Defendant's case that there is no limitation as to which access road he can use to access his property and further, that his neighbours who have properties served by two roads have multiple access routes. According to the Defendant, there is no law, rule or regulation in the area that restricts the kind of development that he can do.

While stating that the suit parcel falls under an agricultural area that has been subdivided into small parcels, the Defendant contends that the land owners have absolute control of their parcels of land. The Defendant avers that the Plaintiff's claims as set out in the plaint and the application are frivolous and

vexatious and further, that the plaintiff's case is based on apprehension that there will be inadequate parking once his development is complete. The Defendant has annexed as evidence architectural designs of the building and avers that he has set aside adequate space for parking within the property he is developing and further, that he owns the adjoining plot which also has space that he intends to use as extra parking in case need arises.

According to the Defendant, the Plaintiff's allegations of insecurity have nothing to do with him and further, that the allegations are generalized and vague since the road where the alleged criminal activity took place is not indicated in the annexed abstract. The Defendant contends that the Plaintiff has not demonstrated a *prima facie* case with a probability of success and further, that the Plaintiff has not demonstrated any loss that he may suffer if the orders sought are not given since his case is based on speculative allegations and conclusions based on assumptions. The Defendant avers that the right to peaceful enjoyment of property is guaranteed by the Constitution and that the orders sought by the Plaintiff will impede his constitutional right.

In a further affidavit sworn on 6th February 2015, the Defendant states that the pipes visible in Plaintiff annexure VL1 (a) are not drainage pipes as alleged in the Plaintiff's further affidavit. According to the Defendant, the said pipes are aeration/breather pipes that do not pose any health hazard to the Plaintiff or the neighborhood and the Defendant exhibited photographs to support his assertion.

The Defendant contends that the proceedings of the Kajiado Land Disputes Tribunal were dismissed by the subordinate court in Kajiado RMCC Misc. Application number 25 of 2014 on 22nd October 2014 and therefore, that the proceedings relied on by the Plaintiff do not have the force of law. It is the Defendant's assertion that his development is not in any way out of character with the surrounding environment and further, that the development does not change the use of the land. The Defendant annexed as evidence photographs marked "GOO 6" to show that he had created adequate parking provision and that there was ongoing construction of flats in a neighbouring parcel of land.

The Submissions

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 24th November 2014 argued that the Defendant's construction project was unlawful for reasons that it was contrary to Laiser Hill Estate rules and further, that approval from the National Environment Management Authority was not sought as required by law. Counsel submitted that under section 3 of the Physical Planning Act, development is defined to include the making of material change in the use or density of any buildings or land. It is the Plaintiff's submission that substantial and greater physical and social impact is likely to arise from the exclusive use of the Defendant's land for erecting commercial flats not only on his residence but also on the neighbouring environment.

According to the Plaintiff, the exclusive use by the Defendant of his land to put up commercial flats while disregarding the fact that the area is meant for purposes of single dwelling residencies is a material change of user within the meaning of section 3 of the Act and the 2nd schedule of the Environment and Management Co-ordination Act. Further, it was submitted that sections 29 and 30 of the Physical Planning Act provide that any development undertaken within an area of local authority must be permitted by the local authority within which the development is being undertaken.

While stating that the law regards the effects of a development on the private rights of others as a material consideration in the granting of development permission, the Plaintiff submitted that there are elaborate provisions on the consultation and participation by those who may be affected by a development under section 32 of the Physical Planning Act. Counsel argued that the local authority to which an application for approval is made is required to have regard to among others, the conveniences of the community generally, the proper planning, density of development and land use in the area. The Plaintiff averred that environmental considerations are also fundamental to any development approval.

Reference was made to section 58(1) of the Environment Management and Co-ordination Act and the Plaintiff argued that the Defendant had not complied with the provisions which were mandatory. It is the

Plaintiff's submission that the Defendant's development does not fall under those developments that are exempt in terms of seeking approvals before commencement under section 30 and 58 of the Physical Planning Act and the Environment Management and Coordination Act respectively. Counsel contended that the Defendant had also not sought change of user which requires approval by the local authority and the Land Control Board Consent.

It is the Plaintiff's submission that the Defendant's construction must be discontinued for failing to seek prior approval and further, that the Defendant ought to restore the suit property to its original condition in accordance with section 30 of the Physical Planning Act. Counsel submitted that the Plaintiff had established a *prima facie* case against the Defendant to warrant the issuance of an injunction to restrain him from further construction of the flats and a mandatory injunction to have the property demolished to conform to the law and the estate rules.

The Plaintiff submitted that the principles for granting temporary injunction were established in the case of **Giella vs. Cassman Brown & another (1973) EA 358** and were also restated by the Court of Appeal in **Mrao vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**. Counsel argued that the Plaintiff submitted had in his pleadings and evidence given elaborate descriptions of the inconveniences and interferences with the enjoyment of his property resulting from the development of commercial flats on the Defendant's land. The Plaintiff submitted that he had also relied on the procedures that required to be followed by the Defendant under the applicable law.

While submitting that irreparable damage which cannot be compensated in damages will be suffered if the orders sought are not granted, the Plaintiff contended that the harm complained of by the will be of a continuing nature as long as the Defendant continues with the development on his parcel and let in persons in the property as tenants. The Plaintiff submitted that in the event all the 8 households under construction own a motor vehicle, the area would be a disaster in terms of parking since some vehicles would be parked on the road. It is the Plaintiff's submission that this would cause tremendous congestion, disturbance and denial of peaceful enjoyment of his property.

In further submission, the Plaintiff contended that the potential threat of insecurity posed by numerous tenants of unknown history and background ought to be averted and further, that no amount of damage can adequately compensate for harm caused to the physical and social environment. Lastly, the Plaintiff submitted that he stands to suffer loss of clean environment as stipulated by Article 42 and 60(1) of the Constitution and that there is threat to degradation of the environment and the residential area.

The Defendant in submissions dated 7th February 2014 reiterated the facts as set out in the pleadings and stated that the conditions for grant of temporary injunction are set out in the case of **Giella vs. Cassman Brown (1973) EA 358**. The Defendant made reference to the case of **Kenya Commercial Bank Co. Ltd vs. Afraha Education Society (2001)1EA 86** where the Court of Appeal held that the conditions for grant of an interlocutory injunction are sequential. Reference was further made to the case of **Mrao vs. First American Bank Ltd & 2 others (2003) KLR 125** where a *prima facie* case was defined inter alia, as a genuine and arguable case.

Counsel for the Defendant submitted that the Plaintiff had alleged that the Defendant's action of constructing a gate on the access road which was adjacent to his property had infringed his rights. The Defendant argued that the architectural plans annexed to his replying affidavit show that parking was factored in the design and therefore, that the Plaintiff's argument of inadequate parking does not lie.

While stating that the Plaintiff's allegation that the planning of the estate does not accommodate multi-dwelling structures was mistaken, the Defendant submitted that the estate is not regulated and that the rules annexed by the Plaintiff and marked annexure "VL5" were of no legal value since they were mere proposals. The Defendant argued that the document produced by the Plaintiff was a draft subject to corrections, amendments and additions and further, that the same was not dated or signed.

Counsel for the Defendant stated that the Plaintiff had conveniently attempted to delete the last paragraph of the rules where it is noted that the document was a draft and was subject to corrections, amendments

and additions. In the alternative, the Defendant submitted that his two-storied building was allowed under Rule 1(c) of the alleged estate rules which prohibits high rise buildings which are above two floors.

In further submission, the Defendant stated that his project was not one that requires an environmental impact assessment since it was not out of character with the surrounding area. Counsel relied on section 58 (1) of the Environmental Management and Co-ordination Act and argued that only projects set out in schedule 2 of the Act require an environmental audit and approval. It is the Defendant's submission that projects that require approval under section 2 are activities that are out of character with their surrounding; any structure of a scale not in keeping with its surrounding and major changes in land use. The Defendant contended that he exhibited photographs that demonstrate that there are similar multi dwelling units within the estate.

In respect to the Plaintiff's submission that he did not obtain development approval, the Defendant relied on section 33 of the Physical Planning Act and submitted that he did not require to obtain development permission. Counsel submitted that the Plaintiff's property is registered under the Registered Land Act (repealed) and further, that the property was agricultural land since the Land District Tribunal had jurisdiction to hear disputes arising from agricultural land. The Defendant also referred the Court to section 2 of the Land Control Act and argued that agricultural land was defined to mean *inter alia*, land that is not within a municipality or a township.

It is the Defendant's submission that the Plaintiff's grievances are based on apprehensions that lack factual or legal foundation and therefore, that the Plaintiff had failed to establish a *prima facie* case with probability of success as established in the case of **Giella vs. Cassman Brown & another (1973) EA 358**. The Defendant argued that the Plaintiff's hands were tainted for attempting to alter the last paragraph of his annexure "VL5" in order to prevent the Court from appreciating its full import. It is the Defendant's submission therefore, that the Plaintiff cannot benefit from the court's equitable power.

On irreparable loss, it was submitted that the Plaintiff had not demonstrated any irreparable loss that he may suffer if the injunction is not granted. Counsel argued that the allegation that the Plaintiff was exposed to security threat does not present an irreparable loss. It is the Defendant's submission that the Plaintiff's incidence relates to situations involving armed thugs who were criminals and whom he had no control over. Further, the Defendant submitted that his act of constructing flats does not pose a security threat and that the Plaintiff's alleged loss or damage was based on assumptions that have no legal or factual foundation.

Counsel for the Defendant argued that the Defendant who is the absolute proprietor and was constructing in land which was not within a local authority, stands to suffer irreparable loss or damage if the prayers sought are granted. The Defendant submitted that the Constitution grants a land owner the right to peaceful use and enjoyment of his property which right would be impeded by the granting of an injunction. Lastly, the Defendant argued that the balance of convenience tilts in his favour and that the injunction preventing him from investing in his property should not issue.

The Issues and Determination

I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction sought.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2**

Others[2003] eKLR as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is 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 must therefore tender evidence to show that he has a right which has been infringed or is threatened with infringement. In the instant case, the Plaintiff's case is hinged on apprehension that the Defendant has not made provision for sufficient parking space to accommodate his tenant's vehicles. The Plaintiff is also apprehensive that the vehicles will be parked on the road outside his gate thereby creating a great security threat, obstruction and inconvenience.

It is my view that the Plaintiff has not established that he has a right which has been infringed since his claim is speculative in nature and therefore, no *prima facie* case has been established. The Plaintiff's contention that relevant approvals have not been procured for the development were resisted by the Defendant who argued that his development does not fall within the provisions of section 30 of the Physical Planning Act and section 58 the Environment Management and Co-ordination Act. Both Acts provide elaborate mechanisms that deal with non-compliance, and the Plaintiff, if he has a grievance in this respect, should exhaust these statutory mechanisms before coming to this Court.

In respect to irreparable damage, the Plaintiff submitted that in the event that all the 8 households in the suit property owned a motor vehicle, the area would be a disaster in terms of parking since some vehicles would be parked on the road causing tremendous congestion, disturbance and denial of peaceful enjoyment of his property. The Court of Appeal in the case of **Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012** has stated in respect to irreparable loss that speculative injury will not suffice and that there must be more than an unfounded fear or apprehension on the part of the Applicant. The Plaintiff has accordingly not satisfied the second condition for the grant of a temporary injunction.

Lastly, the balance of convenience does not lie in favour of allowing the application. The Defendant's right to property enshrined under Article 40 of the Constitution should not be interfered with on grounds of speculative injury likely to be suffered. I therefore find that the Notice of Motion dated 7th May 2014 has no merit and decline to grant the orders sought therein. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____March____, 2015.

P. NYAMWEYA

JUDGE