



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1559 OF 2014

JANET FLORA MUNA.....PLAINTIFF

VERSUS

JOHN KARANU IKINU.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD
DEFENDANT**

RULING

Coming up before me for determination is the Notice of Motion dated 17th December 2014 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. That this court do issue an injunction against the 1st Defendant/Respondent stopping all construction works on the parcel of land known as L. R. No. 209/525/11 (hereinafter referred to as the "suit property") until a fence is erected around the construction site and adequate measures are taken to protect the Plaintiff's premises and the general public and other nearby premises from falling debris caused by the 1st Defendant's construction activities pending the hearing and determination of this Application.
3. That the 1st Defendant/Respondent be compelled to compensate the Plaintiff for damages and loss of business caused by the 1st Defendant's negligence and continued nuisance causing substantial structural damage to the Plaintiff's premises as a result of falling debris from the 1st Defendant's construction works.
4. That the 2nd and 3rd Defendants/Respondents be compelled to enforce the provisions of the Physical Planning Act Cap 286, the Nairobi City County By-laws and Regulations and the Environmental Management and Coordination Act Cap 387 respectively.
5. That the 2nd Defendant/Respondent be compelled to produce to this court a copy of the approved development plan for the 1st Defendant's development to enable this court scrutinize and ascertain whether the conditions thereto have been complied with by the 1st Defendant.
6. That the 3rd Defendant/Respondent be compelled to produce before this court a copy of the

Environmental Impact Assessment approval/licence for the 1st Defendant's development to enable this court to scrutinize and ascertain whether the conditions thereto have been complied with by the 1st Defendant.

7. That the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Janet Flora Muna, sworn on 17th December 2014 in which she averred that she is the beneficial owner of L. R. No. 209/525/12 which is adjacent to the suit property, which is commonly known as Flora House. She further averred that she has been operating a bar, restaurant and butchery business at Flora House for the last four years. She further averred that in February 2014, the 1st Defendant/Respondent, who is the registered proprietor of the suit property, commenced construction on the suit property without fencing off the construction site with the result that her premises and other neighboring properties were harmed by falling debris from the suit property. She stated further that the 1st Defendant/Respondent owes a duty of care to the adjacent and neighboring premises and the general public and the environment as provided under the Physical Planning Act and the Environmental Management and Coordination Act to take precautionary measures to protect her premises from being damaged or being adversely affected by the said construction works. She added that as a result of the 1st Defendant/Respondent's negligence, her premises have suffered substantial structural damage leading to water leaking into her premises causing extensive damage to the ceiling, roofing boards and floor surface of her premises. She added that she has also experience electrical surges which have completely damaged her fridge and TV in the restaurant area. She also added that the falling debris has broken several window panes on her premises and the Flora House has been left looking old, dilapidated and in dire need of repair and repainting. She further added that due to the 1st Defendant/Respondent's failure to dispose of the debris from the construction site properly, the same has escaped into the common sewer line causing the sewage system to collapse with raw sewage escaping into the open streets thereby posing serious health and environmental dangers. She further averred that a registered quantity surveyor she hired estimated the cost of repairing the damage caused at Kshs. 1,400,000/-. She averred further that she was forced to close down her said businesses since March 2014 due to the blocked sewage and fall debris leading to loss of business amounting to Kshs. 6,680,000/-.

The Application is contested. The 1st Defendant/Respondent, John Karanu Ikinu, filed his Replying Affidavit sworn on 13th January 2015 in which he averred that he is the registered proprietor of the suit property where since February 2014 he has been undertaking a development project being a commercial five storey building. He further averred that the development and construction of the said building was duly approved by the relevant authorities including the 2nd and 3rd Defendants. He annexed copies of the approved development plans and environmental impact assessment report. He further averred that from the time construction work commenced on the suit property, his contractor erected a temporary fence around the construction site and thereafter took adequate steps to keep dust levels arising from the construction site within the required limits as stipulated in the NEMA report. He added that his contractor has also taken steps to ensure that the neighboring premises including L.R. No. 209/525/12 are protected from being damaged or adversely affected by the construction work. He denied that there has been any damage occasioned on the iron sheets on the house erected on L.R. No. 209/525/12 or any leaking water causing damage to the ceiling, roofing boards or floor services of the said premises. He further denied that there was any damage to the fridge or TV as alleged. He further denied that there was any falling debris from the suit property breaking window panes on the said premises or left the said premises looking old, dilapidated or in dire need of repair and repainting. He averred that even prior to the construction work on the suit property commencing, the neighboring premises being L.R. No. 209/525/12 looked old, dilapidated and in need of repair or repainting. He further stated that his contractor has adhered to the guidelines of NEMA in ensuring any debris from the construction site is disposed of and never allowed to escape into the common sewer line. He denied that the sewer line is blocked. He further denied that the Plaintiff's business had been interrupted at all during the construction period on the suit property and denied that the Plaintiff had suffered a loss of Kshs. 6,680,000/- as claimed. He further stated that no demand has been made by the Plaintiff to him requiring him to remedy the alleged state of affairs. He further added that he had not received any stop order from the 2nd Defendant to stop the construction. He concluded by stating that the construction work he has undertaken at the suit property has not caused any

harm, trespass or danger to the Plaintiff or other person or the surrounding environment and he has fully complied with the provisions of the **Physical Planning Act Cap 286**, the Nairobi City County By-laws and Regulations and the **Environmental Management and Coordination Act Cap 387**.

The Application is further opposed by the 2nd Defendant which filed its Grounds of Opposition dated 15th January 2015 relying on the following grounds:

1. That the Application is merely speculative as the same does not disclose any failure of the 2nd Defendant to warrant the orders sought.
2. That the Application as drawn and filed does not disclose any reasonable and actionable cause as against the 2nd Defendant.
3. That the Application as drawn and filed lacks merit and should be dismissed with costs to the 2nd Defendant.

The Application is further opposed by the 3rd Defendant which filed its Grounds of Opposition dated 18th May 2015 in which it relied on the following grounds:

1. That the Application as against the 3rd Defendant is scandalous, frivolous and vexatious as it seeks orders in vain as the Environmental Impact Assessment Reports and all other accompanying documents and approvals are public records which are available for inspect at the office of the 3rd Defendant during working hours and copies can be obtained therewith at the Applicant's costs and therefor it is not necessary for the court to issue an order compelling the 3rd Defendant to produce the same.
2. That the Application is not based on facts as the 3rd Defendant has not licensed the project.
3. That the Application as against the 3rd Defendant is therefore an abuse of court process and the same should be dismissed with costs.

All parties filed their respective written submissions.

The Plaintiff/Applicant seeks both a temporary injunction stopping the construction work going on at the suit property as well as a mandatory injunction compelling the 1st Defendant/Respondent to compensate the Plaintiff for damages and loss of business, compelling the 2nd and 3rd Defendants/Respondents to enforce the provisions of the **Physical Planning Act Cap 286**, the Nairobi City County By-laws and Regulations and the **Environmental Management and Coordination Act Cap 387**.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

It is conceded that the suit property is registered in the name of the 1st Defendant/Respondent which lies adjacent to the property L.R. No. 209/525/12 in which the Plaintiff/Applicant runs various businesses. This suit is not a dispute of ownership but rather a dispute regarding the construction activities being conducted by the 1st Defendant/Respondent on the suit property which is allegedly having a negative impact on the Plaintiff's businesses. The Plaintiff/Applicant alleges that the 1st Defendant/Respondent is negligent and being a nuisance in that his construction activities on the suit property is damaging the Plaintiffs adjacent businesses due to falling debris, leaking water which is destroying various parts of the building called Flora House. The 1st Defendant/Respondent has denied all those allegations and maintains that he has complied with all the relevant laws and regulations concerning construction. I have had opportunity to look closely at the photos annexed by the Plaintiff/Applicant to this Application and saw little evidence of the extent of damage and loss that the Plaintiff/Applicant claims has been occasioned by the 1st Defendant/Respondent. I must hasten to add that this is only a preliminary finding at this interlocutory stage of the proceedings. Of course, a final and conclusive position shall be rendered after the full hearing of this suit. However, at this juncture, I see nothing untoward in the construction activities on the suit property being carried out by the 1st Defendant/Respondent and therefore find that the Plaintiff/Applicant has failed to establish that she has a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

The Plaintiff/Applicant also sought for a mandatory injunction compelling the 2nd and 3rd Defendants to produce various documentation and to enforce various legal provisions. To that request, I concur with the position taken by the 3rd Defendant that the documents being referred to by the Plaintiff/Applicant are public documents that the Plaintiff/Applicant can procure copies of without the necessity of a court order. Accordingly, I will not issue any such orders.

The upshot of the above is that this Application is hereby dismissed with costs to the Defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE