



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC SUIT NO. 235 OF 2015**

**THE GROOVER LIMITED.....PLAINTIFF**

**VERSUS**

**ISAAC GITOHO- CHAIRMAN**

**PETER MWANGI- VICE CHAIRMAN**

**SANJEEV SHARMA- COMMITTEE MEMBER**

Being sued as officers and on behalf of

**THE RUNDA ASSOCIATION.....1<sup>ST</sup> DEFENDANT**

**a duly registered association**

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

**RULING**

The Plaintiff's plaint dated 18<sup>th</sup> March 2015 filed in court on 19<sup>th</sup> March 2015 seeks a declaration as against the 1<sup>st</sup> defendant that it has no right and/or authority whatsoever to interfere with the plaintiff's approved project works which the plaintiff is undertaking on **L.R.NO.7785/1451**. The plaintiff also seeks an injunctive order against the 1<sup>st</sup> Defendant restraining them from in any manner interfering with the plaintiff's project works on **L.R. NO.7785/1451**.

Simultaneously with the plaint the plaintiff filed a Notice of Motion application expressed to be brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Order 1 rules 8(1) & (2) and Sections 1A, 1B and 3A of the Civil Procedure Act and seeks the following substantive order:-

**“That the 1<sup>st</sup> Defendant herein- The Runda Association and its officials, jointly and severally be strictly enjoined and restrained whether by themselves, or by their members, servants, agents or otherwise, howsoever from interfering with, disrupting and/or in any manner howsoever delaying the commencement and continuation of the approved project works that the plaintiff is undertaking on all that piece of land known as Land Reference NO. 7785/1451 pending the hearing and determination of suit herein.**

The plaintiff's application is premised on the grounds set out on the face of the application and in the

supporting affidavit of **Rohan Baloobhai Patel** a director of the plaintiff sworn on 18<sup>th</sup> March 2015. The 1<sup>st</sup> Defendant/Respondent in opposition to the Applicant's application on 20<sup>th</sup> April 2015 filed grounds of opposition dated 17<sup>th</sup> April 2015 and further on 6<sup>th</sup> May 2015 filed a replying affidavit sworn on the same date by one **Isaac Gitoho**, Chairman of the 1<sup>st</sup> Defendant/Respondent. The plaintiff through **Rohan Baloobhai Patel** filed a further affidavit on 8<sup>th</sup> May 2015 in response to the 1<sup>st</sup> Defendant's grounds of opposition and replying affidavit.

Counsel for the parties made oral submissions before me on 4<sup>th</sup> June 2015 when **Mr. Amoko Advocate** appeared for the plaintiff/Applicant, Mr. **Masika Advocate** for the 1<sup>st</sup> Defendant/Respondent and **Mr. Mogaka Advocate** for the 2<sup>nd</sup> Defendant/Respondent.

### **The Plaintiff/Applicant case.**

The Plaintiff/Applicant is the registered owner of **L.R.NO.7785/1451** following the amalgamation of parcels of land **L.R.Nos, 29173, 7785/345** and **7785/352** previously registered in the plaintiff's name. After approval of change of user from residential the designated user of the property now is for "**shops, offices and residential hotel**". The plaintiff avers that it obtained approval from the 2<sup>nd</sup> Defendant, County Government of Nairobi for the Construction of hotel, retail centre and office block (**hereinafter referred to as "the project"**) on 27<sup>th</sup> February 2014 which approval was renewed on 24<sup>th</sup> February 2015. The plaintiff further avers that it has also obtained approval for the construction of a temporary access road from Kenya Urban Roads Authority to their plot for use during the project's construction phase. The plaintiff further states it applied for **NEMA** approval for the project and the necessary statutory notice was published in the newspapers and on 14<sup>th</sup> May 2014 the Runda Association submitted an objection to NEMA but upon investigating the objection **NEMA** on 25<sup>th</sup> July 2014 granted the plaintiff EIA licence as per the copy annexed and marked "**RP14**" which paved the way for the plaintiff to commence implementation of the project.

The plaintiff further avers that the 1<sup>st</sup> Defendant despite the fact that the plaintiff had acquired all the appropriate approvals for the project did not accept the project and did everything to frustrate the project implementation including writing objection letters to various authorities and that inspite of the plaintiff opening up to discuss the matter with the 1<sup>st</sup> Defendant a view of reaching an amicable resolution the 1<sup>st</sup> Defendant was not amicable to the matter being resolved.

The plaintiff vide the supporting affidavit sworn in support of the 2<sup>nd</sup> Notice of Motion application dated 26<sup>th</sup> March 2015 averred that three employees of the **Runda Water company**, proposed to be enjoined as the 3<sup>rd</sup> Defendant, namely **Methu** (General Manager), **Steve Mwangi** (security officer) and a third person came to the plaintiff's project site on 25<sup>th</sup> March 2015 and purported to stop the project works and issued threats to the plaintiff's workers on site. The plaintiff states that the same three persons with other employees of the **Runda Water Company** came to the site and back filled approximately 150 holes that the plaintiff's contractor had dug/excavated to support timber for the hoarding that was to secure the project site. That to avert a confrontation and breakout of violence the plaintiff instructed their security guards not to engage with the intruders but avers that the intervention of the proposed 3<sup>rd</sup> Defendant's employees was with the tacit approval of the 1<sup>st</sup> Defendant as attested at the Association's Annual General Meeting held on the evening of 25<sup>th</sup> March 2015 where **Mr. Isaac Gitoho**, the Association's Chairman applauded the action by **Runda Water Company's** staff in stalling the plaintiff's development activities.

The complaint by Runda Water Company according to the plaintiff was that the plaintiff was carrying out works on reserved public land and road reserves and was encroaching on areas reserved for street lightings, water drains and were likely to block the **Runda Water** drains and interfere with the laid optic cables. The plaintiff's position is that their works had been authorized and was being executed strictly on the basis of the approved plans and in that regard seeks orders of injunction against the defendants in terms of the Notice of Motion.

## **1<sup>st</sup> Defendant's Response**

The 1<sup>st</sup> Defendant/Respondent through its Chairman **ISAAC GITOHO** swore a replying affidavit dated 6<sup>th</sup> May 2015 in opposition to the plaintiff/Applicant's application for injunction. The 1<sup>st</sup> Defendant admits being aware of the plaintiff's intention to implement the project which had already received approval from NEMA and the County Government of Nairobi. The 1<sup>st</sup> Defendant avers that being aggrieved by the approvals granted by the approving authorities, they have preferred appeals against the said approvals as provided for under the enabling statutes namely the Environmental Management and Co-ordination Act (EMCA) and the Physical Planning Act. The 1<sup>st</sup> Defendant has filed an appeal before the National Environmental Tribunal vide Tribunal Appeal NO. NET/143 of 2015 and at the City Planning Liaison Committee respectively.

The 1<sup>st</sup> Defendant contends that it has properly exercised its right to appeal the decisions of the approving authorities and that having appealed the appropriate institutions established under the law are properly seized with the matter that the plaintiff has brought to this court. The appropriate forum to deal with the issues brought before the court by the plaintiff have not exhausted their mandate and the 1<sup>st</sup> Defendant's position is that they should be allowed to perform their duties and/or functions as mandated under the law.

The 1<sup>st</sup> Defendant admit that their representatives informed the plaintiff that the 1<sup>st</sup> Defendant would not allow the plaintiff or any other person to cut or destroy cables, break pipes and/or fence off storm water drains comprised in the common areas of the road reserve because that would adversely affect the residents. The 1<sup>st</sup> Defendant however denies trespassing on the plaintiff's property and further denies its representatives were responsible for filling up of the dug holes as alleged by the plaintiff and reiterates that they have taken up the appropriate legal steps to challenge the authorizations and approvals given to the plaintiff before the relevant institutions. Having filed the appeal before the National Environmental Tribunal the 1<sup>st</sup> Defendant states that the **NEMA** Tribunal has issued a stoppage order stopping the further implementation of the plaintiff's project until the appeal is heard and determined. The 1<sup>st</sup> Defendant avers that the applicant's application for injunction is misplaced as no cause of action has been shown as against the 1<sup>st</sup> defendant and seeks the dismissal of the application.

### **Submissions by the plaintiff and the 1<sup>st</sup> Defendant.**

In their oral submissions before me the counsel for the plaintiff and the 1<sup>st</sup> Defendant reiterated the facts of the case as outlined above. **Mr. Amoko** for the plaintiff submitted that the acts of the 1<sup>st</sup> Defendant through its representatives constituted trespass as they were interfering with the activities of the plaintiff which had been authorized. **Mr. Amoko** submitted that the defendants acts of filling up the holes that had been dug by the plaintiff for posts to support the hoarding that was to be put up to shield the project implementation work was trespass. The hoarding was in the County Government's land and had been paid for and authorized and the Defendants had no justification to interfere with the works. The counsel further submitted the 1<sup>st</sup> Defendant's acts were unilateral and infringed on the rights of the plaintiff and that an order of restraint was appropriate. Counsel submitted that the 1<sup>st</sup> Defendant was using **NEMA** as a shield and that although the **NEMA** Tribunal has issued a stop order in regard to the project the court nonetheless should injunct the 1<sup>st</sup> Defendant to forestall future acts of trespass.

For his part **Mr. Masika Advocate** for the 1<sup>st</sup> Defendant maintained that the plaintiff was non suited against the 1<sup>st</sup> Defendant. Counsel submitted that although the plaintiff has grounded its application for injunction on trespass and vandalism the plaint does not raise any claim for trespass and/or vandalism and that the substantive prayers in the plaint are wholly for injunction and there is no claim for damages for any trespass. Counsel further submitted no evidence of any trespass was led against the 1<sup>st</sup> Defendant and the letter from BM Security Firm dated 7<sup>th</sup> April 2015 does not show that the 1<sup>st</sup> Defendant was in any way involved in the filling up of the holes. The 1<sup>st</sup> Defendant has challenged the approval of the

plaintiff's project before the County Liaison Committee at which for the plaintiff is represented. There has been a stop order issued by **NEMA** in regard to the implementation of the project by the plaintiff pending the determination of the appeal before them and hence there is no basis for the court to entertain the instant application.

**Mr. Mogaka Advocate** for the 2<sup>nd</sup> Defendant did not oppose the plaintiff's application as no order is sought against the 2<sup>nd</sup> Defendant. He nonetheless was of the view that no party would suffer any prejudice if the orders sought were granted ostensibly because there was a stop order in place issued by the **NEMA** Tribunal.

### **Analysis and determination**

I have reviewed the pleadings, the Notice of Motion applications dated 18/3/2015 and 26/3/2015 and the affidavits sworn in support and in opposition thereof and I have considered the submissions made on behalf of the parties. The issue for the court to determine at this stage is whether the plaintiff has satisfied the conditions for the grant of an interlocutory injunction that he seeks. The conditions that an applicant for a temporary injunction must satisfy before the grant of an injunction are now fairly well settled arising from the principles enunciated in the often cited case of **GIELLA -VS- CASSMAN BROWN & CO. LTD (1973) EA, 358**. The Applicant has to establish that:-

- i. He has a prima facie case with a probability of success,
- ii. He stands to suffer irreparable harm that cannot be compensated by an award of damages unless the injunction is granted,
- iii. Where the court entertains a doubt in regard to any of the foregoing conditions, the court may determine the application on consideration of the balance of convenience.

At the time the application came for hearing before me, Runda Water Company, the proposed 3<sup>rd</sup> Defendant had not been enjoined to the proceedings and as the matter stands the application proceeded on the basis that the proposed 3<sup>rd</sup> Defendant was not a party. To the extent that the order of injunction would be directed against the proposed 3<sup>rd</sup> defendant and would affect them they needed to have been formally enjoined and served with the application and afforded an opportunity to participate at the hearing of the same. It is unclear why the plaintiff opted to proceed with the application for injunction without the joinder of the proposed 3<sup>rd</sup> Defendant first being determined. The net effect is that no order can be made directed against the proposed 3<sup>rd</sup> Defendant having not been a party to the proceedings in regard to the injunction application.

The plaintiff's injunction application is premised on alleged acts of trespass and vandalism on the part of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has denied committing any acts of vandalism and/or trespass through the replying affidavit of **Mr. Isaac Gatoho**, its Chairman pointing out their concern was that the plaintiff was encroaching on the road reserve and there was the risk that the plaintiff would interfere with street lighting, optic cables and the storm drainage to the prejudice of the residents. These were legitimate concerns in regard to which the 1<sup>st</sup> Defendant would be entitled to seek and obtain clarifications. The 1<sup>st</sup> Defendant being dissatisfied with the manner the plaintiff was granted its approvals for the project by **NEMA** and the Nairobi County Government has lodged appeals with the National Environmental Tribunal and Nairobi County Liaison Committee under the enabling statutory provisions and these appeals are pending. **NEMA** Tribunal has pending the determination of the appeal before it issued a stop order in regard to the implementation of the plaintiff's project.

The plaintiff has stated that the persons who it claims refilled the dug up holes were representatives of the proposed 3<sup>rd</sup> Defendant and there is no evidence of any participation by the 1<sup>st</sup> defendant and on that account I am inclined to hold that no evidence of any trespass has been shown on the part of the defendant. Indeed the 1<sup>st</sup> Defendant opted to challenge the actions of the plaintiff through the established

legal process which process is ongoing at the NEMA Tribunal and Nairobi County Liaison Committee. The Committee before whom the 1<sup>st</sup> Defendant's Appeals are pending are technical institutions which are best suited to consider the concerns raised by the parties in the specific areas of their jurisdiction and until these statutory institutions have exhausted their mandate, the court lacks the jurisdiction to deal with the matters that are within their mandate. The parties agree that the NEMA Tribunal has issued a stoppage order relating to the implementation of the plaintiff's project pending the determination of the Appeal before it and the parties are presently observing this status. Given the attendant circumstances it is my view that even if the plaintiff had established a prima facie case with a probability of success, which the court is not satisfied has been demonstrated, this court in the face of the stop order by the NEMA Tribunal would be reluctant to grant an order of injunction as it would be superfluous and there would be potential conflict in that there is possibility that both NEMA and this court could arrive at varying decisions.

As I have held that the plaintiff has not shown the 1<sup>st</sup> Defendant committed any trespass my view is that no prima facie case with a probability of success has been established to warrant the plaintiff the grant of the order of injunction sought. I have considered the authorities referred to the court by the plaintiff in support of its application but with respect I do not think they are of any relevance in the circumstances of the present case it not having been established that the 1<sup>st</sup> Defendant had trespassed onto the plaintiff's land. These authorities relate to instances where trespass has been proved or established. Without trespass being established on the part of the 1<sup>st</sup> Defendant, there would be no basis to grant an order of restraint. The plaintiff may have had an apprehension that the 1<sup>st</sup> Defendant may in fact be against its project but an injunction cannot be granted in anticipation or expectation that there may be interference. There has to have been a positive act, real or threatened by the person sought to be restrained and such act or threat must be such as would infringe on the rights of the applicant if executed. The 1<sup>st</sup> Defendant has placed evidence before the court to show that they have challenged the approvals given for the implementation of the plaintiff's project as is required of them under the law and thus there is no basis for this court to interfere with the functions of other statutory institutions with lawful mandate to deal with matters within their jurisdiction. Such institutions must be allowed to exercise their mandate and the High Court should only assume jurisdiction once their mandate has been exhausted and should not be seen to usurp their mandate.

In the premises and for all the foregoing reasons I decline to grant the order of injunction sought by the plaintiff. However since the plaintiff had sought leave to enjoin Runda Water Company Limited as the 3<sup>rd</sup> Defendant leave is hereby granted. The plaintiff to serve the proposed 3<sup>rd</sup> Defendant who will have leave of 15 days from date of service of the pleadings on them to enter an appearance and a further 14 days from the date of appearing to file their defence.

I direct that the costs of the application shall be in the cause.

Order accordingly.

Ruling dated, signed and delivered this.....10<sup>TH</sup>.....day of...JULY.....2015.

**J. M. MUTUNGI**

**JUDGE**

In presence of:

..... For the Plaintiff

..... For the Defendants