



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 717 OF 2013**

**CHARLES JONYO OSICHO.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> DEFENDANT**

**KENYA BUILDING SOCIETY LTD .....2<sup>ND</sup> DEFENDANT**

**JARED MBUGUA RAGOI .....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff in a Notice of Motion dated 18<sup>th</sup> June 2013 is seeking the following orders:

1. A temporary injunction restraining the Defendants, and more particularly the 3<sup>rd</sup> Defendant, from constructing or continuing to construct a storeyed building comprising of shops and residential flats on the property known as Title No. Nairobi Block 121/208 pending the hearing and determination of the suit herein.
2. A temporary injunction restraining the Defendants from trespassing onto or in any other manner howsoever interfering with the property known as Title No. Nairobi Block 121/207 or any part thereof pending hearing and determination of this suit.

The Notice of Motion is supported by an affidavit and supplementary affidavit sworn by the Plaintiff on 18<sup>th</sup> June 2013 and 29<sup>th</sup> January 2014 respectively. The Plaintiff states therein that he is the owner of the property known as Nairobi Block 121/207 having purchased the same from the 2<sup>nd</sup> Defendant in 1993. Further, that in March 2013 the 3<sup>rd</sup> Defendant started construction of a building on the adjacent parcel of land namely Nairobi Block 121/208, and that the Plaintiff made numerous attempts to get details on, and to stop the said construction to no avail. The Plaintiff states that he then received an enforcement notice from the 1<sup>st</sup> Defendant on 4<sup>th</sup> April 2013 stating that he had encroached on Nairobi Block 121/208 and requiring him to remove the alleged encroachment.

The Plaintiff averred that he subsequently protested to the 1<sup>st</sup> Defendant that its enforcement notice was misplaced and an infringement on his rights, considering that he had bought his property complete with

the bungalow thereon from the 2<sup>nd</sup> Defendant. Further, that he also asked the 2<sup>nd</sup> Defendant to clarify the position and to protect his rights as a purchaser of a fully developed property for valuable consideration. However, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not answer his concerns, and the 3<sup>rd</sup> Defendant proceeded with construction much to his detriment.

The Plaintiff stated that on 12<sup>th</sup> June 2013, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein, through their employees, officers and/or workmen, trespassed onto his property, and unlawfully destroyed part of his house to pave way for the construction of an upper floor to the building the 3<sup>rd</sup> Defendant was constructing on Nairobi Block 121/208. According to the Plaintiff, his investigations show that Komarock Infill “B” was not meant for any high rise buildings or shops, and the 1<sup>st</sup> Defendant merely changed the condition limiting user of Nairobi Block 121/208 from a private residence to a shop, without the necessary change of user having been approved or granted.

Further, that the housing units within Komarock Infill “B” where the suit properties Nairobi Block 121/207 and Nairobi Block 121/208 are situated were planned and sold by the 2<sup>nd</sup> Defendant as residential houses. The Plaintiff stated that he was not aware of any change of plans and/or user having been obtained by either the 2<sup>nd</sup> Defendant or the 3<sup>rd</sup> Defendant to convert the planned development on Nairobi Block 121/208 to a shop, which is what the 3<sup>rd</sup> Defendant was putting up on the plot. Further, that the 1<sup>st</sup> Defendant had no authority to approve the proposed development of L.R NO.121/208 for shops and residential flats as it purported to do, since it had already approved the plans for development of the whole area exclusively for single and double storeyed residential houses.

The Plaintiff also contended that that National Environmental Management Authority must have been misled to issue the letter dated 19<sup>th</sup> September, 2011 granting the 3<sup>rd</sup> Defendant “confirmation of project ineligibility for environmental impact assessment (EIA) for one Residential House on L.R. NO. Komarock 121/208, Komarock Area Nairobi”, yet the 3<sup>rd</sup> Defendant is now putting up shops and residential flats, a totally different project.

The Plaintiff averred that he will suffer irreparable loss and damage if the 3<sup>rd</sup> Defendant is allowed to construct and/or complete the building he is in the process of constructing. He gave the details of the said loss and damage as follows:-

- (a) The provision of shops next to his property which he occupies as his home will erode his privacy and will cause insecurity to his family.
- (b) Shops were planned for separately within Phase two of Komarack Estate.
- (c) His property is already exposed to structural damage and the walls are already cracking. Further, that the destruction of his roof, if not reversed will lead to further destruction of his property.
- (d) The value of his property will greatly depreciate.
- (e) The 3<sup>rd</sup> Defendant is already causing nuisance, annoyance and disturbance in the area, and as a result his house has almost become inhabitable.

The Plaintiff annexed various documents in support of his arguments, including copies of his certificate of lease dated 21<sup>st</sup> August 2009; of the lease between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant registered on 14<sup>th</sup> October 1993; his letter dated 25<sup>th</sup> February 2013 addressed to the 1<sup>st</sup> Defendant; the Enforcement Notice dated 4<sup>th</sup> April 2013 issued to him by the 1<sup>st</sup> Defendant; his letter dated 4<sup>th</sup> April 2013 addressed to the 2<sup>nd</sup> Defendant; photographs showing ongoing construction by the 3<sup>rd</sup> Defendant; the 2<sup>nd</sup> Defendant’s plan specification supplied to prospective purchasers of the properties in Komarock Infill B in the year 1992; and a newspaper advertisement by the 2<sup>nd</sup> Defendant to this effect.

## **The Defendants' Responses**

The Defendants all opposed the Plaintiff's Notice of Motion. The 1<sup>st</sup> Defendant filed Grounds of Opposition dated 2<sup>nd</sup> August 2013 and a replying affidavit sworn on 26<sup>th</sup> November 2013 by David K. Gatimu, , the 1<sup>st</sup> Defendant's Assistant Director of Development Control. The deponent stated that the 1<sup>st</sup> Defendant granted the 3<sup>rd</sup> Defendant approval in respect of Nbi/Block 121/208 Komarock registered as EP 951, and he annexed a copy of a letter dated 13<sup>th</sup> September 2012 from his office confirming the fact. Further, that the 1<sup>st</sup> Defendant also issued an Enforcement Notice to the Plaintiff under the Physical Planning Act requiring the removal of encroachments to the adjacent plot dated 4<sup>th</sup> April 2013.

The deponent further averred that a joint survey ordered by the court and a report filed in court confirm that there was an overlap into Nairobi/Block 121/208 by 0.40 meters from Nairobi/Block 121/207 and that in the circumstances the 1<sup>st</sup> Defendant had been dragged to court in this case for no just reasons, and that the Plaintiff has not met the threshold for grant of the orders sought.

The 2<sup>nd</sup> Defendant filed Grounds of Opposition dated 2<sup>nd</sup> July 2013 and a replying affidavit sworn on the same date by Migui Mungai, the 2<sup>nd</sup> Defendant's Legal Manager. The deponent stated that the dispute in question does not affect the 2<sup>nd</sup> Defendant by the reason that it is not the owner of the property known as Title Number Nairobi Block 121/207 or Title Number Nairobi Block 121/208, and is hence not a necessary party to the suit. Further, that the dispute herein is clearly an issue of trespass to be determined as between the Plaintiff and the 3<sup>rd</sup> Defendant as the owners of the two aforementioned properties, and the prayers sought cannot be enforced as against the 2<sup>nd</sup> Defendant who is a stranger to the trespass dispute herein.

The deponent further averred that the 2<sup>nd</sup> Defendant is not a party to the lease relied upon by the Plaintiff, and any relief arising as a result of breach of the terms of the said lease cannot flow from the 2<sup>nd</sup> Defendant or be enforced against it. Further, that the Plaintiff had not adduced any evidence to prove that Number Nairobi Block 121/208 was designated for communal parking.

The 3<sup>rd</sup> Defendant filed Grounds of Opposition dated 28<sup>th</sup> June 2013 and a replying affidavit he swore on the same date. He stated that he is the registered proprietor of all that piece or parcel of land known as Nairobi Block 121/208, having bought the same from the 2<sup>nd</sup> Defendant plot on 28<sup>th</sup> September 1992 with vacant possession, and having obtained a lease from the 1<sup>st</sup> Defendant on 6<sup>th</sup> October 1993. He annexed copies of the receipts for payment, a letter of acknowledgement from the 2<sup>nd</sup> Defendant and a copy of the lease issued by the 1<sup>st</sup> Defendant.

The 3<sup>rd</sup> Defendant further stated that there is no boundary dispute between his parcel of land and that of the Plaintiff. Further, that in the process of developing his land it became clear that the Plaintiff's building had encroached his air space by 1 ½ feet, which made it impossible for his contractors to continue with the work unless the facial board of the Plaintiff's building was demolished to that extent.

He further stated that before he commenced the developments on his parcel of land on 10<sup>th</sup> February 2013, he had obtained all the necessary approvals from the relevant authorities, and he annexed a copy of the approved building plans and a letter dated 19<sup>th</sup> September 2011 from the National Environment Management Authority. Further, that the 1<sup>st</sup> Defendant had legal authority to demolish part of the roof of the Plaintiff's property to facilitate the said development. The 3<sup>rd</sup> Defendant averred that he has completed the work on the side of the Plaintiff's property and to issue an injunction at this stage will serve no useful purpose.

## **The Submissions**

The court directed the parties to file a joint survey report on the two parcels of land in dispute namely

Nairobi Block 121/207 and Nairobi Block 121/208, and to file written submissions which they relied upon for the ruling herein. The Plaintiff's counsel in submissions dated 4<sup>th</sup> February 2014 reiterated the facts made in the foregoing, and argued that Komarock Infill "B" is a zoned area for private residences only, and that the change or alteration in the 3<sup>rd</sup> Defendant's lease for Nairobi Block 121/208 from private residence to a shop was not approved, and no proper procedures for change of user were followed.

Further, that the development of a shop and maisonette on the 3<sup>rd</sup> Defendant's parcel of land is contrary to the lease issued to the 3<sup>rd</sup> Defendant, and in breach of the provisions of section 58 and the Second Schedule of the Environmental Management and Coordination Act, which requires that such a development be subjected to an environmental impact assessment.

The Plaintiff further submitted that from the foregoing he had established a *prima facie* case, and would suffer irreparable damage as his house would be dwarfed by a high rise building in an area reserved for bungalows only which would erode his privacy, and expose him to insecurity, nuisance and structural damage to his building. He relied on the decisions in **Ocean Freight (EA) Ltd vs Esmaji & Another, KLR 1 (E&L) 555** and **Gitau vs Savage & 4 Others KLR 1 (E&L) 555** to support his arguments.

The 1st Defendant's counsel did not file any written submissions.

The 2<sup>nd</sup> Defendant's counsel filed submissions dated 25<sup>th</sup> September 2013, and argued that the 2<sup>nd</sup> Defendant is not a necessary party in this suit and is improperly enjoined, as the Plaintiff has not demonstrated any right to reliefs against it, and hence ought to be struck off these proceedings. The counsel relied on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and decisions in **Werrot and Company Ltd & Others vs Andrew Douglas Gregory and Others, 1998 (LLR) 2848 (CCK)**, **Kamau vs Makomboki Tea Factory Ltd (2008) 1 EA 154** and **Kingori vs Chege and Others (2002) KLR 243** in this respect.

The 2<sup>nd</sup> Defendant's counsel further submitted that the Plaintiff had not demonstrated a *prima facie* case against the 2<sup>nd</sup> Defendant as he has no complaint against, nor has he attributed any acts of trespass and interference with his property as against the said Defendant. Lastly, that the Plaintiff has not come to seek equity with clean hands since he had failed to disclose that he had encroached on the 3<sup>rd</sup> Defendant's land.

The 3<sup>rd</sup> Defendant's submissions were dated and filed on 7<sup>th</sup> March 2014. He argued therein that the Plaintiff had not established a *prima facie* case as he did not file suit until after the 3<sup>rd</sup> Defendant has undertaken construction for five months. Further, that the balance of convenience therefore tilts in favour of the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant further submitted that he had obtained all the necessary approvals for the said construction, and he did not require any change of user as his lease was for shops and residential houses.

### **The Issues and Determination**

I have carefully read and considered the pleadings and arguments made by the parties herein. Before I proceed with the substantive issues for determination, I will first address the preliminary issue raised by the 2<sup>nd</sup> Defendant as to whether it is a necessary party to this suit and has been improperly joined, and its request to be struck out. I am of the opinion that since there was no formal prayer made by the 2<sup>nd</sup> Defendant to be struck off the proceedings herein, the other parties and particularly the Plaintiff have not had the opportunity to canvass the said issue. It would thus be imprudent to grant any orders or directions in this regard. The 2<sup>nd</sup> Defendant is therefore directed to make a formal application to the court regarding their continued participation in this suit.

The substantive issue that remains to be determined is whether the Plaintiff has met 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 therefore answer is whether the Plaintiff has established a *prima facie* case. It is not disputed that the Plaintiff is the owner of Nairobi Block 121/207 and the 3<sup>rd</sup> Defendant is the owner of Nairobi Block 121/208, and the two parties have provided evidence of their respective ownership. The main issue in contention is whether the 3<sup>rd</sup> Defendant is undertaking illegal development on his parcel of land. The Plaintiff in the Plaint filed herein dated 18<sup>th</sup> June 2013 is seeking to have the lease issued to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Defendant with respect to Nairobi Block 121/208 declared illegal, null and void. The Plaintiff also seeks various injunctions against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, damages for trespass and an order of demolition of the structures constructed by the 3<sup>rd</sup> Defendant on the property known as Nairobi Block 121/208.

I have in this regard perused the lease entered into between the 3<sup>rd</sup> Defendant and 1st Defendant registered on 14<sup>th</sup> October 1993. I note that condition (ix) of the said lease states as follows:

**“to use the said buildings and improvements as a shop only for himself and his family and not to carry on or permit or suffer to be carried on in or upon the demised premises or any part thereof any trade or business of any kind whatsoever”**

The Plaintiff claims that the cancellation of the words “private residence” and their replacement with the word “shop” in the said condition was unlawful. However, this is not a finding this court can make at this stage without the benefit of further evidence. This court however notes that there is an inherent contradiction in the terms of the said condition, as it expressly prohibits the carrying on of any trade or business of any kind on the 3<sup>rd</sup> Defendant’s land, yet allows him to use it as a shop.

This court also notes that the dispensation given to the 3<sup>rd</sup> Defendant from undertaking an environmental impact assessment by the National Environmental Management Authority in its letter dated 19<sup>th</sup> September 2011, was with respect to a residential house on LR No. Komorock 121/208. However, the 3<sup>rd</sup> Defendant does not dispute that he is constructing a shop thereon, and has attached approved building plans for the said construction. It is also not stated in the said building plans whether the said development is for residential or commercial purposes.

I note in this regard that there are certain general projects that require to undergo an environmental impact assessment pursuant to the Second Schedule of the Environmental Management and Coordination Act. These are the following:

- (a) an activity out of character with its surrounding;
- (b) any structure of a scale not in keeping with its surrounding;
- (c) major changes in land use.

In the present case it is stated in the survey report filed in court on 2<sup>nd</sup> September 2013, and it is also not disputed by the Defendants, that the buildings that surround the maisonette being constructed by the 3<sup>rd</sup> Defendant are bungalows which are used for residential purposes. It is thus evident that the nature and intended use of the 3<sup>rd</sup> Defendant’s construction is out of character with its surroundings. This court accordingly finds that the concerns raised by the Plaintiff as to the impact of the 3<sup>rd</sup> Defendant’s development are valid.

Lastly, after perusal of the survey report filed in court on 2<sup>nd</sup> September 2013, I discern that it was found that the beacons of the two subject parcels of land namely, Nairobi Block 121/207 and Nairobi Block

121/208, are in their correct positions, and that the walls of the houses thereon are built in their rightful position. However, that the roof of the bungalow constructed on land parcel Nairobi Block 121/207 encroached on land parcel Nairobi Block 121/208 by 0.40 meters, and that the overlap had since been removed to make way for construction of a wall of a new maisonette on Nairobi Block 121/208. It is also noteworthy in this regard from the photographs annexed by the parties as evidence that the construction by the 3<sup>rd</sup> Defendant on Nairobi Block 121/208 is almost complete.

In the light of the findings in the foregoing, it is my view that the Plaintiff's Notice of Motion is one that can only be determined on the basis of a balance of convenience. This is particularly in light of the finding that although the Defendant is constructing on his parcel of land, and has obtained the necessary approvals to do so, it is not clear as to what the approved use of the said land is, whether the necessary approvals for change of user were obtained for the 3<sup>rd</sup> Defendant to use his premises as a shop, and whether this change of use thereby requires an environmental impact assessment.

### **The Orders**

This court accordingly orders as follows:

1. The 3<sup>rd</sup> Defendant, his agents and/or servants are restrained from using the premises constructed on Title No. Nairobi Block 121/208 or any part thereof as a shop or carrying out any trade and business thereon, pending the hearing and determination of the suit or until further orders.
2. The Plaintiff, his agents and/or servants are restrained from demolishing or in any other manner howsoever interfering with the 3<sup>rd</sup> Defendant's premises constructed on Nairobi Block 121/208 or any part thereof, pending hearing and determination of this suit or until further orders.

The costs of the Plaintiff's Notice of Motion dated 18<sup>th</sup> June 2013 shall be in the cause.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_13<sup>th</sup>\_\_\_\_ day of \_\_\_\_May\_\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**