



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 809 OF 2013

CECILIA KAGIO KINUTHIAPLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

RULING

The Plaintiff's Application

The application before this court is a Notice of Motion filed by the Plaintiff dated 4th July 2013, seeking orders of a temporary injunction to restrain the Defendant from entering, disposing of, and/or interfering with the Plaintiff's use of her property known as LR no. 57/1513 (hereinafter "the suit property"), pending the hearing and determination of the suit herein.

The grounds for the application are stated in the application, and in supporting and supplementary affidavits sworn by the Plaintiff on 4th July 2013 and 22nd July 2013 respectively. In summary, the Plaintiff claims that she is the registered proprietor of the suit property which is situated in Kasarani Nairobi, and that on 2nd July 2012 she received development permission from the Defendant which was signed on 17th July 2012, having made an application and paid for change of user of the property from single to multi dwelling units. The Plaintiff further explained that she presented the necessary plans and documents and paid the necessary fees, and after being given the necessary certificates, she subsequently started construction of the multi dwelling flats on the suit property.

However, that she received a letter dated 10th June, 2013 from the Defendant, indicating that her building plans had been disapproved for failure to comply with the conditions of approval. The Plaintiff averred that she fully complied with all the laid out procedures as per the law and exercised due diligence before setting out development on the property. Further that the purported disapproval is made in bad faith, is malicious and meant to harass her. In addition, that she sought and was granted approval by the National Environment Management Authority (NEMA), who conducted an Environmental Impact Assessment and approved the construction of the multi-dwelling units on the suit property.

The Plaintiff annexed copies of various documents in support of her claims including the conveyance she entered into in relation to the suit property; the applications to and correspondence with the Defendant; receipts for various fees she paid; the approval and advertisement and approval of change of user, and the Environmental Impact Assessment License issued to her.

The Defendant's Response

The Defendant opposed the Plaintiff's application in Grounds of Opposition dated and filed on 12th July

2013. It avers that the damages or loss the Plaintiff may suffer are quantifiable and can be compensated, and denies that any absolute approval was given to the Plaintiff, and that such approval was subject to conditions (i) to (ix) therein. Further, that the Plaintiff failed to disclose that the procedure she followed in getting the alleged approvals was in contravention of the terms and conditions of zoning regulations within the Defendant's jurisdiction, and that the said process was thus tainted with illegalities and fraud. The Defendant further stated that the Plaintiff did not comply with the condition (ix) in the said approval which required that the approval for change of user was subject to the suit property being situated within an area where flats developed is allowable.

The Submissions

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 10th March 2014, wherein he relied on the decision in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** to argue that the Plaintiff had shown a *prima facie* case, as she had brought evidence that she obtained approval for building on the suit property from the Defendant, and that she paid for the approval and other fees.

The counsel further relied on the decision in **J.M. Gichinga vs Cooperative Bank of Kenya Ltd (2005) e KLR** that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. He submitted that the Plaintiff had invested heavily in the suit property and would suffer irreparable damage if an injunction was not granted. Lastly, the counsel submitted that the balance of convenience tilted in favour of the Plaintiff as she had commenced construction on the suit property, which would be demolished if the injunction sought is not granted.

The Defendant's counsel filed submissions dated 17th March 2013, wherein he reiterated the statements made in the Defendant's Grounds of Opposition, and argued that the Plaintiff had not established a *prima facie* case with a probability of success. The counsel submitted that an injunction would prevent the Defendant from carrying out its mandate of approving developments on property within its jurisdiction. Further, that the Plaintiff was furthering her personal interests at the expense of the larger public interest which the Defendant is mandated to safeguard.

The Issues and Determination

I have read and carefully considered the pleadings 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. 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 therefore 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 in the Complaint filed herein dated 4th July 2013 is seeking a permanent injunction against the Defendant, to restrain it from interfering with the Plaintiff's use and possession of the suit property, as well as compensation at market value of the developments carried out therein, and special damages. It is not disputed that the Plaintiff is the owner of the suit property, and she has exhibited a registered conveyance dated 2nd August 2012 she entered into with one Patrick Waweru Kimani, who was the original transferee of the land from the original owner being Clayworks Ltd. She also attached a copy of

parts of the Indenture between Clayworks Ltd and Patrick Waweru Kimani dated 11th March 2009.

It is also not disputed that the Defendant in its letter dated 10th June 2013 which was annexed as Exhibit "CWK 14" to the Plaintiff's supporting affidavit disapproved the Plaintiff's building plans on the suit property, and required her not to commence and to remove any constructed works on the said property. The reason given in the said letter is that the change of use permitting multiple dwelling flats on the said property was erroneously issued on the basis of non-disclosure of facts relating to policy requirements of the zone.

The Plaintiff did not bring any evidence to show that the building of multiple dwellings is permitted on the suit property, neither did the Defendant bring any evidence of the zoning requirements it claims apply to the said property. In addition this court in this respect notes that the conveyance entered into between the Plaintiff and Patrick Waweru Kimani dated 2nd August 2012 is subject to the covenants and conditions in the original indenture dated 11th March 2009 entered into between Patrick Waweru Kimani and Clayworks Ltd. However, the said covenants and conditions in the original indenture were not attached by the Plaintiff.

In the circumstances, I will decide the Plaintiff's application on the basis of a balance of convenience, given that it is not disputed that she is owner of the suit property. I note in this respect that the Plaintiff had commenced construction on the subject property, and that if demolished at this stage she may suffer irreparable damage if she eventually were to succeed in her suit. I therefore find for this reason that the balance of convenience tilts in the Plaintiff's favour. I however also note that if indeed it is found that there are zoning requirements in relation to the suit property, the public interest would be affected if the said construction is allowed to proceed.

I accordingly orders as follows pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. Pending the hearing and determination of the suit herein, the *status quo* to be maintained by the parties herein shall be as follows:
 - a. The Defendant by itself or through its representatives, agents or servants shall not enter, dispose of, and/or undertake any demolitions of structures on the property known as LR no. 57/1513, and/or in any other manner interfere with the Plaintiff's occupation of the said property.
 - b. The Plaintiff by herself or through her representatives, agents or servants shall not undertake any further construction and/or developments on the property known as LR no. 57/1513.
2. The Plaintiff and Defendant shall comply with the provisions of Order 11 of the Civil Procedure Rules within one year of the date of this ruling. Upon default the *status quo* orders given hereinabove shall lapse.
3. The costs of the Plaintiff's Notice of Motion dated 4th July 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____June____, 2014.

P. NYAMWEYA

JUDGE