REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 189 OF 2014

HUZEFA AMIRALI.....1ST PLAINTIFF

ARWA FIROZ TAYBJI.....2ND PLAINTIFF

VS

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT

THE CHIEF OFFICER LANDS, HOUSING AND PHYSICAL

PLANNING COUNTY GOVERNMENT OF UASIN GISHU.....2ND DEFENDANT

(Application for injunction, principles to be applied; plaintiffs having purchased land and proposed a development plan; plan approved by defendants; plaintiffs proceeding to develop according to approved plan; defendants now seeking documents of title from plaintiffs and issuing an order to stop construction; defendant threatening to demolish structure; defendant claiming land is public utility; no such evidence tendered; no good reason tabled by defendant to warrant their action; legitimate expectation; prima facie cast established; injunction issued).

RULING

This suit was instituted by way of plaint on 9 June 2014. It is the case of the plaintiffs that they are registered proprietors of the leasehold interest comprised in the land parcel Eldoret Municipality/Block 4/2027. They purchased this land on 16 August 2012 from the previous registered owner at a consideration of Kshs. 3, 200,000/=. The land was then transferred into their names and they decided to develop it. They drew up a development plan and forwarded the same for approval. The development plan was approved on diverse dates by the District Physical Planner, the Municipal Engineer of the now defunct Municipal Council of Eldoret, the Chief Public Health Officer of the now defunct Municipal Council of Eldoret, and the National Environmental Management Authority (NEMA). They then embarked on developing the land, which was at various stages, supervised and inspected by the County Engineer of Uasin Gishu County. Various inspection cards were issued and signed by the County Engineer.

Despite all this, the plaintiffs claim that in the month of March 2014, the defendants and their officers started making calls to the plaintiffs asking for proof that their development was approved. They held some meetings and tabled all their approvals. Later, the defendants started demanding lease documents to the suit land and the original sub-division plan of the original parcel. The plaintiffs were not the original allottees of the suit land and therefore did not have these documents. The plaintiffs state that any sub-divisions must have been done by the Director of Surveys and Director of Physical Planning with the involvement of the Municipal Council of Eldoret and therefore these are documents that the defendants must have. The plaintiffs nevertheless embarked on looking for the said documents. While they were

looking for these documents, the defendants ordered the plaintiffs to stop construction on the suit property on 23 May 2014. The plaintiffs attempted to hold meetings to amicably settle the matter but as this was ongoing, the defendants went to the property on 6 June 2014 and earmarked it for demolition. At this time, the plaintiffs were about to complete construction of the ground floor and take in tenants and the stop order has greatly prejudiced them. It is the position of the plaintiffs that the conduct of the defendants has been oppressive and in violation of the plaintiffs' fundamental rights to own property.

The main prayers in the suit are for a declaration that the plaintiffs are the absolute proprietors of the leasehold interest comprised in the suit land and a declaration that the defendants' actions in interfering with the plaintiff's development of the suit land is illegal and in bad faith. The plaintiffs also want a permanent injunction restraining the defendants from demolishing the building on the suit land or in any other way interfere with their quiet possession.

Simultaneously with the plaint, the plaintiffs filed the subject application, which is an application for injunction, seeking to stop the defendants from :-

(i) demolishing the building erected on the suit land.

(ii) interfering with the plaintiffs' development of the said land in accordance with approved plan No. PPD/ELD/BR/124/12/13.

(iii) interfering with the plaintiffs' quiet possession of the suit land.

They want the above prayers to remain in force pending hearing of the suit. The application is supported by the affidavit of the 1st plaintiff which more or less repeats the position as I have set out above. She has annexed copies of agreement through which they acquired the land, copies of the development plan as approved, and various correspondences exchanged between the plaintiff and defendants. She has further deponed that the action by the defendants in seeking to have them avail copies of the lease and the sub-division plan was in bad faith, first because these are documents that the defendant should have in its possession, and secondly, because prior to the approval of the development plan, these documents were never sought by the defendants. She has deponed that the defendant is on a fishing expedition, hoping to find something in the documents, which they can use to nail the plaintiffs. She has also deponed that the lessor, who is the National Government, has raised no issue about the title that they hold. She has deponed that unless the injunction is granted, there is real danger of the defendants demolishing the property, which will cause them irreparable loss, as they have heavily invested in the same.

The defendants have filed defence to the suit and have also filed a replying affidavit to oppose the application for injunction. In the defence, they have averred that the request for documents was done in good faith for verification and authentification and that these documents were not available in the defendants' file. They claim that the suit land is on a public utility and that the registration of the plaintiffs as proprietors is suspect. It is pleaded that the plaintiffs were forewarned before starting to put up structures on the plot.

The Replying Affidavit is sworn by Kenneth Kibiwott Mutai, the County Legal Officer. He has deponed that the plaintiffs refused to supply them with documents for verification and authentification by the office of the County Physical Planning. He has stated that the site is a public utility to be used by the public. He has stated that the same does not have a "slip road".

Mr. Kamau, learned counsel for the plaintiffs urged me to allow the application for injunction. He submitted that the plaintiffs have a prima facie case and are therefore entitled to protection under the law. He submitted that the plaintiffs obtained all necessary statutory approvals before embarking on the development and are therefore protected by the doctrine of legitimate expectation. He argued that there is no proof that the plaintiffs have breached any terms of approval of their plan. He submitted that the plaintiffs have no obligation to supply the documents sought by the defendants and that they have no obligation to make inquiries beyond the register. He stated that in any event the documents sought emanate from the defendant and that they should have them. He submitted that there was no evidence

tabled that the suit land was a public utility. He also pointed out that the Registry Index Map shows a road contrary to the allegations of the defendants.

Mr. Mitei for the respondents, argued that the title of the plaintiffs is in doubt, as the same is a public utility. He also averred that the building being developed is a commercial building yet the surrounding area is residential. He submitted that the plaintiffs were informed to supply documents to prove their ownership which they failed to do. He further submitted that the process of approval of the plaintiffs' plans did not follow the law as provided by the Physical Planning Act and that the building will interfere with the town plan. He stated that the Land Registration Act only protects valid titles and that the plaintiffs do not have a valid title.

I have considered the issues raised by the respective parties. The application before me is an application for injunction. I need not reinvent the wheel, and opt to follow the time tested principles laid down in the case of ***Giella v Cassman Brown (1973) EA 358.*** In the said case, it was laid down that when faced with an application for injunction, the court needs to be satisfied that the applicant has laid out a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and if in doubt, decide the application on a balance of convenience.

The starting point is to make an assessment as to whether the applicant has laid out a prima facie case. This inevitably, involves a preliminary assessment of the applicant's case based on the material that he has tabled. Where the respondent has also put forth some material of his own, the case of the applicant must be assessed in light of the material supplied by the respondent. The court then has to weigh the competing evidence tabled, and determine, whether given the totality of the evidence, the plaintiff is more inclined to succeed in his suit. This is of course only a preliminary assessment, made on the basis of the material tabled at that time of the proceedings, and such an assessment does not necessarily mean that the plaintiff will succeed in the main suit. The main suit will be determined in a different manner, and will depend on the wealth of evidence that will be supplied at the hearing of the suit.

The plaintiffs' case is simple. They bought land, and proposed to develop it. They drew up building plans and sent them to the defendants for approval. They proposed to build a multi-storey commercial cum residential development. The plans were approved and they embarked on the development. The development site was inspected from time to time. The defendants then started asking for proof of ownership documents. They asked for the lease document, the Letter of Allotment, the Part Development Plan, and the Original Sub-Division Plan that created the suit land. They also asked the plaintiffs to prove that their building plan had been approved. The plaintiffs argue that they do not have some of these documents as they are not the original allottees of the suit land. In any event, these are documents that the defendants are supposed to have. The defendants on the other hand claim that the land is public utility land and that approvals could not have been properly obtained.

I agree with Mr. Kamau for the plaintiffs, that there is no evidence tabled that the suit land is public utility land. Nothing whatsoever has been shown to this court to even hint that the suit land is a public utility. There would have been nothing easier than to display the Part Development Plan to show that the land was set aside as a public utility plot. In any event, if the defendants believe that the land is public utility land, then what they need to do is to file an appropriate action to have the plaintiffs' title cancelled on the basis that it is an illegitimate title. The avenue is not to harass and threaten a title owner. In any event, the defendants are privy to all leases within the county as they do collect land rates from the same. They can get documents relating to the original allottee, and the original lessee from the office of the Land Registrar. These are not documents that the plaintiffs must have, and it cannot be said that if they do not have them, then they do not have title to the land. It is the register which demonstrates, prima facie, the ownership of land, and unless it is shown that the person entered therein was entered through fraud or illegitimately, that title must be protected.

The defendant has also been loud in its claim that the building is against the town plan. But what is the town plan for the area ? Nothing was tabled to show what kinds of buildings are to be put up in the area. No zoning plan was tabled before this court if there is one that actually exists. I cannot assume that the

kind of building being put up is against the zoning of the area without being given evidence. It was also said that the plot is not supplied by a road but I can see a road from the Registry Index Map which is annexed.

I have seen the plans approved by the defendants. The defendants have not said that they are not the ones who approved the said plans. They have not said that the plans were approved through a corrupt scheme nor have they given the particulars thereof. The plans appear to me to have been properly approved. The building was duly inspected by the defendants. No issue at all was raised when the plans were being approved and while the building was being developed. I find it callous that the defendants would wait until the plaintiffs have gone far with their developments, then slap them with a stop order, and later threaten to flatten what they themselves have approved. That goes against the doctrine of legitimate expectation. That does not however mean that an approved plan cannot be reneged. It can, if it is shown that there was a mistake or fraud in approving it. In such instance, the best avenue is to inform the land owner of the problem and even offer compensation to him, unless he was a party to the fraud. If the defendants feel they have a good case for the land, the best thing to do is to file suit to reclaim it.

Executive power must be tempered with decorum and good etiquette. There needs to be some protocol and courtesy in how to handle issues. Issues are not to be handled coarsely and inelegantly. That is how I view the behavior of the defendant, at least, from the material that is before me at the moment.

The upshot of the above is that I am of the view that the plaintiffs have demonstrated a prima facie case with a probability of success. There is no doubt that they have invested heavily in the building. They stand to suffer substantial loss. In any event the balance of convenience is in favour of the plaintiffs who are already on site and continuing with a development that has been approved. They deserve the injunction sought. The defendants will at the hearing, of course have an opportunity to prove that their actions were in good faith, but for now, I regret that they have not done so.

I allow the application. I bar the defendants from interfering with the development of the plaintiffs so long as the same is in conformity with the approved building plans. I also stop the defendants from demolishing the building on the suit land or interfering with the plaintiffs' quiet possession of the suit land. The above orders to remain in force pending the hearing and determination of this suit. The costs of the application shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. E.K. Maritim holding brief for Mr. Kamau of M/s Kamau Lagat & Co for the plaintiffs/applicants.

N/A for M/s Arap Mitei & Co for the defendants/respondents.