



**Plein v Ndiritu (Environment and Land Case Civil Suit
E001 of 2024) [2024] KEELC 3509 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2024**

AK BOR, J

APRIL 30, 2024

BETWEEN

PURITY MUTHONI PLEIN PLAINTIFF

AND

PETER MWANGI NDIRITU DEFENDANT

RULING

1. Through the application dated 22/01/2024, the Plaintiff sought to have the defendant restrained *vide* an injunction or his servants, agents or employees from constructing high density permanent structures on the land known as Nyahururu/Municipality Block 8/1005 which adjacent to the Plaintiff's parcel of land being number 1036.
2. The application was made on the grounds that both parcel numbers 1036 and 1005 were located in a medium density zone and that the Defendant had illegally and unprocedurally obtained a plan to build high density permanent structures on parcel no. 1005. Further, that he begun construction of the high density building without change of user or duly approved building plans in contravention of the [Physical and Land Use Planning Act](#) of 2019.
3. The Plaintiff swore the affidavit in support of the application and exhibited a certificate of lease showing that she owns parcel no. 1036. She also annexed a stay order issued by the County Government of Laikipia on 08/09/2023 directed at the Defendant staying the development on parcel number 1005 and requiring the Defendant to furnish certain information and documents to the County Director Physical and Land Use Planning within 14 days of the notice. She also exhibited photographs showing the deposit of building stones on the land and the development commenced.
4. The Respondent opposed the application through his replying affidavit which he sworn on 27/02/2024 and attached the sale agreement and a letter of allotment for the plot. He averred that the suit property had a part development plan developed in 1977 and approved by the Director of Physical



- Planning in 1978 but that this was revised in 1996. He added that the zoning of the area as a medium density zone in 1977 was based on the planning process at that time but that it was revised in 1996.
5. He averred that he initially submitted the building plans to the department of physical planning in Laikipia County for approval in 2017 but lacked the requisite resources to commence the development. In 2023 he did some alterations to the initial building plans which were approved by the department of physical planning and all the relevant departments of lands, infrastructure and urban development gave their approvals following which he made the requisite payments. He exhibited a letter from the National Environment Management Authority (NEMA) dated 05/10/2023 and receipt to show that he was granted approval. He also attached a letter dated 28/12/2023 from the National Construction Authority.
 6. He maintained that the Plaintiff's allegation that he illegally obtained the building plans was baseless and unfounded because he complied with the procedures laid down by the Department of Infrastructure, Land, Energy and Physical Planning of the Laikipia County. He went on to add that that department reviewed all the documents required in the enforcement notice and gave him the go ahead to proceed with the development by stamping on the building plans on 11/09/2023.
 7. He added that the Plaintiff should have joined the Laikipia County Government to the suit and urged that the Plaintiff failed to carry out due diligence on the use of the land in the area before purchasing and developing her plot.
 8. The Defendant averred that the construction had been going on and the Plaintiff did not move the court in a timely fashion and was therefore guilty of laches hence the equitable principle that equity aids the vigilant and not the indolent worked against the Plaintiff. The Defendant added that there are other high density permanent structures bordering the Plaintiff's parcel of land which in his view confirmed that the area was a high density area.
 9. He maintained that the Plaintiff had not shown the injury complained of or that she would suffer irreparable damage which could not be compensated by damages while emphasizing that he stood to suffer a lot if the project were stopped because it had reached a critical stage and the approaching long rains might damage the development. He added that he had taken out a financial facility which continued to attract interest and other charges and stood to suffer damage if injunctive orders were granted.
 10. The court directed parties to file written submissions. The Plaintiff submitted that her parcel of land and that of the Defendant were located in the medium density zone and that her claim was that the Defendant had begun construction of a high density permanent structure on his land without change of user in contravention of the Physical and Land Use Planning Act, 2019. Further, that that construction was in contravention of the stay order which the County Government of Laikipia issued on 8/9/2023. The Plaintiff contended that the Defendant had not tendered evidence to buttress his assertion that the township's part development plan prepared in 1977 was revised in 1996. Additionally, that the Defendant had not submitted evidence to show that the buildings whose photos he exhibited were in the same area as the parcels of land forming the subject matter of this case.
 11. The Plaintiff relied on *Nguruman Limited v Jan Bonde Nielson & 2 Others* [2014] eKLR in support of the contention that positions of parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Plaintiff went to urge that she would suffer irreparable harm if the temporary injunction were not granted as her right to a safe, quiet and healthy environment would be adversely affected.



12. The Respondent submitted that the Plaintiff had failed to raise a prima facie case and had not demonstrated how the construction was infringing on her rights and the prejudice she was likely to suffer if the construction continued. He maintained that the Plaintiff should have attached a report from the Department of Infrastructure, Land, Energy and Physical Planning, Laikipia County indicating that the area was classified as a medium density area and not a high density area. He maintained that he applied for the requisite development permission from the relevant offices and that after being granted approval for the building plans in 2017, he made some alterations to the initial plans which were approved by the department of physical planning in 2023. He maintained that he was using the building plans approved in 2023 and that NEMA had given its approval as well as the National Construction Authority. He asserted that the stay order dated 08/09/2023 which the Plaintiff referred to was issued after he submitted the documents required and added that he had been given a go ahead to proceed with the development. According to the Defendant, this was done through stamping on the building plans on 11/09/2023.
13. The Defendant relied on several court decisions in support of his opposition to the court granting the injunctive orders sought by the Plaintiff. He relied on the meaning of a prima facie case described in *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 as a genuine and arguable case which on the material presented to a court, it would conclude that there existed a right which had been infringed by the opposite party as to call for an explanation or rebuttal by the latter.
14. The issue for determination in this application is whether the court should restrain the Defendant from continuing with the construction on his parcel of land known as 1005. The court notes that General Condition No. 2.9 in the letter from NEMA shows that the proponent was required to ensure that the development adhered to the zoning specifications.
15. The letter from the National Construction Authority dated 28/12/2023 which the Defendant produced was not an approval as such, but indicated that the application would be considered by the Authority, verified and a preliminary certificate issued. The Defendant did not attach the preliminary certificate issued after the verification as indicated in that letter.
16. The plans which the Defendant relied on seem to bear two dates of 30/11/2017 and 01/09/2023. According to Section 57 of the Physical and Land Use Planning Act, a person is prohibited from carrying out developments within a county without obtaining development permission from the respective County Executive Committee member. Section 58 of the Act gives the mode of application for development permission while Section 60 mentions that the application is to be referred to the relevant authorities or agents for comments. It is difficult to establish from the documents which the Defendant tendered in evidence whether these provisions of the law were complied with at the time he obtained approval in 2023. The Physical and Land Use Planning Act came into force on 05/08/2019.
17. Section 92 (2) of the Act provides that if a development for which approval had been granted under a law previously in force was not commenced within 24 months of the date the Act came into force, then the development approval would lapse.
18. What the trial court will have to determine is whether the Defendant duly complied with the applicable law and procured the necessary approvals for construction from the relevant institutions when he obtained approval to commence the development on his parcel of land.
19. The Plaintiff contends that the Defendant is constructing a structure suitable for the high density area in the medium density zone. At the hearing, parties will have a chance to call evidence for the court determine whether the area in question falls within the medium density zone or the high density area.



20. If the construction the Defendant is undertaking on his land is allowed to go on until completion of the development and the trial court finds that the area fell within the medium density residential zone, the Plaintiff whose land is adjacent to that of the Defendant will certainly suffer harm in terms of the change of the character of the area. The building being put up by the Defendant is a permanent structure and would only be removed from the land through demolition. An award of damages may not adequately compensate the Plaintiff for the harm she would suffer. On the other, the Defendant can be compensated by damages for the delay in the completion of his building if at the trial the court dismisses the Plaintiff's claim.
21. The court is satisfied that the Plaintiff has established a prima facie case against the Defendant with a probability of success. A temporary injunction is issued restraining the Defendant by himself, his agents, employees or servants from continuing with construction of high density permanent structures on the land known as Nyahururu Municipality Block 8/1005 until the suit is heard and determined.
22. The Plaintiff is directed to give an undertaking as to damages within 14 days of the date of this ruling.
23. Parties are directed to comply with Order 11 of the *Civil Procedure Rules* forthwith so that the suit can be set down for hearing without delay.
24. The costs of the application will abide the outcome of the suit.

DELIVERED VIRTUALLY AT NYAHURURU THIS 30TH DAY OF APRIL 2024.

K.BOR

JUDGE

In the presence of: -

Mr. Njoroge Mwangi for the Plaintiff

Ms. Njoki Mureithi for the Defendant

