IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 54 OF 2016

BETWEEN

PARKSIDE MEDICAL CENTRE LIMITED……………APPELLANT

AND

NAIROBI CITY COUNTY…………….………………..RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya (Environment & Land Division) at Nairobi (Onguto, J.) dated 20th April 2014 in ELC Case No 605 of 2014)

JUDGMENT OF THE COURT

Background

1. This is an appeal against the Ruling of the High Court (Onguto, J.) dated 20th April, 2014.

2. The background of the appeal is that **Parkside Medical Centre Limited** (the appellant), is the registered owner of various parcels land known as **L.R Nos 209/12614/3 to 209/12614/24,** (the suit property) located in Kabasiran Estate in Lavington, Nairobi. In the year 2014, the appellant was in the process of developing the property when, on 5th May, 2014, employees of the **Nairobi City County** (the respondent), entered onto the suit property and issued an enforcement notice pursuant to the provisions of **Section 38** of the **Physical Planning Act** (the Act). In that notice, the respondent demanded an immediate cessation of the construction work being carried out on the suit property as well as the demolition of a perimeter wall that the appellant had already constructed, within seven days of the notice, and in any event no later than 12th May, 2014. However, on 7th May, 2014, before the expiry of the seven days given in the enforcement notice, the respondent's officers entered onto the appellant's property and demolished the perimeter wall, which according to the appellant caused it massive loss. The respondent's officers also arrested the appellant's employee who was charged before the City Court, in **Criminal Case Number 198 of 2014.**

3. Being aggrieved by the respondent's actions, the appellant filed suit by way of plaint, before the Environment & Land Court at Nairobi (ELC) in **ELC No. 605 of 2014** seeking *inter alia*, a permanent injunction restraining the respondent or its servants, agents or any other body or authority from stopping the ongoing developments in the suit property or from interfering with the appellant's right to quiet enjoyment of all rights to the said properties; general damages for breach of the appellant's right to quiet and peaceful enjoyment of all rights to the suit property; costs of the suit and interest.

4. Contemporaneously with the plaint, the appellant filed a notice of motion seeking in the main, an order of temporary injunction restraining the respondent, either by itself or through any of its officers, servants, agents or other authority, from stopping or interfering in any way with the appellant's right to possession and quiet enjoyment of the suit property. The appellant also sought an order of injunction to stay the proceedings in the City Court at Nairobi in **City Court Criminal Case No 198 of 2014** pending the hearing and determination of the main suit.

5. In support of the application, the appellant, through the supporting affidavit of **James Njenga Mungai**, the appellant's Managing Director claimed that its right to quiet occupation and enjoyment of the suit property, guaranteed under the various titles to the suit property, had been violated by the respondent who had, without any colour of right, stopped the ongoing development; that it had procured all the necessary approvals required to carry out the development; and that the respondent's actions had occasioned it irreparable financial loss and damage.

6. The appellant further claimed that as a result of the damage caused to the perimeter wall, the construction material brought onto the site for development was going to waste, and was at risk of being stolen due to the demolition; that the licence granted to it by the **National Environmental Management Authority** (NEMA) to develop the suit property was due to expire. For these reasons, appellant contended that it has a *prima facie* case with a probability of success to warrant the grant of injunction, and should that order not be granted, it would

suffer loss that was incapable of being compensated by an award of damages; that the balance of convenience tilts in its favour and that the respondent would not suffer any prejudice should the orders sought be granted.

7. The application was opposed by way of a replying affidavit sworn by **J. M. Kathenge**, the Director (Planning, Compliance and Enforcement) in the Department of Land, Housing and Physical Planning in the respondent County Government. In that affidavit, the deponent admitted that the respondent's representatives visited the suit property to investigate whether or not the appellant had obtained the necessary approvals for construction of the perimeter wall; that these investigations revealed that the construction was next to and touching on Kirichwa Kubwa Riparian way leave, which was an area that was not meant for construction; that based on this, the respondent had established that there was no approval for the construction; and that in any event, the development permission for the construction of the perimeter wall had expired and no renewal had been obtained.

8. The respondent raised further issues with the construction: it alleged that its zonal policy in respect of the suit property did not allow for subdivision of the plots of less than a quarter of an acre, which the appellant intended to do; that it had not issued the appellant approval to erect a perimeter wall on the suit property, which led to the issuance of the enforcement notice; that the appellant was not the lawful owner of the suit property as it had not remitted the correct amount of money in terms of stand premium; that the money payable was paid out of time and nearly four months after the expiry of the notice that allotted the suit property to the appellant; and that it was within its rights to issue and enforce any notice as envisaged under **Section 30 (i)** of the **Physical Planning Act**. For these reasons, the respondent urged the court to dismiss the application with costs.

9. In its ruling, the trial court held that while there was evidence that the appellant, as the proprietor of the suit property, had obtained approvals from both the respondent as well as NEMA, these approvals required it to commence construction on or before 24th April,2014 but the appellant had not established that it had actually so commenced the construction; and that the approvals granted by the respondent did not include the construction of the perimeter wall. The trial Court held that the appellant had not proved: a *prima facie* case with any chance of success; that the appellant stands to suffer irreparably; or that the respondent will not be in a position to compensate the appellant if the appeal succeeds. The learned Judge dismissed the application with costs.

10. Aggrieved with that decision, the appellant filed an appeal to this court. Learned counsel **Mr. Ngararu Maina** represented the appellant at the hearing of the appeal. The appellant filed written submissions which **Mr. Maina** orally highlighted.

11. The appellant raised various grounds of appeal, which on the whole impugn the entire ruling rendered by the trial court. Counsel for the appellant presented the appeal on four fronts. The first was that it had commenced the construction work within the twelve-month period set in the approval granted by the respondent. The appellant averred that there was evidence, by way of a letter of award to the contractor, the inspection note and the certificate of tender indicating that construction had in fact begun in the month of February 2014. The appellant further contended that the construction was under way as at May 2014 when the respondent brought down the perimeter wall; and that construction had already commenced and was ongoing.

12. The appellant's second ground of appeal was that it had established a *prima facie* case with a probability of success. It was the appellant's contention that it had proved that it was the registered owner of the suit property and that it had obtained approvals from the respondent allowing it to undertake construction on the suit property within twelve months, which it had complied with; and that the fact that it submitted these documents was proof that its rights had been violated and that it had therefore satisfied the first limb for the grant of the order of temporary injunction.

13. Thirdly, the appellant maintained that the High Court had jurisdiction to handle the issue of the enforcement notice. On this, the appellant submitted that the trial Judge misapprehended the law in finding that **Section 38 of the Act** limits the jurisdiction of the court to a second appeal. In the appellant's view, that section of the law does not clearly and unambiguously take away a litigant's right to file suit before the High Court.

14. On whether the respondent demolished the perimeter wall before the enforcement notice had expired, the appellant submitted that **Section 38 of the Ac**t provided that where there has been no appeal, the notice should take effect after the expiration of the period specified in the enforcement notice. In the instant appeal, it was the appellant's contention that the respondent acted in total disregard of its own notice period, went onto the appellant's property and demolished the perimeter wall before the notice period had expired.

15. The appellant's final submission was that it would suffer irreparable harm that would not be recompensed by an award of damages should the injunctive orders not be granted; that it had invested substantially in monetary terms and in terms of time by engaging various professionals in the development of the suit property; that the respondent's actions put the development in the suit property at risk through vandalism, pilferage or even illegal occupation; and that there would be no award of damages that would be capable of compensating the appellant for such risk which it termed as beyond any logical assessment. For these reasons, the appellant urged us to grant the orders sought.

16. There was no appearance by counsel for the respondent despite evidence of service of the hearing notice.

Determination

17. In granting an order of injunction, a court exercises judicial discretion, and it is trite law, as stated in ***Lucy Wangui Gachara v Minudi Okemba Lore*** ***[2015] eKLR (Civil Appeal 4 of 2015)*** that:-

> ***"… an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court."***

18. The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited. In ***United India***

Insurance Co. Ltd v East African Underwriters (Kenya) Ltd ***[1985] E.A 898,*** this Court set out these circumstances in the following terms:

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

19. In considering whether or not the respondents have a *prima facie* case we must caution ourselves not to make a final finding on the basis of the material that is before us in view of the fact that the main suit is still pending before the Environment and Land Court. We reiterate the sentiments of this Court stated in ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** ***[2014] eKLR (Civil Appeal No. 77 of 2012***) as follows:-

> ***"Ordinarily, this Court would not express any concluded view on the dispute between the parties and must not also form a distinct impression as to the merits of the suit at this stage since such determination is reserved for the trial court after the interlocutory appeal has been disposed of."***

20. In addition to the above considerations, we are cognizant of the fact that an order of injunction will only be granted where the applicant has satisfied the court that the circumstances warrant such orders. The principles upon which a court may grant such order were captured by this Court in ***Charter House Investment Ltd v Simon K. Sang & 3 others*** ***[2010] eKLR (Civil Appeal No. 315 of 2004)*** where it was held that:

21. ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties… [T]he predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."***

[Emphasis supplied] (See also ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** (**the Nguruman decision**).

22. As we consider this appeal, we shall therefore confine ourselves to determining whether or not the trial court erred in the exercise of its discretion in declining to grant the orders of temporary injunction. First, did the appellant set out a *prima facie* case with a probability of success? In ***Mrao v First American Bank of Kenya Limited & 2 others*** ***[2003] KLR 125*** this Court stated that:-

> ***"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…*** **[it] is more than an arguable case.** ***It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

23. In the instant appeal, we shall evaluate from the evidence on record whether the learned Judge properly applied the test for granting interlocutory orders.

In declining to grant the interlocutory orders sought, the learned Judge stated as follows:

> ***"In the long run, I hold the view that the Plaintiff has failed to establish a prima facie case with any chances of success. I am also not convinced that the Plaintiff stands to suffer irreparably and neither has it been suggested that the Defendant will not be in a position to compensate the Plaintiff if the latter is finally vindicated at trial. The circumstances of this case, which involves development planning issues, considered in their totality dictate that I dismiss the application…with costs."***

24. The genesis of the dispute between the parties herein is the enforcement notice issued by the respondent to the appellant. Under the **Physical Planning Act**, an enforcement notice is issued under **Section 38 of the Act**.

Section 38 of the Act provides as follows:

> ***"38. (1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***
>
> ***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or***

the carrying out of any other activities.

…

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).”

25. The enforcement notice under **Section 38 of the Act** requires an owner, occupier or developer to undertake some corrective action with respect to an ongoing development within a notice period set out in the enforcement notice. Under that provision, a person who is aggrieved by the enforcement notice may appeal to a liaison committee established under **Section 13 of the Act**, and any grievances from the decision of that liaison committee are appealed to the High Court. The enforcement notice issued to the appellant dated 5th May, 2014, related specifically to the perimeter wall. It gave the appellant until 12th May 2014 to take corrective action. It is not disputed that before the expiry of the notice period, the respondent demolished the perimeter wall.

26. In support of its claim that it had a *prima facie* case with a probability of success, the appellant contended that it had proved that it was the registered proprietor of the suit property. It also proved that it had obtained various approvals to undertake construction from both the respondent as well as NEMA. In response to this, the respondent contended that the approval given to the appellant was irregular and that the permissions did not encompass all the developments that the appellant was undertaking. The respondent further claimed that the construction of the perimeter wall was being carried out on a riparian way leaf.

27. We have examined the record and we are not persuaded that in the circumstances of this case that the learned Judge erred in finding that a *prima facie* case was not established. We further note that it is four (4) years since the perimeter was demolished. We therefore find that the appellant will not suffer irreparable injury and an injunction will not serve any useful purpose. A *prima facie* case was not established and the trial court had no obligation to examine the other tests stated in the **Nguruman decision.**

28. We may, however, add in *obiter dicta* that even if there was a prima facie case, there can be no argument that damages are an adequate remedy in this case. We note that any loss that may be incurred by the appellant will be purely monetary, and there is no material before us to suggest that the respondent would not be in a position to adequately compensate the appellant should it succeed in its suit. The appellant has therefore failed to demonstrate that the loss it would suffer cannot be adequately compensated by an order of damages should the orders of injunction sought not be granted. In the circumstances, injunctive relief does not lie.

29. In the result and for the reasons we have stated above, we have no reason to disturb the finding of the learned Judge. Accordingly, the appeal is without merit and we order that it be and is hereby dismissed with costs. The suit in the ELC shall be heard on priority basis.

Dated and delivered at Nairobi this 24th day of April, 2020

W. KARANJA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR