



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 387 of 2017

BETWEEN

SYOKIMAU RESIDENTS ASSOCIATION LIMITED.....APPELLANT

AND

COUNTY GOVERNMENT OF MACHAKOS.....1st RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....2nd RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court (Angote. J.) dated 22nd September 2017

In Machakos ELC Petition No. 5 of 2017)

JUDGMENT OF THE COURT

1. The appellant is an association of residents who own property within LR No. 12715 Syokimau Estate, in Mavoko within the County Government of Machakos.
2. By a constitutional petition dated 15th February 2017, the appellant filed the petition contending that the respondents have been issuing building approvals, change of user and Environmental Impact Assessment (EIA) licenses within their Estate without providing an opportunity to them to air their objections thus denying the appellant and its members public participation as envisaged in **Article 196 of the Constitution**.
3. In the Petition, it is averred that the building approvals and licenses issued by the respondents have contributed to the rise of unplanned and unstructured developments that continue to degrade Syokimau Estate causing environmental problem of waste disposal injurious to a clean and healthy environment as well as structural challenges. It contented that the appellant wrote several letters to the respondents objecting to issuance of building and EIA approvals and licenses. Despite the appellant's protestations, the respondents continue to issue building approvals and licenses in an unstructured manner without policy, guidelines or an approved and gazetted development plan leading to unplanned and haphazard development within Syokimau.
4. The appellant averred that the respondents' approval of unstructured development within Syokimau Estate violated their right to a clean and healthy environment as provided in **Article 42 of the Constitution** as read with **Section 3 of the Environmental Management and Coordination Act** and **Section 96 of the County Government Act**. The appellant further contend that their right to public participation and fair administrative action as provided in **Articles 196 (1) (b) and 47 of the Constitution** as well as the right to clean and health environment in **Article 70** were and continue to be violated.
5. In the Petition, the appellant sought a declaration that their constitutional rights had been violated; an order staying, cancelling or revoking any building approvals and EIA licenses given by the respondents to which the appellant had objected and an order restraining the 1st respondent from issuing any new change of user licenses, building approvals for multi- residential or commercial development until a development plan for Syokimau Estate had been gazetted after public participation. The appellant also sought for an order of mandamus to compel the respondents to incorporate the appellant in its decision making process concerning approvals of land development and change of user in Syokimau Estate.
6. The 1st Respondent in a replying affidavit dated 16th March 2017 and deponed by Ms Anne Mwikali Muthoka, as (position) denied all allegations in the Petition. It is deposed that following an application for the proposed change of user on Plot LR 12715/9450 in Syokimau, the registered planner prepared a development plan and filed it with the Mavoko sub-County Development Approvals Committee; the application was advertised in the newspapers as required under the Physical Planning Act; the County Government enhanced public

participation by erecting a signboard on the proposed development site; the appellant objected to the proposed change of user by letter dated 9th September 2015; on 7th October 2015, the sub-County Development Approval Committee met and considered the application, the objection and the technical report and granted approval as recommended by the Planner. The 1st respondent stated that the decision to approve or reject an application is done in a structured manner with public participation. In opposing the Petition, it was averred that the appellant intend to usurp the constitutional and regulatory mandate of the 1st respondent and dictate use of land within Syokimau Estate.

7. Before the replying affidavit to Petition had been filed, the appellant by Motion dated 15th February 2017 moved the Environment and Land Court for an interlocutory injunctive order to restrain the respondents from issuing building approvals for any construction that is not single dwelling residential building or issuing any change of user or any other building license. An order was sought to compel the respondents to allow the appellant to participate in the approval process prior to granting of any approval within Syokimau Estate. The respondent filed a replying affidavit opposing the Motion.

8. Upon hearing the Motion, by a ruling dated 22nd September 2017, the learned judge dismissed the appellant's application with no order as to costs. Aggrieved, the appellant has lodged the instant interlocutory appeal citing the following grounds in its Memorandum of Appeal.

(i) The judge misapprehended the principles applicable to the grant of injunctions.

(ii) The judge erred in finding that the 1st respondent had locked out the appellant from the right of appeal and gave the appellant no recourse for such failure.

(iii) The judge erred when he held that there was no law requiring an area to have a gazetted development plan before issuing building or change of user approvals.

(iv) The judge erred when he held that an application for change of user must be considered on its own merit yet Article 42 of the Constitution guarantee the appellant the right to a clean and healthy environment.

(v) The judge erred in holding that the appellant had not given specific parcels of land which it was opposed to yet in its supporting affidavit the appellant had listed over 35 different objections details which included parcel numbers and reasons for objection.

(vi) The judge erred in failing to find that the right to a clean environment impacts on the whole community and thus change of user and development plan ought not to be considered individually but must take into account public participation and community concerns particularly on waste disposal.

9. At the hearing of this appeal, while learned counsel Mr. E. Chege appeared for the appellant, learned counsel Mr. D. Mungata appeared for the 1st respondent. Despite service of the hearing notice, the 2nd respondent did not appear. The appellant and 1st respondent filed written submissions and list of authorities. The court being satisfied that the 2nd respondent had due notice of the hearing date allowed the appellant and the 2nd respondent to prosecute the appeal.

10. The appellant submitted that the judge failed to appreciate the principles governing the granting of injunctive relief as enunciated in **Nguruman Limited –v- Jan Bonde Nielsen & 2 others, Civil Appeal No. 77 of 2012.**

A party seeking an interlocutory injunction has to establish a prima facie case, demonstrate irreparable injury if a temporary injunction is not granted and that if there is any doubt, an applicant must demonstrate that the balance of convenience tilts in his favour. It was submitted that the judge erred in failing to appreciate that the appellant had satisfied the three conditions for granting of injunctive relief; the judge ignored that the 1st respondent had admitted in its replying affidavit that there was no framework to guide it in assessing change of user applications and licenses in Syokimau Estate; the judge erred and failed to acknowledge that parcels of land in the Estate are single dwelling user; that the Judge having found that the 1st respondent had extinguished the appellant's right of appeal to the Liaison Committee established under the Physical Planning Act, the judge erred in failing to give any relief or remedy to the appellant.

11. In support of its submissions, the appellant urged that pursuant to **Section 13 of the Physical Planning Act**, an aggrieved party has a right to appeal to the Liaison Committee; that failure of the 1st respondent to notify the appellant that it had dismissed its objection to change of user, the 1st respondent extinguished the appellant's right to appeal as conferred by Section 13 of the Physical Planning Act. The learned judge was faulted in finding that there was no law requiring an area to have a gazetted development plan before a building or change of user approval could be issued. It was submitted that **Sections 16 and 24 of Part IV of the Physical Planning Act** gave the Director of Planning authority to make the Regional Physical Development Plan and the Local Physical Development Plan; that the Act envisages that the 1st respondent shall be guided by a development plan for the development of Syokimau Farm Estate for long and short term sustainability of the area. The appellant submitted that the 1st respondent in its replying affidavit admitted it did not have a Regional or Local Development Plan and consequently, we were urged to find that the development in Syokimau Estate is haphazard and unplanned.

12. The appellant submitted that the judge erred in holding that each application for change of user should be considered on its own merit contrary to Article 42 of the Constitution that guarantees a right to a clean environment. Counsel further urged that the judge erred for stating that in this matter, injunctive orders could not be granted because several bodies and land owners would be affected. The appellant contended that it was willing to advertise the application for injunctive orders in the daily newspapers so that any interested party could join; the learned judge declined to grant an order of advertisement despite the same having been prayed for in the Motion.

13. In concluding its submissions, the appellant urged that Syokimau area had no sewerage system and waste disposal is by way of septic tanks which in multi-dwelling units cannot be financially sustainable to be removed by commercial exhausters.

14. The 1st respondent in opposing the appeal submitted that the judge properly exercised his discretion and declined to grant the injunction prayed for. Counsel urged that the judge in refusing to grant the injunction properly avoided prejudging issues that were pending for trial. In support, counsel cited the case of **Lucy Wangui Gachara – v- Minudi Okemba Lore [201] eKLR**.

15. In overall, the 1st respondent submitted that the appellant had not satisfied the principles for grant of injunctive relief as stipulated in the case of **Nguruman Ltd – v- Jan Bonde Nielsen & 2 others, Civil Application No. 77 of 2012**. Further, counsel faulted the substance of the petition urging that it was styled as a constitutional petition yet the orders sought were civil in nature.

16. On the need to establish irreparable injury, the 1st respondent urged that there was no material before the judge to demonstrate that the appellant will suffer irreparable injury; likewise the balance of convenience did not tilt in favour of the appellant; the appellant failed to demonstrate how the judge misapprehended the principles applicable to the grant of injunctions and how individual consideration of applications for change of user is a breach of any of the appellant’s constitutional rights. Counsel concluded by urging that the appellant had failed to appreciate that the instant matter was an interlocutory appeal and the learned judge was not required to make conclusive findings of fact.

17. On our part, we have considered the grounds of appeal as well as submissions by counsel and list of authorities. We remind ourselves that this is an interlocutory appeal and we must consider only issues that do not compromise or prejudice the hearing and determination of the suit pending before the High Court. Some of the authorities cited by the parties, such as **John Kaburuku Kibicho & another – v- County Government of Nakuru & 2 others Petition No. 13 of 2016**, are relevant at the hearing of the main suit before the trial court.

18. We are cognizant of the dictum by this Court in **PATTNI V. ALI & 2 OTHERS CA No. 354 OF 2004 (UR183/04)**, where it was stated that in interlocutory applications, the orders that are sought do not decide the rights and obligations of the parties but are merely meant to keep matters in status quo pending such determination. In **Nguruman Ltd – v- Jan Bonde Nielsen & 2 others[2014]eKLR**, this Court reiterated that in determining whether a *prima facie* case has been established, the court is not supposed to hold a mini trial or to examine the case closely with finality.

19. Bearing these dictum in mind, we note that the prayers in the appellant’s Notice of Motion dated 15th February 2017 are substantially the prayers in the Petition filed before the trial court. With this in mind, we exercise caution as was stated in **Locabail International Finance Ltd. – v- Agroexport [1986] 1 ALL E.R. 901** thus:

“The matter before the court isan application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

20. Despite the manifold grounds of appeal raised in the memorandum, the only pertinent issue in this appeal that will not compromise the suit before the trial court is whether the threshold for granting injunctive orders was met.

We are alive to the dicta in **CMC Motors Group Ltd and Another –v- Evans Kangeche Boro, Civil Appeal No. 295 of 2007**, that:

“In granting injunctory reliefs, the superior court is exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise its discretion judicially.....”

21. The threshold for an interlocutory injunction is stated in **Giella – v- Cassman Brown & Co. Limited [1973] E.A. 358**. First, an applicant must show a *prima facie* case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and third, if the court is in doubt, it will decide an application on the balance of convenience.

22. These three principles were further considered by this Court in the case of **Nguruman Limited –v- Jan Bonde Nielsen & 2 Others, (supra)** as follows:

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

23. In this appeal, we shall evaluate from the evidence on record whether the trial judge properly applied the test for granting interlocutory orders. In declining to grant interlocutory orders, the judge evaluated the evidence as follows:

34. Although it is true that it is the 1st respondent's mandate to grant development and change of user approvals, the process which should be followed before those approvals are granted ought to be fair, inclusive and participatory.

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36. The Petitioner has further alleged that the 1st respondent has been issuing building approvals and issuing change of user licenses without an approved and a gazetted development plan for the whole area.

37. However, the Petitioner has not cited to me the law that requires that the whole area must have a gazetted development plan before the 1st respondent can approve developments and change of user in the area. In the circumstances, I am unable, at this stage, to injunct the respondents from approving the developments and change of user in the Estate, save for the requirement that the Petitioner should be involved in the process.

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41. The Petitioner should have stated in the body of the application and the Petition the specific parcels of land whose approvals for the change of user it is opposed to enable the respondents and the registered proprietors of the affected parcels of land to respond.

42. The way the application has been drafted is ambiguous and too general in nature for a proper judicial inquiry to be made at this stage and for appropriate orders to issue.

24. In **Njenga -v- Njenga [1991] KLR 401** it was aptly stated that an injunctive relief being a discretionary remedy is granted on the basis of evidence and sound legal principles. The first issue for our consideration is whether the trial judge made a finding that a *prima facie* case had been laid out by the appellant to justify grant of an injunctive order. The learned judge in his ruling does not make an express determination whether a *prima facie* case has been established; however, the judge observes that the 1st respondent failed to inform the appellant and other objectors its decision to approve numerous applications for change of user; the 1st respondent did not respond to the appellant's objections thereby denying the appellant the right to appeal. We take these observations by the learned judge as a finding that the appellant had established a *prima facie* case for grant of an injunctive relief.

25. The next issue is whether the appellant had established that it would suffer irreparable injury if interlocutory injunctive orders were not granted. The appellant contends that approvals and licenses issued by the 1st respondent had contributed to unplanned and unstructured development that degrade Syokimau Estate causing environmental and structural problems. The learned judge in declining to grant the injunctive relief expressed that each approval for building plan or change of user has to be considered on its own merit. The court expressed that granting an injunction is inappropriate because change of user of the land within Syokimau Estate involves several bodies and land owners whose interests had to be considered before any adverse order could be made against them.

26. Comparatively, in **Bharat Petroleum Corp Ltd -v- Haro Chand Sachdeva, AIR 2003, Gupta, J.** of the Delhi High Court observed as

follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

27. We have considered the observation by the learned judge that several land owners are involved in the disputed Syokimau Estate and it would be inappropriate to grant an injunctive order. We have likewise considered the appellant's contestation that it stands to suffer irreparable injury if an injunctive order is not granted. Irreparable harm is *sine qua non* for an injunctive relief. Speculative injury is not sufficient, there must be more than mere assertion and an unfounded fear on the part of the applicant would not suffice. A mere possibility of irreparable harm is insufficient to warrant a preliminary injunction.

28. In the instant appeal, the appellant has made of bare assertions that the approvals granted by the respondents degrade Syokimau Estate. There is no *prima facie* evidence tabled to back up this assertion. It goes without saying that the persons applying for building approvals or change of user are also land owners within Syokimau area and from the perspective of such applicants, the change of user or multi-residential developments improve the value of their parcels of land. Whether the approvals degrade Syokimau Estate is a question of fact and an issue in contestation. In the absence of *prima facie* evidence to back up allegation that there is a relationship between the respondent's approval of building plans or change of user and the degrading of Syokimau Estate, we are of the view that the irreparable harm the appellant aver it is likely to suffer has not been established by cogent evidence.

29. In the instant appeal, the appellant seeks an order to stop any approval of building plans and change of user in Syokimau Estate. The practical implication of such an order is to paralyze and halt consideration and processing of all applications in Syokimau Estate. In **Teresa Shitakha -v- Mary Mwamondo & 4 others (1982-1988) 1 KAR 965** it was expressed that it is not right to grant orders which have the effect of paralyzing an organization and to do so would be out of proportion to the alleged wrongs suffered. Persuaded by the foregoing dicta, we

find that in the instant appeal, the balance of convenience would not have tilted in favour of the appellant.

30. For the above reasons, we find that the learned judge did not err in dismissing the appellant's Notice of Motion dated 15th February 2017. This appeal has no merit and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 8th day of February 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

A. MAKHANDIA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I Certify that this is a true copy of the original

DEPUTY REGISTRAR