



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & KANTAI, J.J.A.)

CIVIL APPEAL NO. 292 OF 2015

BETWEEN

TIGONI TRESUERS LIMITED1ST APPELLANT

MR. ARTHUR NAMU2ND APPELLANT

MRS. GETRUDE M. NAMU3RD APPELLANT

AND

DR. J.S. MURIU1ST RESPONDENT

MR. GOERGE RURIA2ND RESPONDENT

MR. JOHN KAMAU MWANGI3RD RESPONDENT

(As Chairman, Secretary and Treasurer respectively of TIGONI RESIDENTS ASSOCIATION)

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....INTERESTED PARTY

(Being an appeal against the ruling and order of the High Court of Kenya at Nairobi (J.M. Mutungi, J.) dated 14th November, 2014

in

HC. ELC. No. 964 of 2014

JUDGMENT OF THE COURT

Some residents who ended up settling in the Tigoni area of Limuru Sub-County, Kiambu County, found a commonality of interests in each other and in themselves. They established Tigoni Residents Association (“**the Association**”), an Association registered under **The Societies Act**. In objective No. 4 of the Constitution of the Association the residents wanted:

“To enhance the quality of life of the community by taking or influencing such actions to improve the environment within the boundaries set out above. To this end, the Association shall devote itself towards the following, in co-operation with Local Authorities, or responsible Government bodies, or private enterprise, or all together as the Committee may see fit:

1. To liaise with responsible Authorities and/or private enterprise to ensure the preservation, cleaning, and restoration of the environment.

2. To liaise with responsible Authorities and/or private enterprise to ensure that all roads within the area defined above are maintained in good and proper condition.

3. To liaise with responsible Authorities and/or private enterprise to ensure that adequate and proper security is maintained within the community.

4. To liaise with responsible Authorities and/or private enterprise to ensure that development within the community is done with all due regard for the welfare of the community, that the community is fully consulted prior to any new developments, that land usage is not changed without due process of consultation and law being followed, and that the essential nature and character of the area is not disrupted or altered to the detriment of the community.

In pursuance of the above, the Association shall make Rules governing the Objectives of the Association, which shall be adhered to by all Members.....”

Membership of the Association was duly defined in the Constitution as were other matters for the good governance and management of the Association. That should paint the picture of a people who came together and agreed to live in a peaceful, quiet, orderly and harmonious community and environment, however, that was not to be as the following events will show.

In a plaint filed at the High Court of Kenya at Nairobi being **Environment and Land Court Case No. 964 of 2014** pitting members of the Association, the respondents **Dr. J.S. Muriu, George Ruria** and **John Kamau Mwangi**, respectively Chairman, Secretary and Treasurer of the Association, sued the appellants, Tigoni Treasurers Limited, Arthur Namu and his wife Gertrude M. Namu. It was alleged in the plaint that the appellants (the 2nd and 3rd appellants were members of the Association) were in the process of building a housing complex consisting of 27 maisonettes on their property known as **Plot 7660/72** located on **Title No. I.R. 7374, Ithanga road**, Tigoni which it was said was a contravention of the head title which gave rise to the said Plot 7660/72 from which it was excised. It was further alleged that the use of the said plot of land was subject to special conditions contained in the head title which did not permit erection of more than a dwelling house and, further, that the development constituted an unlawful change of user. The validity of an Environmental Impact Assessment Report issued by **National Environment Management Authority (NEMA)** was questioned for alleged lack of public participation amongst other breaches; as was the authority of Limuru Sub-County to issue consent for change of user. It was stated that the development would have adverse environmental and societal impact on the area buildings, depreciation of property values, an increase in pollution, waste disposal management were raised among other issues. It was therefore prayed that the appellants be restrained by permanent injunction from undertaking the proposed development. The issues in that suit have not been heard or determined and we will discuss only those issues that will assist the determination of this appeal and leave the main issues to the trial Judge who will take evidence and make determined decisions.

Contemporaneous with the plaint was a notice of motion brought under various provisions of law where it was prayed in the main that the appellants be restrained from constructing and/or developing multi-dwelling houses and/or maisonettes on land parcel L.R. 7660/72 Ithanga road, Tigoni (**“the suit land”**) pending the hearing and determination of the application and of the suit.

In grounds supporting the motion and in an affidavit of **J.S. Muriu**, Chairman of the Association, it was stated that the proposed development was contrary to the Grant that set out the tenure under which the suit land and other parcels were held; that the proposed development was contrary to the development legal regime upon which such development must be approved; that the proposed development was contrary to the development regulations of the Association to which the proprietors of the suit land had subscribed to; that the proposed development would have adverse environmental and societal effects; that majority of the members of the Association were opposed to the proposed development and that the 2nd and 3rd appellants had previously opposed such development, but had turned around to become developers of a project not allowed by members of the Association.

The appellants filed replying affidavits in opposition to the motion. **Robert Masinde**, a director of the 1st appellant, deponed that the 1st appellant was the registered proprietor of the suit land; that the 2nd and 3rd appellants were not directors or proprietors of the 1st appellant; that the suit was premature for not following procedural steps; that the 1st appellant intended to erect pristine, low development project characterized by 24 affluent residential developments whose occupancy inclined to single family houses and maisonettes on the suit land. Further, that the 1st appellant had received relevant consents from the authorities and change of user; that the 1st appellant had engaged the members of the Association and addressed all issues raised by them; that the 1st appellant had invested heavily in the proposed project and there was no case made out for issue of injunction orders.

Arthur Namu, the 2nd appellant, in his replying affidavit; and Gertrude M. Namu, the 3rd appellant, also in replying affidavit restated what Mr. Masinde, director of the 1st appellant, had set out in opposing the motion.

There was a further affidavit of Dr. J.S. Muriu, the 1st respondent, which restated the respondents case adding that, contrary to appellants’ assertions, the 2nd and 3rd appellants had actively engaged as prime movers of the proposed project as shown by various exchange of correspondence; that they (the 2nd and 3rd appellants) had resided in the suit property for over 20 years and were active members of the Association.

The motion was heard by Mutungi, J, who in a ruling delivered on 14th November, 2014 found merit in the same. The Judge issued a conservatory order against the appellants:

“...pending the carrying out of an Environmental Impact Assessment Study in which they are duly involved as interested parties ...”

The appellants were restrained from constructing or developing multi-dwelling houses or maisonettes on the suit property pending the hearing of the suit or further orders. The Judge set aside an Environmental Impact Assessment report prepared by Perman Consultants Limited and the NEMA Environmental Impact Assessment License issued on 15th July, 2014. The Notice of Appeal that followed those orders was against the whole decision of the High Court.

There are 16 grounds of appeal set out in the Memorandum of Appeal drawn for the appellants by their Advocates, **M/S Sichangi, Partners, Advocates**. These range from an attack on the Judge's decision to cancel Environmental Impact Assessment Licence without cause and without hearing NEMA; that the Judge erred in issuing orders to stop construction on the suit property where there was no undertaking on damages; that the Judge cited a wrong provision of law in cancelling the NEMA licence when NEMA was not a party to the suit; that the Judge erred in faulting NEMA when it was not a party to the suit; that the Judge acted in excess of jurisdiction and usurped powers of the National Environment Tribunal conferred with jurisdiction to hear and determine issues environment; that the Judge erred in finding change of user obtained by the appellants to be irregular and, finally, that the Judge erred in allowing the motion. We are therefore asked to allow the appeal, reverse the ruling of the High Court and award costs accordingly.

When the appeal came up for hearing before us on 21st May, 2019 **Mr. Felix Mutua** and **Mr. Alea Gathuku**, both instructed by the firm of Sichangi Partners Advocates appeared for the appellants; **Miss Priscilla Njoroge** instructed by **R.M. Mutiso & Company Advocates** appeared for the 1st, 2nd and 3rd respondents; and **Mr. E.K. Gitonga**, instructed by NEMA (Interested Party) appeared for their clients. All parties had filed written submissions and all chose to rely fully on written submissions without any need for a highlight. We have perused those submissions as we have the whole record of appeal.

First the case by the Interested Party (NEMA). We have not seen any pleading or affidavit by this party in the record except what is stated in written submissions filed on 29th September, 2016. It is said that the JUDGE applied inappropriate provisions of law after which the Interested Party moved the High Court for review under **Order 45 Civil Procedure Rules** but that the trial court in a ruling given on 29th May, 2015 ruled that grounds for review be raised in an appeal. Neither that application nor the said ruling are on record. What is material, however, is that there was no notice of appeal against the said ruling made on 29th May, 2015 and the case for the Interested Party must now rest to await hearing of the suit pending at the High Court.

In making his determination in the ruling subject of this appeal, the Judge reviewed the material placed before him and came to the conclusion that the respondents had made out a *prima facie* case entitling the judge to issue orders of injunction.

In written submissions filed before us the appellants make heavy weather of the orders made by the Judge submitting that he exceeded his jurisdiction in issuing the orders that he did. One of the orders issued by the Judge set aside an Environmental Impact Assessment study report prepared by Peman Consultants and also set aside NEMA Environmental Assessment License issued on 15th July, 2014. Issuing such orders whose effect would appear to finally determine issues at an interlocutory stage of a suit would ordinarily not be permissible. The parties have not been of much help to us in this appeal as it would appear that there are proceedings that went on before the Judge which have not been made part of this record. For instance, we have already referred to an application by the Interested Party for orders of review and a ruling that followed that application which have not been made part of this record.

In written submissions filed by counsel for the 1st, 2nd and 3rd respondents it is stated that after the ruling subject of this appeal and before this appeal was filed the appellants filed Civil Application No. 318 of 2014 (UR 240 of 2014) seeking stay of the orders of the High Court. It is stated that orders of stay of the orders of the High Court were granted against the revocation of the NEMA Environment Impact Assessment License. It is also said that prior to filing of the appeal NEMA applied, at the High Court, to be enjoined to the proceedings.

None of these materials are on our record.

The respondents further state in written submissions that the trial Judge should not have cancelled the NEMA Licence but should have stayed operationalization of the licence pending the hearing and determination of the suit. Those issues that were agreed by the parties in the application for stay of execution of the ruling of the High Court will therefore not attract any further comment or determination by us but, in passing, the parties to an appeal should avail all pleadings and materials necessary for determination of appeals as set out in Court of Appeal Rules.

Was the judge entitled, on the material availed by the parties, to find that a *prima facie* case had been made out on which injunction could issue?

The judge considered the well-known principles which were discussed in the case of **Giella v Cassman Brown & Company Limited [1973] EA 358** and finding those principles satisfied, issued injunction pending hearing of the suit.

The respondents raised issues concerning whether the appellants, as owners of the suit property, could act in a way that appeared to breach conditions set out in the head title and in the Constitution of the Association. The judge further considered whether consents and permissions obtained from Limuru Sub-County were validly obtained and in the end found that the respondents had made out a *prima facie* case entitling them to grant of injunction pending hearing of the suit

We have considered the appeal and the orders made by the Judge and cannot find any error in the way the Judge exercised his mind and discretion to issue an injunction on the material placed before him at interlocutory stage. We cannot find any merit in this appeal which we dismiss with costs to the respondents.

Dated and delivered at Nairobi this 27th day of September, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR