



D’souza & 2 others v Khansa Developers Limited & another (Environment & Land Case E005 of 2024) [2024] KEELC 4721 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E005 OF 2024**

**SM KIBUNJA, J
JUNE 19, 2024**

BETWEEN

**MARIA FELICIDADE BRIGIDA D’SOUZA 1ST PLAINTIFF
NEVILL STEPHEN D’SOUZA 2ND PLAINTIFF
ANGELIDA D’SOUZA 3RD PLAINTIFF**

AND

**KHANSA DEVELOPERS LIMITED 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

1. The plaintiffs moved the court through the application dated the 2nd April 2024 seeking for *inter alia*, “temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st respondent, whether by itself, servant, agents, officers, contractors and or anyone claiming under it from accessing, loading or offloading material, proceeding with or carrying out deleterious and destructive activities particularly excavating or carrying out construction on property known as Mombasa/Block XX1/142” pending the hearing and determination of this suit or further orders. The application is based on the twenty-one [21] grounds on its face marked (a) to (u), and supported by the affidavits of Angeline D’souza, sworn on 2nd April 2024 and 3rd May 2024, deposing *inter alia* that the plaintiffs own Mombasa/Block XX1/143, on which is a two-storey house that is adjacent Mombasa/Block XX1/142, suit property, owned by the 1st defendant; that the 1st defendant commenced construction of a multi-storey building on the suit property in 2022, and during excavations of the foundation, the plaintiffs’ house and those of other neighbours started developing huge cracks, and their perimeter wall collapsed; they reported to both the defendants, and commissioned an engineer to investigate the cause of the cracks and safety in using the house; the engineer presented the report on 25th November 2023 that indicated that the cracks were as a result of settling or readjustment of the 1st defendant’s multi-storey development;



the report also showed that the 1st defendant had failed to take adequate precautions or measures to protect the foundation of the adjacent buildings, including that of the plaintiffs when conducting deep excavations; the engineer recommended the plaintiffs house be demolished and rebuilt; the 2nd defendant conducted an independent investigation, which confirmed the existence of the cracks on the plaintiffs' house due to the 1st defendant's development, and condemned it as unfit for occupation; the 2nd defendant issued 1st defendant with an enforcement notice on the 9th February 2024, and on the 4th March 2024 revoked its development permit; the 1st defendant called for stakeholders meeting on the 7th March 2024, and it was agreed the cracks on the plaintiffs' house were as a result of the 1st defendant's development among others; that despite the resolutions of 7th March 2024 that among others agreed the development on the suit property would remain suspended, the 2nd defendant has colluded with the 1st defendant and without notice allowed it to resume the impugned construction, before addressing the serious issues of safety of the plaintiffs, and their properties; that unless the 1st defendant is restrained, the plaintiffs' house will collapse and the safety of members of the public will be at risk.

2. The application is opposed by the 1st defendant through the replying affidavit of Sammy Kamuio Mukuri, director, sworn on the 23rd April 2024 in which he *inter alia* deposes that the 1st defendant had obtained all consents, licences and approvals before commencing the construction on 14th March 2022; the development has been going on under the supervision of 2nd defendant, and is now at the finishing stages; that the plaintiffs' house has been inhabitable even before the 1st defendant commenced its construction; that the revocation of their development permit had nothing to do with the plaintiffs' house; that they had commissioned an engineer whose findings are different from those by the plaintiffs' engineer; that their engineer's findings indicated the water flowing from the road to the plaintiffs' plot cause further damage; that as the plaintiffs' house remains condemned, there is no purpose of halting the finishing works of the 1st defendant's development.
3. The learned counsel for the plaintiffs filed their submissions dated the 8th May 2024, *inter alia* submitting that the plaintiffs have met the legal threshold set in the case of *Giella versus Cassman Brown* case, and have established a *prima facie* case as defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR. The learned counsel also cited case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR, and prayed for the injunctive order sought to be issued.
4. The 1st defendant's counsel filed the submissions dated the 16th May 2024, *inter alia* submitting that they started their construction on 14th March 2022 upon obtaining all consents, licenses, and approvals, and over two years before the plaintiffs acquired their property on 15th June 2023; that the property on the plaintiffs' property do not have the pre-requisite approvals, and no one can vouch for its structural soundness; that the 1st defendant's building is at the finishing stages, and denied conceding to have caused the cracks on the plaintiffs' property; that the plaintiffs' property has been condemned, and they have not made a case for injunction to issue; that in view of the plaintiffs' prayers of restoration and compensation, damages can be sufficient. The learned counsel relied on the following superior courts decisions; *Giella v Cassman Brown & Company Ltd* [1973] E.A 358, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] and *American Cyanamid Co v Ethicon* (1975) AC 396.
5. The following are the issues for the court's determinations:
 - a. Whether the plaintiffs have established a *prima facie* case with a probability of success upon which the injunctive order sought could be based.
 - b. Whether the plaintiffs have met the threshold for injunction order to issue at this interlocutory stage.



- c. Who pays the costs in the application?
6. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, superior courts decisions cited thereon and come to the following conclusions:
- a. That the plaintiffs commenced this suit through the plaint dated the 2nd April 2024, seeking for inter alia, order for 1st defendant to demolish and rebuild the plaintiffs' house; compensate the plaintiffs for rent paid from May 2023, when the house was condemned, until their house is rebuilt; permanent injunction restraining the 1st defendant from proceeding with or carrying out excavating or construction on the suit property; Kshs.200,000/- engineer's fees, interest and costs. Filed with the plaint is the notice of motion of even date that is the subject matter of this ruling. Temporary injunction order was granted on the 24th April 2024, and on the 22nd May 2024, the order was extended to the 19th June 2024, which is the date of the ruling.
- b. That while the plaintiffs blame the cracking and other damages on their property to the storeyed building developed by the 1st defendant on the neighbouring property, the 1st defendant has strenuously denied that position. Each side has availed their engineer's report to back their respective position. The 1st defendant has posited that the plaintiffs' house was structurally unsound, was built without obtaining the statutory approvals, and that the plaintiffs acquired the property over two years after the impugned development was commenced. On their part, the plaintiffs deposed through the supplementary affidavit that they acquired their property in 1992 and not 15th June 2023; that their house was built in 1992 and had no cracks before the 1st defendant's development caused them; that the 1st defendant had accepted responsibility through one Mr. Khan. The 1st defendant has disputed accepting liability. That at this stage the court is not expected to make definite determinations on any issue on matters of facts and law, and it is therefore difficult to tell who, between the plaintiffs and 1st defendant, will succeed to convince the court eventually, on their position. That will have to wait for evidence to be adduced by the parties, and considered by the court.
- c. Both counsel submitted on the threshold required of an applicant to succeed in an application for injunction of the nature sought by the plaintiffs, and largely relied on similar precedents that is the case of *Giella v Cassman Brown & Company Ltd* [1973] E.A 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003]. Having considered the available affidavit evidence, the court is satisfied that the plaintiffs have a prima facie case with a probability of success.
- d. Looking at the plaintiffs' plaint, the main prayers are evidently (a) and (b), which seeks for order for 1st defendant to demolish and rebuild the plaintiffs' house and to compensate the plaintiffs for rent paid from May 2023, when the house was condemned, until their house is rebuilt. That being the case, it can be taken that the plaintiffs have not said that the damages caused, and losses suffered, cannot be ascertained financially, through for example the assessing costs of demolishing the house and rebuilding it, as prayed for in prayer (a). There is therefore, no suggestion that their loss and damage is irreparable and incapable of being compensated through a financial award. It follows therefore, that the loss and damages the plaintiffs have sued over in this suit does not fall in the category that can be taken to constitute irreparable loss. Their claim can still be pursued to its logical conclusion or determination, even if the injunctive order sought is not granted at this stage. The balance of convenience tilts towards not granting the order sought. The application is therefore, without merit.



- e. That though under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs shall follow the events, unless for good reasons ordered otherwise, in this matter I am of the view the justice of the case will be better served, by an order that costs abide the outcome of the suit.
7. Flowing from the foregoing, the court finds and orders as follows:
- a. That the plaintiffs' notice of motion dated the 2nd April 2024 is without merit and is hereby dismissed.
 - b. The costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

