Mara Road Residents Association (MARA) v Bell Kenya Limited & another (Environment & Planning Appeal E008 of 2024) [2024] KEELC 4704 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4704 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & PLANNING APPEAL E008 OF 2024

AA OMOLLO, J

JUNE 10, 2024

BETWEEN

MARA ROAD RESIDENTS ASSOCIATION (MARA) ..... APPELLANT

AND

BELL KENYA LIMITED ..... 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER BUILT ENVIRONMENT & URBAN PLANNING ..... 2ND RESPONDENT

RULING

1. For determination is the notice of motion application dated 2nd April, 2024 and brought under the provision of Section 3A of the *Civil Procedure Act* and Order 51 rules 1 & 3 of the *Rules*. The Appellant/Applicant sought the following;

    i. Spent

    ii. Spent

    iii. That the honorable court issues a temporary injunction restraining the 1st Respondent, their agents and/or any other person acting under their instructions from continuing with the development of the proposed townhouses on property L.R No. 209/7501, pending the hearing and determination of the appeal.

    iv. That the honorable Court be pleased to grant such orders or further orders as it may deem fit and just to meet the ends of justice.

    v. That the costs of this Application be provided for.

2. The application is premised on the grounds listed on its face and the affidavit of Rukhsana Haq sworn on the same date. Inter alia, the Appellant avers that the Appeal before the Liaison Committee was

struck out on 7th March 2023 without being heard on merit. That since then, the 1st Respondent Company has hastily continued with development of the proposed town houses on L.R No. 209/7501. Consequently, the orders ought to issue so that their appeal is not rendered nugatory.

3. The application was opposed by each of the Respondents filing separate replying affidavits. Mr. Nixon Mburungo deposed that the grant of an injunction pending appeal is a discretional power. He added that the *Physical and Land Use Planning Act* provides for a strict window within which a party aggrieved by the decision of a CEC member can be appealed to the Liaison Committee. That it is a fact the applicant's appeal was filed outside the time set in law.

4. That the 1st Respondent was granted development permission which has not been revoked and that the Applicant has not shown if a refusal to grant the injunction would render the appeal nugatory. The 1st Respondent avers that the Liaison Committee has wide powers under Section 57 of *PLUPA* to grant any remedy should this court find merit in the appeal. It is their case that granting the injunction now would be pre-emptory, premature and misguided.

5. The 1st Respondent deposes that the Applicant has not demonstrated a prima facie case or demonstrated with clarity of evidence what right is being infringed on by the actions of the 1st Respondent. Further, it is their argument that there is a real tangible risk if the orders are granted as they are likely to financially cripple the Respondents on account of indolence by the Applicant.

6. The 2nd Respondent relied on the replying affidavit sworn by Wilfred Masinde dated 4th March, 2024. He deposed that they received an application for development permission; and change of use from single dwelling to multiple dwelling (town houses). That through the said application, an advert was placed in a newspaper of wide circulation whose copy they attached. He added that the law requires a developer to put a notice of any proposed change of use to alert members of the public to give their comment within 14 days of such notice.

7. The 2nd Respondent contended that the 1st Respondent served them with letters from NEMA; Water Resources Authority and Nairobi Water and Sewerage Company. It is on the basis of compliance with the statutory requirements that the Urban Authority issued the development permission. Mr. Masinde concluded that the 2nd Respondent complied with the necessary procedures and requirements.

8. The counsels appearing for the parties agreed on directions of prosecuting the application by way of written submissions. The Appellant file submissions dated 14th May, 2024 and discussed the case law as relates to standards for granting orders of temporary injunction. In addition, they submitted that unless the construction is halted, they will suffer irreparable loss. He stated that Manyani Estate is a low-density residential area for single household on plots measuring 0.3 ha – 0.4ha. That it is zoned for permission of development of one dwelling unit per 0.1 ha size of land. However, the 2nd Respondent obtained permission for proposed development of six (6) multiple town houses on the suit plot whose size is 0.2913 ha. which makes it double the recommended occupation.

9. I have considered the pleadings filed in support of and opposition to the grant of the order of injunction pending appeal. From the pleadings, the appeal before this court is challenging the order that struck out the appeal lodged before the County Physical Planning Liaison Committee. At this preliminary stage, it is not open to this court to look at the contents of the appeal that was struck out. I say so in answer to the 1st Respondent deposition that the Appellant has not brought out what rights are being infringed if the construction continues.

10. The rights complained of as at now is whether or not the Liaison Committee erred in striking out the complaint lodged before it and, in the process, denied the Appellant a right to present their case. This is a valid point as the rules of natural justice on right to be heard are fundamental and where taken away

a party should not be denied an opportunity to challenge such an order. Secondly, the appeal raises a question of law in so far as when time begins to run for appeals against the decision of the County Executive Member. For these propositions, I find that the Applicant has demonstrated a prima facie case.

11. The question of whether the appeal will succeed or not is neither here once the Applicant has demonstrated a prima facie case. In the case of *Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

> " In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant's case upon trial. That is clearly a standard, which is higher than an arguable case"

12. The Court of Appeal also answered the question of having an arguable appeal or not in *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others* [2013] eKLR that:

> " The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable".
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> See also *Denis Mogambi Mong'are v Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same Court stated that: "An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

13. Under the heading of irreparable loss, I am not persuaded that the Applicants have laid a basis for the same. On the balance of convenience, it tilts in favour of staying developing all the houses as approved in the plan so as not to render the appeal academic. The 1st Respondent pleased that stopping construction will cause them financial loss on account of indolence of the Applicant. The 1st Respondent did not however annex photographs of the notice of change of use pinned on site to buttress their argument of indolence. Further, in the application before me, the Appellant is not required to explain the reasons for the delay since those are issues which may have been raised before the Liaison Committee and probably forms grounds for merit of appeal not for temporary orders.

14. In order not to close the door of justice on the Appellant, I am persuaded that they deserve some orders of temporary injunction, I am also alive to financial losses that may be occasioned to the 1st Respondent if the order of temporary injunction is granted as prayed. Consequently, in balancing the two interests, I shall allow the prayer for temporary injunction but vary it on terms that the construction will go on in respect of 3 town houses (premised on the submissions of the Appellant on one house per 0.1 ha size of plot). The development of the remainder 3 houses is stopped pending hearing and determination of the appeal. The hearing of the appeal shall be fast-tracked taking note that there is already filed a record of appeal.

15. Costs of the application to abide the winner of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2024.

A. OMOLLO

JUDGE