



REPUBLIC OF KENYA



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**Imara Educational Foundation Limited v Nur (Environment and Planning
Civil Case E006 of 2024) [2024] KEELC 5571 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5571 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND PLANNING CIVIL CASE E006 OF 2024

SM KIBUNJA, J

JULY 24, 2024

BETWEEN

IMARA EDUCATIONAL FOUNDATION LIMITED PLAINTIFF

AND

ABDULRAHMAN SHARIFF NUR DEFENDANT

***(NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 2nd APRIL
2024 & DIRECTIONS PURSUANT TO THE RULING DELIVERED ON 10TH
JULY 2024 IN RESPECT OF THE NOTICE OF MOTION DATED 27TH MAY 2024)***

RULING

1. The plaintiff filed the notice of motion dated the April 2, 2024 seeking for among others an order of injunction to issue barring the defendant from further constructing and or developing plot No. MN/1/16993, the suit property, pending the hearing and determination of the application in the first instance and thereafter the suit. The application is based on the nine (9) grounds on its face marked (a) to (i) respectively, and supported by the affidavits of Carlos Sotz, in charge of the plaintiff's development on plot No. MN/1/3881, sworn on the April 2, 2024, April 15, 2024 and April 24, 2024.
2. It is the plaintiff's case *inter alia* that the defendant presented to him in early 2023 an EIA approval to develop two blocks of 4-storey apartments on his plot. However, the defendant erected a 9-storey block on one side of the plot and later started to construct another block on the remainder of the plot, that is being done in flagrant violations of the National Construction Authority [NCA], By Laws and Regulations. That the plaintiff lodged a complaint with NCA and then filed this suit and application.
3. On the April 30, 2024, the court granted interim injunction order in terms of prayer (2) of the application, to remain in force until the next mention on May 28, 2024.
4. The application is opposed by the defendant through the replying affidavit of Abdulrahman Shariff Nur, sworn on the May 2, 2024, *inter alia* deposing that the application was without merit, and



defective as plot No. MN/1/16993 does not exist, as it was extinguished following its subdivision into two portions, being LR NO. 23989 and 23900 on October 5, 2023. That his building is on Subdivision LR No. 23989, and is already complete, but subdivision LR No. 23900 does not belong to him, as he had sold it to a third party. That the construction the plaintiff is complaining about is on plot No. MN/1/16994 that borders the plaintiff's land MN/1/3881, and does not belong to him. That his original parcel, MN/1/16993 and its subdivisions, LR No. 23989 and 23900 do not share a boundary with the plaintiff's parcel, MN/1/3881.

5. The learned counsel for the plaintiff filed their submissions dated the May 21, 2024 that the court has considered.
6. The plaintiff then filed the contempt application under certificate of urgency dated the May 27, 2024. The court gave directions on the May 28, 2024 on filing and exchanging replies in respect of the contempt application and fixed it for ruling on the July 10, 2024. The court rendered its ruling as scheduled on July 10, 2024, *inter alia* directing a visit to the locus on the July 12, 2024.
7. The court visited the locus on the July 12, 2024 in the presence of the counsel for the parties, and one representative each for the plaintiff and defendant. The plaintiff's plot MN/1/3881 was pointed out and abuts MN/1/16994, where construction activities were ongoing. That construction is the one the plaintiff alleged was ongoing or continuing even after the injunction order of April 30, 2024. The court was shown plots LR 23989, where a newly completed building stands, and LR 23900 that is fenced with iron sheets. These later two plots are subdivisions of what was MN/1/16993, the suit property, and none of them borders the plaintiff's parcel, MN/1/3881. Parcel MN/1/3880 is the one that shares a boundary with MN/1/3881 and MN/1/16994. The court then fixed the application dated the April 2, 2024 for ruling on the July 24, 2024, when final determinations on the contempt application dated the May 27, 2024 will also be pronounced.
8. The issues for determinations by the court are as follows:
 - a. Whether the plaintiff has met the threshold for temporary injunction order to issue at this interlocutory stage.
 - b. Whether the construction complained of to have continued and was found ongoing on the July 12, 2024, when the court visited the locus is being done by the defendant or put differently, whether it is on the plot belonging to the defendant.
 - c. What orders to issue in respect of the applications dated the April 2, 2024 and May 27, 2024.
 - d. Who pays the costs in each of the two applications.
9. The court has carefully considered the grounds on the application dated the April 2, 2024, the affidavit evidence by the parties, submissions by the plaintiff's counsel and come to the following findings:
 - a. That what comes out clearly from the pleadings, affidavit evidence and the court's observation during the locus visit on the July 12, 2024 is that the construction activities that the plaintiff complains of, and wanted stopped vide the application dated the April 2, 2024, was and still is ongoing on plot MN/1/16994. That plot is different from MN/1/16993 that belonged to the defendant, and which has since evidently been subdivided into LR No. 23989 and 23900.
 - b. In its observations during the locus visit, the court confirmed that on Parcel LR No. 23989 stands a newly completed building belonging to the defendant. That plot borders MN/1/3880 and 16994, on which the continuing construction activities are taking place.



- c. The court's observations over Parcel LR No. 23900, that has reportedly been sold by defendant to a third party, is that it was vacant and has no ongoing construction. It has no borders with the plaintiff's land MN/1/3881 or the plot MN/1/16994, where the ongoing construction is taking place.
 - d. It follows therefore, that plot MN/1/16993 ceased to exist upon being subdivided in October 2023, and the subdivisions thereof to wit, LR No. 23989 and 23900, being registered in May 2024. That further, the construction that caused the plaintiff to come to court appear not to be the one that is on plot LR No. 23989, that is a subdivision of MN/1/16993, that belong to the defendant, but on MN/1/16994. This revelation may require of the plaintiff to move the court for appropriate amendments of its pleadings before it proceeds with the prosecution of the suit further.
 - e. That having come to the foregoing determinations, the court has no difficulties in coming to the finding that the plaintiff has failed to establish a *prima facie case* with a probability of success. The plaintiff has also failed to show that the activities on the defendant's plot, MN/1/16993, or its subdivisions, LR No. 23989 and 23900, would make it sustain any substantial or irreparable loss. The balance of convenience therefore tilts in favour of not issuing any temporary injunction order at this interlocutory stage for the reasons set out above and the injunction order issued in the interim is hereby vacated.
 - f. That further to the findings of the court in the ruling delivered on July 10, 2024 in respect to the contempt application dated the May 27, 2024, and the court's observation on the particulars of the property where construction is taking place, during the locus visit on the July 12, 2024, the court finds and holds that the plaintiff has failed to establish any disobedience of the court orders of April 30, 2024 on the part of the defendant. In hindsight, the court is now certain the interim injunction order issued on April 30, 2024, had been granted on the mistaken presentation by the plaintiff that the construction was on parcel MN/1/16993, that belonged to the defendant. It is now apparent that the plaintiff did not deserve that order, and the question of its disobedience is a moot question.
 - g. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where otherwise ordered for good reasons. In this instance, I do not find good cause to depart from that edict.
10. Flowing from the above conclusions, the court finds and orders as follows:
- a. That the notice of motion dated the April 2, 2024, is without merit and is dismissed and the interim injunction issued on April 30, 2024 is vacated.
 - b. That further to the ruling delivered on July 10, 2024 on the contempt application dated the May 27, 2024, and the visit to the *locus* on July 12, 2024, it is hereby determined that the said application is also without merit and is dismissed.
 - c. That the plaintiff will pay the defendant's costs on the two applications.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24th DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA



In the presence of:

Plaintiff : Mr. Adhoch

Defendant : M/s Nafula for Khalid Salim

Leakey – Court Assistant.

