Tatu City Limited v Home Bridge Limited (Environment & Land Case E046 of 2023) [2024] KEELC 6453 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6453 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE E046 OF 2023

JG KEMEI, J

SEPTEMBER 30, 2024

BETWEEN

TATU CITY LIMITED ..... PLAINTIFF

AND

HOME BRIDGE LIMITED ..... DEFENDANT

RULING

1. Vide its Notice of Motion dated 4/10/2023 expressed under Sections 1A,1B, 3A of the *Civil Procedure Act*, Order 40 Rule 1 of the Civil Procedure Rules, Section 23 (1) of the Physical Planning Act (repealed) and Section 11 of the *Special Economic Zones Act*, 2015, the Plaintiff/Applicant seeks Orders THAT;

    a. Spent.

    b. Spent.

    c. Spent

    d. A temporary injunction do issue restraining the Defendant/Defendant whether by itself, its servants and or employees from excavating constructing demarcating making improvements and or otherwise developing the property known as Unit Number L4-02 measuring 20 acres (suit property) being a portion of Precinct 4B-2 within LR No. 28867/1 situated in Kiambu County.

    e. An order granting the Plaintiff whether by itself, its agents, servants and or employees' access to the suit property known as Unit No L4-02 measuring 20 acres being a portion of Precinct 4B-2 within LR No 28867/1 situate in Kiambu County for purposes of assessing auditing verifying and or confirming the extent of development undertaken by the Defendant so far.

    f. The Court to issue any other orders it may deem fit.

g. Costs of this Application to be borne by the respondent

2. The Application is premised on the grounds disclosed therein and echoed in the supporting affidavit of Perminas Marisi sworn on 29/9/2023.

3. That upon designation of the Special Planning Area (SPA), the Plaintiff prepared the local physical development plan (LPDP) comprising of a comprehensive mixed -use development of low medium and high density residential, commercial light, industrial public purpose and well-developed infrastructure. The copy of the Precinct Plan is annexed as TC-03.

4. It was averred that one of the conditions for the declaration of Tatu City as a special planning area was that the Plaintiff in consultation with the Ministry of Lands and Physical Planning (the Ministry) would formulate harmonized standards and guidelines for buildings and other forms of development under the provisions of Section 3 of the Physical Planning Act (repealed) in line with applicable laws regulations standards and policy guidelines to provide a single reference framework for developers and regulatory agencies with respect to the development control processes within the Special Economic Zone (SEZ).

5. It was further stated that the Plaintiff was to liaise with the Special Economic Zones Authority to establish and operationalize a one stop shop within Tatu City for ease of processing and issuance of the development and construction permits in conformity with the provisions of section 11 of the *Special Economic Zones Act*.

6. That under the SPA buildings or alterations were to strictly comply with the development codes applicable within Tatu City and specifically in accordance with the building plans submitted to and approved in writing by the proponents of Tatu City.

7. In fulfilment of the above guidelines, he averred that the Plaintiff formulated a Master Declaration of Covenants Conditions and Restrictions (MDCCR) for Tatu City which was validated by the Ministry of Lands on 19/10/2021 as the basis for the development, maintenance and improvement of the area for the preservation of the values and quality of Tatu City as a Special Planning Area. That this heralded the creation of the Development Control Company (DCC) through which all the development permissions for all buildings would be submitted to and final approvals issued.

8. That the Lease Agreement dated 22/8/2016 between the Plaintiff and the Defendant obliged the Defendant to strictly comply with the conditions and restrictions in the MDCCR, the structure plan and Precinct Plan, the National Environment and Management Plan and the Physical Planning status of Tatu City.

9. That the Defendant in flagrant breach of Clause 6.7.4 of the Lease Agreement, deliberately refused and or failed to submit its building plans as required under the MDCCR and has commenced development of the demised property without obtaining the requisite approvals from the Plaintiff.

10. Interalia, that the Defendant has sidestepped the Plaintiff and obtained conditional approval (marked as TC-08) for its development from the Ministry of Lands, Public Works, Housing and Physical Planning vide Letter Ref. No. NSP/5/49/2023/163 on 20/3/2023 without first obtaining the Plaintiff's development control approval.

11. That the said Ministry's Approval was subject to the Physical Planning Regulations and Standards of Tatu City Zoning Regulations and strict compliance with development control protocols of the Tatu City management, the consequence whereof the Plaintiff reserves the right to invoke the right of entry and determination of the Lease in line with the provisions of sub clause 11.1.3 thereof.

12. In conclusion the deponent stated that the Defendant has commenced construction of the demised property contrary to the terms of the Lease, which action, defeats the establishment of Tatu City as a special planning area. That the unvetted and unapproved construction will undermine the physical planning standards and guidelines of the Plaintiff and ultimately devalue the special planning status of the property.

13. Reiterating its prima facie case with a high chance of success, the Plaintiff avowed that it stands to suffer irreparable harm that cannot be compensated with damages. The Court was urged to stop the development and grant the prayers as sought.

14. Peter Karoki, a Director of the Defendant, opposed the Application vide his replying affidavit sworn on 10/11/2023. He gave a detailed history of the parties' business relations since 2016. That the Defendant Leased Units L4-01 and L4-02 measuring 10 and 20 acres respectively from the Plaintiff. Copies of the Lease Agreements are annexed as PK4 and PK5. That to finance the consideration for the Leased properties, the Defendant obtained a loan facility from Kenya Commercial Bank Limited. (see annexure PK3). That by virtue of those transactions, the Defendant acquired the right to peaceful enjoyment of the suit property as envisaged under Clause 7.2 of the Lease Agreement.

15. The deponent admitted the contents of the Gazette Notice No. 4975 (TC-02) and acknowledged that the declaration of Tatu City as a SEZ resulted in the change of the approval process for all buildings within Tatu City. That thereafter the responsibility for granting final approvals shifted from the County Government to the National Government specifically the Ministry under the oversight of the National Director of Physical Planning (the Director) as outlined in the Physical Land Use and Planning Act (PLUPA) and *Regulations of 2019*. See Gazette Notice dated 18/5/2017 annexed as PK-14.

16. That vide an email dated 22/7/2022 (PK-17), the Defendant's architect wrote to the DCC notifying it of the Defendant's intention to commence Phase 2 of the construction. Additional correspondences annexed as PK-18, 19 & 20 show that the architect submitted the proposed drawings and master plan to the DCC which the DCC acknowledged receipt and provided supplementary comments for the Defendant's consideration. That in a bid to address the DCC's comments, the Plaintiff's representatives met the Defendant on 9/11/2022 and the Defendant submitted the revised plans to the Plaintiff and the DCC conceded receipt. See copies of email marked as PK-21.

17. Detailing the correspondences between the parties annexed as PK-22, 23 & 24, it was the Defendant's deposition that the DCC asked the Defendant to submit the harmonized plans for L4-01 and L4-02 and proof of amalgamation of the two parcels of land. The Defendant protested the need for amalgamation as it was not provided for under the Lease Agreement. That numerous meetings were held to resolve this impasse in vain.

18. Determined to find a solution, the Defendant affirmed that it sought advice from the Ministry on the requirement of amalgamation as a pre-condition for the Plaintiff's approval. Vide an email dated 14/2/23 (PK-27), the DCC itself wrote to the Defendant indicating that it had received guidance from the Ministry that amalgamation of the two parcels of land was not a pre-requisite but to the Defendant's shock, the DCC demanded a colossal sum of Kshs. 46, 957,567.11 as a condition for review and grant of approval. The deponent viewed this demand as not only exorbitant but arbitrary, unreasonable, unjustified and an extortionist tactic employed by the DCC at the Plaintiff's behest aimed at blocking the Defendant from obtaining its approval. That the Defendant was left with no choice but to revert to the Ministry by submitting the same architectural and structural drawings it had submitted to the DCC to the Director. See copies of letters dated 19th and 28th January 2023 marked PK-28.

19. That upon receipt of the Defendant's letter, the Director wrote to various stakeholders including the Plaintiff seeking recommendations regarding the legal compliance and technical suitability of the Defendant's plans. That the Plaintiff never raised any objection to that end. See PK-29 copy of the Plaintiff's letter dated 22/2/23. That before the Ministry issued its approval (attached as PK-32) it had fully engaged and appraised the key stakeholders including the Plaintiff and as such, the Plaintiff was wholly aware and informed of the process leading to the issuance of the Ministry's approval. See Plaintiff's letter dated 6/3/23 annexed as PK-31.

20. That upon issuance of the Ministry's approval, the Defendant paid the requisite fees for approval of the building plans in the sum of Kshs. 5,000/= to the State Department for Lands & Physical Planning and Kshs. 917,543/- to Kiambu County Government leading to the issuance of the approval on 20/3/23 marked PK-33. That later at the Defendant's request, by a letter dated 5/7/23 copied to the Plaintiff as well, the Ministry approved the alterations to the previously approved developments. That the Defendant paid the statutory fees of Kshs. 6,095,776/= to Kiambu County Government as per annexure PK-34.

21. The deponent averred that after obtaining the Ministry's approval, the Defendant issued a tender for the construction of Phase 2 which M/S Canton Building & Construction Ltd won at a contract value of Kshs.4 Billion (PK-3) necessitating the Application of another credit facility (PK-36) to finance the project.

22. That on the strength of the Ministry's approval, the Defendant commenced construction on 6/5/23 in full sight of the Plaintiff but it was not until 13/10/23 when the Plaintiff served the Defendant with an order stopping further construction on its property. That at the time of issuing the temporary injunctive order, the construction works were at the perimeter wall stage as shown by the photographs marked PK-40.

23. That in light of the detailed averments, the Defendant concluded that it is evident that the Plaintiff and the DCC were not only aware of the commencement of the construction but widely involved in the process leading to the Ministry's approval. That neither has the Plaintiff identified any defects with the submitted building plans but instead opted to impose a grossly exorbitant review and approval fees. That notably no challenge has been mounted by the Plaintiff against the Ministry's approval under Regulation 15 of the Physical and Land Use Planning (Development Control for Strategic National Projects) Regulations, 2021.

24. Further the Defendant was categorical that it has not breached any of the terms under the Lease Agreement as claimed. That the Plaintiff's accusations are false and malicious calculated to impede the Defendant's proprietary rights. That the Plaintiff has gone to great lengths to damage the Defendant's reputation through incitement and defamation.

25. The Defendant swore that if the Court is inclined to grant injunctive orders, the Defendant stands to suffer irreparable loss that cannot be compensated by an award of damages for reasons inter alia; the Defendant has borrowed over Kshs. 2 Billion to finance the development and the repayment is pegged on sale of the units; a substantial number of units have been sold to third parties on off-plan basis; delays in completion of the project will negatively injure the Defendant's reputation and the Defendant will be exposed to suits for breach of contract by the already engaged professionals and consultants. In the end, the Defendant avowed that no prima facie case has been established by the Plaintiff to warrant the orders sought. That instead, the balance of convenience tilts in favor of denying the orders sought.

26. In a rejoinder, the Plaintiff filed its further affidavit dated 30/11/2023. Dismissing the Defendant's replying affidavit as unmeritorious, the Plaintiff averred that the Defendant's right to enjoy the

property peaceably and quietly is not absolute. On the issue of exorbitant fees, the Plaintiff avowed that the Defendant was duly informed of the fees which was based on 4.72 USD per square meter using the Respondent's Gross Buildable Area (GBA). Refuting the defamation allegations, the Plaintiff averred that it was simply responding to the Defendant's malicious attacks levelled against it in the first instance.

The Interim Orders

27. On 12/10/2023 the Court granted interim orders in terms of Prayer number 2 of the Application. On the 6/11/23, the parties by consent agreed to extend the interim orders pending the outcome of the out of Court negotiations that they undertook to conduct with a view to recording a consent with respect to the Application. It would appear the parties did not agree leading to the filing of the Defendant's Application dated 8/12/2023 seeking to set aside the interim orders.

The Defendant's Application dated 8/12/2023

28. By this Motion, the Defendant sought in the main an order to vary, discharge and/or set aside the interim orders issued on 12/10/2023. The Application is based on grounds that the Plaintiff irregularly and without full disclosure of material facts obtained an interim order restraining the Defendant from developing the suit land. That the plaintiff deliberately levelled false allegations against the Defendant in a bid to deceive the Court to issue the orders which have adversely affected the Defendant by exposing it to immense monetary losses.

29. The Defendant averred that it is not true that it commenced construction without seeking the Plaintiff's approval and he reiterated the steps and engagements between the parties leading to the Ministry's approval as aptly deponed in its supporting affidavit sworn on 10/11/2023 summarized above.

30. Opposing the Application, the Plaintiff filed its Grounds of Opposition dated 18/1/2024. The substance of the opposition was that the Application is an abuse of Court process and tantamount to an application for review intended to derail the expeditious determination of the suit.

The Written Submissions

31. On 19/3/2024 the parties elected to canvas the rival applications through written submissions. On behalf of the Plaintiff the firm of Ahmednassir Abdullahi Advocates LLP filed submissions dated 9/4/2024 while the firm of Iseme, Kamau & Maema Advocates filed the Defendant's submissions dated 17/5/2024.

32. In addition, on 29/5/2024, Learned Counsel Ms. Asli Osman and Mr. Karori SC for the Plaintiff and Defendant respectively made brief oral highlights which I have considered.

Analysis and Determination

33. Having considered the rival affidavit evidence and submissions before Court, the germane issues falling for determination are;

    a. Whether the Plaintiff has established a case for grant of an order of temporary injunction?

    b. Whether the Plaintiff is entitled to an order of access to the suit property?

    c. Whether the Defendant's Application dated 8/12/2023 is merited?

    d. Who bears the costs?

34. To put this application into perspective, I find it apt to set out the background for purposes of clarity.

35. The Plaintiff is the Lessor of parcels Nos LR No 28867/1 and LR No 31327 situate in Kiambu County and christened Tatu City. The City covers approximately 5000 acres of planned concept of live- work -play in a mixed use-controlled environment. The Plaintiff has demarcated the land into various Precincts or districts in line with the designated user plans.

36. On the 15/8/2016, the Plaintiff and the Defendant entered into a Sale Agreement for the purchase of two units (properties) totaling 30 acres being L4-01 measuring 10 acres (phase 1) and L4-02 measuring 20 acres (phase 2) both in Precint 4B-2 within Tatu City. Along with the purchase of the units the Defendant acquired beneficial ownership of the shares in the Property Owners Association (POA) whose mandate is to own and control the common areas in the precincts.

37. Subsequently the parties entered into a Lease Agreement for L4-01 and in 2016 the Defendant sought and obtained approval permits to commence development on phase 1 – (L4-01) measuring 10 acres (phase 1). It is commonly accepted that the approvals were granted by the Plaintiff through the DCC and the Kiambu County Government, the result of which the said project was completed and the units sold to third parties. It is important to note that L4-01 is not the subject of this dispute.

38. With respect to Unit L4-02, the subject of this dispute, the Plaintiff, the Tatu City Property Owners Limited (TCPOA) and the Defendant entered into a long-term Lease Agreement dated the 22/8/2016 with respect to phase two measuring 20 acres in Precinct 4B-2 forming a portion of LR No 28867/1 detailing the terms and conditions of the Lease.

39. Clause 6.7.1 of the Lease Agreement provided that the lessee must adhere to interalia the MDCCR, the structure, precinct, environmental management and the Physical Plans in their developments. Further under clause 6.7.4 all the developments were to strictly comply with the building plans submitted and approved in writing first by the DCC and thereafter the relevant local authority or any other relevant competent authority.

40. Vide Gazette Notice No. 4892 dated 22/5/17 the land was declared a Special Economic Zone (SEZ) under the Special Economic Zone Act. To facilitate the realization of the Special Economic Zone, the area was accorded the status of a Special Planning Area (SPA) vide Gazette Notice No. 4975 dated the 7/6/2019 pursuant to Section 23 (1) of the Physical Planning Act.

41. To actualize the realization of the Special Economic Zone and special planning status of the property, and in line with the declarations contained in the Gazette Notice aforestated, the Plaintiff was mandated to establish the development and control instruments, standards and guidelines in consultation with the Ministry, the Director and other multi sectoral Government agencies that accord with the PLUPA and the Special Economic Zone Act.

42. Following the establishment of the SEZ and the SPA, the Plaintiff amended the MDCCR to provide for a three-tier approval system being the DCC, two levels of Governments; the Kiambu County Government and the National Government represented by the Director and the Minister. This MDCCR was validated by the Ministry on the 19/10/21. The MDCCR interalia contained the guidelines and standards to guide the development management and approval of development plans in the Tatu City.

43. It is the Plaintiff's claim that the Defendant refused to obtain development approvals from the Plaintiff contrary to the express provisions of the Lease Agreement, the MDCCR, structure plan, precinct plan; NEMA and planning standards despite several requests to do so; has sidestepped the mandatory processes of submitting and obtaining the Plaintiff's approval in respect to the proposed development

and instead obtained a conditional approval from the Ministry without first seeking and obtaining the approval of the Plaintiff and the DCC as required under clause 6.7.4 of the Lease and that the Defendant has commenced the construction of the project using unvetted and unapproved plans.

44. The Defendant on the other hand denied the Plaintiff's claim and stated that it unsuccessfully sought approvals from the Plaintiff. That the Plaintiff declined approval on the basis of amalgamation of the two plots and further demanded an approval fee in the sum of Kshs 46 Million which was unreasonable and arbitrary. It is the Defendant's rebuttal that its approval was frustrated by the Plaintiff who withheld the approval unreasonably thus resorting to the Ministry.

a. Whether the Plaintiff has established a case for grant of an order of temporary injunction?

45. The guiding principles for the grant of orders of temporary injunction are that the Plaintiff has to satisfy the triple requirements; to a, establishes its case only at a prima facie level, b, demonstrate irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in its favour." See the case of Giella vs Cassman Brown (1973) EA 358.

46. The standard of proving a prima facie case was set out by the Court of Appeal in the case of Mrao Ltd Vs. First American Bank of Kenya Ltd (2003) eKLR as follows;

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Plaintiff need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed."

47. Additionally, in the case of Stek Cosmetics Limited Vs. Family Bank Limited & Another [2020] eKLR, it was held that the Plaintiff bears the burden of proving a prima facie case in its favor. The Plaintiff must show that its right is being violated or is likely to be violated by the Defendant which would shift the burden onto the Defendant to explain or rebut the Plaintiff's claim.

Prima facie case

48. Has the Plaintiff demonstrated a prima facie case with a probability of success? It is not disputed that the Defendant approached the Plaintiff for a development permit for phase 2 and submitted the architectural plans as per the Tatu City Protocols on 14/7/22. This can be gleaned from the exchange of correspondences between the parties from pages 354 – 382 of the Defendant's replying affidavit. When the Plaintiff delayed in issuing the approval permit, the Defendant concluded that it was being frustrated by the Plaintiff by introducing new requirements that were not set out in the approval protocols, being the demand to amalgamate the two parcels of land and the payment of Kshs 46 Million as approval fees. It is also not disputed that the Defendant then sought refuge from the office of the Director and the Minister.

49. When the request was placed before the Director, its office sought the concurrence and comments of the stakeholders including the DCC. Upon review of what was presented to the Director, the Minister granted approval on the 20/3/2023 and a further approval of the proposed amendments on 5/7/2023.

50. The Court finds that the Defendant commenced construction after seeking and obtaining approval from the Minister. The claim therefore that the Defendant was developing the unit without approved plans is untenable. It is not disputed that the Plaintiff was involved in the process of approval undertaken by the Director. This is shown on pages 383-395 of the Defendant's Replying Affidavit.

51. It is stated that the approval of the Director and the Minister was subject to strict compliance with the planning Regulations and standards, Tatu City Zoning regulations and special development conditions specified in the Lease Agreement and the development control protocols.

52. The Plaintiff's claim is that its right to first approve the development plans was sidestepped by the Defendant when it approached and obtained the approvals from the Director. That the act of the Defendant in developing the unit using unapproved and unvetted plans will devalue Tatu City.

53. At this juncture the question before the Court is whether the Defendant upon obtaining approvals from the Director and the Minister could lawfully commence the construction without the approval from the DCC. According to the Lease Agreement, the Plaintiff enjoyed primacy in granting the approvals. The Court is of the view that the question as to which approval takes precedence will require investigation upon taking evidence. Another area of inquiry is whether approvals of the National and the County Governments are subordinated to the one of the DCC. Whether the involvement and participation of the Plaintiff in the approval process can be viewed as a waiver of its right to first consider and approve the plans. The other question that needs inquiry is whether the Plaintiff in refusing to grant the approval was unreasonable in the circumstances of this Application.

54. Undoubtedly at the preliminary stage, the Court should not delve into substantive issues best reserved for the trial Court but it suffices to state that the above questions serve to cast doubt on the probability of the Plaintiff's case, at least at the application stage.

55. The purpose of seeking an injunction is to protect the rights of the Applicant from violation or threatened violation of an act it cannot be compensated by an award of damages. It is trite that the right must have crystalized or matured in its favour and it must not just be based on an apprehension or anticipation.

56. That said the Plaintiff is nevertheless entitled to a grant of equitable relief if it approaches the Court with clean hands which includes full and frank disclosure in respect to the matters in which it seeks reliefs.

57. The Application for injunction being an application seeking equitable reliefs must fail the moment the Court finds the Plaintiff's hands are tainted. This was rightly captured in the case of Caliph Properties Limited Vs. Barbel Sharma & Another [2015] eKLR, where the Court stated:

> " Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity."

58. In addition, the Court of Appeal in the case of Tende Drive Villas Limited Vs. David Kamau & 4 Others [2005] eKLR in affirming the trial Court decision that declined to grant an injunction observed that; -

> " The superior Court made a further finding that the Plaintiff was not deserving of the equitable relief of injunction due to his non-disclosure of facts material to the Application which appear to have been designed to mislead the Court."

59. The record shows that at the time of granting the interim injunction, the Plaintiff did not disclose that it participated in the approval process conducted by the Director and that indeed gave its comments and recommendations which were considered before the approval was granted. The Court finds that this was material non-disclosure thus the Plaintiff fell short of meeting the approval of a Court of equity.

60. Lastly it is not in dispute that the approval of the Director was issued in March of 2023 and the Plaintiff filed this suit in October 2023, a period of close to seven (7) months. Delay in calling in the aid of the Court of equity disentitles the Plaintiff from the remedy.

61. The Court finds that the Plaintiff has not demonstrated a prima facie case with a probability of success.

Irreparable harm

62. It is trite that the burden is on the Plaintiff to demonstrate the nature and the extent of the injury. In the Mrao case (supra), the Learned Judges added;

> " Temporary injunction should never issue when an action for an award of damages would adequately compensate the injuries threatened or caused. It must also be remembered that it is a serious thing to restrain a property owner over what is undeniably his unless there are justifiable grounds to do so.....it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."

63. In the case of Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others CA No.77 of 2012 (2014) eKLR the Court of Appeal had this to say regarding irreparable loss;

> " On the second factor, that the Plaintiff must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Plaintiff to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy ..."

64. On irreparable harm, the Plaintiff submitted that the proposed Defendant's development which is yet to comply with Plaintiff's Conditions, Restrictions and Plans will cause severe harm to the

environment and ultimately devalue the special planning status of Tatu City. That such harm cannot be adequately compensated by way of damages.

65. The Defendant posited that it actually stands to suffer irreparable harm if the Application is allowed. That it commenced construction on receipt of the approvals from the Ministry and that the Plaintiff never raised any concerns for a period of 6 months despite being aware that the construction was ongoing.

66. The Court finds that the Plaintiff has failed to show the harm it has suffered given that its prima facie case is doubtful. The MDCCR and the Lease contain default clauses with respect to the development permission among other obligations which call for penalties and other forms of damages on the part of the licensees and property owners.

67. It is trite that the Court should take the course that appears to carry the lower risk of injustice if it should turn out to have been wrong in its decision not to grant the injunction. See the case of Films Rover Investment Limited & Others Vs. Cannon Film Sales Limited 1986 3 ALL ER. The Defendant contended that it borrowed colossal loans to undertake the project which accrues interests and further that a number of units have been sold off-plan basis and if an injunction is granted, the Defendant's reputation will be greatly eroded/damaged leading to massive financial losses to third party purchasers and contractors and professionals already commissioned. This was not controverted.

68. In the end the Court finds that the Plaintiff has not demonstrated irreparable injury that cannot be compensated with costs.

Balance of convenience

69. Finally, the Plaintiff has to demonstrate that the balance of convenience tilts in its favour. In the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR the concept of balance of convenience was defined as: -

> 'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Should the inconvenience be equal, it is the Plaintiffs who will suffer. In other words, the Plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it."

70. From the foregoing it is clear that the Court is not in doubt. The balance of convenience militates or tilts against issuing the temporary injunctive orders.

b. Whether the Plaintiff is entitled to an order of access to the suit property?

71. The Plaintiff seeks an order to access the suit property as coached in Prayer No. 5 of its motion. In its submissions, the Plaintiff inferred to the Defendant's resistance to allow the Plaintiff access the suit property. No evidence of such resistance has been tabled before this Court. Emphasizing the objective of Tatu City as articulated in its Article 1 and 16.16, the Plaintiff reiterated its right to access the suit land.

72. In negation, the Defendant submitted that the Lease Agreement under Clause 6.7.6 has an inbuilt mechanism allowing the Plaintiff through the DCC to oversee and enforce implementation of

construction controls. Indeed, the Defendant affirmed the Plaintiff's right to enter and inspect the premises as further provided under Section 65 (2)(a) of the *Land Act* which states;

> " 2) There shall be implied in every Lease covenants by the lessee empowering the lessor to—
>
> (a) either personally or by agents, enter, the Leased land or buildings at any reasonable time for the purpose of inspecting the condition and repair of the premises, or for carrying out repairs and making good any defects that it is the lessor's obligation so to do; but in the exercise of that power, the lessor shall not unreasonably interfere with the occupation and use of the land and buildings by the lessee;"

73. Clause 6.7.6 of the Lease Agreement– see page 47 of the Plaintiff's Application states;

> " The Lessee agrees that the DCC shall, at the Lessor's cost be entitled to oversee and enforce the implementations of the construction control. The Lessor and the DCC shall have the right to appoint an independent engineer or such other consultant to verify the site desiGazette Notices and to further verify that the implementation controls are adhered to." [Emphasis added]

74. The Plaintiff's further right to access the premises is captured under Clause 6.12 of the Lease Agreement (page 50 of the Plaintiff's Application). The Lessor's rights in totality are further fortified under Clause 6.22.1 of the Lease Agreement (at page 54). Article 16.16 of the Deed of Variation and Restatement of the MDCCR (TC-06) at page 243 of the Plaintiff's Application provides that;

> " 16. Inspection
>
> The Declarant (Tatu City Limited) and its Affiliates may from time to time at any reasonable hour or hours, enter and inspect any of the affected Precinct or parcel to ascertain the compliance with this Declaration."

75. Flowing from above, the Court finds that there being no evidence of the Defendant's resistance of the Plaintiff's right of entry and inspection of the suit land, the Court has been moved prematurely and prayer number 5 fails.

c. Whether the Defendant's Application dated 8/12/2023 is merited?

76. The impugned interim orders were time bound to last till the hearing and determination of the Plaintiff's motion. The Court having found that the Application for injunction is unmerited, the interim orders now automatically lapse and thus the Defendant's motion is moot for consideration and it is marked as spent.

d. Who bears the costs?

77. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follow the event. The Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise.

78. Ultimately, the final orders for disposal are;

a. The Plaintiff's Application dated 4/10/2023 is unmerited. It is dismissed with costs to the Defendant.

b. The Defendant's Application dated 8/12/2023 is deemed spent.

79. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muthoni HB Asli Osman for the Plaintiff

Ms. Weru HB Kamau Karori, SC for the Defendant

Court Assistants – Phyllis/Oliver