



**Lamba & another v Pearls Kids Academy Limited & 3 others (Environment & Land  
Petition E008 of 2024) [2024] KEELC 5988 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5988 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E008 OF 2024  
AA OMOLLO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**DAVINDER LAMBA ..... 1<sup>ST</sup> PETITIONER**

**SUNIL LALCHARD SHAH ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PEARLS KIDS ACADEMY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SAVITA VIRCHARD SHAH ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MNGEMENT AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**

**RULING**

1. The application for determination is the Notice of Motion dated 8<sup>th</sup> April, 2024 where the Petitioner sought the following orders;
  - a. Spent
  - b. That an order do issue barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from operating a school on Land Reference Number 1870/X/84 situated in Westlands Sports Road pending the hearing and determination of this application and petition.
  - c. That a declaration do issue that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents irregularly, unconstitutionally issued approvals for change of use from residential to commercial/school, and the Environmental impact assessment license.
  - d. That a declaration do issue that the approvals were obtained without any public participation and/or seeking the views of the petitioners and other members of the Estates thus contravened



Articles 1(2), 10(2, a, b, c) 27, 33, 35, 61, 69(1), 118(1a, b), 119(1,2), 174c, 174(d) 184(1), 196(2), 201(a), 232(1)(d)(f), 159 Fourth Schedule part 2(14) of *the Constitution* of Kenya.

- e. That a declaration do issue that the establishment of a school on Land Reference Number 1870/X/84 situate in Westlands Sports Road is unconstitutional and an abuse of the Petitioner's Right Under Articles 39(3), 42, 69(d,g) 70.
  - f. That a declaration do issue that Petitioner's zoning and/or geographical location namely westlands sports road is not a commercial area by dint of the urban and cities Act and regulations of Nairobi County.
  - g. That any other order in which this Honourable court may deem fit to grant for purposes of attaining justice for all
  - h. Costs in the cause.
2. The application is premised on several grounds listed on its face and the supporting affidavit of Dvainer Lamba. Mr. Lamba deposes inter alia;
- i. That they acquired the various properties and established our own estate demarcated the roads and established various gates for our own security, sanity, beauty within our residential homes.
  - ii. That they have lived in harmony in our estate for over 30 years without any destructions, disturbances, noise pollution, congestion until such a time when the owner of plot No. 1870/X/84 passed away and the suit property was taken over by the 2<sup>nd</sup> Respondent as the beneficiary.
  - iii. That the development of the school is a violation of the conditions attached to the mother title over the property on which the school is situated.
  - iv. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents being aware of the fact that the suit property is at the entrance of the estate, created an alternative gate (orange gate) without their approvals and that of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to let in cars dropping and picking up students. Thus the blocking of the main entrance (Black gate) to the estate, inconveniences the estate residents and interferes with their quiet stay and use of their properties.
  - v. That on 27<sup>th</sup> February, 2023 the Petitioners moved this court vide ELC Case No. E078 of 2023 seeking interim orders barring the Respondent from operating a school within the estate and declarations that the same were being run illegally thus be stopped forthwith.
  - vi. That the court issued orders of 24<sup>th</sup> April, 2023 barring the Respondents from operating a school and pull down all advertisements they had made to which they refused to comply with until a contempt of court application dated 23<sup>rd</sup> October 2023 was filed.
3. The application was opposed by the replying affidavit of Trusha Shah dated 26<sup>th</sup> April, 2024. She deposes that application is devoid of merit as the 1<sup>st</sup> Respondent obtained all relevant approvals between 2015 and 2016 before the school was opened and the Applicants did not raise objection in 2015. The 1<sup>st</sup> Respondent avers that the school is distinct and separate from the petitioners' residence with its own gate and does not inhibit the petitioners' access to their properties in any way. The allegations of traffic issues and noise pollution as raised by the petitioners are unfounded as the school's entrance and exit are entirely separate from the Petitioner's entry into their estate.
4. She avers further that the distance between the kids play area and the main gate is substantial ensuring that any noise generated from play activities is significantly attenuated before reaching the entrance.



Moreover, considering the additional distance from the petitioners' residences, it becomes evident that the allegations of noise pollution are unfounded and lacking a solid basis. The layout of the area and the natural barriers in place contribute further to the mitigation, reinforcing the argument that the noise impact a neighbouring properties is minimal and does not warrant the concerns raised by the petitioners. The honourable court is invited to conduct a site visit to ascertain the independence of the 1<sup>st</sup> Respondent's school from the petitioners' estate. (Annexed hereto marked and produced as Exhibit "TS8" is a photo of the 1<sup>st</sup> respondent's play area).

5. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents denied colluding with anyone to obtain approvals unlawfully that since there is no appeal against the ruling in this court in ELC 078 of 2023 before the suit was withdrawn which ruling directed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to obtain essential approvals. They urged the court to dismiss the application.
6. The Applicants filed written submissions dated 22<sup>nd</sup> May, 2024 while the 1<sup>st</sup> & 2<sup>nd</sup> Respondents submissions is dated 18<sup>th</sup> June, 2024. The Applicants submit that the approvals were obtained illegally, no public participation and the court's order cannot be interpreted to allow the Respondents obtained without following due process, The Applicants submit change of user can only be obtained after the 3<sup>rd</sup> Respondent has issued a gazette notice inviting members of the public to give their views on the proposed development and they cited the provision of section 40 of the Physical Planning and Land Use Act.
7. While referring to the case of Kenya Bus Services Ltd & 2 Others vs Attorney General (2005) KLR 787, the Applicants aver that planning of an urban area comes with restriction over zoning areas thus does not give rise to rights but restrictions. That the petitioners are elderly persons aged 70+ years thus noise from the school will be so irritating and discomforting. That they have demonstrated a prima facie case that their rights to own and have quite possession of property have been arbitrarily infringed.
8. On irreparable loss, the Applicants submit that the subject matter in the case before court, is establishing a school on land within an estate which cannot be irreplaceable by way of damages if the Respondents are not constrained by way of an injunction. That the school generates noise pollution, smoke pollution from the kitchen, traffic congestion leading to wasting of time at the main entrance of the estate whose effects cannot be compensated in monetary terms. It is only prudent that an injunction does issue to bar the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their agents from any further dealings as prayed in the notice of motion application dated 8<sup>th</sup> April, 2024.
9. They continued that the scale of balance of convenience tilt in favour of granting the orders. That the law protects a litigant that has been harmed by a party who unjustifiably tends to deprive the rightful owner of his property value and the neighbour principal has to be adhered too to avert committing torts.
10. This court has read and considered the pleadings filed and the submissions rendered. What is before me is an application whose purpose is for grant of interim reliefs pending hearing and determination of the Petition. On the face of the application, the orders sought appear to be of a permanent nature save for prayer (b) of the motion. I will therefore consider the application on prayer (b) that is seeking for an order to bar the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from operating a school on L.R No. 1870/X/84 situate in Westlands Sports Road pending determination of the Petition.
11. The application is premised on the grounds that the approvals obtained were obtained irregularly as there was no public participation undertaken by the Respondents. In contrast, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that they obtained all the requisite approvals beginning in 2015 when they began construction on the suit premises. They averred to also obtaining change of user from residential to



commercial and proceeded to annexed the development approvals and the change of user licence issued to them in the replying affidavit.

12. Before filing this petition, the Applicants had filed a suit vide a plaint in ELC E078 of 2023. Alongside the plaint, they filed a notice of motion application dated 27<sup>th</sup> February, 2023. One of the prayers sought read thus;

“That pending the hearing and determination of the suit, the court be pleased to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, agents and any person acting under its authority by way of an injunction from establishing, operationalizing and/or in any other way carrying on the business of a school known as Pearls Kids Academy on L.R No. 1870/X/84”

13. That application in the previous suit was heard and determined on its merits. In my ruling delivered on 26<sup>th</sup> October, 2023, I made the following findings at paragraph 33 & 34 of the ruling thus;

“33. It is discernable from the pleadings that the suit property was designed as residential premises, for example, as gleaned from the application for change of user. Since the intended land use change was out of character with its surrounding, the Defendants ought to have undertaken an environmental impact assessment. However, there is no EIA license annexed to the replying affidavit to ascertain if the exercise was done. This omission evidences the presence of a prima facie case put forth by the Applicants.

34. The Defendant argument that they obtained the requisite approvals from the 1<sup>st</sup> Interested Party and the Ministry of Education does not take away their obligations of complying with the Land Use and Physical Planning Regulations. Allowing the Defendants to proceed with the development (running of the school) before complying with the law is asking the court to abet an illegality.”

14. I allowed the said application on the following terms;

“(a) That pending the compliance with the EIA and Change of User Regulations and or hearing ad determination of this suit (whichever is earlier) this Honourable Court does issue orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants / Respondents, their agents, servants, employees or any person acting under their authority by away of temporary injunction from operationalizing, running and/or in any way carrying on the business of a school, known as PEARLS KIDS ACADEMY on L.R NO.1870/X/84 situated in Westlands, Sports Road,

(b) The costs of the application to the Applicants”

15. Subsequently, the petitioners decided to withdraw suit ELC E078 of 2023 after it filed the present petition. They proceeded to bring the current application which is almost similar to the previous application dated 27<sup>th</sup> February, 2023 except the change of user licences now being challenged was issued in July, 2023. Although ELC E078 of 2023 was withdrawn. It does not change the fact that the impugned application dated 27<sup>th</sup> February, 2023 was heard on merit and a determination made. The orders given were conditional to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents obtaining the requisite EIA and change of User Licences.



16. I have noted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents obtained the licences from Nairobi City County for change of user dated 19<sup>th</sup> December, 2023 (annex TS'10') and NEMA licence dated 15<sup>th</sup> December, 2023 (annex TS '11') with all dates being post the date of ruling rendered in ELC E078/23. Thus, the present application challenges the current licenses which the Applicants aver were not properly obtained. The issues raised make a good case for trial and hence the proof of a prima facie case, the Applicants have stated that unless the orders are granted they are likely to suffer irreparable loss inter alia loss of ambience, inconvenience due to increased traffic and noise that will come from the school/ establishment.
17. The court takes cognizance that the school is already operational and so it bring into question in whose favour the balance of convenience tilts if the orders are granted. I find that inconveniences to be caused to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents far outweighs that of the Applicants because, previously, this court had stopped the operations of the school pending compliance with the development regulations.
18. It would serve the interests of justice to have the suit heard on merits instead of issuing a temporary mandatory injunction at this stage. The inconvenience of traffic can be temporarily minimized by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meeting the costs of hiring the services of traffic police during the school peak hours of drop-off and pick-ups. At the interlocutory stage, the levels of noise cannot be ascertained to be outside the allowable levels and no such arguments were made that the noise levels are excessive.
19. In conclusion, although I find the Applicants have demonstrated a prima facie case, the standard of proof to warrant the granting of an order of mandatory interlocutory injunction was not met. Further, the balance of convenience tilts in maintaining the status quo which is the having the school which is already operating to continue running until the Petition is heard and determined. Consequently, the application is dismissed with costs in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**A. OMOLLO**

**JUDGE**

