



Plein v Gathigia (Sued on her behalf and on behalf of Kingdom Seekers Fellowship Nyahururu) & 3 others (Environment and Land Appeal E010 of 2022) [2023] KEELC 878 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

YM ANGIMA, J

FEBRUARY 16, 2023

BETWEEN

PURITY MUTHONI PLEIN APPELLANT

AND

PASTOR TABITHA GATHIGIA (SUED ON HER BEHALF AND ON BEHALF OF KINGDOM SEEKERS FELLOWSHIP NYAHURURU) 1ST RESPONDENT

KINGDOM SEEKERS FELLOWSHIP 2ND RESPONDENT

PASTOR FRANCIS NDUNGU GITHAIGA (SUED ON HIS OWN BEHALF AND ON BEHALF OF JESUS EXALTATION CENTRE-NYAHURU) 3RD RESPONDENT

JESUS EXALTATION CENTRE-NYAHURU JESUS EXALTATION FAITH MINISTRY 4TH RESPONDENT

RULING

A. The Appellant's Application

1. By a notice of motion dated 23.06.2022 grounded upon sections 3 & 3B, 6 and 63(e) of the *Civil Procedure Act*, (cap.21), order 42 rule 6(6) and order 51 rule (1) of the *Civil Procedure Rules* 2010, the appellant sought an interim injunction restraining the 4th respondent from continuing with construction of permanent structures on L.R.No. Nyahururu Municipality Block 8/1017 (Parcel 1017) in contravention of the Physical Planning Act, 1996 pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the Appellant, Purity Muthoni Plein, on 23.06.2022 and the exhibits thereto. The



appellant stated that she was aggrieved by the ruling and order of the trial court made on 07.06.2022 dismissing her application for an interim injunction against the Respondents, hence the instant appeal.

3. The Appellant contended that unless the interim injunction sought was granted the construction of a permanent church building by the 4th respondent shall alter the substratum of the appeal and render enforcement of any decree by the appellate court difficult or the suit before the trial court nugatory. It was further contended that the appeal had high chances of success and that the said construction was being unlawfully undertaken on parcel 1017 using approved plans for a totally different parcel of land being L.R.No. Nyahururu Municipality Block 8/374 (Parcel 374).

B. The Respondents' Response

4. The 4th respondent filed a replying affidavit sworn by John Kanyango Wathira on 26.07.2022 in opposition to the application. The 4th respondent stated that it was the registered proprietor of parcel No. 374 where the construction in issue was being undertaken after obtaining all the required approvals under the law. It was denied that the church building was being erected on Parcel 1017 as claimed by the appellant.
5. The 4th respondent stated that it had no ownership dispute with the appellant over Parcel 374 and that the said parcel was initially allocated for commercial cum industrial purposes in line with the Part Development Plan (PDP) for the area and that the church had been in use since 2008 and conducting its activities thereon without any problem.
6. It was contended that in 2019 the 4th respondent submitted its building plans to the County Government of Laikipia for approval which approval was granted in 2021 upon payment of the requisite fee. It was further contended that the 4th respondent conducted an environmental impact assessment and submitted the relevant report to the County Government of Laikipia before obtaining development permission on 08.10.2021. It was further pointed out that the appellant had never challenged the approval of its building plans since 2021.
7. The 4th respondent further stated that it applied for change of user from commercial cum industrial to religious and a notice to that effect was published in the newspaper inviting objections by any concerned residents but the appellant did not raise any objection at the time. It was, therefore, contended that the appellant was estopped from raising any objections on change of user at this stage.
8. The 4th Respondent ultimately contended that the appellant had failed to satisfy the requirements for the grant of an interim injunction as set out in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] EA 358. It was contended that the Appellant had failed to demonstrate that she stood to suffer any irreparable loss or injury if the injunction sought was denied. The court was consequently urged to dismiss the application with costs.

C. Directions on Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions and the parties were given timelines within which to file and exchange their respective submissions. The record shows that the 4th Respondent's submissions were filed on 18.11.2022 but the appellant's submissions were not on record by the time of preparation of the ruling.

D. The Issues for determination

10. The court has considered the appellant's application dated 23.06.2022, the 4th respondent's replying affidavit in opposition thereto as well as the materials on record. The court is of the opinion that the



main question for determination is whether the appellant has made out a case for the grant of the temporary injunction sought.

E. Analysis and Determination

11. The court has fully considered the material and submissions on record. The appellant's application was hinged on the ground that the 4th respondent was undertaking a permanent construction on Parcel 1017 without any approved building plans in violation of the law. It was contended that the only plans which were approved were in respect of Parcel 374. The 4th respondent, on the other hand, asserted that the construction in issue was actually being undertaken on Parcel 374 and not Parcel 1017. The 4th Respondent explained the steps it took to obtain change of user, approval of building plans, and as well as development permission from the County Government of Laikipia which is the planning authority under the *Physical and Land Use Planning Act*, 2019. It was submitted that the Appellant's application had no merit for failing to meet the requirements for the grant of an injunction as enunciated in the case of *Giella –vs- Cassman Brown & Co. Ltd.* [1973] EA 358.
12. In the said case, the former Court of Appeal for East Africa summarized the principles for the grant of an interlocutory injunction as follows:
 - a. First, an applicant must demonstrate a prima facie case with a probability of success at the trial.
 - b. Second, an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm or damage.
 - c. Third, where the court is in doubt as to the second principle, it shall determine the application on a balance of convenience.
13. The nature of a prima facie case was described by the Court of Appeal of Kenya in the case of *Mrao Limited –vs- First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 as follows:

“...So what is a prima facie case? I would say that in civil cases it is a case, 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 as to call for an explanation or rebuttal from the latter...”
14. The court is far from satisfied that the appellant has demonstrated a prima facie case with a probability of success at the trial. There is no credible evidence on record to demonstrate that the 4th respondent is undertaking its construction on parcel 1017 as opposed to parcel 374. There is no report from either a surveyor or official of the County Government of Laikipia alleging that the construction is taking place on parcel 1017 and not 374. There is no material on record to demonstrate that the 4th respondent obtained change of user, approval of building plans and development permission through unlawful or fraudulent means. The 4th respondent's allegation that it has been utilizing parcel 374 for its religious activities since 2008 was not controverted by the Appellant.
15. The court is thus of the opinion that the appellant has failed to satisfy the first crucial principle for the grant of a temporary injunction. There is, therefore, no need of considering the rest of the principles in the instant application. The court is also not satisfied that the appellant's suit shall be rendered nugatory should it be ultimately successful. There is no material on record to demonstrate that it shall be impossible to bring down any structures which the 4th respondent may put up upon conclusion of the suit in the appellant's favour. Consequently, the court is not inclined to grant the interim injunction sought in the application.



F. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds no merit in the appellant's application for an interim injunction. Accordingly, the appellant's notice of motion dated 23.06.2022 is hereby dismissed. Costs of the application shall be costs in the appeal.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF FEBRUARY, 2023.

In the presence of:

N/A for the Appellant

Mr. Kaburu for the 1st Respondent

N/A for the 2nd & 3rd Respondents

Ms. Njoki Muriithi for the 4th Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

