



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 234 OF 2020

SOSPLASHED LIMITED & ANOTHER..... PLAINTIFFS

VERSUS

PWANI MAONI LIMITED & 3 OTHERS DEFENDANTS

RULING

(Application for injunction; principles to be applied; applicants being neighbours of the 1st respondent who is undertaking a construction through the 2nd respondent; applicants contending that the development is illegal for want of licences from NEMA and the County Government sued as 3rd and 4th defendants; 1st respondent filing a replying affidavit sworn by a person purporting to be a director; applicants demonstrating that the deponent is a stranger as she is not a director of the 1st respondent; licences displayed questionable as they are not in the name of the 1st respondent; prima facie case established that the 1st and 2nd respondents may be undertaking an illegal development; order of injunction issued)

1. The plaintiffs commenced this suit through a plaint filed on 17 December 2020. The 1st plaintiff is the owner of the land parcel Kwale/Diani Beach/799 whereas the 1st defendant is the owner of the plots Kwale/Diani Beach/800 and 801 each measuring half an acre, which abut the plot of the 1st plaintiff. The 2nd plaintiff is the Chairperson of South Coast Residents Association, whose objective is to promote the interests of property owners in South Coast. The complaint that the plaintiffs have concerns a development being of the 1st defendant on its two plots, with the 2nd defendant employed by the 1st defendant as its contractor. The development comprises of high rise apartments and the plaintiffs contend, inter alia, that it is being undertaken fraudulently. Among the particulars of fraud pleaded are that the 1st and 2nd defendants have not obtained the requisite building approvals and/or Environmental Impact Assessment Licences respectively from the 3rd defendant (the National Environment Management Authority) and the 4th defendant (County Government of Kwale). The plaintiffs claim that the 1st and 2nd defendants fraudulently obtained building approvals and an EIA licence in the name of Ravji Karsam Hirani and Kalpana Ravji Karsan, the previous owners of the two plots. They further complain that the area is meant for low density accommodation yet the 1st defendant is undertaking a high rise development. The 1st plaintiff on its part, claims that it will suffer a loss of KShs. 14,466,000/= , in order to make alterations on its original development plan, so as to mitigate the effects of the construction of the 1st and 2nd defendants. In their suit, the plaintiffs want orders of a declaration that the building being undertaken by the 1st and 2nd defendants is illegal for being constructed without obtaining planning approvals and an EIA licence; a permanent injunction to restrain the 1st and 2nd defendants from constructing unless there is strict compliance with planning and environmental regulatory requirements; an order directing the defendants to demolish the buildings on the 1st and 2nd defendants' plots, or the plaintiffs be allowed to demolish at the defendants' cost; an order directing the 3rd and 4th defendants to cancel the building plans and EIA licences they have issued; special damages in favour of the 1st plaintiff for the sum of KShs. 14, 664, 000/=; general damages for breach of the plaintiffs' right to privacy and a clean and healthy environment; interest and costs.

2. Together with the plaint, the plaintiffs filed an application for injunction to have the 1st and 2nd defendants restrained from proceeding with the construction pending determination of this suit. It is that application which is the subject of this ruling.

3. To oppose the application, the 1st and 2nd defendants filed replying affidavits sworn by Jane Mueni Musyoka and Eric Onyango Omolo. Jane Mueni Musyoka has deposed that she is one of the directors of the 1st defendant. She has annexed resolutions said to have come from the company authorising her to swear the replying affidavits. The resolutions are purported to have been passed in a meeting of directors where Festus Kalii Musyoka and Jane Mueni Musyoka were the directors present. Ms. Musyoka has deposed that all the building plans were approved by the relevant authorities on 8 November 2019 and she has annexed the copies of the plans. She has contended that the plaintiffs are acting with mala fides. She deposed that the approved plans and EIA licences are in the name of the previous owners because they were taking over an on-going project.

4. The plaintiffs filed a supplementary affidavit. In it, they have attached a copy of the CR12 company particulars of the 1st defendant to demonstrate that neither Jane Mueni Musyoka nor Festus Kalii Musyoka are directors of the 1st defendant. There is also attached an affidavit of Ravji Karsan Hirani who has refuted giving any permission to the 1st defendant to use their names as previous owners to undertake any project. He has deposed that when they sold the land, it was vacant, thus principally refuting the claim that there was a take-over of a project that they had commenced.

5. Counsel agreed to dispose of the application through written submissions and I have taken note of the submissions of Ms. Saeta, learned counsel for the 1st plaintiff, and Mr. Birir, learned counsel for the 1st and 2nd defendants. The 3rd and 4th defendants did not participate in the application. Ms. Saeta in her submissions referred me to various sections in the Physical Planning Act, 2019, and the Environmental Management and Coordination Act (EMCA) on the need to have a development and EIA licence. She thought that her client has established a prima facie case. She submitted that the damage her clients stand to suffer cannot be compensated by an award of damages. She submitted that on a balance of convenience, if the 1st and 2nd defendants continue with their development, great expense will be incurred if the court orders a demolition of the structures, and further, that the 1st defendant will dispose of the units to third parties.

6. On his part, Mr. Birir submitted on the issue of directorship, that even if Jane Mueni Musyoka is not a director, the 2nd respondent has declared that all approvals and licences were obtained. He submitted that it would be unjust to strike out the pleadings. He submitted that it is not true that the previous owners did not give consent for their names to be used. He added that the properties were transferred to the 1st defendant on 14 September 2020, and therefore they could not obtain approvals without using the name of the previous proprietor. He submitted that the plaintiffs have not established a prima facie case nor do they risk to suffer irreparable loss. He stated that the 1st respondent is willing to commit to an undertaking for damages.

7. I have considered the application. It is of course the plaintiffs' case that the 1st and 2nd defendants are developing without the requisite licences. It is correct as put forth by counsel for the plaintiffs that the law does require a party to have the requisite development and EIA licences before embarking on a development. Section 57 (1) of the Physical Planning and Land Use Act, provides as follows :-

Development permission

(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.

It will thus be seen that one ought not to carry out development without a development permissions. In situations where the person is not the owner of the land, Section 59 (4) provide as follows :-

Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission.

For EIAs, Section 58 (1) prohibits the carrying out of a project without first undertaking an EIA. It provides as follows :-

Application for an Environmental Impact Assessment Licence

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or

causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

8. It is thus clear that one needs to have a development and EIA licence before embarking on a project. The case of the plaintiffs is that the 1st defendant does not have these licences and I think they do have a point. What the 1st defendant has displayed are EIA licences and development licences issued to Ravji Karsan Hiraji and Kalpana Ravji Harsan. They appear to have been the previous owners of the 1st defendant's properties, but they say that they never applied for any licences, and they never gave their consent for their names to be used by anyone to apply for licences. The 1st and 2nd defendants have not shown this court any consent from the previous owners. Their claim that there was an on-going project has also been disputed by the previous owners. The fact remains that the 1st defendant has not displayed any development licence or any EIA licence for its project in its name. Prima facie, the 1st defendant therefore ought not to be undertaking any project.

9. I even now wonder who the 1st defendant is, for it appears to have "ghost" owners. The documents claimed to be filed on behalf of the 1st defendant are filed by Jane Mueni Musyoka. The directors and shareholders of the 1st defendant, according to the CR12 displayed and which is not disputed, are Adrinus Maria Verhoef and Dorcas Waithira Kiiru. They have not sworn any affidavit and I have nothing from them showing that they have authorised Jane Mueni Musyoka to represent the company or to swear any affidavits on its behalf. There is a purported "resolution" of the company that Ms. Musyoka annexed. It is said to have been issued pursuant to a meeting of directors and the alleged directors are said to be Jane Mueni Musyoka and Festus Kalii Musyoka. These, at least from the material before me, appear to be strangers to the 1st defendant. I am still at a loss as to who exactly they are and how come they are filing documents purporting to represent the 1st defendant.

10. Prima facie, from what is before me, the 1st defendant does not appear to have any licence to develop. This court cannot close its eyes to an apparently illegal development. There was mention that great cost will be suffered by the 1st defendant. My answer to that is that the 1st defendant ought to have known of the great risk it was taking by undertaking a development without a licence. In any event, a person cannot be allowed to benefit from his illegal acts. Allowing the project to continue will be allowing the 1st defendant to benefit from an illegality.

11. From the above, I am persuaded that this is a fit case to grant an injunction. The plaintiffs certainly have displayed a prima facie case. Without a valid development permission, it cannot be said that it is even clear what the 1st and 2nd defendants are developing, and given that lack of clarity, it is probable that the development being undertaken may lead to irreparable loss to the plaintiffs, that may not be compensated by an award of damages. If I was to consider the balance of convenience, it tilts towards suspending the development given the prima facie evidence that it is not licenced.

12. I therefore order the 1st and 2nd defendants and/or any of their servants and agents, to forthwith stop any further construction or development of the project that is being undertaken within the land parcels Kwale/Diani Beach Block/800 and Kwale/Diani Beach Block/801 until further orders of this court or until the disposal of this suit. Both the 3rd and 4th defendants and the OCS Diani Police Station are authorised to ensure that this order is obeyed.

13. The plaintiffs will also have the costs of this application as against all defendants.

14. Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA



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