REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 547 OF 2013

IRENE JOYCE KITUR CHUMO……PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI……1ST DEFENDANT

EPCO BUILDERS LIMITED……2ND DEFENDANT

RULING

The application before this court for determination is the Notice of Motion dated ***30th January 2014*** brought under Sections ***1A,1B 3 & 3A*** of the ***Civil Procedure Act, Order 40 Rules 1 & 2*** and ***Order 51 Rule 1 of the Civil Procedure Rules*** seeking for orders that;-

i. ***pending the hearing and determination of the main suit the 1st defendant be restrained either directly and/or their employees and/or officers from demolishing, pulling down or in any way interfering with the plaintiff's occupation, use, quiet possession of her property located on plot No Block 72/2263 B175 Uhuru Gardens Estate;***

ii. ***Pending the hearing and determination of the suit the 2nd defendant be directed to furnish to the plaintiff the initial approved structural and architectural plans for the sewer lines for the 1st defendant to approve and allow her to reconstruct the damaged main and adjacent sewer lines.;***

iii. ***That pending the hearing and determination of this suit the 1st defendant be directed to approve the structural and architectural plans for reconnecting and reconstructing the sewer line ,reconstruction of the detached servant's quarter ,erection of the damaged perimeter wall and damaged kitchen wall to the main house.***

This application is premised on the grounds stated on the face of the application and the plaintiff's supporting affidavit wherein she averred that she is the registered lessee of all that property better known as ***Plot No. Block 72/2263 Plot B175*** corner plot located at ***Uhuru Gardens*** for 99 years from ***1st January 1987***, after purchasing the said property from National Housing Corporation and has been in possession since ***1990.***Further she averred that the terms of the purchase included construction of a detached servants quarter which the 2nd defendant did upon securing all the approvals and consents on or about ***1990.***However the servants quarter got burnt on or about ***7th April 2007*** but she renovated the same . She further averred that on or about ***December 2009*** in the midmorning the 1st defendant through its agent's employees, servants and agents entered into her property and brought down part of the

perimeter fence together with the servant quarters. In carrying out the demolition, the 1st defendant's servants stole from the servants quarter ***31 cartons of ceramic tiles, plumbing materials, electrical item,15 bags of cement,2 toilet seats with covers, kitchen cupboards,2 flush doors, wheelbarrow,4 plastic buckets all valued at Kush 166,500.00***.They they also destroyed two 200 liters plastic containers, three 140 liters water containers and generators all valued at ***Ksh 376,500.00***.In October 2008 the 1st defendant through its servants demolished the compound wall and the main sewer to the main house and in March 2010 demolished the main sewer line to the estate of Uhuru Gardens and the sewer lines connecting the main sewer line and excavated soil using a caterpillar and dumped soil inside the demolished sewer line connecting the house sewer line to the main sewer line to the estate thereby rendering it totally unusable. She further averred that the 1st defendant's servants forcefully broke into the main steel gate, entered the compound and went ahead to break the front steel door leading to the sitting room and stole a television set, gas cylinder, DVD, her passport, Microwave, shoes and cloths all valued at Ksh 200,000/=In January 2011, the 1st Defendant through its servants fully demolished the servants quarter damaged the kitchen wall to the main house. That the 1st defendants action rendered the main and direct sewer lines unusable and house inhabitable as the main sewer line for the estate was inside her compound and was serving the 4 immediate neighboring houses thereby affecting the neighboring housing leading to blockage of their sewer and the raw sewage pouring out of the street and also her compound. She reported the incident to the City Council of Nairobi and the Ministry of Local Government and still waiting for a report from the two institutions. She now wants a permanent injunction directed to the defendant restraining them from pulling down or interfering with her occupation of the suit property, that the demolitions were illegal and that she is entitled to compensation for the loss suffered. She also seeks that the 2nd defendant do furnish her the initial approved structural and architectural plans for the detached servants quarters and sewer lines and for the 1st defendant to approve and allow her to reconstruct the detached servants quarters and sewer lines.

This application is opposed. The 1st defendant filed its grounds of opposition wherein it stated that the application was premature, misconceived and bad in law as the applicant had not complied with section 13 (1) of the Physical Planning Act which required that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected may within sixty days of receipt by him of notice of such, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed. That the court has no jurisdiction to the orders prayed in the application until the applicant has exhausted the available procedural remedies. That the applicant was of violation section 30(10) and (2) of the Physical Planning Act which makes any development without the 1st defendants approval illegal and any dealings regarding the development null and void. Further, 1st Defendant also stated that section 30 (3) of the Physical Planning Act makes any development without the defendant's approval illegal therefore the applicant cannot find a cause of action when she is in clear breach of law. That under section 29 and 30 of the Physical Planning Act the 1st defendant is mandated to regulate use and development of land buildings within its jurisdiction and that its approval is a mandatory requirement before any development is done.

Parties filed their written submissions which this court has given due consideration.The plaintiff submitted that she has established a prima facie case and relied on the case of **Giella –vs Cassman Brown Limited** and also stated that this was a matter of public interest because the demolition caused the sewer line connecting the Uhuru Grdens Estate to be interfered with and that the sewer line passes at the corner of the applicant's house which posses a health hazard not only to the applicant but to other residents of the neighbourhood as the 1st Defendant had failed to repair the same.She further submitted that she had no avenue to seek redress as the enforcement notices were sent to her after the destruction of her property and only sent the enforcement orders after this suit had bee instituted.She further submitted that not only was the detached servant's quarter and part of the perimeter wall fence demolished ,she had borrowed a loan from National Housing Corporation to finance the reconstruction. Further the sewer line connecting her house was filled up which action has not only prevented her from charging the market rate for rent but also a health risk to her and other tenants of Uhuru Gardens Estate as the 1st Defendant failed and neglected to repair the sewer line.

The 1st defendant in its submissions stated that it was justified to demolishing in structures and it followed the right procedures prescribed by the law by issuing the Notice in respect of the development carried out without a development permission granted by the 1st Respondent under section 33 of the physical planning Act. That it was the duty of the plaintiff to submit drawings for approval and the plaintiff never did so, adding that the approval by the 1st defendant was a mandatory requirement before any development could be done.

This Court has now considered the written submissions and prayers in the application by the plaintiff and the Court finds that only one issue arises for consideration which is whether the plaintiff has established a prima facie case to enable the court grant her the order of injunction sought.It is not disputed that the plaintiff is the owner of the suit property and that the servant quarters was burnt down sometime in 2007.The plaintiff alleges that she was desirous of reconstructing the servant quarters and for that matter sought the necessary approvals to do construction.She however did not state whether the documents she submitted for approval were approved or rejected.It is her evidence that she reconstructed the servant quarters and even rented it out to a tenant.It is her averment that the 1st defendant without sending enforcement notices demolished the servant quarters and in the course of demolishing the alleged illegal structures the 1st defendant interfred with the sewer line. The 1st defendant has defended itself by stating that the plaintiff should have first sought approval from its offices before undertaking the reconstruction of the servants quarters.The 1st defendant further submitted that the plaintiff should have first sought redress from the 1st defendant since there were mechanisms placed in its institution in dealing with approval of building plans and appeals in cases where a party is aggrieved by the actions of the 1st defendant.

Having considered the pleadings and the written submissions, I concur with the 1st defendant that the plaintiff had an avenue through which to file her complaint where she was not agreeable with the decision of the 1st defendant. Such mechanisms provided is the Physical Planning Act but she has not done so as there is no evidence that she attempted to do so. It is a well established principle that where there exits an alternative remedy the same ought to be exhausted before the court's jurisdiction is invoked. I am persuaded by the court decision in **Republic –vs.- City Council of Nairobi ex parte Leah Aida Wambete [2010] e KLR** where the court held that

"Section 38 of the Act sets out an elaborate procedure to be followed in the issuance execution and determination of any grievance relating to Enforcement Notices. The said provisions read alongside with sections 13 and 25 of the same Act reinforces the position that before a party exhausts the procedure set out there in any action in the High Court would be premature"

I find that the plaintiff has not established that she has a prima facie case to warrant her the prayers sought and therefore her application dated ***30th January 2014*** is premature.

Having considered Plaintiff/applicant Notice of Motion dated ***30th January 2014*** , the Court finds it not merited and consequently dismisses the said application entirely with costs to the Defendants .

It is so ordered.

Dated, Signed and Delivered this *20th* day of *May,* 2015

L.GACHERU

JUDGE

In the Presence of:-

Mr Odundo for Plaintiff/Applicant

Mr Mung’ao holding brief for Mr Osiemo for 2nd Defendant

Court Clerk: Hilda

Court:

Ruling read in open Court in the presence of the above counsels.

L.GACHERU

JUDGE

20/5/2015