



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 82 of 2013**

**STEPHEN MBUGUA.....PLAINTIFF/APPLICANT**

**V**

**CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff by a Notice of Motion dated 18<sup>th</sup> January, 2013 expressed to be brought under Order 40 Rule 1(a) and (b) of the Civil Procedure Rules, Sections 1, 1A, 3 and 3A of the civil Procedure Act and all other enabling provisions of the law inter alia seeks the following orders:-

1. ....
2. That a temporary injunction do issue to restrain the respondent from demolishing trespassing or in any way deal with property No. 578 on L.R No. 8469/9 pending the determination of this application.
3. That a temporary injunction do issue to restrain the respondent from demolishing trespassing or in any way deal with property No. 578 on L.R. No. 8469/9 pending the determination of this suit.
4. ....

The application is supported by the affidavit of the plaintiff and the further grounds as appear on the face of the application as follows:-

- (a) That the applicant is the bona fide proprietor of land Parcel No. 578 on L.R. No. 8469/9.
- (b) The applicant is constructing a commercial house on the said plot.
- (c) The applicant has been served with enforcement yet he has complied with the defendants requirements.
- (d) That the applicant may suffer untold losses should any demolition take place.
- (e) That it is in the interest of justice that the orders sought be granted.

The defendant in response to the plaintiff's application for injunction on 5<sup>th</sup> February, 2013 filed grounds of opposition and in the main contended in the grounds of opposition that the plaintiff's suit is premature, misconceived and bad in law. In particular the defendant contends that the plaintiff has not complied with Section 13(1) of the Physical Planning Act Cap 286 Laws of Kenya that requires that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected

therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed. The defendant further contended that the plaintiff's suit is frivolous and devoid of any merit to the extent that the plaintiff adopted the wrong procedure in seeking redress and that this court lacks jurisdiction to grant the orders sought in the plaint and in the instant application. Additionally the defendant avers that the plaintiff did not obtain approval for the development as required under Section 30(3) of the Physical Planning Act and that the defendant in exercise of its mandate under the Physical Planning Act lawfully issued the plaintiff with an enforcement notice in accordance with the law.

The plaintiff in the supporting affidavit has annexed photographs showing the development he is undertaking and those of his neighbours. The plaintiff although under paragraph 5 of the filed plaint he states that he commenced construction in November, 2012 after fulfilling the council requirements and paying for the same the plaintiff has not tendered any evidence to show that the building plans had been approved by the defendant.

Payment of the approval fees alone cannot connote that approval was given. Payment of the approval fee is to enable the defendant to carry out the process of evaluation and approval of the plans if the same satisfy the set criteria. Approval ought to be signified by a decision emanating from the defendant and usually apart from the formal decision by the evaluation committee in the case of approval, the approval is endorsed on the submitted building plans. The plaintiff has not exhibited any minute by the defendant approving the building plans and/or any plans duly endorsed with the defendant's approval.

The parties have filed written submissions in support of their respective contentions and positions. The plaintiff maintains that he has shown he has a prima facie case with a probability of success and that he stands to suffer irreparable damage should the defendant execute the enforcement notice. The defendant for its part contends that sections 29 and 30 of the Physical Planning Act gives it the mandate to regulate use and development of Land and buildings within its jurisdiction and that Section 38 of the Act clothes it with the authority to enforce compliance of the Law.

The defendant consequently contends that in issuing the enforcement Notice against the defendant it acted lawfully and within its mandate and in compliance with the law.

I have considered the rival submissions by the parties and on the basis of the facts and evidence tendered by the parties I make the following observations:-

1. The plaintiff is the beneficial owner of Plot No. 578 Mwiki having purchased the same from the previous owner and that the plaintiff has commenced construction of residential units on the said property.
2. That although the plaintiff states that he has fulfilled all the requirements to enable him to construct, he has not availed any evidence to demonstrate that the building plans were approved by the defendant as the law requires.
3. That the defendant under the provisions of the Physical Planning Act Cap 286 Laws of Kenya has the legal mandate to regulate use and development within its jurisdiction and in particular is required to approve any building plans. It is not difficult to understand why this is so because development within the city of Nairobi and indeed in all Local authorities need to be regulated to accord to the respective development plans of the authorities. If there was no such requirement the planning and development would be haphazard and chaotic. The mushrooming of informal settlements/slums in many of the local authorities can to a large measure be attributed to lack of proper planning and non compliance with building bye-laws and the appropriate statutory provisions.
4. The defendant under section 38 of the said Act has the mandate to enforce compliance with the provisions of the Planning Act and in exercise of this mandate served an enforcement notice upon the plaintiff since the plaintiff was constructing a building within its jurisdiction without any approved plans.

The issue for the court to determine is whether on the basis of the attendant circumstances and the evidence placed before the court the plaintiff has made out a case to merit the grant of an interim injunction.

An applicant for an injunction has to satisfy the conditions that the court has to take account of before granting an injunction as enunciated in case of **GIELLA VS. CASSMAN BROWN & CO. LTD [1973] EA 358** namely:

- (i) The applicant has to show and demonstrate that he has a prima facie case with a probability of success;
- (ii) The applicant should also show that he stands to suffer irreparable loss/damage that cannot be compensated for by an award in damages in the event the injunction is not granted;
- (iii) In case the court is in doubt it can determine the matter by considering the balance of convenience as between the applicant and the respondent.

In the instant suit the plaintiff/applicant has not shown any evidence that he in fact sought and obtained approval of the building plans from the defendant for the building that he was constructing. The defendant has a legal mandate to regulate use and approve any building plans and further is empowered to enforce compliance. The defendant states that the enforcement notice was issued in compliance with the law since the plaintiff did not have any approval for the building he was constructing.

To the extent that the plaintiff has not shown the building plans for the construction he was making had been approved by the defendant it is my view that he has not discharged the burden of showing or demonstrating that he has a prima facie case with a probability of success and on that account his application for injunction is doomed to fail. The plaintiff was in breach of a legal requirement and he therefore cannot rely on his acts of breach to seek an equitable remedy from the court as that could be construed to mean the court sanctions the legal breaches.

The plaintiff has argued that the neighbours have constructed similar units but in my view even if that was true that cannot come to his aid as every case must be considered on its own merits. It would not matter even if the neighbours constructed without having obtained approved building plans as the defendant would still be entitled to enforce the law and seek compliance. The Defendant can order the demolition and/or removal of any structure that is put up in contravention of the law. That is what section 38 of the Physical Planning Act empowers it to do.

As I have found that the plaintiff has not demonstrated he has a prima facie case I need not consider the other two conditions but I would observe that the plaintiff cannot suffer irreparable harm by being required to comply with the law and in circumstances I would hold that the plaintiff has not demonstrated he would suffer irreparable harm or damage.

In the result I therefore find and hold that the plaintiff's application lacks any merit and I order the same to be dismissed with costs to the plaintiff.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the Plaintiffs

..... for the Defendant