REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISIONxc

ELC CIVIL SUIT NO. 655 OF 2011

DAVID KIRUTHI KAMOCHE ……..…….…….....……..…PLAINTIFF

VERSUS

THE MUNICIPAL COUNCIL OF RUIRU….....….....….1ST DEFENDANT

THE CHIEF LANDS REGISTRAR..…….....…….....…….2ND DEFENDANT

THE HON. ATTORNEY GENERAL …….....…….3RD DEFENDANT

RULING

The application filed herein by the Plaintiff is by way of Notice of Motion dated 21st November 2011. The Plaintiff is seeking orders that pending the hearing and determination of the suit, a temporary injunction do issue restraining the 1st Defendant, its employees and/or agents from demolishing or interfering however with the Plaintiff's developments on Ruiru Town/496 (hereinafter referred to as 'the suit property').

The Plaintiff in his supporting affidavit sworn on 21st November 2011 states that on 21/04/2010 he entered into an agreement for sale with one Sona Properties Limited, for the purchase of the suit property for the sum of Kshs.2,000,000/=. Further, that prior to purchasing the suit land, the Plaintiff conducted a search at the lands registry in Thika and confirmed that Sona Properties Limited were the registered owner of the suit property. The Plaintiff claims that he therefore paid the balance of purchase price and took over possession of the suit property in September 2010. The Plaintiff has annexed to the said affidavit a copy of the certificate of lease issued to Sona Properties Ltd on 16th February 1996, a copy of the certificate of official search dated 18/5/2010 and a copy of the agreement for sale dated 21st April 2010. Also annexed are copies of various cheques paid to Sona Properties Ltd, the assessment of rates payable to the 1st Defendant as at 14/09/2010 of Kshs.43,275/=, and evidence of payment of the said amount by Sona properties Limited on the said date.

The Plaintiff avers that on taking possession of the suit property, he paid the 1st Defendant the fees for approval of building plans for the construction of a commercial building on the said property, and inspection fees in the sum of Kshs.15,300/=. On approval of the development plans by the 1st Defendant, the Plaintiff states that he commenced construction of a three (3) storey commercial building. The Plaintiff has annexed as evidence a copy of the assessment of charges for the various fees by the 1st

Defendant, which also indicates thereon payment of the said fees of Kshs 15,300/= by the Plaintiff on 28th October 2010. Also annexed is a copy of the building plans approved by the 1st Defendant's Town Clerk on 12/11/2010, and photographs of the developments on the suit property.

The Plaintiff further avers that he received a notice from the 1st Defendant on 18/11/2011 requiring him to stop any further developments on the suit property and specifically to demolish all the developments on the suit property within three (3) days of the notice, failing which the Plaintiff would be prosecuted and remedial measures undertaken by the 1st Defendant. The said enforcement legal notice dated 18th November 2011 is annexed by the Plaintiff as evidence.

The Plaintiff claims that the 1st Defendant's notice is illegal, arbitrary, irrational, null and void for reasons of the facts given in the foregoing, and also for reasons that the Plaintiff is an innocent purchaser for value without notice of any impropriety on the land register. The Plaintiff also claims that his proprietary rights under the Constitution of Kenya, 2010 will be violated if the 1st Defendant carries its threat and demolishes the developments on the suit property.

The 1st Defendant's response is contained in the replying affidavit sworn by its Clerk, Lesley Khayadi, on 8th December 2011. It is stated in the said affidavit that the suit property is part of land reserved for public use and septic tanks placed thereon, and is controlled by the 1st Defendant as a public utility property for the benefit of the members of the public. It is further stated that the original master Plan for the area dated 16/2/1972 clearly shows that allocation in respect of the suit property had been deferred, and that the adjacent plots are sewered in the said property and thus the development thereon is hazardous to the residents of the area

The Deponent expresses shock at seeing the certificate of title produced as an exhibit by the Plaintiff, and states that the said title is a forgery and/or was produced in a fraudulent manner. The Deponent avers that the Commissioner of Lands cannot allocate any land which is under the control of a local authority without first getting a resolution from the Council concerned advising him to allocate such land, and that having gone through the bundle of documents presented by the Plaintiff, and there is no such resolution from the 1st Defendant. The Deponent has annexed as evidence a copy of a Tenant Purchase Scheme Layout Plan by the National Housing Corporation dated February 1973, and a copy of the minutes of meeting held on 13th May 2011 at the Ruiru District Commissioner's office on sewage disposal problem in Ruiru District.

The Plaintiff filed a Further Affidavit sworn on 30th December 2011 in which he denies that there are septic tanks or any other public works or installation on the suit property as alleged by the 1st Defendant. The Plaintiff reiterates that the 1st Defendant duly inspected the development site and issued him with a green card approving the construction on the suit property, and that he also obtained approval from the National Environment Management Authority (NEMA) in respect of the development on the suit property. The Plaintiff has annexed to the affidavit a copy the said green card dated 12th November 2010 and a rate clearance certificate issued by the 1st Defendant to Sona Properties Ltd on 29th February 2011 and valid until 29th February 2012. Also annexed are copies of the Plaintiff's environmental impact assessment report submitted to NEMA, a payment receipt for the said report dated 1st August 2011, an acknowledgement of receipt of the report by NEMA of the same date, and the approval thereof by NEMA dated 20th December 2011.

The Plaintiff's and 1st Defendant's Advocates reiterated the above arguments at the hearing of the application on 17th January 2012. The 1st Defendant's Advocate in addition submitted that the subject application is defective as it contravenes Order 40 Rule 4 (3) of the Civil Procedure Rules, as the Plaintiff did not serve it with summons and a copy of the Plaint. Further, that it is therefore not possible for the 1st Defendant to know what the Plaintiff's claim is, and to adequately respond to the application for the injunctive relief. The Plaintiff's Advocate in reply submitted that the present application was filed under certificate of urgency and summonses are yet to issue. The Advocate also submitted that technicalities are

no longer a bar to justice under Article 159 of the Constitution.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. Before proceeding with the substantive determination of the application filed herein, I will first deal with the contention that the application offends the provisions of Order 40 Rule 4(3) of the Civil Procedure Rules. After examination of the said provisions, I find that they only apply upon an *ex parte* order for injunction being issued by a court, which is the time there is an express requirement for the applicant to serve pleadings on the other party. We are now at the stage of *inter partes* hearing, and the 1st Defendant has clearly missed that boat, if ever the occasion arose to object. Any prejudice caused can therefore only be as a result of its own delay. What is applicable at this stage in terms of procedure are the provisions of Order 51 of the Civil Procedure Rules, which have been met.

I will now proceed to determine the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. On the first requirement as to whether the Plaintiff has shown a *prima facie* case, the Plaintiff has brought evidence of a title of the suit property issued to the vendor who sold him the said property, of the sale agreement and the payments made thereunder to the said vendor, and of the vendor having met his rate payment obligations with the 1st Defendant. Further the Plaintiff has shown that he has obtained approvals and made the necessary payments to the 1st Defendant and the National Environment Management Authority (NEMA) with respect to the construction on the suit property.

The 1st Defendant has not controverted the said approvals and payments, and has instead alleged that the title was issued fraudulently. The issue of whether there was any fraudulent dealing with the suit property by the Plaintiff is a matter that can only be decided after a full hearing of the suit filed herein, and not at this stage. Furthermore, upon perusal of the document provided in evidence by the 1st Defendant as the Masterplan, there is no indication in the said document of the property it refers to, or of the property whose allocation is alleged to have been deferred being public land, or indeed of any evidence of sewer plants being planned for or located on the suit property.

In light of the foregoing, it is my finding that the Plaintiff has established a *prima facie* case, and as there is no pleading by the 1st Defendant as to their willingness to compensate the Plaintiff by way of damages if he is successful in his suit, I will not make any finding as to the adequacy of damages.

I hereby accordingly allow the Plaintiff's application dated 21st November 2011 and orders that pending the hearing and determination of the suit, a temporary injunction do issue restraining the 1st Defendant, its employees and/or agents from demolishing or interfering however with the Plaintiff's developments on Ruiru Town/496

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this __28th___ day of _____February____, 2012.

P. NYAMWEYA
JUDGE