



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 79 OF 2011

CIVIL

Injunction order cannot be issued in vain

PAM BREEZE LIMITED.....PLAINTIFF

VERSUS

GENERAL (RETIRED) J.R.E. KIBWANA (as a representative of all those persons who are
Members of the Association known as New Nyali Resident **Association**).....**DEFENDANT**

RULING

The plaintiff company has sued General (Retired) J.R. E. Kibwana as a representative of an association known as New Nyali Residents Association. The plaintiff by its claim stated that it is the registered owner of land known as M.N/1/3158. It acquired approval from the Municipal Council of Mombasa to develop 16 residential apartments together with a pent house. It also obtained approval from the National Environment Management Authority (NEMA) for that development. On commencing construction of the said houses, the plaintiff pleaded that it received a notice dated 11th October 2010, but received on 21st March 2011, from the defendant objecting to the construction of the 3rd floor of those houses and the pent house.

This action is based on the plaintiff's fear that the defendants will obstruct the construction of its houses to its detriment, since it has had to obtain financial facility from the co-Co-operative Bank of Kenya Limited to carry out that construction. The plaintiff pleaded that any interruption in the construction of those properties would cause it irreparable losses. The plaintiff's prayers in its plaint are two. In the first prayer, it seeks a declaration that the construction work on that property has been approved by both Municipal Council of Mombasa and NEMA. In the 2nd prayer, the plaintiff seeks an injunction against the defendant to restrain him from interfering with the construction. The plaint was filed on 1st April, 2011. It is a wonder to me whether at present that construction is still continuing as I consider this ruling. That as it may be, the parties have filed their written submissions in respect of the Notice of Motion dated 1st April, 2011. That notice of motion seeks the prayer for the defendant to be restrained from interfering with the on-going construction pending the hearing and determination of this suit. An order was made by this court on 1st April, 2011 that general (Retired) J.R.E Kibwana be deemed to be a representative of the members of the New Nyali Residents Association.

The Director of the plaintiff's company Paul Wainaina in his affidavit, essentially repeated what is pleaded in the plaint. He repeated that the plaintiff is the owner of the suit property. The plaintiff decided to develop the property by building residential houses. Before construction the plaintiff obtained the necessary approval of both Municipal Council of Mombasa and NEMA. The deponent of the affidavit referred to a letter written by General (retired) J.R.E Kibwana as the chairman of the New Nyali

Residents Association dated 11th October 2010. That letter was written to the Town Clerk of the municipal council of Mombasa. It is important to reproduce that letter in this ruling because it is pertinent to the issues raised in the interlocutory application. That letter whose copy attached to the application was very poor quality, is in the following terms:

“Monday October 11, 2010

The Town Clerk
Municipal Council of Mombasa
MOMBASA.

Dear Sir,

RE: Construction Pam Breeze Apartments Plot 1 to approval MCNP/1121/2009

The **New Nyali Residents Association** would like to ..above mentioned apartments which are currently being constructed in our Estate have been advertised for sale as a four storey approved plans which only provide for three floors.

We have noticed the following irregularities:

1. The property has been advertised in the ‘Unique H issue 05 – Sept, Nov. 2010 on page 58 as a four attached)
2. The approval given as per MCNP/1121/2010 was for ...
3. The By-laws of Mombasa allow for three levels only.

We herewith request your office to ensure that the said building floors (ground floor and two additional floors) as approved by them.

Please take note that a similar illegal development along the plot MN/1/3161 MIMI Apartments has been stopped by a member of Association and the matter is currently in court. An injunction construction has been stopped.

Another illegal development adjacent to Pam Breeze Apartment also stoped in 1996.

The Association will hold the Municipal Council and the development construction in excess of three floors including legal costs which we will appreciate your confirmation that the council will ensure does not exceed three floors

By separate submission the Association will raise its objection to construction contrary to the title deeds which provide developments in this estate.

Yours sincerely,

For NEW NYALI RESIDENTS ASSOCIATION

Gen (rtd) J.R.E Kibwana
Chairman.”

That letter is the basis of the plaintiff’s application to restrain the defendant from interfering with construction on the suit property and is indeed the basis of this suit. In the replying affidavit sworn by the defendant, the defendant stated that he had been wrongly sued in this matter because he is not the person responsible for the physical planning of Mombasa and that such responsibility lay on the director of physical planning of Mombasa Municipal council. He further deponed as follows:

“I have not threatened the plaintiff/applicant in any way nor have I referred in any way with the

construction works on-going on the plaintiff's/applicant's plot No. L.R. M.N/1/3158."

In the plaintiff's submissions in support of the application before court, the plaintiff submitted that it had satisfied the principles of granting an injunction as set out in **GIELLA VS CASSMAN BROWN & CO. LTD [1973] E. A 358**. The plaintiff submitted that it had shown a prima facie case with probability of success because it had obtained all the necessary approval to carry out its construction but that the defendant had definite intention to interfere with its project. It also submitted that if an injunction is not granted, it would suffer what it called monumental losses which could not be compensated. The defendant in his submissions stated that the plaintiff had not established grounds for granting it an injunction as sought. The defendant submitted that in writing the letter reproduced in this ruling, he had intended to bring the attention of the authority that the plaintiff was violating the municipal council by-laws. Such communication according to the defendant is protected under Article 33 (a) of the constitution of Kenya 2010. That Article provides:

"33. (1) every person has the right to freedom of expression, which includes –

(a) Freedom to seek, receive or impart information or ideas."

The defendant submitted that his letter fell within the right enshrined in the above Article of the constitution of Kenya 2010. The defendant further stated that the by-laws can only be enforced by the Municipal Council and that he was not an agent of the council. In other words the defendant was stating that even if the plaintiff was in breach of the by-laws of the council he was not empowered to take any action against the plaintiff as suggested by the plaintiff by this action. The defendant in support of his submissions submitted that the maxim of equity should be considered in this matter and relied on the case **ERICK V.J. MAKOKHA VS LAWRENCE SAGINI (COURT OF APPEAL EAST AFRICA C.A. NO. 20 OF 1994)**. The defendant relied on the following portion of the judgment in that case:

"One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As I said "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it. In this case, the compulsory retirement which the applicants sought to injunct was effected on the 6th April, 1993. In this case, even at the date of the filing of the plaint on the 13th April, 1993 the action which the applicants sought to prevent by an injunction had already taken place. It took place on the 6th April, 1993. When in October 1993, the applicants repeated their application for interim injunction to restrain the corporation from compulsory retiring them and evicting them from their residences, the court's attention was drawn to how pointless the granting of a temporary injunction would be at that date. The court itself recorded that counsel for the corporation submitted that: ".....by the time, the applicants went to law, their retirement had already taken effect."

As rightly submitted by the defendant courts do not make orders in vain. Looking at the defendant's letter reproduced above, it is clear that the defendant was bringing to the attention of the municipal council the likely violation of the by-laws of the municipal council by the plaintiff. There is nothing in that letter that can remotely suggest that the defendant intended to obstruct the plaintiff's construction. Even where the defendant, in that letter, referred to constructions that had been stopped, the defendant was very clear that those stoppages were as a result of court injunction. The defendant in his letter or otherwise gave no indication that he intended to take the law into his own hands to stop the plaintiff's construction. The plaintiff seems to have no basis for its injunction it seeks by the notice of motion dated 1st April 2011. That being so that application is hereby dismissed with costs being awarded to the defendant.

DATED and DELIVERED at MOMBASA this 29th day of March, 2012.

Mary Kasango

JUDGE