REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 252 OF 2011

JAMES KAMAU NJENDO……..……...……..…..…APPELLANT

VERSUS

ABDUL ALI ABDULSWAMAD…….....……..……2ND RESPONDENT

RULING

1. The application before me is the Plaintiff's amended Chamber Summons dated 25th October, 2007. It was filed pursuant to Order XXXIX Rules 1, 2, 3 and 9 of the old Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application was filed under urgency and so certified. Prayer 2 thereof, seeking an interim injunction, granted on 26th October, 2007. It restrained the 1st and 2nd Defendants from continuing with the construction on Plot Number 3130/I/MN and from dealing with it in any manner that will interfere with the Plaintiff's neighbouring Plot Number 3131/I/MN Mombasa, pending the hearing and determination of the application.

2. On 13th December, 2007 a consent order was recorded as follows:

"The interim order of injunction remain in force until the Chamber Summons is heard inter partes. The orders are barring construction beyond the 1st floor. The 1st and 2nd Respondents be allowed to continue works as concerning the ground and first floor."

The matter was not heard, although it was mentioned on many occasions in 2008, but not at all from 2009 up to 6th October, 2011, when it was revived by the parties seeking to dispose thereof by written submissions. Highlights were heard orally on 21st March, 2012.

3. The prayer now sought is prayer 2a as follows:

"2a That pending the hearing and determination of this suit the 1st and 2nd Defendants by themselves, their agents, servants and/or employees be restrained from continuing with the illegal construction on plot Number 3130/I/MN or dealing with it in any manner that will interfere with the Plaintiff's Plot Number 3131/I/MN Mombasa."

4. The application was premised on the following grounds:

"1. That the 3rd Defendant has irregularly approved drawings done for and on behalf of the 1st and 2nd Defendants and which drawing offend express provisions of the Municipal 's By-laws.

2. That the 1st and 2nd Defendants have illegally commenced construction to their parcel of land Number 3031/I/MN which construction has interfered with the Plaintiffs' access views and unhindered enjoyment of their parcel of land Number 3131/I/MN, inclusive of infringement on privacy.

3. That there is an imminent danger that the septic tanks and soak pits constructed by the 1st and 2nd Defendants will cause a nuisance as the same are being constructed on the only available space between the premises.

4. That the said extensions for construction by the Defendants are contrary to the Municipal Council by-laws and are therefore illegal.

5. That unless the Defendants are barred by injunction, the Plaintiff will suffer grave and irredeemable loss.

6. That it is in the interest of justice that this application be allowed."

5. The application was supported by the Affidavit of James Kamau Njendu, the registered proprietor of Plot Number 3131/I/MN Mombasa which borders the property. Essentially, he depones that the 1st and 2nd Defendant irregularly caused the 3rd Defendant to approve architectural drawings that did not comply with Mombasa Municipal Council By-laws in that:

- *The drawings do not have the name of Architect*
- *They were not signed by the developer, or show his address or that if his agent*
- *No open space of 20 feet is provided along the entire plot frontage*
- *There is no clear space of 8 feet wide between Plot 3130 and Plaintiff's Plot 3131*
- *Two septic tanks and soak pits are located in the same narrow place next to one another*
- *Plot ration of 0.15 for 1/4 acre is not considered, resulting on three floor on the crowded site and a ratio of over 500% on normal ratio is allowed.*

6. The 3rd Defendant filed a Replying Affidavit sworn by its Town Planning Officer P.K. Mutungi on 6th November, 2007. He annexed correspondence and documents showing that the 1st and 2nd Defendants had sought Municipal Council permission for change of user of their plot from residential to flats/apartments, and it had been granted. An advertisement had also been placed in the Standard Newspaper of 12th April, 2006. He deponed that no by-law or regulation had been contravened.

7. The 1st Defendant on 7th December, 2007 filed a Replying Affidavit, also on behalf of the 2nd Defendant. He deponed, in a nutshell, as follows:

- *That the allegations in the supporting affidavit are denied.*
- *That they followed the required procedure for approval of their plans and obtained necessary consents, including consent for change of user.*
- *That their application for change of user was advertised in the Standard Newspaper on 6th April, 2006.*
- *That on surrounding plots buildings with apartment of 3 storeys or more are under development or have been developed as is the trend in that neighbourhood of Nyali.*
- *That the Plaintiff took no action to stop construction of the Defendants apartments until they had reached an advanced stage.*
- *That the construction has not created any barrier to the Plaintiff.*

8. In his written submissions, the Applicant reiterated the contents of his application and supporting affidavit. He restated that the drawings annexed to the 3rd Defendant's Replying Affidavit do not bear the architect's name, address, signature or contents. He referred to breaches of the Kenya Building Code and by Laws, citing specific provisions, and did provide the court with copies of the same on 11th March 2008, together with other authorities. He referred to the breaches in relation to the size, capacity and location of the septic tanks, and referred to the Building Code By-Laws which were allegedly breached. Counsel also pointed out that he had complied with the requirements of the principles in **Giella vs Cassman Brown** in relation to injunctive relief.

9. The 3rd Defendant's submissions essentially stated that there is no order sought against it. Further, that the procedures for approval were complied with, a point not countered by the Applicant. Finally, that the Plaintiff should have provided an environmental impact assessment report to show how the right to a clear and healthy environment had been breached.

10. The 1st and 2nd Defendants' submissions restate the procedures for, and approvals granted by, the 3rd Defendant and the District Physical Planning Officer. They relied on the annextures to their Replying Affidavit including photographs showing their development under construction, and the buildings in the surrounding area that have been developed. They urge that the Plaintiff's application is activated by malice and bad faith, and that the principles in **Giella vs Cassman Brown** have not been fulfilled.

In particular, the 1st and 2nd Defendants argue that the Applicant compromised the whole application by entering into a consent on 13th December, 2007, in which they agreed to the construction works proceeding up to only the first floor. This, they argue, had the effect of disregarding all the Applicant's protestations.

11. I have carefully considered the parties' submissions, the authorities cited and documents provided. A close perusal of the 3rd Defendant's Replying Affidavit shows that, although the 1st and 2nd Defendants plans were approved, neither the Affidavit nor the annextures specifically respond to the allegation of irregularity asserted by the Applicant in his supporting affidavit. For example, the approved architectural drawings do not indicate the architect's name, contact address and signature, or show the developer's signature.

Further, the issues concerning the soak pits and septic tanks, frontage space, plot ratio and space between the two plots were not addressed by the 3rd Defendant.

12. The architectural drawings attached to the 1st and 2nd Plaintiff's Replying Affidavit were equally, devoid of the names and contacts of the architect or signature of the developer. The photographs annexed on the affidavit as "AAA-9" showed one set of apartments which has three floors, but the space and conditions of the parcel of land on which they are built is not alleged to be of the same size and condition as the suit property.

Further, I note that annexure 'AAA-5' is a letter by the 3rd Defendant to the District Lands Officer, Mombasa, copied to the 2nd Defendant, seeking their comments, and advising the 2nd Defendant to advertise. Annexure "AAA 6" is a reply from the District Planning Officer also dated 4th May, 2006 granting him no objection. The 3rd Defendant's approvals are annexed as "AAA-" and "AAA-8". All these approvals notwithstanding, they do not answer directly to the Applicant's complaints of irregularity.

13. Amongst the authorities cited and provided by the Applicant, were the Building Code. Unfortunately, the title and year of publication were not photocopied and included in the bundle of documents availed.

The following provisions were highlighted by the Applicant, and no response thereto was provided by the Defendants:

First Schedule on "Deposit of Plans and other particulars", which provides as follows:

"***Every plan, section, drawing or other document shall be signed by the developer or a person representing himself to be his duly authorized agent. If it is signed by such an agent it shall state the name and address of the person on whose behalf it is submitted."***

This was not done by the Defendants. Also highlighted by the Applicant were By-Laws as follows:

Paragraph 17 (1) – on leaving a frontage of 20 feet.

Paragraph 18 (1) on leaving on one side an open space of at least 8 feet.

Paragraph 24 – On siting a building on a plot so as to avoid a possible nuisance or annoyance to neighbouring plots.

None of these elicited any response from the Defendants other than a bare denial.

14. Given the foregoing, I am wholly satisfied that the Applicant has made out a *prima facie* case that meets the first criteria under the **Giella vs Cassman Brown** principles. The mere fact that the Applicant consented to the Defendant's constructing upto the first floor, in my view, in no way dilutes the Applicant's case.

Accordingly, and in order not to appear to condone the construction of buildings which are not wholly in compliance with the legal requirements, I am prepared to grant the injunction sought by the Applicant in terms of prayer 2a. This prayer is granted, however, taking into cognisance the consent Order of 13 December, 2007 and the effects thereof, whereby the parties agreed that construction on the suit property may proceed up to only the first floor. That order has not been reviewed or vacated, and therefore continues in force.

The result is that the injunction herein granted shall be to the effect that the 1st and 2nd Defendants and any person acting on their behalf or on their instructions is hereby restrained from continuing with construction on Plot Number 3130/I/MN beyond the first floor until the hearing and determination of the suit.

Orders accordingly.

Dated, signed and delivered this …16th ….Day of …May…. 2012

R.M. MWONGO
JUDGE
Read in open court
Coram:
1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:
a) ……..
b) ……..
c) ……..
d)…….