



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ENVIRONMENTAL & LAND CASE 574 OF 2010**  
**KENTAL ENTERPRISES LIMITED .....PLAINTIFF**  
  
**-VERSUS-**  
  
**CITY COUNCIL OF NAIROBI ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant hereinafter referred to as the applicant filed chamber summons dated 25<sup>th</sup> November 2010 under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of Law seeking the following Orders;-

i. That a temporary injunction be issued restraining defendant and/or its servants and/or its agents from entering in or interfering with the possession or proprietary rights of the plaintiff in respect of the properties known as Land Reference Numbers 209/11307 and 209/11308 Nairobi or to enter the said properties to remove any structure on the said development as threatened in the defendant's Notice dated 16<sup>th</sup> November,2010 served on the plaintiff on the same date, or otherwise of for any other purpose or to require the plaintiff to remove or demolish any structure therein pending the hearing and determination of this application inter partes and the suit herein.

ii. That the plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.

iii. Costs of this application be provided for.

The application is based on the following grounds;

i. The defendant has served a Notice dated 16 November, 2010 on the plaintiff, wrongfully, without just cause, illegally and without justification claiming inter alia, that construction of an unspecified building structure on the plaintiff's said properties is encroaching into the road reserve (Mwanza Road ) and

requiring the plaintiff within fourteen days from the date of said Notice to remove the said structure on the plaintiff's said properties.

ii. That the defendant has in the said Notice threatened that if the said structure is not removed within 14 days, the defendant will enter and trespass into the suit properties and execute and implement the said notice.

iii. That the plaintiff contends that no part of the development on the suit properties encroaches on any road reserve and the said development is within the boundaries of the said properties.

iv. That the said Notice in effect threatens to disrupt and paralyze the commercial activities of the plaintiff.

v. That unless the application is heard urgently and orders sought for are granted, the defendant will take the threatened action and the plaintiff will suffer irreparable damage which cannot otherwise be compensated by an award of damages.

vi. The plaintiff will give such undertaking as to damages or security as this Honourable Court may order.

vii. The plaintiff will rely on the affidavit in support of the application.

2. Mr. Bejul Chunilal Shah a director of the plaintiff company filed a replying affidavit dated 25<sup>th</sup> November 2010 and states as follows; that the plaintiff is the registered proprietor under the registration of Titles Act, Cap.281 as Lessee from the Government of the Republic of Kenya of properties known as L.R. no. 209/11307 Nairobi and L.R. No. 209/11308, Nairobi. That the said properties together with the building and improvements erected and being thereon are comprised in grants numbers I.R. 49532 and I.R. 49531 respectively and the plaintiff is the absolute and indefeasible owner of the said properties in terms of Section 23 of the Registration of titles Act. That the deed plans annexed with the said grants do not show or demarcate a road reserve. That the said properties have been lawfully developed by the erection and construction of a multistoried building thereon known as the UKAY CENTRE and a car park and is occupied by a multiplicity of substantial tenants including Nakumatt Holdings Ltd. Further the plaintiff has invested very substantially in the said properties. The plaintiff purchased the said properties with the said development and improvements from African Apartments Ltd and Magus Limited of Nairobi in or about December, 2003 and the Commissioner of Lands duly consented to the transfer thereof in favour of the plaintiff and its titles were registered as number I.R.49532/2 and I.R. 49531/9 respectively on 16<sup>th</sup> December 2003. That the plaintiff paid the requisite stamp duty as assessed by the collector of stamp duty in respect of the said transfers of the said properties in its favour in the aggregate sum of shillings eleven million and twenty (shs.11,000,020/-) made up as follows, in addition to the registration fee for the said transfers.

(i) Stamp duty on transfer relating to L.R. 209/11307, Nairobi..... Shs.480,010.00

(ii) Stamp duty on transfer relating to L.R.209/11308 Nairobi .....Shs.10, 520,010.00

Total

**Shs. 11,000.020.00**

That the plaintiff charged the said properties to Guardian Bank Ltd, which charges were registered as I.R. No. 49532/3 and I.R. 49531/10 against the said titles respectively. That the Commissioner of Lands duly consented to the said charges being registered against the titles of the said properties and the plaintiff paid the requisite stamp duty thereon together with the registration fee. That the plaintiff has since the purchase of the said properties with the development paid the annual land rent to the commissioner of lands and the annual rates to the City Council of Nairobi (the defendant) regularly and the same have been accepted by the commissioner of lands and the defendant respectively without demur. That the said development on the suit properties have been carried out lawfully and within its boundaries and pursuant to plans and drawings duly approved by the defendant and at no stage has the defendant objected to the same. That the defendant has pursuant to a Notice dated 16<sup>th</sup> November 2010 addressed to the plaintiff,

wrongfully, without just cause, illegally and without justification claimed that the construction on an unspecified building structure on the plaintiff's said properties is encroaching into the road reserve (Mwanzi Road) and requiring the plaintiff within fourteen days from the date of the said Notice to remove the said structure. The said notice is deliberately vague and incapable of reasonable understanding. That the defendant has in the said notice threatened that if the said structure is not removed within 14 days, the defendant will enter and trespass into the suit properties and execute and implement the said notice. The plaintiff contends that no part of the development on the suit properties encroaches on any road reserve and the said development is within the boundaries of the said properties.

3. That the said notice in effect threatens to disrupt and paralyze the commercial activities of the plaintiff. That the defendant having approved the development on the said properties is stopped from making the said allegations set out in the said notice or to execute and/or implement the same. That there is no substance in the allegations made against it in the said notice as it is not in breach of any alleged provisions of any Act and that the plans and drawings for development were submitted to and were duly approved by the defendant. Further, the development was carried out on the basis of the said approved plans and drawings. That the said notice issued against the plaintiff is wrongful, illegal and unlawful and that the defendant is not entitled to take the threatened action. The plaintiff contends that the said notice is a nullity and stands to be cancelled and/or withdrawn. That the plaintiff claims that the defendant is not entitled to enter the suit properties or to trespass therein to execute and/or implement the action set out in the said notice. That unless the defendant and/or its agents are restrained by an order of injunction the defendant will proceed with the threatened action and the plaintiff will suffer irreparable damage which cannot be compensated with an award of damages. In the Supplementary affidavit of Bejul Chunilal Shah dated 7th February 2012 he attached the following letters, the letter dated 30th March, 2011 suspending the enforcement Notice dated 16th November 2010 until the actual facts of the matter are determined and communicated to the plaintiff, the letter dated 4th July, 2011 stating inter alia that an independent survey had been carried out and it has been established that there is not encroachment on Mwanzi Road, letter dated 3rd August, 2011 stating inter alia "since matters which had led to this encroachment notice being issued against their development has been ironed out, this enforcement notice is hereby withdrawn subject to him performing his part of the agreement including withdrawing of the Court case thereof.

4. Mr. Joseph Wanjohi Mburu filed an affidavit dated 7/12/2010 and he depones as follows: That he know M/S Kental Enterprises Ltd, the plaintiff in high Court ELC Civil suit No.574 of 2010. He also know the Managing Director of M/s Kental Enterprises Ltd, Mr. Bimal Shah. That on 26<sup>th</sup> November, 2010 the said M/s Kental Enterprises Ltd instructed him to carry out a Beacon search in respect of the properties namely, L.R. 209/11308 (original No. 1870/1/476) and L.R. 209/11307 (original No. 1870/47). Nairobi on which are constructed a multi-storied building called "Ukay Centre" and an elaborate car park. That on the same date, 26 November, 2010 he went to the survey office of Kenya at Ruaraka and purchased a survey plan in respect of the said properties, namely L.R. No. 209/11308 (original No. 1870/1/476 and 209/11307 original No. 1870/1/475. Nairobi Folio Register number 190/44. That on 27<sup>th</sup> November 2010 he went to the said properties namely, L.R. No. 209/11308 and L.R. No. 209/11307 Nairobi and using a Total Station Machine identified the position of the beacons of the said properties as per the survey plan, being beacons numbers M, T4, T3, G12,4D, 10A and G14. That he determined that the positions of the said beacons were unoccupied. That his conclusion is that the premises, development and the construction of the said Ukay Centre and the said Car park fall within the boundaries of the said properties namely, L.R. No. 209/11308 and L.R. No. 209/11307, Nairobi and that there is no encroachment on Mwanzi Road which according to the said survey plan Folio Register Number 190/44 is 12 meters wide.

5. Mr. P.T Odongo a director of City Planning department with the defendant filed an affidavit dated 18<sup>th</sup> February 2011 and states as follows: That the defendant approved the construction of a Multi storied building with a condition that the road reserve be preserved and/or maintained as per the deed plan. That the plaintiff in utter disregard of the terms and conditions in place by the defendant put up a multi storied building without supervision by the defendant and hence encroached upon the road reserve. That when the defendant's officials from the city planning department visited the plaintiff's premises it observed with regret that the plaintiff had indeed encroached on a road reserve. That the defendant did not want to be accused of impunity and so gave the plaintiff a police notice to demolish the part that encroaches on

the road reserve but the plaintiff instead of complying rushed to Court to prevent the defendant from carrying its lawful mandate. That the defendant has no place in the dealings between the bank and/or any other person and the plaintiff and cannot be privy thereby. That the plaintiff has been paying rates for the pieces of land owned by them and not including the road reserve and so payment of rent and rates to the defendant does not license the plaintiff to encroach on a road reserve. That the plaintiff has not attached any property approved development plans to their application and has not shown that the defendant approved plans to build on a road reserve. That one of the requirements of developing a leasehold land is to let the defendant's official from the City Planning Department visit, supervise and know whether the developer has conformed to the development plans submitted to the Council, but in this case no such supervision was sought by the plaintiff when putting up the said construction and so cannot claim that it built according to the development plans. That the plaintiff is guilty of material misrepresentation of facts, non disclosure of the real issues and so has not disclosed any cause of action against the defendant herein and this application together with the suit should be dismissed with costs. That the plaintiff cannot act as a judge in its own case and rule that it has not encroached upon a reserve unless a surveyor is appointed to survey and demarcate the plaintiff's land and see whether the development is on the land as per the beacon certificate or the plaintiff goes beyond the beacons set out by the defendant. That the defendant insists that the plaintiff has encroached on road reserve and so the building and development on the plaintiffs plots is illegal and unlawful. That each and every developer should adhere to the City Council by laws and approved plans and it is upon the defendant to supervise any building put up and confirm whether they are illegal and unlawful or not and that is why the defendant has a city planning department. That the plaintiff has not given any undertaking as to damages and security hence does not deserve the orders sought. That the plaintiff's application has not met the rules set out in *Geilla Vs. Cassman Brown* for the grant of an injunction hence should be dismissed with costs. That the plaintiff's application lacks merit, is malicious an abuse of the Court process as it seeks to make that which is illegal, legal and hence cannot stand the test of a good case. That no prima facie case has been established by the plaintiff herein as the plaint herein and the chamber summons application raises no tribal issues. That on a careful study of the plaintiff's case it is a boundary dispute and that this Honourable Court does not have jurisdiction to handle a boundary dispute as there is proper forum to address such issues. That the plaintiff has not shown any loss to be suffered and the loss to be suffered if any by the plaintiff, then it can be quantified and compensated by damages hence part of the building that encroaches on the road reserve should be demolished. That the plaintiff has not shown any prima facie case with chances of success as it has not shown that it constructed the building and/or structure on the suit land according to the approved plans and the terms conditions and law as set out by the defendant which the governing body. That balance of convenience tilts in this suit towards the defendant and not the plaintiff.

6. I have carefully considered the affidavits filed which I have quoted at length to lay out the facts by the parties and the annexures and the cases cited, ***Geilla Vs. Cassman Brown & Co.Ltd, Kanji Premji Gangi & Mistry Premji Gangji Ltd Vs. Revankumar Nanchand Savadia (Civil Appeal No. 6 of 1991 at Mombasa), H.C.C.C. No. 622 of 2009, Milimani commercial courts, Nairobi Parkview Shopping Arcade Ltd Vs. City Council of Nairobi***, The Registration of Titles Act-Section 23, The Government Lands Act – Section 77 and Section 4 of the limitations of Actions Act. The applicant has to establish that it has a prima facie case with a probability of success. Although the respondent filed an affidavit in opposition the letters attached in Mr. Bejul Chunilal Shah's supplementary affidavit letter dated 3/8/2011 clearly shows that the issue enforcement notice No.9703 the subject of this application was withdrawn by the respondent. However to protect the applicant since through the affidavit of Mr. Shah they have shown that they did not encroach I will grant prayer 2 of the application dated 25<sup>th</sup> November 2010. The applicant is awarded costs.

Dated, signed and delivered this 22<sup>nd</sup> day June of 2012

**R. OUGO**  
**JUDGE**

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk