REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL CASE 27 OF 2012

ALOYS KAVEEN CHEPKWONY ….....…….APPLICANT

VERSUS

ALICE HOTTENSIAH GITHU …….....……..RESPONDENT

RULING

The application the subject of this ruling is dated 1st February, 2012. The applicant seeks 6 prayers. However, prayers 1 – to 3 have since been overtaken by events. What is therefore left for determination are prayer 4, 5 and 6. Prayer 4 seeks an interlocutory injunction to restrain the defendant from demolishing, destroying the borehole and trespassing on L.R No. 14431, Ngong Township hereinafter *"the suit premises"* pending the hearing and determination of the suit. Prayer 5 seeks also an interlocutory injunction to restrain the defendant from entering, removing or undertaking any works on the suit premises pending the determination of the suit. Prayer 6 is about costs.

The grounds in support of the application are that the applicant is the owner of the suit premises. The respondent had trespassed on the same and destroyed the boundary wall and cut down mature trees. In the process he had destroyed the borehole casing. The respondent constructed illegal structures on the suit premises which construction straddles the applicant's suit premises and unless restrained the respondent would continue to harm the applicant.

The affidavit in support of the application was sworn by the applicant. Most of the contents were a rehash of the foregoing. Suffice to add that on the suit premises the applicant has a borehole from which he sources water for domestic use. On 14th January, 2012, he received a letter from the respondent's Advocates claiming that he had encroached on L.R No. 14433 Ngong Township belonging to the respondent. He denied the claim and called for the respondent's title to enable them seek clarification from a Surveyor. There was no response, instead on 30th January, 2012, the respondent, her husband and a group of 30 workers descended into the suit premises, demolished the boundary wall, cut down his trees and broke the concrete casing covering the borehole. Thereafter the respondent commenced erecting a massive building and was deliberately dropping debris into the borehole with intent to fill it up. The respondent's conduct was a blatant disregard of law and a violation of the applicant's right to property. The massive highrise building consists of residential cum commercial units yet the area is specifically reserved for residential single dwelling units and there had been no change of user, nor had he obtained approval by relevant authorities to construct a highrise building in the area. Further, the building has not been approved by NEMA nor had neighbours' view sought or considered. The building cannot be supported by the water or sewerage system in the area. It will also block the suit premises from the reach of natural light and the applicant would suffer loss and damage.

The application came before **Ngugi,J** *ex parte* on 21st May, 2012 and the applicant managed to

obtain an interim injunction. The injunction was to remain in force until the next hearing date. It would appear that the said interim injunction was obtained mainly as a result of non-disclosure of material facts by the applicant. On 13th March, 2012, the interim injunction was vacated by **Ngugi, J** after he had gone through the respondent's documents and realised that the applicant had misled him by not disclosing certain facts that were within his knowledge. In his own words the good judge said:-

"***Without purporting to be exhaustive, I can say at this point that it seems that a major basis for the interim orders has turned out to be hollow! The defendant has exhibited copies of what is seen to me to be very genuine approvals by the Olkejuado County Council on change of user and building plans from NEMA. I am confident that if these reports had been brought to the attention of the court, I would not have issued the interim orders. I did without more. On that basis alone, I will vacate the interim orders issued on 21/2/2012…"***

The judge then directed the parties to return for *interpartes* hearing of the application on a date to be fixed by the Deputy Registrar on priority basis. The application was subsequently fixed for *interpartes* hearing on 7th June, 2012. However come that day and **Ngugi, J** had been redeployed to the Office of the Chief Justice in Nairobi. The application therefore fell on me for determination with the consent of the parties.

In the meantime, the respondent had filed a replying affidavit contesting the depositions of the applicant. Where pertinent she deponed that she was the registered owner of land parcel Ngong Township Block 1/258 (L.R. No.14433). Her land borders that of **Lydia Wanjiku Gichobo** (L.R. 14434) who is the immediate neighbour of the applicant. The suit premises only touched the far corner of her land being at Beacon No. A45. She denied that all parcels of land in the neighbourhood consisted of a single dwelling house that covers 50% of the land. Before putting up the multi-storey residential building on her parcel of land she obtained the necessary documentation and approvals as required by law to wit;

§ Extension of user from single dwelling unit to multi-unit,

§ Approval of the building plans by NEMA; and

§ She notified all the neighbours of her intention by public advertisement.

In view of the foregoing, the applicant had been dishonest with the court when he deponed otherwise. She was a stranger as to the existence of the borehole. On 16th March, 2004 a beacon certificate had been issued by Geometrics Services Ltd showing that there was part of a permanent building and a stone wall between beacon A45 and A46 encroaching on her land. The stone wall as well as the permanent building had been constructed by the applicant who was the previous owner of both 14433 and 14434. As far back 2004, the respondent had brought the findings of the survey report to the attention of the applicant but he completely ignored the same, was arrogant, abusive and unresponsive and thereby refused to remove the wall and demolish part of the building that had encroached on her property. Later when she discovered that 144434 had been sold by Development Bank of Kenya to a third party through a public auction, she approached the third party about the encroachment and he agreed to remove the stone wall and demolish part of the building that had certifiably encroached on her property. The third party subsequently on 12th January, 2012 engaged 3 men to do so. It was then that the applicant appeared with the police alleging that 14434 belonged to him. He caused the arrest of the 3 men who were detained at Ngong Police Station. On 13th January, 2012, the representatives of the owner of the suit premises went to Ngong Police Station, recorded statement confirming that 14434 did not belong to the applicant as **Lydia Gichobo** had purchased it in 2004. As a result when the police were satisfied that the applicant was not telling the truth about ownership of 14434, the 3 men were released unconditionally. In the premises the applicant had not come to court with clean hands, nor had the applicant made out a *prima facie* case with probability of success. Further it cannot be said that the applicant would suffer irreparable injury and even if he did, the injury can easily be quantified and compensated through damages. Finally, that the balance of convenience heavily tilted in her favour as the orders sought are drastic and seek to stop her from continuing to enjoy her right of ownership of her property yet the applicant had absolutely no interest in the same.

In a supplementary affidavit filed by the applicant he deponed that the certificate of lease issued to the respondent had no endorsement of change of user, there was no change of user as the special conditions required the land to be used for a private dwelling house and should not cover more than 50% of the area of land. The approval by NEMA was obtained without due process. There was no approval shown to have been obtained from the relevant authority. All said and done it was his view that the contents of the replying affidavit were selective, false and misleading. They amounted to trifling with the court. With the permission of the court, the respondent also filed further replying affidavit. In this affidavit, the respondent countered all the depositions of the applicant in his supplementary affidavit. She stated that special conditions or the user of the property is generally not indicated on the title document. Such information is recorded in the green card in the registry. The issue of change of user being recorded on the certificate of lease does not therefore arise. She had successfully applied for change of user to the County Council of Olkejuado. The special conditions contained in the certificate of lease were the conditions set by the County Council of Olkejuado at the time of transfer of the property. Those conditions could be and indeed were altered once approval had been obtained. The NEMA report contained a letter from the Ministry of Lands and Settlement which recommended extension of user. Otherwise the building she was putting up had not occupied the entire parcel of her land. A complete copy of the NEMA report had been handed to the applicant's advocates on their request. The applicant was therefore being insincere by claiming that the report was incomplete. Then gives the names of those consulted who had plots neighbouring the respondent's.

I have carefully read and considered the pleadings, the affidavits and annextues on record as well as rival written submissions and authorities. We are all familiar with the conditions that the court considers in granting or refusing interlocutory injunctions. Those conditions were established in the notorious case of **Giella vs Cassman Brown [1973] E.A. 358**. Basically, those conditions are:-

§ The applicant must establish a *prima facie case* with a probability of success.

§ The applicant must establish that he might otherwise suffer irreparable damage which would not adequately be compensated by an award of damages

§ The court would decide the application on a balance of convenience if in doubt.

On the foregoing, I must add and emphasize that an interlocutory injunction is an equitable as well as discretionary remedy. Therefore whoever seeks the same must come to court with clean hands and his conduct must be beyond reproach. He must be candid with the court and disclose all material facts whether they are in his favour or not. Any whiff of lack of candour or material non-disclosure of facts will automatically disentitle the applicant to the said equitable and discretionary remedy.

In my view, this application is bound to fail on the above ground as well as the applicant's failure to establish a *prima facie case.*

I have no doubt in my mind that the applicant is guilty of material non-disclosure, lack of candour and deliberately misleading the court. When he came to court, his complaint was that the respondent had without colour of right broke and entered the suit premises and demolished his boundary wall, cut his trees and supporting structures and she remains in forceful occupation, that the applicant had embarked on erecting structures on the suit premises in contravention of the law and conditions upon which titles in the area are issued. In so doing he was digging up soil and filling his borehole, the project did not have the approval of NEMA, Physical Planning Officer, there was no change of user, the building had been erected on more than 100% of the plot and had encroached on his suit premises. However on the material presented before court, this accusations would appear to be false. It is apparent at least for now that it is not the respondent who broke and entered the suit premises if at all there was such an occurrence. Rather it was a third party whom the applicant knew as he made a report to Ngong Police Station regarding the occurrence and the 3 men who had been hired by the 3rd party to do the job, were arrested and locked up. Following investigations, it was found that the applicant's complainant was unmerited and the 3 men were released. Surely if the applicant's assertions were true, couldn't the police have preferred charges against the 3 men, the respondent and even the 3rd party? Above all why did the applicant not disclose

this fact in his pleading? He has also not rebutted the same in his subsequent pleadings, nor has he sought to enjoin the third party in these proceedings.

The applicant too claims that the respondent was illegally putting up the structures without change of user, a fact which again is in correct. The respondent has exhibited such change of user. On being confronted with such evidence, the applicant changed tact and now claims that the change is not endorsed on the title documents. Of course such change cannot be reflected on the title documents. Again the applicant has alleged that the structure that the respondent is putting up did not meet the approval of NEMA. However there was such approval dated 20th February, 2012. What is the applicant's response? He apparently concedes that there was such approval but hastens to add that the report is incomplete and in any event it was authored without the participation of those likely to be affected by the developments. But it transpired that infact, the applicant's counsel sought and obtained from the respondent's counsel a complete NEMA report. Further in the report, the names of those who were consulted are given as being **George Otieno** of L.R.No. 14434, **Maurice Otieno** on behalf of the **New Apostolic Church, Ziggy David** of plot No. 14434 , **Peter Kimemia Njoroge** of plot No. 4480/230 and **Philip Munyao**. It is instructive that the name of the applicant is missing. If indeed his parcel of land bordered that of the respondent, couldn't he have been among those who could have been interviewed by NEMA officials. Does this perhaps not show that infact the applicant is not a neighbour of the respondent as she has maintained. It is also self incriminating for the applicant to claim that the respondent did not obtain **NEMA** approval, yet he has filed an appeal in the **NEMA Tribunal, Nairobi** seeking reverse of the approval. The applicant is clearly breathing hot and cold at the same time. On one hand he is claiming that the applicant did not obtain an approval from NEMA and yet on the other hand he is appealing against NEMA'S decision to grant its approval to the respondent. Finally is the question of the approval of the Physical Planner. There is evidence on record that respondent sought and obtained change of user, and approval of his building plans from County Council of Olekejuado. Indeed even the change of user was advertised in the Daily Nation of 24th September, 2011. That being the case can the applicant having failed to raise any objection to the Notice be heard to complain? I do not think so. He is estopped for doing so now. Of course he now says that those approvals were obtained irregularly. However, has he sued NEMA or the County Council of Olkejuado? No.

The applicant has not disputed that he has lodged an appeal against the decision of NEMA granting the respondent the approval. In the appeal he has sought the recall of the approval. Indeed the grounds of appeal are similar to those in the present application. Although the applicant has a right to appeal NEMA'S decision, he had a choice of vindicating or ventilating his concerns either in the appeal or the present application. He cannot have it both ways. Having parallel proceedings at the same time over the same dispute is clearly a waste of valuable judicial time and resources. Obviously it also has a bearing on this court's exercise of discretion to grant or refuse the injunction.

On the question of material non-disclosure and lack of candour on the part of the applicant, the Court of Appeal had this to say in the case of **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 others**, **Civil Application Number Nai 140 of 1995 [U.R**]:-

"… once the learned Judge was satisfied , as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further for the court must be able to protect themselves from parties who are prepared to deceive, whether their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a mentorious case and would have been entitled to the order anyway. If the case is mentorious there can be no reason for concealing some parts of it from the court…"

I would classify the applicant in this category. He has sought to deliberately mislead the court, and every time such mischief has been countered by the respondent, he has sought to shift goal posts. At the end of the day one is left wondering whether we are dealing with the application or his grievances against bodies charged with giving approvals with regard to such undertakings by the respondent.

With regard to whether the applicant has established a *prima facie case* with probability of success, I have

my doubts. Those doubts hinge on the fact that perhaps the applicant may not be the registered owner of the suit premises. From the title deed annexed to his supporting affidavit, the title is issued under the Registration of Titles Act while other titles in the area are all issued under Registered land Act. Moreover, it is evident that the respondent did not trespass into the applicant's suit premises. If there was such trespass, it was by a third party, **Lydia Wanjiku Gichobo**. The said **Lydia Wanjiku Gichobo,** donated a power of attorney to **Rosemary Gichobo**, her sister who swore an affidavit which was annexed to the respondent's replying affidavit. In it she was categorical that the applicant's suit premises did not share a border with the respondent. It was her property which bordered the applicants. She conceded that part of the wall of her property had encroached on the respondent's land. On discovery, she immediately, voluntarily and at her cost demolished the wall as far as it extended into the respondent's property. It is instructive that there was no response or rebuttal from the applicant on this account. That being the case, these depositions must be taken to be true. That then means that there may have been no trespass, no debris falling into the applicant's suit premises, more so the destruction of the applicant's borehole. Further in the light of the approvals obtained by the respondent before the commencement of her project and there is no evidence of departure from the conditions of approval, how can the applicant possibly succeed in his case at the plenary hearing. This being my view of the matter it is unnecessary to consider the remaining conditions for the grant of injunction.

For all the foregoing reasons, I dismiss the application with costs to the respondent.

RULING DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day **JULY, 2012**.

ASIKE-MAKHANDIA
JUDGE