



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 323 OF 2009

NELSON MWANGI PLAINTIFF

- VERSUS -

KIKUYU TOWN COUNCIL1ST DEFENDANT

JOHN KAMAU NDERE2ND DEFENDANT

RULING

1. This is the plaintiff’s notice of motion dated 26th August 2011. The plaintiff prays for injunction to restrain the 2nd defendant from constructing a building on an access road fronting the plaintiff’s premises. The application is expressed to be brought under order 40 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act.
2. In a synopsis, the plaintiff avers that the 2nd defendant has commenced construction on an open space on Kikuyu – Nderi road and Kikuyu – Kefri road. That open space is in front of the plaintiff’s plot number 41/12 Nderi B, Kikuyu. The plaintiff has erected a shopping complex on it. The acts of the 2nd defendant will thus block the right of way, light and easement for the plaintiff and his tenants. It is the plaintiff’s case that the 2nd defendant has no right to the open space and that the development contravenes planning regulations.
3. The 2nd defendant refutes those allegations. He avers that he was allocated a plot number 35 by Kikuyu Town Council the 1st defendant, in the year 2001. While it is true that it fronts the plaintiff’s premises, he avers that it does not form an open space, parking or road reserve as alleged. He denies that the construction will block light or interfere with the plaintiff’s access or sewer system. He contends that the council approved the allotment for his mobile kiosk as per the minutes annexed. The council later approved his request to construct a toilet adjacent to his plot number 35. He has paid fees to the council and complied with the conditions of the allotment. In a nutshell, the 2nd defendant’s case is that he is the *bona fide* allottee of a plot independent of that of the plaintiff. He thus submitted that the applicant has not met the threshold for grant of interlocutory prohibitive injunction.
4. The 1st defendant’s town clerk, J.N Mwangi, has also filed a replying affidavit sworn on 28th October 2011. He supports the position taken by the 2nd defendant. He avers that the 2nd defendant applied in 1995 for a mobile kiosk in Nderi Market. It was approved. In 1998, the 2nd defendant applied for a “lock – up plot” number 35 which was approved at the council’s meeting of 30th November 1999. The 1st defendant contends that the plaintiff has no exclusive right “over other plots, open spaces or council property” adjacent to his plot number 41/42 Nderi B. He avers that the 2nd defendant’s plot 35 is not on a

parking or road reserve. Lastly, it was submitted that the motion and suit is an abuse of court process in view of previous proceedings over the same subject matter in Kikuyu Magistrate's court case number 308 of 2005.

5. I have heard the rival submissions. From the evidence before me, I am satisfied that the plaintiff is the proprietor of plot number 41/12 Nderi B. He has constructed a building consisting of shops and other commercial uses. There are open spaces fronting Kikuyu – Nderi road and Kikuyu – Kefri road. The plaintiff concedes in the supplementary affidavit dated 21st November 2011 that the 2nd defendant was allocated a “lock – up plot” No 35 by the 1st defendant adjacent to the plaintiff's property. But the plaintiff contends that this was a 15” by 15” space. The plaintiff's principal complaint is that the 2nd defendant has exceeded that space by 24 feet on one side and another 45 feet on the other side. I have looked at the extract of council minutes of 30th November 1999 annexed to the 2nd defendant's replying affidavit as “JKN 3”. It is true that the approval was for a 15” X 15” “lock up”. It was meant for a semi-permanent structure.

6. The 2nd defendant then became like the proverbial camel. He made more demands on the council. On 5th March 1998, he applied to construct a permanent stall or “lock-up”. On 9th September 2009, he again applied to the council to erect a toilet next to his “lock-up”. It was approved by the 1st defendant as per the minutes annexed marked “JKN 6”.

7. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80.

See also the *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR, *George Munge Vs Sanjeev Sharma & 3 others* HCCC ELC 677 of 2011 [2012] e KLR.

8. When I juxtapose the law against the facts, I find as follows. From the lay out map provided by the 2nd defendant, the plaintiff's property was the last building at the corner of the two roads. The space in front of it is marked as a road reserve. I am thus not surprised that the initial allotment to the 2nd defendant was for a “mobile kiosk”. The approval for permanent structures and a pit latrine on the open space seem to me haphazard and poor planning. I also entertain serious doubts that it would pass the test under the Environmental Management and Coordination Act. The plaintiff is not claiming ownership of the open space or road reserve. His case is that it should be left as an open public space. The 2nd defendant has annexed drawings for the developments on plot 35. They are for a “proposed shop”. It is a fairly extensive permanent structure. The pit latrine will be smack outside the plaintiff's property. I thus find the submission by the 2nd defendant that his plot is independent with no nexus to the plaintiff's plot to be prosaic. The plaintiff's case is not that the 2nd defendant has encroached on his property *per se*: it is that the activities of the 1st and 2nd defendants' poor planning have deleterious environmental consequences. The plaintiff does not himself own the open spaces and road reserves. But he is now entitled under articles 42, 60 and 70 of the constitution to maintain such a claim. Even before the Kenyan constitution 2010, these courts were willing to intervene in such matters. See *Park View Shopping Arcade Limited Vs Charles M. Kangethe and others* (2006) 1 KLR (E & L) 591, *Gitau Vs Savage & 4 others* (2006) 1 KLR (E & L) 463.

9. The 2nd defendant claims he was allotted plot number 35 by the 1st defendant. The approval or creation of that plot by the 1st defendant in a manner inimical to environmental, planning and land use laws does not legitimize it. If it encroaches on a road reserve or other public open spaces, it violates the rights of the plaintiff as a member of the public. In *Kamau Vs Gathuru and another* (2006) 1 KLR (E & L) 655 the court, faced with near similar circumstances was emphatic that a part development plan

purporting to create the impugned plot was an unlawful document. In that case, the defendant had encroached on the frontage of the plaintiff's house alleging that the public park area had been allotted to him by the municipal council of Nakuru. Those matters and the truth in this case will be disentangled by the trial court on full evidence. On the basis of the evidence before me and the history of the allocation to the plaintiff, I have expressed serious doubt about the validity of allotment or approval for development on plot 35 by the 2nd defendant. A letter of allotment in any event constitutes a temporary right. See Wreck Motor Enterprises Vs Commissioner of Lands and others Nairobi, Civil Appeal 71 of 1997, Court of Appeal (unreported), Jaj Super Power cash & carry Limited Vs Nairobi city council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal (unreported).

10. My attention was drawn to proceedings in Kikuyu Principal Magistrate's court case 308 of 2005 Nelson Mwangi Vs Kikuyu Town Council and John Ndere Kamau. That suit was between the same parties over the same subject matter. A similar application for injunction was dismissed on 17th February 2006. That is why the respondents claim that the present proceedings are an abuse of court process or *res judicata*. I do note that the plaintiff has not concealed the matter entirely. At paragraph 9 of the plaint, he discloses the suit but states it "has since been withdrawn". I have studied the ruling of the subordinate court. The court stated in part that it lacked jurisdiction to determine the question whether the council allocated the plot in a regular manner. It said;

"The said property is within the jurisdiction of the 1st defendant who allocated the same to the 2nd defendant. The plaintiff claims that it is a road reserve. I find that the issue as to whether or not the 1st defendant/respondent irregularly allocated the subject plot to the 2nd defendant is one which ought to be the subject of judicial review proceedings and this court cannot interfere with the exercise of the 1st defendant's powers of allocation of property within its jurisdiction. In the circumstances, I hereby disallow the application"

11. That perhaps explains why the suit was subsequently withdrawn. This court is now enjoined by articles 50 and 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. The ruling of the subordinate court did not address the merits of the matter because it found it had no jurisdiction. The suit has been withdrawn. There is no decree. The interlocutory matter was determined on a technical ground. The matter is not thus strictly *res judicata* under section 7 of the Civil Procedure Act. It falls more in the class of abuse of court process. But in view of withdrawal of the suit, I do not wish to blame the applicant. That said, this court cannot, on the basis of that technicality of procedure, close its eyes to the wider abuse of land planning and the environment.

12. An interlocutory injunction is a discretionary remedy. The kind of prejudice that would be suffered by the plaintiff is not the type that can be easily remedied in damages. I find that on the basis of evidence before me, the plaintiff has established a strong *prima facie* case. And even if I were in doubt the balance of convenience tilts more in favour of maintaining the *status quo* pending the determination of the suit.

13. For all of the above reasons, I order as follows:

- a) **THAT** an injunction shall issue restraining the 2nd defendant, his agents, servants or howsoever from erecting any building or structure on plot 35 fronting Kikuyu – Nderi road and Kikuyu – Kefri road until the hearing and determination of this suit.
- b) **THAT** the plaintiff shall file and serve a suitable undertaking as to damages.
- c) **THAT** the suit shall be heard and determined within 1 year, in default of which the order of injunction shall lapse.
- d) **THAT** costs shall abide the judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 24th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Mwangi for the 1st Defendant.

Mr. K.O. Arum for the 2nd Defendant.