



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 63 OF 2012

**IRENE NYOKABI CHEGE.....PLAINTIFF/
APPLICANT**

VERSUS

**CITY COUNCIL OF NAIROBI.....DEFENDANT/
RESPONDENT**

RULING

The Defendant /Applicant herein filed a Notice of Motion dated 7th February 2012. This application is brought under order 40 Rule 1,2,3 and Order 51 Rule 1 of the Civil Procedure Rules .It is also premised on section 1A,1B,3A,and section 63 (e) of the Civil procedure Act. This application is supported by the affidavit of **Irene Nyokabi Chege** sworn on the same date.

This application brought under certificate of urgency is seeking for five (5) orders. Orders 1 and 2 have since been spent having been granted on the 8th February 2012.The orders now before me are:

1. That the order for interlocutory injunction do issue restraining the defendant ,its agents ,servants, employees or any other person whatsoever from executing against the plaintiff the Enforcement notice dated 20/1/2012 and/or from, demolishing ,and/or interfering with the plaintiff's implementation of the approved development plan on her Land No. LR 57/773 in Kasarani and/or threatening to revoke the approved structural plans pending the hearing and determination of this application.
2. That a temporary injunction do issue in terms of prayer (2) pending inter parties hearing of the suit herein.
3. That an order hereby given be enforced by the OCS Kasarani Police station.
4. That the costs of this application be provided for.

This application is premised on the grounds that the Plaintiff/Applicant is the registered proprietor of the Parcel of land No. 57/773 Kasarani .She says she obtained the necessary approvals from the Defendant/Respondent including change of user and development plans before she started to develop the said parcel of land but was served with an enforcement notice to stop further development based on the approved development plans .This notice she says was made without according her an opportunity to be heard.

In her sworn affidavit, the applicant/Plaintiff deponed that she bought the parcel of land LR No. 57/773 which was undeveloped and being of agricultural use. She applied for change of user from single to multi

dwelling units and paid the requisite fees which change of user was approved on 14th October 2010. She further swears that she applied for approval of development of plans for a multi dwelling flats and after payment of requisite fees the defendant approved the plans and subsequently the structural plans were approved by the Defendant/Respondent. She avers that as she was preparing the site for construction, she was served with a notice to stop further development and asked to remove the structures that had already been erected. She says that she was condemned unheard yet she had complied with the law and had the necessary approvals from the Defendant/Respondent before the commencing of the work. She swears that she stopped construction and tried to seek audience with the Defendant /Respondent but she was not able to. Further to her inability to access the Defendant /Respondent, and says she had been threatened by the Defendant/Respondent that the approved structural plans will be revoked and prays this Honourable court to grant her the prayers she seeks so as not suffer irreparable damage from the demolition of the structures already erected.

This application has been strongly opposed by the Respondent/Defendant and a Replying Affidavit sworn by Rose Muema on the 7th March 2012 .In her affidavit she swears that she is the Director of City Planning Development with the Respondent/Defendant .She stated that the Applicant/Plaintiff was guilty of material non-disclosure of full facts and grossly misrepresented facts concerning the case. She said that a conveyance from an individual was not a title deed and cannot therefore use the said conveyance to plead that she got the land from the Respondent/Defendant. It is her argument that, if indeed any lease had ever been given to the Applicant/Plaintiff then a title deed should have then proceeded but the fact that there is no title deed exhibited speaks volumes for itself. She further says that payment of rates did not prove ownership of property and an injunction cannot issue on a property on the strength of receipts of the rent and rates as there is no interest to be protected .She was of the view that what was issued by the Respondent/ Defendant was notification of approval of development permission which was subject to conditions and unless these conditions were met, the final approval is never given. She says the Applicant/Plaintiff had not met the conditions. She further says that the enforcement order was proper and that the applicant/Plaintiff should have followed the procedure laid down in the Physical Planning Act Cap 286 Laws of Kenya instead of rushing to court for an injunction.

There was a further affidavit sworn on 24th April 2012 by the Respondent/Defendant through Patrick Tom Odongo who is also the Director of City Planning Development whose affidavit reiterates the contents of Rose Muema's affidavit.

During the hearing on the 10th May 2012, both counsels reiterated the contents of the affidavits and in addition they considered the case of **Giella –vs- Cassman brown & Co. Ltd.** In which the main principles for granting injunction is:-

1. An applicant must show a prima facie case with a probability of success
2. The applicant might suffer irreparable injury if the injunction is not granted.
3. Where the balance of convenience lies.

I have carefully read the pleadings filed by the parties in support of their respective cases. I have also considered the rival submissions made before me. I have also taken into consideration the case of Giella – vs- Cassman Brown & Co. Ltd since both parties had relied on it .The issue for determination by this court is whether the applicant has shown this whether he merits the temporary injunction at paragraph 3 of the Notice of Motion.

The applicant/Plaintiff has shown that she bought the suit premises which title is disputed by the Respondent/Defendant; this is a matter for full hearing.

On the issue of Enforcement Notice, there is nothing from the Applicant /Plaintiff to show that she responded to the enforcement notice by way of a letter to seek the Respondent/Defendant's audience. The Respondent/Defendant has challenged the Applicant/Plaintiff's procedure of obtaining the approvals which she did not respond to through a Further Affidavit. I recognize that the City Council of Nairobi has

the authority in dealing with construction /development of structures under the Physical Planning Act Cap 286 Laws of Kenya to stop any development that does not comply with their procedures. I also recognize that in The Applicant/Plaintiff's Annexure "INC3"she did not comply with the Respondent/defendant's instructions. The Defendant /Respondent has also raised a vital issue that her plans were not approved.

The applicant/Plaintiff was challenged that after being served with the enforcement notice she should have sought audience with the Respondent/Defendant .The applicant/Plaintiff has not shown that she was denied a hearing. I find that her actions are premature and that she should have presented herself to the City Council and sought out issues on the enforcement notice.

I therefore find that she has not established a prima facie case with a probability of success nor has she shown that she will suffer irreparable loss that cannot be compensated by damages. The construction has been stopped for a good cause by the enforcement notice. She has not explained the harassment from the Respondent/Defendant other than stating it in her affidavit. The balance of convenience therefore does not tilt in her favor.

This court therefore finds no merit with the application filed by the Applicant/Plaintiff and declines to grant the order of injunction as sought. The application is therefore dismissed with costs to the Respondent/Defendant.

Dated, Signed and delivered this 19th Day of July, 2012

R. OUGO
JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

..... Court Clerk