



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Environmental & Land Case 131 of 2012

MABACHA INVESTMENTS

LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF

NAIROBI.....DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 16th March 2012. The plaintiff prays for injunction to restrain the defendant local authority from demolishing the whole or part of the property known as LR No 36/VII/409 Nairobi. The motion is brought under order 40 of the Civil Procedure Rules and section 3A of the Civil Procedure Rules.
2. In a synopsis, the plaintiff is the owner of LR No 36/VII/409. The plaintiff has erected a multi-storey commercial property. The plaintiff's case is that the entire development is well within the beacons of its property and has not encroached upon a public property or road. It is its further case that the development met the conditions and was approved by the defendant. The plaintiff was thus surprised to receive an enforcement notice from the defendant dated 12th March 2012 requiring the plaintiff to demolish the building for encroaching on a road reserve. The notice was for 7 days. In default, the defendant reserved a right to enter the property and carry out the demolition.
3. The motion is contested. The defendant has filed two sets of grounds of opposition dated 7th May 2012 and 22nd May 2012. In a nutshell, the defendant's case is that the plaintiff breached the development conditions by encroaching on a road reserve. The defendant contended that under the Physical Planning Act, the plaintiff should have sought remedy to the national liaison committee and not the court. The defendant also took up cudgels on a further affidavit of the plaintiff that was sworn without leave of court. The jurisdiction of the court is attacked. The defendant submitted that in all the circumstances of the case, the plaintiff has not reached the threshold for grant of interlocutory prohibitive injunction.
4. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive and mandatory injunctions are now well settled. When a litigant approaches the court for prohibitive 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.

5. When I juxtapose those principles of law to the available evidence, I find as follows. It is common ground that the plaintiff owns the suit property. This is self evident from the indenture of conveyance dated 18th October 2006 from Grace Wanjiku Kabui to Mabacha Investments Limited. The consideration was Kshs 45,000,000. The plaintiff has erected a multi-story shopping complex on the suit land. From the annexures to the supporting affidavit of Hussein Yusuf sworn on 16th March 2012, the defendant's City Planning Department granted an approval for the development on 4th March 2009. I have also seen an environmental impact assessment licence issued by the National Environmental Management Authority on 11th November 2009. I agree with the defendant that the approvals did not, *ipso facto*, grant permission to the plaintiff to encroach on public land. The defendant has however not filed a deposition evidencing such encroachment. The defendant has chosen to rebut the plaintiff's case by grounds of opposition. That in my view is insufficient and a poor line of defence in such circumstances. The allegations of encroachment on public land are a serious matter. All I now have before is the enforcement notice of 12th March 2012 which states:

"Illegal development i.e. encroachment (sic) into road reserved (sic)".

The notice then required the plaintiff to take the following action:

"Remove the said encroachment (sic) onto road reserved (sic) within a period of seven day (sic) (7)".

6. Granted those circumstances, the defendant has deliberately left the court in a blind spot. I am unable to say that the defendant has then adequately traversed the averments of the plaintiff in the supporting affidavit. From the evidence available I am unable to find that encroachment on a road reserve or public property has occurred. This will hopefully be disentangled by the trial court on tested evidence. It is also not lost on me that the defendant was obligated to supervise and ensure that the plaintiff complied with the approved development plans. I must state that if the plaintiff has contravened the terms of the approval or encroached on public land, the defendant would be entitled to demolish the structures. What I am saying is that the defendant has failed to furnish such evidence.

7. I agree with the defendant that the further affidavit of Hussein Yusuf sworn on 18th May 2012 was filed without leave of the court. It does not also expressly state that he has authority of the plaintiff company to depose to the matters. As it would prejudice the defendant, I strike it out entirely.

8. The impugned enforcement notice number 9667 dated 12th March 2012 was issued under section 38 of the Physical Planning Act. It is true that a person aggrieved by the notice should under section 38 (4) and (5) appeal to the local liason committee under section 13 and further to the National Liason Committee under section 15. A further appeal may then be made to this court. It is clear to me that the plaintiff has not exhausted those local remedies. It is not enough to say that the two committees are made up of officers of the defendant and that the plaintiff cannot get justice there. The Physical Planning Act is not ousting the jurisdiction of this court. It cannot do so in view of the constitutional underpinning of the jurisdiction of this court. The Act merely postpones an action to this court pending exhaustion of the two step local appeals. The present action to court is thus fraught with serious procedural difficulties. If I had a suitable application to strike out the action, I would have said a little more.

9. Article 159 of the constitution as read with sections 1A and 1B of the Civil Procedure Act enjoin this court to do substantial justice to the parties. See Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania, Nairobi, Court of Appeal Civil Application No 68 of 2008 [2010] e KLR, Oraro & Rachier Advocates Vs Co-operative Bank of Kenya Ltd [1999] 1 EA 236. The enforcement notice gave the plaintiff a mere 7 days to comply. The plaintiff has expended substantial sums to put up the commercial buildings. Although the plaintiff has not complied with the procedures under section 38 of the Physical Planning Act, I do not wish to leave it without a temporary remedy. I will dismiss the plaintiff's application for injunction. I however order in the interests of justice that the *status quo* now obtaining on the suit property shall be maintained pending an appeal by the plaintiff under section 38 (4) and (5) to the Local liason committee under section 13 of the Act or a further appeal to the National Liason Committee under section 15 of the Act. As the impugned notice did not specify the period for the appeal as required by section 38 (4), I extend the period by 15 days from the date hereof. As the action before the court is premature, I will grant costs to the defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of September 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Wangi for Mr. Ataka for the Defendant