



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CIVIL SUIT NO.366 OF 2010

ALICE WAMBUI THIONGO.....PLAINTIFF/APPLICANT

VERSUS

TAN INVESTMENTS LTD.....1ST RESPONDENT/DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT/DEFENDANT

RULING

The plaintiff herein is the registered owner of a property known as Nairobi/ Block 63/694 situate at Jamhuri II, Jamhuri Estate along Joseph Kangethe Road, Nairobi. The 1st defendant is the owner of an adjoining plot known as LR. No. Nairobi/Block 63/693.

It is the plaintiff's case that, the development plans provided that a single residential mansionate of not more than one storey be erected thereon. However, in or about August 2009, the 1st defendant started erecting and constructing a building on its plot LR.No.Nairobi/Block 63/693 in the type of apartments/flats consisting of several units which went beyond the prescribed plans. It is also her case that, the building plan has not been approved by the 2nd defendant herein.

The construction and development of the said structures by the 1st defendant has and is interfering with the plaintiff's property as a result of which the plaintiff's walls and floor slabs have cracked and are about to collapse. The construction has also become a nuisance and is annoying and inconveniencing the plaintiff and has caused the plaintiff's property to depreciate in value. The plaintiff has set out the particulars in the plaint and as a result, now seeks a mandatory injunction to restrain the 1st defendant, its servants and agents from constructing, erecting and or developing the buildings and or structures on parcel No. Nairobi/Block 63/693 which have not been approved by the 2nd defendant.

There is also a prayer that the 1st and 2nd defendants jointly and severally demolish the buildings and structures erected and constructed on land parcel No. Nairobi/Block 63/693. The plaintiff has also sought an order that she be allowed to demolish the said structures and recover the costs incurred from the 1st and 2nd defendants jointly and severally.

The plaintiff filed an application by way of Chamber Summons under Order XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking interim injunction orders in line with the main prayers sought out in the plaint. The application is supported by an affidavit sworn by the plaintiff and grounds set out on the face of the application.

On 20th August, 2010, Warsame J. recorded consent orders to the effect that the parties do make a joint site visit together with their respective engineers to verify the source of cracks on the applicant's building walls and that the 2nd respondent do file a report on the true and or correct status of the two buildings.

The application by the plaintiff is opposed by the two defendants who have filed replying affidavits sworn by Erastus Thoronjo Karimi a Director of the 1st defendant and P.T. Odongo the Director of City Planning and Architecture of the 2nd respondent.

Subsequently, the report as envisaged by the consent order of 20th August, 2010 was filed. It is signed by one J.K. M'Riria the Structural Engineer, City Engineering Department.

The application was addressed by way of written submissions which I have taken time to read. What has transpired at the end of all these submissions is that the alleged structural interferences attributed to the development on plot title Nairobi/Block 63/693 cannot be blamed on the said development. The 1st defendant had approved plans by the 2nd defendant and that, the report by the Structural Engineer filed in court has not been challenged by the plaintiff.

Prior to the development on the said property, the 1st defendant caused a notice to be given and no objections were raised by any party including the plaintiff. Additionally, the National Environment Management Authority (NEMA) issued an Environmental Impact Assessment licence in respect of the said development. That licence has not been challenged.

More significantly however, is the fact that at the time the plaintiff came to court, and before the present application was argued, the said development had been completed and an occupation certificate issued by the 2nd defendant. It would appear therefore that, the orders sought by the plaintiff would be an exercise in futility. As the court does not act in vain, I can only observe that the application has been overtaken by events. If the plaintiff hereinafter suffers any damage whatsoever, I believe she can be adequately compensated by an award of damages which can be assessed if need be. For now she has not established any *prima facie* case with probability of success and accordingly, the application is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day of February, 2011.

**A. MBOGHOLI MSAGHA
JUDGE**