

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. 563 OF 2009

NESCO SERVICES LIMITED1ST PLAINTIFF
HARUN OSORO NYAMBOKI2ND PLAINTIFF

V E R S U S

CITY COUNCIL OF NAIROBIDEFENDANT

R U L I N G

The Defendant has admitted that an Enforcement Notice was issued to the Plaintiffs who are developing the suit property L.R. No. 12761/11 Magadi Road, Karen, Nairobi that belongs to the 1st Plaintiff. The Notice stopped further development and occupation of the suit premises. It stated that the development had not been approved. This Notice forced the Plaintiffs to come to court on 6th November 2009 for a permanent injunction, among other prayers. With the suit was filed an application under Order 39 of the Civil Procedure Rules seeking a temporary injunction.

The 2nd Plaintiff swore a supporting affidavit and annexed documents to show that the Defendant had approved change of user and structural drawings for the construction of the Executive Hostel. The National Environmental Management Authority (NEMA) duly assessed and approved the project which is now 95% complete at the cost of KShs. 45 million, part of the money having been borrowed from Housing Finance Company of Kenya.

The Defendant did not file a replying affidavit to controvert the averments in the supporting affidavit, but instead filed a defence, notice of preliminary objection and grounds of opposition. The result is that the evidence contained in the supporting affidavit was not controverted. The Defendant has approved the on-going development on the 1st Plaintiff. NEMA has also approved it. It was therefore *prima facie* illegal for the Defendant to issue the Enforcement Notice which alleged that the development had not been approved. Subject to such approval, the Plaintiff had not only the absolute and indefeasible claim to the suit premises but also the right to develop and use it without interference. This right is, based on the available evidence, being infringed.

It is not true that an injunction cannot issue against the Defendant. Under section 16(1) of the Government Proceedings Act (Cap. 40) no injunction can issue against the Government. The Defendant is a local authority, and not the Government. The distinction is made clear by section 2 of the Public Authorities Limitation Act (Cap. 39) and section 3 of the Interpretation and General Provisions Act (Cap. 22).

The Defendant pleaded that the suit was premature because under section 38 of the Physical Planning Act Cap. 286) if the Plaintiffs were aggrieved by the Enforcement Notice they should have appealed to the Liaison Committee under section 13. An appeal against the decision of the committee is to the National Liaison Committee and an appeal from the National Liaison Committee is to the High Court. The Defendant was saying that the Plaintiffs had not exhausted the machinery provided under the Act. In the supporting affidavit, the 2nd Defendant swore that the Notice, although dated 27th August 2009, was served on 28th October 2009. It was being served 2 months late. There was no response to this averment. The Plaintiffs contend that under section 38(2) of the Act they were denied the opportunity to

file an appeal to the committee. The suit became the only feasible remedy.

The principles for the grant of interlocutory injunction have been settled since **Giella – Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The applicant has to show he has a *prima facie* case with a probability of success; that he will suffer irreparable damage; and, that, in case of doubt, the court should decided the matter on the balance of convenience. I have found in the foregoing that the Plaintiffs have established a *prima facie* case. They are entitled to an order of injunction in terms of prayer 4 of the motion. Costs shall follow the event.

**DATED AND DELIVERED AT NAIROBI
THIS 23RD DAY OF FEBRUARY 2011**

**A. O. MUCHELULE
J U D G E**