

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 540 OF 2010

ROBERT NTOYAI & 10 OTHERS PLAINTIFF

VERSUS

ERIC ODHIAMBO OMOLLO & 2 OTHERSRESPONDENTS

RULING

The plaintiffs brought this suit against the defendants alleging that the defendants who are the owners of properties known as Nairobi/Block 72/239 and Nairobi/Block 72/ 215 situate in Ngei Phase II Nairobi had commenced and continue constructing illegal structures on their properties. The plaintiffs are residents and property owners in Ngei Phase II Estate in the same area. It is their case that the alleged illegal structures are built without any regard for legal requirements under the City Council Building by Laws or approvals and qualifications under the Physical Planning Act, approvals by National Environmental Management Authority and other legal requirements. The said construction poses a grave danger to the plaintiffs, their families and tenants and also put pressure on the existing amenities such as sewer, water and parking; and there is a likelihood of increased population in this area. Such action is also likely to reduce the value of the plaintiff's' properties and may be an eye sore since the area is meant for a single residential dwelling.

Accordingly, they seek injunction orders against the 1st and 2nd defendants to restrain them from constructing the structures without the said approvals.

There is also an order sought to compel the defendants to demolish the illegal structures aforesaid. The 3rd defendant, that is, the City Council of Nairobi is joined in these proceedings in its capacity as the Local Authority charged with, inter alia, regulating construction of buildings within the City of Nairobi. Alongside the plaint the plaintiff filed an application by way of Chamber Summons under Order XXXIX Rule 1, 2 and 9 of the Civil Procedure Rules and Sections 3A, 3B and 63 (e) of the Civil Procedure Act for interim injunction orders in line with the prayers in the plaint.

The application is opposed and there is a replying affidavit sworn by the first defendant Eric Odhiambo Omolo. There are also grounds of opposition filed by their advocates. Both learned counsel have filed written submissions to address the application.

It was a specific pleading in the plaint that the defendants were undertaking the said construction without any regard for the legal requirements under the City Council Building bylaws, The Physical Planning Act and the National Environment Management Authority. As a rejoinder to that allegation, the defendants should have filed in their reply approved authority with regard to the said constructions which should have included approved plans by the City Council of Nairobi. Additionally, a certificate issued by National Environmental Management Authority should have been presented. This has not been done. What is on record is an application for approval of plans and there is no evidence that such plans were ever approved. If that were the case, copies of the same would have been exhibited. In the absence of all those documents, the plaintiffs are right to state that the constructions are illegal.

The zoning of this particular area meant for single residential dwelling units has not been disputed by the defendants. It is enough at this stage for the plaintiffs to state that their properties and lives would be adversely affected.

How this will happen is a question of evidence. For now I am persuaded that the plaintiffs have presented a *prima facie* case with a probability of success. It is not necessary at this state to consider the issue of damages. Accordingly, I grant orders as prayed in the plaintiffs' Chamber Summons dated 10th November, 2010 with costs to the plaintiffs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 9th Day of June, 2011

**A. MBOGHOLI MSAGHA
JUDGE**