



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC SUIT NO. 205 OF 2010

NAFTAL OKWANYO MASARA1ST PLAINTIFF
 JANE MASARA 2ND PLAINTIFF

VERSUS
 TOWN CLERK

CITY COUNCIL OF NAIROBI1ST DEFENDANT

DIRECTOR OF CITY PLANNING

CITY COUNCIL OF NAIROBI2ND DEFENDANT

DIRECTOR OF INSPECTORATE &
 ENFORCEMENT CITY COUNCIL OF NAIROBI3RD DEFENDANT

CITY COUNCIL OF NAIROBI4TH DEFENDANT

RULING

On 4th October, 2010 Okwengu J gave an order to the effect that the 1st, 2nd, 3rd and 4th defendants their agents, servants, workmen or anyone else under their direction or instruction be and are hereby restrained by way of interlocutory injunction from arresting, restraining, harassing and or in any other manner interfering with the 1st and 2nd applicants in the construction of developments on their plot LR. No. 1870/111/530 Westlands Matundu Lane.

There is now an application before me by way of Chamber Summons under Order 39 Rule 4, Order 9A Rules 10 and 11 and Order 9B Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking a stay of the said order and the setting aside of the same.

The reasons advanced for the said orders are, inter alia, that the same were issued ex parte in the absence of the advocate for the defendants, they were obtained by the plaintiffs fraudulently by concealing vital information which if provided the said orders would not have been issued and that the absence of the defendants’ counsel was not intentional but a mistake of an advocate which should not be visited on the client. It is also alleged that if the plaintiffs are allowed to continue with their construction the public residents neighbouring the suit property stand to suffer irreparably and the proposed development will cause environmental injury to other residential developments.

It is also alleged that the plaintiffs obtained approval of the construction fraudulently by mis-representing and concealing information and the said construction is illegal since it is contrary to the approved plan registration No. EV507. The plaintiffs’ construction is contrary to the title covenants for the property and the obtaining development planning policy for the area which contravenes the mandatory provisions of the Physical Planning Act No. 6 of 1996.

In addition to the said grounds, there is a supporting affidavit sworn by Dennis Joseck Mare who is an advocate for the respondents. The respondent opposed the application and there is the replying affidavit sworn by Naftal Okwanyo Masara the 1st plaintiff herein. Upon directions, both learned counsel have filed submissions to address the application.

The plaintiffs are the registered joint owners of the suit premises. The building plans for the proposed development were presented to the 4th defendant who approved the same and construction commenced. The acting director of City Planning department now says the approval was inadvertently granted. The said averment has not been supported by evidence. The defendants have also not demonstrated what provisions of law or environmental issues have been breached by the plaintiffs. The defendants can now not shift the blame to the plaintiffs.

The absence of the advocate on the date the orders were issued has no legal impact on the said order. I say so because, the court must have been persuaded by the material presented that the orders were warranted. That is clear from the content, context and tenor of the said order. In any case, time has come when counsel must bear full responsibility for their actions when absent from their mandate bestowed upon them by their respective clients.

At the end of it all, the defendants have not persuaded the court that the said order should be stayed or set aside. Consequently the application dated 22nd October, 2010 is hereby dismissed with costs to the plaintiffs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of September, 2011

**A. MBOGHOLI MSAGHA
JUDGE**