



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 285 of 2009

**JANE NGONYO MUHIA.....PLAINTIFF
VERSUS**

**A. ABDALLA1ST DEFENDANT
GEORGE MWANGI.....2ND DEFENDANT
DONHOLM PHASE 5G RESIDENTS.....3RD DEFENDANT
WELFARE ORGANIZATION.....4TH DEFENDANT**

R U L I N G

1. This ruling concerns two applications. The first application is the Chamber Summons dated 15/06/2009 filed by the Plaintiff herein and brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the Law seeking **ORDERS:-**

1. ***THAT*** this Honourable Court be pleased to certify this application as utmost urgent and the same be heard *ex parte* in the first instance owing to the urgency of the matter on the unique circumstance of the case.

2. ***THAT*** an urgent temporary injunction be issued against the Defendants/ Respondents restraining the Defendants, their agents, servants, employee or whomever from demolishing, evicting, entering in any manner interfering with the Applicant's possession of the suit property in Land Reference Number NAIROBI/BLOCK 82/6259 pending the interpartes hearing of this application.

3. ***THAT*** a temporary injunction be issued against the Defendants/Respondents, their agents, servants, employees or whomever from demolishing, destroying, evicting or in any manner whatsoever from interfering with the Applicants possession of Land Reference Number NAIROBI/BLOCK 82/6259 situated in Donholm estate pending the hearing and determination of this application and the suit and/or until further orders of this Honourable Court.

4. ***THAT*** the costs of this suit be provided for.

2. The application is premised on the ground, inter alia, that the Defendants are threatening to demolish, destroy, evict, enter the Plaintiffs suit property known as LR Number NAIROBI/BLOCK 82/6259 situated in Donholm Estate. The application is also supported by the affidavit sworn by the Plaintiff Jane Ngonyo Muhia dated 15/06/2009 in which she says that the suit property which she bought from M/s Continental Developers Ltd in or about 1998 rightfully belongs to her. She also says that she has started constructing a Three (3) storey building consisting of 16 bedroomed flats after obtaining all the necessary approvals from both the City Council of Nairobi and the National Environmental Management Authority (NEMA). The Plaintiff alleges that after the construction had reached an advanced stage, the Defendants started harassing her and her employees and issued threats to demolish the flats and to evict her, hence this application.

3. Together with the application, the Plaintiff filed a plaint dated 5/06/2009 in which she avers that she is the legal and registered owner of the suit property since 7/10/1998 on which she is constructing sixteen (16) one bed roomed flats. She avers further that on or about 12/06/2009, the Defendants sent some hired goons to the suit property and the said goods threatened to destroy the suit premises and lay it to waste. The Plaintiff prays for judgment against the Defendants for:-

(a) *An urgent temporary injunction restraining the Defendants, their servants, agents and/or employees from in any manner demolishing, destroying, evicting or interfering with the Plaintiff's parcel of land reference number Nairobi/Block 82/6259 pending the final determination of this suit.*

(b) *A permanent mandatory injunction restraining the Defendants, their servants, agents and/or employees from in any manner whatsoever demolishing, destroying, evicting or interfering with the Plaintiff's said parcel of land No. NAIROBI/BLOCK 82/6259.*

(c) *General damage.*

(d) *Costs of this suit*

(e) *Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.*

4. The 2nd application is the Defendants Chamber Summons dated 26/06/2009 by which the Defendants pray for orders that the interim orders issued herein be discharged and/or vacated. The Defendants also pray that the costs of their application be provided for.

5. The Defendants application is supported by grounds appearing on the face thereof and mainly that there are stop orders in force issued by the National Environmental Tribunal in NET/38/09 between the same parties, and that if the construction continues, the environment is in danger of being degraded. The application is also supported by the sworn affidavit of George Mwangi, the 2nd Defendant herein. George Mwangi says that he is the Secretary of the 3rd Defendant and has been duly authorized by the 1st and 3rd Defendants to swear and make the Supporting Affidavit. The deponent reiterates the averments on the face of the application and says that the Plaintiff has hidden material information from the court, namely that stop orders were issued by NET pending the hearing and determination of an appeal that is pending before that tribunal. That if the Plaintiff was dissatisfied by NET's order, she should have called for the said order to be brought before this Honourable Court for quashing by way of Judicial Review.

6. Annexed to the Supporting Affidavit of George Mwangi is annexure "GM 1" being a document in respect of NET's Tribunal, Appeal No. NET/38 of April 2009 between the 3rd Defendant herein on the one hand and the Director General – NEMA and Jane Ngonyo wherein the Appellants sought an order stopping further development on the suit property. Under Summary of Grounds of Appeal – item 4 – the Appellants said that the development was stopped by NEMA until the Developers got Change of User from City Council of Nairobi and Residents' objections on change of user addressed.

7. By a letter dated 24/04/2009 by NET to Jane Ngonyo, the Plaintiff herein, she was directed to **STOP** any activity on the plot until the appeal to the Tribunal was heard and determined. Copies of proceedings in the NET appeal also form part of annexure marked "GM 1".

8. These two applications proceeded by way of written submissions. The Plaintiff's main argument is that she has come to this court seeking orders to preserve the suit property, which orders could not be issued by the Tribunal. The Plaintiff also submits that the interim orders issued herein were obtained legally and regularly and that it is only fair and just that the said orders remain in force until the case is heard and determined, as, in the opinion of the Plaintiff, the Defendants will suffer no prejudice. The Plaintiff also argues that the Plaintiff could not have sat back and waited for the Defendants to enter upon and demolish the suit premises or evict her therefrom while awaiting the NET's decision. The Plaintiff freely admits that there is pending before NET an appeal which is yet to be heard and determined but says that the merits or demerits of that appeal shall be argued when its time comes. In the Plaintiff's view, the balance of convenience tilts in her favour and that if the application for injunction is not allowed as prayed, it is the Plaintiff who will suffer loss and damage. The Plaintiff avers further that contrary to what the Defendants say, this court has the jurisdiction to hear and determine this application the appeal pending before NET notwithstanding. The Plaintiff has cited the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** to support her contention that she has established that she has a prima facie case with a probability of success; that unless the orders sought are granted the Plaintiff will suffer irreparable loss and damage and that even if the case were to proceed on a balance of convenience, the balance of

convenience tilts in her favour.

9. The Defendants case was ventilated vide the submissions filed on the Defendant's behalf by the firm of J. Makumi & Co. Advocates. The Defendants admit the facts of this case up to the appeal pending before the NET. It is the Defendant's submission that the Plaintiff's application does not meet the three conditions for the granting of injunctions as set out in the **Giella case**. The Defendants argue that

(a) *It is not the defendants who are barring the plaintiff from constructing but a valid tribunal order.*

(b) *The plaintiff continues to construct despite the Stop Orders in force.*

(c) *The plaintiff's only option if dissatisfied with the Orders is to appeal against those Orders or have them quashed by way of judicial review if she so believes the tribunal acted in excess of its mandate hence luck [sic] of jurisdiction by this court.*

(d) *The plaintiff has misled this court on what she is constructing and by constructing what she is not authorized is wasting the environment.*

10. The Defendants further contend that the Plaintiff has not shown what damage she would suffer if the orders sought are not granted; and that the Plaintiffs' loss which has been quantified at Kshs.10,000,000/= can be paid in damages (see **Milimani HCCC No. 664 of 2004 – Winam Petroleum Products & Another –vs- Kenya Shell Ltd.**) In the **Winam case**, the court (Kasango J) held the view that the moment the Plaintiff charged the suit property, the suit property became a commodity for sale whose loss could be compensated in damages. Mr. Makumi, advocate who appeared for the Defendants has argued that the Plaintiff has put a value on her house at Kshs.10,000,000/= and that such loss can be recovered in damages.

11. The Defendants have argued further that if the court were in doubt, it should weigh the private rights of the Plaintiff against the public interest of having a clean and safe environment; that when this consideration is made, the balance of convenience tilts in favour of the Defendants.

12. As to whether or not and upon what grounds the interim orders should be discharged, learned counsel for the Defendants relied on Ringera J's (as he then was) observations in **Milimani HCCC No. 1357 of 2001 – Reef Building Systems Ltd. –vs- Nairobi City Council** thus:—

“... there is no qualification or restriction as to the nature of the order which is liable to be interfered with on the application of a dissatisfied party. I think if the rules committee had intended the rule to apply only in respect to ex parte orders in the first instance sense the same would have been made a sub-rule of rule 3 which deals with the orders which are ex parte in that sense. I also think that if the intention was to restrict the operation of the rule to ex parte orders in the second sense the rules committee would have expressly so provided. Taking that view of the matter my conclusion is that the rule applies to both types of ex parte orders. Indeed I would go further to opine that it also applies to interlocutory injunctions made after an inter partes hearing. In other words the rule in my discernment applies to all interlocutory injunctions however obtained.”

13. In the same **Reef Building Systems** case (above) the court set out the circumstances under which a court may exercise its discretion to discharge and/or set aside an order of injunction —

(a) *if it is shown that the order was irregularly obtained or;*

(b) *there was a subsequent change in circumstances that it was unjust to maintain it in force or;*

(c) *is otherwise unjust and inequitable to let the order remain*

14. In the instant case, the Defendants argue that the order sought to be aside was irregularly obtained and it is otherwise unjust and inequitable to let the order remain in force (see the persuasive authority in **Milimani HCCC No. 2382 of 1999 – John Muritu Kigue & Another –vs- Agip (Kenya) Ltd.** It would appear from the above authority that where a party fails to disclose all the facts material to the suit or application which facts are material to the determination of his right to an order of injunction then such non-disclosure disentitles or disqualifies such a party from equitable relief and particularly so when the disclosed facts were within the knowledge and possession of the Plaintiff. In the case of **The King vs General Commissioner for Income Tax (1917)1 KB 486**, a case that was applied with approval in the **John Muritu Kigwe** case (above) the court held that where an Applicant fails to disclose all material facts before the court, the court will not grant “*him an injunction even though there might be facts upon which the injunction might be granted.*” The Defendants in this case are contending that the Plaintiff

failed in her pleadings to disclose that there was a STOP order issued by NET; and that by failing so to disclose, the Plaintiff showed total lack of faith. So that where there is lack of good faith on the part of an Applicant, the court ought not even to listen to its application.

15. The question that arises here then is what amounts to non-disclosure. Learned counsel for the Defendants submits that relevant non-disclosure is established from the fact that —

(a) *The duty of the applicant is to make “ a full and fair disclosure of all the material facts.*

(b) *The materials facts are those which it is material for the Judge to know in dealing the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.*

(c) *The applicant must make proper inquiries before making the application.*

(d) *The extent of the inquiries which will be held to be proper and therefore necessary must depend on all the circumstances of the case including (i) nature of the case which the applicant is making when he makes the application; and (ii) the order for which application is made and the probable effect of the order on the defendant.*

(e) *If the material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains (an ex parte injunction) without full disclosure ... is deprived of any advantage he may have derived by that breach of duty”.*

(f) *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the Order without examination of the merits depends on the importance of the facts to the issues which were to be decided by the Judge on the application.*

(g) *It is not every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded ... when the whole of the facts including that of the original non-disclosure are before the court may well grant a second injunctions if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.*

16. It is the Defendant's submission that the Plaintiff concealed material facts in making the application and that the facts in making the application and that the facts not disclosed are such that they are sufficient to justify a discharge of the ex parte order of injunction. The Defendants contend that though the Plaintiff has been stopped from building until the appeal before the NET is heard and determined the Plaintiff proceeds to do so, and that the real sufferers in this case are the Defendants.

17. I have now considered the opposing views in this matter. The issue that arises for determination is whether, as alleged by the Defendants the Plaintiff obtained the interim order of injunction on 16/06/2009 in an irregular manner? In other words, was the said order issued on the basis of material non-disclosure by the Plaintiff? What is the consequence of such non-disclosure if the court establishes that there was such non-disclosure?

18. My view of the matter after the above considerations is that the Plaintiff did not make a full and fair disclosure of all the material facts to assist the court in reaching a fair decision. In her plaint accompanying the application for injunction, the Plaintiff averred at paragraph 14 of the plaint:-
*“The Plaintiff avers that there is no other suit pending between the parties herein and that **there has never been** any suit between the parties over the same subject matter” (Emphasis supplied).*

19. The truth of the matter is that as at 15/06/2009, there was an appeal pending before the NET between the Plaintiff and the Defendants and another. It is also true that as a result of the said appeal there was a STOP order against the Plaintiff, directing her to “STOP” any activity on the plot until the matter is heard and determined by the Tribunal. The Plaintiff has argued that the proceedings before the NET are irrelevant, but that argument is flawed because there was a “suit” pending before the NET. Under Section 2 of the Civil Procedure Act, a “suit” “means all civil proceedings commenced in any manner prescribed”. For the above reason, this court cannot allow the Plaintiff to continue enjoying the advantage already obtained by means of the order which in my view, has been wrongly obtained by her. The Plaintiff knew exactly what she was doing. She wanted to cover the court's eyes to the fact that she was not supposed to carry on with any activity on the suit property until the appeal before the NET was heard and determined. The Plaintiff has admitted that the said appeal is yet to be heard and determined. If the

court at first instance had been given this information by the Plaintiff, I am clear in my mind that the interim order of injunction would not have been granted.

20. Now turning to the application for injunction, I am not persuaded that the Plaintiff has met the conditions for the granting of any injunction as set out in the **Giella** case (above). The main reason for reaching this conclusion is that the Plaintiff has quantified her loss to date, and such loss is capable of being paid to the Plaintiff by way of damages. Further, the Plaintiff is not likely to suffer any loss because there is already in force a STOP ORDER. In any event, I think that the balance of convenience in this case would tilt in favour of the Defendants because the Plaintiff has acted dishonestly in this case by choosing to put on record only such information as would favour her case. The Plaintiff has not come before this court with clean hands.

21. For the reasons above given, I find that Plaintiff's Chamber Summons application dated 15/06/2009 lacks merit. The same is dismissed with costs to the Defendants. In the same breath, I find and hold that the Defendants Chamber Summons application dated 26/06/2009 has merit. The same is allowed and accordingly, the interim order of injunction issued herein on 16/06/2009 be and is hereby vacated and discharged. The Defendants shall have the costs of their application.

It is so ordered.

Delivered and Dated at Nairobi this 22nd day of January, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Paulo Ndungu (present) for the Plaintiff/Applicant

M/s Makumi & Co. Advocates (absent) for the Defendant/Respondent

Weche – court clerk