



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 730 of 2009

ADVENTIS LIMITED PLAINTIFF

VERSUS

SUPERIOR HOMES (K) LTD. & ANOTHERDEFENDANTS

RULING

By an application by Chamber Summons dated 10th November, 2009 brought under a certificate of urgency, the Plaintiff applied for two main orders as follows –

1. *A temporary injunction do issue restraining the Defendants/Respondents by themselves, their servants, agents and/or assigns from using the Plaintiff's drawings in any manner contrary to the Plaintiff's copyright over the same and any further or other construction, development, alteration, sale or other alienation of any nature in the development/project at Stoni Athi (Stoney) Athi, in Athi River, commonly referred to as "Green Park" on L.R. Number 8785 that constitutes an infringement over the Plaintiff's moral and economic rights over its drawings, pending the inter parties hearing and determination of this application.*
2. *A temporary injunction do issue restraining the Defendants/Respondents by themselves, their servants, agents and/or assigns from using the Plaintiff's drawings in any manner contrary to the Plaintiff's copyright over the same and any further or other construction, development, alteration, sale or other alienation of any nature in the development/project at Stoni Athi (Stoney) Athi, in Athi River, commonly referred to as "Green Park" on L.R. Number 8785 that constitute an infringement over the Plaintiff's moral and economic rights over its drawings, pending the hearing and determination of the suit.*

To this application, the Advocates for 1st Defendant raised a notice of preliminary objection dated 5th February, 2010 stating that –

"The application on record dated 10.11.2009 is bad in law and fundamentally defective for being in contravention of the provisions of Copyright Act No. 12 of 2001 of the Laws of Kenya"

The application is also opposed by a replying affidavit of Edward Dickson Gicobi, the 2nd Defendant, sworn on 8th December, 2009 in which he denies conversion and infringement of copyright. It was the preliminary objection dated 5th February, 2010, that first came for hearing. In those proceedings, Mr. Gitonga appeared for the Plaintiff/Applicant, while Ms. Oduor appeared for the 1st Defendant and Mr.

Mutula Kilonzo Jnr. for the 2nd Defendant.

In her submissions, Ms. Oduor argued that the dispute here touches upon infringement of copyright and that it is not disputed that the constructions are still underway. She referred to **Section 35 (7)** of the **Copyright Act, 2001** and submitted that in view of that **Section**, the application was not properly taken and that it was a clear case for dismissal. She further contended that copyright, unlike other matters, is not registrable. It is therefore paramount that parties appear in Court and give oral evidence. In the affidavit evidence of the 1st Defendant, the Plaintiff claims certain architectural designs which can only be resolved at a full hearing. On that note she urged the Court to dismiss the application.

Mr. Kilonzo Jnr. for the 2nd Defendant associated himself with the submissions of Ms. Oduor. He argued that the plaint filed on 28.9.2009 had two pronged prayers. The first one sought damages against the 1st Defendant and the second sought an injunction against the 2nd Defendant. The application by Chamber Summons dated 10.11.2009 sought temporary injunction against both Defendants in prayers (b) and (c). The injunctive prayers sought to restrain the Defendants from infringing copyright by stoppage of any further or other construction or development. It was therefore not in dispute, he maintained, that the Plaintiff was seeking injunction to stop further construction. The objection under **Section 35 (7)** of the **Copyright Act**, therefore, applied. It was his final submission that the objection satisfied the conditions laid down in **MUKISA BISCUIT MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD. [1969] E.A. 696**, as it had the potential of disposing of the interlocutory application altogether.

Oposing the application, Mr. Gitonga for the Respondent submitted that the objection raised does not satisfy the criteria in **Mukisa's Case**. He further submitted that **Section 35 (7)** of the **Copyright Act** prevents demolition of partly completed buildings. It was further his contention that what the application seeks to be stopped is development and not constructions of buildings. They also seek to stop development of the entire town but not any particular building, and that the Court has the power to say that any partly built building may be completed. However, the Applicants are not seeking demolition of built buildings. Arising from this, the application does not fall within **Section 35 (7)** of the **Copyright Act**. The Court will be better placed by hearing the arguments in the substantive application as the matters addressed by the Defendants are addressed in the replying affidavit. Mr. Gitonga finally submitted that the preliminary objection does not fall within the definition in **Mukisa's Case** and referred to **LAXMANBHAI CONSTRUCTION v. ANSPAR BEVERAGES LTD., (Milimani) HCCC No. 1327 of 2001; AKIBA BANK LIMITD v. REKHA CHANDIDAS & ANOR. (Milimani) HCCC No. 522 of 2004; and NYORO CONSTRUCION CO. LTD. v. KENYA AIRPORTS AUTHORITY (Milimani) HCCC No. 205 of 2005**. He urged the Court to dismiss the preliminary objection and asked that the costs be assessed by the Court and be paid before taxation as indicated in **Akiba's Case (supra)** since the Preliminary objection was not raised in good faith but for delaying the hearing of the case.

In her reply, Ms. Oduor submitted that **Section 35 (7)** of the **Copyright Act** is very clear that no injunction can be issued in respect of partly completed buildings, and the term building includes any structure. She further submitted that the Plaintiffs seem to impute bad faith on the part of the Defendant which is not the case. As regards the formula laid in **Mukisa's Case**, the pleadings are evidence and the law is very clear, and this is a proper preliminary objection. She urged the Court to strike out the application.

I have considered the pleadings and the submissions of all Counsel and the cases referred to. What was laid in **Mukisa's Case** was that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are given as for instance, an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. In that context, I note that **Section 35 (7)** of the **Copyright Act** states as follows –

“No in injunction shall be issued in proceedings for infringement of any right protected under this Act which

requires a completed or partly built building to be demolished or prevents the completion of a partly built building”.

In the light of that provision, prayer (e) of the judgment sought against the 2nd Defendant asks for **“an injunction restraining the Defendants by themselves, their servants, agents and/or assigns from using the Plaintiff’s drawings in any manner contrary to the Plaintiff’s copyright over the same, and any further or other construction, development, alteration, sale or other alienation of any nature in the development project at Stoni Athi (Stoney) Athi, in Athi River, commonly referred to as “Green Park” on L.R. 8785 that constitute an infringement over the Plaintiff’s moral and economic rights over its drawings.”** Mr. Gitonga for the Plaintiff is recorded as having said that **“what the Plaintiff seeks to be stopped is development and not constructions of buildings, and that they seek to stop the development of the entire town and not any particular buildings.”**

With respect, such a statement is, *prima facie*, at variance with prayer (e) of the judgment sought against the 2nd Defendant and also at further variance with paragraphs (1) and (2) of the orders sought in the application by Chamber Summons dated 10th November, 2009. Unless we are splitting hairs, in the context of this preliminary objection, my understanding of all those 3 prayers is that they seek **“an injunction restraining the Defendants by themselves, their servants, agents and/or assigns from ... any further or other construction, development ... of any nature in the development/project at Stoni Athi (Stoney) Athi, in Athi River ...”** It is significant that Mr. Gitonga concedes that what the Plaintiffs seek to stop is development of the entire town and not the construction of any particular buildings. By its very nature, the development of any town entails the construction of roads and buildings to accommodate all the necessary human amenities and it is inconceivable that the project at Athi River could answer to development of a town without buildings. It is my considered view that construction of buildings is central to the development of any human habitation and for that reason, if the injunctions sought are granted they will certainly prevent the completion of any buildings which may be partly built which is the mischief that **Section 35 (7)** sought to prevent. The wording of the injunction sought speaks for itself and is clear that what is sought to be restrained is **“... any further or other construction ...”** and this inevitably entails the prevention of completing any partly built buildings, which prevention is outlawed by **Section 35 (7) of the Copyright Act.**

By reason of the foregoing, I find that the preliminary objection is valid, well taken and it is hereby upheld. I therefore find that the application on record dated 10th November, 2009, is bad in law and fundamentally defective for being in contravention of **Section 35 (7) of the Copyright Act,** and it is hereby struck out with costs to the Defendants.

Orders accordingly.

Dated and Delivered at Nairobi this 6th day of May, 2010.

L. NJAGI
JUDGE