REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

CIVIL SUIT NO. 267 OF 2009

1. EPHRAIM MAINA RWINGO
2. RICK SEASIDE VILLAS LIMITED ……...PLAINTIFFS
3. FARID ALMAARY

-VERSUS-

1. LALJI RALJI
2. KARIBUNI MANAGEMENT LIMITED
3. S. L. HIRANI ……DEFENDANTS
4. J.V. HIRANI
5. S. V. HIRANI

RULING

On the basis of the consent of the parties, two out of the plurality of applications on this file were heard together: the plaintiff's Notice of Motion of ***5th August, 2009***, and 2nd defendant's Notice of Motion dated ***17th March, 2010***.
The plaintiff's application was brought under Orders **L**, rule 1 and **XXXIX**, rule 2 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). This application carried two main prayers, which may be set out here:

(i) for –
"an injunction restraining the defendant by himself, his servants or agents from continuing, or undertaking building construction on MN/I/4947, MN/I/9853 and MN/I/5136 in excess of 3 floors, 50% of the area of their plot, without the required approval by the Council, NEMA and/or otherwise in contravention of the Environment Management and Co-ordination Act, the physical Planning Act, the Local Government Building bye-laws, the Zoning Policy for the Nyali area and/or in any other illegal way pending the hearing and determination of this application and/or suit";
(ii) for –
"a mandatory injunction compelling the defendant, their agents and/or servants, at their own cost, to demolish any of the buildings or structure standing on MN/I/4967, MN/I/9853 and MN/I/5136 that are in excess of 3 floors, 50% of the area of plot, without the required approval by the Council, NEMA, and/or otherwise in contravention of the special conditions of plot title, the Physical Planning Act, the Local Government Building bye-laws, the Environment Management and Co-ordination Act, the Zoning Policy of the area or in any other illegal way and remove all debris of demolition and, in default, the plaintiff be at liberty to demolish the same at the defendant's cost pending the hearing and determination of this application and/or suit."
In the supporting grounds, the applicant contended that the constructions in question are illegal, because the defendants are constructing apartments without first obtaining the required approval under the Municipal Council by-laws, the Physical Planning Act, and the National Environment Management and Co-ordination Act. It was contended that the plaintiff's and the defendant's properties are located in an area designated as residential, and land use in the area is restricted; that the defendants were in breach of the special conditions attached to the properties in question; that 2nd defendant was constructing a five-

storey building on MN/I/5136; that 1st defendant is constructing high-rise buildings without environmental impact assessment and without obtaining the required approvals; that the buildings constructed by each of the defendants occupy more than the required 50% of the area of land within which they are located; that the defendants have illegally constructed buildings that constitute a danger to the plaintiffs and that devalue the plaintiffs' properties in the neighbourhood.

The various grounds were illustrated in detail by the supporting affidavit of 1st plaintiff sworn on ***5th August, 2009***.

The 3rd defendant, acting for himself and for his co-defendants, swore a replying affidavit on ***14th January, 2010*** deponing that, before initiating construction on Plot No. 4967/I/MN, the 3rd, 4th and 5th defendants sought and obtained all the relevant approvals and licences from the relevant authorities; that, before commencement of 2nd defendant's project on Plot No. MN/I/5136 2nd defendant had sought and obtained all the relevant approvals and licences; that the defendants after obtaining the approvals, had put up the project and invited purchasers who invested "vast sums of money in the project and are currently inconvenienced by the delay in the project"; that the project has been developed using monies obtained as loans from commercial banks, and so the defendants stand "to lose substantial sums of money if the project is not completed in time due to accrued interest charges"; that the project entails the construction of 16 four-storey flats, and this "does not in any way interfere with the plaintiff's right, if any"; that 2nd plaintiff's building is also a four-storey building, and there is no basis for the plaintiff's complaint about it; that the location in question already has high-rise buildings, some being as high as eight floors; that the construction projects are not illegal as contended by the plaintiff; that 2nd plaintiff had raised no objection to the construction project at the time the defendants sought the approvals; that the plaintiffs in their claims; have not enjoined the public authorities which had given the approvals for the construction project.

The 2nd defendant also filed a Notice of Preliminary Objection, against the plaintiff's application, the main contentions being that:

(i) the application is incompetent, frivolous, and an abuse of Court process;
(ii) leave had not been obtained, to file a representative suit involving multiple plaintiffs and defendants in respect of different properties, and the suit as filed is highly prejudicial to 2nd defendant;
(iii) the plaintiffs have no *locus standi* ***to file the suit,***

and that, in the circumstances, the plaintiff's application should be struck out with costs.

The 2nd defendant's Notice of Motion of ***17th March, 2010*** was brought under ss. 1, 3A and 63(e) of the Civil Procedure Act, and Orders I (rules 10,13), **VI** (rule 13(1)(d)), **XXXIX** (rule 4) and **L** (rules 2, 17), seeking as the main prayers: temporary stay of the order of ***5th August, 2009***; that the plaint of ***5th August, 2009*** be struck out with costs; that, in the alternative, the order of injunction issued on ***5th August, 2009*** be discharged, varied and/or set aside.

The application was founded on the grounds that: the entire suit was "fatally defective for misjoinder of defendants"; the plaintiffs had failed to obtain leave of the Court to file a representative suit; the plaintiffs failed to disclose material facts to the Court – especially, the fact that 2nd defendant had obtained all necessary approvals before commencing construction; 1st plaintiff's building consists of numerous apartments set out on a three-storeyed structure; the 2nd plaintiff's building consists of numerous villas within its compound; the plaintiffs were enjoying an ***ex parte*** order to the detriment of 2nd defendant; the plaintiffs' material non-disclosure amounted to an abuse of court process, as the plaintiffs sought to use the same to retain a commercial advantage over 2nd defendant; there was no law in force, or by-laws, restricting the construction of buildings higher than three storeys; the plaintiffs had not provided any form of undertaking as to damages to 2nd defendant; the 2nd defendant stands to suffer "huge losses considering the fact that no security has been provided by the plaintiffs".

The statement of grounds is illustrated in detail by the affidavit of ***Suleiman Admani***, the managing director of 2nd defendant, sworn on ***17th March, 2010***.

The 1st plaintiff swore two separate replying affidavits which bear inconsistent dates: one is dated ***11th March, 2009*** – even though it is responding to the affidavit of ***Shivji L. Hirani*** dated ***14th January, 2010***! And it is marked "***further affidavit***". The other, marked "replying affidavit", is dated ***15th April, 2010***. I

have overlooked this confusion, and set my sights on the merits.
The deponent contends that the defendants' averment that they obtained the required approvals before initiating construction, is false; that since certain documents of approval are not displayed by the defendants, "the exhibits in ***Mr. Suleiman Admani's*** supporting affidavit are mere forgeries"; that "any purported licence is either not authentic or is issued in gross violation of the Act, is illegal and does not confer any rights at all to the holder under the Act".
In the further affidavit the 1st plaintiff attempts to show, from his own knowledge of the approval processes for building-construction, that the defendants could not have obtained the approvals, and so they had no right to proceed with their building project.
The plaintiffs also filed grounds of opposition, dated ***8th April, 2010***; the objections, however, largely turn on matters of evidence which would best have been left as deponed in the affidavits.
The plaintiffs in their submissions, urge that it is common cause between the plaintiffs and the defendants, that as a basis for the carrying out of the building project, the defendants required the following approvals:

(a) development permission from the Municipal Council of Mombasa – s. 30 of the Physical Planning Act, 2006 (Act No. 6 of 2006);
(b) Municipal Council approval for the building plans – By-law 252(1) under the Building Code;
(c) Environment impact licence under s. 63 of the Environment Management and Co-ordination Act, 1999.

It was the plaintiffs' claim that the defendants had put up their constructions without the foregoing approvals.
Counsel in their submissions, have given what appears as an ultimate assessment on significant issues in the pleadings, to this effect:
"The defendants' allegation that they have obtained all the necessary approvals is an outright falsehood [bordering] on deliberate perjury. The plaintiffs will demonstrate that the defendants went [about] fabricating purported approvals long after they had built the offending structures and the plaintiffs had filed this suit and obtained an injunction dated *5th August, 2009* ***stopping further construction."***
Counsel has set out substantial sections from the affidavits to prove that the constructions complained about are illegal, having been erected without the requisite approvals; and he has proceeded to argue that –
"the defendants' illegal structures are causing irreparable damage to the plaintiffs by creating uncontrolled slum-like development in a neighbourhood designated residential, overstretching the physical infrastructure such as [for] water, [and] overwhelming [the] sewerage system".
Such a situation, counsel urges, amounts to "a violation of the plaintiff's right to a clean and healthy environment [as provided for under s. 3 of the Environment Management and Co-ordination Act, 1999]."

Learned counsel urged that –
"the plaintiff is also entitled to live in a zone that is designated as residential, and not a zone for commercial residential flats. The illegal developments are devaluing the plaintiffs' property……."

As regards 2nd defendant's prayer in the Notice of Motion of ***17th March, 2010*** that the plaintiffs' suit be struck out, counsel for the plaintiff submitted that this had no merit, firstly, as there was nothing in the nature of representative action in the suit; and secondly, as it was not true that the filing of the suit was attended with any non-disclosures before the Court. On this point, learned counsel was making a final-kind rebuttal of the defendants' contention in the interlocutory application, that –
"the defendants manufactured these suspicious approvals long after the suit was filed and an injunction obtained. It is the false documents annexed by the defendants that prompted the plaintiff to file the Chamber Summons dated 17th March, 2010….."
Counsel urged that the plaintiffs had satisfied the principles in the guiding authority on interlocutory injunctions, ***Giella v. Cassman Brown*** [1973]EA 358, and that:
"the plaintiffs have……established a case that is sure to succeed".
Counsel for 2nd defendant, however, urged that the suit as filed, was "fatally defective for misjoinder of

defendants"; "all the five defendants own different properties and do not co-own any property; the defendants have nothing in common to warrant a class action that tends to prejudice the 2nd defendant". Counsel stated in illustration, that allegations of disobedience of court orders has been made against some of the defendants, but not 2nd defendant; and it was not possible for 2nd defendant to control the actions of the other defendants but 2nd defendant would also run the risk of being accused of contempt, along with the other defendants.

Counsel urged that there had been a material non-disclosure by the plaintiffs at the ***ex parte*** stage when they had obtained orders of injunction. The relevant point was: "the plaintiffs have allowed 2nd defendant to continue with construction only to seek an injunction after the 2nd defendant has invested heavily and was on the verge of completing the third storey". This, counsel submitted, "has caused 2nd defendant enormous losses and any further delay is ….causing huge loss to 2nd defendant"; and yet no security had been given, nor any undertaking made as to damages, by the plaintiffs.

Counsel questioned the propriety of 1st plaintiff's affidavit evidence, in meeting 2nd defendant's case at this stage; for the deponent in that affidavit "seeks to usurp the role and functions of the Municipal Council of Mombasa and NEMA". Counsel perceived the plaintiffs as busybodies seeking to litigate on behalf of the Municipal Council and of NEMA – and he urged this to be an abuse of Court process. Counsel submitted that the plaintiff's application did not meet the test in ***Giella v. Cassman Brown***, for the grant of interlocutory injunction.

The 3rd, 4th and 5th defendants by different counsel, contested the plaintiffs' application, on the following grounds:

(i) the application is misconceived and unmerited since the respondents have obtained all the relevant approvals and licences;

(ii) there was a misjoinder of the defendants;

(iii) the plaintiffs are guilty of laches, as the defendants' buildings are virtually complete.

Counsel urged that since the public authorities who approved the defendants' constructions have not been joined in this suit, the plaintiffs' case is fatally flawed – particularly so as "no evidence has been placed before the Court to show that the said regulating authorities are opposed to the developments complained of". And counsel urged that no evidence of damage to the plaintiffs or their property has been shown, save for the bare allegation that the defendants' projects are "slum-like".

Learned counsel urged that the plaintiffs have not succeeded in establishing a ***prima facie*** case to warrant the grant of injunctive orders; that no evidence of real loss or damage has been shown; and that the balance of convenience tilts in favour of the defendants. It was urged that the plaintiffs had the opportunity to move the Court earlier, but waited until it was too late, and in these circumstances, "a prohibitory order will serve no purpose and will only cause further and immense injury and loss to the defendants."

Counsel cited in support an earlier decision of this Court (***Azangalala,J***), in respect of a property development in the same vicinity: ***Wolfgang Stut-Schilp v. Joseph Chege Gikonyo***, Mombasa HCCC No. 20 of 2009. That case was, in many respects, similar to the instant one; but the learned Judge declined to give orders of injunction against a virtually completed housing-construction project. The reasons for that decision were as follows: (i) the plaintiff appeared to be prosecuting a case (regarding authorizations for construction, and related matters) that belonged to public authorities who are so well-endowed with forensic resources and ought by themselves to move the Court; (ii) for quite some time the construction on the suit property had been going up, and it was not conscionable, so belatedly, to seek to terminate the project; (iii) the defendant had, at the interlocutory stage, denied the plaintiff's substantive claim, and this matter should await resolution during full trial; (iv) the suit property was purchased by the defendant when partially constructed, but the plaintiff had not then raised any objection; (v) when the defendant had applied for change of user, the plaintiff had not at the time raised objections; (vi) "in the premises, according to the defendant, the plaintiff had acquiesced in the said development"; (vii) the plaintiff had not established a ***prima facie*** case with a probability of success; (viii) the plaintiff would not suffer an injury which could not be compensated in damages; (ix) the balance of convenience titled in favour of declining the prayer for an injunction.

The foregoing decision, so far as I can see, and in exercise of the judicial principle of affirming and consolidating consistent rules of dispute resolution, is to be adopted and applied in the matter now before me.

I have already noted that the plaintiff's case is being repeatedly made with apparent ***finality***, on the basis

that "the plaintiffs have ……established a case that is sure to succeed". Even were such to be the case, the judicial mien rules out such an approach; the Court's commitment to impartiality dictates suspension of final judgment on issues of merit until the best mode of trial, recording and assessment of evidence has already taken place.

It is clear from the affidavit evidence that the several constructions which are the subject of the plaintiff's suit, are fairly advanced towards completion. Was this happening with, or without the approvals of the relevant public authorities? This is a matter in respect of which the said authorities are not only the true custodians of the necessary information, apart from being the essential task-managers whose preferences, actions and/or forbearances ought to be made known, but, indeed, necessary parties in a suit such as has been lodged by the plaintiffs herein: and it is by taking into account these facts, that the plaintiff would be showing a ***bona fide*** case.

Whether or not the plaintiffs have, as they contend, a cast-iron case that must succeed, is a question of merits, and that point can only be determined on the basis of the full trial.

I note that the plaintiffs have urged certain lines of evidence, based on documents said to belong to the public authorities with the mandate of building-approval; and they urge that the buildings in question have been illegally constructed: that, however, cannot be ascertained at this interlocutory stage.

It is not contested, that the building works complained about are nearly complete; and the defendants state that they have expended much money on the constructions, and the financial accommodations they employed in that regard, are posing considerable loan-terms challenges, as well as losses to them. The defendants are concerned that the plaintiffs have been enjoying temporary injunctive relief, but without attendant security against liability to the defendants if the suit should not succeed.

The defendants, and more particularly 2nd defendant, have contended that there are signals of acquiescence by the plaintiffs while the expensive building projects were progressing, and so it is unconscionable that, at the plaintiff's instance, the completion of the projects should now be prohibited by court orders.

The foregoing analysis, in my opinion, shows on a ***prima facie*** basis, that the plaintiffs will not, in the absence of injunctive orders in their favour, suffer any damage not compensable in damages. It is also not clear that the plaintiffs have, in their suit, a ***prima facie*** case with any degree of certainty of success. It is clear too, that the defendants are already suffering substantial loss and damage, in respect of which no undertaking to pay compensation, and no security of any sort, had been given by the plaintiffs. It is clear, too, that the balance of convenience stands in favour of the defendants and not of the plaintiffs, and thus interlocutory orders should be in favour of the defendants and not the plaintiffs.

Consequently, I will make orders as follows:

(1) In the plaintiffs' Notice of Motion of *5th August, 2009****, prayer No. 2 for prohibitory injunctions against the defendants is refused.***

(2) In the plaintiffs' Notice of Motion of *5th August, 2009****, prayer No. 3 for a mandatory injunction against the defendants is refused.***

(3) Costs in respect of the said Notice of Motion of *5th August, 2009* ***shall be borne by the plaintiffs, in any event.***

(4) As regards 2nd defendant's Notice of Motion of *17th March, 2010****, the temporary orders of 5th August, 2009 are hereby vacated.***

(5) The costs of the Notice of Motion of *17th March, 2010* ***shall be borne by the plaintiffs, in any event.***

(6) The plaintiffs' suit dated *5th August, 2009* ***shall be listed for hearing on the basis of priority and in any event, within 60 days of the date hereof.***

(7) Within 28 days of the date hereof, the parties shall complete the pre-trial stage of (a) discovery and inspection of documents; (b) filing and service of bundles and lists of documents; (c) identification of issues for trial.

(8) This matter shall be listed for mention and directions as soon as the terms of Order No. 7 have been complied with.

DATED and **DELIVERED** at **MOMBASA** this 24th day of September, 2010.

J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*
Court Clerk: *Ibrahim*
For the Plaintiffs:
For 2nd Defendant:
For Defendants 3, 4, 5: