



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 102 of 2008

JINAT INVESTMENTS LIMITED PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF KISII DEFENDANT

RULING

The plaintiff's application sought an order of injunction to restrain the defendant and/or its agents, servants and/or representatives from interfering with construction of the plaintiff's premises on land **parcel No. Kisii Municipality/Block III/77** pending hearing and determination of the suit. The application was supported by an affidavit sworn by Dr. Anil Ratilal Tailor, a director of the plaintiff. He stated that the plaintiff is the registered proprietor of a parcel of land known **L.R. No. Kisii Municipality/Block III/77** hereinafter referred to as "**the suit property**". Prior to the commencement of construction on the suit property the plaintiff made an application for approval of his building plans by the defendant and the plans were duly approved. On 4th August 2008, he went to the construction site and found an enforcement notice dated the same day which had been served upon the plaintiff's employees by an agent of the defendant.

The notice required the plaintiff to immediately stop further construction and report to the undisclosed person who had issued the notice in the defendant's offices.

Paragraph 5 of the enforcement notice informed the plaintiff that if he was aggrieved by the notice he could lodge an appeal either to the liaison committee or the High Court.

Thereafter the deponent visited the defendant's offices on several occasions with a view to finding out exactly why the said notice had been issued and the town clerk gave him assurances that the matter would be looked into. The notice alleged that the plaintiff was not building according to the approved building plans. However according to the plaintiff upon giving approval to the building plans, the defendant was legally obliged to undertake periodic inspections of the construction to confirm compliance with conditions precedent to grant of approval. The plaintiff averred that it was undertaking the construction in accordance with the approved building plans. The plaintiff urged the court to grant the orders as sought failing which it would suffer loss and damage which can not be compensated by an award of damages. It was averred that the notice served was invalid and contravened various sections of the Physical Planning Act.

Dr. Tailor added that the plaintiff is currently servicing a loan facility of Kshs. 18,000,000/= granted to it by Credit Bank Limited and stoppage of the construction will throw the repayment schedule into disarraying with the attendant risk, *inter alia*, of a public auction of the property as the plaintiff intends to

make future repayments of the loan from rent income and from the commercial premises it is putting up on the suit property.

The defendant filed a replying affidavit sworn by Joe Morris Odundo, the Deputy Town Clerk. He stated that the building originally situated on the suit property was constructed long before the passing of the **Physical Planning Act No. 6 of 1996**. The suit property was sold to the plaintiff in the year 2006 or thereabout. He further stated that the plaintiff never applied to the defendant for the relevant development permission but wrongfully commenced renovations, extensions of the building, partitions and addition of an extra floor.

On 4th August 2008 the Municipal Council's enforcement agents discovered the illegal construction that was going on and reported the matter to the deponent who notified the plaintiff to stop the illegal construction forthwith and produce any development permission issued to him by the defendant and show evidence of inspection done by its agents on the ongoing construction. He further stated that the plaintiff had failed to comply with the notice and continued the construction during weekends when the council's enforcement agents are not on duty. As a result the defendant has now issued a notice demanding that the original condition of the building be restored in default of which the defendant shall move to the site and enforce the notice in accordance with the provisions of the **Physical Planning Act No. 6 of 1996**.

The advocates for the parties filed skeleton submissions and I have duly considered the same. The defendant's contention is that the plaintiff is not putting up its building according to the approved building plans. That presupposes that the plaintiff had submitted some building plans which were duly approved but the plaintiff was not adhering to them. The notice did not specify in what manner the plaintiff had deviated from the approved building plan. The enforcement notice was issued on 4th August 2008 and took effect on the same day. According to paragraph 5 of the notice, if the plaintiff was aggrieved by the notice, he could appeal to the Liaison committee or to this court before 4th August, 2008. To that extent, the notice was unreasonable.

Section 38(4) of the **Physical Planning Act** states that a person aggrieved by an enforcement notice may within the period specified in the notice appeal to the relevant Liaison Committee under **Section 13**. According to **Section 38(3)**, an Enforcement notice can only take effect after the expiry of the period specified therein in the event that an appeal is not lodged. The notice that was served is therefore contrary to the relevant law and is therefore illegal.

Whereas the defendant is vested with power under Section 38(1) to issue Enforcement notices, such a notice must comply with the law. The defendant is also mandated to ensure that there is proper execution and implementation of approved physical development plans. In exercising this supervisory role, where the defendant's agents come across any developer who is violating the approved development plans, the agents can issue an Enforcement notice but the same must comply with the relevant law. This is where the defendant failed.

Having established that the Enforcement notice dated 4th August 2008 is unreasonable and contrary to provisions of the law as aforesaid, the order of injunction as sought in prayer (c) in the plaintiff's application is granted. The plaintiff can go on with its construction but these orders will not be a bar to performance of the defendant's supervisory role as aforesaid and issuance of any lawful direction and/or notice. The defendant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 29 DAY OF JULY 2009.

D.MUSINGA

JUDGE.

29/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Bosire for the Respondent.

Mr. Oguttu for Mr. Nyamurongi for the Applicant.

Court: Ruling delivered in open court on 29th July, 2009.

D. MUSINGA

JUDGE.