



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 20 of 2009

WOLFGANG STUT-SCHILP PLAINTIFF

VERSUS

JOSEPH CHEGE GIKONYO DEFENDANT

RULING

By his plaint dated 2.2.2009 and filed on 3.2.2009, the plaintiff seeks two main orders expressed as follows: -

- a) A permanent injunction restraining the defendant, his employees, agents or servants from continuing with any construction works or works of a similar nature on the apartments/flats that are being developed on his property known as MN/1/3166-Mombasa (hereinafter the suit property”).**
- b) A mandatory injunction directed against the defendant, his employees, servants, and or agents directing him/them to demolish all the illegally and/or unlawfully constructed apartments/flats on the suit property.**

The foundation of the plaintiff’s claim, as may be gathered from the plaint, is that the plaintiff owns the property known as L.R. No. MN/1/3198 which is adjacent to the suit property and that both properties are designated for purposes of being used for single house residential purposes but the defendant has, in breach of that development condition, embarked upon construction of high rise apartments/flats to the detriment of the plaintiff.

Simultaneously with the filing of the plaint, the plaintiff lodged a chamber summons seeking one primary order of the court namely: -

“that an injunction be granted to restrain the defendant, his employees, servants, and/or agents, from continuing with any construction works now being undertaken at the defendant’s premises until the hearing and final determination of this suit or further orders of the court.”

The application is based mainly on the grounds that the respondent has, without first applying for and obtaining change of user to his property, embarked on construction of apartments on his plot contrary to the grant pursuant to which he holds the same and further that the respondent is embarking on the said construction without obtaining approved plans from the relevant authorities. In support of the application one, Walter Reif, the donee of a power of attorney from the plaintiff has sworn an affidavit in which he has elaborated the above grounds for the application. The said Walter Reif has averred that the respondent commenced the development complained of sometime in the year 2005 and he (the plaintiff) caused an enforcement notice to be served by the Municipal Council and further instructed counsel to

demand that the said construction be discontinued. Mr. Reif has further deponed that the respondent temporarily stopped the construction but resumed in December 2008 and has almost finished construction works on the 3rd storey of his apartments/flats and will continue to the fourth floor. In the premise, so Mr. Reif contends, the construction constitutes a rude intrusion into private property and despite intervention by the Municipal Council, the respondent continues with his construction.

When the defendant was served, he delivered a defence on 3.3.2009 in which the plaintiff's claim is denied. Further the defendant avers that he acquired the suit property when development of the same was in progress and the plaintiff has acquiesced to the said development which development is only upto the 2nd floor which is within the permitted level of development within the area. The defendant has also filed a replying affidavit in opposition to the application in which affidavit the averments in the defence are substantiated. Of significance are the averments that the defendant purchased the suit property in 2005 and was registered as proprietor thereof on 6.12.2005 and at the time the development on the suit property had gone upto the 1st floor without complaint from the plaintiff; that he applied for change of user which application was not challenged by the plaintiff; that his plans were approved by the Council and the project approved by National Environment Management Authority (NEMA). In the premises, according to the defendant, the plaintiff acquiesced to the said development and the order sought should be declined.

When the application came up before me for hearing on 18.6.2009, counsel agreed to file written submissions which were duly lodged by 8.7.2009. I have considered the same together with the authorities cited therein. I have, of course, also given due consideration to the pleadings and the affidavits filed together with the annexures exhibited. Having done so, I take the following view of the matter. At this stage, I am not expected to determine with finality the rights and obligations of the parties. As the plaintiff seeks an interlocutory prohibitory injunction, he had to show first that he has a prima-facie case with a probability of success at the trial. On satisfying that condition, he had to show that he would suffer an irreparable injury which could not adequately be compensated by way of damages. Lastly if I am in doubt, the application is to be considered on a balance of convenience. (See the case of Giella – v – Cassman Brown & Co. Ltd. [1972] EA 358).

Has the plaintiff established a prima facie case with a probability of success? In American Cynamid Company – v – Ethicon Limited [1975] 1 ALL ER 504, Lord Diplock stated as follows:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be compensated in damages.”

The plaintiff must therefore show that, he has a right which the defendant has violated or threatens to violate. The plaintiff's right allegedly violated by the defendant as per the plaint is his right to privacy and enjoyment of his property adjacent to the suit property. The material availed to the court however suggest that the cat is already out of the bag or the horse has already bolted from the staple. In the plaintiff's own words at paragraph 9 (a) of the plaint: -

“9. (a) “The defendant's apartments which have already exceeded the second floor are a rude intrusion into the plaintiff's right to privacy and quite enjoyment of his property.”

And at paragraph 14 of the supporting affidavit:

“14. That as a result of the matters stated in para (sic) 11 above the respondent has now almost finished construction works on the 3rd story of his apartments/flats, and will continue to the fourth floor.”

The injunction sought at this interlocutory stage is prohibitory and is sought to restrain the defendant from continuing with any construction works now being undertaken at the defendant's premises. As against that contention, the defendant has deponed that he purchased the suit property when it had been built upto the 1st floor and has only constructed the 2nd floor which is within the permitted level of development within the area and that there are other developments within the same area which go up to

the 3rd floor against which the plaintiff has not complained.

The gist of the plaintiff's complaint against the development carried out by the defendant seems to be the alleged failure of the defendant to obtain a change of user from a single dwelling house to apartments/flats and also failure to obtain the plans for the said development approved by the relevant authorities. The defendant's answer is that he purchased the suit property when the development was in progress and that subsequently the Municipal council of Mombasa advertised intention to change the user of the suit property against which the plaintiff raised no objection and that he has since obtained approval of the development plans from the said council and from the National Environment Management Authority (NEMA).

It is significant that the plaintiff did not file a subsequent affidavit challenging the defendant's averments in the replying affidavit. The factual position with regard to the development on the suit property as stated in the replying affidavit therefore was not rebutted and for now must be deemed to represent the correct position. That position is that the development on the suit property has now been approved by the relevant authorities and has reached the 2nd floor which is within the permitted development limits in the area.

The Grant of the suit property may now not be endorsed with the change of user by the Commissioner of Lands. That is however the headache of the Commissioner and as stated in **Nairobi Permanent Markets Society and Others – v – Salima Enterprises & Another [C.A. No. 185 of 1997] (UR)**, any breach of conditions of the grant is a matter between the defendant and the Commissioner of Lands. The plaintiff has no basis to urge the Commissioner's case when the Commissioner has vast resources at his disposal.

Prima facie therefore, the plaintiff has not persuaded me that his interest is being violated or is threatened with violation by the unlawful actions of the defendant. Even if he had such interest the plaintiff has left it until too late when the defendant has reached the 2nd floor of the construction on the suit property. The plaintiff, to my mind, has therefore failed to establish a prima facie case with a probability of success.

On the second condition for the grant of an interlocutory injunction, I am not persuaded that the plaintiff will suffer an injury which cannot be compensated in damages unless the injunction is granted. It is significant that the plaintiff does not say so in his affidavit in support.

With regard to the balance of convenience, I have come to the conclusion that, the same tilts in favour of declining the injunction. The defendant has already developed the suit property to the 2nd floor. The plaintiff had the opportunity to move the court earlier,. He did not. A prohibitory injunction would serve no purpose now. Indeed, in my view such an injunction would cause the defendant greater injury than the plaintiff. Further should the plaintiff succeed at the trial all the actions of the defendant will be reversed.

The upshot of my above consideration of the plaintiff's application dated 2nd February 2009 is that the same is without merit and is dismissed with costs to the defendant.

It is so ordered.

DATED AND DELIVERED AT MOMBASA KTHIS 27TH DAY OF AUGUST 2009.

F. KAZANGALALA

JUDGE

Read in the presence of: -

Mr. Buti for the plaintiff and Mr. Njoroge for the defendant.

F. AZANGALALA

JUDGE

27.8.2009