



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

Civil Suit 2096 of 2007

RAPHAEL MUIRURI.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI COUNCILDEFENDANT

R U L I N G

1. The application before me is the Chamber Summons dated 26/02/2009 brought under Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking orders:
 1. ***THAT this application be certified urgent and the same be heard exparte in the first instance.***
 2. ***THAT the orders granted by this Honourable Court on the 25th of June 2007 directing the parties to maintain status quo in respect of the suit premises be lifted.***
 3. ***THAT the Applicant be at liberty to restore the status quo ante***
 4. ***THAT this costs (sic) of this Application be provided for.***
2. The application is premised on grounds (a) that the Plaintiff/Respondent is in gross violation of the orders granted by this Honourable Court on 25/06/2007, (b) that the Plaintiff/Respondent has continued with illegal construction thereby interfering with the suit premises and (c) that this court has jurisdiction to grant the orders sought. The application is also grounded on the Supporting Affidavit sworn by **Peter Kibinda**, Director of City Planning of the Defendant/Applicant. He has annexed to his affidavit some photographs allegedly taken of the suit premises. A point to note is that the pictures are not identifiable as being of the suit premises.
3. The application is opposed. The Replying affidavit dated 4/03/2009 is sworn by **Raphael Muiruri**. He says that:-
 - (a) *On 6/12/2006, the court issued orders exparte restraining the Defendant from further demolishing and/or interfering in any way with the Plaintiff's house.*
 - (b) *On 20/12/2006, when the application was supposed to be heard interpartes, the interim orders were extended pending the hearing and determination of the case.*

(c) *On 5/01/2007, without any colour of right and in total disregard of the court order issued by this Honourable Court, the Defendant/Respondent without any notice whatsoever caused the Plaintiff's house to be demolished and as a result caused the Plaintiff's property to be lost and looted by those who came to witness the destruction.*

(d) *THAT the matter was reported acts to Jogoo Police Station under*

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No.30/5/2007 with the result that an Architect was called to rectify the damages.

(e) *On 4/04/2008, the Defendant repeated acts similar to those committed on 5/01/2007 with great impunity and cause much harm and damage on the premises*

(f) *The instant application is brought in bad faith and tainted with unclean hands with the attendant anguish caused to the deponent and his family.*

(g) *The sole aim of this application is to harass and intimidate the Plaintiff at the whim of an unnamed local politician and not to safeguard the provisions of the Physical Planning Act as alleged by the Defendant/Applicant.*

(h) *The Defendant's actions are a reaction to the acquittal of the Plaintiff in Criminal Case No. 27 of 2007*

The Plaintiff/Respondent asks the court to disregard the photographs annexed to the Supporting Affidavit as the same

do not indicate the time or the date when they were taken, and to dismiss the Defendant's application.

4. When the parties appeared before me for interpartes hearing, Mr. Odede appeared for the Defendant/Applicant while Miss Makori appeared for the Plaintiff/Respondent. In his brief submissions, Mr. Odede submitted that he relied wholly on the averments contained in the Supporting Affidavit and the annexures, thereto. Mr. Odede referred specifically to annexure "RNM 7" to the Supporting Affidavit to the application, namely copies of pictures allegedly taken of the suit premises. Apart from the pictures, there is no other information to show what the pictures represent, when they were taken and by whom.
5. Miss Makori also made brief submissions and reiterated the averments contained in the Replying Affidavit of Raphael Muiruri on 4/03/2009. She submitted that the Applicant's application has been brought in bad faith and has no basis.
6. Briefly the history of this matter is that the Plaintiff commenced suit by way of a plaint dated 4/12/2006 and filed in court on the same day. The Plaintiff averred that he was and still is the registered owner of all that parcel of land known as Plot No. "B" Uhuru Estate Phase IV (the suit property) and that by a notice dated 30/10/2006, the Defendant wrongfully, illegally and unlawfully issued a 7 day notice requiring the Plaintiff to submit building plans for approval. That as a result of the said notice, the Plaintiff was on 4/11/2006, arrested and charged in City Council Criminal Case No. 898 of 2006. Believing that the notice and the arrest were instigated by malice, the Plaintiff filed this suit praying for judgment against the Defendant for:-
 - (a) *An order of permanent injunction restraining the Defendant whether by itself or its servants or agents or any of them from further demolishing or otherwise interfering with the Plaintiffs house in Plot No. "B" Uhuru Estate Phase IV and/or alternatively an order of general damages for unlawful demolition.*
 - (b) *Costs of the suit and interest be granted to the Plaintiff.*
7. The Defendant filed its statement defence on 26/09/2007, denying all the allegations made by the Plaintiff. The Defendant alleged that the Plaintiff was carrying on illegal activities on the suit property and that as such he was not entitled to the reliefs sought. Contemporaneously with the suit, the Plaintiff filed an application for injunction. On 6/12/2006, interim orders of injunction were granted pending interpartes hearing on 20/12/2006. The court (Osiero J) ordered the Applicant to effect service upon the Respondent within 7 days. On 20/12/2006, the application did not proceed, but the parties consented to the extension of the interim orders pending the hearing and determination of the application. On the said date, M/s Rumba Kinuthia and M/s Chebii appeared for the Plaintiff/Applicant while a Mr. Kariuki appeared for the Respondent. On the 25/06/2007, the parties again appeared before Osiero J. Mr. Wamwayi appeared for the Plaintiff/Applicant while Mr. Omotii appeared for the Defendant. By consent, the parties agreed to maintain the status quo pending the hearing and determination of the suit. The order stated that "*none of the parties to interfere with the suit premises in any manner*" while they fixed the matter for hearing on a priority basis. On the same day, the application dated 4/12/2006 was marked as withdrawn with no order as to costs. That application is the one by which the Applicant sought the following orders against the Defendant as follows:-
 1. *THAT for reasons to be recorded service of this application be dispensed with and this application be heard ex-parte in the first instance in respect of prayer number 2 of this application.*
 2. *THAT the Defendant whether by itself or its servants or agents or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them that is to say from demolishing or further demolishing the Plaintiff's house or interfering with it, alienating it or otherwise howsoever interfering with the Plaintiff's house in parcel plot No. "B" UHURU Estate Phase IV pending the hearing and determination of this application.*
 3. *THAT the Defendant whether by itself or its servants or agents or any of them or otherwise be restrained by an order of injunction from doing the following acts or any of them, that is to say from further demolishing the Plaintiff's House, interfering with it and/or dealing with the Plaintiff's premises in that piece of land known as Plot No. "B" UHURU Estate Phase IV.*
 4. *THAT the costs of this application be provided for.*
8. It is the consent order of 25/06/2007 that the Defendant/Applicant wants set aside. The principles for the setting aside of consent judgment/orders were established in the case of **Flora N. Wasike –vs- Destimo Wamboko** [1982-88]1 KAR

in which the Court of Appeal held that:-

“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.”

9. In the instant case, the Applicant’s counsel wants the consent order set aside because the Plaintiff is in gross violation of the said consent order. Can it be said that this reason put forth by the Applicant amounts to fraud mistake or misrepresentation? In light of the principles in the **Flora Wasike** case (above) I do not think so. The Applicant did not expound on this allegation of contravention of the court orders, and in any event, the way out for the Applicant is to cite the Plaintiff/Respondent for contempt of court and not to apply in the manner it has done.
10. In the circumstances, I do find and hold that the Applicant’s application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Makori (present) for the Plaintiff

M/s Omotii & Co. (present) for the Defendant

Weche – court clerk