REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

ENVIRONMENTAL & LAND CASE 142 OF 2009DELUXE MOTORS LTD……PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI……DEFENDANT/RESPONDENT

RULING

The plaintiff has moved to this court, vide a plaint dated 1st April 2009 and filed the same date. The salient features of the same in a summary form are as follows:-

-The plaintiff is the owner of the suit property acquired on the 10th December 1963 and were duly registered as owner.

-In 1997 obtained permission from the defendants to put up new offices.

-The lease terms with the defendant contains a provision for guiet enjoyment of the suit property.

-The grievances arise from the fact that the defendant moved to the premises on February 2009 and threatened demolition of the same, which threat was directed at the tenants then repeated to the plaintiff in March 2009.

-They are entitled to damages for breach of the guiet enjoyment term.

-The plaintiff will suffer irreparable loss if restraint orders are not granted.

In consequence thereof, the plaintiff seeks from the court:-

(a) A declaration that the plaintiffs are the legal owners of the suit premises and are entitled to quiet enjoyment therein.

(b) An injunction restraining the defendants by itself, agents, servants or otherwise howsoever from trespassing, evicting, entering, alienating, allocating and or demolishing or in any other way interfering with land parcel LR. NO. 209/2439/8 situate on Koinange street, Nairobi.

(c) Costs of the suit.

(d) Any other relief deemed just and expedient.

The plaint has formed an anchor for the interim application brought by way of chamber summons brought under order XXXIX rules 1,2,3 and 7 of the CPR, section 3A of the CPA and all enabling provisions of

the law. 4 prayers are sought namely:-

1. *Spent*

2. *Spent*

3. *That the defendant either by themselves, their agents and/or servants or any other person and or authority be restrained by way of a temporary injunction from demolishing, encroaching, trespassing, entering or in any other way interfering with the Applicants parcel of land known as LR NO. 208/2439/9 pending the hearing and final determination of the suit.*

The grounds are set out in the body of the application, supporting and supplementary affidavit, written skeleton arguments. The major ones in a summary form are as follows:-

-The plaintiff is the registered owner of the suit land and has title to the same issued in 1962-63 which suit property has a going value of over 50 million.

-There has been constructed on the same building which has been leased out to the tenants.

-The defendant has threatened to demolish the said property hence the need for an injunctive relief.

-The plan used to construct the premises was approved by the defendant's way back in 1997 as per annexture 3.

-New offices have been constructed on the same premises.

-The current tenant African Banking Corporation has a lease from the plaintiff running from the year 1997.

-By threatening the demolition the defendant is creating anxiety and threatening guiet enjoyment of the said suit premises.

-They have been in the premises for 46 years and the current value is over 50 million by reason of which the applicant will suffer irreparable loss if the injunctive relief is not granted.

-They have been paying land rates as shown by annexture 2 and are not in arrears in any way.

-They also rely on the case law cited.

The respondent on the other hand has moved to oppose that application on the basis of a defence dated 8th day of May 2009 and a replying affidavit sworn by one P.T. Odongo sworn on the 29th day of April and filed the same date.

The salient features of the defence dated 8th May 2009 and filed on the 14th day of May 2009 relevant to the application are as follows. In a summary form.

-The defendant has authority bestowed upon it under the physical planning Act to exercise supervisory powers over the suit property.

-If the plaintiff undertakes unauthorized constructions, the defendant is entitled to the enforcement of its by laws against the plaintiff as envisaged by the said statute.

-They are not aware of the status of the plaintiffs ownership of the suit land by contend that the said ownership is not in itself absolute and neither does the same cause a right to infringement of others rights therein.

-Contends the defendant does not carry out its duties by means of Coersion or intimidation but within the law especially when it comes to the implementation of the council by laws as read with the physical planning Act.

-They were entitled to move in and take corrective measures on acts of infringement committed by the plaintiff after the initial approval was granted.

-Contend that the plaintiff has no right to use expending of large sums of money to justify contravention and infringements of by laws and the approval given is no demonstration of suffering of irreparable loss and as such issuance of an injunction is un warranted and there is no prima facie case and will at an appropriate time raise a preliminary objection to the plaint and have the same struck out.

On the basis of that defence, there is anchored a replying affidavit sworn by one P.T.Odongo on the 29th April 2009 and filed the same date. Perusing the same reveals that save for annextures it is a reiteration of the content of the defence as hereunder:-

-The defendant conducts its business in accordance with the by laws and the physical planning Act and will not hesitate taking appropriate actions where constructions are ultra vires, the approval granted and the afore said by laws and the physical planning Act.

-The plaintiffs alleged right to ownership is not a shield to the defendants right to enforce the by laws and the provisions of the physical planning Act.

-That there are suspected infringement of the approvals initially granted for the construction of the structures by the plaintiff and the defendant was entitled to move in and enforce it's by laws and the physical planning Act.

-The defendant does not conduct its affairs though threats, intimidation and coersion and none were used against the plaintiff and are strangers to such allegations.

-That on the facts, demonstration the plaintiff has not demonstrated that it is entitled to issuance of the injunctive relief.

-Contend that the plaintiff has not come to court, with clean hands and all that it is doing is to try and use the court, process to cause the defendant to sanction an illegality.

In response to the replying affidavit the plaintiff/applicant put in a supplementary affidavits stressing the following:-

-there is no accusation of flauting of the by laws by the plaintiff levelled against them by the defendant in their replying affidavit.

-Deny ever breaching any of the defendants by laws or provisions of the physical planning Act.

-Do not dispute the defendants right to enforce both the by laws and the physical planning Act save that such enforcement has to be within the law.

-Maintain they fully complied with the approvals given by the defendant when carrying out constructions on their said property.

-Deny withheld any material information from the court, more so when the material withheld have not been mentioned.

-Material loss arises because the property is currently valued above 50 million.

-Contend that it is the defendant who has been very guarded in giving sufficient information to justify

their action of moving against the plaintiff for whatever reason.

In the written skeleton arguments the content of the plaint, grounds in the body and the supporting and supplementary affidavit set out above have been reiterated.

-On the law they contend that they are within the ingredients established by the decision in **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358** because of the following:-

(a) The applicant is the undoubted owner of the suit property.

(b) Before commencing construction of the structures on the suit property, sought approvals of its construction plans from the defendant, in tandem with the provisions of section 33(1) of the physical planning Act cap 286 laws of Kenya, which approvals were duly sanctioned by the defendant on the 18th day of July 1997 without attaching any condition, which constructions were concluded in the same year. That not withstanding, the defendant has come back 12 years later in 2009 claiming infringement. There is therefore justification for the applicant to come to court, and complain that the defendant is infringing on property rights.

(c) Maintain that the verbal threats, intimidation and coersion were meted out by the defendant's officers.

(d) The plaintiffs' apprehension of demolition is rightly founded as under section 38 (1) of cap 286, the defendant is not obligated to serve an enforcement notice by reason of the use of the word "***may*".** The defendants can move to the site and carry out demolition without issuance of an enforcement notice.

(e) The plaintiffs' application has been fortified by the fact that the defendants have failed to particularize the particulars of infringement committed by the plaintiff in their replying affidavit.

(f) They have also satisfied the ingredients of suffering irreparable loss in that the value of the property stands at 50 million and also damages occasioned to their tenants, the bank,in terms of loss of business and property.

(g) Since the defendants have not disclosed the infringement committed by the plaintiff, and have also denied issuing threats, demolition to the plaintiff issuance of an injunctive relief will not prejudice them in any way. As such the balance of convenience tilts in favour of the plaintiff for the issuance of the injunctive relief in their favour.

Turning to the skeleton arguments, of the defendant, the following have been stressed:-

1. The defendant being a local authority, and just like the government no injunctive relief can lie against the defendant and its officers. As such the proper remedy available to the applicant should have been an application for judicial review.

2. They also maintain that no availability of the injunctive relief not withstanding the applicants has not met the required standards set by the decision in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358**, in that the loss to be suffered by the plaintiff if any has been quantified and the same can be paid for in terms of monetary compensation.

3. The plaintiffs' claim is based on fear which fear is un founded as it has not been stated exactly when and who made those visits and issued threats.

4. No valuation report has been annexed to prove the value attributed to the property thus making it not compensatable in terms of damages.

5. The balance on convenience tilts in favour of denying the applicant the right to the injunctive relief because the damages if any can be compensated for in terms of damages on the one hand and on the

other, the alleged threat to the property has not been demonstrated.

In reply to the defendant submissions, counsels for the applicant stated that the defendant is a body corporate capable of suing and being sued in its own name, and not a government department and as such it cannot avail itself of the protection under the government proceedings Act, as the central government and local government are not one and the same entity. For this reason the court, is enjoined not to be persuaded by the case law relied upon by the defendant.

On case law, the court, was referred to the case of **ALI AND 3 OTHERS VERSUS CITY COUNCIL OF NAIROBI (2003) KLR 596** decided by a court of co-ordinate jurisdiction interalia that "*the city council of Nairobi is a local authority and just like the government no injunction can lie against its officers. The proper remedy lies in such course would be an application for judicial review.*

The case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358** where it was held inter that "*in order to earn an injunctive relief:*

(iv) An applicant must show a prima facie case with a probability of success.

(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vi) When the court, is in doubt, it will decide the application on the balance of convenience."

The case of **MURAO LIMITED VERSUS FIRST AMERICAN BANK OF KENYA LIMITED AND 2 OTHERS (2003) KLR 125** decided by the CA where it was held interalia that:-

1. The power of the court, in an application for an interlocutory injunction is discretionary.

2. The principles for granting of an interlocutory injunction are that:-

(a) The applicant must show a prima facie case with a probability of success.

(b) An interlocutory injunction will not normally be made unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

(c) If the court, is in doubt it will decide the application on the balance of the convenience.

3. A prima facie case in a civil application, includes but is not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

In the assessment of the facts herein, the court, has taken due consideration of the points advanced in the rival arguments by both sides for and against the granting of an injunctive relief at an interlocutory stage herein. The court, has also taken into consideration the applicable principles of law on the subject and applied them to the fore set out rival arguments and the same makes a finding that the following issues have arisen for determination by this court, namely:-

1. Whether an injunction can lie against the defendant and its officers.

2. Whether on the facts demonstrated herein, the applicant has satisfied the ingredients for granting the injunctive relief.

3. What are the final orders herein?

As regards the first question for determination, it is clear that the defendant relies on the government

proceedings Act to shield it from immunity from an injunctive relief and the case law cited a matter disputed by the applicant.

The decision relied upon is a decision of a court, of co-ordinate jurisdiction and as such it is not binding on this court. This court, is entitled to construe the relevant provisions of the law applicable and then arrive at its own conclusion. There is also inspiration to be drawn from another decision of another court of coordinate jurisdiction on the case of **B. VERSUS THE ATTORNEY GENERAL (2004) IKLR 431** decided by Ojwang J in which he held interalia that: "*Injunctive relief may be made against government officers in a proper case."*

These decision are considered in the light of the relevant provisions of the government proceedings Act cap 40 laws of Kenya. The provisal to section 16(1) states inter alia:-

"(i*) Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court, shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the parties.……"*

Section 2 (3) on the other hand provides:-

"*Any reference in part IV or part V to civil proceedings by or against the government, or to civil proceedings to which the government is a party, shall be construed to include a reference to civil proceedings to which the Attorney general or any government department or any officer of the government as such is a party*"

Applying these provisions to the rival arguments herein, it is clear that the defendant is not a beneficiary because it has not been shown to be a government department. Neither has it been represented herein by the office of the Attorney General.

As submitted by the applicants counsels in their reply to the defendants submissions the legal status of the defendant is not determinable under the government proceedings Act but under the local government Act. It is correctly submitted that under the said legislation namely section 3 thereof a local authority is a body corporate with power to sue and be sued in its own name. As such where its officers exceed their mandate or act high handedly; or in breach of the law an injunctive relief will issue against them.

Having established that injunctive relief is available to the applicant as against the defendant, the court, proceeds to determine whether the applicant has earned the same on the basis of the facts presented herein. The ingredients to be applied to those facts are already set out herein. The relevant facts to be considered are the following:-

(i). The applicant is the proprietor of the suit property, a fact not disputed by the defendant.

(ii). That the applicant indeed recognized the supersensory role of the defendant in matters of development of that property and as required of him by the defendants by laws, and the provisions of the physical planning Act cap 286 laws of Kenya, he sought approval from the defendant to carry out construction on the said property in 1997. The defendant concedes as much.

(iii). What is in dispute is the level of compliance of those approvals. The applicant alleges that they complied with the approvals fully and there are no infringements and as such the defendants threats of demolition amount to an intimidation and excess of authority whereas the defendants contends that there is an infringement and if not enforced they would be allowing an illegality to stand.

(iv). As submitted by the applicants, the infringements have not been enumerated by the defendant. It therefore follows that there is an issue to be interrogated at the trial for the defendant to state what infringement have been committed by the applicant on the one hand and the applicant to demonstrate how these are not infringement but are within the approvals given by the defendant. The court, therefore finds

this to be an arguable point within the meaning of a prima facie case in civil proceedings as enunciated by the CA in the Mrao Limited case (supra).

As for the second ingredient of showing existence of irreparable loss, the court, agrees with the stand of the defence that this ingredient has not been satisfied in that the valuation report has not been exhibited in the first instance. In the second instance the value of the property has been quantified and in the absence of an averment or allegation that the defendant is impecunious an award of damages will be an adequate compensation.

As for the balance of convenience, the court, finds that this tilts in favour of both parties, in that care has to be taken to ensure that should the demolition go on as apprehended and at the end of the trial it turns out that, these were un called for, both parties will have suffered damages. Damages would have been occasioned to the defendant in that it will be required to make good the damage. Likewise the applicant would have suffered damages in that, it will be obligated either to remedy the damages itself and then seek compensation for the costs, from the defendant. It will also have suffered loss of business. Therefore the damage that the applicant stands to suffer should they succeed at the end of the trial. Out weighs the degage that the defendant stands to suffer should they succeed at the end of the trial after an injunction had been granted at an interlocutory stage.

For the reasons given in the assessment the court, finds merit in prayer 3 of the applicants application dated 1/4/09 and filed the same date. The same is granted for the following reasons:-

1. There is an arguable case in favour of the applicant in that there is need for the defendant to demonstrate how there exists infringement committed by the applicants against the approvals given by them since they have not enumerated them in their deponement.

2. The balance of convenience also tilts in favour of the applicant in that the damage they stand to suffer if an injunction were not be denied and they succeed at the end of the trial out weighs the damages that the defendant is likely to suffer at the end of the trial should an injunction be issued against them at this interim stage and they succeed at the trial.

3. There is also another balance of convenience which tilts in favour of both in that should the defendant carry out the threatened demolition, and it turns out that there were no infringement; the defendant will be called upon to make good that damage. The applicant will have suffered damage to their property and loss of business unnecessarily.

It is therefore in the interests of both parties that an interim injunctive relief be granted.

4. The applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBNI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE