



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

ENVIRONMENTAL & LAND CASE 506 OF 2008

THE KING POST LIMITEDPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

The Plaintiff has undertaken some developments on a parcel of land known as L.R. No.1870/IV/42 on Rhapta Road, Westlands Nairobi, which is registered in its name.

The Defendant has issued an Enforcement Notice under the Physical Planning Act Cap 286 Laws of Kenya to the effect that the developments by the Plaintiff were without permission or fulfillment of development conditions and that the Plaintiff had no occupation certificate.

It is the Plaintiff's case that the purported notice is unlawful, null and void and hence ineffectual as the council is *functus officio* as regards its supervisory role in the construction of the said premises.

As a result of the foregoing there is now a suit brought by the Plaintiff for a order of permanent injunction against the Defendant, its agents, servants, employees of whatever capacity to restrain and prohibit them from issuing any enforcement notices, entering L. R. No. 1870/IV/42 or executing the said Enforcement Notice.

There is also a prayer that the Enforcement Notice aforesaid is oppressive, ineffectual and therefore null and void. The Plaintiff also claims general damages for trespass and nuisance.

Following the filing of the suit, the Plaintiff moved the court by way of Chamber Summons for interim orders upon which the court ordered status quo to be maintained.

The Defendant has filed a Notice of Preliminary Objection seeking dismissal of the application and the entire suit on the ground that the same are bad in law and therefore incompetent for having been undertaken without exhaustion of the

relevant procedure, to wit, appeals to the relevant Physical Planning Liaison Committee, and the National Liaison Committee. The entire suit is therefore in contravention of Section 38 of the Physical Planning Act, Cap. 286, Laws of Kenya.

Both learned counsel for the parties herein agreed to address the objection by way of written submissions. They have also cited several authorities. I have had the time to read the material before me.

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit.”

See **Mukhisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors Ltd** [1969] E.A 696 at p. 700.

The statutory procedure provided under Sec.38 of the Physical Planning Act aforesaid is not mandatory. The wording which includes the word **“may”** appears to suggest a party offended is at liberty to elect to follow the said administrative procedure or file action.

The validity of the notice has been made an issue in the pleadings. Two other causes of action also stand out. There is the issue of trespass; and nuisance and or harassment. The Plaintiff has also claimed general damages. These cannot be canvassed under the Physical Planning Act aforesaid.

I have not deemed it necessary to delve any deeper into the contentious issues because it is my finding that the objection raised if upheld cannot dispose off the suit. If I were to go beyond this observation, prejudice may result to both parties in view of what may be identified as triable issues when the matter eventually comes up for hearing.

The notice of preliminary objection lacks merit. The same is dismissed with costs to the Plaintiff. Status quo shall be maintained. Orders accordingly.

Dated, signed and delivered at Nairobi this 12th day of October, 2009.

A. MBOGHOLI MSAGHA

JUDGE