



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**  
**Civil Case 193 of 2009**

**ROBIN MOMANYI**

**JANE BOSIBORI MOMANYI ..... PLAINTIFFS**

**VERSUS**

**TAWFIQ ABDULKADIR HUBESS**

**NARDA MSWABAH ABEID ..... DEFENDANTS**

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**RULING**

Before court is the Chamber Summons dated 10<sup>th</sup> June 2009 by which the Applicant seeks inter alia the following orders:-

“2. *An injunction be granted to restrain the defendants, their servants and/or agents from constructing, and or continuing with any construction works, at present or in future, of any building of a highrise nature on their plot L.R.MN/1/6594 situate at Nyali Estate Mombasa, until the hearing and final determination of this suit, or further orders of this court.*”

At the centre of this dispute is the plot LR No. MN/1/6594 (hereinafter referred to as “*the plot*”) which is located at Nyali Estate Mombasa, where the Respondents have commenced some building construction works. The Applicants object to this construction on three main grounds:-

- (i) *The building which they allege consists of a four storey block of flats, is being put up without heed to the applicable local bye-laws in Nyali Estate in Mombasa*
- (ii) *Notice of the proposed change of user of the said plot was not served personally upon the Applicants as is required by S.41(3) of the Physical Planning Act (Cap 286) Laws of Kenya*
- (iii) *The Respondent did not seek and obtain an ENVIRONMENTAL IMPACT ASSESSMENT LICENCE before commencing and embarking on the said construction works.*”

The application has been vehemently opposed by the Respondents by way of an affidavit sworn by one **IDHA AWADH ABEID**. By consent it was agreed that the application be argued by way of written submissions. Both parties duly filed their written submissions by 28<sup>th</sup> October 2009 and ruling was set for 25<sup>th</sup> November 2009.

The Applicants in this matter are seeking an interlocutory injunction to compel the Respondents to cease their construction pending the hearing and determination of the main application. Therefore at this stage I am not being called upon to determine the substantive application. That will only be done at a later stage when evidence will be adduced on the same. The principles relating to the granting of injunctions was very clearly laid down in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A.L.R. 358** where it was held as follows:-

*“(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) where the court is in doubt, it will decide the application on the balance of convenience.”*

I have carefully considered the submissions of both counsel as well as the annexures thereto. In my view this application raises several pertinent issues. I am satisfied that the Applicants indeed have a prima facie case. For these reasons I find that the prejudice the Applicant stands to suffer due to nuisance and/or loss of privacy may not be adequately compensated by way of damages. As such I do allow this present application in terms of prayer (2) thereof. Costs in the cause.

Dated and Delivered at Mombasa this 25<sup>th</sup> day of November 2009.

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Mr. Chizipha holding brief for Defendant/Respondent

No appearance by Plaintiff/Applicant

**M. ODERO**

**JUDGE**

**25.11.2009**