



REPUBLIC OF KENYA

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

Civil Suit 439 of 2008

ANJU CHANANDINPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI1ST DEFENDANT

JANE MUGO.....2ND DEFENDANT

RULING

1. By her application dated 12/09/2008, which is expressed to be brought under Order XXXIX Rules 1, 2, 3 and 7 of the Civil Procedure Rules and Sections 3A and 63(c) of the Civil Procedure Act, the Plaintiff/Applicant prays for an order of permanent injunction to restrain the Defendants/Respondents from trespassing, demolishing any structures and/or in any other way interfering with the Plaintiff's/Applicant's quiet enjoyment of all that property described as LR No. 7752/65 (hereinafter referred to as the suit property) pending the hearing and determination of this suit. The Applicant also wants a mandatory order of injunction directed at the Defendants commanding them to reconstitute the suit property the way it was prior to the illegal and unlawful destruction. The Applicant also wants the Officer Commanding Station (OCS) Spring Valley to supervise the execution of the orders of injunction sought herein.

2. The Plaintiff's application is premised on the following 8 grounds, that is to say —

(a) *THAT the Plaintiff/Applicant herein is one of the registered owners and the person in possession of all that property described as L.R. No.7752/65 situated in Kibagare Valley within Nairobi.*

(b) *THAT on the 22nd day of August 2008 the Defendants/Respondents agents and/or servants in the company of armed policemen descended upon the said property with bulldozers.*

(c) *THAT the Respondents herein through their agents and/or servants trespassed and maliciously damaged property on the said property.*

(d) *THAT the destruction and use of force by the Respondents agents and/or servants was excessive and without any justification in Law.*

(e) *THAT the Respondents herein and/or their agents have threatened to return and demolish structures on the said property.*

(f) *THAT the said property is in real danger of being demolished by the Respondent's agents and/or*

their servants.

(g) THAT the Applicant is apprehensive that unless the orders sought are granted she will suffer irreparable loss.

(h) THAT it is in the interest of justice that the orders sought be granted.

3. The Plaintiff/Applicant has also sworn a supporting affidavit dated 12/09/2008 in which she reiterates the averments in the grounds on the face of the application. She says that the 1st Defendant granted an occupation certificate for the suit property; that it is the 2nd Defendant who gave instructions for the demolition; that as a result of the unlawful demolition, the Plaintiff/Applicant lost personal property of great value, namely:-

(a) Piano

(b) Trees

(c) Garden and Garden Lights and wiring

(d) The Ark

(e) The drive way/garden enhance or stairway (sic)

(f) Swimming Pool

(g) Doors and windows

(h) Glasses, plates

(i) Servant's quarter

(j) Digital Fuji Film Camera

(k) Shaver Machine

(l) Nokia 6300

(m) Table Top with Toughen Glass (sic)

4. The Applicant further contends that by unlawfully and illegally entering the suit property, the Defendants trampled upon the Plaintiff's constitutional rights. The Plaintiff/Applicant wants the Defendants enjoined so that they do not continue with their wanton destruction of the suit property.

5. Simultaneously with the application, the Plaintiff/Applicant filed plaint dated 12/09/2008. At paragraph 8 of the plaint, the Plaintiff sets out particulars of loss amounting to Kshs.925,000/=. The Plaintiff also avers that the Defendants' actions were actuated by malice, as more particularly set out in paragraph 8 of the plaint, that is to say:-

(a) Destroying the plaintiff's premises without any or any lawful cause.

(b) Uprooting the plaintiff's trees and destroying her flower garden contrary to law.

(c) Breaking the plaintiff's piano and other household goods namely glasses, plates etc,

(d) Breaking doors and door glasses

- (e) *Maliciously damaging the swimming pool and the area around it when they had no right to do so.*
- (f) *Maliciously damaging the plaintiff's property*
- (g) *Maliciously breaking the law with impunity*
- (h) *Working under the direction of the 2nd defendant while knowing that she was not the 1st defendant's agent*
- (i) *Using abusive language towards the plaintiff*

6. The Plaintiff/Applicant alleges that the two Defendants did what they did out of spite for the Plaintiff and that they so acted with the intention of humiliating the Plaintiff and injuring her proper feelings of dignity and pride. The Plaintiff/Applicant prays for judgment against the Defendants jointly and severally for:-

- (a) *Special damages in the sum of Kshs.925,600/=. (sic)*
- (b) *A permanent injunction restraining the Defendants by themselves and/or servants and/or anyone claiming through them from trespassing, interfering, damaging the plaintiff's properties.*
- (c) *A declaration that the demolition and/or destruction was illegal and in breach of the plaintiff's constitutional rights*
- (d) *General damages*
- (e) *Exemplary damage*
- (f) *Cost of the suit*
- (g) *Any other or further relief as the court may deem fit to grant.*

7. The Plaintiff's application is opposed. The 1st Defendant filed Notice of Preliminary Objection on 22/09/2008 on the ground that "the Plaintiff/Applicant suit as filed is misconceived, a non starter in law and hopelessly defective, as it was filed in blatant violation and/or contravention of Order LIII Rules 1 and 2 of the Civil Procedure Rules. The 2nd Defendant filed grounds of Opposition pursuant to Order L Rule 16 of the Civil Procedure Rules. The grounds are:-

1. *That the plaintiff's said application fatally defective, is incompetent and an abuse of court process. (sic)*
2. *That the plaintiff's said application frivolous, vexatious and devoid of merit. (sic)*
3. *That the plaintiff has come to court with unclean hands and not satisfied the conditions for granting the orders sought.*
4. *That the plaintiff's said application is bad in law and is for striking out.*
5. *That plaintiff's said application ought to be dismissed with costs.*

However at the hearing of the application, counsel for the 1st Defendant only relied on the replying affidavit, the gist of which appears below.

7. The 1st Respondent's Replying Affidavit dated is 3/10/2008. It is a long affidavit but the long and short of it is that the Plaintiff's application for conversion of the suit property to Home Stays was refused

on the ground that what the Plaintiff sought to do was to convert the residential use into hostel. The deponent, Mr. P.M. Kibinda who is the Director of City Planning & Architecture with the 1st Defendant also says that other correspondence between the Plaintiff's agents and the 1st Defendant was exchanged, resulting in a visit by the 1st Defendant's officers to the suit property on 17/07/2008 when the said officers found construction work going on under the supervision of the Officer Commanding Spring Valley Police Station and his officer incharge of Crime. The deponent says that the said OCS arrested the 1st Defendant's officers; that the 1st Defendant's law enforcement officers later arrested the developer, one Vishal Ghai Sushil who was arraigned in court in case No. 529 of 2008 – a City Planning matter.

8. The deponent of the Replying Affidavit also says that on the 28/07/2008 the 1st Defendant's officers issued an Enforcement Notice to the Plaintiff herein who is also the owner of the suit premises, though the Plaintiff refused to sign the Notice. The deponent says that the Plaintiff was carrying out the following illegal development:-

(a) Illegal conversion of user from Residential to Commercial (Restaurant) without approval of the 1st Defendant/ Respondent.

(b) Additions of extensions without approval of the 1st Defendant/Respondent.

9. The deponent says further that the Enforcement Notice required the Plaintiff to:-

(i) Stop further conversion

(ii) Remove the said extension by 10/08/2008, but that instead of complying with the Enforcement Notice the Plaintiff went ahead to complete and occupy the conversion without an occupation certificate issued by the 1st Defendant/Respondent. The deponent says that the Plaintiff advertised the conversion in the Daily Metro Magazine of 20/07/2008.

10. The deponent also says that the 1st Defendant was under a duty under the Local Government Act, Cap 265 and Sections 33 and 38 of the Physical Planning Cap 286 and the City Council of Nairobi By-Laws (2007) Amended to carry out the demolitions which demolitions he says were done such demolitions were carried out in accordance with the Enforcement Notice. It is also the 1st Defendants case that there have been many other complaints from other Government quarters concerning the matter in hand. The deponent says that the approvals exhibited by the Plaintiff/Applicant and particularly Annexure AC-2 and AC-3 were for the period prior to the Plaintiff's application for Home Stay or conversion of LR 7752/65 from Residential User to commercial user (Home Stay) which was rejected. From the records, annexure AC2 is a letter from the City Planning And Architecture Department dated 12/10/1998 to L.G. Dave & N. Patel (Mr. & Mrs. Dean) C/O Vetle Jorgensen (A 327) conveying approval in respect of plan registration no. D1 495 for the proposed Domestic Building – Amended approval conveyed was given on 18/09/1998. Annexure AC-3 is a Certificate of Occupation of Building Erected on plot No. 65 of LR No.7752 Kibagare Valley, under Registered Plan No. DD435 and D1 495 – Domestic Building Extensions. Plan No. DD 435 and D1 495 were for Residential Extensions, namely house alterations and extensions. The deponent denies that the 1st Defendant was actuated by malice in the actions it took with respect to the suit property and urged to court to dismiss the Plaintiff's application with costs to the 1st Defendant.

11. The 2nd Defendants Replying Affidavit is dated 1/12/2008 and filed in court on 2/12/2008. The deponent, Jane Mugo denies that she has anything to do with this case or with the 1st Defendant herein. She says that she has never been in any position as would entitle her to issue commands to the 1st Defendant herein. The deponent says that she was an innocent passer-by and by-stander in the normal course of her duties as she patrolled her employees, namely security guards in the area.

12. At the hearing of the application Miss Kinyua appearing for the Plaintiff/Applicant contended that the 1st Defendant's action of entering the suit property amounted to trespass which resulted in illegal and

wanton destruction of the Plaintiff's property. It was further contended on behalf of the Plaintiff/Applicant that the Respondents' actions were motivated by malice on account of the matrimonial dispute in HCCC No. 29 of 2005.

13. Mr. Abwao appeared for the 1st Respondent and submitted that despite the 1st Respondent's disapproval of the Plaintiff's proposed conversion the Plaintiff went ahead to convert the suit premises from residential to commercial. Mr. Abwao further submitted that the Plaintiff/Applicant also disobeyed the Enforcement Notice issued upon her, hence the 1st Respondent's actions. It was also Mr. Abwao's contention that if the Plaintiff/Applicant was aggrieved by the Enforcement Notice, she should have appealed to the relevant Liaison Committee established under section 13 of the Physical Planning Act, Cap 286, Laws of Kenya (the Act). Section 38(4) of the Act provides:—

“If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice, he may within the period specified in the notice appeal to the relevant liaison committee under section 13.”

14. Section 33 of the Act, which deals with “Approval of Development application” confers a right upon an aggrieved party to appeal against the decision of a local authority refusing his application for development permission to the relevant liaison committee under section 13. Under subsection (4) of section 33, an appeal from the decision of the liaison committee lies to the National Liaison Committee under section 15 and an appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court. Mr. Abwao submitted that since the Plaintiff did not comply with the above provisions, she has no case against the 1st Defendant herein.

15. Mr. Abwao relied on 3 authorities to buttress his arguments against the Plaintiff's application. In **Ali & 3 Others –vs- City Council of Nairobi [2003] KLR 596**, the court held, inter alia that:-

“The city council of Nairobi is a local authority and just like the Government no injunction can lie against it and its officers. The proper remedy in such a course (sic) would be with an application by way of judicial review.”

16. In the case above cited, the Plaintiffs filed a civil suit together with an application seeking an injunction to prevent the City Council of Nairobi from interfering with the development and construction of multiple dwelling houses on a parcel of land. The Defendant argued that non-compliance by the Applicant with section 33 and 38 of the Physical Planning Act (Cap 286) which requires a developer to first seek permission from a local authority to undertake certain developments, meant that the High Court had no jurisdiction to entertain the application.

17. The case of **Niazons (K) Ltd. v China Road and Bridge Corporation (K) [2001]2 EA (CAK) 502** deals with the question of preliminary objections and what amounts to a preliminary objection as stated in **Mukisa Biscuit Co. v West End Distributors [1969] EA 696**. Since in the instant case, Mr. Abwao relied on the Replying Affidavit, this case is not relevant.

18. The court has now considered the application and all the grounds, including the submissions in support of the same. The court has also considered the Replying Affidavits and the submissions in support of all the objections raised against the application. The question that arises for determination is whether in light of the submissions and the law, the Applicant has made out a case for the grant of an order of injunction. The Applicant herein contends that she was granted the necessary approvals for the development which she has been undertaking on the suit premises. On the other hand, the 1st Defendant contends that no such approvals were given, and that it was as a result of such disapprovals that the 1st Defendant issued the Enforcement Notice which was disregarded by the Plaintiff/Applicant. The court has scrutinized the documents produced by the 1st Respondent and finds that there was no approval given to the Plaintiff/Applicant for the developments that are the subject matter of this suit. The court also finds that the refusal to approve by the 1st Respondent was premised on the grounds that the Plaintiff intended

to convert the residential property into a Hostel.

19. The law is that once the approval for development application was refused, the Plaintiff/Applicant should have appealed against the said decision in accordance with section 33(3) of the Act, all the way to section 33(4) and (5) of the Act. The Plaintiff/Applicant chose not to follow that and went ahead with the alterations and conversion, forcing the 1st Respondent to issue an Enforcement Notice No. 4557 on 25/07/2008, The Plaintiff/Applicant did not take heed of the notice nor did she appeal against the said notice as provided by section 38(4) of the Act.

20. The sum total of what the Plaintiff/Applicant did was total disregard of the law, and eventually, the contractor was arrested and arraigned in court for carrying out development on the suit property without permission from the 1st Respondent. For the above reasons, the court is not satisfied that the Plaintiff's/Applicants claims have any basis. Apart from the fact that an injunction does not lie against a local authority in the person of the 1st Respondent, the court finds that the Plaintiff/Applicant has not established a prima facie case with a probability of success. The Plaintiff/Applicant was the author of her own misfortune, and cannot now be heard to blame the two Respondents and in particular, the 1st Respondent. Secondly, the court finds that the Plaintiff/Applicant has quantified the damage suffered. Pursuant to this claim for a liquidated amount, the Plaintiff/Applicant filed her Request for interlocutory judgment for Kshs.925,600/=. It is therefore not true as alleged by the Plaintiff/Applicant that the damage suffered or to be suffered by herself cannot be compensated by damages. The Plaintiff/Applicant is therefore not entitled to an order for injunction in light of the principles set out in the **Giella –vs- Cassman Brown & Co. Ltd. case**. The Plaintiff's/Applicant's allegation that the Respondents actions were motivated by malice has not been supported by evidence. Further, the Plaintiff has not placed any evidence before this court to support her claims for an injunction against the 2nd Defendant/Respondent.

21. Finally, the court must state here that the citizens of this country must learn to obey the law. The constitutional provisions should not be used as a shield against the proper administration of justice unless it can be part in bringing about the actions complained of. In this case, the Plaintiff chose to ignore the law governing the developments that she proposed to carry out on the suit property. The Plaintiff also ignored warnings given to her by the 1st Defendant herein that she should not proceed with the construction, the Plaintiff hands are therefore tainted with the blood of disobedience which disentitles the Plaintiff from the exercise of this court's discretion in her favour.

22. For the above reasons, the court finds and holds that the Plaintiff's application dated 12/09/2008 lacks both merit and substance. It is hereby dismissed with costs to the Defendants/Respondents. The interim orders issued by Visram J (as he then was) on 12/09/2008 be and are hereby discharged.

Orders accordingly.

Dated and delivered in Nairobi this 3rd day of December, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Kinyua (present) For the Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

Weche – court clerk

