REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 47 of 2006

ONESMUS MASIKA MUSOLA::::::::::::::::::::::::::::::::::1ST PLAINTIFF

PHILIP MUNGUTI::2ND PLAINTIFF

NELSON WAMBUA::3RD PLAINTIFF

BENARD GITAU::4TH PLAINTIFF

FRANCIS KURIA NJUGUNA::::::::::::::::::::::::::::::::5TH PLAINTIFF

KITUA KITUKU::6TH PLAINTIFF

FRANCIS MUTISO::7TH PLAINTFF

CELESTINE MUTISO ::::::::::::::::::::::::::::::::::::::8TH PLAINTIFF

FRANCIS MUTISO ::9TH PLAINTIFF

JAPHETH MUSYOKA MONDA::::::::::::::::::::::::::::::10TH PLAINTIFF

VERSUS

THE TOWN CLERK, TOWN COUNCIL OF MATUU::::::::::::DEFENDANT

RULING

1. The Application dated 11.5.2006 was heard by *Sitati,J.* on 6.2.2007 but before the learned judge could deliver a Ruling, another Application was filed, heard and Ruling delivered on 17.3.2008. By that time *Sitati,J.* had left the Station and on 24.7.2008, parties agreed that I should study the record and write a Ruling which is what I have done.

2. The Application in any event is premised on Order XXXIX Rules 1, 2 and 2A of the Civil Procedure Rules and the Applicants seek orders that the Defendants/Respondents be restrained from demolishing part of the Applicants' buildings in Matuu Town until the suit is heard and determined.

3. The grounds in support are;

"i. *That the Defendant intends to destroy and demolish part of*

the Applicant's buildings that exceeds a length of 100ft.

ii. That intended demolition has been okayed by councillors in a council meeting.

iii. That the applicants had paid fees demanded by the council to maintain the status quo.

iv. That the applicants stand to suffer irreparable loss if the intended demolition is carried out.

v. That the Applicants have a good case with overwhelming chances of success.

vi. That the balance of convenience is on the side of the Applicants'.

vii. That there is no notice in the Kenya Gazette of the council's intention to make a road or through way behind the applicant's plot."

4. I have read the Affidavit in support sworn on 11.5.2006 by Onesmus Masika Musola on behalf of the other Plaintiffs and they all claim to own plots within Matuu Town that range in size from 160 feet to 180 feet. They have no titles to the said plots but say that they have "*leasehold interests"*. No document so to show was exhibited but I see copies of receipts for payments to Matuu Town Council for plan drawing fees, licenses etc. It is claimed further that on 28.12.2005, the Applicants amongst others met with the officials of the Council and;

" *That on 28th December, 2005 plot owners held a meeting with the officials of the Council at the Council's offices and agreed that status quo be maintained upon the Plot owners paying the fees below."*

i. Plot Extension fee…….. 20,000/=

ii. Plant Approval fee……. 10,500/=

iii. Plan drawing fee……. .10,000/=

iv. Beaconing fee……6,500/=

v. Inspection fee……1,000/=

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Total Kshs 48,000/=

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5. That on 4.5.2006, Councillors of the Matuu Town Council having failed to get a share of the fees resolved that all buildings exceeding 100 feet be demolished to crate lanes behind the buildings. That the resolution was made in bad faith and that the consequent demolitions will cause the Applicants irreparable injury since they have installed tenants in part of the premises. The minutes of the meeting with Council Officials is annexed to a further Affidavit sworn on 18.7.2006 by Onesmus Masika Musola aforesaid.

6. The Defendants filed grounds of opposition on 6.11.2006 and the grounds raised are as follows:-

" i. *That the honourable court lacks original jurisdiction in*

this matter by virtue of section 15 of the Physical Planning Act Chapter 286 of the Laws of Kenya.

ii. That the honourable court lacks jurisdiction in this matter by virtue of the provisions of section 38 of the Physical Planning Act, Chapter 286 of the laws of Kenya.

iii. That the Application lacks in merit in that the sections of the building earmarked for demolitions were developed without development permission from the defendant.

iv. The Application lacks in merit in that the demolition was resolved by the defendant and the resolution as a force of law and has to be complied with.

v. *The Application lacks in merit in that the developments earmarked for demolition are illegal structures and the applicants have no cause of action against the defendant/ respondent pertaining the demolition thereof.*

vi. The action contemplated by the defendant is furtherance and/or performance or its statutory duty and the plaintiffs have no locus standi to prevent the performance of the statutory duty to protect the public interests.

vii. The Application ought to be dismissed with costs to the defendant/respondent."

7. I have read the detailed notes of submissions made before *Sitati,J*. and I have perused the authorities cited before her. Since advocates agreed that principles cited in Giella vs Cassman Brown and Co. Ltd [1973] E.A. 358 represent the law on the subject I should reproduce the words of Spry V-P in that case. The learned judge rendered himself thus:-

"*I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (sargent v Patel [1949], 16 E.A.C.A 63).*

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima face case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v Trufoods, [1972] E.A. 420)."

8. Have the Applicants established a prima facie case with a probability of success? Their case is simple; they acquired the plots either by direct allotment or by purchase from allotees. They have paid the requisite fees as demanded by the Defendants but part of their developed plots may be demolished. In their Plaint, they only seek a permanent injunction to restrain the Defendants from ever demolishing those plots.

9. In submissions, Mr. Musyoki for the Defendants raised a legal question which I should address. He said that section 15 and section 38 of the Physical Planning Act would be properly invoked in this case. Section 38 is especially pertinent because it provides as follows:-

"(1) *When it comes to the notice of a local authority that the*

development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) *An enforcement notice shall specify the development*

alleged to have been carried out without development permission, or the conditions of the development

permission alleged to have been contravened and such measures as my be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) *Unless an appeal has been lodged under subsection (4) an*

enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) *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.

(5) *Any person who is aggrieved by a decision of the liaison*

committee may appeal against such decision to the National Liaison Committee under section 15.

(6) *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.

(7) *Any development affecting any land to which an*

enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under sub-section (4), (5) or (6).”

10. I will dispose of the issue by saying that in fact section 38 aforesaid is in favour of the Applicants. This is because whereas a local authority, in this case the Matuu Town Council, has the lawful mandate to ensure that development of land in its jurisdiction is properly carried out, notice must be served to enforce that power. In this case, no such notice has been shown to exist neither has it been shown that it was properly served on each owner, occupier or developer including the Applicants.

11. Section 15 of the Act must be read with section 38 and it provides as follows:-

“(1) *Any person aggrieved by a decision of a liaison*

committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.

(2) The National Liaison Committee may reverse, confirm or vary the decision appealed against.

(3) The provisions of this Act relating to the determination by the Director or local authority of objections to physical development plans or development applications, as the case may be, or the determination of an appeal under section 13, shall apply mutatis mutandis to the determination of appeals by the National Liaison Committee under this section.

(4) Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court.”

12. It is obviously clear that all the submissions made by Mr. Musyoki regarding section 15 were wholly irrelevant in addressing the issue before me because the process envisaged by that

section cannot commence until notice is properly served on the Applicants.

13. The whole essence of proceedings under Order XXXIX Rule 1 of the Civil Procedure Rules is that where one party threatens inter-alia to act illegally, an injunction can issue. In this case, the Applicants have passed the test that prima facie the Council may have acted unprocedurally and I so hold.

14. It has been claimed that irreparable injury which cannot be compensated in damages may result but save for the averment that tenants may suffer if the buildings are demolished, I see no other reason for so holding. In any event that in itself is not a ground for saying that damages cannot compensate damages to be suffered.

15. In any event, on a balance of convenience, discretion must favour the Applicants and I have said why.

16. I will grant prayer 3 of the Application dated 11.5.2006 with costs to the Applicants.

17. Orders accordingly.

Dated and delivered at Machakos this 14th^{h} day of October 2008.

Isaac Lenaola

Judge

In the presence of : Mr. Mutinda h/b for Mr. Musyoki for Applicant

No appearance for Respondent

Isaac Lenaola

Judge