



1. Land and Environmental Law Division
2. Subject of main suit:- Injunction
 - i) Against City Council of Nairobi
 - ii) To restrain the Director of City Planning from demolishing boundary wall between part No. 209/744234 and 209/744235 in City Planning Act Cap 286 Laws of Kenya.
3. Preliminary Objection:-
 - (a) There is no injunction against the City Council of Nairobi
 - (b) Actions pursuant to Physical Planning Act can only be challenged by way of a Judicial Review.
4. In reply:-
 - (a) Equity before law
 - (b) Law not respected
 - (c) Plaintiff should be at liberty to amend pleadings
5. Held – Preliminary objection upheld. Suit struck out.
6. Case law Shueb Adam Ali & 3 others v City Council of Nairobi
7. Advocate

D.M. Gikunda for Gikunda & Co. Advocates for the plaintiff

B.W. Milimo for Mose & Mose Advocates for the defendant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 348 OF 2004

DOMIZIANO KABURU NJERUPLAINTIFF

V E R S U S

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

ON A PRELIMINARY OBJECTION

I: BACKGROUND

1. Domiziano Kaburu Njeru (the plaintiff herein) is the registered owner of LR No.209/7442234. He had a boundary wall erected between his property and the adjacent property being LR 209/7442235. The City Council of Nairobi (the defendant herein) gave the plaintiff a notice requiring him to demolish the wall as the same had been so constructed without the approval of the Director of City Planning and had encroached the adjacent plot by 1.0 metres.
2. On being given the enforcement notice to so implement within seven days as of 31 March 04, the plaintiff filed suit on 8th April 2004 seeking for a permanent injunction (to restrain the defendant from interfering with the plaintiff's boundary plot No.209/7442234).
3. Exparte injunction was issued up to 22 April 04 (P. Kihara Kariuki J.) to give the plaintiff time to serve the application upon the defendant. The plaintiff filed contempt proceedings on 27th July 2004 against defendant. The same was set down for hearing 4 October 04, 8 December 04, 28 April 05, 22 September 05 but appears to have been taken out of the list. On 22.9.05 the application was dismissed for non attendance by the plaintiff to prosecute the application (Kubo J.).

II Application 8th April 2004

4. When the application of 8th April 2004 came for inter-parties hearing, it was adjourned several times and taken out. The plaintiff set the main suit for hearing. This was taken out on grounds that there was an application existing. The defendant raised a preliminary objection which is the subject of this suit.

III Preliminary Objection

5. The objection raised being that no injunction can issue against the City Council of Nairobi. The case law of Strueb Adam Ali & 3 others V City Council of Nairobi HCCC 820/03 Ang'awa J. refers.
6. Further, the plaintiff is challenging the Physical Planning Act Cap 286 Laws of Kenya. He should have filed suit by way of Judicial Review and not by way of a plaint.
6. The respondent in reply stated that the court ought to put equity

before the law and not strike out the suit. The defendants were in breach of the law and did not respect it. The plaintiff should nonetheless be at liberty to amend the pleadings.

III Findings

8. The issue before this court is that of jurisdiction where a court lacks

jurisdiction to hear a matter, a preliminary objection must be up held. In this case the plaintiff constructed a boundary wall. He admits he was issued with an enforcement notice to demolish the wall within seven days. This is in pursuant to Section 30 of the Physical Planning Act that states:-

“ no person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33”.

9. This includes a boundary wall. Where a person such as in this case is dissatisfied with the decision of the Director of City Planning then such person may appeal against such decision to the relevant liaison committee.

10. As stated in the case law of **Shueb Adam Ali & three others v City Council of Nairobi** (Supra), the only option the plaintiff has is to appeal to the liaison committee or to file a judicial review. The appellant cannot come in by way of a plaint. I did state that:-

“... he defendant is correct in arguing that this court has no jurisdiction to hear matters under the Physical Planning Act of 1996; the court has a right and jurisdiction to hear Judicial Review cases”.

11. The plaintiff have come by way of plaint which is not a remedy available to them.

12. Further, the City Council of Nairobi is a local authority and like the government no injunction may lie against it and its officers.

III Conclusion

13. I accordingly uphold the preliminary objection. This court lacks jurisdiction to hear this matter unless the plaintiff comes by way of an appeal from the decision of the Director of City Planning or by way of a judicial review.

I hereby struck out the application of 8th April 2007, and the plaint
duly filed herein with costs to the defendant.

Dated this 18th day of June 2007 at Nairobi.

M. ANG'AWA

JUDGE

D.M. Gikunda for Gikunda & Co. Advocates for the plaintiff

B.W. Milimo for Mose & Mose Advocates for the defendant