



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

Civil Case 55 of 2002

CONTINENTAL DEVELOPMENT LIMITED.....PLAINTIFF

VERSUS

MR. KAGAI, MR. OSHOCK (as Chairman & Secretary respectively)

DONHOLM JACARANDA HOUSING SCHEME.....1ST DEFENDANT

SAVANNAH JUA KALI ASSOCIATION2ND DEFENDANT

B.W. GACHICHIO3RD DEFENDANT

J.C. KARUGA4TH DEFENDANT

R U L I N G

- (1) Continental Developers Ltd., the Plaintiff in this case, is the registered owner of the property known as Title Nos. Nairobi/Block/82/4265, 82/7836 — 7855, 7814, 6194 and 7856 (“**the suit premises**”).
- (2) On the 14th January 2002, the Plaintiff filed this suit against the Chairman and Secretary of Donholm Jacaranda Housing Scheme and Anne Khasoa as Chairman of Savannah Jua Kali Association. The Plaintiff claimed that between the 22nd December 2001 and the 7th January 2002, the Defendants, their members and other unknown persons had illegally constructed structures thereon. The Plaintiff sought an injunction to restrain the Defendants, their servants, agents or any other person from trespassing on the suit premises.
- (3) The Plaintiff was amended on the 2nd April 2002 to add three more Defendants — Provincial Commissioner Nairobi, the District Officer Embakasi and the Chief of Umoja Location. The reliefs sought were increased to include a mandatory injunction removing the trespassers and the illegal structures from the suit premises and a declaration that the Plaintiff is the rightful owner of the suit premises.
- (4) On the 17th September 2004, the Plaintiff applied by Chamber Summons under Order 39 rules 1 and 2 of the Civil Procedure Rules for a temporary injunction to restrain the Defendants from trespassing on to the suit premises or disrupting the Plaintiff’s quiet user thereof. The application was supported by

the affidavit of Harun Muturi a Director of the Plaintiff. He deponed that the Second Defendant was giving letters of allotment to various people. This is one of the applications I have heard.

(5) The second application I have heard and is also the subject of this ruling is the Notice of Motion dated the 30th September 2004 taken out by the Second Defendant. She seeks orders to dismiss the suit for want of prosecution and an injunction to restrain the Plaintiff from fencing or developing the suit premises. The supporting affidavit was sworn by Anne Khasoa who claims to be the representative of Savannah Jua Kali Association. She alleged that the Plaintiff, on the strength of an earlier order given by the Court, sent a gang of thugs into the suit premises who set a school on fire and left 1000 children without classrooms. She wants the suit dismissed because to date she has not been served with summons.

(6) In the replying affidavit dated the 28th October 2004, Harun Muturi denied the allegations of arson and destruction made by Anne Khasoa. But he has not commented on the allegation in paragraph 14 of Khasoa's affidavit that to date she has not been served with summons. The Notice of Motion was amended on the 1st October 2004 to indicate that it was also brought under Order 44 rule 1 of the Civil Procedure Rules.

(7) As I have already said, this suit was filed more than four years ago. No tangible progress has been made in its prosecution during that period except for interminable interlocutory applications by both parties. There is no evidence that the Plaintiff's Advocates have taken any steps to serve the Defendants with summons as is required by Order 6 rules 7 and 8 of the Civil Procedure Rules. The result is that although the Second Defendant has kept herself busy warding off application after application by the Plaintiff, she has not filed a Defence to the Plaintiff's claim. Without a Defence on record, it is not easy to make out the nature of her claim to the suit premises. If she had been served, she would probably have filed a Defence and probably revealed the identities of the members of Savannah Jua Kali Association whom she claims to represent in this case.

(8) As I have also already said, the Plaintiff amended the Plaintiff on the 9th April 2002 and sought a mandatory injunction removing the trespassers and illegal structures from the suit premises. My understanding of this is that the suit premises have been invaded by several persons and not just Anne Khasoa. If that is the case, it is the duty of the Plaintiff to bring before the court all these trespassers against whom it is seeking an injunction. I cannot see what practical value an injunction against Anne Khasoa alone will be to the Plaintiff. The necessity of a mandatory injunction as an acknowledgment that the trespassers have invaded the suit premises and are in occupation. Hence the need for an order to evict them.

(9) In a situation like in this case, temporary injunctions do not provide a final solution. The prudent way to proceed would be to arrange for the case to be heard on merit and obtain a decree against the trespassers. Then armed with a decree, the Plaintiff can get the trespassers removed from the suit premises.

(10) I had expected counsel for the Plaintiff to respond to the claim by the Defendant that to date summons have not been served on the Defendants. That may explain the reasons why the Second Defendant, who is represented by an Advocate, has not to date filed a Defence in this case.

(11) Although the 2nd Defendant has not filed a replying affidavit or statement of grounds of opposition under Order 50 rule 16 of the Civil Procedure Rules, I am not inclined to grant the orders sought in the Chamber Summons for the reasons I have explained. Anne Khasoa claims to represent some people. Who are these people and are they aware that the Plaintiff has come to court to obtain an order for their eviction? I have my doubts.

(12) Equally, the Second Defendant is not entitled to any of the orders sought in the Notice of Motion. She has no right to seek to dismiss the suit for want of prosecution before she files a Defence to the claim. She cannot restrain the Plaintiff from fencing or developing the suit premises because she has not established any title to the same.

(13) The result is that both the Plaintiff's Chamber Summons dated 17th September 2004 and the Second Defendant's Amended Notice of Motion dated the 1st October 2004 fail and it is ordered that they respectively be and are hereby dismissed with no order as to costs.

It is further ordered that the temporary injunction granted herein in terms of prayer No. 2 of the Chamber Summons be and is hereby vacated and discharged.

Dated and delivered at Nairobi this Thirtieth day of June, 2006.

P. Kihara Kariuki

Judge.