



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

Civil Case 801 of 2005

**SHEILA MAPENZI SAIDI.....
PLAINTIFF**

VERSUS

**JULIUS KIPKETER1ST
DEFENDANT**

FRED OBACHI MACHOKA OFFICIALS OF KITENGELA HEIGHTS

WELFARE

ASSOCIATION.....2ND DEFENDANTS

RULING

The Plaintiff is the registered proprietor of Title No. KJD/KAPUTEI-NORTH/2379 as evidence by annexure “SMSI” to the affidavit in support of her Chamber Summons dated 28th June 2005 brought under Order XXXIX Rule 1 and 2 of the Civil Procedure Rules. She seeks inter alia a temporary injunction restraining the Defendants, Kitengela Heights Welfare Association from interfering either by themselves, their servants, agents employees and whomsoever, from interfering with the Plaintiff, applicants’ continued construction of a commercial building on the suit premises.

She bases her application on the grounds that she took possession of the property upon being issued with the Certificate of Lease (annexture “SMSI”) and after obtaining due approval of building plans from the Olkejuado County Council’s District Physical Planning Officer, the District Public health Officer and the Clerk she commenced constructing a 2 storey building in January 2004.

The applicant claims to have spent about 5 million shillings on the building which was almost complete when the defendants, without any colour of right, maliciously and in flagrant violation of her proprietary rights threatened to use physical violence to stop her construction of the building and also threatened to hire thugs to demolish the building.

This, she says, was despite her having submitted an Environmental Impact Assessment Project Report to the National Environment Management Authority (NEEMA). Additionally the Plaintiff claims that her husband has taken a loan to finance the construction which unless the construction is completed cannot be paid, thereby exposing the applicant to the risk of substantial and irreparable loss. In the

submissions made before me by counsel for the applicant it was revealed that the Applicant intends to put up a 6 storey building not the 2 storey building as indicated in the application and supporting affidavit for which she claims to have obtained requisite approval. Annexure “KJ 5” of the Replying Affidavit clearly shows 3 storeys so far completed.

The Defendant/Respondents in their Reply do admit their objection to the construction of the commercial building by the Applicant but deny issuing any threats of violence to stop the same. They have demonstrated their interest in the matter by displaying the approval of their involvement in the control of the developments put up in the Kitengala area by both the Ministry of Lands and Housing and the Olkejuado County Council (annextures “JK3” and “JK2” to the Replying Affidavit sworn by the Association Chairman Julius Kipketer on 8th July 2005). In addition to swearing to various matters constituting their objections to the applicant’s development, the Respondents have exhibited a “**STOP ORDER**” issued by the National Environmental management Authority to the applicant on 15th June 2005. The Applicant has not filed any supplementary Affidavit to counter the allegations made in the Replying Affidavit.

Instead, Counsel for the applicant proceeded to make allegations from the bar that the area occupied by the applicant’s construction, which the Respondents say exceeds 50% of the maximum allowed by her Lease, cannot be challenged since the plans used in the construction were drawn by architects in the Ministry of Works and Housing and the Ministry of Physical Planning. From the bar again, whilst replying to submissions for the Respondents Counsel for the Applicant denied the receipt of Notice from NEMA by the applicant despite his filing of annexure “SMSI-16”, a letter written by the Applicant to NEMA referenced “MITIGATION” in which she states that:

“On 1st April I received an order to stop building because of non compliance of Environmental Regulations Act. The authority acted after neighbours’ complaints..”

Although the Applicant claims to have obtained relevant approvals to her construction, none has been produced in court despite the deposition in paragraph 19 of her Supporting Affidavit and her Counsel’s submission that

“The proof of approval of (building) plans are to be found in the annexure”.

In Exercising my discretion to issue injunctive orders of the sort claimed herein I must satisfy myself that

1. The applicant has established a prima facie case against the Respondents with a probability of success
2. That she risks incurring irreparable loss not capable of compensation in damages unless the injunction is given.
3. That being in doubt on (1) and (2) above, the balance of convenience lies in favour of the applicant

Clearly from the application, the supporting affidavit and attendant annexures, as well as submissions made on behalf of the applicant, she has neither established a prima facie case against the respondents by not proving the threat of violence or to bring down her building. That she is the registered owner of the plot in question is not in issue and the Respondents are not interested in the ownership thereof. Their interest in objecting to the construction of a structure in the nature intended by the Applicant has been clearly demonstrated. Perhaps she should have taken steps in solving her case with NEMA before filing the proceedings against the Respondents. Again it is quite clear that although she must have expended money in the construction, the same may have been so expanded at her own risk if the construction was commenced without the necessary approvals and contrary to the law. NEMA, Not the Defendants is the body that has stopped the construction and the Respondents have demonstrated their right to insist that, in exercising her rights of ownership and enjoyment of her property, the Applicant must do so with due

regard to the rights of others as is intended by the enactment of the Environmental management and Coordination Act, Act No. 8 of 1999 under which her construction has been stopped by NEMA.

Considering the above findings I am of the view that the Applicant has not satisfied the conditions on which the injunctive orders sought can issue. I disallow her application and dismiss the same with costs to the Respondents.

Dated and Delivered at Nairobi this 7th day of July 2006.

M.G. Mugo

JUDGE

Delivered in the presence of

Mr. Wachira for Applicant

Mr. Isindu for Respondent