



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 939 OF 2005

NELLY NJUGUNA & ANOTHER.....PLAINTIFF

VERSUS

BRAHAM DATT SEEDHAR & OTHERS.....DEFENDANT

RULING

The defendants are the registered proprietors as tenants in common of LR NO. 3734/378 at KAPUTEI GARDENS, LAVINGTON in Nairobi which falls in Zone 5 of the Nairobi City Urban Plan.

The 1st plaintiff is the Chairperson of KAPUTEI Gardens Association while the 2nd plaintiff is the Chairman of LAVINGTON Residents Association both within the same zone 5 aforementioned.

The defendants started constructing a 5 storeyed apartment on their said plot.

By a plaint dated 26th July 2005 and filed in court on 27th July 2005, the plaintiffs brought this suit against the defendants seeking:

- (a) A permanent injunction restraining the Defendants by themselves or their servants/agents from continuing with the construction of a 5 storeyed apartment block or any other construction of similar size and/or nature on LR NO. 3734/378.
- (b) An order that the Defendants do liaise with the plaintiffs when planning any other development on the aforementioned plot and to obtain all requisite approvals from the respective Government Authorities and to ensure that the same are obtained properly.
- (c) Damages for a nuisance and reduction in property values.
- (d) Costs of this suit and interest thereon.
- (e) Any other or further relief as this court may deem fit.

The defendants on being served with the summons filed a joint defence on 29th August 2005 challenging the suit.

On 3rd May 2006 the plaintiffs brought a Chamber Summons under certificate of urgency seeking orders of injunction restraining the defendants/respondents, their servants and/or agents or otherwise

howsoever from proceeding with the construction of a storied apartment block or any other apartment block on plot No.3734/378 at Kaputei Gardens in Lavington Nairobi pending the hearing and determination of this suit.

The application is based on the grounds as stated in the body of the Chamber Summons and is also supported by an affidavit sworn by Professor Joseph Kitonyi who avers that his premises is adjacent to the suit premises known as L NO. 3734/378 at Kaputei Gardens of Lavington area and belonging to the defendant herein, that the premises are within ZONE 5 of the Nairobi City Urban Policy Plan and that the construction of apartments and/or flats in this zone are prohibited, that on further enquiries from the National Environmental Management Authority (NEMA) it was revealed that the construction had not complied with the regulations of the Environmental Management and Co-ordination Act No. 8 of 1999 Laws of Kenya, which non-compliance caused NEMA to issue a stop order on the construction; that Respondent belatedly and irregularly procured the undertaking of an Environmental Impact Assessment Report by

Kisima Environmental Consultants after they had already commenced construction and that he later learnt that NEMA had irregularly uplifted the stop order which now left the defendant at liberty to continue with the construction and lastly that the initial plans were approved by the City Council which were in contravention of the City Zoning Plan.

On the 5th May 2006 the defendants filed a Notice of Preliminary Objection to the plaintiff's Chamber Summons dated 3rd May 2006.

Miss Mogusu counsel for the defendants when arguing the Preliminary Objection submitted that the plaintiff's application was brought under a wrong provision of the law and secondly that what the suit raises are environmental issues which should have been taken to NEMA Tribunal for determination.

Further, counsel submitted that the plaintiff's ought to have exhausted the procedural requirements as provided under The Environmental Management and Co-ordination Act No.8 of 1999 before they came to the High Court under the provisions of the Civil Procedure Act and urged the court to strike out the applicant's application for being incompetent.

Mr. Njoroge counsel for the plaintiff submitted that The Environmental Management And Co-ordination does not oust the jurisdiction of the High Court and that a party can come directly to the High Court and that the issues raised in this suit are not purely environmental. It is the defendants counsel's submission that the dispute between the parties ought to have been dealt with under the provisions of the Environmental Management And Co-ordination Act No.8 of 1999 which entitles every Kenyan to a clean and healthy environment and each Kenyan has a duty to safeguard and enhance environment.

But the construction of the apartments by the defendants did not raise any environmental issues and this was confirmed by the procurement of the Environment Impact Assessment Report.

In the circumstances the plaintiff invoked the by laws of Nairobi City Council which regulates Zonal Urban development and which prohibits construction of apartments in Zone 5 of the City.

For the above reasons there was not need for the plaintiff to refer the dispute to NEMA.

The defendants Preliminary Objection is upheld with costs to the defendants.

Dated and delivered at Nairobi this 7th day of December 2006.

J.L.A. OSIEMO

JUDGE