

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 3810 OF 1994

(AS CONSOLIDATED WITH CIVIL CASE NO. 3473 OF 1994)

**GIKOMBA MOTORS ENGINEERING
CO-OPERATIVE SAVINGS AND
CREDIT SOCIETY.....PLAINTIFFS**
VERSUS
**1. ZIWANI JUA KALI ENGINEERING
WORKS ASSOCIATION**
2. ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

On 23rd November, 1995, Aganyanya, J. after hearing inter partes applications filed in these two suits for temporary prohibitory and mandatory injunctions, ruled as follows:-

***“The balance of convenience in all the three applications tends to tilt in favour of the defendants in HCCC No. 3810 of 1994, and the maintenance of the status quo therein cannot be over-emphasized-----.*”**

***“-----in the exercise of my discretion, I grant the applications for temporary injunction prayed for by the defendants (in HCCC No. 3473 of 1994) and the Plaintiff in HCCC No. 3810 of 1994 and specifically order that the Plaintiffs in the former case be and are hereby restrained by themselves, their members, and/or agents from evicting, interfering with the defendants in the said case and Plaintiffs in HCCC No. 3810 of 1994, their servants, agents and/or customers’ quiet enjoyment of the suit property, or wasting, damaging, attempting to or alienating the same until the hearing and final disposal of the two pending suits herein----.”*”**

There were other additional orders. All these orders were formally issued on 22nd December, 1995. The orders still remain in place and have not been vacated or varied. The suits themselves, which were consolidated about the time the applications referred to above were heard, have not been heard and are pending.

The Plaintiffs in HCCC No. 3810 of 1994 have now come to court by chamber summons dated 21st December, 2004 seeking the main order that the Defendants either by themselves, their agents and/or servants be restrained by an order of injunction from in any way interfering with the Plaintiffs’ construction of a toilet within the suit premises. In the alternative the Plaintiffs seek an order to compel the Defendants to deposit the sum of Kshs.800,000/= in court. This is the amount of money said by the Plaintiffs to have been funded by the Starehe Constituency Development Committee for construction of the toilet.

It seems to me that this application, if granted, would fly in the face of the order of Aganyanya, J. of 23rd November, 1994. That order prohibited inter alia, the wasting of the property. In law, even positive improvement of land would amount to wastage thereof if it has the effect of altering its character. As long as the orders of 23rd November, 1994 remain in place the improvement of the suit land by construction of the toilet as is proposed appears to me to be prohibited. The application is therefore misconceived. I think what the Plaintiff needs to do is to apply for an appropriate variation of the said order of 23rd November, 1994.

The chamber summons dated 21st December, 2004 being misconceived, the same is not maintainable. It is hereby struck out with costs to the 1st Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU
JUDGE

DELIVERED THIS.....DAY OF MARCH, 2005.