



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 9 of 2005

DIANA INTERNATIONAL LTD. PLAINTIFF

VERSUS

NYERI MUNICIPAL COUNCIL DEFENDANT

RULING

By a Chamber Summons dated 18th January 2005, the Plaintiff Co, Diana International Ltd., has come to this court seeking an order of injunction restraining the Defendant, the Municipal Council of Nyeri, its agents servants or employees from demolishing the Plaintiff's generator room constructed and standing on the Plaintiff's plot No. Block 111/98 Nyeri Municipality pending the hearing and determination of this suit.

Filed simultaneously with the Chamber Summons is the suit which seeks a declaration that the intended demolition by the Defendant of the Generator room constructed by the Plaintiff on plot No. Block 111/98 Nyeri Municipality and or the intended confiscation of the Plaintiff's generator is unlawful, oppressive, discriminatory, null and void. The Applicant also seeks a further order for a permanent injunction restraining the Defendants from demolishing the generator room and or confiscating the generator installed therein.

The application is supported by an affidavit sworn by the Plaintiff's Managing Director Fredrick Ngatia on 18th January 2005 and a further affidavit filed on 1st February 2005.

It is the applicant's contention that the generator room has been constructed within the building line of the building on the applicant's plot and that it was constructed with the full knowledge of the Municipal Engineer.

The Applicant contend that the Defendant has now purported to issue a notice demanding demolition of the generator room as being illegal and or constructed along a street. The applicant maintains that this notice has not been properly served on it and that in any case the Defendants intended action is unlawful as the same is actuated by malice and an intention to sabotage the Applicant's business. The applicant maintain that it did not require any authority from the Defendant/Respondent to construct the generator room as the construction was not a development as defined within the Physical Planning Act. The applicant therefore urged the court to grant the order of injunction sought.

For the Defendant it was submitted that the generator house did not form part of the main building nor was it an extension but is an independent structure, and that no building plans were availed to show that

the plans provided for a generator room. Mr. Wahome who appeared for the Defendant/Respondent maintained that the construction of the generator room fell within the definition of a development as provided under section 30 of the Physical Planning Act and the approval of the Defendant was therefore necessary as per By-Law No. 5. No approval having been given the structure was illegal and the Defendant had the right to demolish it.

It is evident that the orders sought by the applicant at this stage are mere interlocutory orders pending the hearing and final determination of the main suit. The principles upon which such an order can be made are clearly stated in the celebrated case of **Giella versus Cassman Brown & Co. Ltd. [1973] E.A. 360** as follows:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

It is evident in this case that the applicant is threatened with demolition of the generator room which it has put up as well as confiscation of its generator. It is not disputed that the applicant owns plot No. Block 111/98 Nyeri Municipality and that the generator room and generator installed therein is intended to serve the applicant's building which is on this plot. I have no doubt that the applicant is likely to suffer substantial loss if the generator room is demolished and the generator confiscated. Issues have arisen during the hearing of this application as to whether the construction of the generator room was a development requiring the approval of the Defendant/Respondent, or whether the construction is on an access road. I find however that these are issues to be determined by the court at the full hearing of the suit.

Suffice it is at this stage that the applicant has shown that he has a prima facie case with a probability of success by establishing that the Defendant intends to demolish the applicant's generator room an action that is likely to cause the applicant substantial loss and inconvenience. The Defendant/Respondent on the other hand is not likely to suffer any loss or inconvenience if the interlocutory injunction is granted.

The upshot of the above is that I find it fair and just that the Defendant/Respondent be restrained from demolishing the generator room or confiscating the generator installed therein pending the hearing of this suit.

I do therefore grant the application dated 18th January 2005 and issue the order of injunction as per prayer (2) of the application.

Costs of this application shall be in the cause. Orders accordingly.

Dated this 2nd day of March 2005

H. M. OKWENGU

JUDGE