REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 803 OF 2000

THE CHAIRMAN RAHMAT GHASSIM (*suing on behalf*

***of Nyari Residents Welfare Society*)…….PLAINTIFF**

VERSUS

SADHU SINGH DEVGUN…….. DEFENDANT

JUDGMENT

A. INCONGRUOUS, OR ENHANCING LAND DEVELOPMENT? -

THE PLEADINGS

This suit was commenced by plaint dated and filed on 24th May, 2000 which was later amended (amended version dated 4th July, 2000) and re-filed on 5th July, 2000.

The plaintiff is the chairman of Nyari Residents Welfare Society and has sued in that capacity and as a representative of the members. The defendant is the registered owner of plot No. L.R No. NAIROBI/BLOCK 94/226 situate in Nyari Estate. The defendant's said plot comprises approximately 0.1610 of an acre and is less than the minimum size required for the construction of a residential house under the applicable City Council by-laws. Yet the defendant has, it is pleaded, unlawfully and without reasonable cause, initiated the construction of a residential house on his said plot, and this is destined to affect the market value of all other adjacent plots which belong to the members of the plaintiff society. It is pleaded that the plaintiff society is likely to suffer irreparable loss if the defendant puts up a residential house on his plot, as the value of houses on the adjacent plots will in consequence depreciate, thereby attracting tenants of small means who may pose a threat to the security of members of the plaintiff society.

The plaintiff's society seeks a permanent injunction restraining the defendant from constructing a residential house on the plot in question which is reserved for a shop and not a residential house. Despite demand being made upon the defendant, with notice to sue in case of default, he has not desisted from constructing a residential house, and so the instant proceedings have become necessary.

The plaint carries prayers for:

> **(i) a permanent injunction restraining the defendant from constructing a residential house on plot L.R No. NAIROBI/BLOCK 94/226;**
>
> **(ii) costs of the suit;**

(iii) such further relief as the Court may deem fit and just to grant.

The defendant's statement of defence was dated and filed on 8th August, 2000. Apart from broad denials, the defendant pleaded that he is developing the suit premises "**in accordance with terms and special conditions of the lease**" in respect of NAIROBI/BLOCK 94/226. He avers that he has sought and obtained the relevant approval of the building plans by the City Planning and Architectural Department, in accordance with the law. He states that the user stated under the relevant lease is "**shops and flats**", and so it is lawful to construct *residential-cum-commercial units*. He pleads that he is merely exercising his *right as a leasehold owner*. The defendant pleads that he is constructing an *executive residential house* on the suit premises, well fenced with a perimeter wall, with an intended finish of *high quality*. Such a construction, it is stated, will not pose a security risk to neighbouring residential houses, and will not lower their value; rather it will *enhance the beauty of the area* thanks to its architectural design.

The plaintiff's reply to defence dated 17th August, 2000 was filed on 8th September, 2000. He asserted that the defendant's residential house under construction *does not meet the requirement specified by the City Planning and Architectural Department*, as the defendant had submitted an incomplete building plan for approval by the said Department. The plaintiff reaffirmed the contents of the plaint, and denied certain assertions contained in the statement of defence.

B. A RAPID CONSTRUCTION :

INJUNCTION PENDING HEARING AND DETERMINATION OF SUIT

Even as the pleadings progressed towards a close, the plaintiff found it necessary to seek restraining orders against the defendant's works which were proceeding at a fast pace. The plaintiff's application by Chamber Summons, dated 24th May, 2000 was amended on 4th July, 2000 and heard by *Lady Justice Ang'awa* on 12th July, 2000. She gave the order, issued by the Deputy Registrar on 14th September, 2000 -

> **"THAT the defendant/respondent be and is hereby restrained by an injunction from constructing a residential house on plot No.NAIROBI/BLOCK 94/226 until this suit is heard and determined".**

C. PRE-TRIAL PREPARATIONS

The defendant's list of documents, dated 31st October, 2000 and filed on 2nd November, 2000 carried the following items:

(i) Certificate of Lease dated 10th July, 1998.

(ii) Lease registered on 11th May, 1994.

(iii) Building plans.

(iv) Nairobi City Council (City Planning and Architecture Department) – letter of approval of the Building Plans (dated 29th February 2000).

The plaintiff's list of documents dated 5th December, 2000 and filed on 6th December, 2000 carried two items:

(i) The Local Government (Adoptive By-Laws) (Building) Order,1968.

(ii) The Local Government (Adoptive By-Laws) (Grade II Building) Order, 1968.

The pre-trial stage was then concluded with an agreement between the parties on issues for resolution. The content of the statement of agreed issues may be set out here:

(1) Is the defendant the registered leasehold owner of the suit premises known as Plot No. L.R NAIROBI/BLOCK 94/226?

(2) Are the suit premises reserved exclusively for a shop?

(3) What are the terms/conditions of user stipulated under the lease? Is the defendant's act of constructing a residential house unlawful and a breach of the terms/conditions of the lease, and the City Planning regulations?

(4) Whether the plaintiff society stands to suffer irreparable loss as a result of the defendant's construction of a residential house on the suit premises by lowering the market value of all other adjacent plots, and/or negatively affecting the security of the plaintiff's members.

(5) Whether demand or notice of intention to sue was ever given to the defendant.

(6) Is the plaintiff entitled to the orders sought in the amended plaint?

(7) Who pays the costs of this suit?

D. TRIAL BEGINS: EVIDENCE IN PROOF OF CLAIMS IN THE PLEADINGS

The trial process took place before another *Judge, Hayanga, J*; and following his retirement the Duty Judge, *Mr. Justice Lenaola*, gave directions by virtue of Order XVII, rule 10 of the Civil Procedure Rules that the proceedings be typed to facilitate the preparation of judgment by another Judge. *Ransley, J* as Duty Judge, on 7th July, 2005 committed the task to me; and so I begin from the record taken before *Hayanga,J.*

1. Evidence for the Plaintiff

On the first day of hearing before *Mr. Justice Hayanga*, on 18th March, 2002 learned counsel, *Mrs. Kivuva* and *Mr.Maweu* appeared for the plaintiff and the defendant respectively.

Mrs. Kivuva introduced her client's case as being that the defendant had constructed a *residential home in a commercial area*, an irregularity which exposed the plaintiff and members of his society to injury.

PW1, *Duncan Paul Kabiru*, was then sworn and led through the examination-in-chief. He testified that he was the Vice-Chairman of the Nyari Welfare Society, a registered society with as many as *120 members*. He produced a copy of the society's certificate of registration (plaintiff's exhibit No. 1). He averred that the defendant's plot in Nyari Estate is not the normal size for residential houses, and is much less than the *half-acre* minimum approved for the area. He produced the Nairobi City Planning map (plaintiff's exhibit No.2)which showed, clearly marked out, a rectangular area in the immediate neighbourhood of Red Hill Road in Nyari Estate, with many small plots abutting on one another and sandwiched among larger plots. PW1 testified that the defendant was in the process of constructing a *maisonette* on one of the small-size plots; and the members of the society were objecting to the construction of a residential house in an area reserved for a commercial centre. The witness testified that members of the society apprehended that the defendant's construction of a residential house as he intends it, will *lower the value of land in the Nyari area*, which currently stands at Kshs. 5 million for half an acre. PW1 testified that the plaintiffs' complaint had been brought before the defendant but he had ignored it, and so suit became the only recourse left. He produced the demand letter from the plaintiff's advocates (plaintiff's exhibit No. 3) addressed to the defendant and dated 17th May, 2000. The letter reads in part as follows:

"RE: L.R. NO. NAIROBI/BLOCK 94/226

"We act for the Nyari Residents Welfare Society and upon instructions received have to address you as hereunder:-

"That you have started constructing a residential house on the captioned plot while you know very well that your plot is reserved for a shop.

"Our client has on several occasions approached you with a view to solving……. the issue of the said construction but you have refused to stop.

"By reason of your foregoing actions our client has suffered and will continue to suffer irreparable loss and the market value of the adjacent plots will be greatly reduced. Further to the above our client members feel that there will be no security in the area as you are likely to get tenants of low means.

"Our instructions are to demand as we hereby do, that you stop forthwith any further constructions on your plot.

"TAKE NOTICE that if you do not comply within the next five (5) days from the date hereof, we have mandatory instructions to institute legal proceedings against you at your own costs without any further reference to you whatsoever……..".

PW1 prayed for orders of injunction, and costs against the defendant.

On cross-examination PW1 further testified that he had *joined the plaintiff society in 1987*, and had been *elected vice-Chairman in 1999*. The Chairman had travelled abroad in February 2002 and he was not yet back home. The witness averred that at the time of filing suit, the Nyari Residents Welfare Society had about *150 members*. The society had passed a resolution authorizing suit to be instituted, though the witness was not in possession of the relevant minutes. The society as an entity did not hold property, but its members were property owners. The loss which the society apprehended if the defendant's construction proceeded, the witness averred, was the loss that would fall directly upon *the members*. He said his own plot was only 500 metres away from the suit property. The witness testified that the physical plan papers from the Lands Office showed the suit plot to be on land reserved for commercial purposes. He said he had visited the defendant's plot and could confirm that it was a *maisonette* under construction. He did not know whether the Nairobi City Council could approve the construction of the maisonette on land that was reserved for commercial purposes. When shown the lease for the suit property, he observed that the approved user was for *shops and flats*. He also observed from the physical planning map that the area in which the defendant was building his maisonette had been reserved for *commercial development*. There were, according to the map, 10 plots meant for commercial purposes, and the defendant's was one of these.

PW1 testified that although he was not a land valuer, he did know that the value of one unit of land in the neighbourhood of the suit plot is *Kshs.6 million*. The impugned construction had begun in 2000; but he was *uncertain whether since then, land values in the neighbourhood had declined*. The plaintiff society had become aware of the defendant's construction five months before the suit was filed; but some time passed before the suit was commenced, as "**we were…. waiting to see if it was going to be a flat or a maisonette**". The witness *believed the chairman had personally complained to the defendant*. Further complaint was taken with the *Commissioner of Lands*.

The witness averred that, *had the defendant constructed a shop below a residential unit*, this *would not be in breach of the relevant City Council by-law*. In the existing circumstances, a residential unit had taken up *all the space*, and *none was left for a shop*. In PW1's opinion there would be no *impropriety if the defendant had constructed the living quarters under the shopping unit*. It was his testimony that a bare maisonette, for living purposes, constructed in the commercial plot *could be used for any purpose and would be a source of insecurity for the Nyari estate residents*.

Pw2 was *Nilesh Bhailalbhai Patel*, the Chairman of the Nyari Residents Welfare Society, who was sworn

and gave evidence on 30th May, 2002. He testified that the society was registered, and produced the original certificate of registration (plaintiff's exhibit No. 6)which showed the date of registration as *2nd September, 1999*. PW2 had *no personal knowledge of the defendant*, though he knew that the defendant owned plot No. 94/226, a commercial plot, in Nyari Estate. He identified on the Nyari plot map (Plaintiff's exhibit No. 2) the suit plot. He averred that the defendant was constructing a *maisonette that occupied the whole of the plot which was only about 0.16 of an acre in size*, whereas the normal size of land for residential-house construction was from half-acre to one acre. The witness averred that the Society wishes to see to the regular use of the defendant's land – *for the construction of shops, but not maisonettes*. He prayed for a *permanent injunction* to stop the defendant from constructing a residential house on a commercial plot. He also prayed for costs of the suit.

On cross-examination, PW2 averred that he had joined the Nyari Residents Welfare Society in 1999 and he was elected Vice-Chairman in May, 2002. He said his own plot in Nyari, known as No. 179, was residential and comprised one acre, adjacent to the defendant's plot. He stated that the defendant's lease approved the use of the suit plot "**for shops and flats, excluding petrol station**". *Flats,* as the witness understood the term, were a *structure with residential units*, and this is different from maisonettes. The witness testified that the plaintiff residents would have no problem with the defendant if he constructed shops on his plot. In his words: "**If the defendant put up a shop on top of the flat or beside the maisonette, the [society] would still have a problem with the value of the surrounding plots……."**

This was the close of the plaintiff's case.

2. Evidence for the Defendant

DW1, *Sadhu Singh Devgun*, was sworn and gave his testimony on 17th June, 2002. He testified that he lives on Riverside Drive in Nairobi, and was a property developer as well as an accountant. He produced a *certified copy of the lease* for the suit property (defendant's exhibit No. 1). He noted that clause 5 of the special conditions of the lease did state that *the land was reserved for shops and flats*. He testified that he was putting up a multi-storey *residential building*, and the drawing had been *approved by the Nairobi City Council on 24th July, 2000*. He said the approved architectural plan had been prepared by M/s Rombaldo Associates, Registered Architects; and that his construction was *in accordance with the approved plan* which he produced as defendant's exhibit No. 3. He produced a letter dated 29th February, 2000 from the Office of the Director of City Planning and Architecture. This letter is addressed to *Sadhu Singh*, and bears the caption "**LOCAL GOVERNMENT (ADOPTIVE BY-LAWS) (BUILDING) ORDER 1968, L.N. 15/1969, CITY OF NAIROBI (BUILDING) BY-LAW1948 G.N. 313/1949"**. The relevant part of this letter reads:

> **"Your plan registration No. DL67 for the proposed Domestic Building – Dwelling House to be erected on L.R No. BLK 94/226 was approved at the Town Planning Committee meeting held on the 24th day of February, 2000 subject to:-**
>
> **(a) Submission of satisfactory structural details including lintols and trusses……"**

The City Council letter then declares the status of the approval itself:

> **"The passing of this plan operates as an approval thereof only for the purposes of the requirements of the Local Government (Adoptive By-Law) Order 1968, G.N. 313/1949, the Public Health Act (Cap. 242) and any rules made there under."**

The letter was marked defendant's exhibit No. 3. DW1 produced (defendant's exhibit No.4) the *structural drawing of his building* on the suit property. He testified that this drawing, which had been made by a firm known as Strunt Africa, had been *approved by the City Council*, and this was the basis of the construction of his building. He said the area of his *plot* was 29 meters by 22 meters, while the *building* measured 13 meters by 7.35 metres; the *area of the plot was 6826 sq. ft*., and the area of the building was *1016 sq. ft.*, which was about *15.1%* of the plot area. He testified that the City of Nairobi

Building By-law required that the built-up area *should not exceed 25% of the plot area*. He produced defendant's exhibit No. 5 – a photograph showing his up-coming building; and said he had received *no complaint from the City Council* about his building. DW1 averred that he had never been approached by the plaintiff over his building works, and he had received no notice from the plaintiff. He prayed that the Court do permit him to proceed with his building, and that the suit be dismissed with costs.

On cross-examination the defendant testified that his building was *not intended to be a shop*: "*It is a residential maisonette, but later on I intend to build a shop* because we have enough space in future for development. He stated that Nyari estate was not on main sewer, and that clause 5 of the lease provides that the user of the suit plot is *commercial – cum –residential*. He had not applied for change of user because the *approved user allowed him to construct his residential house* as he was doing. He said that the correct mode of use of such plots dedicated to residential – cum – commercial user, is that "**shops would be down and flats [would] be on top**". He said his plan was different : "**we are planning for the shops to be *on the side***". He further averred: "**I am putting up a maisonette but I believe I have *complied with the conditions of the lease documents***".

That was the close of the defendant's case, and counsel agreed before *Hayanga, J* on 17th June, 2002 that they would file written submissions, to be the basis of the judgment. The date of delivery of judgment was set for 26th July, 2002 but was later re-scheduled to 14th March, 2003 and then again for 13th June, 2003. This did not, however, take place and the Deputy Registrar, on 16th March, 2004 directed that the file be placed before the Duty Judge for directions; and the Duty Judge on 26th March, 2004 ordered the typing of the proceedings which are the basis of today's judgment.

Counsel for the plaintiff filed his submissions on 12th June, 2002 while counsel for the defendant filed his on 17th June,2002. I will follow that order of submission, in analyzing the submissions on evidence and on applicable law.

E. COULD THE CITY COUNCIL VALIDLY APPROVE A CONSTRUCTION THAT WAS DISCORDANT WITH DOMINANTUSER OF LAND?

WAS THE DEFENDANT WRONG IN LAW TO CONSTRUCT A RESIDENTIAL UNIT?

– SUBMISSIONS FOR THE PLAINTIFF

Learned counsel stated that the plaintiff had brought this case on his own behalf and on behalf of other members of the residents' welfare society.

The essence of the plaintiff's case is stated to be that, the defendant's plot which is approximately 0.1610 of an acre *falls short of the minimum size required for the construction of a residential house at Nyari Estate*; for, construction of a residential house on such a small plot would affect the market value of all adjacent plots. Such apprehended decline in plot-value, the plaintiff claims, will occasion irreparable loss to the members of the plaintiff society.

Counsel set store by an admission made by the defendant in his evidence:

> **"….. during cross-examination he admitted that what he has put up is not a flat but a maisonette which clearly shows that he has not complied with the terms and conditions set out in his lease."**

Counsel repeated the fact emerging from the testimony, that *the plaintiff society would have no complaint against the defendant "if he had constructed a shop downstairs and a residential house or a flat on top of the shop,* as that will not interfere with the set up of the commercial area, and the same will comply with Legal Notice No. 256 of 1963.

Counsel repeated the statement in the plaintiff's evidence, that members of the plaintiff society stood to

suffer *irreparable loss* unless the defendant is restrained by a permanent injunction; and the reason is that "**Nyari Estate is [a] posh estate [located in] a prime area within Nairobi, and [the] construction of a residential house on [an under-size plot] …… will lower the value of the other houses**". It was counsel's expectation that the decision in **Giella v. Cassman Brown** [1973] E.A. would support the plaintiff's claim for a permanent injunction.

Counsel has highlighted certain passages in **Giella v. Cassman Brown**; these include:

> **(i) that an applicant for the equitable remedy of injunction has to show a prima facie case;**
>
> **(ii) that, an injunction will not be granted unless irreparable injury is likely;**
>
> **(iii) that, where the Court is in doubt, then the balance of convenience is to be taken into account;**
>
> **(iv) that, for an injury to be redressed by injunction, it should be beyond compensation by an award of damages.**

Unfortunately, counsel did not at all address the forgoing principles in detail or indicate how the compelling fact – scenario in the case would dictate that the same be applied in favour of the plaintiff and against the defendant.

F . DO "SHOPS AND FLATS" INCLUDE MAISONETTES? WOULD NAIROBI CITY COUNCIL'S "WRONG" NULLIFY DEFENDANT'S RIGHTS? – SUBMISSIONS FOR THE DEFENDANT

Learned counsel made his submissions on the basis of the agreed issues between the parties, dated 13th December, 2000. He submitted, correctly in my view, that it was common ground that the *defendant was the proprietor of the suit premises*, namely plot L.R. No. NAIROBI/BLOCK 94/226. On that account counsel urged that this was not really an issue and it had been included by mistake. I would agree, and so I will disregard the question of ownership of the suit property as an issue for resolution.

Counsel noted the content of condition No. 5 in the special conditions in the lease document dated 10th May, 1994; it states:

> **"The land and buildings shall always be used for shops and flats (excluding the sale of petrol and motor oils)."**

This provision, counsel submitted, is to be understood to mean that the suit premises is "**NOT reserved exclusively for a shop**".

Learned counsel then referred to special conditions of the lease, numbers 1,5 and 6. The first one provides:

> **"No building shall be erected on the land nor shall additions or external alterations be made to any buildings otherwise than in conformity with the plans and specifications previously approved in writing by the Commissioner of Lands and the Local Authority. The Commissioner of Lands shall not give his approval unless he is satisfied that the proposals are such as to develop the land adequately and satisfactorily."**

The second provides:

> **"The land and buildings shall always be used for shops and flats."**

And the third stipulates:

"The buildings shall not cover more than fifty (50%) per centum of the area of the land or such lesser area as my be laid down by the local authority in its by-laws".

Learned counsel submitted that proof of the requisite approval for the defendant's construction has been *furnished and demonstrated by documentary evidence* (defendant's exhibit No.2), to wit, a letter dated 29th February, 2000 from the Nairobi City Council, singed by the Director of City Planning and Architecture on behalf of the Town Clerk. The said letter states that the defendant *had complied* with the relevant **LOCAL GOVERNMENT (ADOPTIVE BY-LAWS) (BUILDING) ORDER 1968**, L.N. 15/1969, G.M. 313/1949, and that the defendant's plan (defendant's exhibit No. 3)being registration No. DL – 67 for the construction of a domestic building – dwelling house on the suit premises, *had been allowed on 24th February, 2000*. And paragraph 3 of the letter of approval required that construction of the approved domestic building, *do commence within twelve months* and the same *be completed within two years*. With such approval, it was submitted, the defendant was not at liberty to engage in any construction on the suit premises *other than that of a domestic building – dwelling house* in the nature of a *maisonette*. In the words of counsel : "**There is no requirement that the defendant should put up a residential – cum – commercial building, or both a residential and a commercial building simultaneously or at all**"; otherwise the City Council would not have given approval in the terms stated in the relevant documents. Counsel stated, as was clear from the evidence, "**that the defendant intends to exercise his 'commercial' rights over the suit property when conditions allow**".

Learned counsel construed the plaintiffs' complaint to amount to *a contention that the City Council, in authorizing the defendant to proceed with his construction, had acted unlawfully*. But the evidence shows that neither of the plaintiff's witnesses had been in contact with City Hall, for the purpose of establishing the defendant's bona fides in putting up his building. Besides, counsel observed, and quite persuasively, with respect: "**the City Council of Nairobi is not a party to this suit and neither did the plaintiff call in evidence any personnel or document therefrom……**" Counsel urged that the defendant's construction had been duly sanctioned by the Local Authority, and such approval was *final so long as it had not been set aside*. Any doubts in this regard, counsel submitted, must be resolved in the defendant's favour – because anyone complaining about breach of by-laws would have to place his gravamen *at the doors of the City Council*, or at the very least, *enjoin the City Council as a party in the suit*.

Learned counsel submitted that the defendant's building is by no means in violation of the operative terms and conditions specified under the laws; for cogent evidence has been given that the construction occupies only *1016 sq. ft* out of a total plot-area of *6824 sq. ft.*, and that is only 15.1% of the plot- area.

On the question whether the plaintiff society stands to suffer irreparable loss as a result of the defendant's construction of the residential house on the suit premises, counsel submitted, and I think, with justification:

> "**He who avers must prove. Both PW1 and PW2 have given speculative, vague and incompetent evidence concerning issue No. 4.Neither of them could tell or confirm how the society would suffer or has since suffered courtesy of the defendant's building herein. No professional, documentary or other concrete evidence was adduced to prove the alleged market value of the plaintiff's plots adjacent to the suit premises or to confirm even the remotest possibility, probability or fact of depreciation thereof".**

Learned counsel contended that evidence tendered for the plaintiff is essentially conjectural, and is founded on mere assumptions and presuppositions, without a proven basis in law or fact. It was not shown, counsel submitted, why or how the defendant's multi-storeyed building would, once complete, "**attract tenants of small means**", or persons who would "**put the security of the plaintiff's members at risk**". The claims made in that regard, counsel submitted, may be seen as essentially scandalous.

Counsel submitted, and cogently, with respect, that allegations of *irreparable loss*, *declining property values*, or *emerging insecurity*, are serious claims which cannot be baldly made without proof by *evidence*.

Counsel also doubted that the plaintiffs had shown that they had conveyed their demand letter to the defendant. While it is true that there is on file a *demand letter* addressed to the defendant, it was not shown how the letter was delivered. And while PW1 had testified that the Chairman (PW2) had complained to the defendant on several occasions, I was not persuaded that this testimony was true, since PW2 left a clear impression that he *did not know* the defendant, and perhaps had never met him before the appearance in Court.

Such considerations have led counsel for the defendant to propose that the plaintiffs be held *not entitled to costs* even if they were to succeed in the suit, for bringing an unnecessary and premature suit.

Learned counsel submitted, on the basis of the prayers in the suit, that the gist of the plaintiff's case lies in restraining the defendant from putting up a residential house on the suit premises. But it is clear from the evidence that the defendant has already "**constructed**" a residential house on the suit premises, and what remains is *completion*. Counsel contended that the plaintiff is attempting to restrain the doing of an act which has *already taken place*: and such a course of action is oppressive, misconceived, bad in law, and an abuse of the process of the court.

G. PROPERTY RIGHTS, BUILDING BY-LAWS versus RESIDENTS' LAND DEVELOPMENT SENSITIVITIES : OVERALL ANALYSIS, AND DECREE

It is claimed in the plaintiffs' case that the defendant has unlawfully constructed a maisonette on a small plot, 0.1610 of an acre, in a residential estate where minimum acreage is 0.5 and in which houses are largely, stately, carrying enhanced values, and reflecting the elevated status of accommodation in the area. The real gravamen is that the maisonette, on account of its structural limitations, can only be a candidate for lower-range tenancy, a factor that is likely to depreciate the value, the status and appeal of residential houses in the vicinity. This spawns the further grouse that lower-end accommodation in Nyari Estate will attract tenants not so security-minded, who will eventually compromise the general security of residents.

Now to address those grievances, which I perceive from the pleadings and evidence to be the reason for the suit, the plaintiffs have contended that the defendant's construction of a maisonette on the suit plot, is *contrary to law*, and hence a *permanent injunction* should be issued to bar the construction initiative.

Learned counsel for the defendant raised an important point on the application of the *law of injunctions*, which I am not convinced counsel for the plaintiffs adequately addressed : the purpose of an injunction is to *restrain a course of action* from being prosecuted, or to compel a particular course of conduct. The relevant course of action in this case is the *construction of a maisonette* on the suit plot, L.R No. NAIROBI/BLOCK 94/226 situate in the Nyari Estate, Nairobi. Evidence coming from both sides leaves the clear impression that the maisonette in question is already *up and standing*, and the plaintiffs are coming to Court when all that remains to be done is finishing touches. The question then arises: what is to be restrained? There moreover has been *no prayer for a mandatory injunction* to demolish the structure already built. This means necessarily that if the prayers for an injunction were granted, it would be *in vain*.

The foregoing point relates also to the question whether the plaintiffs had taken the requisite actions *before* filing suit. Did they take up the matter with the Nairobi City Council which is said to have authorized the construction of the defendant's maisonette? If they did not take these precautions, they would not have exercised the *basic prudence* that clears their conscience as they come to seek the equitable remedy of injunction.

Although the plaintiffs have produced a letter addressed to the defendant, and complaining about the construction of the disputed maisonette, it has not been shown that the letter was indeed delivered to the defendant at the early stages of his construction. Besides, the defendant denies having received the letter. PW1 had testified that part of the representations to the defendant included the Chairman of the Society (DW 2) talking to the defendant. But this appears not factual; for DW2 denied knowing the defendant as a person. The conclusion to be drawn is that the plaintiffs had not taken appropriate steps to place their

complaint before the defendant before, or during the early stages of, the construction.

Apart from such difficulty which afflicts the plaintiffs' claim in *equity*, equity follows the law; and the plaintiffs have to prove that the defendant's construction of the disputed maisonette was *in violation of the law*. While the plaintiffs have the bald submission that the defendant had not complied with the City Council by-laws, and that one of the breached by-laws required that only *shops and flats* may be built in the area where the suit plot is located, the defendant has produced his architectural drawings which had been submitted to the City Council for approval, and has shown authentic letters of approval emanating from the City Council. The defendant's position is that he has strictly complied with the conditions upon which the City Council had given him the all-clear, to construct his maisonette. While conceding that the normal practice where land in the urban areas is reserved to "**shops and flats**", is to construct shops at ground level and flats above them, the defendant has shown *authority* from the City Council which allowed him to build not a flat, but a *maisonette*; and he has testified that he may, in the future, seek further authority to construct shops as well adjoined to the maisonette-unit.

The defendant gave evidence that he was not in breach of the City by-law which requires that no more than one-quarter of the suit plot should be occupied by built-up structure. He testified that his maisonette covers only 1,016sq.ft of ground surface, out of the larger area of 6,824 sq ft of plot-area, and that is only 15.1%.

As the suit belongs to the plaintiffs, it was for *them* to bring forth such evidence as would create no more than the bare probabilities in their favour. While it is clear that the plaintiffs have a legitimate concern to keep high standards of buildings and of the residential neighbourhood, they have not, in my view, succeeded in showing *unlawful conduct* on the part of the defendant. As it emerges that the defendant's construction was duly approved by the City Council, any claims of impropriety would have to be placed *at the doors of the City Council*. Since the City Council has neither been sued nor enjoined as a party, it follows that the plaintiffs *have no case*, in law, against the defendant. And if, in that regard, the plaintiffs lose, then they can make *no claim in equity*.

I will, therefore, decree as follows:-

1. The plaintiffs' prayer for a permanent injunction restraining the defendant from constructing a residential house on plot L.R No.NAIROBI/BLOCK 94/226, is dismissed.

2. **The plaintiffs shall bear the defendant's costs in this suit.**

DATED and DELIVERED at NAIROBI this 30th day of September, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the plaintiff : Mrs. Kivuva, instructed by M/s S.M Kivuva & Co. Advocates.

For the defendant : Mr. Maweu, instructed by M/s Adera & Co. Advocates