



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.277 OF 2003

OCEAN FREIGHT (E.A.) LIMITED.....PLAINTIFF

=V E R S U S=

1.B.Y. ESMAILJI.....1ST DEFENDANT

2.H.Y. ESMAILJI.....2ND DEFENDANT

R U L I N G

The Plaintiff is a limited liability corporation which is registered as proprietor of property registered as Plot No. MN/1/6615 in Mombasa District Mainland North. Upon the said plot the Plaintiff has erected a residential private residence in accordance with provisions of the conditions set out in the Grant issued and No.CR 21832. Condition numbered (1) states:-

“No buildings shall be erected on the land nor shall addition or external alterations be made to any buildings otherwise than in conformity with plans and specifications previously approved in writing by the Commissioner of Lands and the Local Authority.”

Condition No.5 thereof states:-

“5. The land and the buildings shall on ly be used for one private dwelling house (excluding guest house)”

Condition numbered 6 thereof states:-

“6. The building shall not cover more than 50 per centum of the area of land or such lesser area as may be laid down by the Local Authority in its by-laws.”

On the other hand the Defendants are registered owners of Plot No. MN/1/6618 which is adjacent to the Plaintiff’s developed property.

By a Notice advertised in the local newspapers and dated 13/6/2003 the Town Clerk of Municipal Council of Mombasa the Local Authority with jurisdiction in the area notified members of public that the Defendants have applied for change of user from that of a single residential residence to flats of three floors.

It appears there were objections from the neighbors and the Municipal Council wrote and informed that the Defendants because of objections the application was not approved.

It is not disputed that the Defendants’ plot is granted under the same conditions as those of the Plaintiff.

There is no dispute that the Defendants have commenced constructions notwithstanding the objections and rejection of change of user. The court was taken on a tour of both plots and found that there is already commenced laying of foundations and building materials are deposited on site by the Defendants.

In their replying affidavit the Defendants say that building plans have been approved and exhibited are building plans for proposed buildings. This approval is quite different from that of change of user. They are stamped valid for one year.

It is my finding that this is not the required approval of change of user. It is admitted that change of user has not been granted. See para.6 of the Replying Affidavit.

To encourage the Defendants to continue constructions would be condoning breach, of the conditions upon which the property is granted and of the law regarding to planning of and use of land which is so important in view of needs of environmental requirements. It will be seen that the complaints that led the Council in rejecting the application for change of user are, congestion, change of skyline, demand for more services, lack of privacy leading to the degradation of the neighbourhood and most importantly that the Provincial Physical Planning Officer, Coast, did not favour the application expressing fears that the area will eventually turn into a high density zone.

It is my finding that the case is very much against the Defendants. The Plaintiff has shown a strong case with high chance of success.

In the circumstances, I allow the application and grant orders sought with costs to the Applicant.

Dated at Mombasa this 8th day of March, 2004.

JOYCE KHAMINWA

J U D G E

In view of the nature of this case, there is need for treating the suit with priority. The parties must proceed to prepare suit for hearing and fix a hearing date within the next thirty days from to-day 8-3-2004.

JOYCE KHAMINWA, J.

8/3/2004

Khaminwa, J.

Chege – Court Clerk

Mr. Buti – for Applicant

Mr. Kiarie Kariuki –

Ruling read in their presence.

JOYCE KHAMINWA, J.

Mr. Kiarie:-

I apply for certified copy of Ruling and proceedings.

Court:-

Let the same be supplied as prayed.

JOYCE KHAMINWA, J.