REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 820 OF 2003

ALI AND 3 OTHERS …….…. PLAINTIFFS

VERSUS

CITY COUNCIL OF NAIROBI……. DEFENDANT

RULING

(A) A brief background of this case is as follows: The four plaintiffs herein filed this civil law suit on the 7.8.2003, during the Court vacation period together with an application seeking an injunction against the defendant, the City Council of Nairobi.

According to the plaint the four plaintiffs had bought a good sizeable land property off Komorack close on Eastleigh Road. This property was originally owned by the Kenya Government who leased it to the defendants the City Council of Nairobi for a period of ninety nine years with effect from 1.1.99. Sometime in June of the same year, the City Council leased the land to Giken Enterprises. The purpose of the use of the said land was for residential purposes only Ms Giken Enterprises in turn sold the piece of land to the four plaintiffs for Kshs 8,750,000/=. They were aware of the conditions of such sale.

The plaintiffs sub-divided the land with the view of constructing multiple dwelling houses. The residents around protested against this. The Mayor and the area Member of Parliament visited the scene where work was undertaken by the plaintiff at night. They ordered the plaintiffs to stop construction. The plaintiff filed an application for an injunction preventing the City Council of Nairobi by a permanent and mandatory injunction from interfering with the said development and construction (in a separate suit they sued the Member of Parliament on the same grounds HCCC 785.2003).

When this application came before Kuloba, J on 7.8.2003 he declined to certify this matter as having merits to be heard during the Court vacation.

The applicants returned six days later and notified Rimita, J another judge that due to new matters they be heard during the vacation. Rimita, J who issued an injunction adjourned he matter till 19.8.2003 when I was then the vacation duty judge.

Before the application was heard *inter partes* the advocates for the respondent raised a preliminary objection to the application. It is this preliminary objection which is the subject matter of this ruling. (B) The Preliminary Objection

Under the Physical Planning Act (Cap 286) Laws of Kenya it requires a developer to first seek permission from the Local Authority known as a development permission to undertake certain developments duly

approved by the City Council.

Permission may be granted or refused by the Local Authority. Notification of such decisions is then communicated in writing to the applicant.

Where a person is dissatisfied with the decision after being served with an enforcement notice they are entitled to appeal against the said decision of the National Liason Committee. The appeal is made to the High Court.

The defendants thus argued that the noncompliance by the applicants of section 33 and 38 of the Physical Planning Act (Cap 286) Laws of Kenya means that this High Court of Kenya has no jurisdiction to entertain this application. To this illustrate this the case law *Narok County Council Vs*

Trans Mara County Council & Another Kwach, Akiwumi and O'Kubasu

JJA was used.

In the above case the Minister for Local Government had created a new County Council known as Trans Mara from the original Narok County Council.

The Minister had powers to appoint the rights and liabilities of the properties where the parties did not agree. The parties filed suit in court as they could not agree.

There was a preliminary objection raised that under section 270 of the Local Government Act (Cap 265) where the parties did not agree then the Minister would apportion the rights, liabilities and properties between the two County Councils.

The Hon Judge overruled this preliminary objection on the grounds that the High Court had inherent jurisdiction to hear matters, section 60 of the Constitution being relied on.

It was held that the Hon Judge erred in Law. The Minister must first act. If he fails to do so under the Law then the aggrieved party must apply for orders of *mandamus*. The suit was duly struck out.

The advocate for the applicant/plaintiffs argued that indeed the courts had inherent jurisdiction at the level of the High Court. His list of authorities cited the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd* [1969] EA 696

A case dealing with the dismissal of the suit and the courts inherent jurisdiction.

In the case of *Niazsons (K) Ltd v China Road Bridge Corp (K)* [2001] 2 EA 502 Whereby the nature of a preliminary objection on a point of law was discussed. *Nairobi City Council Vs Cris Evanand & Others* HCCC No 851/02 (unreported) J W Mwera

Prayer for striking out a plaint whereby the name of the plaintiff was incorrectly used.

Further the respondent/applicants/plaintiff state that they had already been issued with the notification of approval of development permission granted on 26.5.2003.The applicants/respondent/defendant stated in the replying affidavit that regardless the planning authority were entitled to stop the purported development and thus its acts legal. The defendant also relied on the Building Code.

"Local Government (Adoptive By-Laws) (Building) Order 1968 and The Local Government (Adoptive By- Laws) (Grade II Building) by Order 1968 whereby at para 252 it states that;

"Any person, who shall erect or permit the eviction of a building without first obtaining the approval of theCouncil to plans submitted in accordance with these by laws shall be guilty of an offence".

It is quite clear from the arguments put before me that suit land LR No 209/12562 from a third party for Kshs 8,750,000/=.They obtained a 99 year lease. They also sub divided the land and had embarked on the construction of the dwelling houses. From the pleadings filed it seems that the Mayor and the area Member of Parliament visited the site at night where the construction had proceeded even after dark. The residents protested against such development. Orders were given that the construction should stop.

This prompted the plaintiffs to file this suit. Their arguments being that the defendants claim that they had not complied with the Physical Planning Act of 1996. They stated that they had and that permission was granted on the 26th day of May 2003. They were then arrested and charged before the subordinate courts with the offence of erecting a building structure contrary to section 30 of the said Physical Planning Act (Cap 286) Laws of Kenya. On13.8.2003 they were acquitted. Five days later on the 18.8.03 the approval for permission to construct was revoked.

It is correct to argue that if anyone is not satisfied with the decision made by a committee under the Physical Planning Act that they may appeal against such decision and in the process seek a stay. Once the appeal is lodged with the relevant body a last appeal lies with the High Court. It is to this jurisdiction that the defendants stated that this court has no powers to entertain. The plaintiff, they claim have come first to the wrong court.

I find that if the decision of the committee under the Physical Planning Act had been unsatisfactory to the plaintiff then they would have appealed and not come to the High Court. The plaintiffs say they were indeed granted with the permission and therefore had nothing to appeal against.

The second decision of 18.8.2003 they stated had the effect of revoking the permission of 26.5.2003.

To this instance I find that the plaintiff have no remedy in applying for an injunction. The City Council of Nairobi is a local authority and like the

Government no injunction may lie against it and its officers. The remedy would be with an application by way of a judicial review.

This although the advocate for the defendant is correct in arguing that this court has no jurisdiction to hear matters under the Physical Planning Act of 1996 the Court has a right and jurisdiction to hear judicial review cases. Unfortunately the applicants have come by way of a plaint and for remedies that this court cannot make available to it. The effect is that this application must fail.

I wish to add that the area Member of Parliament was sued in his personal capacity on the same case his *locus* in this matter requires to be questioned.

I believe that with the current manner that acquired land are often allocated and or sold to developer over and above the interest of the public, the country and against good policying may have prompted the use of the

Physical Planning Act without regard to the rule of law.

I nonetheless uphold the preliminary objection on different grounds namely that an injunction does not apply to a local government authority and that these proceedings ought to have been instituted by way of a judicial review.

I award costs to the respondent and dismiss this application and strike out the suit.

Dated and delivered at Nairobi this 9th day September, 2003

M. A. ANG'AWA

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JUDGE