



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 166 OF 2019

ARIKO ODERO OCHOLA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KWALE.....DEFENDANT

RULING

(Application for injunction; applicant claiming to have approved building plans and wishing to have the respondents restrained from interfering with his development; documents annexed to the application showing that the respondent had issued an enforcement notice to stop what it thought were unapproved plans; no mention of this enforcement notice in the plaint or the supporting affidavit; apparent that the applicant has not disclosed all material facts; application denied for failure to fully disclose all material facts)

1. This suit was commenced through a plaint which was filed on 17 September 2019. The case of the plaintiff is that he is the registered proprietor of the land parcel Kwale/Ukunda/3610. He avers that in the year 2014, he applied for and obtained approval from the County Government of Kwale (the defendant) for the construction of a four storied building on the suit land. In the year 2016, he sought to extend his building by adding one more storey and an additional penthouse, and had to seek further approval for this. He avers that he submitted the building plans but the Physical Planner- Kwale, refused to assess the same and instructed him to come back on another day. He pleads that since the year 2016, he has been making several trips to the Physical Planner- Kwale, only to be informed that the planer is either out of office or attending meetings. On 13 March 2019, the plaintiff was shown by the Deputy Physical Planner a letter dated 13 March 2019 from the Airport Manager- Ukunda Airstrip, purporting that the plaintiff's building posed a serious safety issue to aircrafts operating in and out of Ukunda Airstrip and that the plaintiff's building was above the obstacle height limit allowed on flight paths. The plaintiff has pleaded that following this letter, his advocates wrote a letter dated 25 April 2019, to the Kenya Civil Aviation Authority (KCAA) and Kenya Airports Authority (KAA) requesting for the relevant guidelines and approval of the plaintiff's project. He has pleaded that his advocates followed the requirements furnished by KCAA and KAA, and that through a letter dated 31 July 2019 and 13 August 2019, KCAA and KAA ascertained that the plaintiff's building satisfies their minimum requirements. He was required to pay a fee which he avers that he proceeded to pay, essentially granting him approval to proceed. He went to get an application from the Physical Planner-Kwale but he was denied the same.

2. The plaintiff has pleaded that on 13 August 2019, the County Commissioner- Kwale and the DCIO Ukunda, came to his building site and arrested one of his tenants and some workmen who were working on the third floor of the building which already had the defendant's approval. They were released without any charges being preferred against them.

3. In this suit, the plaintiff seeks the following orders :-

- (a) The court to supervise the process of acquiring the relevant building extension approval from the County Government of Kwale.*
- (b) A declaration that the plaintiff's building extension plans are in order and the same be approved for construction.*
- (c) A mandatory injunction directed to the County Government of Kwale, its agents, employees and servants directing them to approve the plaintiff's extension building plans or in the alternative furnish comprehensive reasons why the same cannot be approved.*
- (d) General damages.*
- (e) Costs of this suit and interest thereon.*

4. Together with the plaint, the plaintiff filed an application brought under the provisions of Section 15 (4) of the Physical Planning Act, and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The application was later amended on 6 December 2019. The plaintiff in the amended application has sought the following substantive orders which are prayers 4A and 4B thereof being:-

4A - That pending the hearing and determination of the main suit, there be an interim order of injunction directed at the 1st defendant, its servants and agents, prohibiting them from denying the plaintiff/applicant, the right to develop the already approved floors of his building on the land parcel Kwale/Ukunda/3610.

4B - That pending the hearing and determination of the main suit, there be an interim order of injunction directed at the 1st and 2nd defendant (one Khamisi Omar Mwandarao formerly County Administrator of the County Government of Kwale) their servants and agents, prohibiting them from harassing, intimidating, arresting and interfering with the plaintiff, plaintiff's tenants or the plaintiff's workmen working on the site of the already approved floors of his building on the land parcel No. Kwale/Ukunda/3610.

5. The application is supported by the affidavit of the applicant. He has more or less reiterated the contents of the plaint and has annexed some documents including a letter dated 27 November 2014 from the County Government of Kwale, approving a development plan submitted on 26 November 2014. I have also seen annexed an enforcement notice dated 17 May 2019 which claims that the plaintiff is undertaking illegal development on the suit land, being an extension of a storey building, without planning permission. The said notice required the plaintiff to stop any further construction works and remove the unapproved floors. The notice further gives the plaintiff the option of appealing that decision to the Liaison Committee under the Physical Planning Act. I have also seen another notice issued by Khamisi Omar Mwandarao, the 2nd defendant, dated 7 July 2015. That notice asks the plaintiff to stop the sinking and development of a shift tank on a road reserve. I have seen a letter dated 30 May 2019 to the County Physical Planning Liaison Committee being an appeal against the notice of 17 May 2019. The supporting affidavit does not however mention this appeal or what happened to the appeal.

6. No replying affidavit nor grounds of opposition were filed by the respondent before the hearing of the application inter partes. However, on 20 April 2020, an application as filed by the respondent seeking to arrest the ruling scheduled for today, and seeking to be allowed to respond to the application. I was not persuaded by that application, my view being that the respondent had been duly served in good time but failed to respond to the application in time. Despite there being nothing on record to oppose the motion, on my part, I hesitate to grant the orders sought. I hesitate, because as I have stated above, the applicant has not mentioned what happened to his appeal before the County Physical Planning Liaison Committee. His plaint has no mention of this letter and neither does the supporting affidavit say anything about it. I get the feeling that the applicant has not disclosed all the material facts pertaining to his case and I would not wish to make orders based on half information. It is extremely important for litigants to disclose all material facts if they wish to have the court issue orders in their favour. I doubt if the applicant has done so in this case and I regret that in those circumstances I am not persuaded to make any orders in favour of the plaintiff.

7. This application is dismissed but I make no orders as to costs since it was not defended.

8. The result is that plaintiff will need to prove his case without the benefit of any interlocutory orders of injunction.

9. Orders accordingly.

DATED and delivered this 22ND day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA