



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 1187 OF 2016**

**MACHARIA MWANGI**

**MARGARET NYAMBURA NJAAGA**

**ROSE WANGARI KIMANI ( Suing as the Registered officials of  
KAMITI CORNER WELFARE**

**GROUP KIAMBAA SETTLED AREA.....PLAINTIFF/APPLICANTS**

**=VERSUS=**

**JOSEPH GACHOKI GITARI & 4 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The applicants are officials of Kamiti Corner Welfare Group Kimbaa settled Area which is a residents association. The applicants brought a Notice of Motion dated 21<sup>st</sup> September 2016 in which they seek the following reliefs:-

***1. Spent***

***2. Spent***

***3. That this Honourable Court do grant a temporary injunction against the 1<sup>st</sup>,2<sup>nd</sup> ,3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally by themselves, their servants ,agents and or any other persons authorised by them from constructing ,causing to be constructed or permitting the construction of multi-dwelling units on the one storeyed multi-dwelling unit comprising of four ,two bedroomed units on plot No. 94,a subdivision of the property known as land Reference No. 7019 ( 5805/2). Pending hearing and determination of this suit.***

***4. That costs of this application be provided for.***

2. The applicants contend that the area known as summer court which is under the control of the Residents Association is a controlled area where members are supposed to construct either a 3 or 4 bedroomed bungalows or massionattes. That contrary to the agreed controlled construction, the first Respondent has gone ahead to put up a one storeyed unit comprising of 4 two bedroomed units on plot No.94 . That this will lead to devaluation of the area which was only meant to host one unit dwelling

house.

3. The applicants contend that though they have not obtained individual titles from Murarandia Development Company Limited which sold the plots to them, they have filed a case against the company seeking to compel it to give them titles. That when the members bought their individual plots, there was an agreement between the Company and the purchasers that they were to put up only certain specified houses which were to be picked from the options given and put up in accordance with the architectural designs of the company architects.

4. The first Respondent has opposed the application in which he contends that the applicant's application has been overtaken by events. That he is not a member of the Residents Association and cannot be bound by their regulations. That he never signed any agreement as to the house he was to put up on his property.

5. I have carefully considered the applicant's application as well as the opposition to the same by the first Respondent. This being an application for injunction, the applicants are expected to meet the conditions set out in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**. First there has to be a prima facie case with probability of success. Second, an injunction will not normally be granted unless otherwise the applicant will suffer loss which will not be compensatable in damages. Third, if the Court is in doubt, it will decide the application on a balance of convenience.

6. The issue for determination in this application is whether the applicants have demonstrated that they have a prima facie case with probability of success. A prima facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125** as:-

***“a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

7. In the instant case, the applicants have predicated their application on the plaint dated 21<sup>st</sup> September 2016 in which they contend that the first Respondent's plot No.94 is comprised in LR No. 7019 (5805/2). Though the applicants contend that there were agreements as to the type of houses which were to be put up, the applicants have annexed a copy of an agreement between Murarandia Development Company Limited and one Eric Oluoch Oele. This agreement was signed on 30<sup>th</sup> April 1999 and is in respect of plot No.134 comprised in LR No. 7019 (5805/1).

8. The agreement was an individual agreement binding only the parties to it. The agreement had options which the purchaser was to choose from. It relates to LR No. 7019 (5805/1). This is a separate property from LR No. 7019(5805/2) which is the subject of this suit. There is no evidence that the agreements affecting property No.LR No 7019 (5805/1) applied to LR No. 7019 (5805/2) as well. The three applicants who are officials of the association did not annex any agreements signed with the company. There is no evidence that the agreement exhibited by the applicants was an agreement which was to bind all other members. The first Respondent has denied being a member of the association. The applicants seem to drag him into the association by association. They claim that he has been paying money to the association through his wife. There is no evidence that the person they call his wife is actually his wife.

9. It is clear from the pleadings in this case that the applicants moved to court to get injunctive orders when the first Respondent had already completed constructing his house. This is how the applicants knew the type of house and the number of units in the house. An injunction is never given to restrain what has already happened. This is because court orders cannot be issued in vain. See the case of **Jane Kemunto Mayaka Vs Municipal Council of Nakuru & Others High Court Civil case No.124 of 2005**, where it was held as follows:-

***“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place”***

10. If there were any agreements regulating buildings which were to be put up on LR no. 7019( 5805/1) the applicants have not demonstrated that this was the case with developments on LR no. 7019 ( 5805/2). The fact that the two properties may be owned by the same company, does not automatically mean that any development regulations affecting one parcel would affect the other as well. Zoning of areas is done by the area Council concerned. The applicants have not shown that the area had been zoned for a particular kind of development by the then Kiambu County Council.

11. The first Respondent has exhibited photographs showing flats even higher than his in the same area. It does not help the applicants to say that the photographs were not taken from the area. It was incumbent upon the applicants to demonstrate that no storey buildings were allowed in the area. A letter from the County Government of Kiambu showing that there were no approvals for building of such a house and that the same was built on land meant for a dispensary does not help the applicant's case. I find that on the material presented before the court, the applicants have not demonstrated that the first Respondent has contravened any development regulations. The applicants have not demonstrated that they have a prima facie case with probability of success. What was meant to be stopped has already taken place. No injunction can be given in the circumstances. I find that this application lacks merit. The same is hereby dismissed with costs to the first Respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this *8<sup>th</sup>* day of *May 2017*.

**E.O .OBAGA**

**JUDGE**

In the absence of advocates who were aware of the date and time of delivery of ruling.

Court Assistant: Kevin

**E.O.OBAGA**

**JUDGE**