

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 10 OF 2016

KHALID HUSSEIN REHMAN.....PLAINTIFF/APPLICANT

-VERSUS-

AHMED MOHAMED SULEIMAN

LUHAR.....DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 1st February 2016 brought under the provisions of Order 40 of the Civil Procedure Rules and section 3A of the Act. The Plaintiff/Applicant seeks for the following orders:

1. Spent

2. Spent

3. That pending the hearing and determination of this suit, the defendant, his agents, servants and/or employees be restrained from, constructing, alienating or dealing adversely in any manner whatsoever with the all that property known as Sub-division Number 13400 (Original Number 13380/21 Section 1 Mainland North registered in the Coastal Lands Registry as C.R. 39639), situated in Nyali, Mombasa County, within the Republic of Kenya.

4. That costs of this suit be provided for.

2. The application is supported by the affidavit of Afzal Hussein Rehman and the grounds listed on its face. The applicant pleads inter alia that he purchased 3 units of apartments one from block A and two from block C. That the defendant registered the applicant's sub – leases on the certificate of title. Further that the defendant having retained only 2 apartment units is deemed like other lessees to be a communal owner in as far as the roofing area, fence, gate and other communal aspects of the property are concerned. In spite of this, the defendant commenced construction on roof top of block B which construction according to the applicant has the net effect of totally destroying the structure of the entire apartment complex. The applicant also avers that the defendant has not obtained the necessary approvals of NEMA & NCA. He therefore urges the Court to restrain the defendant from interfering, constructing and dealing adversely with the suit property.

3. The application is opposed by a replying affidavit deposed to by the defendant. The defendant raises the issue of locus standi on the basis that the power of attorney donated to the plaintiff was not registered. He also deposed that the suit property is still registered in his name therefore it is unfair to restrict him from developing the property. That the lease of the plaintiff relates to only 3 units of the apartment and not the entire property and they are charged service and maintenance of common areas. The defendant denies the construction will devalue the complex and that he obtained all the requisite approvals as per copies annexed. The defendant therefore urged the Court to dismiss both the application and the entire suit.

4. Both parties filed written submission which I have read and considered. My duty is to establish whether the application meets any of the principles for granting orders of injunction and therefore temporary orders earlier issued be confirmed. The applicant's complain is two-fold i.e. no approvals from the relevant authorities were obtained and that the construction works will devalue their apartments. That inspite of his and other lessees, the defendant is still keen to continue with the construction. To rebut these issues, the defendant annexed an approval in form PPA 2 P/2015/371 from the County Government of Mombasa and a letter addressed to the county government dated 22nd July 2015 by Engineer Joshua W. O. Achia. On the issue of not listening to the protests of the plaintiff, the defendant described the plaintiff as a lessee and that the construction is on block B which does not affect his units. That the defendant is still the registered owner of the entire suit property.

5. The plaintiff did not make any specific reference to any clause in his lease that would bar the defendant from carrying out any activities on the property other than stating that the sub-lease was registered on the certificate of the title. I have taken time to read the sub-lease dated 24.6.2013 and annexed to the supporting affidavit. There is no clause that indeed bars the lessor/defendant from carrying out constructions on the premises. However such constructions like all developments in the republic of Kenya must be done only after obtaining the requisite approvals from the bodies charged with giving such permission.

6. The question therefore is whether the requisite approvals were obtained by the defendant. The defendant annexed the approval obtained from the County Government of Mombasa vide form PPA 2 dated 27th November 2015 and the letter dated 15th January 2016 correcting the error to amend the approved project referred to as 3rd floor. The defendant did not however annex the E.I.A licence issued to it by NEMA as is required under part VI of the Environmental Management & Coordination Act. The regulations makes the exercise a mandatory prerequisite process that should be complied with before any development is undertaken. To this extent I am thus satisfied that the applicant has established a prima facie case since not all the requisite approvals were obtained. Consequently I shall grant the orders in terms of prayer 3 of the motion to subsist until the defendant complies with this requirement. The Court was not made aware of the nature of approval to be obtained from National Construction Authority as no provision of the law was quoted to have been breached. I will therefore not give any directions as to obtaining any approvals from this body (NCA).

7. Accordingly the orders of injunction will subsist for the duration the NEMA licence is not obtained and to automatically lapse upon the applicant being supplied with a copy of the same. On costs, I do order each party to bear their costs of the application.

Dated, signed & delivered at Mombasa this 29th day of September 2017.

A. OMOLLO

JUDGE