



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC. CASE NO. 563 OF 2009

NESCO SERVICES LIMITED.....1ST PLAINTIFF

HARUN OSORO NYAMBOKI.....2ND PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGEMENT

1. The Plaintiffs filed this suit on 6/11/2009 seeking a permanent injunction to restrain the Defendant from demolishing, blocking the construction and occupation, trespassing, or in any other way interfering with the hostel building erected on L.R. No 12767/11, Magadi Road, Karen, Nairobi. The Plaintiffs also seek a declaration that they obtained approvals from the Defendant for the change of user of L.R. No 12767/11 from residential to hostel and for construction of executive hostels.
2. Further, the Plaintiffs seek a declaration to estop the Defendant from denying the authenticity or validity of the approvals it granted in respect of the hostel block to be erected on the suit land. The Plaintiffs wish to have the enforcement notice dated 27/8/2009 and served on the 1st Plaintiff on 26/10/2009 declared illegal void and unenforceable. The Plaintiffs also seek damages together with interest calculated at 26% per annum applied daily and compounded from 26/10/2009 until payment in full.
3. The 1st Plaintiff is a limited liability company while the 2nd Plaintiff is a director of the 1st Plaintiff. The 1st Plaintiff entered into a partnership and joint venture agreement to develop executive hostels for visiting professors on the suit property which is owned by the 1st Plaintiff.
4. The Defendant is a local authority. The 1st Plaintiff made an application for change of user for the suit land from residential to hostels on 19/6/2006. The Defendant allowed that application. In September, 2007 the Plaintiffs sought permission to develop the proposed executive hostels for visiting professors. This application was considered and allowed by the Defendant and the Plaintiffs paid the approval fees. The Plaintiffs submitted to the Defendant the Architectural drawings for the proposed hostels.
5. The Plaintiffs claim to have undertaken the construction of the executive hostels at a cost of KSHS. 45 million.
6. The Plaintiffs complained that despite having all the necessary approvals on 26/10/2009 the Defendant served the enforcement notice dated 27/8/2009 stopping further construction and occupation of the hostel constructed on the suit property. The Plaintiff claims that the notice was backdated and it was therefore illegal and unenforceable for being contrary to the law. The Plaintiffs claim that he borrowed money from

Housing Finance Ltd to carry out the construction and that the loan sum attracts interest of 26% per annum calculated on the daily rate and compounded. The Plaintiff goes further to claim that the value of the building that was threatened with demolition was Kshs. 45 million and that they were suffering losses from the Defendant's action besides losing revenue on a daily basis. The Plaintiffs claim that the Defendant acted unreasonably and was actuated by bad faith and vendetta beyond its statutory mandate.

7. The Defendant filed its defence on 22/4/2010 in which it denies most of the allegations made in the plaint. The Defendant also avers that the suit is defective since the orders sought cannot be granted against it. The Defendant further contends that the suit does not disclose a triable cause of action and that it ought to be dismissed since the Plaintiffs have not met the legal requirements for the grant of the orders they seek.

8. The 2nd Plaintiff testified at the hearing of this case. He adopted his witness statement dated 15/7/2015 as his evidence. The witness produced the documents in support of the claim which include a copy of the title together with the architectural and structural drawings for the proposed executive hostels and the receipts for the payments made. On cross examination the witness stated that the intention was to build executive hostels for lecturers. It was to be a high rise building according to their full plans and to go up to the 4th floor with a basement.

9. He stated that he was served with enforcement notice requiring him to cease further construction and stop occupation in October, 2009 yet it was dated August, 2009. There is no evidence to show the actual date when the Plaintiff received the enforcement notice. The witness admitted that they didn't pursue an appeal against the enforcement notice issued by the Defendant. Instead the Plaintiffs came to court and obtained an injunction against the Defendant on 23/11/2011. The witness stated he did not proceed with the construction after obtaining the interim order from the court. He confirmed that there were occupants in the building and that he rented out the building after the injunction was granted. He stated that he applied for an occupation certificate and duly paid for it. The witness maintained that the Plaintiffs had built according to the approved plans and conceded that the Defendant had a right to issue an Enforcement Notice.

10. A senior Building Instructor testified on behalf of the Defendant he adopted his witness statement. He confirmed that the Defendant granted the Plaintiffs approval to construct a hostel. He stated that the Enforcement Notice was issued to the Plaintiffs because they were constructing a block of flats instead of hostels. He pointed out that the structural details relied on by the Plaintiff only showed the steel work to be used for the construction but you cannot tell whether they relate to flats. He stated that the approved architectural drawings approved by the Defendant were for development of executive hostels.

11. The witness stated that the drawings relied on by the Plaintiffs showed that in its application for development permission showed that they were for 3 number 2 bedroom flats per floor. The common room would be a lounge while room 1 and 2 are basically bedrooms. The witness clarified that a flat is a well-integrated structure that can be used by a family while a hostel is a small space with a kitchenette and a bathroom that can be used by a student or a visiting lecturer. The witness stated that the Defendant's Officers discovered that the Plaintiff had contravened the approval by putting up 2 bedroom flats. He also stated that the Plaintiff did not apply for an occupation certificate which is normally issued once the project has been completed before occupation. The application is to be accompanied by a certain documents.

12. The witness stated that the Plaintiffs are not entitled to the reliefs they seek as they should have appealed when they received the Enforcement Notice. He stated that after exhausting the requirements under the Physical Planning Act and submitting changes made to his development proposal, the Plaintiff ought to have applied for occupation certificate from the Defendant. He stated that the property is occupied without an occupation certificate. The witness did not know when the building was occupied.

13. On cross examination, the witness clarified that their payment for occupation certificate is made at the time of submitting architectural drawings but the occupation certificate is issued after completion of the project. The witness stated that there was material difference between what was approved and what the

Plaintiff built. He stated that the Defendant inspectors filed a report which was not before court. He confirmed that he had also gone to the ground even though he did not prepare a report. Enforcement Notice gave 7 days which if not complied with would result in demolition. He clarified that where a developer is served with an expired notice, they should still take the re-cause stated in the notice. He stated that the Enforcement Notice mentioned the breach and the procedure to be followed which the Plaintiffs failed to follow.

14. The court has considered the evidence adduced and considered the submissions of counsels. The Plaintiff argues that under Article 165 (3) of the constitution setting out the powers of the High Court, this suit was properly before court. The Plaintiffs urged the court to grant the prayers sought in the plaint claiming they had demonstrated a *prim facie* case against the Defendant.

15. The Defendant argued that it has powers under section 38 (1) of the Physical Planning Act to issue an Enforcement Notice against the person who has constructed contrary to the approved plans. He stated that section 38 (3 to 6) of the Physical Planning Act provides procedure to be followed once the Enforcement Notice is issued. The Defendant argues that the Plaintiffs failed to follow the laid down procedure and instead moved to court. He maintained that statutory provisions have to be followed and the parties cannot always result to the constitution instead of following the other laws.

16. His other argument was that the proper way to move to court was to apply for orders of certiorari since the Defendant was carrying out its administrative function. The Defendant also submitted that no evidence was provided to prove the sum of Kshs. 45 million plus interest which the Plaintiffs claim. Special damages must be proved and the Plaintiffs had not produced any document to confirm that they took a loan to put up the structure and the interest payable on the loan. There was also no valuation report to show the cost of putting up the building.

17. The court has considered the provisions of the Physical Planning Act. Section 29 of this act grants local authorities power to control development. The local authorities are mandated to prohibit or control the use and development of land and buildings in the interest of proper and orderly development in an area. Local authorities consider and approve all development applications and they also grant permission under section 29 (C) of the act. They are tasked to ensure the proper prosecution and implementation of approved Physical Development Plans.

18. Section 38 deals with Enforcement Notices. A notice is served if the development is proceeding without permission or where there is failure to comply with conditions of the development permission. The notice specifies the development conditions contravened and measures that need to be taken within a specified time to restore the land to the position it was in originally before the development took place. The Enforcement Notice may also require the demolition or alteration of the building or the construction of any building.

19. The court has looked at the Enforcement Notice served on the Plaintiff. It states the contravention by the Plaintiffs as constructing flats without approved plans. The notice required the Plaintiffs to stop further construction and also stop further occupation. The notice is dated 27/8/2009. There is no acknowledgment to show the date the Plaintiffs were served or how they were served. The Plaintiff did not tender evidence to show that he was served on 26/10/2009.

20. Under Section 45 of that Act the notice can be served on the developer or given to the agent. It may also be left at the last known postal, residential or business address of the person or it could be sent by registered post. 20. Enforcement Notices issued under Section 38 take effect after the period specified in the notice lapses where no appeal is lodged.

21. A person aggrieved by an Enforcement Notice may first appeal to the relevant liaison committee and if dissatisfied by the committee's decision, he may appeal further to the National Liaison Committee. An appeal to the High Court would be against the decision of the National Liaison Committee. This would now be the Environment Land Court which under Section 13 of the Environment and Land Court Act is mandated to deal with disputes relating to land and the environment. Further development is to be

discontinued once an Enforcement Notice is issued.

22. Section 39 (2) of the Act states that if no appeal is lodged against the Enforcement Notice then the person is not entitled to question the validity of any action taken by the Local Authority. There was no evidence led to show that the Defendant acted in bad faith. It is still unclear whether the Plaintiff built flats or hostels. The owners was on the Plaintiff to prove that it build hostels.

23. The Plaintiff neither demonstrated to the court that it had not contravened the conditions of the approval granted by the Defendant for the development nor did it demonstrate that it had actually built hostels and not flats as the Defendant asserts.

24. The court notes that the bill of quantities produced by the Plaintiffs reads at the top "*Proposed Cottages on Plot Number 12767/11.*" A cottage is different from a hostel. The Longman Dictionary of Contemporary English defines a cottage as a small house in the country, while a hostel is defined as a place where people who have no home can stay. A flat is a place for people to live that consists of a set of rooms that are part of a larger building.

25. The court finds that the Plaintiffs have not proved their claim on a balance of probabilities. The court declines to declare the Enforcement Notice illegal and unenforceable there being no evidence of when it was served upon the Plaintiffs.

26. The Plaintiffs ought to have pursued the procedure set out in Section 38 of the Physical Planning Act. They also ought to have applied for Judicial Review if they were aggrieved by the manner in which the Defendant had implemented the procedure set out in the Physical Planning Act.

27. The Plaintiffs did not demonstrate good faith when they went ahead to put tenants in the disputed building after coming to court and obtaining a temporary injunction on being served the Enforcement Notice by the Defendant.

28. The Defendant had the legal mandate to issue the Enforcement Notice which the Plaintiffs were required to comply with. Upon receipt of the Enforcement Notice, the Plaintiffs ought to have pointed out the fact that the date for compliance with the notice had long passed and sought more time to comply with the Enforcement Notice.

29. The Plaintiffs seek an equitable review yet they have not followed the law. Equity follows the law.

30. The prayer for damages of Kshs. 45 million together with interest at 26% per annum from 26/10/2009 until payment in full must fail since no evidence of a loan agreement was adduced.

31. The Plaintiffs suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 28th day of September 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Otieno for the Plaintiffs

No appearance for the Defendant

Mr V. Owuor- Court Assistant