



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 27 OF 2015

THE TRUSTEES OF SHREE VISA
OSHWAL VANIK COMMUNITY PLAINTIFF

VERSUS

JUMA SHILLINGI.....1ST DEFENDANT

DAA HALIMA SHILINGI.....2ND DEFENDANT

OMAR SHILLINGI.....3RD DEFENDANT

RULING

1. The Plaintiff has sued the three Defendants and is seeking the following prayers:

- i. A declaration that the said construction/development is illegal.**
- ii. An order for demolition of the said illegal construction**
- iii. An injunction compelling/barring the Defendants from proceeding with an illegal construction.**
- iv. Costs of this suit.**

2. Simultaneously with filing of the suit the Plaintiff has through an Application dated 23rd February 2015 sought the following orders:

- 1. Spent**
- 2. That Temporary Injunction be issued against the Defendants, agents, servants and/or employees or any other person whatsoever from constructing/developing the suit property on plot No.41 XVI Annex, Faza Road.**
- 3. That an order of demolition do issue to the part of the building that has encroached the pedestrian pavement and the Plaintiff/Applicant plot.**

3. The Application is made on the grounds on the face of the Motion and is supported by an affidavit sworn by Viren Harilal Shah on 23rd February 2015 in which it is deponed that the Plaintiff is the legal and beneficial owner of **Plot No. 4 Section XVI Annex, Faza Road** while the Defendants are the owners

of hut No.15 without land thereon having acquired it from their grandfather one Mwanakombo Madhi (deceased). That the Defendants are obliged to pay periodic ground rents as and whenever due but have not done so and are in arrears. It is the Plaintiff's contention that despite being in rent arrears, the Defendants have initiated developments/refurbishment on the said house without land in total disregard to the required approvals and/or authorization from the relevant authorities. The Plaintiff states that the said construction/development have caused obstruction to the pedestrian pavement along the said plot, and the obstruction has caused public anxiety and anguish to pedestrians who are unable to use the route/pavement. To that affidavit are attached copies of documents of ownership, letter of complaint from the Plaintiff and notice from the County Government of Mombasa issued under the Public Health Act and photographs showing the said constructions.

4. The Defendants entered appearance and filed defence dated 20th March 2015 in which they deny the Plaintiff's claim and state that they were only renovating their house that was in a dilapidated condition and that upon being served with a notice from the County Government of Mombasa they stopped the renovations. For some unknown reason, the Defendants filed another defence dated 9th August 2016 in which they aver, in alia that their house without land was built before Kenya attained its independence and being a temporary structure, no approval plans were required. They further aver that they are carrying out repairs of the roof which collapsed to make the house habitable and were not undertaking an extension or reconstruction that would alter the nature of the house and therefore did not need approval or consent from the County Government. The Defendants further deny that this Court has jurisdiction to hear and determine the suit as the complaint, if genuine, ought to be handled under The Physical Planning Act.

5. The Defendants opposed the Application and filed a Replying Affidavit dated 10th May 2017 sworn by Juma Shillingi, the 1st Defendant in which they reiterate the contents of their defence dated 9th August 2016 and aver, that the repairs undertaken was to make the house habitable and did not require any approval plans or consent from the County Government of Mombasa. It is the defendant's' contention that the Court lacks jurisdiction as the complaint, if genuine should be handled under the Physical Planning Act.

6. Both parties filed Written Submissions which were highlighted by their respective Counsel and which I have read and I need not reproduce their contents herein. In his submission, Mr. Mwasasa, learned counsel for the Applicant submitted that the tenancy provided that the tenants may not build on the said land any building other than a wattle and daub house built in the native manner, and that the improvement by the Defendants who used stone and cement was of a permanent nature that required consent of the Plaintiff and approval from the County Government of Mombasa. He submitted that the Physical Planning Act was not applicable as the agreement only allowed the use of wattle and daub, not the construction of a permanent house. He further submitted that the Plaintiff has established a *prima facie* case with a probability of success and that this was a clear case which merits a mandatory order of demolitions as the structures were illegally constructed.

7. On their part the Respondents through their Counsel Ms. Mwangera submitted that the Application is incompetent and bad in law as the complaint is centered on non-compliance of provisions of Physical Planning Act which the Applicant has not followed. The Respondents further submitted that there is no evidence of encroachment that has been exhibited and the Plaintiff has not established a *prima facie* case with a probability of success and has not demonstrated that they would suffer irreparable injury that may not be adequately compensated by an award of damages.

8. I have considered the Application, the affidavits in support of and against and the rival submissions made and authorities cited. It is not disputed that the Plaintiff is the owner of the suit plot. It is also not disputed that the Defendants are in occupation of part of the plot under the principle commonly referred to as house without land and have been so through their predecessors since 1976. The Plaintiff has deponed that the Defendants have initiated developments/refurbishment on the said house (without land) without approvals and/or authorization from the relevant authorities. The Plaintiff further avers that the said construction/development made by the Defendants have encroached on and obstructed the pedestrian pavement on the suit land and therefore prays that the Court grants an order for their demolition. The

Defendants on their part aver that they have undertaken repairs on the house which was built during pre-independence in order to make it habitable.

9. The law as to the principles under which temporary injunctions may be issued are well settled in the well-known case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** which are that an applicant needs to establish that he has a *prima facie* case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the Court is however, in doubt, on the foregoing then it will decide the matter on the balance of convenience. The Plaintiff besides seeking an order for temporary injunction is also seeking a mandatory injunction to compel the Defendants to demolish part of the building that has allegedly encroached on the pedestrian pavement. The law as regards the principle to be applied when considering the prayer for demolition is different from the principles set out in Giella's case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction.

10. In the case of **Locabail International Finance Ltd v- Agro-Export & another (1986) I ALL ER 901** it was stated that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

The Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is *prima facie* established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

11. It is common ground that the Defendants are in occupation of the house (without land) pursuant to the memorandum of agreement dated 21st April 1976. The said tenancy agreement spelt out the terms and conditions that governed the parties, including how the tenancy may be terminated. Whereas the Plaintiff alleges that the Defendants have initiated the construction/developments/renovations without following the laid down legal procedures, the Defendants on their part contend that the repairs they have undertaken did not require such approval. There was no rebuttal of the defendant's assertion. In the supporting affidavit, the Plaintiff has annexed a notice allegedly written by the Public Health Department of the County Government of Mombasa. The Court has not been told what followed after the issuance of the notice.

12. Before this Court, it has been established that the Defendants are lawfully in occupation of the suit property. The renovations undertaken are in the house they have occupied for years with the Plaintiff's permission and pursuant to the tenancy agreement referred to which is still in force. There is a dispute as to whether the constructions/renovations are confined to the Defendants' house or have encroached on the pedestrian pavement. There is also a dispute as to whether the said renovations/construction/development required approvals from the relevant bodies. These are issues that have to be determined at the main trial. Having carefully considered the material before me, I am not satisfied that the Plaintiff has established a *prima facie* case with a probability of success to warrant the grant of the prohibitory injunction sought. The Plaintiff has also not shown what irreparable injury it will suffer in the event the injunction is not granted. In any case, the cost of demolition can easily be quantified in monetary terms in the event the Plaintiff succeeds at last. In my view, damages could still be an adequate remedy. In addition, from the facts of this case, in my humble view a case for mandatory injunction has not been made out as outlined in the principles already mentioned. The case is not unusually strong and clear as to allow me to grant the order for mandatory injunction prayed for.

13. The upshot of this is that the notice of motion dates 23rd February 2015 lacks merit and the same is

hereby dismissed with costs to the respondents.

Ruling dated, signed and delivered at Mombasa this 2nd day of October 2017

C. YANO

JUDGE