REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 276 OF 2015

ANGELINE AWINO ONYANGO…..……. PLAINTIFF

VERSUS

LYDIA WANJIKU……..…….…….....1ST DEFENDANT

NAIROBI CITY COUNTY……..……....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 7th April 2015 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from demolishing or otherwise interfering with the structures erected on Plot No. 4/148 Muoroto Resettlement Scheme (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds set out on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Angeline Awino Onyango, sworn on 7th April 2015 in which she averred that she was allotted the suit property vide an Allotment Letter dated 24th October 1991. She averred further that she constructed a residential structure thereon with 24 residential houses occupied by tenants. She further averred that it is now 30 years since the residential structures were constructed. She further averred that on 4th April 2015, the 1st Defendant/Respondent claiming to be chairman of the physical planning authority served her with a demolition notice and directed all tenants to vacate the suit property. She further stated that the intended demolition is illegal since she had complied with all the requirements known to law in developing the suit property.

The Application is contested. The Defendants/Respondents filed their Grounds of Opposition dated 20th April 2015 as follows:

1. That the instant proceedings are in violation of the mandatory provisions of **section 38(4), (5) and (6) of the Physical Planning Act, Cap 286 Laws of Kenya.**
2. That the jurisdiction of the court is prematurely and wrongly invoked.
3. That the Defendants/Respondents have not issued any demolition notice but an Enforcement Notice.
4. That the Plaintiff/Applicant has neglected to comply with the Enforcement Notice.
5. That the pleadings and affidavit do not disclose the alleged illegality and irregularity of the Enforcement Notice.

6. That the Application and the suit are founded on empty averments and no material in support.
7. That the Application and suit constitutes unmitigated abuse of the court process and deserve to be struck out with costs to the Defendants/Respondents.

The Plaintiff/Applicant filed her written submissions in which she stated that the Enforcement Notice issued by the Defendants/Respondents had the effect of authorizing the demolition of the structure on the suit property so the debate whether or not the Notice issued was an Enforcement or Demolition notice is purely academic. She further submitted that the claim that the jurisdiction of this court is wrongly invoked is misguided because the reliefs sought by the Plaintiff/Applicant can only be granted by this court because the Liaison Committee and the National Liaison Committee have no powers to issue temporary relief. She further submitted that the Enforcement Notice issued by the Defendants/Respondents only allowed her a 2-day period within which to comply with the terms of the notice. She stated that this was not adequate notice and proceeded to state that she should have been given a 60-day notice period. On that ground, she submitted that the Enforcement Notice issued to her was irregular, illegal and made in bad faith. She further submitted that having regard to the finding in the case of **Giella v. Cassman Brown**, she had satisfied all the grounds for award of the temporary injunction she seeks.

I am required to determine whether the Plaintiff/Applicant is entitled to an order of temporary injunction pending the hearing and determination of this suit which she seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

> **"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is 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."**

The Plaintiff/Applicant faulted the Defendants/Respondents for serving her with the Enforcement Notice dated 4th April 2015 arguing that it gave her only 2 days of notice to comply and further that it was in essence a demolition notice. The Defendants/Respondents have on their part argued that they were merely enforcing the law contained in **section 38 of the Physical Planning Act.** Section **38(1)** of the **Physical Planning Act** provides as follows:

> **"When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land."**

Further, **section 38(4**) of the **Physical Planning Act** provides as follows:

> **"If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may appeal against such decision within the period specified in the notice appeal to the relevant liaison committee under section 13."**

Looking at the actual Enforcement Notice dated 4th April 2015, it was clearly stated as follows:

> **"If you are aggrieved by this notice you may appeal to Liaison Committee the case may be under provisions of Part II of the Act before the aforesaid 5th April 2015 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal."**

The Plaintiff/Applicant has not shown that she made an appeal to the Liaison Committee as is required in the law and as specified in the Enforcement Notice. In fact, **section 38(5) of the Physical Planning Act** provides for further appeal to the National Liaison Committee where one is dissatisfied with the decision of the Liaison Committee and according to **section 38(6) of the Physical Planning Act,** it is only an appeal against a decision of the National Liaison Committee that an aggrieved party may approach the High Court.

The relief sought by the Plaintiff/Applicant in this Application was already possible to obtain through the Plaintiff/Applicant filing an appeal to the Liaison Committee. As mentioned above, this would have had the effect of suspending the Enforcement Notice until the Liaison Committee has arrived at their decision. In the circumstances, I do agree that the Plaintiff/Applicant has approached this court improperly without following the laid down procedure in **section 38 of the Physical Planning Act**. I therefore agree with the position taken by the Defendants/Respondents that this suit is premature as the laid down procedure for challenging enforcement notices was not followed to the letter. Accordingly, I find that the Plaintiff/Applicant is wrongly before this court and has not shown that she has a prima facie case with high chances of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown,** this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

> **"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…"**

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 18TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE