



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CIVIL SUIT NO. 262 OF2014

SEWON ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT

RULING.

The matter coming up for determination is the *Notice of Motion* Application dated **7th March 2014**, brought under **Section 1A and 1B, 3 and 3A and 63(e)** of the *Civil procedure Act* seeking for Orders that;-

- a. *Spent*
- b. *Spent*
- c. *There be a temporary stay of the Notices Nos. 157 and 158 issued to the Plaintiff by the Defendant to stop further development and remove structures on LR No.6845/1412 and 6845/1371, Mihango, Utawala Nairobi County , pending the hearing and determination of this suit.*
- d. *That costs of this application be provided.*

The application is premised on the grounds stated on the face of the application and on the annexed affidavit of **Joseph Masakhalia**, one of the Directors of the Plaintiff company. These grounds are;-

1. *That the Defendant has issued irregular and illegal Notices to the Plaintiff to stop construction on its plots No.LR No.6845/1412 and LR No.6845/1371, Mihango Utawala Nairobi calling illegal structures on the aforesaid plots .*
2. *That the Plaintiff had initiated the process of regularizing the approval of plans on LR 6845/1371 and is awaiting approval from the Defendant.*

In his supporting Affidavit, **Joseph Masakhalia** averred that he together with **Lydia Lubanga** are the registered proprietors of all that piece of Land known as **LR No. 6545/1412** which was a result of subdivision of **LR No.6845/221/2**. He further averred that upon acquiring the said parcel of land, they sought the approval of building plans from the Defendant/ Respondent and further obtained approval vide

their approval dated 3rd October 2013 together with the payment of **Kshs.71,530/-** and a further **Kshs.40,500/=** as per annexure **JM1(a-c)** . He also contended that they further proceeded to apply for and obtained a certificate from the National Environment Management Authority (**NEMA**) **JM1-D**. It was his further contention that they also acquired plot **No.6845/1371** and constructed a two storey flat composed of six units above five years ago and that fact is well within the knowledge of the Defendant.

Further that they have applied for change of use and submitted their building plans for approval in order to regularize the situation and requirements and the said application was done by Real Plan Consultants as per annexure **JM2** at a cost of **Kshs.360,000/=**. However, the Defendant has issued a **Notice No.157** to stop further development and removal of the structures on **LR No.6845/1412** being a Notice dated **26th February 2014**.It was also averred that the Defendant has further issued them with a Notice **No.158** in respect to **LR No. 6845/1371** also dated **26th February 2014**, requiring them to stop further illegal development. It was his contention that the said Notices are **illegal, irregular** and **vague** in nature and are thus challenging the same. He therefore urged the Court to intervene and stay the aforesaid notices as there is a danger of having their building illegally demolished which would paralyse their investment and would in turn tender them destitutes. He urged the Court to allow their application.

The application is opposed. **Rose Muema** the Chief Officer, **Urban Planning and Housing** of the Respondent swore a Replying Affidavit and averred that the applicant carried out development on **LR 6845/1412** using plan **CPF AD 90** dated **3rd October 2013**, which was forged and not approved by the Respondent. She further averred that the applicant developed a block of flats 3 levels on **LR No. 6845/225/1** otherwise referred to by the applicant as **LR No. 6845/1371** and occupied the same without occupation certificate . She contended that indeed the Respondent issued the said enforcement notices

(**No. 157 & 158**) to stop the illegal development on the said property and were to remove the same within **7 days**. Further that the said enforcement Notices issued to the applicant were regular and legal as the development at the time of issuance did not conform to the requirements of the **Physical Planning Act**. It was also contended that on **27th February 2014**, the applicant obtained development approval on **LR No. 6845/1412** with attendant condition which it has not complied fully. She also contended that the applicant's application is bad in bad Law and ought to be dismissed as the applicant has not approached the Court with clean hands. She urged the Court to dismiss the applicant's application with costs.

The parties filed their written submissions which the court has carefully considered. I have also considered the pleadings in general, the relevant laws and the cited authority. The applicant is seeking for a stay or restraining Order against the Defendant.

The application is brought under **Section 1A** and **1B** of the **Civil Procedure Act** which deals with the **overriding objective** of the Act and **Section 3** and **3A** of the same Act which deals with the special jurisdiction and powers of the Court. The Court is also empowered by **Section 3A** to issue such orders that are necessary for the ends of justice or prevent abuse of the Court process. Further **Section 63(e)** of the said Act empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient in order to prevent the ends of justice from being defeated.

There is no doubt that the Respondent herein, Nairobi County Government did issue enforcement notices to the Developer on **LR No. 6845/1412** and **LR No. 6845/225/1**. The Developer was supposed to stop further illegal development and remove the said structures. There is no doubt that **LR No. 6845/225/1** is registered in the name of **Agnes Wamuthanga Kibuchi** as per the certificate of title attached to the application.

The Plaintiff alleged that they purchased this parcel of land from the aid **Agnes Wamuthanga Kibuchi**. That allegation is not disputed by the Respondent. The applicant has further alleged that they **purchased LR No. 6845/1371** and put up a block of flats. I have seen receipts dated **3rd March,2014** received from **Sewon Enterprises Ltd** in connection to plot **No.6845/1371**, and **9th July, 2015** in connection to **LR No.6845/1412** . These are the two suit lands. The said payments were made by **Sewon Enterprises Ltd**, the Plaintiff herein. There is no doubt that the plaintiff herein has some relationship with

Plots No. 6845/1371 and 6845/1412, the ones that enforcement notices have been issued.

I have also seen the Planning Report in connection to change of use for **LR No. 6845/1371** and the photographs attached thereto. Indeed there are completed 3 storey apartments consisting of six two bedrooms units. The said units must have been built earlier than **28th February 2014**, when the notices were issued. There is no evidence of any on-going development now and the Court cannot hold and find that there is illegal development or construction that is on-going. I have also seen the approval of development of proposed residential flats to the plaintiff herein from the Defendant vide letter dated 3rd October 2013, . There is also a **Environment Impact Assessment Licence** from **NEMA** dated **2nd December 2013**, to the applicant herein. It is therefore evident that the Plaintiff put up the said development with the approval of the Respondent. The structures are already developed and they cannot be referred to as illegal development or construction, at this point.

The Respondent had now demanded through the Enforcement Notices that the Plaintiff do remove the said structures. The issue of whether the same are illegal or not would have to be determined through full trial where witnesses would be called by the parties and their evidence tested. In cross-examination the applicant is apprehensive that if the Order sought is not granted, then its block of flats will be demolished. The blocks of flats are now completed and there is danger that if indeed the Orders sought are not granted, the same may be removed as per the Enforcement Notices and tenants who are in occupation would be affected. For the above reasons, the Court finds that the applicants have demonstrated that they have a prima facie case with probability of success and that if orders are not granted, they would suffer irreparable loss which cannot be compensated by an award of damages (See the case of **Giella Vs Cassman Brown 1973 EA 358**).

As was held in the case of “the **official receiver ex parte Paul Rotich Cheor Vs Barclays Bank of Kenya , Kisumu High Court , Civil case no. 17 of 2004**, the purpose of the injunction is in most cases to keep things in **status quo** pending the trial . It is necessary herein to keep things in status quo pending the trial.

Having now carefully considered the Notice of Motion dated **7th March 2014**, and the written submissions, the Court finds that the same is merited and it is allowed in terms of prayer **No. C** with costs to the applicant/Plaintiff.

It is so ordered.

Dated, Signed Delivered this **10th** day of **July, 2015**

L. GACHERU

JUDGE

In the presence of

Mr Mungao for the Plaintiff/Applicant

None attendance for Defendant/Respondent

Lerionka: Court Clerk