



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 292 of 2005

NALIN NAIL WORKS LIMITED (IN RECEIVERSHIP).....
PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI..... DEFENDANT/RESPONDENT

RULING

The Applicant seeks temporary injunctive orders restraining the Respondents its agents, officers, servants, workmen, employees and or any other person acting for and on behalf of the Defendant from pulling down, demolishing removing or otherwise interfering with the Applicants gates, perimeter and masonry walls or any structure erected on its parcel of land known as L.R. No. 209/6722 pending the hearing and determination of this application and of the main suit. The Applicant also prays that proceedings filed against it by the Defendant/Respondent in the City Subordinate Court, namely Case No. 101 of 2005 be stayed pending the hearing and final determination of this suit.

The application is grounded on the reasons that

- 1) an Enforcement Notice issued against it on 1st March 2005 under Chapter 286 of the Laws of Kenya threatening to demolish its structure for want of planning permission is incompetent, null and void, being premised on a non existent statute.**
- 2) The planning permission said not to exist has been obtained**
- 3) That the Plaintiff/Applicant has not committed any offence to warrant the commencement of the Criminal Case No. 101 of 2005.**

In support of its application, the Applicant company has shown this Court documents evidencing that it is indeed the registered proprietor of the suit premises. It has also shown by way of Annexures "AZS 1" and "AZS 3" that requisite approvals to the construction of its developments were obtained from the Respondent as well as the East African Railways Corporation, the predecessors of the Kenya Railways Corporation, the would be complainant in City Court Criminal Case No. 101 of 2005.

Counsel for the parties herein opted by consent, to file written submissions only, for my consideration, whereupon this Court ordered that the same be filed on or before 10th February 2006. The Respondents did not meet this deadline and requested further time to the 17th February 2006. This Court allowed the extension but with an order that in the event that the Respondents failed to file their submissions by that date the same would be disregarded. Consequently, the Respondents submissions having been filed on 21st February 2006 in violation of my order, the same have been disregarded. I have however considered the Replying Affidavit filed by the Respondents herein and have noted that they do admit that

development plans were approved as submitted by the Applicants. They however contend that the offending portion is a wall that was not provided for in the approved plans

“and appears to have been erected well after the original structures comprised in the said plans.”

They contend also that

“the offending wall has obstructed a public access to adjoining property owners and in particular a firm known as Midco.....”

I find that these are matters going to the merits of the suit itself which are not suitable for consideration at this stage. My duty at this stage is to consider and determine whether the Applicant has demonstrated a proper case for a temporary prohibition, if I may call it so of the threat contained in the Enforcement Notice issued by the Respondents to the Applicants on 1st March 2006. In doing so I am only required to consider whether

i) The Applicant has a prima facie case against the Respondents with a probability of success

ii) The Applicant risks incurring irreparable loss not capable of compensation in damages in the event that the application is not allowed and the Respondents do carry out their threat.

If in doubt, this Court is required to consider whether on the balance of convenience the Applicant is entitled to the injunction sought.

Looking at the evidence presented before me by the Applicant as owners of the property known as L.R. No. 209/6722 which they have developed with approval of the Respondents I am satisfied that they have established a prima facie case with a probability of success against the Applicants. It being evident that the development is a permanent building structure consisting of a Show-room, Offices and Godowns, I am of the view that the threat to bring the premises down, if carried out, without proof of the statutory offences cited by the Respondents would cause great loss. Considering that the Respondent is currently grappling with financial burdens, I am of the view that such damage would be incapable of compensation in damages. It matters not that the Applicant Company is under receivership since the work of a receiver is to gather and preserve the Company's assets with a view to ensuring that creditor's interests are taken care of. This Court will not, in the circumstances of the case, place itself in a position whereby it renders nugatory the efforts by the receivers by failing to preserve the assets of the Applicants by way of an injunction when the facts and circumstances clearly support the issuance of one. I therefore allow the application and grant the order sought under prayer 4 of the application. I do not in the circumstances consider it necessary to deal with the 1st ground in support of the application at this stage.

As regards prayer 3 I find that since the charge therein relates to a boundary wall said to have been erected on a railway line and not the permanent structure threatened to be brought down under the Enforcement Notice, the two may not be related. I am not inclined to stay the criminal proceedings on the evidence adduced.

The burden of proof that indeed the Applicants have committed the offence complained of rests with the Prosecution in the City Court. The Applicants may submit a “no case to answer” or prove that indeed permission was given for the erection of the wall. I therefore refuse to grant prayer 3 of the application but do award costs of this application to the Applicants.

Dated and delivered at Nairobi this 28th day of April 2006.

M.G. Mugo

Judge

In the presence of

Mr. Karungo for Applicant

Mr. Omotii for Respondent