



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 39 OF 2020**

**JOHN ALUMA ODEYO.....1<sup>ST</sup> APPELLANT**

**JOSEPH ONYANGO BOLLO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**KISUMU COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**CITY MANAGER KISUMU COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application dated 12<sup>th</sup> August 2020 was for an Interim Order of Injunction, restraining the Respondents from entering, taking over or trespassing onto or in any way interfering with the Appellants' trade and work at **KIBUYE MARKET**, pending the hearing and determination of the appeal.

1. Secondly, the Appellants sought the stay of proceedings in the case of **JOHN ALUMA ODEYO & ANOTHER Vs KISUMU COUNTY GOVERNMENT & ANOTHER, KISUMU CMCC NO. 239 OF 2018**, until the appeal was heard and determined.

2. The Appellants, **JOHN ALUMA ODEYO** and **JOSEPH ONYANGO BOLLO** had instituted proceedings on behalf of the **KIBUYE MARKET TRADERS ASSOCIATION** and the **KIBUYE MARKET TRADERS WELFARE ASSOCIATION**. The proceedings were instituted at the Chief Magistrate's Court at Kisumu.

3. The Appellants' case was that over the last 50 years, they had been working at the Kibuye Market, uninterrupted.

4. At ground No. 2 in the application before me, the Applicants said that they were surprised when, on 10<sup>th</sup> August 2020, the 2<sup>nd</sup> Respondent **Ms DORIS OMBARA** notified them that they had to move out by 14<sup>th</sup> August 2020 or they would face eviction.

5. It is that alleged verbal notice that prompted this application.

6. This court was informed that the Respondents had previously disobeyed Injunction Orders which had been granted by the trial court.

7. The Applicants said that the orders in issue had been served severally, "*on the office of Doris Ombara.*"

8. Notwithstanding the said service of the orders, Doris Ombara is alleged to have;

*"..... sent Council Askaris, goons*

*and journeymen to demolish our*

*Property."*

9. The Applicants exhibited pictures of the property belonging to traders. The pictures showed property which had been destroyed, and the Applicants asserted that the value of the said property was in Millions of Kenya Shillings.

10. At paragraph 9 of his supporting affidavit, John Aluma Odeyo said;

*“THAT the demolition which took place on the 7<sup>th</sup> June 2020 was illegal for the following reasons*

*(A) The demolition was done at 10p.m*

*in the night up to 2a.m in the morning.*

*(B) That there was no notice from the County Government.*

*(C) There was no consent obtained from the Court.”*

11. In the face of those alleged actions of the 2<sup>nd</sup> Respondent, the Applicants filed an application before the trial court, seeking to have the 2<sup>nd</sup> Respondent cited for contempt of court.

12. When canvassing the application, the Applicants submitted that their appeal would be rendered nugatory if they were to be evicted before their appeal was heard and determined.

13. Citing the case of **EQUITY BANK LIMITED Vs WEST LINK MBO LIMITED CIVIL APPEAL NO. NAI. 78 OF 2011**, the Applicants drew this court’s attention to the following words of E. Githinji JA;

*“It is trite law in dealing with 5 (2) (b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5 (2) (b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”*

14. The purpose and intent of an injunctive order, pending the hearing and determination of an appeal, is the preservation of the subject matter of the appeal.

15. In this case, the appeal arose from the Ruling which the trial court delivered on 16<sup>th</sup> July 2020.

16. It is the Applicants’ case that the appeal would be rendered nugatory if they were evicted from the Kibuye Market before the appeal was heard and determined.

17. The Applicants submitted that the protection of citizens from forced evictions can be inferred from the Constitution and other legislations.

18. At paragraph 32 of their written submissions the Applicants said;

*“Doris Ombara, the City Manager,*

*violated these requirements by the  
International Community. According  
to the Ministry of Lands, KENYA  
guidelines on evictions of 2009, states  
that;  
‘Eviction must not take place  
in bad weather, at night, during  
festivals or religious holidays,  
prior to election, during or just  
prior to school examinations .....’*

19. The Applicants went on to say that;

*“It is therefore clear that the respondent  
violated both national and international  
guidelines on forced evictions.”*

20. In answer to the application, the Respondents drew the court’s attention to the fact that the Ruling which the Applicants have lodged an appeal from, arose from the Applicants’ application in which they had asserted that the Respondents were in contempt of court, by evicting the Applicants.

21. The Respondents’ position was that they had actually complied with the orders of the court, as they had ensured that the Applicants were relocated to various other locations within Kisumu Town.

22. In determining this application, I first remind myself that it is an application that has been brought within an appeal arising from an interlocutory order.

23. The substantive case, was still pending before the trial court. Therefore, this court is obliged to carefully navigate its determination so as to ensure that there does not arise any embarrassment to the trial court when it will be called upon to determine the substantive case.

24. The Ruling that the Applicants have appealed from is dated 16<sup>th</sup> July 2020.

25. As the trial court noted, the Applicants herein had sought leave of the court to cite Doris Ombara for contempt of court. They had asked the trial court to order Doris Ombara to Show Cause why she should not be jailed for a period of six months.

26. As the trial court noted, the Applicants had asked the alleged contemnor be fined the sum of Kshs 1,000,000/=, as an alternative to serving a jail term.

27. It is common ground that on 3<sup>rd</sup> July 2018, the trial court had granted orders in the following terms:

*“1) THAT a temporary order of  
injunction do issue retraining the  
1<sup>st</sup> Defendant/Respondent either by  
themselves, their servants, agents  
and or anyone deriving authority or  
acting on their behalf from evicting the*

*Plaintiffs in particular, members of  
Kibuye Traders Association trading  
within the areas identified and marked  
for construction of access roads and  
parking and or demolishing their  
structures or buildings situated within  
the said areas for a period of Twenty  
Seven (27) days from the date hereof.  
2) THAT the Defendant to avail alternative  
trading sites situated within Raila Hall  
within Kibuye Market and Posta Grounds  
between Star Hospital and United Mall  
Kisumu to the said affected members of  
the Plaintiffs' association and undertake  
all requisite logistics within 14 days  
from the date hereof to enable them  
relocate them by the 31<sup>st</sup> July 2018.”*

28. My reading of the said order is that for a period of 27 days, the 1<sup>st</sup> Defendant would be restrained from evicting the Plaintiffs.

29. During the first 14 days from the date when the injunction was granted the Defendant was required to finalize all the requisite logistics, for the purposes of having the Plaintiffs relocated to the specified areas.

30. The Plaintiffs were supposed to be relocated to the said specified areas by 31<sup>st</sup> July 2018.

31. On the one part, the Respondents say that the Plaintiffs were relocated; whilst on the other hand the Plaintiffs say that they had remained at the Kibuye Market.

32. As to whether or not the Plaintiffs were relocated is an issue which would have to be determined by the trial court, during the substantive trial.

33. However, I note that in the Memorandum of Appeal dated 21<sup>st</sup> July 2020, the Appellants stated the following as one of their Grounds of Appeal;

*“2. THAT the Learned Trial Magistrate  
erred in law and fact by failing to  
find the eviction having been carried  
out at night, was illegal and amounted  
to impunity.”*

34. None other than the Applicants are asserting that eviction had been carried out. Their complaint was that the eviction had been conducted at night.

35. Secondly, the Applicants exhibited pictures of their property, which the Respondents had destroyed.

36. My understanding is that it was because the Respondents had destroyed the Applicants' property, and the Respondents had also evicted the Applicants, that the Applicants filed the application to have the Respondents cited for contempt.

37. By asking this Court to grant an injunction to restrain the Respondents from entering into and taking over the area which the Applicants were carrying on business, the Applicants appear to be saying that they were still in occupation of the places where they have been carrying on business all along.

38. If the Plaintiffs were still in occupation, that implies that the Respondents had not evicted them, at night or at all.

39. That would then appear to be wholly inconsistent with their assertions, concerning their inhumane eviction: for which the Applicants want the Respondents cited for contempt.

40. In a nutshell, I find that the evidence placed before the Court does not demonstrate a prima facie case with a probability of success, in the appeal before me.

41. I also hold the considered view that if the appeal were to succeed, that would imply that the Respondents or either of them were in contempt of Court. To hold them in contempt would imply that they had evicted the Applicants and also that they had destroyed property belonging to the said Applicants.

42. In effect, even if the appeal were to succeed, it would constitute confirmation that the Respondents had already taken over the suit premises. In the circumstances, I find that an injunction to restrain the Respondents in the manner proposed by the Applicants, would be an order in vain.

43. It is noted that in the Memorandum of Appeal, the Appellants sought, inter alia, the following order;

***“(c) A declaration that eviction at night***

***violates the Constitution and that***

***the 1<sup>st</sup> Respondent should pay Kshs***

***20,000,000/= as compensation to***

***the Appellants.”***

44. Implicit in that proposed order is a concession that the eviction had already taken place.

45. Secondly, the Applicants have indicated that they would be seeking compensation by payment of a quantified amount.

46. It therefore follows that if the appeal were to be successful, the Appellants are aware that they can be adequately compensated by payment of Kshs 20,000,000/=.

47. Considering that the Appellants can be adequately compensated, if their appeal were to be successful, I find that the Appellants have failed to satisfy one of the ingredients for the award of interlocutory injunctions.

48. Furthermore, I note that the injunction which the Respondents had allegedly flouted was to last for a specific period, during which time the Appellants were to be relocated to designated places.

49. My understanding of the facts which can be discerned from the record of proceedings, is that the Respondents may have assigned to the Appellants, spaces which were inadequate for use by all the Appellants.

50. If I am right in my said understanding, (and that can only be determined after evidence is tendered at the trial), I would expect the parties to explore the modalities of achieving a win-win resolution.

51. Meanwhile, the Appellants appear to have abandoned the prayer for stay of the proceedings in the trial court. I so find because the same was not canvassed.

52. In any event, I hold the considered view that it is in the best interests of all parties that the substantive suit be heard and determined on merit.

53. In the result, I find no merit in the application dated 12<sup>th</sup> August 2020. It is therefore dismissed, with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU This 30<sup>th</sup> day of November 2020**

**FRED A. OCHIENG**

**JUDGE**