



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEL NO. 187 OF 2019

CITY MARKET STALL HOLDERS ASSOCIATION.....APPELLANT

(Suing through Michael Noru Kamau (Organizing Secretary)

Anthony Kuria (Secretary) and Peter Osore (Treasurer)

VERSUS

ARTHUR ODIPO.....1ST RESPONDENT

GEORGE NYAMITA.....2ND RESPONDENT

CAROLINE LIMBERIA.....3RD RESPONDENT

BENSON KIIRU.....4TH RESPONDENT

MARGARET WANJIKU.....5TH RESPONDENT

MILICENT OCHOLA.....6TH RESPONDENT

KENYANAM LAKE FISH DEALERS ASSOCIATION.....7TH RESPONDENT

(Suing through Fredrick Ngesa Odongo (Chairman) and Benard Abok (Secretary)

NAIROBI COUNTY GOVERNMENT.....8TH RESPONDENT

THE DIRECTOR OF THE NAIROBI COUNTY INSPECTORATE.. 9TH RESPONDENT

Being an Appeal from the Ruling and Orders of the Chief Magistrate Court

at Nairobi Hon. P.N. Gesora (Mr) Chief Magistrate in CMCC 684 OF 2018

in Milimani Court delivered on 27th March, 2019)

RULING

The respondents herein obtained an order from the Chief Magistrate's court Nairobi on 9th October, 2018 restraining the 8th and 9th respondents from removing, harassing, discriminating and or evicting them from their place of work. The appellant in this application was an interested party in that application.

It would appear from the material before me that, the 8th and 9th respondents moved the court to challenge the said order by way of an application dated 7th November, 2018 to review the same, on account of errors of law and facts apparent on the face of the record. That application was however dismissed on 28th March, 2019 for lacking in merit and since the orders made on 9th October, 2018 had not been obeyed, the 9th respondent was ordered to purge the contempt in two weeks' time.

The appellant and the 8th and 9th respondents were aggrieved by the said order prompting the appellant to file the present application to stay the execution of the order made on 27th March, 2019 pending the hearing and determination of the appeal filed herein. There is already a memorandum of appeal dated 3rd and filed on 4th April, 2019.

The Notice of Motion is brought under Sections 1 A, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 (1) and (6), Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution.

There are 44 grounds upon which the said application is premised, alongside a supporting affidavit comprising 50 paragraphs sworn by Michael Noru Kamau, the Organizing secretary of the appellant herein. The application is opposed and there is a replying affidavit filed on behalf of the respondents by George Nyamita running into 24 paragraphs and several annexures. Parties have addressed the court on their respective positions.

The 8th and 9th respondents support the appellant's application and added that in addition to the appellant's Memorandum of Appeal they, (8th and 9th respondents) have filed a Memorandum of Appeal dated 9th April, 2019. The application was filed on 4th April, 2019 which was 8 days from the delivery of the contested ruling delivered on 27th March, 2019. Under Order 42 rule 6 of the Civil Procedure Rules the application was filed timeously.

Whether or not substantial loss will be occasioned to the appellant is a fact that must be addressed and justified for the granting of the stay order sought. There is no dispute that the appellant's members are occupants of the several stalls in the City Market. In fact, the dispute involves a complaint by the 1st to 7th respondents who were allegedly evicted from the said market at the instance of the appellant and the 8th and 9th respondents.

The appellant has alleged in the application that the presence of the 1st to 7th respondents outside their business premises has compromised access to their business and also introduced insecurity. Its members are the bona fide tenants of 8th respondent with duly executed tenancy agreements and have complied with all relevant conditions including payment of rents to the city county. It is their case that continued interference by the 1st to 7th respondents with their businesses has resulted in loss of business.

On the other hand, the 1st to 7th respondents submit that they have all the rights to trade in the city market having been licenced and complied with all the relevant requirements to do so.

I have considered the rival submissions of the parties herein, with a view to addressing the application before me. There is a running interim stay of execution order given by Githua J who was first seized of the application under certificate of urgency on 4th April, 2019.

I have looked at the pleadings by way of the plaint dated 20th July, 2018 lodged by the respondents and the application filed on the same date, seeking interim orders against the 8th and 9th respondents leading to the order made by the lower court on 9th October, 2018.

Paragraph 10 of the plaint states as follows,

“10. The plaintiffs aver that on or about the 5th day of July, 2018 the 2nd defendant herein came to the Nairobi City Market and without notice unlawfully evicted the plaintiffs from their place of work.”

Paragraphs 15 and 16 of the same plaint read as follows,

“15. The plaintiffs also aver that they were evicted without due notice.

16. The plaintiffs further aver that the 1st and 2nd defendants herein have acted in breach of their terms of operation at the City Market.

Particulars of breach of terms;

- a. Failing to give the plaintiffs sufficient notice before eviction.**
- b. Wrongful eviction of the traders.**
- c. Arbitrary arrest of the plaintiffs.**
- d. Discrimination of the plaintiffs against other traders at the market.”**

The application filed alongside the plaint sought the substantive order,

“That pending the hearing and determination of the main suit the defendants, their servants, agents or any person claiming through them be restrained from removing, harassing, discriminating and / or evicting the plaintiffs from their place of work.”

That prayer is lifted from the plaint which sought a permanent injunction in the same terms against the 8th and 9th respondents.

Going by the provisions of Order 42 Rule 6 the appellant is properly before this court whether or not an application was made before the court which made the contested ruling.

I have already observed that the appellant's members are occupants of the several stalls in the city market. They have demonstrated that they are likely to suffer substantial loss in the event the stay orders are not given.

I also find that there is an arguable appeal by the appellant and the 8th and 9th respondents which may be rendered nugatory if stay orders are not granted. I am fortified in that position by reasons that, the pleadings in the plaint and the application by the 1st to 7th respondents point to the fact that before they came to court, they had already been evicted.

For the lower court to give restraining orders against an action that had already been completed is, to say the least, a misdirection. That being the case, the 8th and 9th Respondents can not be compelled to enforce the same neither can they be held in contempt for the alleged failure to do so. Further, the order of injunction being the only one pleaded by the 1st to 7th respondents, it would be prejudicial to the appellant and the 8th and 9th respondents to grant the same at interlocutory stage before the hearing of the suit, where the evidence shall be subjected to scrutiny and cross examination.

I am persuaded that the appellant and the 8th and 9th respondents should be granted the orders sought in the Notice of Motion dated 3rd of April, 2019. The appellant's members are sitting tenants recognized by the 8th respondent. I do not deem it necessary to order any provision of security on their part.

On the other hand, the 8th and 9th respondents are exempted from posting any security under Order 42 Rule 8 of the Civil Procedure Rules because by any standards, they are a government.

I have come to the conclusion that the application filed by the appellant must succeed. It is therefore allowed as prayed. The costs shall abide by the decision of the appeal.

Dated, signed and delivered at Nairobi this 30th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE