



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 109 OF 2015

RUMBA KINUTHIA.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU.....DEFENDANT

RULING

1. The Plaintiff filed the notice of motion dated 15th March, 2015 seeking that the Defendant be ordered to release the carwash machine unlawfully confiscated pending hearing and determination of this suit and restrained by an interlocutory injunction from interfering with the Plaintiff's premises plot No. 1489/1490 Kiamumbi Block 5 and its tenants in their ordinary course of business and in particular "Radiant Car Wash" pending the hearing and determination of this suit. The application is based on the grounds on the body of the application and the supporting affidavit of the Plaintiff. He averred that he was the registered owner of the suit property known as L.R. No. Kiamumbi Mun/Block5/(Kiamumbi)/1489 & 1490. That he invested in commercial rental units and a car wash to the tune of KShs. 25.5 Million. He alleged that after the completion of the project he applied to the Kiambu Lands Housing and Physical Planning Department for a certificate of occupation. The officials visited the premises and declared it fit for occupation. It is his gravamen that on 27th February, 2015, the Defendant's agents raided the premises and confiscated a car wash machine from one of his tenants, Charles Karanja who runs the car wash business. He stated that the reason given was that the car wash was located on a road reserve. That he was informed by the Defendant's agents that for the carwash machine to be returned, he ought to get a written consent from Kenya National Highways Authority which has never raised the issue of the car wash being on a road reserve. He stated that to prove that the Defendant is engaged in a malicious mission, the Defendant's agents raided the premises on 6th February, 2015 and gave all the tenants a notice to vacate on the basis that the premises did not have a certificate of occupation yet he had been issued with the certificate way back on 25th September, 2013. He lamented that the closure of premises was still scheduled for 17th March, 2015. He stated that it is through the premises that he and his tenant make a living.

2. In response thereto the Defendant filed a preliminary objection dated 25th March, 2015. The objection was based on the following grounds; that this court has no jurisdiction to entertain the present suit and the application as filed; that section 38 of the Physical Planning Act, Cap 286 Laws of Kenya provides that a challenge to an enforcement notice shall first lie with the relevant liaison committee and that the Plaintiff has failed, neglected and or refused to follow the laid down procedure in the Physical Planning Act to challenge an enforcement notice.

3. In submissions, the Plaintiff argued that this court has unlimited and original jurisdiction in criminal and civil cases under Article 165(3) (a) of the Constitution. It was argued that the implication of the said Article is that even with the existence of liaison committee, the High Court would still

have original jurisdiction to hear the matter in the first instance. It was further submitted that this suit touches on issues the committee has no jurisdiction over such as confiscation of the car wash machine. It was also stated that because the liaison committee's existence was in question and approach seemed distant, the Plaintiff could not secure his right to fair and efficient administration of justice provided for under Article 47 of the Constitution before it. Reliance was placed in *Registered Trustee Redeemed Gospel Church v. Yusuf Ibrahim & another* (2013) eKLR and the Plaintiff argued that where the jurisdiction of the court was challenged, the court was quick to note that whereas statutory procedures may exist, they do not necessarily oust the constitutional jurisdiction of the High Court.

4. The Defendant on the other hand submitted referred to Section 38 of the Physical Planning Act which provided that a party aggrieved by the issuance of an enforcement notice are entitled to seek redress before the liaison committee in the first instance. The said sub-section 4 and 5 of that section particularly provides as follows:-

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

5. Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15."

5. The Defendant urged that a determination as to jurisdiction ought to be determined at the first instance in terms of the **Owners of the Motor Vessel "Lilian S" Caltex Oil (Kenya) Ltd (1989) KLR 1** Where it was stated:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

6. On the issue of jurisdiction, the Defendant added that Article 159 (2) (c) encourages alternative forms of dispute resolution and as such the liaison committee ought to hear the matter. The Defendant argued further that it has been held by the courts that in a situation where the procedure for dispute resolution is provided, the court is obliged not to arrogate on itself jurisdiction.

7. I have considered the depositions of the parties. I am called upon to first determine whether or not this court has jurisdiction to deal with this matter. As was pronounced in **Lilian "S"** (supra), if found to be without jurisdiction, any decision by this court will be a nullity. It is with that in mind that I proceed to determine the objection to jurisdiction. I have given due consideration to Section 38(4) and (5) of the Physical Planning Act, it only applies to instances where one is aggrieved by an enforcement notice issued. Section 10(1) of the Physical Planning Act provides as follows:-

"The Function of the National Physical Planning Liaison Committee shall be-

- a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;***
- b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;***
- c) to advise the Minister on broad physical planning policies, planning standards and economic viability of any proposed subdivision of urban or agricultural land; and***
- d) to study and give guidance and recommendations on issues relating to physical planning which transcend more than one local authority for purposes of co-ordination and integration of physical development.***

(2) *The functions of other liaison committees shall be—*

a) *to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;*

b) *to enquire into and determine conflicting claims made in respect of applications for development permission;*

c) *to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;*

d) *to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguard areas; and to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.*

8. In this particular case, the Plaintiff does not only aggrieved by the issuance of the enforcement notice but also with the confiscation of the car wash machine. It is clear therefore that the Plaintiff could not seek redress from the liaison committee. I am fortified by the case of **Gospel Church** (supra) and further state that it is worth noting that Section 38 quoted above is not couched in mandatory terms. In this particular case, the Plaintiff is not only aggrieved by the issuance of the enforcement notice but also with the confiscation of the car wash machine. It is clear therefore that the Plaintiff could not seek redress from the liaison committee. I am fortified by the case of **Gospel Church** (supra) and further state that it is worth noting that Section 38 quoted above is not couched in mandatory terms. In the circumstances, I find and hold that this court has jurisdiction to hear this matter. The preliminary objection is hereby dismissed.

9. This being an interlocutory application for injunction, the court is concerned with the plaintiff showing *prima facie* case that he has a right to the property, that the property is at a risk of being disposed and that the disposal shall occasion the plaintiff irreparable loss which would not be compensated by costs. In the event the court is in doubt, the application will be decided on a balance of convenience. See: **Giella v. Cassman Brown & Co. Ltd(1973) E.A.358.**

10. In deciding whether a prima facie case has been established, the court must not make definite findings of fact or law. **Black's Law Dictionary, 8th Edition** defines *prima facie* as “**sufficient to establish a fact or raise a presumption unless disproved or rebutted**”. This definition is fortified by the Court of Appeal's pronouncement in **Mrao Ltd v. First American Bank Ltd & 2 Others(2003) KLR 125** where it was stated:-

“In civil cases, it is a case in 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.”

11. The Plaintiff in his affidavit annexed documents which prima facie show that he was issued with a certificate of occupation and that a notice to vacate on account of lack of certificate of occupation was served. The Defendant on the other hand has not rebutted the Plaintiff's allegations. It was further shown that the car wash machine was confiscated and that the premises are likely to be closed. It being his source of livelihood, if the Defendant is not restrained from interfering with the Plaintiff's premises and his tenants in their ordinary course of business he stands to suffer loss. I find that this application has merit and allow it in the following terms:-

a) The Defendant is hereby ordered to release the carwash machine confiscated pending

hearing and determination of this suit.

b) The Defendant is further restrained by an interlocutory injunction from interfering with the Plaintiff's premises plot No. 1489/1490 Kiamumbi Block 5 and its tenants in their ordinary course of business and in particular "Radiant Car Wash" pending the hearing and determination of this suit.

Dated, Signed and Delivered in open court this 22nd day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant