



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 13 OF 2015

SIRIBA ONTITA & 13 OTHERS.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT

RULING

1. The plaintiffs carry on their businesses in Eldoret Municipality Block 7/18, a building on Oloo Street styled Saito Centre. They all claim to be operating under a licence issued by the respondent. On 30th April 2015, the defendant's agents served them with notices revoking their trading permits. They filed a joint plaint on 6th May 2015 craving two reliefs: a declaration that the revocation of licences was illegal; and, an order for injunction to restrain the defendant from revoking the licences.

2. Contemporaneously with the suit, the plaintiffs presented a notice of motion dated 5th May 2015 praying for interlocutory injunction. The grounds are pleaded in a deposition by the 1st plaintiff sworn on even date. The pith of the motion is that the plaintiffs have been condemned unheard. They say that they have valid single business permits for the year 2015. They were not consulted by the defendant before the issuance of the impugned notices. There was no formal hearing. The 1st plaintiff deposes that he has many employees who will be affected by the closure of his business. The plaintiffs contend that the action by the defendant is malicious, discriminatory, illegal, and unconstitutional. The plaintiffs' case is that they will suffer irreparable harm not compensable in damages.

3. The motion is contested. The respondent has filed a replying affidavit sworn by Peter Leley, the County Secretary, on 26th May 2015. There are also grounds of opposition dated 18th May 2015. The gravamen of the reply is that the businesses were being operated in a *basement* of the building contrary to sections 117, 118 and 151 of the Public Health Act.

4. Learned counsel for the plaintiffs has filed comprehensive submissions dated 27th May 2015. Both parties have filed lists of authorities. On 27th May 2015, I briefly heard learned counsel for both parties. I have considered the pleadings, depositions, precedents and rival submissions.

5. The motion is predicated upon section 63 (e) of the Civil Procedure Act. The section empowers the court to grant an interlocutory injunction as it may deem expedient. Like I stated, the present motion seeks injunctive relief. The principles governing the grant of interlocutory prohibitive injunctions are well settled. A litigant must rise to the threshold laid in *Giella v Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a

probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

6. Being a discretionary remedy, there is also ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80, Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

7. The conditions outlined in Giella's case (supra) are sequential “so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed” Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.

8. In Mrao Limited Vs First American Bank of Kenya Ltd and others [2003] KLR 125, the Court of Appeal stated that a *prima facie* case is one –

“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”.

9. The main suit is pending for hearing. It would be prejudicial at this stage to make conclusive findings on the matters in dispute. That will be the true province of the trial court upon tested evidence. Applying the legal parameters I set out earlier, I find as follows. The plaintiffs have been operating the businesses under valid *single business permits* issued by the defendant. On 30th April 2015, the respondent’s agents served them with notices revoking the permits. A sample of the impugned notice is annexed to the supporting affidavit marked SO1. It required the plaintiffs “upon the date and time of receipt of [the] notice and with immediate effect to close [the] business and cease any undertaking in the premises...”. The plaintiffs contend that they were *not* afforded a hearing.

10. On the other hand, the defendant avers at paragraphs 10 and 11 of the replying affidavit that the businesses were being operated in a *basement* of the building contrary to section 151 of the Public Health Act; and that the permit was obtained without a *full disclosure* of all relevant information. It is also contended that the respondent has a statutory duty to maintain a clean and healthy environment in the county. In particular, it is contended the express permission of the Medical Officer of Health was not obtained to carry on the business in a *basement*. The plaintiffs retort that by issuing the permit, the respondent was deemed to have been *satisfied* that all the conditions precedent to the grant of the licence, including public health regulations, were complied with.

11. It is common ground that the impugned notice was served on 30th April 2015. The defendant has not said that it granted the plaintiffs a hearing before delivery of the notice. For the time being, I note that the plaintiffs have not seriously contested that their businesses are located in a *basement* or that they obtained the *express* permission of the Medical Officer of Health to carry on the business there. Certainly, there is no supplementary deposition *controverting* the averments by Peter Leley. If that be the case, then the single business permit may have been issued in contravention of section 151 of the Public Health Act. I say that carefully and without a final finding. Learned counsel for the plaintiffs stated from the *bar* that the businesses are located on the *ground floor*. At the hearing of the main suit, the trial court may wish to visit the premises to clear any lingering doubts.

12. Granted those circumstances, I am hard pressed to say that the plaintiffs have made out a *strong prima facie* case with a probability of success. The alleged breach of sections 117, 118 and 151 of the Public Health Act *prejudices* the grant of a *prerogative* remedy. I am alive that the effect of the notices is to stop the operation of the businesses of the plaintiffs in the current premises. There are costs that go with it. But that loss is clearly *quantifiable*. Damages would be available if the plaintiffs are well advised to amend their pleadings. I cannot then say that failure to grant the injunction will cause *irreparable harm*. And I did *not* hear the plaintiffs to say that the defendant *cannot* meet the damages. Having reached that conclusion, I do not need to weigh the balance of convenience. Kenya Commercial Finance

Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.

13. The upshot is that the notice of motion dated 5th May 2015 is devoid of merit. It is hereby dismissed. Costs shall abide the final judgment.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:-

Mr. Momanyi for the *ex parte* applicant instructed by Anassi Momanyi & Company Advocates.

Mr. Kenei for the respondent instructed by Gumbo & Associates Advocates.

Mr. J. Kemboi, Court clerk.