



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 231 OF 2015

CHARLES THUKU..... PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL DEFENDANT

RULING

1) Charles Thuku, the Applicant herein, took out the motion dated 2nd June 2015, whereof he sought for the following orders interalia:

1. THAT the Respondent, its agents or otherwise be temporarily restrained from, harassing, confiscating the Applicants merchandise and/or interfering with peaceful stay of the Applicant in his designated place of business being Safi Lane off Moi Avenue as envisaged by the business permit dated 2nd March 2015 pending the hearing of this application.

2. THAT the Respondent, its agents or otherwise be permanently restrained from, harassing, confiscating the Applicants merchandise and/or interfering with peaceful stay of the Applicant in his designated place of business being Safi Lane off Moi Avenue as envisaged by the business permit dated 2nd March 2015.

3. OCS, Central Police Station do ensure compliance with the said orders

4. THAT the costs of this application be provided for.

2) The Applicant swore an affidavit he filed in support of the motion Nairobi City County, filed a notice of preliminary objection and the replying affidavit of Hesbon Agwena to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have motion disposed of by written submissions.

3) I have considered the rival written submissions and the grounds stated on the face of the motion. I have also considered the facts deponed in the affidavits filed for and against the motion plus the grounds raised in the preliminary objection. It is the Applicant's submission that the Respondent duly authorised him to conduct his business along Safi lane off Moi Avenue by issuing him with a business permit.

4) The Applicant complained that the Respondent is in the habit of harassing, confiscating his merchandise thus interfering with his business. It is the Applicant's argument that unless the order of injunction is given he stands to suffer substantial loss.

5) The Respondent on the other raised a preliminary objection based on section 11 of the Civil Procedure Act which gives the details of the magistrate's pecuniary jurisdiction. The Respondent point out that since the plaintiff's claim is below the value of kshs.8 million, the same should have been filed before the magistrate's court. The Applicant was of the view that this court has the original jurisdiction to entertain any civil matter of any value. With respect, it is difficult to ascertain in monetary terms the Applicant's claim. What is apparent is that the business permit attached herein is for kshs.2,500/=. Even if one was to say that the aforesaid figure as the value of Applicant's claim, that alone is not fatal to the Applicant's suit because the matter can simply be transferred to the court competent to hear and determine the dispute. On this account alone I find the preliminary objection to be without merit. In the replying affidavit of Hesbon Agwena the Respondent denied knowledge of the existence of plot no. 'O' along Safi lane street, Nairobi. It is argued that the Applicant is illegally operating his business on a pavement along the same lane in contravention of the city by-laws. It is argued that the business permit issued to the Applicant is a trading licence restricted to the premises, plot number, building, floor, door/stall number disclosed on the application by any Applicant.

6) This court was urged not to issue the orders as to do so, the court will issue an order at large which may open floodgates of all manner of suits against the Respondent.

7) Having considered the divergent views submitted by both sides, it is now clear to me that the Applicant was issued with a permit to operate his business of selling shoes and bags along Safi lane as from 2nd March 2015 after paying a fee of kshs.2,500/=. The Respondent has stated that from its records, it is evident that it did not issue such a licence to the Applicant. It is also alluded that the Applicant has not complied with all the requirements to operate a business within the CBD and that if the Applicant has any evidence of compliance, then the same compliance documents and or licenses were fraudulently obtained since the Respondent has no record. The Respondent further pointed out that Moi Avenue where the Applicant alleges to operate a business is a public road for public use and not designated for any business or hawking. The above issues were raised and put to the attention of the Applicant and the Applicant's response is that by virtue of the license he was issued he is entitled to operate the business.

8) It would appear from the submissions of the parties that the Applicant has a permit allowing him to operate hawking business of laying or hanging his wares along the Safi lane. There is no plot number mentioned in the license. There is also an allegation that the permit attached to the Applicant's supporting affidavit is not genuine.

9) The Applicant has not responded to these serious allegations. I am satisfied that the Applicant has not shown a prima facie case with any chance of success.

10) There is one issue which the parties have not raised but it is apparent from the file. The motion is brought under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules. There is no doubt that there is no suit filed which a temporary order of injunction can emerge. Under Order 40 rule 1 of the Civil Procedure Rules, a substantive suit is envisaged. In my view this suit is rendered incompetent.

11) In the end, I find the motion to be without merit. It is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant