



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 360 OF 2011

LAWRENCE TONY KURIA

CHRISTINA NJOKI KURIA

(SUING AS THE ADMINISTRATORS OF THE ESTATE OF

PETER KURIA NDWARU) PLAINTIFFS

- VERSUS -

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

MICHAEL MAINA NGABURIA 2ND DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 19th July 2011. The plaintiffs pray that the 1st defendant be restrained by injunction from licencing the 2nd defendant or other traders to trade or display goods in front of the property known as Dagoretti/Riruta/T.32. The plaintiffs also pray that the 1st defendant be restrained by injunction from interfering with the plaintiffs' storm water drainage system adjacent to the property. The motion is expressed to be brought under order 40 of the Civil Procedure Rules.

2. The plaintiffs are the administrators of the estate of Peter Kuria Ndwaru, deceased, the owner of the property situated at Kawangware shopping centre, Nairobi. It is deponed that the property faces an open air market. The first plaintiff avers that the 2nd defendant has been unlawfully licenced by the 1st defendant to display and trade in merchandise outside his premises. The 2nd defendant has constructed temporary wooden structures atop the storm water drainage channel constructed by the plaintiffs. Those actions have had a triple effect: they have blocked the storm water drainage; blocked the entrance to the plaintiff's property; and paralysed the plaintiff's business.

3. The motion is contested. The 2nd defendant has filed a replying affidavit sworn on 8th September 2011. He avers that he is a member of Kawangware Ushirikiano self-help group. It is a group of hawkers and small scale traders. He blames the plaintiffs for encroaching upon public land. He states that he operates from temporary wooden structures on public land outside the plaintiffs' premises. His case is that the plaintiffs are expanding the buildings onto public land. Lastly, he avers that his business is the only source of income. Accordingly, the grant of injunctive relief would prejudice his livelihood.

4. The 1st defendant filed a statement of defence dated 16th September 2012. It denies breach of its

statutory duties. It denies all the claims by the plaintiff and puts him to strict proof. The 1st defendant did not file a replying affidavit. The parties have filed written submissions. The plaintiffs' submissions are dated 11th October 2011, those of the 1st defendant are dated 28th March 2012 and those by the 2nd defendant are dated 21st October 2011.

5. I have heard the rival arguments. The principles for grant of injunction are well settled by the time honoured decision of Giella Vs Cassman Brown & Company Limited [1973] E.A. 358. The plaintiff must demonstrate a *prima facie* case with a probability of success; show that he stands to suffer irreparable harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience. Being a discretionary remedy, there is also ample authority that a person who has misconducted himself in the eyes of equity will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank & another [2004] 1 KLR 80.

6. When I juxtapose those principles against the facts, I find further as follows. The plaintiffs are the administrators of the estate of Peter Kuria Ndwaru, deceased. It is not disputed that the deceased was the owner of Dagoretti/Riruta/T32. He had erected a permanent building or shops on the land. I have seen a copy of the certificate of title in the name of the deceased. The 2nd defendant does not deny that he displays and trades in wares outside the plaintiffs' premises. From the pictures attached by both parties, the 2nd defendant's structures are semi-permanent and are erected on top of a storm drainage channel under construction by the plaintiffs. Neither the plaintiff nor the defendant owns that space. It seems to be a public area or part of a road reserve. But it is clear to me that the 2nd defendant's business is blocking the plaintiff's shop frontage.

7. The 2nd defendant is not entirely candid. He says his business is not in the plaintiff's way. The evidence before me shows that the 2nd defendant's stalls are right in front of the plaintiffs' building. There are pictures of the 2nd defendant's customers or members of the public shopping from the temporary stalls. It does not seem to me to form part of an organized open air market referred to by the defendants. I would agree with the plaintiffs that that prejudices their business. I am however alive that I am not seized of all the evidence at this stage. That will be the true province of the trial court. From the evidence available now, and particularly exhibit "MNN3" to the 2nd defendant's affidavit, it is clear that the 1st defendant has been issuing a daily hawkers permit or receipt to the 2nd defendant. I do not think the intention of the council is to licence the 2nd defendant to trade at the door step of the plaintiff. I do not think that the issue of an informal daily hawkers licence grants the 2nd defendant the nature of proprietary rights he asserts. In my view the 1st defendant should not allow haphazard developments in the city that prejudice the rights of a registered proprietor of permanent and well established business premises. It is anathema to its own by laws and the Physical Planning Act.

8. I am satisfied that the actions and conduct of the 2nd defendant's business are harmful to the plaintiffs' proprietary interests and business. The long term losses to the plaintiffs cannot be compensable in damages. In any event, the 2nd defendant states he is one of a fluctuating group of hawkers trading outside the plaintiffs' premises. I doubt very much that the 2nd defendant or that unnamed group of hawkers would meet such damages. Even if I were to be wrong in that holding, it is clear that the rights of the plaintiffs largely outweigh those of the 2nd defendant at this stage. The balance of convenience would tilt in favour of the plaintiffs as registered proprietors of permanent premises from blockage of their property's frontage. See Nelson Muguku Vs Kikuyu Town Council Nairobi, High Court ELC 329 OF 2009 [2012] eKLR, Gitau Vs Savage & 4 others [2006] 1 KLR (E & L) 463, Park View Shopping Arcade Ltd Vs Charles M. Kangethe and others [2006] 1 KLR (E & L) 463.

9. For all the above reasons, I find that the plaintiffs have established a strong *prima facie* case with a probability of success. They have reached the threshold for grant of interlocutory prohibitive injunction. In the result, I order that the 1st defendant be and is hereby restrained by injunction from licencing the 2nd defendant or other traders to trade or display any wares, goods or merchandise on the frontage of Dagoretti/Riruta/T.32 or the public road running parallel to the property. For the avoidance of

doubt, the 2nd defendant is restrained by injunction from trading, displaying or dealing in goods, wares or merchandise on the frontage of Dagoretti/Riruta/T.32.

10. I decline to grant an injunction against the 1st defendant from interfering with the plaintiffs' construction of storm drainage because it seems to be outside the plaintiffs' property. I grant the plaintiff costs of the application in any event.

11. Lastly, the main suit shall be determined within one year. In default, the orders of injunction shall lapse.

It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of October 2012.

G.K. KIMONDO

JUDGE

Rulings read in open court in the presence of

Mr. Koech for Mr. Macharia for the Plaintiffs.

No appearance for the 1st Defendant.

Mr. Njuguna for the 2nd Defendant.