



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.615 OF 2008

MWATHI
MUGWE.....1ST
PLAINTIFF

JOEL KAMAU
MWANGI.....2ND
PLAINTIFF

DOMINIC WAMBUA
.....3RD PLAINTIFF

(Suing on their own behalf and on behalf of 403 other stall owners &
traders at Eastleigh open-air market Nairobi)

VERSUS

ALI SHEIKH
MOHAMUD.....1ST
DEFENDANT

FARAH MOHAMED
BARROW.....2ND DEFENDANT

CITY COUNCIL OF
NAIROBI.....3RD
DEFENDANT

GOLDEN LIME INTERNATIONAL
LTD.....4TH DEFENDANT

ABDIRASHIA
ABDISHARIFO.....5TH
DEFENDANT

ADAN HAJI
ISSAK.....6TH

DEFENDANT
MOHAMUD
SHEIKH.....7TH
DEFENDANT

CONSOLIDATED WITH
REPUBLICOF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 24 OF 2007

MWATHI
MUGWE.....1ST
PLANTIFF

JOEL KAMAU
MWANGI.....2ND
PLAINTIFF

DOMINIC
WAMBUA.....3RD
PLAINTIFF

(Suing on their own behalf and on behalf of 403 other
stall-owners & traders of Eastleigh Open-air Market Nairobi)

VERSUS

ALI SHEIKH
MOHAMUD.....1ST
DEFENDANT

FARAH MOHAMED
BARROW.....2ND
DEFENDANT

CITY COUNCIL OF
NAIROBI.....3RD
DEFENDANT

CONSOLIDATED WITH
REPUBLICOF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 589 OF 2008

ALI SHEIKH MOHAMED AND

FARAH MOHAMED BARROW T/A ALFA

TRADERS.....PLAINTIFFS

VERSUS

CITY COUNCIL OF

NAIROBI.....DEFENDANT

GOLDENLIME INTERNATIONAL

LTD.....INTERESTED PARTY

R U L I N G

1. By a consent order recorded on 30th September, 2009, ELC No.24 of 2007, HCCC No.615 of 2008, HCCC No.589 of 2008 and HC Miscellaneous Misc. No.37 of 2009 were consolidated. Since there are many parties involved in the suits, it is important for purposes of clarity and for avoidance of doubt, to indicate how they shall be referred to in this ruling. Mwathi Mugwe, Joel Kamau Mwangi, and Dominic Wambua (who are the plaintiffs in HCCC No.615 of 2008 and HCCC No.24 of 2007) shall be referred to as the plaintiffs. Ali Sheikh Mohamud and Farah Mohamed Barrow who are defendants in HCCC No.615 of 2008 and HCCC No.24 of 2007 and plaintiffs in HCCC No.589 of 2008 shall be referred to as 1st and 2nd defendants. The City Counsel of Nairobi who is a defendant in all the suits shall be referred to as 3rd defendant. Golden Lime International who is a defendant in HCCC No.615 of 2008, and an interested party in HCCC No.589 of 2008 shall be referred to as 4th defendant. Abdirashia Abdisharifo, Adan Haji Issak and Mohamud Sheikh who are 5th, 6th and 7th defendants in HCCC No.615 of 2008 shall be referred to as such.

2. Two applications have been argued before me. The first application is a chamber summons dated 26th May, 2010 (which was wrongly referred to as dated 27th May, 2010). The application was filed by the plaintiffs. The plaintiffs who had filed the original suit i.e. HCCC No.615 of 2008 on their own behalf and on behalf of 403 others, seek leave of the court to have an additional 306 plaintiffs joined to the suit. The application is supported by an affidavit sworn by one of the plaintiffs, Mwathi Mugwe. The plaintiffs have also filed written submissions in support of the application.

3. In short, the plaintiffs contend that the additional 306 persons should be brought on board as plaintiffs for their interests to be catered for, in regard to damages which were occasioned by the unlawful demolition of their business premises. It is contended that the persons sought to be added, include stall owners and or traders, to whom the stalls were let, for conducting business. The applicants further explain that although originally only 4 or 3 plaintiffs were named as representing the owners of 403 stalls, which were standing by 10th January, 2009 before the demolition, some of the stalls had been let out to traders for business. The total number of 709 plaintiffs proposed by the intended amendment represents the list of allottees and traders who have given authority for the suits to be filed on their behalf.

4. The plaintiffs maintain that there has been no inordinate delay in bringing the application for amendment as the claim was fairly technical. It also required agreement, as it involved many people. The plaintiffs further contend, that they have come to court with clean hands, and that the application is merited, as the claim of the intended additional plaintiffs is valid. It is argued that the presence of the additional plaintiffs is necessary for determination of all the issues arising between the parties, thereby avoiding a multiplicity of suits. It is further argued that no prejudice will be suffered by the defendants as the plaintiffs' suit has not substantially changed.

5. The 1st and 2nd defendant did not object to the application for amendment, whilst the rest of the defendants objected. The 4th, 5th, 6th and 7th defendants objected to the application for amendment and jointly filed grounds of opposition raising the following grounds.

- (i) That the plaintiffs do not have a common interest or grievance, and the relief sought is not in its nature beneficial to all.
- (ii) That the 306 purported new plaintiffs have no cause of action against the 4th, 5th, 6th and 7th defendants.
- (iii) That the plaintiffs' application is detrimental and prejudicial to the 4th, 5th, 6th and 7th defendants.
- (iv) That the plaintiffs are guilty of laches.
- (v) That the plaintiffs' application is an abuse of the court process, and intended to delay the expeditious hearing and disposal of the consolidated suits.
- (vi) That the plaintiffs' application has no merit, is incompetent, fatally defective, and ought to be dismissed with costs.

6. The 4th, 5th, 6th and 7th defendants also filed joint submissions, which were highlighted before me. Relying on *Duke of Bedford vs Ellis [1901] AC 1* it was argued that in order to bring a representative suit, it must be shown that all the members of the class sought to be represented have a common interest, a common grievance, and that the relief claimed in the proceedings is in its nature beneficial to all. It was submitted that the plaintiffs do not have a common interest or grievance, nor is the relief sought in its nature beneficial to all.

7. It was submitted that the list proposed by the plaintiffs in the application dated 26th May, 2010 has several deliberate inaccuracies. These inaccuracies were identified as follows:

- (i) The draft re-amended list of plaintiffs demanding special damages has 403 traders yet the actual number listed is 397 for reason that some of the plaintiffs have more than one stall.
- (ii) The draft re-amended list of plaintiffs demanding special damages is said to contain 403 traders "**who were not original allottees**" yet the said list of traders contains names of not less than 75 allottees.
- (iii) Leave of court has been sought to re-amend "the plaint by way of additional 306 plaintiffs" over and above the 403 stalls owners. This would make a total of 709 plaintiffs, yet the draft as presented indicate a total of over 724 plaintiffs. This is further compounded by the fact that the total number of persons said to be plaintiffs and giving authority to Mwathi Mugwe, Joel Kamau Mwangi and Dominic Wambua to sue is 711.

(v) The exhibit marked MM-1 annexed to the supporting affidavit sworn by Mr. Mwathi Mugwe on 26th May, 2010 contains 711 names of plaintiffs. Whilst the names of all the 403 purported stall owners in the re-amended plaint appear in the said list, the amended list of purported traders in the re-amended plaint contains at least 28 names that do not appear in annex MM-1. The end result is that there are at least 28 strange people who have given authority to sue yet they are not plaintiffs in that they are neither in the list of allottees nor in that of traders.

8. It is further submitted that since some of the plaintiffs in the list are original tenants of 3rd defendants while others are assignees of the council's tenants, there are two materially different classes of rights which cannot be joined in the same cause of action. The reliefs sought are also different, in that some of the plaintiffs are seeking special damages and others general damages. The defendants relied on **Smith vs Cardiff Corporation [1954] QB 226**, in which the court held that there was no common grievance regarding a notice for increase of rent for 13,000 tenants as the tenants were in different categories and paid different rents.

9. Further, it was argued that the plaintiffs were guilty of laches as no attempt was made to amend the list of plaintiffs for 3 years. Moreover, the attempt to amend was only made after discrepancies were pointed out. It was argued that an amended plaint was filed on 23rd October, 2009 during which the plaintiffs had opportunity to add the additional 306 plaintiffs. However, that was not done. Relying on **Kyalo vs Bayusuf Brothers Ltd [1982]; Mechanized Systems Ltd vs Guardian Bank Ltd [2005] eKLR; and Mehta vs Shah [1985] EA 321**, the court was urged to reject the application as it was brought after an undue delay which was not explained.

10. The 3rd defendant adopted the submissions made for the 4th, 5th and 6th defendants and also filed written submissions in which it was reiterated that the application by the plaintiff to amend the plaint coming after more than 3 years, was an attempt to defeat the hearing of the consolidated suits. Relying on **Central Kenya Ltd vs Trust Bank Ltd Civil Appeal No.222 of 1998 (Nairobi)**, it was argued that a party who was guilty of undue delay was not deserving of the exercise of the court's discretion in granting leave to amend pleadings. It was further contended that the plaintiffs had not shown any good cause for the court to exercise its discretion in their favour.

11. It was argued that the application for amendment was an abuse of the court process. It was pointed out that there were more than 724 plaintiffs in the re-amended draft instead of the expected 709 plaintiffs, whereas the number of persons said to be plaintiffs and giving authority to sue is 711. It was also pointed out that the chamber summons dated 26th May, 2010, does not comply with mandatory requirements of Order VIA Rule 7(1) of the Civil procedure Rules as it failed to indicate the date of the order allowing the amendment.

12. It was submitted that the plaintiffs including the proposed new plaintiffs have no cause of action against the 3rd defendant. It was argued that the proposed additional plaintiffs were not a necessary party to the plaintiffs' suit, as their presence was not necessary to enable the court to effectually and completely adjudicate and settle all questions involved in the suit. Relying on **Sarkar's Law of Civil Procedure 10th Edition Vol.2 page 776**, it was submitted that there was no right or any relief to the 3rd defendant as the 3rd defendant did not demolish any structures. The court was therefore urged to dismiss the application.

13. I have carefully considered the plaintiffs application for re-amendment of the plaint. Under Order VIA Rule 5(1) of the Civil Procedure Rules, the court has general powers to allow the amendment of pleadings, for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings. In this case, the applicants maintain that the persons sought to be joined as co-plaintiffs have a common grievance with the plaintiffs in this suit. The applicants explain that some of the original allottees of space for market stalls had sublet their stalls, upon completion of the construction. They are therefore some traders who were not initial allottees, but whose stocks and goods in trade were destroyed when the stalls were demolished.

14. In his affidavit sworn in support of the application, Mwathi Mugwe has given a list of a total of 711 persons who have given authority to the plaintiffs to sue on their behalf. An attempt has also been made to identify the original allottees and the traders although as observed by the defendants, there is some element of confusion in that regard. Be that as it may, in the draft amended plaint, the plaintiffs claim falls into two categories. i.e. firstly is the claim by the original 403 plaintiffs who are original allottees. The claim is for loss and damage for the cost of the stalls, structures and fixtures, loss and damage of stocks, ware and tools of trade belonging to the original allottees, and loss of earnings in lieu of demolition notice. Secondly is the claim by traders to whom some of the original allottees had sublet their stalls i.e. loss and damage of stocks, and wares of trade, and loss of daily income arising from failure to give notice of demolition. In my considered view, these are two different classes of claimants. Although the claims arise from the same cause of action, they are actually different. One is a claim arising out of a direct relationship between the original plaintiff and the 3rd defendant, and the 2nd class of claimants is third parties, who do not seem to have a direct relationship with the 3rd defendant. Given the number of the plaintiffs involved in the litigation, it is evident that it would neither be convenient nor prudent to try the two classes of claims in one suit.

15. Moreover, the contention that granting the amendment would avoid a multiplicity of suits does not really hold. This is because there are essentially two classes of claims, each of which would be tried separately. The suit for the original allottees has already been consolidated. The other class which is traders affected by the defendant's actions, but who are not original allottees can also consolidate their claims in a separate suit. Further, the plaintiffs have not sufficiently explained the undue delay in bringing the application for amendment. The plaintiff's suit was essentially brought by a certificate of urgency over 3 years ago. By the time the suit was brought the alleged damage had already been occasioned.

16. The explanation that the claim was technical and involved many people, provides no justification for the inordinate delay by the traders in taking over 3 years to decide that they needed to pursue their claim. Thus the plaintiffs have not satisfied this court that the court should exercise its discretion in their favour. This dispute involves businesses and there is no doubt that the continued delay of the suit is causing prejudice to the parties. For the above reasons, I reject the application for re-amendment of the plaintiffs' suit.

17. The 2nd application was an application which was partly argued orally before Mbogholi J. on 20th May, 2010. The application was made by the 4th defendant who sought to have the order of status quo issued by the court discharged. Following directions made by Mbogholi J. written submissions were also filed in regard to that application. The 4th defendant, who was the mover of the oral application, filed written submissions urging the court to discharge the order of status quo. The 4th defendant appreciated

that by virtue of the consolidation of all the suits, all pending applications in the consolidated suits were subsumed in the consolidation and that the order for status quo granted on 15th January, 2009, by Kihara Kariuku J. is the one which remained in force.

18. The 4th defendant explains that the status quo as at that time was that the 4th defendant had secured possession of the suit property and commenced re-development activities. The order of status quo was to last until 3rd February 2009 during which period efforts at settlement were to be pursued with a view to relocating the plaintiffs. The order was extended severally until 2nd June 2009 when due to the plaintiffs' absence the suit was adjourned without the order for status quo being extended and the order thereby lapsed. The 4th defendant therefore resumed its development activities.

19. The plaintiffs then filed an application dated 18th June 2009 in an attempt to have the order of status quo which had lapsed reinstated. Thereafter the court on its own motion ordered status quo to be maintained until the hearing and final determination of the consolidated suits. The 4th defendant complains that one year down the road the suit has not been heard, instead the plaintiff is now attempting to re-amend an amended plaint thereby delaying the suit further. The 4th defendant maintains that the circumstances under which the orders of status quo was granted have now changed.

20. The 4th defendant contends that the 1st and 2nd defendants have been guilty of laches thereby delaying the hearing of the suit. The 4th defendant accuses the 1st and 2nd defendants and the plaintiffs of failing to exercise good faith and grossly abusing the court process, to the prejudice of the 4th defendant.

21. The 4th defendant argues that the order of status quo should be discharged in order to obtain the overriding objective of reducing delay, costs and expenses and determining the suits expeditiously. In that regard ***City Chemist (NBI) & Anor vs Oriental Commercial Bank Ltd Civil Application No. Nai 302/2008(VR)*** was relied upon.

22. It was submitted that an injunction being an equitable relief, a court of equity which administers justice according to fairness, should not allow the injunction to be used to exercise unfairness to others. It was pointed out that the plaintiff has not manifested any intention of facilitating the expeditious disposal of the suit. The court should not therefore assist them in delaying or obstructing the course of justice. The court was urged to discharge the order of status quo as the same was being used as an end in itself rather than holding the legal status quo.

23. ***George Muraya Kirira Vs Zakock Enane (2005) eKLR*** was cited for the proposition that the court has unfettered discretion to discharge or vary an order of injunction if the ends of justice so demands it. The 4th defendant maintained that due to the order of status quo, it was incurring substantial losses which it may not be able to recover from the plaintiff and the 1st and 2nd defendant as no undertaking as to damages had been given. On the other hand neither the plaintiff nor the 1st and 2nd defendants had shown that they would suffer irreparable loss or prejudice if the order of status quo is discharged.

24. The 3rd Defendant i.e. City Council of Nairobi also filed written submissions urging the court to vacate and discharge the order of status quo. It was submitted that the 3rd defendant will continue suffering huge economic losses if the order of status quo remains in place. This is because it has a lease in place which is not generating any revenue as was intended. It was maintained that no irreparable harm would be suffered by the plaintiff and the 1st and 2nd defendants if the order of status quo was discharged.

25. The plaintiffs opposed the application for discharge of the order of status quo. They pointed out that the public private partnership agreement entered into between the 3rd and 4th defendants was entered into in contravention of an interlocutory injunction issued in HCCC No. 24 of 2007, and this is what necessitated HCCC No. 615 of 2008. It was maintained that even the demolition of the plaintiff's structures and business, and their subsequent eviction was also done in contempt of court orders. It was argued that the interlocutory orders previously issued in the various suits still remain in force.

26. It was submitted for the plaintiff that the status quo order could not lapse unless parties consent to that position. It was contended that the suit property was a market run and operated by the plaintiffs, and they therefore have a claim over it. Thus no party should be allowed to do anything on the suit property until the matter is heard and determined after the full hearing of the suit. It was argued that if the 4th defendant was allowed to work on the land it would interfere with the land such that, if the plaintiffs were to succeed in their claim they would be prejudiced. The court was thus urged to maintain the order of status quo.

27. Ali sheikh Mohamud and Farah Mohamed Barrow (who are 1st & 2nd Defendants in 615/08) have also filed written submissions. Unlike the 4th defendant, they opposed the application and urge the court not to discharge the order of status quo. The 1st and 2nd Defendant point out that the court granted an order of interim injunction against the 1st & 2nd Defendants and the 3rd Defendant in ELC 24 of 2007. The order which 1st & 2nd Defendants allege is still subsisting restrained the Defendants from dealing with the suit property. It is alleged that the PPPA and the subsequent agreement to develop the suit property between 3rd & 4th Defendants were done in contravention of this court's order. It is submitted that orders of status quo in regard to the suit property were further issued on 28th November 2008 in ELC. 589 of 2008 which orders have been registered against the suit property.

28. It was therefore submitted that there were orders given by other courts in regard to the suit property which tie the hands of the court. It was maintained that the court has stayed the illegal attempts by the 3rd Defendant to cancel the title of 1st and 2nd Defendant. The 1st & 2nd Defendant submits that there is a 99 year lease subsisting in their favour in regard to the suit property. They argue that In the absence of any fraud or misrepresentation the title of 1st & 2nd Defendant is indefeasible. It was argued that the attempts by the 4th Defendant to lift the orders of status quo must fail because the lifting of the status quo was intended to enable the 4th defendant develop the suit property when:

- (i) It holds a PPPA with the 3rd Defendant to develop the suit property which is registered in the name of 1st & 2nd Defendant.

(ii) The 3rd defendant granted the PPPA in gross contempt of subsisting court order.

(iii) The 3rd Defendant got possession of the suit property by illegally demolishing the structures of the plaintiff in contempt of court orders.

(iv) The parties consented to maintaining the orders of status quo.

29. I have carefully considered the submissions made in regard to the status quo orders. Firstly, there appears to be some misconception regarding the orders sought to be discharged. From the court record it is clear to me that the order of status quo which the 4th defendant sought to have discharged was the one issued by Hon. Msagha Mbogholi J. on 25th June, 2009. That order was not a consent order but was an order issued by the court exercising its inherent powers under Section 3A of the Civil Procedure Act.

30. From the court record, it is evident that the order of status quo made on 25th June, 2009 was intended to preserve the status quo on the ground as at that date, until the application dated 18th June, 2009 filed by the plaintiffs was heard and determined. That application although listed for hearing on several occasions has never been heard. Instead on 30th September, 2009, the parties entered into a consent for consolidation of the 4 suits, finalization of pleadings and pre-trial procedures with a view to having a hearing date fixed on priority basis. The parties also agreed to have the status quo preserved.

31. It may well be as was argued by the 1st and 2nd defendant that there are other injunctive orders in force. If that be so, then this court has not been moved to discharge such orders, nor has the court been moved to deal with any contempt or contravention of such orders. The oral application for discharge of the order of status quo simply related to the order made by Msagha Mbogholi J. on 25th June, 2009 and re-enforced by the parties consent. It is evident that the application made by the 4th defendant on 20th May, 2010 for discharge of the order of status quo was out of frustration after the 4th defendant realized that rather than hasten the hearing of the suit as agreed the plaintiff's were dragging their feet and appeared to be using the order for status quo as an end rather than a temporary measure to freeze the legal position.

32. Again from the court record it is evident that the 4th defendant's frustrations are not without justification. Contrary to the consent order recorded by the parties on 30th September, 2009, for finalization of pleadings and pre-trial procedures, the plaintiff has not complied with the consent instead the plaintiff is moving backwards in an attempt to enjoin more plaintiffs to the suit. Thus the plaintiff has frustrated the consent entered into by the parties and is estopped from relying on that consent.

33. It is common knowledge that the suit property is intended to be used as business premises and therefore delay in finalizing this dispute is causing a lot of financial loss to the parties involved. In a situation such as this where interlocutory orders of the court are causing hardship, injustice or oppression to one party, this court is not toothless but has discretion to intervene and to stop such injustice by

discharging or varying the orders.

34. In this case, the orders of status quo have been in force since 25th June, 2009 which is well over 1½ years. These orders cannot be allowed to continue to remain in force indefinitely. Although I decline to discharge the order of status quo I find it necessary to limit its lifetime.

35. The upshot of the above is that I reject the oral application for discharge of the order of status quo, but direct that the order of status quo shall remain in force for a period of 90 days only, from the date hereof, within which period the hearing of the suit must be finalized.

36. In order to ensure that the hearing of this suit is not delayed any further, I shall give the parties a hearing date on priority. Those shall be the orders of the court.

Dated and delivered this 4th day of February, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Nyaberi for the plaintiffs

Mugunda H/B for the 1st and 2nd defendants

Owino & Ochola for 4th defendant

Owino H/B for Murgor for 5th, 6th & 7th defendants

B. Kosgei - Court clerk