



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 308 OF 2010

DAVID KAMAU KARIUKI & 98 OTHERS.....PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

This suit is filed by 99 plaintiffs who describe themselves as traders in Nakuru Municipality, selling second hand clothes at Free Area, Lanet Mitumba Air Market and have done so for the last 30 years. They contend to have paid the requisite fees to the Municipal Council of Nakuru, the defendant herein. By notice dated 12/11/2000, the plaintiffs were ordered to vacate the said area to pave way for construction of a fresh produce market and no alternative has been provided to them. They seek orders of a permanent injunction to issue against the defendant restraining it from constructing a fresh produce market on the suit land, other than for sell of second hand cloths and in the alternative, a mandatory injunction to compel the defendant to factor into account the interests of the plaintiffs in constructing the new market and a mandatory injunction to allocate the plaintiffs stalls in the new market. Filed simultaneously with the plaint was the Chamber Summons dated 18/11/2010 in which the plaintiffs seek a temporary injunction to restrain the defendant from evicting the plaintiffs from the suit land or commencing construction or in any way interfering with the plaintiffs' businesses on the suit land pending hearing and determination of the suit (prayer 3). The application is supported by grounds found in the body of the application and the affidavit of David Kamau Kariuki, the 1st plaintiff herein. It is the plaintiffs' contention that the defendant's actions are illegal, unlawful and bent on locking the plaintiffs from the fresh produce market. During the meetings with officials of the respondent, the plaintiffs were informed that the Ministry of Finance was only giving out money to construct a fresh produce market to which the plaintiffs do not object, save that they should be allocated an alternative piece of land to carry on their trade otherwise the plaintiffs and their families will be rendered destitutes yet **Article 43 1(b) & (c)** guarantees every person a right to earn a livelihood. The plaintiffs also allege breach of their rights under **Section 27** of the **Constitution**, right against discrimination. They urge that they have a prima facie case with chances of success and relied in **GIELLA V CASSMAN BROWN & CO. LTD (1973) EA 358**.

In opposing the application, Abdirizak Sheikh Abdullahi, the Clerk of the defendant swore an affidavit in which he deponed that the application is frivolous, bad in law and misconceived and that the plaintiffs have not proved a prima facie case or that they will suffer irreparable loss. It was deponed that the plaintiffs have not demonstrated that they operate in Free Area, Lanet Mitumba Air Market and that the said market has not been used by 'mitumba' traders alone but has mixed businesses. It is denied that the plaintiffs have demonstrated that they have been paying the necessary fees to the respondent and that annexure (DKK2) receipts is suspect. It was further deponed that the respondent needs to construct a fresh produce market shade to cater for all traders dealing in different goods and services and the defendant has held several meetings with stakeholders towards its realisation. Whereas the respondent's officers were initially booed by some rowdy people, the latter meetings went on smoothly. The plaintiffs

have not demonstrated that they are residents of Free Area or that they were affected by the notice given on 12/1/2010. It is the defendant's case that it has acted in good faith in the interest of all the inhabitants of Nakuru and that this application is premature since none of the stakeholders has complained or demonstrated any prejudice. The tender for the construction of the market has been awarded and the defendant and other stakeholders are likely to suffer substantial loss if this application is allowed.

This suit was filed by 99 plaintiffs. The Chamber Summons was supported by the affidavit of David Kamau Kariuki, who exhibited some receipts (DKK2) as evidence that they have been trading in the market for the last 30 years and that they pay monthly fees to the respondent. The respondent has disputed that allegation. The respondent's counsel observed that only 11 out of the 99 plaintiffs annexed monthly receipts of a maximum of three months. They did not exhibit any receipt for December 2010. The defendant's counsel also observed that 28 of the receipts bear names of persons not parties to this suit while others like the 53rd and 54th plaintiffs deal in sale of new cloths. I find that what has been produced before the court does not demonstrate that the 99 plaintiffs are traders in used clothes in the disputed market; the 99 have not demonstrated that they have been paying fees to the respondent for trading in the market. Only 11 people have exhibited about 3 receipts, but others have nothing to prove that they have any interest in the said market. Further to the above, there are receipts for people who do not trade in 'mitumba'. Why would their receipts find their way with the applicants? Will the court presume that there are others who were not availed any proof of being 'mitumba' traders and are strangers to this matter? The plaintiffs have filed this suit alleging to have a common interest in the matter, that they are traders in 'mitumba' and they are threatened with removal from the market upon construction of a fresh produce market. However, from the evidence I have considered above, they have failed to demonstrate that all the 99 plaintiffs have a common interest in this matter. Some of the plaintiffs have not even demonstrated a personal interest and I find that they have not proved that they have a prima facie case with a likelihood of success.

The respondent exhibited minutes of a meeting with stakeholders on 17/11/2010, who included traders from the market in which the District Officer confirmed that the second hand clothes traders had nothing to fear because they would also be allocated stalls at the market and that is what is still maintained. Besides under **Section 145 (p) Local Government Act**. The respondent has the mandate to establish, maintain, let and manage public markets and marketing buildings. The section reads as follows:-

“S.145 A local authority may –

(p) (i) establish, maintain, let and manage public markets and market buildings:

Provided that no county or urban council shall establish any market within a distance of three miles of the boundary of its area without the consent of the Minister; and

(ii) control markets in its area by whomsoever established and, where a market has been established by the local authority, prohibit the establishment of any other market within its area without the permission of the local authority; and

(iii) control public sales held on any public or open space or in any public building; and

(iv) control places used for the purpose of selling publicly, or exposing for sale, any cattle, horses, sheep, goats, pigs, poultry or other livestock; and

(v) where provision is made for any such sale in any market established by the local authority or at any place provided by the local authority for the purpose, prohibit such sales elsewhere than in or at such market or place and license persons to conduct such sales in or at such market or place and require the deposit of security by an applicant for such licence.”

The respondent has the statutory mandate to create and maintain markets. The decision of the respondent is made in the public interest. Though the applicants have a right to a livelihood as guaranteed under

Articles 43 (1)(b) and **(c)** the same are not absolute. They are subject to the rights of others and public interest. **Act 20(5)** and **Act 24(1)** of the **Constitution** limits the said rights to availability of resources the rights of others and public interest. The state cannot possibly create different markets for every kind of business. In this case it seems only about 11 persons object to the Fresh Produce Market project. **Section 20(d)** reads:-

“S.20(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion..”

“S.24 1(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.”

If the respondent who is charged with town planning is of the view that there is need for such a market and the applicants’ interest is taken into account, then the right of the few ‘mitumba’ traders can not be elevated above those of the other traders in other commodities or services.

The defendant has exhibited evidence to the effect that a tender for the construction of the market has already been concluded with Resjos Enterprise, for Kshs.10,627,479/-. The letter addressed to the winners of the tender is dated 8/4/2010. Interfering with the said contract is a costly affair, so that in the event the court does not grant final orders to the plaintiffs, they may not be able to make good the damage or loss that may have been suffered/incurred. The scale to deny an order of injunction tilts in favour of the respondent.

From the foregoing, I find that the plaintiffs have not demonstrated that they have a prima facie case with chances of success or that they will suffer irreparable loss. The balance of convenience tilts in favour of the respondent that the market is for the public, and there is a contract that has been signed towards its construction and that project should proceed. I decline to grant the interim orders and dismiss the application dated 8/11/2010. Costs to abide the main suit.

DATED and DELIVERED this 25th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Naija holding brief for Mr. Matiri for the plaintiffs.

Mr. Bii holding brief for Mr. Orege for the defendant.

Kennedy – Court Clerk.