



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.8 OF 2008

BERNICE WANGARI CHEGE.....APPELLANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

[An appeal from the Judgment in Nakuru C.M.C.C.NO.1447 of 2002 by Hon. W. Kagendo, Senior Resident Magistrate, Nakuru dated 14th January, 2008]

JUDGMENT

The appellant in this appeal, Bernice Wangari Chege brought an action by way of a plaint seeking a poorly drafted prayer for:

“a) mandatory injunction restraining the defendant by itself, its agent and/or servants from closing, evicting, interfering and/or dealing in any matter whatsoever with stall No.A52/53 and 75-80 Nakuru West Market.”

(Emphasis added)

A mandatory injunction cannot restrain an act. It can only command the performance of an act. I believe the appellant wanted a perpetual prohibitory injunction for the following reasons.

The appellant was allotted stall Nos.A52 and 53 as well as Nos.75-80 Nakuru West Market by the respondent, Municipal Council of Nakuru. It was the appellant’s contention that the respondent issued her with a single business permit for the stalls which had been connected together by the demolition of the partition separating them. That this was done with the express written permission of the respondent.

On 6th August, 2002, the respondent demanded from the appellant Kshs.26,953/= being rent arrears for stall Nos. 75-80 Nakuru West Market. One week later on 13th August, 2002, the respondent’s agents and/or servants ordered the closure of the appellant’s premises. It was claimed by the appellant that this closure was unlawful.

In an interlocutory application, the appellant sought and obtained a mandatory injunction against the respondent and the business premises were opened.

In their defence the respondent maintained that the appellant had a single business permit for stall Nos.A52 and 53 and not for stall Nos.75-80; that the appellant made alterations to the premises with the aim of evading her obligation; that the appellant was duty-bound to pay for single business permit contemporaneously with rent for the stalls. The learned trial magistrate visited the *locus in quo* and found in her judgment that the appellant was obliged to pay rent for the portion of the business premises which was within the market hence her holding that the respondent acted lawfully in demanding rent and closing

the premises

The appellant was aggrieved and brought this appeal on six grounds which can be condensed as follows:

- i) that the finding was not consistent with the evidence;
- ii) that the learned magistrate erred in finding that the business premises attracted both daily fees and a single business permit;
- iii) that the lower court erred in finding that the respondent had a right to recover accrued fees by way of distress without any court order; and
- iv) that the court erred in finding that part of the business was inside while the other part was outside the market.

The respondent opposed the appeal arguing that the appellant had two sets of stalls attracting different charges. That stall Nos.A52 and 53 located along the perimeter wall and facing Biashara Street were subject to a Single Business Permit while stall Nos.75-80 being inside the market were subject to rent; that the modification of the stalls by demolition of the partition walls did not affect the payment arrangements.

Having duly considered the foregoing submissions, the evidence presented before the trial court and the authorities cited, it is clear that the single broad issue for determination is whether the appellant owed the respondent Kshs.26,953/= as at 6th August, 2002 in rent arrears in respect of stall Nos.75-80 Nakuru West Market.

It was the appellant's case at the trial that she did not owe the respondent any rent as she was only obligated to obtain a single business permit. It was incumbent upon her to prove this assertion. She produced, in support of her case, two invoices and two Single Business Permits. There is also the invoice dated 11th July, 2001 for stall Nos.A52/A53 and a corresponding Single Business Permit dated 18th July, 2001. The second set is an invoice dated 19th February, 2002 and a corresponding Single Business Permit dated 20th February, 2002 for the period ending 31st December, 2002.

It was the appellant's case that the permits were issued upon payment of the charges in respect of stall Nos.A52 and 53 as well as stall Nos.75-80. The respondent on the other hand produced their copies of the invoices and the single business permits for the two periods which they maintain were the genuine sets. The difference in the two sets presented by the appellant and the respondent are as clear as the day is from night.

Both the invoice and the permit have a provision for the insertion of the plot number. In respect of the set of invoices and permits produced by the respondent, stall Nos.75-80 are clearly a late entry as they are not inserted along with stall Nos.A52 and 53 in the area provided for in the form. The appellant did not call the person who made those entries. That alone creates doubt as to the authenticity of the documents. It therefore, follows that the substratum of the appellant's claim having been so discredited cannot form the basis of granting the relief sought. She did not demonstrate that she had paid rent demanded.

The learned trial magistrate did not commit any error and this appeal is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 16th day of June, 2011.

**W. OUKO
JUDGE**