



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 105 OF 2010

DANSON NJERU MWENDWA & 8 OTHERS.....PLAINTIFFS

VERSUS

THE CLERK COUNTY COUNCIL OF MBEERE.....DEFENDANT

R U L I N G

The nine (9) plaintiffs/Applicants have sued the Clerk County Council of Mbeere for orders of permanent injunction to restrain the council from “purporting to dispossess, alienate and/or take away the plaintiffs ownership rights over the market stalls/kiosks situated within Kiritiri market. Along with the plaintiff, they filed the application dated 28/7/2010 under a certificate of urgency seeking the same orders pending the hearing and determination of the suit. The Application is supported by the Affidavit sworn by Danson Njeru Mwendwa the 1st Plaintiff/applicant on his behalf and that of the other 8 plaintiffs/Applicants. There are a total of 5 annexures thereto. The applicant’s case is that they are allottees of kiosks at Kiritiri market and that they have been paying rent to the council. In spite of paying rent over the years, the council sometime in March issued notices to them informing them of the council’s decision to upgrade the stalls to permanent status. They were asked to pay some amount of money for the said upgrade. According to the Applicants however, the said notices were served on others who were not the original allottees. They fear that they might be left out of the upgraded scheme and hence their present suit and application. They are asking this court to restrain the defendants from taking away the said market stalls from them.

The Application is opposed by the respondent through one Ali Onamu the Clerk to the defendant council. According to the Respondent, the kiosks in question were allocated to the Applicants on temporary basis. Therefore it has been deposed that they are mere licensees and the council can therefore terminate the said licenses. The respondent also deposes that the market upgrade is strictly within the law and the court cannot therefore injunct the Council from carrying out its lawful duties/tasks. They also say that if the applicants were to suffer any loss or damages, they can be compensated for the same.

I have considered the application along with the rival affidavits and both counsels’ oral submissions in court. To start with, as I stated when called upon to grant ex-parte injunctive orders, the applicants herein have not annexed any letter of allotment that spells out the nature of their tenancy or licence. Are they monthly tenants; are they licensees under some defined terms of contract which spells out the nature of their interest in the property with a clause on how their rights over that property can be terminated? There is no such document. All they have annexed are receipts showing that they have been paying rent – a fact that the Respondent has not disputed. Exactly what rights are the applicants herein

trying to enforce in this court? They cannot ask the Court to protect some amorphous rights which they themselves have been unable to prove.

In my considered view, they have failed to establish a prima facie case with a probability of success to warrant orders of injunction being granted to them at this stage.

Where no prima facie case has been established, the court will go further and see if the applicants are likely to suffer irreparable loss or damage if the injunctive orders are not granted. In this case, they have not. As submitted by counsel for the respondent, if indeed the Applicants suffer any loss, then the Respondent is well endowed financially and would therefore be in a position to compensate them. The balance of convenience is also not in their favour. This court cannot stop the Respondent from upgrading the stalls occupied by the applicants along with the rest of the stalls in the market. Nor can the court force the council to prioritize the applications by the applicants. It is the council that knows what criteria they are using in the allocations. Indeed the Applicants have not shown that they have been discriminated against in the upgrading and intended legalization of the tenancies.

I have no basis whatsoever to allow their prayers. They have a very weak case which has failed to meet the threshold of the basic requirements as set out in the *Giella Vs Cassman Brown* case. This Application must therefore fail.

The same is hereby dismissed with costs to the Respondent.

W. KARANJA
JUDGE

Signed by the above mentioned but dated and delivered at Embu this 28th day of July 2011 by the undersigned:

JUDGE