



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 12 OF 2011

SAMMY NDUNGU & 61 OTHERS.....PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF NANYUKI.....DEFENDANT

RULING

Sammy Ndungu and **61 others**, being the Plaintiffs, herein, took out the Motion dated 11th February 2011, whereof they applied for an order of temporary injunction to restrain the Municipal Council of Nanyuki, its servants, agents and or employees from allocating and alienating kiosks within the old Bus Park to any persons other than them. The Motion is supported by two affidavits of Musudi Kibwana Abdul Karim sworn on 11th February 2011 and 19th February 2011. The Defendant opposed the Motion by filing the replying affidavit of A. Mwangi, it' s town clerk. When the Motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the Motion disposed of by written submissions.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed for and against the application. I have further considered the written submissions filed by both sides. The substantive suit is expressed in the Plaint dated 11th February 2011 in which the Plaintiffs are praying for judgment against the Defendant in the following terms:

(i) An order to compel the Defendant to issue certificates of ownership to the Plaintiff of the upgraded stalls at the Nanyuki Old Bus Park.

(ii) An order of injunction to restrain the Defendant from allocating the aforesaid stalls to other people other than the Plaintiffs.

(iii) An order directing the Defendant to account how Ksh.19,200,000/= was spent.

(iv) Costs of the suit.

It is the Plaintiffs' submission that they are the Defendant's tenants operating kiosks at the Nanyuki Old Bus Park. In the year 2009 or thereabouts, the Plaintiffs aver that the Defendant informed them that it intends to upgrade the old Bus Park Stalls by putting up modern stalls. The defendant is said to have requested each tenant to deposit with it a sum of Ksh.120,000/= to meet the costs of construction of each stall. The Defendant would in return register the Plaintiffs as owners of their respective stalls. The Plaintiffs aver that they went ahead and paid the aforesaid sum and then moved out of the timber stalls to enable the Defendant put up new modern stalls. It is alleged by the Plaintiffs that the Defendant has purported to renege on the agreement by issuing a notice dated 31st August 2010 inviting prospective allottees to bid for allocation without giving them first priority. One of the conditions required in the notice is ownership documents. The Plaintiffs aver that the requirement was intended to lock them out of the bid because the Defendant has not issued them with ownership documents. For the above reasons the Plaintiffs urged this court to grant them the order of injunction pending the hearing and the determination of suit.

The Defendant on its part, urged this court to dismiss the Motion because it thinks the same is untenable because the Plaintiffs have not complied with the provisions of *Order 1 rule 13 (1) and (2)* of the Civil Procedure Rules. It is said that the other Plaintiffs did not authorize Sammy Ndungu in writing to plead on their behalf hence the suit and the Motion are non-starters therefore they should be struck off. It is the Defendant's further contention that the Plaintiffs Motion does not meet the conditions for granting orders of injunction. The Defendant also stated that there is no merit in the Motion in that there is no real or apparent danger of alienating the stalls to other people other than the Plaintiffs.

Let me start with the preliminary point argued by the defendant which is to the effect that there is no written authority given to Musudi Kibwana Abdul Karim to plead on behalf of the other Plaintiffs. There is no doubt that one Musudi Kibwana Abdul-Karim was authorized in writing by an authority to sue dated 11th February 2011 only signed by Sammy Ndungu. Sammy Ndungu has purported to sign the authority on behalf of himself and 61 others. With respect, that authority did not meet the requirements of *Order 1 rule 13 (1) and (2)* of the Civil Procedure Rules which clearly provides as follows:

“13 (1), where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings.....

.....

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

It is obvious that it is only Sammy Ndungu out of the 61 Plaintiffs who authorized Musudi Kibwana Abdul-Karim to file this suit and the Motion on his behalf and on behalf of 61 others. That authority fell short of the requirement of *Order 1 rule 13 (1) and (2)*. The provision is mandatory in nature hence it may not be regarded as a technicality because the same goes to the root of the case. It may turn out in the course of these proceedings that Musudi Kibwana Abdul Karim and Sammy Ndungu may have just used the names of the other Plaintiffs. The law requires that each of the Plaintiffs giving authority to the other must sign the authority. The preliminary objection is upheld as against the other Plaintiffs save for Musudi Kibwana Abdul Karim and Sammy Ndungu. In short, the suit and Motion filed on behalf of the other Plaintiffs who did not sign the written authority is ordered struck out. The suit and Motion of Sammy Ndungu and Musudi Kibwana Abdul Karim, being the 1st and 25th Plaintiffs survives.

Let me now consider the merits or otherwise of the Motion filed by the 1st and 25th Plaintiffs. The principles to be considered in applications for injunction are well settled. It suffices to state that the principles were stated in the celebrated case of **Giella =Vs= Cassman Brown [1973] E.A. 358**. In short,

(i) An applicant must show that he has a prima facie case with a probability of success.

(ii) An applicant must show the irreparable loss he would suffer if the order is denied.

(iii) If the court is in doubt, then the application will be decided on a balance of convenience between the parties.

There is no doubt that the two Applicants have shown a prima facie case. The Defendant does not deny that it has issued a notice inviting bids for the allocation of the new stalls. There is no evidence that the Plaintiffs were given priority as envisaged in the agreement the Defendant entered with the Plaintiffs. With respect, the Plaintiffs have convinced me that they have a prima facie case. The next question is whether the Plaintiffs have shown the irreparable loss they will suffer if they are denied the order. There is no dispute that the suit premises are stalls located within a bus park in Nanyuki town. The locality is unique and cannot be easily obtained within that town. If the order is not granted, it will mean that the Plaintiffs will lose the stalls. That loss cannot in my view be determined in monetary terms. Even if one was to determine the monetary value, I think the amount will be an astronomical figure that the Defendant cannot simply say that it can afford to pay the Plaintiffs. Since I am not in doubt, I do not intend to consider the third principle of convenience.

In the end I allow the Motion by the 1st and 25th Plaintiffs as prayed. The suit and the Motion by the other Plaintiffs is ordered struck out with costs.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Macharia holding brief Gichuki for the Respondent Mr. Karweru holding brief P. G. Kariuki for applicant.