No 113

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 12 OF 2010

SHEM ONDLENGA

RONALD ONDEYO NYAKWAYA

SAMWEL ONCHWATI

PATRICK OTONDI OTARA

SAMSON OMONYI

CHRISANTUS MAINGA

STEPHEN AMINGA

BENSON ONDUSO…….. APPLICANTS

-VERSUS-

TOWN COUNCIL OF OGEMBO ……..…….. RESPONDENT

RULING

On 21st July, 2010 the eight applicants filed this suit againstthe respondent. The suit was triggered by the actions of the respondent against them. They claimed that they were allotees of plot nos.19,15A, 15B, 16A, 16B, 17, 18, 19 and 20 at Ikoba market by the predecessor to the respondent namely, Gusii County Council herein after the ***"suit premises"***. On being so allotted, they developed the plots aforesaid with the approval of relevant authorities and have since then been carrying on businesses therein. However between March 2009 and the 18th January 2010, the respondent issued and served them with notices to demolish their business premises aforesaid without offering compensation to them for the developments and or improvements aforesaid before the said demolitions are effected.

Contempreneously with the filing of the suit, the applicants took out under certificate of urgency an application in the main seeking an injunction to restrain the respondent from entering on to and or interfering with and or demolishing their suit premises pending the hearing and determination of the suit. The grounds advanced in support of the application were that the applicants were allotees of the suit premises which they had developed and carried therein various businesses. That the respondent's intended actions were in total disregard of the due process of law, irregular and unlawful. They would

suffer irreparable loss and damage as the respondent is not keen on compensating them for the developments and the respondent's action therefore had no basis in law.

In support of the application, the applicants swore an affidavit through the 8th applicant. They deponed where relevant that they were allotees at Ikoba market of the suit premises. They were so allotted on diverse dates between 1960's and 70's by Gusii County Council, the predecessor to the respondent. After the respondent assumed jurisdiction and control of Ikoba market from Gusii County Council, it realigned the same plots and assigned then new numbers as per the suit premises. That the suit premises were fully developed with permanent materials and various businesses being carried therein by the applicants, their servants and or agents. In March , 2009 the respondent without lawful cause, excuse and regard to the due process of law and or without offering to compensate the applicants issued them with notices requiring them to demolish the structures in their respective plots. Consequent upon receipt of the said notices, the applicants were apprehensive that the respondent will effect the notices with the consequence that it may demolish their respective structures which action will cause irreparable loss and damage.

Through **Mr. Nelco Masanya Sagwe,** the town clerk, the respondent duly reacted to the application. It opposed the application on the grounds that the applicants had never sought to be formally allotted the suit premises nor had the respondent approved the same. The applicants too had never submitted the building plans for the suit premises to the respondent for approval before they erected the buildings or carried out the, developments and or structures at the said market. Instead the applicants had proceeded to unlawfully erect structures on the suit premises ignoring the warnings and or notices of the respondent to stop and or demolish the same. Some of those structures are infact erected on a road reserve leading to Mesesi Market and some are on the space reserved for an open air market meant to serve the large community. The applicants were thus trespassers not deserving any order of injunction.

When the application came up for interpartes hearing before me on 22nd April 2010, **Mr. Soire** and **Mrs. Asati**, learned counsels for the applicants and respondent respectively agreed to converse the same by way of written submissions. Subsequently those submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

The application before me is for interlocutory injunction. The conditions for the grant of such injunctions are now settled. From the outset the applicant must show a prima facie case with a probability of success, Secondly, the possibility of the applicant suffering irreparable loss which would not be adequately compensated for by an award of damages and finally if the court is in doubt it will decide the application on the balance of convenience. Of course the doubt referred to above must in logic refer to the existence of a prima facie case. I may also add that the remedy of injunction being equitable in origin, the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court in equity. Delay, acquiescence and unclean hands would disqualify an applicant from the equitable relief. See generally **Kenya Projects and Investments Ltd V Kenya Posts Office Saving's Bank Ltd**. **NBI.HCCC.NO. 2811 of 1995(UR), Albert Kihanyu Gikaria V National Housing Corporation and Another (2007) eKLR, Kibutiri V Kenya Shell Ltd (1981) KLR 390 and Giella V Cassman Brown & Co Ltd, (1973) E.A 358.**

Applying the above principles to the circumstances of this case, I have no doubt at all in my mind that the applicants have not satisfied me on any of the aforesaid conditions. From the plaint it is apparent that the applicants are only resisting their removal on the grounds that the respondent is not keen on compensating them for their structures. Lack of compensation cannot be a ground for granting an injunction. Neither have the applicants demonstrated that they are entitled to such compensation. In any event by so pleading, the applicants are clearly admitting that their occupation of the suit premises is temporary and in fact at the mercy of the respondent. As it were they are mere licenses subject to eviction if and whenever the respondent feels like and on notice. The pleadings show that the applicants have been duly served with such notices on no less than two occasions. The first occasion was on 18th March, 2009. They failed to comply. They were again served on 18th January, 2010. Again they failed to comply. Instead they rushed to this court for injunction. Clearly this is a case where the applicants cannot be said to be acting in good

faith. Had that been the case, they could not have waited for almost a year down the line after the 1st notice to them to commence the instant proceedings. There is therefore an element of delay and bad faith which militates against the exercise of my unfettered discretion in their favour. Further it is also not lost on me that much as the applicants claim that they are threatened with eviction without compensation for their developments in the suit premises, they have not made compensation as one of their prayers in the plaint.

The respondent has deponed that the applicants did not make applications to it for allocation of the suit premises nor have they been approved by the respondent. The respondent has further deponed that they never submitted buildings plans for approval by it before the applicants commenced the developments. Finally, it deponed that the applicants proceeded to unlawfully erect the structures ignoring the warnings and notices of the respondent to stop and or demolish the same. Those depositions were neither challenged, contraverted and or countered by the applicants. That being the position they must be taken to be true. Further if that be the case to grant the application sought, this court will indirectly be sanctioning an illegality and allowing the applicants to benefit from their own mischief. That is not the function of a court of law. The applicants have thus not been able to demonstrate a prima facie case with probability of success.

Besides there is no evidence on record to show that such plots if at all they exist belong to the applicants. They are mere allotments. Allotments without more does not confer title to the suit premises The plot cards annexed to the application in event refer to different plots and different persons who are not even parties to this suit. Although the applicants allege that the initial plots were re-aligned and given new numbers, there is no documentary evidence or indeed any other evidence to back up or buttress that claim. Apart from plot 37 which is allotted to the 2nd applicant, the rest of the plots shown on the plot cards are allotted to persons other than the applicants. Infact even the plot allegedly allotted to the 2nd applicant is not among the suit premises mentioned in this suit. This plot is no. 37. Small wonder then that the applicants have deponed that those who allegedly carry on businesses in the suit premises are either themselves, their agents and or servants. Since when have a letter of allotment perse been equivalent to title capable of being transferred to 3rd parties. Or since when have licencees been capable of transferring their licence to 3rd parties.

The applicants having failed to demonstrate ownership of the suit premises, they cannot be said to be likely to suffer any irreparable loss that cannot be compensated by an award of damages. Strictly speaking, the applicant would want to be compensated before they vacate the suit premises. Whatever loss they will suffer therefore is capable being compensated by an award of damages. Such damages are capable of computation.

The evidence on record suggests that the applicants have stood in the way of development of an open air market. They are on the road reserve. Again this facts were not countered by the applicants. In the premises, the balance of convenience tilts in favour of refusing the application.

Accordingly, the applicants application fails and it is dismissed with costs to the respondent.

Ruling dated, signed and **delivered** at Kisii, on this 17th June 2010.

ASIKE-MAKHANDIA

JUDGE