

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 83 of 2008

HACIENDA DEVELOPMENT HOLDINGS LIMITEDPLAINTIFF
VERSUS
MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT

RULING

Before court is a Chamber Summons application dated 15th April 2008. In that application the Applicants sought two main orders in respect of LR Number MN/II/10279 (hereinafter referred to as the “*suit property*”). The Applicants sought two main orders namely an interlocutory prohibitory order and secondly an interlocutory mandatory order. The first has been settled by way of a consent entered into between the parties on 10th December 2008. The matter came up before me for hearing of submissions on the second order. In their Chamber Summons dated 15th April 2008 by prayer (3) the Applicant seeks orders as follows:-

“3 *THAT this honourable court be pleased to grant an interlocutory mandatory injunction to compel the Defendant to remove the public waste, garbage, refuse and other materials already dumped on the property to an alternative location*”.

The genesis of this matter is that the Municipal Council of Mombasa have over the years been dumping waste and garbage on a portion of the suit property. The Plaintiff claims to have acquired ownership of the said property in 2006 and has commenced development of the same. For that reason the Applicant desires that the use of the suit property as a dumping ground cease and further that the Defendants take steps to remove the garbage dumped on the said property. On their part the Defendants whilst conceding that they had been using the suit property as a dumpsite claim that this was being done with the full knowledge and consent of the previous owners. Secondly whilst the Defendants are agreeable to removing the non-biodegradable waste they claim that they are not in a financial position to remove the biodegradable waste and further that they do not have an alternative landfill where such waste can be taken. I have carefully considered the submissions of Mr. Noorani for the Applicants and Mr. Kibara for the Respondents. I have also perused and considered the cited authorities. Without a doubt the mandatory order being sought is a substantive and conclusive order which may in fact serve to summarily conclude the case. This court is anxious not to turn the Defendants away from the seat of justice. I am persuaded by the cited case of **Cayne and Another –vs- Global Natural Resources PLC, Court of Appeal, Civil Division** wherein at page 225 it was held that:-

“where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the Plaintiff would mean giving him judgement in the case against the defendant without permitting the defendant the right of trial ...”

In this present suit the Defendants did file their statement of defence dated 4th March 2009 in court on 4th March 2009. They are ready and willing to defend this suit. As a court I would be reluctant to act in such a way as to deny the Defendants the opportunity for a fair trial. I do agree with Mr. Kibara advocate that such mandatory orders are only suitable for summary and/or simple cases. In this case without a doubt there are complex issues to be canvassed. These can only properly, exhaustively and fairly be canvassed at a trial of the suit. The Defendants have through the consent order stopped any further dumping on the suit property. I am of the opinion that the status quo should be maintained at this stage. For the reasons cited above I decline to grant the mandatory orders sought. This present application is hereby dismissed. Costs in the cause.

Dated and delivered at Mombasa this 29th day of July 2009.

M. ODERO

JUDGE

Read in the open court in the presence of:

Mr. Kibara for Defendant

Mr. Lewa holding brief for Plaintiff

M. ODERO

JUDGE

29.7.2009