



IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 26 of 2009

GLADYS MUGALAVAI..... 1ST PLAINTIFF

JECKIE JUMBA 2ND PLAINTIFF

V E R S U S

TEACHERS SERVICE COMM. 1ST DEFENDANT

DANIEL OLENGOIPON 2ND DEFENDANT

EVERLINE ONYANGO 3RD DEFENDANT

ALFRED RICHARO KIGANI 4TH DEFENDANT

R U L I N G

The application filed the application dated 8th June, 2009 seeking the following:-

1. *THAT this Honourable court be pleased to issue an injunction restraining the respondents M/S Gabriel Olengoiponi, Evelyn Onyango, A. R. Kigani Edemba, their Agents or representatives from interfering or removing the remains of the said canteen/kiosk in dispute until further Notice. The O.C.P.C.D. Vihiga Police Station or his representatives do be or is directed to arrest and charge any person disobeying the court injunction.*
2. *THAT the defendants in this suit M/S Olengoipon, Everlyn and Kigani be or are summonsed to come and show cause why the court should not make interim orders for them to pay KShs.600,000/= in the first instance for the treatment of the 1st plaintiff for High blood pressure caused by the defendants when they destroyed her canteen/kiosk and the goods in the stock etc pending the hearing of the main suit or else they be committed to civil jail in default until they bring the said money.*
3. *THAT finally the defendants in this suit be or are summonsed to come and show cause why this Honourable court should Not declare their action of dismantling the said canteen/kiosk destroying the stock inside, stealing some cash and stock Records Book belonging to the 1st applicant/plaintiff in this suit Mrs. Gladys Mugalavai with a view of evicting her without any court order as unlawful.*
4. *THAT the O.C.P.D. Vihiga Police Division, his Agent or representative be or is directed to make sure that Mrs. Gladys Mugalavi is provided with Police security when she rebuilt the dismantled canteen/kiosk at the same place it was at Kegoye sub-location, Vihiga District, Western Province in the Republic of Kenya.*

The 2nd applicant submitted that the 1st applicant was shocked when her kiosk was demolished by the defendants and her blood pressure went up. She was referred to a physician for treatment. The applicants attached a letter dated 27th February 1985 indicating that the 1st applicant was authorized to put up the kiosk by the East Africa Yearly Meeting of Friends Church, a religious society of Friends.

The applicants exhibited the list of goods that were destroyed totaling KShs.816,900/= and prayed that this court grants an injunction and the OCPD, Vihiga Police Division charge anyone who disobeys the court order.

In an application for injunction the applicant must establish that he has a prima facie case with a probability of success, that he will suffer irreparable damage or loss not capable of being compensated by way of damages if the orders being sought are not granted and in the alternative, the balance of convenience.

On 2/3/2009 Justice Ochieng directed that all the defendant be served with the application. Similarly, on 9/6/09 I did direct that all the respondents be served. The affidavit of service by Herman Anyenda indicates that he served the amended chamber summons on the 3rd respondent for 1st and 2nd defendants. This is not proper service. The affidavit does not indicate whether the 2nd defendant accepted service or declined or whether she signed the documents. For the benefit of doubt it can be taken that the 2nd defendant was served. However, since there is no document showing that the 2nd defendant was authorized to receive summons on behalf of the other defendants, it is my finding that the other defendants were not served.

The applicants have indicated that goods worth KShs.816,900/= were destroyed. The loss is therefore capable of being compensated by way of damages. Once the plaintiffs prove their case then the respondents will be called upon to pay the amount that would have been awarded. I do find that the applicants have failed to establish that they will suffer irreparable damage or loss if the orders being sought are not granted.

In the application dated 8th June, 2009 the 2nd defendant has indicated that he acts for the 1st applicant. Further, in the plaint dated 27th February, 2009, paragraph 2 thereof indicate that the 2nd plaintiff is acting for the 1st plaintiff as per the powers of the 1st plaintiff's affidavit. The attached affidavit dated 25th February 2009 by the 1st plaintiff indicates that the 1st plaintiff has authorized the 2nd plaintiff to conduct this suit on her behalf as she is shocked and unable to move the court for having developed High blood pressure.

Order III (2) of the Civil Procedure Act provide for recognized agents and states as follows:-

Order III rule 2 (a)

(a) *persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties.*

It is clear from the provisions of *Order III rule 2 (a)* that there is need to have a power of Attorney for one to be recognized as an agent. It therefore follows that the affidavit by the 1st plaintiff authorizing the 2nd plaintiff to conduct this suit on her behalf is not sufficient.

Having found that the applicant's loss is capable of being compensated by way of damage, this court finds that the applicant's application dated 8th June, 2009 has no merit and the same is dismissed. There shall be no order as to costs.

Dated, delivered and signed at Kakamega this 23rd day of July 2009

SAID J. CHITEMBWE

JUDGE