



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 732 of 2005**

- 1. PETER MWANGI**
  - 2. PATRICK MABUKA**
  - 3. FRANCIS OTIENO**
  - 4. MARGARET NJOROGE**
  - 5. ROSE WAMBUI**
  - 6. JOHNSON OMUSULA**
  - 7. DALVIS KINYANJUI**
  - 8. LIVISTONE RONO**
  - 9. PETER MATHENGE**
  - 10. ZACHARIAH MAINGI**
  - 11. JOHN KINUTHIA**
  - 12. NANCY MAINA**
  - 13. BEATRICE KETER**
  - 14. LILIAN OTIENO**
  - 15. PETER KASEE**
  - 16. ZIPPORAH NDAK**
  - 17. CATHERINE KISIMA**
  - 18. CHRISTINE GATI.**
- .....**PLAINTIFFS/APPLICANTS**

**VERSUS**

**CITY COUNCIL OF NAIROBI. ....**  
**DEFENDANT/RESPONDENT**

**R U L I N G**

The application before the court is a Chamber Summons dated 5<sup>th</sup> March, 2009. It seeks an injunction order restraining the Defendant Council, its servants and agents from demolishing the Plaintiffs, business premises and/or evicting the Plaintiff's or in any other manner interfering with the Plaintiff's business operation until the hearing and final determination of this suit.

The application is brought under Order 39, rule 1, 2 and 9 of the Civil Procedure Rules and is supported by an affidavit of support of one D. Kinyanjui sworn on 6<sup>th</sup> March 2009. It also based on the grounds on the face of the Chamber Summons together with the documents annexed to the supporting affidavits.

The applicant avers that the Respondent served the applicant with a Removal Notice (exhibit DK 3) stating on it that the applicant's services are no longer required by the Respondent and that the Applicant's presence together with presence of Applicants' structure on Plot No. 9042/799 in Nairobi was not required and was undesirable.

The applicants' then exhibited the trade licence issued to him for the year 2005 (exhibit DK 4) when also they obtained this court's interim orders restraining the Defendant from removing or interfering with the Plaintiffs (exhibit DK 5) until the same were vacated on 19<sup>th</sup> September, 2005.

The record shows further that on 16<sup>th</sup> October, 2005 the Respondent served fresh Removal Notices dated the same day. The grounds upon which the intended removal this time round, was grounded were that (a) that the Applicants' structures were temporary and illegal and (b) occupation was illegal. It was further, the Applicants' case that the Removal Notice was invalid in so far as the Respondent had issued to the Applicants a valid trading licence for carrying on trade on the said structures for the whole year of 2005.

It is also argued by the Applicant that on 3<sup>rd</sup> March, 2009 the Respondent served a new enforcement notice dated 25<sup>th</sup> February, 2009 – Exh. DK 8A. This notice sought removal of the Plaintiffs trading structures from the specific land on the ground that the construction thereof was made of illegal structures on the plot no. 9042/799 without the authority or approval from the Respondent Council.

The Applicants also argued that the land upon which encroachment is said to have been done, was private land and accordingly, the Respondent has no business involving itself in an issue between the Applicants and third parties i.e. Kahama Properties Ltd. Applicants therefore urge that Respondent have no lawful authority to issue quit notices over the land in question.

And finally the Applicants state that the intended eviction from the said piece of land, would interfere with their source of income and livelihood.

Furthermore the Applicants argued that the replying affidavit filed by the Respondent is illegal for being filed outside the prescribed time and should be expunged from the record, thus leaving this application unopposed. For those reasons, the applicants averred that the application should be granted.

The Respondent replied to all the above arguments.

It first urged that the application is incompetent and Res Judicata, on the grounds that the Plaintiffs had filed similar applications dated 14<sup>th</sup> June, 2005 seeking similar reliefs and the applications are still pending.

the Respondent argued secondly, that the structures being condemned were not approved by the City

Council in accordance with Section 30(1) of the Physical Planning Act, Cap 286 which is mandatory in terms i.e. if a structure is build without such approval, it is illegal ab initio. Issuance of licence to carry on business under Local Government's Act Cap 165 in no way authorizes any structure not built in accordance with Physical Planning Act, argued the Respondent. Such structures, the Respondent further argued, are liable for demolition under Section 30(3) of the same Act.

Thirdly, the Respondents argued that none of the applicants annexed a licence issued to them personally. That the licences attached belonged to other persons who are not applicants.

Finally, the Respondents warned that there is a policy issue involved. The applicants have to operate within the law and if protected, when breaking policy, then the City will never be cleared of illegal traders and will never be allowed to be clean.

I have considered the arguments raised by counsel of both parties after also carefully perusing the pleadings under which the prayers for injunction are sought. Paragraphs No. 5 of the Plaint avers as follows: -

**“5. On 9<sup>th</sup> day of June 2005, the defendant served the Plaintiffs with eviction Notice purported to take effect within seven days.**

**6. The Plaintiffs aver that the purported notices are illegal, irregular and in breach of the Plaintiffs' licence terms**

**7. Demand to revoke the subject Notices has been made and Notice of Intention to sue has been given to the defendant.”**

It is not denied and indeed it is openly conceded by the Plaintiffs that the Defendant/Respondent did not act on the Removal or Eviction notices served upon the Plaintiffs on 9<sup>th</sup> June, 2005. It is also not denied and indeed it is clear from the pleadings that the acts or conduct of the defendant which gave the Plaintiff a cause of action are those contained in the said eviction notice dated 9<sup>th</sup> June, 2005.

It follows, in my view, that when the defendant failed to act on its said notice of eviction dated 5<sup>th</sup> June, 2005, the failure took away or denied the cause of action which had accrued upon the Plaintiffs. That means that the Plaintiffs could not proceed with their suit unless and until the defendant acted on the said notices. It also means that by the end of the year 2005, the notices would and became stale and the substantive suit itself became stale and overtaken by events, except probably for costs.

In my view the Defendant must have understood the above consequences, hence to pursue the issue of eviction in 2009, it proceeded to serve a fresh notice of eviction dated 25<sup>th</sup> February, 2009 on 3<sup>rd</sup> March, 2009.

In the court's view and finding, the fresh notice of eviction dated 25<sup>th</sup> February 2009, created a totally new cause of action to the Plaintiffs. A new suit accordingly was required to be filed and interim or temporary orders if required to be obtained, were to be pursued under such suit, unless suitable amendment had been made before the present application was filed.

As things stand, therefore, this application for injunction to restrain the Defendant from evicting the Plaintiffs from plot no. 9042/799, is brought under a suit which as it stands, is not only stale but overtaken by events. The pleadings of the main suit filed in 2005 do not and cannot house the facts of this application filed in 2009. The suit has little chance of success and does not and cannot accommodate this application. For example the suit does not plead the Defendant's eviction notice dated 25<sup>th</sup> February, 2009 which would form the gist of the Plaintiffs cause of action.

In the above circumstances this application has no merit and must fail. It is hereby dismissed with costs to the Defendant. There is therefore, as a result no purpose of examining the other grounds

advanced by Plaintiffs in support of the application.

Dated and Delivered at Nairobi this 16<sup>th</sup> day of July, 2009.

**D A ONYANCHA**

**JUDGE**