



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CIVIL SUIT 169 OF 2009**

**KAGEMA MURAYA T/A PRONTO ASSURANCE AGENCIES....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING NO. 1**

There is a plaint in place dated 16<sup>th</sup> day of April 2009 and filed on the 17<sup>th</sup> day of April 2009. The salient features of the same are as follows:-

- In the year 2004 the plaintiff approached NSSF with a view to leasing their parcel of Land No LR No 209/1/305 upper hill area Nairobi for purposes of setting up a restaurant on the said premises.
- NSSF agreed subject to approval by the defendant for the construction of temporary structures on the said land.
- Approval for the construction of the said temporary structures was obtained on 16/4/2004
- Architectural drawing were submitted and the plaintiff was informed verbally that the said Architectural drawing were in order.
- On the basis of the said approval by the defendant, the plaintiff executed a lease with NSSF for a period of 6 years, effective 1<sup>st</sup> July 2004, and the plaintiff thus has become a protected tenant under the shops, Hotels and catering Establishment Act Cap 301 Laws of Kenya.
- By reason of the said tenancy, the plaintiff was obligated to honor all the terms of the tenancy up to 2010 thereby being required to pay to NSSF Kshs 1,666,8007.00.
- The construction was done and the plaintiff applied for and was given single business permit by the defendant to operate a bar, Butchery, a large, Restaurant with bar and a members club.
- Granting of the single business permit was subject to satisfaction that all the by laws had been complied with.
- licences have all along been being issued to him inclusive of the current one for 2009.
- The source of complaint that prompted the plaintiff/applicant to come to this court, is found in paragraph 14 of the plaint, to the effect that on the night of the 20<sup>th</sup> and 21<sup>st</sup> March 2009, the officers from the council descended on the plaintiffs premises on the suit land, and then went on a stealing,

looting and destruction spree and flattened all the structures on the suit premises leading to loss of million of shillings.

- Vide paragraph 15 that the defendant has now moved to require the plaintiff to demolish the structures they had previously approved him to put up.
- Assert that once approval was given to construct, and licenses given, the defendant is estopped from interfering whatsoever with the plaintiff quiet possession and occupation of the suit premises.
- That it is unlawful, illegal and unjustifiable by the defendant to order the plaintiffs to demolish his buildings when he has complied with the law.
- The suit premises are also subject of the proceedings in HCC No 811/2004 where the plaintiff is the 2<sup>nd</sup> defendant.
- It is to be noted that on a previous occasion, the defendant directed the plaintiff to demolish the premises where by the plaintiff moved to court and filed HCC NO 1205/2006 ( now E.L.C NO 2080 of 2007) in which an injunction was issued against the defendant, which proceeding is pending disposal.

In consequence thereof, the plaintiff sought “*a mandatory injunction restraining the defendant, either by itself his agents and or servants from trespassing on, demolishing any buildings and structures on, or in any other way from interfering with the plaintiffs quiet possession and occupation of parcel number LR. NO 209/11305*”

*(ii) Damages as particularized at paragraph 19 herein.*

*(iii) Costs of the suit and interest thereon at court rates from the date of filing suit till payment in full.*

*(iv) Any other relief that he court may deem fit to grant.*

On the basis of the content of the a fore set out plaint, the plaintiff anchored an application by way of chamber summons brought under order XXXIX rules 1 and 2, section 3A of the CPA and all other provisions of the law. Five reliefs are sought namely:

(1) Spent

(2) Spent

(3) & (4) *That the defendants, either by itself, its agents and or servants be restrained by a temporary injunction from trespassing on, demolishing any buildings and structures on, or in any other way from interfering with the plaintiffs quiet possession and occupation of parcel number LR NO 209/11305 pending the hearing of prayer 5 – pending the hearing and determination of the main suit.*

(5) *That costs of he application be provided for.*

The grounds are set out in the body of the application, supporting affidavit, annexure, written skeleton arguments and case law. The major ones are a reiteration of the content of the plaint already set out herein and in a summary from these are:-

- (1) The facts are undisputed as no replying affidavit has been filed by the respondents to controvert their allegations.
- (2) That plaintiff offered to lease the suit premises from NSSF and NSSF agreed.
- (3) The plaintiff dully obtained the relevant approvals from the defendant for construction of temporary structures and upon obtaining such approval, dully constructed the same, obtained relevant license, and

commenced operations till March 2009 when the defendants unlawfully committed the Acts complained of.

- The plaintiff relied on the pleading in HCCC NO 811/2004 where African Reinsurance Corporation sued the defendant among others and the plaintiff alleging that the plaintiff who was the defendant therein had breached by laws. To which the current defendant put in a defence denying that the plaintiff had breached any by laws.
- Contend that the action of the defendants agents raiding the plaintiffs premises in the manner they did is illegal, unconstitutional, unjustifiable and without any colour of right whatsoever.
- Maintain that on the basis of the facts demonstrated above, they have established a prima facie case with a probability of success and are therefore entitled to the injunction sought.
- No prejudice will be suffered by the defendant if the injunction sought is issued as the plaintiff will be in a position to pay what is due to the defendant.
- If the injunction is given, the plaintiffs employees ranging over 200 and suppliers of food and services will suffer irreparably, especially now that the global economic situation is facing a down trend and rate of unemployment within is very high.
- Any total loss that the plaintiff stands to suffer will be disproportionate to any amount the defendant will ultimately be ordered to pay more so when the defendant is known for not settling its debts or honoring judgments issued against it.
- Maintain that the defendant being a creature of statute, an injunction can be issued against it. It is their stand that there is nothing in the local government Act and the government proceedings Act that provides that an injunction cannot be issued against a statutory body.

The Respondent has opposed the application on the basis of grounds dated 16<sup>th</sup> day of July 2009 and filed on the 17<sup>th</sup> July 2009. They are 3 in number namely:

- (1) *That the application is untenable misconceived and an abuse of the court process in that:-*
  - (a) *The application has been overtaken by events and the orders sought cannot issue.*
- (2) *That the orders sought are incapable of being granted on the basis of the applicants grounds.*
- (3) *That no injunction can issue against the City Council of Nairobi.*

In the written skeleton arguments the defendant Respondents stressed the following:

- (1) It is now trite that an injunction cannot issue against the defendant and its officers. The only remedy open to the applicant should have been judicial review to challenge the decision of the defendant and its officers to demolish the premises.
- (2) No prima facie case with a probability of success has been demonstrated because the content of the affidavit demonstrates that the application has been overtaken by events.
- (3) The balance of convenience tilts in favour of the defendant as the effect has already been overtaken by events.
- (4) Damages will be an adequate compensation.
- (5) The applicants evidence is general and not exhibit.

On case law, the defence referred the court, to the case of ALI AND 3 OTHERS VERSUS CITY COUNCIL OF NAIROBI 2003 KLR 596 where Ang'awa J held that “*where one is dissatisfied with the decision of a local authority, declining permission to undertake developments on a specified parcel of land, he is entitled to appeal against the said decision pursuant to the physical planning Act (Cap 286)*”

*(2) The City Council of Nairobi is a local authority and just like the government, no injunction can lie against its officers. The proper remedy in such course would be with an application by way of judicial review”.*

On the courts assessment of the facts herein, there is no dispute that the interim relief sought herein is an injunctive clear. The principle are now crystal clear. These are set out I the case of GIELLA VERSUS CASSMAN BROWN (1973) EA 358. All that the applicant needs to do is to demonstrate facts within the ambit of the ingredients established in the said celebrated case. These are:-

- (i) Demonstration of the existence of a prima facie case with a probability of success.
- (ii) Demonstration that the applicant will suffer irreparable loss which cannot be compensated for by way of damages.
- (iii) Where (i) and (ii) do not apply the court, will decide the matter on a balance of probability.

These ingredients have to be applied to those advanced by the applicant namely:

- (i) The applicant applied for permission from the defendant to put up temporary structures on the suit premises and him applicant dully submitted the plans.
- (ii) That he was verbally informed that the same had been approved.
- (iii) In pursuance to the said verbal information, that the plans had been approved, he executed a lease for 6 years with the landlord which lease is expected to run the full length.
- (iv) By reason of the length of the terms of the lease, he is anprotected tenant. By reason of which he is expected to enjoy all the terms of the lease up to its expiry meaning that he has to pay NSSF the sum of Kshs 1,666,800/=
- (v) That the defendant is estopped from acting otherwise, since they even went a head to license the operations of the business which were carried out before the unlawful and illegal destruction mounted by the defendant.
- (vi) That if the destruction is not reversed, then there are 3<sup>rd</sup> parties likely to suffer namely loss of employment by the employees, loss of income by the suppliers of the goods.

Due consideration has been made of the above grounds put forward by the applicant, and the same considered in the light of the accepted ingredients required to be advanced in order to enable one earn an injunctive relief, and the court, proceeds to make the following findings:-

- (1) This court, has judicial notice of the fact what an injunctive relief is meant to fore stall herein is the destruction of the plaintiffs temporary business premises on the suit property herein. From the content of the documentation relied upon, the destruction has already been carried out. As such there is nothing to be stopped. This being the case an appropriate relief that could have been sought by the plaintiff/applicant should have been a mandatory injunction to reverse the damage.
- (2) This court, has judicial notice of the fact that it is now trite that a mandatory injunction can only issue where the case is clear, and straight forward, the facts are clear and can be dealt with summarily or that there is evidence that the opposite party has attempted to steal a match over the opponent. In this courts opinion, these prerequisites are missing, in that, the applicant relies on KM1 which was conditional

to compliance with the conditions of the lease between the applicant and the lessor. There is no affidavit from the lessor to confirm that these conditions were complied with.

- (i) The applicant has also sought to rely on a verbal approval which cannot be proved.
  - (ii) Reliance on the pleadings in another case does not hold because pleadings as this court, knows of them on its judicial notice, is not evidence. They have not been ruled upon.
- (3) Emphasis on the requirement of the lease running for the entire full term has not been supported by the deponents from the lessor to confirm the correct position. Neither has the applicant showed his commitments to the said lease by showing payment of any money towards the fulfillment of the same.
- (ii) Further a perusal of the said lease document reveals vide clause 3, (d) that indeed it was not a permanent lease meant to run for the full term as it has a termination clause.
- (4) As regards reliance on the hardship that is likely to be suffered by the suppliers and the employees, the applicant has not exhibited any documentation to show that these existed and if so how many, and the amount of money involved. It therefore remains a mere allegation.
- (5) Evidence of the defendant stealing a match on the plaintiff does not arise because there is no demonstration that the condition specified in KM 1 was complied with as there is no confirmation from the lessor to that effect.
- (ii) The permanency of the lease has not been exhibited as there is no confirmation from the lessor.
  - (iii) The verbal approval of the building plans has not been supported as the date on which made and by whom made has not been established.
  - (iv) Reliance on the issuance of the licenses though established by exhibition of the licenses do not have any qualifications in them to the effect that these were unassailable, more so when there is notice that the issuance of the licenses is not exempt from compliance with other applicable regulations. A part from the deponement that all those conditions were complied with, there is no demonstration from either the lessor or the defendant's authorized agents, to show that these conditions were fully complied with
- (6) Issue was raised about the non availability of an injunctive relief against the defendant. The decision relied upon is a decision of a court of concurrent jurisdiction. All that this court, can state is that had the application been found meritorious the court, would have revisited that issue and arrived at its own conclusions as it is not bound by that decision.
- (7) As regards damages, the court, is satisfied that the fact demonstrated herein do not fall into the exception rules of though damages would be an adequate compensation, an injunctive relief would non the less issue by reason of the defendant having acted in a high handed, oppressive and in utter disrespect of the law. These ingredients are absent herein because:-
- (a) Allegations that the defendant never meets its obligations in judgment issued against it have been stated generally and no specific instances were given. Secondly there has been no demonstration that the conclusion stipulated in KM1 were complied with.

For the reasons given in the assessment prayer 3 and 4 of the applicants application dated 16/4/2009 have been declined for the following reasons.

- (i) Matters sought to be fore stalled have already taken place.
- (ii) There is no demonstration that anything was left that was not a victim of destruction whose destruction could be fore stalled.

(iii) A mandatory injunction sought for in a coumflaged manner cannot issue as the ingredients for granting the same namely clear and straight forward case capable of being dealt with in summary manner and or alternatively evidence of the stealing of a match on the opponent are absent.

(iv) The hardship to be suffered by employees and suppliers of goods which has been stressed by the applicant is not one of the ingredients to be established when one seeks an injunctive relief.

(v) Permanence of the lease affected by the demolition has not been established as the lease contains a termination clause.

(b) Commitment to the said lease for a show of meeting all payments under the leave have not been demonstrated.

(vi) Nothing has been demonstrated to show that the facts herein fall into the category where even if damages would be an adequate compensation non the less an injunctive relief would issue by demonstration that the defendant has acted in an oppressive and high handed manner or attempted to steal a match on his opponent or has behaved in utter respect of the law as it has not been demonstrated that the conditions set in KM 1 were fulfilled by the applicant.

(vii) The defendant will have costs of the application paid by the plaintiff in any event.

**Dated Read and delivered at Nairobi this 18<sup>th</sup> day of September 2009**

**R.N. NAMBUYE**

**JUDGE**