

REPUBLIC OF KENYA

HIGH COURT AT KAKAMEGA

CIVIL CASE 29 OF 2009

COUNTY COUNCIL OF VIHIGA.....PLAINTIFF

VERSUS

DAVID K. ANUSU.....DEFENDANT

RULING

The Plaintiff filed the application dated 2nd March 2009 seeking mandatory orders of injunction against the defendant to the effect that the defendant remove all the underground Petroleum tanks and pumps installed by the defendant on a road reserve opposite Plot No. 8 Serem Market and that the defendant refills all the trenches and restore the road reserve. The application is supported by the affidavit of Tom Kwasi sworn on 22nd March, 2009 and a supplementary affidavit sworn on 22nd June, 2009.

Mr. Samba, counsel for the applicants, submitted that the defendant's Petrol Station is erected on a road reserve and that it was unlawfully erected as the Plaintiff did not grant development permission to the defendant. Counsel further submitted that provisions of the Physical Planning Act, Chapter 286 of the Laws of Kenya were contravened by the defendant as he did not apply for change of user to the Plaintiff and that the Commissioner of Lands and the Director of Physical Planning are expected to evaluate an application for erection of a Petrol station before a local Authority grants a development permission. Counsel submitted that the provided procedure was not followed and that no development Plan was presented to the plaintiff. The respondent tried to follow the procedure after this matter was filed in court.

Counsel for the applicant further submitted that the business permit issued to the defendant was cancelled and that the defendant's operations possess great danger to the public.

Mr. Nandwa, Counsel for the Defendant opposed the application. Counsel submitted that the defendant has not encroached on a road reserve and that the Petrol Station in dispute is situated on Plot No. 8 Serem market. The notice dated 14/1/2009 to stop the defendant from constructing the petrol station was not received and that the defendant was issued with a permit to operate a Petrol Station on 18th February, 2009. Counsel further submitted that it was incumbent on the Plaintiff to ensure that the requirements were fulfilled before issuing a business permit. The defendant would suffer great damage should the tanks be removed.

From the pleadings and documents annexed to the affidavits of both parties herein, it is clear that the defendant has been operating a Petroleum station business at Serem market on or before the year 2005. In his replying affidavit sworn on 5th May, 2009 the defendant has exhibited Trade Licences issued on 31/12/2005, 25th March, 2008 and 18th February, 2009. It is also clear from the documents annexed to the supporting and replying affidavits that no development plan was submitted to the plaintiff before the defendant erected his Petrol Station. The defendant noted the anomaly and approached the plaintiff with a view to follow the correct procedure. The defendant submitted a development plan to the Plaintiff on 27th March, 2009 and paid Kshs.2,700/- for the same. On 27th March, 2009 the Clerk to the County Council of Vihiga wrote to their Advocates on record indicating that the defendant had started the process of acquiring a licence. This letter was written after the one dated 2nd March, 2009 canceling the Business permit issued to the defendant.

Having received the defendant's application for development permission and having issued the defendant with business permits after receiving the normal licence fees from the defendant, it shall not serve the

interest of justice to issue a Mandatory Injunction at this Preliminary stage. It is upto the Plaintiff to evaluate the defendant's application and subject the same to all the required processes. The defendant has been operating the business for quite sometime before this suit was filed and I see no reason to disrupt the said business at this interim stage. The Plaintiff is also guilty of making the defendant believe that his operations were lawful and cannot turn round and demand that the business be stopped for non-compliance with the law.

I do find that the Plaintiff has not established a prima facie case with a probability of success to warrant the issue of orders of mandatory Injunction at this stage. Further, the balance of convenience is in favour of the defendant who has had to incur expenses to establish the Petrol Station after having been issued with licences by the Plaintiff. The application dated 2nd March 2009 is hereby dismissed with costs to the Defendant. It is so ordered.

Delivered, dated and signed at Kakamega this 17th September, 2009.

S. J. CHITEMBWE

J U D G E