REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

Civil Appeal 363 of 2006

PATRICK MUHORO MUKUNI .....APPELLANT

VERSUS

NAIVASHA MUNICIPAL COUNCIL & 3 OTHERS .....RESPONDENT

RULING

The background information to this ruling is that the appellant moved to the lower court vide a plaint dated 10th April, 2006 and filed on 12th April, 2006 against the Respondents, Naivasha Municipal Council, George Ng'anga and Steven Njenga Njuguna. The salient features of the same which has a bearing to this ruling are that:-

(i) In l989 the appellant applied to the 1st respondent Naivasha Municipal Council for a grant within Biashara road for a public open space to carry on business of a general kiosk as a new licence holder.

(ii) Vide minute No. TP/53/89 an approval was issued on 14.12.89 hence the issuance of licence No. 11850 as contained in the town Council of Naivasha letter dated 13th August l990.

(iii) The cause of action arises because the respondents jointly and severally have without any colour of right threatened to allocate, develop and construct a permanent structure on the plaintiffs and or a public open space/plot to which they have through fake letters of allotment back dated to l996 or there about as documents to support the threat.

(iv) They respondents have without good cause either by them or through their servants and agents have alleged that plot No. 129 resulting from an open space belongs to the 3rd respondent who had purchased it from the 2nd respondent and that the appellant herein was only granted temporary licence.

Against that background the appellant sought from the lower court:

(a) a permanent Injunction restraining the 1st, 2nd and 3rd defendants from disposing off in any manner whatsoever plot no. 129.

(b) Costs of the suit plus interest.

(c) Any other relief that this Honourable court may deem fit and just to grant.

The Plaint had been accompanied by an interim application by way of chamber summons dated the same date as the plaint and filed the same date as the plaint. The application was brought under order 39 rules 1 and 3 and Section 3A of the Civil Procedure Act. For purposes of the record the application sought 2 key reliefs namely.

(1) That this honourable court be pleaded to grant the plaintiff/applicant. Interim orders retraining the 1st, 2nd and 3rd defendant/respondent their servants, agents and or/any other persons, working under them from dealing, alienating or developing the public open space where the temporary kiosk of the plaintiff/applicant is erected or otherwise known as plot No.129 site and service 11 extension until determination of the suit.

(2) That this honourable court be pleased to issue an order in the nature of mandatory injunction compelling the 1st, 2nd and 3rd defendant/respondent their servants, agents and/or any other persons, working under them pending the final determination of this suit.

(3) Costs of the application be provided for.

It is common ground that the respondents defended the interim application. The matter was canvassed inter parties and it was dismissed with costs to the respondents. The dismissal order in the Naivasha SPMCS 240/06 is what gave rise to the appeal herein namely Civil Appeal Number 362 of 2006 dated 7th June 2006 and filed the same date. It raises 8 grounds of appeal namely, that the learned trial magistrate erred both in law and fact:-

(i) In holding that the appellant had not been able to establish the ownership of the suit plot.

(ii) Adamantly refused and denied the appellant a chance of prosecuting his case only to rule that all he appellant told the court was for the same (court) to look at the application he had filed and that the annexed proceedings bears him witness.

(iii) By ruling that he appellant had sought orders of eviction when in the contrary he had sought for orders that the 1st, 2nd and 3rd defendants be restrained from dealing, alienating and or developing the suit plot.

(iv) In holding that him appellant had not brought any documentary evidence to convince the court that him appellant was the rightful owner of the suit plot.

(v) By disregarding the appellant's arguments and holding that the appellant had no certificate of Title and knowing very well that the 1st Respondent does not issue title deeds. What it does is only to provide allotment letters. Neither does the 2nd nor the 3rd respondents have title deeds.

(vi) In failing to uphold the Appellants objection as to why he could not produce a land certificate or a certificate of lease despite the appellant having adduced cogent evidence.

(vii) By nullifying and coming up with a ruling in an extent that the appellant was a mere licencee and being a licencee does not conform as property interest at all.

(viii) Ruling was against the weight of the evidence.

The memorandum of Appeal was accompanied by an Interim Notice of Motion also dated and filed simultaneously with the appeal. But which was amended on 11th day of July 2006 and filed on 12th July 2006. The same is brought under order XLI rule 4 (2) (b) and Order XXXIX Rule 1(a) and (b) and Section 3A of the Civil Procedure Act and all enabling provisions of the laws. The prayers sought are:-

(1) That an order do issue restraining the 1st, 2nd, and 3rd Respondents whether by themselves or by their servants and or their agents or by any other person working under them from dealing, alienating and

or developing plot No.129 site and service 11 extension pending the hearing inter parties of this application.

(2) That an order do issue restraining the 1st, 2nd and 3rd Respondents whether by themselves and or servants and or agents or by any other person working under them from dealing, alienating and or developing plot no. 129 site and service II extension pending the hearing and determining of appeal herein.

The grounds in support are set out in the grounds in the body of the application, supporting affidavit, further supporting affidavit in reply to the supplementary replying affidavit of the 1st respondent and written skeleton arguments filed herein. A perusal of all these reveal that most arguments are intertwined with the grounds of appeal and the Court has to be careful in sifting through them in order to ensure that the disposal of the application does not short circuit the pending appeal. The major points that he applicant seems to be putting forward are that:

(1) He had a genuine complaint before the lower court at Naivasha.

(2) The learned trial magistrate denied him justice.

(3) He had become aggrieved by that decision hence the appeal.

(4) He has an opinion that he has a strong appeal with high chances of success.

(5) The subject matter sought to be preserved is the same subject matter of the appeal and if destroyed then the appeal will be rendered nugatory.

(6) He appears to have moved to court to secure his rights of trading in a kiosk erected on a disputed site.

(7) He challenges the allocation to the 2nd and 3rd respondents.

The first Respondent has opposed the application on the basis of the grounds set out in an affidavit inadvertently titled supplementary affidavit and written skeleton arguments. The major points relied on by them are:

(1) That the application is res judicata as the same was ruled upon by the lower court and it should be dismissed.

(2) That they dispute the applicants locus standi to file the lower court suit as well as the present appeal and accompanying application as he has no title to the disputed property.

(3) That he was a mere licencee then of which he is not currently and as such he has no interest capable of being protected by law.

(4) Him applicant has never been allocated the plot which he purports to be disputing over. He had been granted a licence to run a moveable kiosk which licence expired on 31st December, 2004 and since then it has never been renewed and as such he has no protect able interest.

(5) That in view of the foregoing assertions, he has no prima facie capable of succeeding as required by the principle established in the case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358.**

On the basis of the foregoing the first respondent urged the court to dismiss the application.

Counsel for the 3rd respondent relying on the replying affidavit and written skeleton arguments put

forward the following grounds:-

(1) Although the applicant cited provisions for stay of execution pending appeal, the prayer relating to them was deleted in the amended notice of motion leaving the prayer for injunction only.

(2) That granting an injunction at this stage will amount to granting what was denied by the lower court through the back door.

(3) It is their stand that the trial magistrate dealt with the application on merit and from the reasoning of the court the applicants appeal does not appear to have any chances of success and as such there will be no basis upon which the injunction sought can be granted by this court.

(4) That the applicant was a licencee and therefore a tenant at will and since an injunction is a preservative order, he has to show the possibility of irreparable loss which cannot be compensated for by damages.

(5) The injunction relief as per the provisions cited by the applicant has to be premised on a suit and not on an appeal.

(6) The preservation order is usually for the preservation of the subject matter which is capable of being wasted which it is necessary to preserve pending the disposal of the suit. Herein the subject matter of the appeal is an order of dismissal by the lower court which is in capable of being wasted.

On account of the foregoing arguments learned Counsel urged the court to disallow the application

As mentioned earlier on it is evident from the record that the main issues in contention between the appellant/applicant and the respondent have not been disposed off in the lower court. What was disposed off by the lower court was an interim application seeking a preservative order to preserve the subject matter of the suit in the lower court which was a plot No. 129 curved out of an allegedly open public place, where the applicant had been given temporary licence to erect a kiosk and carry on trade. It transpired to him applicant later on documentation had been done and the said space had been allocated allegedly to the 2nd and 3rd respondent. The applicant was therefore challenging the allocation.

It is submitted by both sides the application for a preservative order was declined by the lower court giving rise to this appeal. Upon filling the appeal the appellant/applicant simultaneously, put in an application that prayed for stay and an injunctive relief. The said notice of motion was subsequently amended. The prayer for stay pending appeal was deleted leaving the prayers for a preventive order both pending the disposal of the application and pending the appeal. As noticed the strong points put forward are that his appeal has high chances of success and if the order is not granted, the appeal will be rendered nugatory.

The 2nd respondent filed no papers. The 1st and 2nd respondent have attacked the application both on point of technicality and on merit. The points of technicality raised are Res Judicata by virtue of the same having been disposed off on merit by the lower court and the court having no jurisdiction to entertain the same. The merits attack is based on the grounds that the ingredients for granting such a relief as established by case law are lacking.

The court will deal with the technicalities before dealing with the merits. On Res judicata the pre requisites for its existence are set out in section 7 of the Civil Procedure Act. It reads:

"*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom claim litigating under the same title in a court competent to try such subsequent or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court*". The central theme in the provisions is that the order for res judicata to hold parties must be "*litigating under the same title*".

In the case of **OMONDI AND ANOTHER VERSUS NATIONAL BANK OF KENYA LTD. AND 2 OTHERS [2001] KLR 579,** on an argument that the suit was Res judicata save for additional of new parties, Ringera J. as he then was ruled inter alia that "*the doctrine of Res judicata is to present the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter. The doctrine of Res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined*."

Applying that to the proceedings herein, it is clear that before the lower court, the parties were litigating as plaintiff and defendant. Herein they are litigating as appellant and respondent. The nature of the dispute is not the same irrespective of the subject matter being adjudicated upon. Further the subject matter before the lower court was a preservative order where as the subject matter before the appellate court is a dismissal order for the prayer seeking the preservative order. It is therefore the finding of this court that Res judicata does not apply to these proceedings. To fortify this there is clear jurisdiction and provision for an appellate procedure from the subordinate court to the high Court over the same subject matter where the lower court decision is being challenged as set out in Sections 78 -79 of the Civil Procedure Act and order 41 Civil Procedure Rules. The existence of this statutory conferement out of jurisdiction negates the invocation of Res judicata where a dispute decided in its original jurisdiction form moves to an appellate court in an appellate form.

As regards lack of jurisdiction to entertain the application the court notes that the provisions of Order 41 rule 4(2) (6) relating to stay of execution pending appeal were deleted on an amendment. As such the existence of these provisions in the heading of the application are now mere appendage and cannot be used as a basis for any relief.

Turning to the injunctive relief it is correctly submitted that the injunctive relief in its original form is only awardable in a suit. Order 39 rule 1 reads: "*where in any suit"*. The existence of the words "*where in any suit"* precludes the award of the injunctive relief in the exercise of the appellate jurisdiction. Its equivalent on appeal is an order of stay pending appeal which the applicant decided not to pursue. The above disposes of the application, but since the merits were also argued it is proper to rule on the same so as to complete the argument. The ingredients for granting this relief are well established in the case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358.** These are found in holding iv-vi and there are.

(1). An applicant must show a prima facie case with a probability of success.

(2). An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(3). When the court is in doubt it will decide the application on the balance of convenience.

The exception to the damages rule is found in exceptional circumstances. In the case of **AIKMAN VERSUS MUCHOKI [1984] KLR 353,** a company had been placed under receivership. The Directors defied that order and hijacked the running of the company. On appeal on a refusal by the Superior Court to grant an injunction, the court of Appeal held inter alia. "The respondents having unlawfully seized possession of the estates were infringing on the appellants and ought to have been restrained by an injunction as equity does not assist law breakers. The position taken by the high Court that an injury suffered by the appellants as a result of the trespass was capable of being compensated by damages was wrong because a wrong doer cannot keep what he has unlawfully taken just because he can pay for it. The real injury arose from the unlawful seizure of the estate by the defendants in defiance of the law.

Also in the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPEMENT CORPORATION [2001] KLR 374**, Ringera J as he then was, held inter alia that "it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction

should never issue. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to hold that one cannot violate another citizens rights at the pain of damages.

In conclusion the applicants/appellants application dated on 7th day of July 2006 and amended on 11th July 2006 be and is hereby dismissed for the following reasons:-

1. being an application for an injunction jurisdiction vested on the Superior Court to grant the same is limited to where the relief is sought to be granted in a suit.

No jurisdiction exists to grant the same by a Superior Court in the exercise of its appellate jurisdiction. Its' near equivalent on appeal, would have been an order for stay pending appeal which the applicant chose not to pursue.

2. Even if the court had had jurisdiction to grant the same, the applicant had not satisfied the ingredients for granting the same because what the appellant/applicant was complaining about is wrongful allocation of plot No. 129, loss of would be business from the kiosk, all of which can be quantified and paid for by way of damages in the first instance. In the second instance the circumstances demonstrated do not reveal existence of high handedness, oppressiveness and flagrant defiance of the law by the respondents so as to bring the application outside the ambit of meeting the damages award criteria and have it fit the award of the injuctive relief criteria despite there being a possibility to award damages satisfactorily.

It is appreciated the appellant/applicant, is defending himself and he may not have appreciated the rules, of law, applicable to the kind of relief he was seeking properly in order to make an informed decision on which of the two procedures was appropriate to his demands namely the order 41 or Order 39 Civil Procedure Rules procedure. However sympathetic the court maybe to his predicament, the court is bound by the well known maxim in judicial practice that "a court of law is a court of justice and not sympathy and that a litigant who chooses to conduct his own case is deemed to understand the law and its procedures.

(2) The 1st and 3rd respondents who participated in the proceedings will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE