



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

Election Cause 2189 of 2007

1. Land and Environmental Law Division
2. Subject of main suit: Trespass/nuisance.
 - i. Market Stalls at Kenyatta Market.
 - ii. State B7 and B4.
 - iii. Defendants 1 and 2 install charcoal cooker (jiko) against plaintiff stall wall to roast meat.
 - iv. Nuisance
 - v. Injunction to restrain the defendants from placing jiko on plaintiff wall, lighting and causing heat and smoke to be emitted.
3. Application 8.10.07
 - a. Injunction to restrain the defendants committing nuisance.
4. In reply.

Defendants 1, 2, and 4

- a. You cannot restrain what has already occurred.

Defendant No. 3 -Nil

(City Council of Nairobi)

5. Held:-
 - a. Issue is one of nuisance and trespass.
 - b. Nuisance continues can be restrained.
6. Case law

a) Dinah Limo vs. Johah Limo HCCC 124/04 Musinga J

b) Patel & Others vs. W. H. Smith(Eziot) Ltd & Another

2 All England Law Report 1987 569

7. Advocates.

a) G. J. Mungu instructed by Mungu & Company Advocates for the applicant/plaintiff

b) A. M. D. Enonda instructed by Enonda, Makoloo, Makori & Co. Advocates for the defendants 1, 2 and 4 defendants

c) John Barongo Ombogi, Advocate, instructed by City Council of Nairobi. For 3rd defendant.

JANE WANGUI.PLAINTIFF

VERSUS

GRACE NJOKI MBURU.....1ST DEFENDANT

ROSE DUMIA..... 2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

WILFRED OBIERO4TH DEFENDANT

RULING

I. BACKGROUND

1) The application of 8th October 2007 seeks order of injunction sought by Jane Wangui the plaintiff/applicant herein against the 1st, 2nd and 4th defendants/respondents Grace Njoki, Rose Mburu, Mburu, and Wilfred Obiero respectively.

The application being that:-

“a temporary injunction restraining 1, 2 and 3rd defendants by themselves or through their agents or employees from creating a nuisance or trespassing upon stall B4 Kenyatta Market in Nairobi by placing a “jiko” on the wall of the said stall or lighting it or roasting any meat or any food stuff on the said jiko which so placed until the determination of the main suit.”

2. The plaintiff/applicant and the 1st defendant /respondent together the 2nd defendant/respondent own market stalls in the Kenyatta market area of Nairobi namely B4 and B7 stalls respectively. The 1st and 2nd respondent with the assistance of the City Council of Nairobi, the 3rd defendant and Wilfred Obiero the 4th defendant, placed a charcoal burner against the stall B4.

3. The said charcoal burner commonly known as jiko was large in size and was used to burn roast meat. The parties are licensed by the City Council to carry on a business of selling meat.

4. The effect of the said “jiko” burner has been to emit extensive heat , smoke and generally effect the business of the plaintiff at stall B4.

5. The plaintiff wishes that this business be stopped of roasting meat on the said “jiko” that has caused a nuisance.

6. The plaintiff wishes that this business be stopped of roasting meat on the said “jiko” that has caused a nuisance.

7. The plaintiff filed suit on 8.10.07 and sought orders of injunction.

II. APPLICATION 8.10.07

8. It was argued by the plaintiff that an attempt to place the said “jiko” had been made many years earlier. This had been stopped. In 2007, the said respondents 1 and 2 placed the jiko where it should not be. There had been protracted cases before in order courts or trespass.

9. In reply, the advocate for defendant 1, 2 and 4 stated that the said jiko had been placed already. That act of placing it on the said wall against B4 stall belonging to the plaintiff/applicant was past. You cannot therefore ask for restraining orders when you the act to be restrained has already been committed. The respondent relied on the case law of:-

Dinah Limo Vs Jonah Limo

Nakuru HCCC124/04

Musinga J

In which the Hon. Judge noted in a land case restraining orders were not suitable namely, to restrain the defendant from entering into the land when in fact the plaintiff/applicant sought orders to stop defendant was already on the land.

9. The act had already been committed and it was past.

10. In reply the applicant stated that the authority relied or by the respondent was irrelevant. It dealt with the eviction of a tenant. It also is a decision of the High Court and not binding.

11. The 3rd respondent is the City Council of Nairobi. They lightly made no reply as no injunction can issue against them.

III. OPINION

12. The issue before this court is one of trespass and nuisance. Nuisance is continuous unless otherwise restrained. This court has power to restrain the 1st and 2nd defendant only from continuing with the nuisance of burning the jiko charcoal cooker and causing smoke and heat to remit and affecting the applicants.

13. As stated earlier no injunction cannot stand against the City Council of Nairobi as 3rd defendant. The application against them is hereby dismissed.

14. As the 4th defendant I see no prayers for injunction against him none will issue.

15. The application for injunction be and is hereby issued against 1 and 2 defendant respectively till the determination of the main suit. Cost is awarded to the applicant by 1st and 2nd defendants. Costs to 3rd defendant by applicant.

16. I thank the two advocates for the applicant and respondent 1, 2 and 4 for their argument.

DATED THIS 11TH DAY OF MARCH 2008 AT NAIROBI.

M. A. ANG'AWA

JUDGE

- a) G. J. Mungu instructed by Mungu & Company Advocates for the applicant/plaintiff
- b) A. M. D. Enonda instructed by Enonda, Makoloo, Makori & Co. Advocates for the defendants 1, 2 and 4 defendants
- c) John Barongo Ombogi, Advocate, instructed by City Council of Nairobi. For 3rd defendant