

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 109 of 2007

1. BROWN ONDEGO

2. KIRTIKANT P. SHAH

3. AHMED WARSHOW

4. TOM C. MUCHURA (as Registered Trustees

Of Mombasa Sports Club).....PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF MOMBASADEFENDANT

RULING

The plaintiffs herein, being the trustees of Mombasa Sports Club, took out a chamber Summons under order XXXIX rules 1,2,3 and 5 of the Civil Procedure Rules in which they sought for an order of injunction to restrain the defendants by themselves, their servants or agents from creating or constructing a bus park on a road reserve along Dedan Kimathi Street within Mombasa pending the hearing and the determination of this suit. The summons is supported by the affidavit of Kirtikant Punja Shah sworn on 30th April 2007. When served with the summons, the defendant filed grounds of opposition and a replying affidavit.

When the summons came up for interpartes hearing Miss Obura, learned advocate, argued the case for the applicants. It is the submission of the learned advocate that the defendant has unlawfully commenced works to clear the road reserve adjacent to the premises

occupied and owned by Mombasa Sports Club known as Title numbers Mombasa/Block XXI/515, Mombasa/Block XXI/260 and Mombasa/Block XXI/468. Copies of the titles were annexed to the affidavit of support. It is submitted that the defendant's intention of clearing the road reserve was to establish a bus park. Such a move is opposed by the plaintiffs on the basis that the members of the club would wish to preserve, enhance and safeguard the environment at its land/premises and the surrounding areas since the sporting activities require a particular quiet and clean environment. It is alleged that the defendant intends to put up a bus park to cater for long distance passenger buses and vehicles which will heavily pollute the air due to smoke and noise. The defendant has also been accused of failing to comply with sections 182 and 185 of the Local Government Act thus the plaintiffs are unable to raise any objections against the proposed development. In other words the defendant has been accused of failing to publish any notices inviting any objections on the proposed change of user of the proposed site from a road reserve to a public bus park.

The defendant denied in the replying affidavit sworn by John Mazuri, a Principal Assistant Engineer with the defendant, that it intended to put up a public bus park. It is the averment of the defendant that it has been unfairly sued for a wrong it did not and does not intend to commit. Mr. Chakera, the defendant's learned counsel urged this court to dismiss the summons because the same is frivolous and vexatious.

I have considered the oral submissions made by learned counsels. I have also taken into account the

grounds set out on the face of the application and the facts deponed in the affidavits filed for and against the summons. The principles for granting or refusing orders of injunction are well settled. The first condition is that an applicant must show that he has a prima facie case with a probability of success. In this case the applicants have shown that the club they represent as trustees own land adjacent to a road reserve. They have also shown that there are intentions by the defendant to put up a public bus park. There is no denial by the defendant that the plaintiffs possess titles to the parcels of the land adjacent to the road reserve along Dedan Kimathi Street. Of course the defendant has denied having intentions to put up such a facility. The defendant has not denied the contents of the minutes attached to the supporting affidavit which indicate that the defendant intends to either build a bus park or a market on the disputed parcel of land. On the basis of the above I am convinced that the applicants have shown that they have a prima facie case with a probability of success.

The second condition is that an applicant must be shown that he would suffer irreparable loss unless the order is granted. The kind of damage complained of is that of pollution. I agree such a damage is irreparable. The damage cannot be qualified in monetary terms.

The third principle is that, when the court is in doubt, it should decide the application on a balance of convenience. Of course I am not in doubt. Even assuming I was in doubt, it is obvious that the plaintiffs would be put in to great inconvenience in trying to reduce the pollution which is likely to be caused by the proposed project. The inconvenience caused will tilt in favour of the order being given to the applicants. In the end I grant the orders as prayed with costs to the plaintiffs.

Dated and delivered at Mombasa this 28th day of August 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo h/b Kiarie for Plaintiff/Applicant and Mr. Norani h/b Mr. Chakera for the def