



REPUBLIC OF KENYA

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

Civil Case 432 of 2008

MORIONSON HOLDING LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT

RULING

ON PRELIMINARY OBJECTION

1. Background

1. A plant was filed by Marionson Holdings Ltd in which they sue the city council of Nairobi for:-
  - a) **An order of injunction to restrain the defendant its agents , and or employee from interfering with and or encroaching upon or destroying the plaintiffs property in Kahawa West Nairobi comprising of Marion Preparatory School.**
  - b) **An order of injunction to compel the defendants to reinstate part of the fence constituting Marion Preparatory School**
  - c) **Damages for trespass**
  - d) **Costs of this suit**
  - e) **Interest.**
2. An application dated much earlier than the plaint of 2<sup>nd</sup> September, 2008 (the plaint being September, 2008) was filed on 9<sup>th</sup> September, 2008 seeking the following orders.
  - “1) **That the Honourable court be pleased to issue orders against the defendant by itself or through its agents employees and or assign and or anybody whosever acting on its behalf restraining them from trespassing and or alienating the plaintiff property in Kahawa West Nairobi herein .**
  - 2) **That alternatively this Honorable court do issue a Declaration that the plaintiff is the proprietor of the premises upon which stands Marion Preparatory School Nairobi.**
  - 3) The said plaintiff applicant ran a school. They requested that this school be expanded but the property given to them was far away. They were lawfully allocated an additional land adjacent to their

property known as Kahawa West.

- 4) When this matter came up during the vacation under certificate of urgency the duty judge Visram was declined to certify the matter urgent.
- 5) The applicant thought it was urgent as the city Council had destroyed their fence and encroached upon and trespassed on the said property demanding it be repossessed.
- 6) At the inter parties hearing the advocate for the municipality council raised a Preliminary objection that the order of injunction cannot issue against the defendant.

## **II Preliminary Objection**

- 7) The advocate for the defendant/ respondent relied on the decision of Ali & Others V the City Council of Nairobi (2002) KL 596 whereby this court held that no injunction can issue against a local authority.
- 8) In reply the plaintiff/respondent stated that there are other decisions of this court including the court of appeal also entertained the issue of injunction being issued against the City Council of Nairobi or a local authority.

9. The first case he relied on case that of:

### **Nelson Mwaza Kivuvari V City Council of Nairobi Hccc 172/03 Hayanga J. (unreported).**

In which an application for an injunction was declined. It is a case that involved the land Acquisition Act under section 144(6) and the City Council. The Minister of Local Government at one point had to be involved.

10. No injunction was issued. A remedy for damages was to be provided.

11. The second case of:

### **Mureithi V City Council of Nairobi (1976 – 1985) EALR 331 (Madan,Miller Potter JJA)**

When a Kiosk was demolished and the superior judge declined to issue an injunction the court of appeal upheld the decision of the superior judge and stated that her only remedies is by way of damages.

12. I am asked to determine whether the injunction is available to the applicant. The said applicant in their affidavit goes further and states that there be a mandatory injunction to reinstate the fence.

13. In either way, should an injunction issue?

## **I: Opinion**

14. The City council of Nairobi is a local authority. It is a local authority and or body established under the local Government Act.

15. A local authority has power and duties that require them to service the public. The functions is defined in that act. When a general election is called, the position of president , Member of Parliament and Councilor being from a local authority are contested

16. Its function is to make decisions and act in the affairs of the local authority through a council. These actions are the same as those generally exercised by the government and statutory bodies.

17. I would be persuaded by the decision in the Ali & Others case (supra) that no injunction can issue against the local authority. The remedy lies in a judicial review and from the decision above in damages.

18. I would though wish to caution the City Council and Local authority not to use their powers in excess and without due regard to the rule of law.

19. I accordingly uphold the preliminary objection and struck out the application at the prayer seeking an injunction.

20. I award the costs of this Preliminary Objection to the respondent.

DATED THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2008 AT NAIROBI

M.A. ANG'AWA

JUDGE

T. Sijeny instructed by T. Sijeny & Co. Advocates for the plaintiff /respondent – present

Madara T.W. instructed by Madara & Co. Advocates for the plaintiff/applicant