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

Civil Case 129 of 2007

DAVID MWALILI & 5 OTHERS.....APPELLANT

VERSUS

RUMA NDEGWA MWANGOMBE & 2 OTHERS.....RESPONDENTS

RULING

The Respondents here filed suit in the Chief Magistrates Court at Milimani No.13487 of 2006 against the defendant appellants. The key averments are that the Plaintiffs are officials of an incorporated organization known as seven investment self help group. In the year 2001 they were allocated with Luthuli Avenue Lane as their location for operating route 7 matatus. The allocation was done by the City Engineer and the Town Traffic Management Committee. All this was done for purposes of ensuring smooth operations of matatus.

· In March 2003 they were re-located to Mgang'ano Street, Sheikh Karume Road Junction as its picking/dropping point.

· In the year 2003 the Defendants who are applicants herein trespassed on the said Luthuli Lane and started causing obstruction, threats, assaults and generally interfering with the smooth operation of the business by the Plaintiffs. As a result of this interference they moved to court and filed civil case no.5024 of 2003 which was withdrawn when the interference ceased.

· From mid 2006 the defendants who are applicants allegedly trespassed on the plaintiffs area of operation and started harassing and intimidating the plaintiffs, their employees and started extorting money from them by way of false pretences in the name of welfare operation, obstructing their motor vehicles from picking and dropping passengers and threatening to remove all their vehicles from the said stage.

· That the defendants who are the applicants herein should have applied to the City Council Engineer and the City Traffic Management Committee for designation of a sport in the city from which they can operate their matatus. This would prevent fear, despondency, confusion loss of lives.

· There is fear that the defendants/applicants' activities may cause the plaintiff/respondents irreparable loss.

On account of the aforesaid averments the plaintiffs' activities sought a permanent injunction to restrain the defendants either through themselves, their agents and/or servants or any person claiming to be a

member of Nissan matatu operations route 7 and Jesmat Travellers Sacco Limited from trespassing, disturbing, obstructing, interfering and or impending in any way whatsoever with the plaintiff's and their members operations of their commuter services plying route number 7 from Mfangano Street, Sheikh Karuma Junction Nairobi and peaceful operations of the plaintiffs and their members vehicles business from the said designated stage, general damages and costs.

The application giving rise to the orders of 2.2.2007 has been exhibited to RMI do the Respondents replying affidavit. It is dated 1st December 2006. Prayers 5 of the said application sought restraint orders in terms of the main prayer in the plaint. This prayer is what formed the basis of order 1 and 2 of the grieving orders made on 2.2.2007 but issued by the Court on 27.2.2007. They state (1) "*That pending the hearing and determination of this suit, the defendants whether by themselves, their servants or agents or any person claiming to be a member of Nissan Matatu operators Route No.7 and Jesmat Travellers Sacco Ltd be restrained from interfering with the plaintiffs and their members operation of commuter service plying route number 7 along Mfangano Street, Sheikh Karuma Road junction the peaceful operations of the Plaintiffs and their members vehicles business from the said designate stage Mfangano Street Sheikh Karuma Road junction the peaceful operations of the plaintiffs and their members vehicles business from the said designate stage Mfangano Street Sheikh Karuma Junction Nairobi*

(2) That this order be served on the officer in charge, Traffic Nairobi, OCPD Centrol Police Station, the City Engineer and the City Council of Nairobi for Compliance"

The appellants moved to court and filed DM2 which is an application for review but before that application was heard the Respondents moved to extract the order and have it served for purposes of enforcing it, thus forcing the appellants applicants to move to this court to file this appeal and application dated 5.3.2007 subject of this ruling.

Two Counsels represent the appellants Begi for 1st , 2nd, 5th 6th appellants stressed the following points:-

1. That the orders granted are against public policy and the law as no person can be granted mono poly over any route.

2. They are mandatory in nature and yet the circumstances under which they were granted do not warrant the granting of a mandatory injunction.

3. The loss likely to be suffered cannot be compensated for in terms of damages as the same will be immense as the appellants depend on this trade for livelihood.

4. The court was urged to ignore the grounds of opposition and replying affidavit of the Respondents and have them struck out firstly because they contravene the provisions of order 50 rule 16 Civil Procedure Rules which mandates a party wishing to oppose an application to file either grounds of opposition or a replying affidavit. Where both have been filed it amounts to an irregularity and they should be struck out. Secondly they should be ignored because they deal with the merits of the appeal.

Miss Amani for the 3rd and 4th appellants concurred with the submissions of Mr. Begi and added that the operations are manned by City Council Askaris and so a possibility of interferences does not arise.

(2) Her clients have been operating from this location and earn their living from this business and if the order is effected they will suffer undue hardship.

(3) They are entitled to the orders sought in this application as the same has been presented without undue delay and is merited.

In reply Mr. Nyandwika for the Respondents both to the appeal and application stressed the following points.

1. The provisions on filing of grounds of opposition and replying affidavit is not mandatory and so he is not precluded from filing both

2. That the court is urged to do justice to both parties but should the court find that it was improper to file both grounds of opposition and replying affidavit then he opts to drop the grounds of opposition.

3. They take issue with the objection raised as it should have been raised as a Preliminary Objection instead of ambushing them at the last minute.

That aside since counsel for the applicants have commented on his papers he should also be allowed to use them in their submissions. Failing which they will have no alternative but to rely on points of law.

4. On the merits of the application the point in issue is a terminus allocated to the respondents for purposes of maintaining law and order. The applicants are free to apply to the relevant authority to be allocated their own terminus.

5. They contend that the orders issued are not at mandatory injunction but simply a restraint order issued properly by the court as the appellants did not contest the papers the Respondents had presented to Court. What the applicants are relying on, appeal was not before the lower court when it made the orders complained of.

6. They do not contest the fact that applicants have sought stay without undue delay. However, should this court be inclined to grant stay then the same should be accompanied by conditions to ensure law and order. The conditions suggested are:-

(1) There should be no harassment of either side by members of each

(2) appellants should not extort money from the Respondents.

(3) There should be no assaults,

(4) There should be no harassment by police at the instigation of the appellants.

In response to the Respondents Counsel, submissions Begi for the applicants maintained that they have placed sufficient material before this court to warrant the orders sought being granted to them, they are opposed to the conditions suggested being made as they will not serve ends of justice, they have met conditions, for granting stay and maintain the Respondents papers are improperly on record and they should be struck out.

On the courts assessment of the facts herein, it is clear that the matter can be resolved on two fronts namely:-

(1) Technical front.

(2) Merit front.

The technical front arises because of the objection raised on the respondents action of filing both the grounds of opposition and replying affidavits to the applicants application. It is undisputed that the Respondents filed both a replying affidavit and grounds of opposition. The Respondents Counsels', argument is that there is nothing wrong with that. But should this court find that it is improper then he opts to drop the grounds of opposition and remain with the replying affidavit. The questions to be paused here is whether the filing of both documents is fatal and secondly whether the counsel has an election to drop either of them and thirdly, whether the court has a discretion to waive or ignore the error. To resolve these questions the court has to turn to the prescribing provisions which are order 50 rule 16, Civil Procedure Rules. It states:-

16(1)"*Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any not less than three clear days before the date of hearing.*

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule:-

(i) may with the leave of the court file a supplementary affidavit

(4) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be hard exparte"

The word "or" has featured in subrule 2 and 3. These same provisions came for construction and scrutiny before Ombija J. in the Milimani Commercial Courts Civil Case No.1628 of 2000. NATIONAL INDUSTRIAL CREDIT BANK LTD VERSUS GITHUKU NGETHE GATHIKU. At page 3 –4 of the ruling the learned judge while setting out the said provisions made the following observations:-

"The respondent filed grounds of opposition dated 13th March 2005 and replying affidavit sworn on 13th March 2001 and purported to rely on the same at the hearing. That cannot be……

In my view the said order entitles the respondent to elect whether to file a replying affidavit or statement of grounds of opposition. By filing grounds of opposition and replying affidavit the respondent has breached the mandatory provisions of order L rule16 (1) which in my view is fatal. On that ground alone I would allow the application"

This decision is a High Court decision and is therefore not binding on this court. However, this court has considered this findings in the light of the provisions concerned and find that the decision is correct. The use of the word "or" gives a party to make an election to file either of the said papers but not both. The section is silent as to what happens where both have been filed. That not withstanding there is no doubt that where such a step has been taken it will amount to an irregularity. Where an irregularity is found to exist and there is no provision which gives the court an election either to allow it in or not the error is fatal and the remedy open to the court is to strike out that particular pleading. A perusal of order 50 rule 16 gives this court no room for saving the said papers. The court has no alternative but to have them struck out. The only response the Respondent has is to take refuge under subrule 3 whereby the court can allow Counsel to submit on points of law only. Counsel for the respondent availed himself of this by submitting that the court has to satisfy itself that the conditions for stay are satisfied under order 41 rule 4 Civil Procedure Rules and secondly that where the court is inclined to grant stay it has the jurisdiction to grant conditional stay.

Turning to the issue of merit it should be noted that the Preliminary objection raised leading to into striking out of the Respondents papers was raised without notice to them amounting to what has become popularly known in legal practice as "*an ambush."* For purposes of the record being a legal point of law it can be raised at any stage of the proceedings. Requirement of notice is a rule of practice and not law usually insisted on for purposes of ensuring fair play to both sides and also to save judicial time. This being the case the applicant receives no reprimand for raising the same without notice.

On the ingredients for granting stay pending appeal these are found in order 41 rule 4(2) and these are that no order for stay of execution shall be made under subrule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

These are the two major ones. There are additional ones added by judicial practice arising from

principles established by decided cases. There is a wealth on of them. But the, commonest and most prominent among them is that the court has to ensure that the appeal if successful will not be rendered nugatory.

(2) The Court has to ensure that the order is not going to be used as a shield and word by the recipient against the successful party.

(3) The Court has to ensure that the successful party is not unreasonably withheld from the enjoyment of the fruits of his judgment.

All these principles have been applied to the facts of this application and the court makes findings that:-

(1) The condition for requiring that the party seeking to avail himself of this relief has to come to court without undue delay has been satisfied as conceded by the Respondents.

(2) As regards the appeal being rendered nugatory, reliance was placed on in the authorities namely STANLEY MUNGA GITHUNGURI VERSUS JIMBA CREDIT CORPORATION LTD Nairobi C.A.144 of 1988 AND KAMAU MUCUHA VERSUS THE RIPPLES LTD NAIROBI C.A. 186/1992. Both dealt substantially with principles for granting of injunctions and mandatory injunctions. The appellants grievances is that what was applied for was a temporary injunction but the learned trial magistrate granted a mandatory injunction. The Respondents response to this was that the court acted on the documentation placed before it. In resolving this, this court will not embark on a scrutiny of the papers placed before the lower court. It is enough to say that the issue of whether the proper order was granted or not is a matter for the trail judge on appeal to deal with venturing into that at this juncture will amount to a trespass on that jurisdiction.

(3) As regards substantial loss. There is now a wealth of authorities to the effect that this loss must be tangible and should not be stated from the bar. Herein no figures have been given save that it has been stressed that the applicants depend on this business as a means of livelihood. This court takes judicial notice of the fact that indeed it is common knowledge that the business of running matatus plying various routes within and without Nairobi is for making money. Therefore if one is prevented from carrying on such business, economic or financial loss is inevitable. This ingredient has been established.

(4) As regards conditional stay, the court has a discretion to attach conditions. In a situation like this one where both sides stand an equal footing in competition over the same resources a conditional stay is appropriate. The Applicants counsel suggested none although he opposed those suggested by the Respondents Counsel. His assertion that they will not serve ends of justice to both sides holds no water. This is so because all that is necessary is to ensure law and order and ensure that both sides carry on their trades smooth and in harmony with each other as they wait for the court to decide which of them will have the monopoly of the terminus, they are fighting to gain control over.

The net result of the assessment is that this court is inclined to grant stay pending appeal on the following conditions:

(1) There should be no harassment of members of the applicants by those of the Respondents over the use of the terminus. Likewise there should be no harassment of the respondents members by those of the appellants.

(2) There should be no demand of money by the appellant members for whatever reason from those of the Respondents. Likewise, there should be no demanding of money by the Respondents members from those of the appellants for whatever reason members.

(3) There should be assaults by members of either side to the other.

(4) Both sides to seek an amicable assistance from the City Traffic Management Committee on how both groups can amicably pick and drop off passengers from the same terminus peacefully as both await the

decision of the appeal.

(5) The appellants to deposit in Court Kshs 50,000.00 as security for costs within 45 days from the date of the reading of this ruling.

(6) Costs in the cause since the Respondents papers were struck out.

DATED,READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE