



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 52 of 2005

GERALD HUNGI MURIGO.....1ST PLAINTIFF

JOSEPHAT KIMIRI.....2ND PLAINTIFF

ANASTACIA MAIGU KIHU.....3RD PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

The plaintiffs filed suit on behalf of Nakuru Market Wholesalers Association against the defendant, the Municipal Council of Nakuru seeking various reliefs. They also made an application under the provisions of **Order XXXIX rules 1, 2, 3 & 9 of the Civil Procedure Rules** seeking to restrain the defendant, its agents and or servants from imposing, demanding and or requiring the plaintiffs' members to pay in advance but instead require or demand only the fees payable per day set out in the **Kenya Gazette Notice No. 6365**. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Gerald Hungi Murigo who deponed that he was the chairman of the Nakuru Market Wholesalers Association. The application is opposed. The defendant filed grounds in opposition to the said application. Three replying affidavits were filed by the defendant in further opposition to the said application.

At the hearing of the application, Mr. Mbiyu Learned Counsel for the plaintiffs submitted that by Gazette Notice No. 6365 of the 13th of August 2004, the Minister in charge of Local Government approved the fees to be paid by users of the Nakuru market. The said fees were required to be paid daily. The plaintiffs complained that instead of the defendant charging the fees for the use of the market daily as provided for in the said Gazette Notice, they have demanded that the plaintiff members pay the said amount monthly in advance. He submitted that the requirement that the members of the plaintiff association pay the fees monthly instead of daily would occasion hardship on the members because not all the members used the said market daily.

He further submitted that the court should direct the defendant to obey its own rules when it came to charging fees for the use of the market. He submitted that the membership of the plaintiff was more than three thousand who all relied on the market for their daily upkeep and sustenance. He argued that if the application is not granted, it would result in the plaintiffs being denied their right to livelihood. He submitted that the plaintiffs had established a prima facie case with a likelihood of success and therefore

should be granted the orders sought. He further submitted that the balance of convenience tilted in favour of the plaintiffs. He submitted that the plaintiffs were not refusing to pay the fees if the defendant abided by its own rules by charging the fees per day instead of monthly. He argued that if the defendants wanted to streamline the collection of the said fees by collecting it monthly instead of daily, then it should have amended its by-laws. He urged this court to allow the application.

Miss Chege Learned Counsel for the defendant opposed the application. She submitted that the application lacked merit and should be dismissed. She took issue with the fact that the plaintiffs had sought both prohibitory and mandatory injunction without following the laid down procedure. She submitted that the fee charged by the defendant for the users of the market was a contract between the defendant and the said users of the market. She submitted that the fees charged were specified in the gazette notice at a daily rate. However the said gazette notice did not provide for the mode of collection of the said fees. She argued that it was within the mandate of the defendant to determine the mode of payment of the said fees.

She further submitted that the defendant had sought to encourage the users of the said market to pay their fees monthly in advance instead of daily so that they could benefit from the rebates which were given by the defendant. She submitted that the membership of the plaintiff association was indeterminate and there were other users of the market who were satisfied with the arrangement put in place by the defendant. She submitted that the plaintiffs wished to cause havoc and interfere with the smooth running of the market by the defendant. She further submitted that the plaintiffs had not established a prima facie case that would persuade this court grant them the order of junction sought. She argued that the matter in dispute related to the issuance of licences which was the statutory duty of the defendant and could not therefore be restrained by means of a temporary injunction. To grant such an injunction she argued, the court would be aiding the plaintiffs to contravene the established law. She urged this court to dismiss the application with costs.

I have read the pleadings filed by the parties to this application. I have also carefully considered the rival submissions that were made before me by the learned counsel for the plaintiffs and the learned counsel for the defendant. The issue for determination by this court is whether the plaintiffs have established a prima facie case so as to enable this court grant them the order of injunction sought. The principles to be considered by this court in deciding whether or not to grant the order of injunction are well settled. In **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86** the Court of Appeal held at page 89,

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd [1973] E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

In the instant application the plaintiffs have complained that the defendant had breached its own by-laws by purporting to charge the fees payable by the users of the market monthly in advance instead of daily as provided for by the **Municipal Council of Nakuru (Public Markets) By-Laws 2004**. The said by-laws were approved by the Minister for Local Government and were gazetted on the 13th of August 2004 vide gazette notice No. 6365.

I have carefully read the said gazette notice. It provides for the various fees to be paid by the users of services provided for by the Municipal Council of Nakuru. Of particular relevance to this application, is the payments which were set for the users of the wholesale market at Nakuru. It was provided that the sellers of produce at the wholesale market within the roofed area would pay Kshs 30/= per day whilst the users in the open air area would pay Kshs 20/= per day. However the said gazette notice did not state the mode in which the said fees were to be collected by the defendant. **By-law 18 of the Municipal Council of Nakuru (Public Markets) By-Laws 2004** which was approved by the Minister for Local Government

on the 14th of April 2005 provides that:

“18(1) In any public market where stalls have been provided each stall shall be numbered and the council may let or hire out such upon conditions as they shall think fit and upon payment or the charges determined by the council under by-law 21 of these by-laws.”

By-law 21 provides that;

“(1) For the use of a public market for the purpose of selling or offering for sale any food, produce, article or other thing, there shall be fees payable to the council determined from time to time.

(3) The council may determine or alter the charges referred to in paragraph (1) of this by-law at anytime but at least one month before such charges come into force shall give notice in at least one newspaper circulating in the area in which the public market is situated of such determination or alteration.

(4) The council shall display at every public market a list of charges levied in accordance with paragraph (1) of this by-law.

(5) The charges levied in accordance with paragraph (1) of this by-laws shall be paid in advance, in the case of stall and in any other case by the person or attempting to take any food, produce, article or any thing into a public market.”

The plaintiffs have no problem with the charges imposed by the defendant for the users of the said market. They however have taken issue with the manner in which the defendant is levying the said fees. The plaintiffs are of the view that the gazette notice specifies that they should pay the said user fees daily instead of monthly as demanded by the defendant. I have perused the said gazette notice. No where does it provide the manner or the mode in which the defendant is to collect the said fees levied from the users of the market. I agree with the submissions by the defendant that the mode or the manner of collection of the said fees has been left at the discretion of the defendant. The defendant submitted that it encouraged the users of the said market to pay the said fees monthly in advance so that they could benefit by being given rebates. I see nothing illegal in the manner in which the defendant has sought to levy the said fees from the users of the said market. While the plaintiffs could have a case when they argued that not all the members of the plaintiff use the market daily, taking into consideration all the matters in dispute in this case, that is not an issue which can make this court grant them the order of injunction sought.

Having carefully considered the facts of this case, it is clear that the plaintiffs have not established a prima facie that would enable this court grant them the order of injunction sought. They have not established that the defendant infringed any law when it made the decision to levy the fees monthly in advance instead of daily in advance. I have read the by-laws of the defendant which I have reproduced in this ruling. I hold that the defendant acted within its mandate when it made the decision to levy the fees payable by the users of the market monthly in advance instead of daily in advance.

The application for injunction herein must fail. It is dismissed with costs to the defendant.

DATED at NAKURU this 30th day of June 2006.

L. KIMARU

JUDGE