



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 380 OF 2005

KENGELES HOLDING LIMITED..... PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI DEFENDANT/RESPONDENT

RULING

The Applicant applies for the following orders: -

(3) “THAT this Honourable Court be pleased to order that pending the hearing and final determination of this application, an order of temporary injunction do issue restraining the Defendant, its agent, officers, servants, workmen employees and/or any other person acting or purporting to act for and on behalf of the Defendant, from further pulling down demolishing removing or interfering in any manner whatsoever with the Plaintiff’s potted plants, canopy and other structures situated on LR NO.209/4399 Nairobi.

(4) THAT this Honourable Court be pleased to order that pending the hearing and final determination of this suit, and order of temporary mandatory injunction do issue compelling the Defendant through its agents, officers, servant, workmen, employees to return all removed potted plants and other structures to the premises of the Plaintiff on L.R. NO.209/4399 Nairobi and to permit the same to remain on the said premises.

(5) THAT this Honourable Court be pleased to order that pending the hearing and final determination of the suit, an order of injunction do issue restraining the Defendant, its agents, officers, servant, workmen, employees and/or any other person acting or purporting to act for and on behalf of the Defendant, from further pulling down demolishing removing or interfering in any manner whatsoever with the Plaintiff’s potted plants, canopy and other structures situated on LR NO.209/4399 Nairobi.”

The Applicant complains that the Respondent unlawfully removed its pots, plants and other moveable property from its premises in Koinange Street. Its contention is that it had a valid licence from the Defendant to encroach on the street pavement dated the 24th March, 2005 which is to expire on the 30th June, 2005. Submissions were adduced to me by both counsel for the Applicant and Respondents as to the validity of the licence, it being the Respondent’s view that such a licence can only be issued by the Town Clerk on application made to him. Mr. Wambugu for the Respondent relied on section 31(1) of the Physical Planning Act 1996:-

“Any person requiring a development permission shall make an application in the form prescribed in the Fourth Schedule, to the clerk of the local authority responsible for the area in which the land concerned is situated”

A copy of the Licence in question is annexed to the Replying Affidavit of Francis M. Ndereba as Annexure "F.M. N.2" It is clear that it is a valid licence signed from the D.C.P on behalf of the Town Clerk

All officers of the Council who execute documents are deemed to have done so with the Authority of the Council and whatever wrangles there may be internally the Council is bound by the act of its officer. Annexed to the Supporting Affidavit is a copy of a letter written to the Managing Director of the Applicant dated the 4th April, 2005 which purports to be a revocation of the said licence. This Notice of Revocation was sent by post and had not been received by the Applicant prior to this Application and is therefore irrelevant. The licence was therefore valid at all material times.

In the supporting Affidavit the Respondent refers to a criminal case in which the deponent was charged with:

(1) Unauthorized encroachment in Koinange Street establishment (3 x 19) M2 amounting to Shs.684.000/= outdoor licence.

(2) Branded canvas without City Council amounting to Shs.19, 200/= advert fee contrary to Licence City Council of Nairobi Planning Regulations and By-laws. The Offence having been committed on the 20th December 2004.

The defendant pleaded guilty and was fined. This was however prior to the licence which authorized the Applicant to encroach on the pavement and put up a canopy. The defendant also states that the Magistrate stated the Council could only demolish the structure after the licence had expired.

In his affidavit Mr. Ndereba in Replying in paragraph 6 states as follows:

"THAT the Order made by the Honourable Magistrate in the Criminal Case No.934 of 2005, City Court between Republic and Athenacius Kilonzo gave the Respondent liberty to demolish the structures on the encroachment of LR No.209/4399, Nairobi after the expiry of the license that is on 31st March 2005. The Applicant Manager Mr. Athenacius Kilonzo attests to this fact in paragraph (13) of the Supporting Affidavit to the Originating Summons annexed in their Supporting Affidavit in this application as annexure "AK4"

Clearly the learned Magistrate was not aware of the licence expiring on the 30th June, 2005 and it does not behove the Respondent to say that the Magistrate authorized the Respondent's action on the 4th and 5th April, 2005 complained of in this application.

I am of the view that the Respondent acted unlawfully in detaining and taking away the Respondent's property and the Applicant has shown a prima facie case with a probability of success with regard to his properties taken away. This is one of those rare cases where the Respondent should return the wrongly taken property. I therefore grant prayers 3,4 and 5 of the Application with costs to the Applicant. If the Respondent is unable to comply with prayers 4 in that the items are destroyed then applicant is at liberty to pursue a claim for damages against the Respondent.

Dated and delivered at Nairobi this 26th day of April, 2005

P.J. RANSLEY

JUDGE