

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 480 OF 2000

1. WALTER MILLER OWUOR

2. LISTON KENGA KADENGE

3. MWAMGUA MWALUMBI PLAINTIFFS

- Versus -

KILIFI COUNTY COUNCIL DEFENDANT

R U L I N G

This is a Chamber Summon application dated 28.8.2001 made under Order 39 rr 4 & 7 of Civil Procedure Act and of the Civil Procedure Rules asking for orders given herein earlier to restrain the defendant from developing suit premises be discharged and or varied that the Defendants be allowed to proceed with construction of a Bus Park in Kilifi. It is stated that the Plaintiffs are mere licencees and have no interest and have no lawful claim and also that the Defendants will meet penalties for non-performance as they had hired a third party to construct the premises. The application is supported by the affidavit of EDWARD KINGI KAHINDI SWORN ON 28.6.2001 BUT IT IS OPPOSED BY Mr. Marende for the Respondents/Plaintiffs opposed the application who relied on the original affidavit and claimed that the kiosks had been pulled down and that the Town Clerk of Kilifi is in contempt. The original affidavit of W.M. however claimed that the parties have always carried on business there for over 14 years and that they should not be recovered.

The principle guiding a court in dissolving, varying or discharging existing injunction order which had been ex-parte is based on discretion but not as Mr. Chitembwe impliedly submitted that they were mere licensees because even a licence is a proprietary right. In my view where the interim injunction was obtained by suppression of facts or where it turns out that injunction was obtained in reliance in a decision which was wrong in that then ex-parte injunction can be discharged or on any other cogent reason or where the order has become harsh, unmarkable. Mr. Chitembwe has said that the Council is going to pay a lot of money to contractor already engaged. I think the expense will exculpate. Secondly Plaintiffs are licensees, kiosk owners. Their expectation must have been a temporary occupation ... The Council wants the area for a public park. I think the injury to the plaintiff's legal right is And one which can be estimated in money and in contradiction one which is over weighed by a public developer like a Bus Park.

In this situation it would be just that plaintiff be given alternative grounds for their kiosks but they vacate the premises for the stated development.

I direct that this be done through the Town Clerk Kilifi in an orderly way. There be liberty to apply cost in the cause.

Order varied to that extent.

Read this 21st day of September, 2001.

A.I. Hayanga

JUDGE

21/9/2001