



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 342 OF 2020

HIRAM MALUKI KASONI (*Suing as Chairman of Committee*

and Resident of TWIMUMA AREA OF GAI SUB LOCATION

KYUSO SUB COUNTY & 25 OTHERS.....PLAINTIFFS

VERSUS

KARSAN RAMJI & SONS LIMITED.....1ST DEFENDANT

NDOVU CEMENT LIMITED.....2ND DEFENDANT

RULING

Introduction:

1. This Ruling is in respect to a Notice of Motion Application dated 21st January, 2021 in which the Defendants/Applicants are seeking for following Orders:

a) Spent.

b) Pending the hearing and determination of this Application inter partes, the orders of injunction issued on 19th January, 2021 be stayed.

c) The injunction orders issued on 19th January, 2021 be set aside, reviewed and/or varied.

d) Costs be provided for.

2. The Application is supported by the Affidavit of the Defendants' advocate who has deponed that on 19th January, 2021, the court issued substantive orders of injunction against the Defendants during the mention of the case and that the orders were issued in the absence of the Defendants' advocates which absence was not intentional and was occasioned by the fact that they were not able to log in to the court session in time due to technical challenges.

3. It was deponed by the Defendants' advocate that the same orders had been declined earlier when the suit was filed on 24th November, 2020 and that the orders are prejudicial to the Defendants since this is the Defendants' sole business.

4. It was deponed by the Defendants' advocate that the injunction orders will affect the business and expose the Defendants to suits by third parties who had already placed orders for the limestone which the Defendants excavate from the premises and that the Defendants' businesses have not been proved to be unlawful or to cause any prejudice to the Plaintiffs. The Plaintiffs did not file an Affidavit in response to the Application dated 21st January, 2021.

5. In his oral submissions, counsel for the Defendants argued that he was unable to get the link for 19th January, 2021 in good time and was therefore unable to join the court's virtual session on that day; that the orders made by the court on 19th January, 2021 were substantive and that the Court of Appeal has held that substantive orders cannot be issued on a mention date.

6. Counsel argued that they had already filed their Grounds of Objection to the Plaintiffs' Application dated 30th October, 2020; that the *ex parte* orders were given on the basis that schools had just opened and yet the excavation started in the year 2019 and that the same orders had been declined by the court when the Plaintiffs' Application was filed at the first instance.

7. Counsel submitted that by 19th January, 2021, he had not filed submissions because the Plaintiffs were supposed to file first and that his clients will suffer prejudice unless the Application of 21st January, 2021 is allowed.

8. The Plaintiffs' counsel submitted that there were no challenges in accessing the link as claimed by the Defendants' counsel; that the court granted the orders of 19th January, 2021 since the children had just reopened schools and that they delayed in the filing of the Plaintiffs' submissions because they were still waiting to be served with the Replying Affidavit by the Defendants.

9. The Plaintiffs' advocate argued that they asked for interim orders as excavation of the suit property by the Defendant would affect the psychology of the children. In response, the Defendants' counsel argued that the issue of the children being affected by the Defendants' activities is a statement from the bar and that excavation of the suit property began before 2019 when the schools were open.

Analysis and findings:

10. I have considered the Defendants' Application dated 21st January, 2021 and the oral arguments by counsel. The only issue for determination is whether the injunctive orders that were granted on 19th January, 2021 should be set aside. The orders of this court of 19th January, 2021 read as follows:

a) That temporary injunction restraining the Defendants whether by themselves, their assigns, employees, agents, proxies and/or any other person working under their instructions from engaging in any acts of excavation or digging out hard rocks through blasting on the parcels of land known as Kyuso/Kyuso B/1066/1067/1068 and 1082 be and is hereby issued until 27th April, 2021.

b) That temporary injunction restraining the Defendants whether by themselves, their assigns, employees, agents, proxies and/or any other person working under their instructions from driving any prime movers or trucks on the parcels of land known as Kyuso/Kyuso B/1066/1067/1068 and 1082 or in any way ferrying or transporting hard rocks or limestone or any type of soil be and is hereby issued until 27th April, 2021.

11. The Defendants' argument is that their advocates were unable to join the virtual sessions of 19th January, 2021 when the matter was called out and that in any event, a substantive order cannot be issued by the court when the matter comes up for mention.

12. The argument by counsel that the court cannot issue a substantive order on the day that a matter comes up for mention is erroneous, and is contrary to the provisions of Section 3A of the Civil Procedure Act and Order 40 Rule 10(1).

13. Pursuant to the provisions of Section 3A of the Civil Procedure Act, this court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court. The said powers of the court can be exercised even when the matter is coming up for mention, and in the absence of the parties. However, as has been stated by this court and the Court of Appeal, the inherent powers of the court have to be exercised judiciously.

14. The record shows that the Plaintiffs filed this suit together with an Application dated 30th October, 2020 under a Certificate of Urgency seeking for injunctive orders to restrain the Defendants from engaging in any acts of excavation or digging out hard rocks through blasting on the parcels of land known as Kyuso/Kyuso B/1066/1067/1068 and 1082 pending the hearing of the Application and the suit.

15. When the Application was placed before the court on 17th November, 2020, the court certified the Application as urgent and directed the Application to be heard *inter partes* on 24th November, 2020. On 24th November, 2020, the Defendants' advocate sought for fourteen (14) days to be able to file a Replying Affidavit on behalf of the Defendants.

16. In its orders of 24th November, 2020, this court directed the Defendants to file their Replying Affidavit within fourteen (14) days, whereafter the Plaintiffs were required to file a Further Affidavit together with written submissions within fourteen (14) days from the date of being served with the Replying Affidavit. The Defendants were then required to file and serve submissions within fourteen (14) days from the date of being served with the submissions by the Plaintiffs' advocate. The court fixed the matter for mention on 19th January, 2021.

17. On 19th January, 2021, the Plaintiffs' advocate informed this court that they had filed their submissions that morning, and that a temporary order of injunction should issue because the Defendants continued excavation of the suit properties would cause the classrooms to collapse.

18. The court acceded to the Plaintiffs' advocates' submissions and granted the interim orders of injunction until 27th April, 2021. Although the Defendants' advocate has argued that the cause of not having filed his submissions in response to the Plaintiffs' advocate's submissions was because the Plaintiffs' advocate had not served him with his submissions as at 19th January, 2021, the record shows that he filed the Replying Affidavit on 25th January, 2021.

19. Although the Defendants' advocate has claimed that he was unable to join the virtual hearing on 19th January, 2021, he has not informed this court why he did not comply with the orders of this court of 24th November, 2020. Indeed, as at 19th January, 2021, the Defendants had not responded to the Plaintiffs' Application for injunction, a situation that contributed to the grant of a temporary injunction until 27th April, 2021.

20. That being the case, and considering that the Plaintiffs moved this court under a Certificate of Urgency, and in the absence of a Replying Affidavit as at 19th January, 2021 as directed by the court, this court was entitled to preserve the suit property until 27th April, 2021 when the

court is supposed to receive submissions from both parties.

21. Having made those interim orders due to the delay by the Defendants to file and serve a Replying Affidavit as directed by the court, which delay led to the late filing of submissions by the Plaintiffs, the orders of 19th January, 2021 will remain in force until 27th April, 2021 as directed by the court. Indeed, until the court hears both parties, it is prudent that the suit properties are preserved in their present state, the inconvenience caused to the Defendants notwithstanding.

22. For those reasons, the Application dated 21st January, 2021 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE