



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APP. NO. 12 OF 2018

MAU NAROK NISSAN & COOP SOCIETY LTD.....APPLICANT

-VERSUS-

SAMMY P. LANGAS & 20 OTHERS.....RESPONDENTS

[Application stay of execution of the ruling and orders of the Chief Magistrate's Court at Narok delivered on 22nd may, 2018 by Hon. T. Gesora on CMCC. No. 75 of 2018]

RULING

1. By its notice of motion dated 5/6/2018 the applicant filed an application under certificate of urgency seeking the following orders:
 - 1) That the application be certified urgent, which is now spent.
 - 2) A conservatory order of stay of the ruling of the Senior Principal Magistrate issued on 22/5/2018 in Civil Case No. 75 of 2018, pending the hearing and determination of the application inter partes.
 - 3) That there be a stay of execution of the ruling and orders in the aforesaid suit pending the hearing and determination of both the application inter partes and the appeal.
 - 4) That the respondents be restrained from operating, collecting fare from passengers on behalf of the applicant at Narok stage, pending the hearing and determination of the suit in the magisterial court.
 - 5) That the respondents and their servants or any person under their authority be restrained from operating, trespassing, collecting fare from passengers of the applicant pending the hearing and determination of the appeal.
 - 6) That the OCS Narok police station to enforce the order.
 - 7) That the costs of the application to abide the result of the said appeal.
2. The application is brought pursuant to *Articles 165 (6) (7), 40, 260 and 159 of the Constitution of Kenya, 2010, under Order 40 Rule 2, 3 and 4 and Order 51 (1) and (3) of the Civil Procedure Rules, section 3A of the Civil Procedure Act and Order 42 Rule 6 of Civil Procedure Rules.*
3. The application is supported by twelve (12) grounds that are set out on the face of the notice of motion. The following are the major grounds. First, the applicant has been deprived of its property, which is protected by article 40 of the 2010 Constitution. Second, the applicant is an independent co-operative society which is licensed by the Narok and Nakuru county governments.
4. Furthermore, the respondents continue unlawfully to collect fare, sending or receiving parcels in their names. Additionally, the respondents are not employees of Mau Narok Nissan and Co-operative Society Ltd. The other ground advanced by the applicant is that the Senior Principal Magistrate held that the loss that is likely to be suffered is monetary and can be compensated.
5. And by virtue of that ruling and/or order, the respondents unlawfully continue to run a parallel fare collection, sending and receiving parcels on behalf of the applicant, while the respondents have known employees who are mandated to carry on such business.
6. The applicant has also stated that it intends to appeal the said ruling in accordance with the relevant provisions of the law. The applicant is apprehensive that should the ruling be enforced, it will impede the applicant's right of appeal to the high as provided for by the law.

7. Finally, the applicant has stated that it has the right to carry on its business under article 40 of the Constitution and stands to suffer irreparable loss if the respondents are not stopped.

8. The applicant through David Ngigi Kimani, who is its director and shareholder has deponed to a 17 paragraphs supporting affidavit. He has deponed to the following major matters. He has deponed that the applicant has been making payment of business permit to the County Government of Narok and Nakuru in the sum of Shs.2,000 per vehicle. He has deponed that it has been running its transport business conductively in all other towns except in Narok town due to the actions of the respondents.

9. The applicant has also deponed that the application has been made without unreasonable delay and that it is in the interests of justice that the application be granted. Finally the applicant has deponed to the grounds of its intended appeal in addition to replicating in the affidavit the grounds in support of the motion.

10. The respondents through Oboru Ole Ntete on behalf of the respondents have filed a 29 paragraphs replying affidavit dated 15/6/2018 in opposition to the application. He has deponed to the following major matters. That the applicant has obtained an ex parte injunction in the magisterial court on 27/3/2018, which remained in force until 22/5/2018, when that *ex parte* order was discharged. That court directed the parties to expedite the trial of the man suit.

11. The 1st respondent has deponed that the respondents have a partnership agreement with the applicant, which was established on 16/2/2010, in respect of which he has annexed annex ON-1 which is a resolution that established that partnership.

12. The 1st respondent has also deponed that in order to actualize the partnership, the respondents leased stall No. 94 from David Mpatiany, a matter in regard to which he has annexed the lease agreement as annex ON-2. The 1st respondent leased stall No.94 to be used as an office and pursuant to the leasehold agreement, the respondents have been paying rents. Annex marked ON-3 to the respondent's affidavit is a bundle of rent payment slips.

13. Furthermore, the 1st respondent has deponed that the collection of the jointly fixed fee, sending and receiving of parcels by the respondents at the Narok stage is a lawful and legitimate contractual obligation given to them by minute 8 of that partnership agreement.

14. Finally, the 1st respondent has deponed that they will suffer irreparable loss if they are deprived of their lease interest in the premises and if they are prohibited from performing their obligations in terms of the leasehold agreement.

15. Counsel for both parties filed rival submissions which included authorities. I have considered the affidavit evidence of the parties and the authorities cited by them in the light of the applicable law. I have also considered the oral submissions of both counsel.

16. As a result I find the following to be issues for determination

- 1) *Whether or not the applicant might suffer substantial loss if stay of execution is not granted.*
- 2) *Whether or not the applicants have met the threshold for the grant of a temporary injunction.*
- 3) *Whether or not a mandatory injunction should be granted.*
- 4) *Who bears the costs of this application?*

Issue 1

17. I find from the affidavit evidence of the applicant that it is running its business in many towns including Narok town, except that in the latter town its business appears to have been interrupted by the respondents, hence this application. This is clear from paragraph 5 of the supporting affidavit of David Ngigi Kimani, who is the applicant's director. From the totality of the affidavit tendered before me, I find that the applicant is not likely to suffer substantial loss. Whatever loss that the applicant might suffer will be compensated by damages.

Issue 2

18. The principles governing the grant of a temporary injunction are set out in *Giella v. Cassman Brown [1973] EA 358*, which are well settled. I need not recite them in this ruling. Suffice to point out that the parties appear to have entered into a partnership agreement. Pursuant to that agreement the respondents leased stall No. 94 from David Mpatian, which is still subsisting. A grant of a temporary injunction might interfere with this leasehold agreement. An order of injunction is a discretionary remedy, which if granted will cause hardship to the respondents. I therefore decline to grant it.

19. Furthermore, Order 42 rule 6(2) requires security to be furnished by the applicant. The applicant has not indicated his willingness to offer any security in his affidavit. The applicant also seeks a mandatory injunction to direct the OCS Narok police station to enforce the order of this court by keeping the respondents out of the suit premises. A grant of this order will require continuous supervision by the court. It is for that reason, according to *Njau v. City Council of Nairobi [19830 KLR 625]*, that mandatory injunctions are sparingly granted by the court. In the instant case it is not a suitable remedy and I hereby decline to grant it.

Issue 3

20. The upshot of the foregoing is that the applicant has failed to demonstrate that it is likely to suffer substantial loss unless stay is granted. It has also failed to demonstrate that it is entitled to a temporary injunction. In short, the applicant has failed to meet the threshold set out in Order 42 rule 6 (1) and (2) of the 2010 Civil Procedure Rules. It has also failed to meet the requirements for the grant of a temporary injunction as set out in *Giella v. Cassman Brown, supra*. In the light of the foregoing the applicant's application fails. It is hereby dismissed in its entirety.

Ruling Delivered in open court at **Narok** this **16th** day of **July, 2018** in the presence of Mr. Biko for the applicant and in the absence of Mr. Masikonde for the respondents.

J. M. BWONWONGA

JUDGE

16/7/2018