REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA NO. 511 OF 2013

MICAH GICHUKI.....APPELLANT

-VERSUS-

SIMION NJAU MBURU.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. C.C Kipkorir (SRM) in the Chief Magistrate's Court

at Nairobi (Milimani Commercial Courts) Civil Case No. 1841of 2013,

delivered on 30th August 2013).

JUDGEMENT

INTRODUCTION

1. The Appellant had filed an Application in the lower Court seeking to restrain the Respondents from disturbing, demolishing, wasting and/or destroying any stalls, houses on the Appellant's plot as allocated or occupied by him, specifically at Dandora Phase IV below the Kenya Power line way leave. It was his averment that he had been served with a notice to that effect on 14/02/2013.

2. To support the Application, the Appellant averred *inter alia* that he was in occupation of the plot temporarily with permission of Kenya Power & Lighting Co. Ltd (KPLC), that he had lived there for a long time and had paid all the requisite fees and licences in order to conduct his business.

3. The Respondents filed their respective Replying Affidavits in opposition and the Appellant filed further affidavits in response. The matter was heard and eventually a ruling delivered dismissing the application with costs.

4. Aggrieved by the said ruling, the Appellant filed the instant appeal and listed 10 grounds as follows;

> ***a) That the learned Magistrate erred in law and fact by failing to find that the Appellant was the rightful owner of the business stall at Dandora.***
>
> ***b) That the learned Magistrate erred in law and fact by failing to take notice that the Appellant was in occupation of the stall for the last 23 years and had complied with the 2nd Respondent's by-laws.***
>
> ***c) That the learned Magistrate erred in law and fact by not taking notice of the fact that the land occupied is a well informed settlement owned by KPLC and not the Respondents.***
>
> ***d) That the learned Magistrate erred in law and fact by not appreciating that the Appellant was allocated the pitch No. 80 and has been on the pitch for long as neighbours with the Respondent.***
>
> ***e) That the learned Magistrate erred in law and fact by failing to find that the Appellant was the rightful owner of the business stall at Dandora.***

f) That the learned Magistrate erred in law by not finding that the pitches fall below the KPLC way leave.

g) That the learned Magistrate erred in law and fact by finding that the Appellant had no prima facie case.

h) That the learned Magistrate erred in law and fact by not finding that the 1st Respondent had started threatening the Appellant with eviction.

i) That the learned Magistrate erred in law and fact by not finding that the notice issued actually affected the Appellant.

j) That the learned Magistrate erred in law and fact by not granting the orders of status quo pending the hearing of the main suit so as to stop interference by either party.

k) That the learned Magistrate erred in law and fact by not granting the orders sought.

5. Directions were given that the appeal be canvassed by way of written submissions. The only submissions on record are for the Appellant.

6. Having looked at the entire record, the only issue for determination in my view is whether the Appellant had made out a case for grant of injunctive orders

DUTY OF THE 1ST APPELLATE COURT

7. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

ANALYSIS

8. As rightly observed by the trial magistrate, the conditions to be satisfied in an application for interlocutory injunction were laid down in the *locus classicus*, **Giella –Vs- Cassman Brown & Co. (1973) E.A 358.** They are;

a. That there is a prima facie case with probability of success.

b. That the applicant will suffer irreparable harm if the injunction is not granted.

c. In case of doubt, the matter should be decided on a balance of convenience.

9. Jurisprudence from our Courts shows that in dealing with such an application, the Court is not necessarily bound by the afore mentioned three principles. It should also have regard to the circumstances of the case generally and the overriding objective of the law.

10. The genesis of the Appellant's grievance as per prayer 3 of his application was a notice, issued by the 2nd Respondent, dated 14/02/2013. It was attached to his supporting affidavit and marked 'MG-6'. It's reference was *'Illegal development: pitch No. C77*. It had no specific addressee but required the recipient to report to the Assistant Director, Dandora Housing Development Department with necessary documents to prove ownership.

11. The 1st Respondent attached documentation to his replying affidavit showing that pitch No. C-77 was allocated to him by the 2nd Respondent as well as C-76, C-110 and C-111. The 1st Respondent averred that it was the Appellant who had encroached on his pitch causing him to lodge a complaint with the area chief and the housing development department. That the Appellant was summoned to prove ownership but he did not comply.

12. The 2nd Respondent agreed that it had issued the notice pursuant to a complaint from the 1st Respondent that the Appellant had encroached on his stall. That the Appellant had failed to honour numerous summons from the 2nd Respondent thus necessitating issuance of the notice. That the notice required the Appellant to prove ownership but he was yet to do so.

13. In his further affidavit, the Appellant sought to show that Dandora Terminus market (DTM) residents and Dandora Wayleave residents were distinct. He agreed that DTM was allocated to residents by the 2nd Respondent but contended that the Dandora wayleave was the property of Kenya Power & lighting Company (KPLC) and as such, no particular individual could lay claim to it.

14. He annexed a letter marked MG1 showing that he was also allocated pitch No. 80 at the DTM. He urged the Court to note that the pitches were allocated at the DTM and not along the wayleave where they were residing.

15. In his submissions before this Court, the Appellant submitted that the necessary notices and exhibits annexed to his pleadings at the time of filing suit were to be interrogated during hearing. That the learned trial magistrate should have appreciated that the pitches are temporary and that the Appellant and 1st Respondent are neighbors.

16. That he should have maintained this position pending the hearing and determination of the suit.

17. From the evidence on record, it is clear that the pitch referred to in the notice (MG-6) was allocated to the 1st Respondent. In my understanding, it was not even an eviction notice *per se* but a notice requiring the Appellant to prove ownership. This fact was buttressed by the 2nd Respondent who agreed that it had issued the notice following a complaint by the 1st Respondent.

18. For a *prima facie* case to be established, the Appellant was duty bound to demonstrate that he had some rights in the subject pitch which were under a threat that could result in irreparable harm.

19. I would agree with the trial magistrate that the various correspondences attached to his application were too general and did not help his case. Further, if indeed the Appellant was residing at the Dandora way leave which he urged the Court to find was distinct from DTM, then there was no evidence to show that his stay there was under the threat of eviction.

20. Having analyzed the evidence before the trial Court, I am in agreement with the learned trial magistrate that indeed the threshold for grant of injunctive orders was not met.

CONCLUSION

21. The Court thus finds that the appeal has no merit and is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE