



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NUMBER 295 OF 2010

HUSSEIN M. HAJI

AHMED SHEIKH

ABDULLAHI

**ISMAEL HASSAN MAALIM (suing for and on behalf
of).....PLAINTIFFS/APPLICANTS**

**EASTLEIGH BUSINESS
DISTRICT ASSOCIATION.**

VERSUS

**CITY COUNCIL OF
NAIROBI.....DEFENDANT/RESPONDENT**

RULING

This is an application by way of Chamber Summons dated 11th June 2010 filed by M/s Oduk & Company for the plaintiffs. It is an application filed under the provisions of Order 39 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya)

The application was filed under certificate of urgency and has the following prayers: -

- 1. This application be certified as urgent and be heard ex-parte in the first instance.***
- 2. A temporary injunction do issue restraining the defendant by itself, its servants or agents or otherwise howsoever from solely collecting rates from the plaintiffs, fees and charges imposed for business permits granted the plaintiffs and fees and or charges for all the billboards and advertisements erected and put up in Eastleigh Division pending hearing of this application inter partes.***
- 3. A mandatory temporary order be and is hereby issued directing that the plaintiffs and the defendant do jointly collect the rates, fees and or charges for business permits granted and for all the billboards and advertisements erected and put up within Eastleigh Division and deposit and or place***

the same in an account held jointly by the plaintiff and the defendants pending the hearing inter parties of this application.

4. That this Honourable court directs that the plaintiffs do give notice of the institution of this suit to all those persons having the same interest in this suit by a public advertisement in one local daily newspapers.

5. The costs of this application be awarded the plaintiffs/applicants.

The application has grounds on the face of the Chamber Summons. It is supported by the affidavit sworn on 11th June, 2010 by **HUSSEIN HAJI**, the 1st plaintiff.

It was deponed in the said affidavit, inter alia, that the deponent was the acting Chairman of Eastleigh Business District Association, and that the plaintiffs carried on business in Eastleigh. That the plaintiffs paid rates to the defendant as well as charges for business permits and licences. That the defendant had imposed fees and charges for all bill boards and advertisements erected in the area. That the defendant had failed in its statutory duties such as failure to prohibit obstruction on public places such as footpaths and roads contrary to section 14(b) of the Local Government Act; allowing refuse, garbage and effluent to be strewn all over Eastleigh Division contrary to section 160 (a) of the Act; failure to provide public lavatories and urinals contrary to section 160(b) of the Act; failure to provide street lights contrary to section 160(p) (i); failure to provide footpaths contrary to section 161(c); failure to prevent peddling hawking and street trading contrary to section 163(a); failure to provide proper facilities for disposal of sewerage and other effluent contrary to section 168; and failure to provide and maintain roads and streets contrary to section 182. It was deponed therefore that it was imperative that the defendant did not solely collect rates, fees and or charges for business permits and licences and for billboards and advertisements but the same be collected jointly by the parties and be placed in a joint account of the plaintiffs and the defendants to enable the same to be applied for provision of services in Eastleigh.

The plaintiffs through their advocate also filed written submissions on 3rd December, 2010. The contents of the affidavit filed in support of the application were emphasized. It was emphasized that the photographs annexed to the affidavit clearly demonstrated that what the plaintiffs were stating was true. That the defaults of the defendants had materially interfered with the plaintiffs' comfort, health, fullness of human existence and caused them to suffer loss and damage. It was the contention that the defendants had not in their replying affidavit controverted the complaints of the plaintiffs but merely said that if the orders sought were confirmed, they would open a pandoras box as other tax payers would seek similar orders.

The application is opposed. The defendant filed a replying affidavit sworn by Aduma Owour (Acting Director Legal Affairs) on 18th June, 2010. It was deponed, inter alia, that the plaintiffs had not sought prior leave of court to institute a suit on behalf of others. It was deponed that the orders sought herein were calculated to restrain the defendant from carrying out its statutory powers and mandates. That the levying of rates and charges were statutory entitlements of the defendant under the Local Government Act (Cap 265). That, in any case, the complaints raised were being attended to in by the relevant Departments of the defendant.

The defendant filed preliminary objection on 22nd June 2010. They also through their counsel M/S E N Omoti & Company Advocates, filed written submissions on 15th November, 2010. They reiterated the contents of the replying affidavit, and relied on several court authorities. They argued that no injunction could issue against a local authority or its officers. Their contention was that being a statutory entity, it could only be compelled through Judicial Review, not through ordinary suit.

The defendant also contended that all the substantive prayers in the application had been spent.

Having considered the application, the prayers sought and the submissions, I am of the view that the application is for dismissal. It is not for dismissal on its merits, but merely because of a technicality regarding the prayers sought. I do not find it necessary to make a decision on the prayer for advertisement, as a society has to sue through human persons. It is at the hearing that the plaintiffs will prove their capacity.

All the orders sought from this court for injunction under order 39 of the Civil Procedure Rules, are for the period up to the hearing of the application inter partes. They are prayers 2 and 3. They are not prayers for orders up to the hearing or determination of the suit. This court cannot manufacture prayers for parties. It can also not give orders that have not been prayed for.

The interim orders already granted on the above two prayers have already served their purpose. After the determination of this application they cannot be extended, because the plaintiffs did not ask for orders pending hearing of the case. I dismiss the application with regard to prayers 2 and 3. They cannot be granted pending hearing of the suit. However, due to the nature of the case, I order that costs of the application will be in the cause.

In the result, I dismiss the application with regard to the said prayers and disallow prayers 2 and 3. Any interim orders with regard to those two prayers are hereby vacated. For the avoidance of doubt, since I have dismissed the application on those two prayers on a technicality only, the plaintiffs have liberty to file a proper application, in accordance with law.

Dated and delivered at Nairobi this 1st day of March 2011.

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GEORGE DULU

JUDGE

In the presence of

Mr. Owino for plaintiff/applicant

Mr. Omindo for defendant/respondent

C Muendo – court clerk