



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Appeal 469 of 2005**

**STEPHEN GUTHUA KANYORO..... APPELLANT**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI..... RESPONDENT**

**R U L I N G**

1. On 24<sup>th</sup> of October, 2005, following an application made by Stephen Guthua Kanyoro, (hereinafter referred to as the respondent), an order was issued by this Court as follows:

*“that an injunction be and is hereby issued against the respondent, its agents, servants, and employees and/or through whoever against interfering with the appellant’s fully licensed business along 6<sup>th</sup> Parklands Avenue until the hearing and determination of this appeal and CMCC No. 5191 of 2005 before the Chief Magistrate’s Court at Milimani.”*

2. The City Council of Nairobi, who is the respondent in the appeal, (hereinafter referred to as the applicant), has now moved this Court by way of a Notice of Motion dated 6<sup>th</sup> March, 2008 seeking the following orders:

(i) That this Honourable Court be pleased to order that the temporary injunction granted herein by this Honourable Court be discharged or set aside.

(ii) That in the alternative this appeal be dismissed for want of prosecution.

(iii) That the costs of this application and/or appeal be provided for.

2. The application is based on the following grounds which have been stated on the face of the application:

(i) The plaintiff/appellant was granted an order on 25<sup>th</sup> October, 2005 after an *ex parte* hearing on the Notice of Motion application dated 5<sup>th</sup> July, 2005 and the supporting affidavit thereof.

(ii) Since the appellant was granted the said orders he has gone to sleep and cannot continue to enjoy the temporary orders and injunctum.

(iii) the gravamen upon which the application dated 5<sup>th</sup> July, 2005 was on account of the fact that the appellant had been licensed to operate a 'small workshop service repair constructor' for the year 2005 which license number NC0164171 has since lapsed and as such the basis of the injunction or this cause no longer exists.

(iv) The appellant is required to renew his license and pay the requisite fees but continues to enjoy the said injunction without complying with the law.

(v) The appellant has not taken any steps to prosecute this appeal, on account of the fact that he is enjoying the said injunction.

(vi) The orders as granted were granted until hearing of both this appeal and the lower Court case, thus it would not matter even if this appeal is dismissed, the orders would still remain if the lower Court case is still pending, yet the appellant is not prosecuting any of the causes.

(vii) It is mete and just that the orders sought hereof are granted.

3. The application is further supported by a supporting affidavit sworn on 6<sup>th</sup> March, 2008 by Karisa Iha, an advocate of the High Court of Kenya and also the Assistant Town Clerk (L) in charge of the Legal Department of the applicant.

4. The appellant/respondent has responded to the application through a replying affidavit sworn on 30<sup>th</sup> April, 2009. The respondent explains that the orders sought to be set aside, were issued by Hon. Mutungi, J. following the failure of the applicant to attend Court despite having been aware that the matter was

coming for *inter partes* hearing. The respondent maintains that the application lacks merit as the applicant continues to collect daily operations fees which is even more than the cost of annual licence.

5. I have given due consideration to this application. I have also perused the Court record. It is evident to me that the order which was given on 24<sup>th</sup> October, 2005 granted the respondent an interlocutory injunction pending the determination of the appellant's suit, which was pending in the Chief Magistrate's Court at Milimani. From the memorandum of appeal, together with the handwritten ruling, it is apparent that the respondent's appeal was against the order of the lower Court dismissing his application for an interlocutory injunction pending the hearing of the suit that he had filed in that Court.

6. By granting the orders of 24<sup>th</sup> October, 2005, this Court in effect, compromised the appeal, as it granted the order of interlocutory injunction which had been rejected by the lower Court. The order of 24<sup>th</sup> October, 2005, made the appeal redundant as there would be no further issues to be determined in this appeal after the appellant's suit in the lower Court is determined. In that regard the application for dismissal of the appeal under Order XLI Rule 31 of the Civil Procedure Rules is misconceived. The applicant's remedy lies in pursuing the speedy disposal of the suit in the lower Court.

7. Further the respondent has moved this Court for review under Order XXXIX Rule 4 of the Civil Procedure Rules. That rule is not applicable as the order for interlocutory injunction issued by this Court, was made under Order XLI Rule 4(6) of the Civil Procedure Rules, and not under Order XXXIX. Section 63 of the Civil Procedure Act which was cited by the applicant does not also give this Court powers to set aside or review orders. Nor would this Court be able to fall back on its inherent powers as the applicant had the alternative of proceeding by way of appeal or review under Order XLIV Rule 1 of the Civil Procedure Rules but chose not to do so.

8. The upshot of the above is that I find no merit in this application. It is accordingly dismissed.

Those shall be the orders of this Court.

**Dated and delivered this 6<sup>th</sup> day of November, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kariuki for the appellant/respondent

Advocate for the respondent/applicant, absent

Eric, court clerk

