IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Madan, Miller & Potter JJA)

CIVIL APPEAL NO. 5 OF 1979

BETWEEN

MUREITHI.....APPELLANT

AND

CITY COUNCIL OF NAIROBI.....RESPONDENT

JUDGMENT

Madan JA Upon an application made under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, for the grant of a temporary injunction the learned judge of the High Court made the following ruling:

"Injunction refused as plaintiff can be adequately compensated if Council have derogated from grant. Leave to appeal with photocopy record."

This appeal is against the above order. The appellant's (plaintiff's) application for an injunction was, I quote, to restrain the defendant, its agents or servants from demolishing the kiosk built by the plaintiff at Jericho open-air market, or harassing the plaintiff, her agents or servants in relation to the kiosk. The defendant then stopped the plaintiff from occupying the kiosk, also forbidding her to sell meat, and further threatened to demolish the kiosk. In its statement of defence, as also in the replying affidavit sworn by the defendant's Town Clerk, it is averred and deponed that stall Number 485 was not allocated to the plaintiff or any one else, nor did the defendant's servant or agent point out to the plaintiff the space where she has constructed an unauthorised structure. That stall No 485 was not included in the plan of the Jericho Temporary Market (a copy of the plan being filed in court.) That therefore the defendant was entitled to stop the construction of the stall and also to demolish it. The law as I understand it is that an appeal lies to this Court against an order granting or refusing an interim injunction which is a matter within the discretion of the court below, and this Court will interfere only if it be shown that the discretion has not been exercised judicially *Sargeant v Patel* [1949] 16 EACA 63.

Whether damages would be an adequate remedy, the breach of contract, even if uncontroverted which is not the case here, is not normally a ground for the grant of an injunction. *Ibrahim v Sheikh Bros Investment Ltd* [1973] EA 118.

The former Court of Appeal whose main judgment was delivered by Mustafa JA, with whom Wambuzi P and Law VP (as they were then respectively) agreed, said in *Abdul Salim and Others v Okong'o and Others* Civil Appeal No 44 of 1975 (unreported), that the conditions for the grant of an interlocutory injunction were well settled then in East Africa, and he could see no reason to depart from them. They were stated in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 at 360. Mr Gachuhi for the appellant

referred us to the decision of the English House of Lords in *American Cynamid v Ethicon* [1975] 1 All ER 504. Mustafa JA also said in *Abdul Salim* (supra) that the decision to the contrary in *American Cynamid* case did not alter the situation here.

According to Mustafa JA.

"The conditions are (1) the probability of success (2) irreparable harm which would not be adequately compensated for by damages and (3) if in doubt, then on a balance of convenience."

In order to elucidate the position further from my point of view, I would respectfully borrow the following words from the speech of Lord Diplock in *American Cynamid Co v Ethicon Ltd* supra (1975) AC 396 at pp 406 and 408 with which I see no cause to differ:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial … if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

I would deal with the condition concerning the question of irreparable harm if the injunction is not granted. In this case the space allotted to the plaintiff, whether number 381 or 485, was in a new temporary market as is made clear in the application for a site attached to the plaintiff's second affidavit. The plaintiff's occupation thereof also would have been correspondingly temporary and terminable by the defendant at any time at its discretion. Unless there was a change in policy as to which no evidence has been referred to, the plaintiff would not have got a permanent title to the site for the kiosk. Therefore, the plaintiff would not suffer an irreparable injury.

In this case there is also no question but that the defendant would be in a financial position to pay any damages that may be awarded to the plaintiff. If her action succeeds she could be adequately compensated in damages, including loss of profits if she is advised to amend her plaint accordingly. The learned judge was right in refusing the injunction. I would dismiss the appeal with costs.

Potter JA. I have read the judgment of Madan JA and I agree with his conclusions and the proposed order.

Miller JA. I have read in draft the judgment of Madan JA in this appeal. I agree with it and have nothing to add.

Dated and Delivered at Nairobi this 11th day of July 1979.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR