



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 634 OF 2010

NAIROBI BOTTLERS LIMITED.....1ST PLAINTIFF

KENYATTA INTERNATIONAL

CONFERENCE CENTRE.....2ND PLAINTIFF

=VERSUS=

NAIROBI CITY COUNTY GOVERNMENT.....DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit through a plaint dated 16/12/2010 and filed in court on the same day. They allege that the 2nd plaintiff is the ostensible owner of an unsurveyed property forming the open grounds bordering the back of Sheria House, Parliament Road and the City Hall Way, adjacent to Garden Square Restaurant, together with the surrounding land, including Land Reference Number 209/11157. They contend that the 2nd plaintiff entered into a lease agreement with the 1st plaintiff pursuant to which it allowed the 1st plaintiff to place a container on the said grounds. They contend that on 7/12/2010 the City Council of Nairobi served the 1st plaintiff with a removal notice requiring it to remove its container from the said grounds. It is the plaintiffs' position that the said removal notice would interfere with the 1st plaintiff's business operations. The plaintiffs contend that the said grounds fall under the jurisdiction of the Ministry of Lands and that take-over of the grounds by the defendant is a violation of the Ministry of Lands' directive that status quo be maintained in relation to the land. The plaintiffs add that they stand to suffer substantial damage owing to the defendant's notice.

2. Consequently, the plaintiffs seek the following orders against the Nairobi City County Government:

i. A permanent injunction restraining the defendant from trespassing upon the suit property.

ii. A permanent injunction restraining the defendant by themselves, their servants or agents from interfering with peaceful and quiet enjoyment and use of the suit property by the plaintiffs.

iii. A declaration that the defendant's actions of issuing a Removal Notice / interfering and/ or evicting the 1st plaintiff from the suit property is illegal.

iv. Costs of this suit.

3. The defendant filed a statement of defence dated 5/3/2015 denying the plaintiffs' claim. The defendant contends that the impugned notice is an enforcement of its By-Laws under the Physical Planning Act. It also denies the plaintiffs' claim of interest in the land on which the container is located.

4. On 18/9/2017, the City Council of Nairobi was substituted with the Nairobi City County Government as defendant.

5. Hearing commenced on 18/9/2017. Justus Kivindy who is an Assistant Legal Manager at KICC testified as PW1. He adopted his witness statement dated 9/10/2012 and testified that the 2nd plaintiff was allocated Land Reference Number 209/11157 where KICC currently stands. He produced an allotment letter marked as PExh 1. PW1 informed the court that the 1st plaintiff pays the 2nd plaintiff rent. He added that the 2nd plaintiff pays land rates to the defendant. He produced a demand letter from the defendant and a copy of receipt of payment of rates marked PExh 2 and 3 respectively. He contended that the defendant claimed ownership of the land and attempted to evict the 1st plaintiff from the land. Copies of letters dated 16/11/2010 and 23/11/2010 were produced as PExh 4 and 5 respectively. Removal notice, car parking licence agreement and a copy of a newspaper notice were also produced as PExh 6, 7 and 8 respectively. He further testified that there were attempts to amicably resolve the dispute and the Ministry of Lands had advised that the status quo be maintained.

6. In cross-examination, PW1 testified that the land on which the container is located is still unsurveyed government land. He stated that the

letter dated 21/10/2009 from Ms Dorothy Angote meant that KICC was in possession and was to remain in possession of the said land. He also stated that the letter indicated that neither party could advance valid legal reasons why it should be allowed to manage the unsurveyed Government land or collect revenue from it. He averred that the car parking agreement between KICC and Central Bank of Kenya is evidence of possession by KICC.

7. In re-examination, PW1 stated that the land on which the container is located does not have a title because it is unsurveyed government land. The defendant did not call any witness or present submissions.

8. The plaintiffs filed written submissions dated 14/3/2018. They submitted that the defendant had no legal right to issue the impugned notice in relation to land which it did not legally own. The plaintiffs further submitted that the 2nd plaintiff had been paying rates to the defendant and it was trite law that it is only an occupier of land who in law was compellable to pay rates to the County Government. They further submitted that the plaintiffs' case was uncontroverted as the defendant did not call any evidence to challenge the plaintiffs' case.

9. The plaintiffs further submitted that they were entitled to the remedies sought in the plaint. They relied on **Lucy Wangui Gachara vs. Minudi Okemba Lore [2015]eKLR** where the principles for granting an interlocutory injunction (sic) were laid out.

10. The plaintiffs further submitted that the court should declare the defendant's action of issuing a removal notice and interfering and/or evicting the 1st plaintiff from the suit property as illegal. They added that the court needs to determine whether the defendant possesses any ownership rights over the suit property that is superior to that of the 2nd plaintiff. Reliance was placed on the case of **Republic vs. Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017]eKLR** where the criteria for grant of declaratory orders was outlined.

11. I have considered the parties' pleadings and the plaintiffs' submissions. I have similarly considered the relevant legal framework and jurisprudence. The suit herein is a challenge against a removal notice dated 7/12/2010 by the defunct City Council of Nairobi. The removal notice was directed against Rosinje Soda Distributor in its capacity as holder of Hawker Licence Number BP 0543002. The said Rosinje Soda Distributor is not the plaintiff herein. The plaintiffs herein did not lead evidence to bring out the relationship between them and the party against whom the removal notice was directed. Secondly, there is absolutely no evidence that the said removal notice was an assertion of a claim of ownership of the unsurveyed Government land by the defendant. The defendant has contended that the removal notice was an enforcement of its By-Laws.

12. Looking at the plaintiffs' Exhibit 8 which is a newspaper notice published on 7/10/2010 by the City Council of Nairobi, it is clear that the Council notified the general public to remove illegal structures in the City. The notice was issued under Section 38 of the Physical Planning Act. Subsequent to that, the Council served upon M/s Rosinje Soda Distributors the impugned removal notice.

13. In my view, in issuing the removal notice, the Council was exercising its regulatory mandate under Section 38 of the Physical Planning Act. The said notice was an enforcement notice under Section 38 of the Act. The Act provided and still provides for a redress mechanism by a party who may be aggrieved by the regulator's decision such as the impugned enforcement notice. That is the mechanism which M/s Rosinje Soda Distributor was required to utilize in seeking redress.

14. Counsel for the plaintiffs submitted at length on interlocutory injunction. That submission is in my view misplaced because what is before court at this point is the substantive suit, not an interlocutory application seeking interim injunction.

15. In light of the above findings, this court is not satisfied the plaintiffs have proved their case on a balance of probabilities to warrant grant of the orders sought in the plaint. The net result is that the suit herein is dismissed for lack of merit. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22 ND DAY OF JANUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr. Mbaji holding brief for Ms Dar advocate for the plaintiffs

June Nafula - Court Clerk