



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 91 OF 2018**

**DAVIS MWALIMU MWANGEKA.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY & ANOR.....DEFENDANT**

**RULING**

1. This matter was transferred from the High Court pursuant to the establishment of this court in October 2012. On the transfer, Justice Kasango had on 3<sup>rd</sup> March 2015 given directions on the pending applications. The directions made by the Judge were as follows;

**(a) The Notice of Motions dated 26<sup>th</sup> November 2012, 4<sup>th</sup> December 2012, 26<sup>th</sup> February 2014 and 27<sup>th</sup> February 2014 shall be determined by this court after the Officer-In-Charge of the Port police provides information on the tenancy of the Plot No. 971/972 MN Shimanzi Road.**

**(b) The Attorney General is hereby ordered to assist this court to obtain an affidavit sworn by the Officer-In-Charge of the port police station whereby that officer will inform the court whether or not David Mwalimo Mwangeka is a tenant of the police at Plot No 971/972 MN Shimanzi Road Mombasa. If he is a tenant the said Officer-In-Charge of Port Police shall indicate the period of such tenancy.**

**(c) An extracted order of today's ruling shall be served by the Deputy Registrar of this court upon the office of the Attorney General.**

**(d) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are granted access to Plot No. 971/972 MN Shimanzi Road for the purpose of carrying out repairs. If such repairs cannot be done while the plaintiff is in occupation, the Plaintiff shall give vacant possession within 7 days from today to enable such repairs to be done.**

**(e) Each party is granted leave to move the court, if necessary.**

2. On 29<sup>th</sup> April 2019, Mr Samuel Cheruiyot Tuwei former Port Police Station Commander appeared in court for cross examination as per the directions given on 3<sup>rd</sup> March 2015. Mr Tuwei stated that based on a memorandum of understanding between the 1<sup>st</sup> Defendant and the National Police Service, the 1<sup>st</sup> Defendant does allocate houses to the Kenya Police including a police canteen for the welfare of the police. That the memorandum of understanding dated 29<sup>th</sup> March 2004 did not make any reference to the canteen. Mr Tuwei said the canteen built in 1981 was occupied by the plaintiff since 1999. He confirmed that cess payments were being made to the County Commander Coast Province and not the 1<sup>st</sup> Defendant.

3. The officer said that the plaintiff had an agreement dated 1<sup>st</sup> September 1989 kept at the Port Police Station but he was not sure if a copy of the said agreement was forwarded to the 1<sup>st</sup> defendant. In further cross-examination by Mr Mwawasi advocate appearing for the plaintiff, Mr Tuwei stated that in paragraph 5(1) of the memorandum of understanding, in every established police station, there must be a canteen for the welfare of the police officers. That the canteen is not limited to feeding of prisoners/remandees but also provide the police and their families with food and other services like entertainment. That according to records kept at Port Police Station, the plaintiff had an agreement with the police (dated 1<sup>st</sup> September 1989, one in 2015 and the current one).

4. The applications dated 26<sup>th</sup> November 2012 and 27<sup>th</sup> February 2014 sought similar orders i.e for temporary orders of injunction pending hearing and determination of the said applications and the suit. The application dated 26<sup>th</sup> February 2014 sought for an order of status quo, leave to construct a skeleton file and that the orders issued on 26<sup>th</sup> November 2012 be reinstated. Pursuant to the directions given on 3<sup>rd</sup> March 2015, I consider this application as spent. The application dated 4<sup>th</sup> December 2012 brought under Order 40 rule 2 & 3 was for

summons to issue to Gichiri Ndua, the Managing Director of the 1<sup>st</sup> defendant and Kennedy Mwangi, the Managing Director of 2<sup>nd</sup> defendant to appear in court and show cause why they should not be cited for contempt of the order issued on 26<sup>th</sup> November 2012 and be committed to prison.

5. In regard to the application for injunctions, I note that the plaintiff had sought in the plaint for an order of permanent injunction to restrain the defendants by themselves, their servants and or agents or otherwise howsoever from interfering with the plaintiff's occupation of and business on the premises situated on Plot No. 971/972 MN, Shimanzi Road or evicting the plaintiff therefrom.

6. The plaintiff also sought orders of temporary injunction pending determination of his suit. The defendants opposed the grant of the said orders vide a replying affidavit of Kiprotich Cheruiyot sworn on 11<sup>th</sup> December 2012. This affidavit also responded to the application dated 4<sup>th</sup> December 2012. What is expected of the plaintiff is to show that he merits the orders is either he has a prima facie case or he is likely to suffer irreparable loss if the orders are not given and or that the balance of convenience tilts in his favour.

7. Without going into the contents of the pleadings filed by both sides, the evidence of the former Port Police Commander Mr Samuel Tuwei is sufficient to help the court resolve the application. Mr Tuwei confirmed that the suit properties belonged to the 1<sup>st</sup> defendant which the 1<sup>st</sup> defendant allocated to the National Police Service pursuant to a memorandum of understanding. The National Police Service on its part put the plaintiff in to possession of the canteen. As at the time of filing of this suit, the plaintiff was in possession and that the 1<sup>st</sup> defendant had served him with a notice to vacate the suit premises.

8. In answering whether the 1<sup>st</sup> defendant had any contractual relationship with the plaintiff can only be resolved during a full hearing. I say so because according to Mr. Samuel Tuwei, he stated that the plaintiff had an agreement with Port Police and that he was paying cess to the County Commander. This inference drawn is that the plaintiff has demonstrated that he has a prima facie case. Secondly on account of the plaintiff being in possession, the balance of convenience tilts in his favour. It is thus in the interest of justice that a temporary injunction be and is hereby confirmed in terms of prayer 3 and 4 of the application dated 26<sup>th</sup> November 2012 pending determination of the suit.

9. In regard to the 2<sup>nd</sup> application, it is my considered opinion that the same is spent pursuant to paragraphs 15 and 16(d) of Kasango J's ruling. The said paragraphs are provided as follows;

**Paragraph 15 “ Indeed it was the 1<sup>st</sup> defendant show of interest to restart the repairs in February 2014 that led the plaintiff to file two more injunctive applications dated 26<sup>th</sup> and 27<sup>th</sup> February 2014. There is no doubt the 1<sup>st</sup> defendant has been frustrated in carrying out those necessary repairs. As consequence of the court appreciating that fact the 1<sup>st</sup> and 2<sup>nd</sup> defendants will be granted access to the premises to carry out repairs.”**

**Paragraph 16(d) “The 1<sup>st</sup> and 2<sup>nd</sup> defendants are granted access to Plot No. 971/972 MN Shimanzi Road for the purpose of carrying out repairs. If such repairs cannot be done while the plaintiff is in occupation, the Plaintiff shall give vacant possession within 7 days from today to enable such repairs to be done.”**

10. The issuance of paragraph 16(d) definitely changed what the status quo was at the time of filing of the application of 4<sup>th</sup> December 2012. The interest of justice and article 159 of the Constitution requires the expeditious disposal of suits. Given the age of this suit and various orders made parties are directed to forthwith set it down for hearing. Each party shall meet their respective costs of the four applications.

**Dated, Signed and Delivered at Mombasa this 31<sup>st</sup> day of July 2019.**

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**A. OMOLLO**

**JUDGE.**