



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 27 OF 2017

PETER MIDIMO AGOLA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TRANS NZOIA.....DEFENDANT

RULING

1. The plaintiff filed an application dated 20/2/2017 seeking the following orders

a)spent

b) **That pending the inter-partes hearing of this application there be issued an order of temporary injunction restraining the defendant, whether by itself, its servants, agents and/or any other person(s) acting through the defendant from evicting the plaintiff from the portion of land on which he carries on business under the name and style of “Kulia Ujuzi Garage” behind the National Bank of Kenya, Kitale Branch, off Central Elgon Road.**

c) **That at the inter-partes hearing of this application orders granted in the terms prayed in prayer (b) above do operate till the substantive suit is heard and determined.**

d) **That there be made such other and/or further orders as the ends of justice may demand.**

e) **That costs be provided for.**

2. In his affidavit in support of the application he has argued that the respondent, the Successor to the Municipal Council of Kitale, through its officers have informed him that his premises would be demolished to pave way for some unspecified public works.

3. He avers that has not been served with any written notice of the defendant’s intention and that he is apprehensive that in the event the demolition occurs, he will suffer substantial loss. He avers that the due notice having not issued, the intended demolition is unreasonable and unlawful hence the prayers in the application dated **20/2/2017**.

4. The background to this application is that, according to the plaintiff, he was allocated a portion of land by the defunct Municipal Council of Kitale to operate a garage business for the purpose of repair of motor vehicles and other engineering works. The parcel of land is situated of Central Elgon Road behind the National Bank of Kenya in Kitale town.

5. The plaintiff states that he has been paying annual rates and license fees to the defunct council and the exhibits copies of the receipts **PMA 1, 2,3,4,5 and 6**.
6. He avers that since **1989** he has developed the portion of land and installed thereon a three-phase electricity supply, a lead machine for turning iron, a lead machine for turning iron, shaber machines for turning, drilling machines and he has assorted motor vehicles, trailer frames, maize choppers, 4 welding machines, farm implements and other chattels.
7. The threat of demolition which has aroused the plaintiff apprehension was delivered by unnamed enforcement officers from the County Government of Trans Nzoia to the plaintiff on **16/2/17**.
8. The defendant filed a defence to the suit on **24/3/2017** and a Replying Affidavit in respect of the application on **24/3/2017**.
9. In the defence the defendant pleads that the plaintiff has been unable to provide it with allotment letters or documents from the defunct Kitale Municipal Council dating back to **1989**. Consequently the defendant denies that the plaintiff was authorized to transact on the land.
10. It is also pleaded that the plaintiff does not own land in Kitale town and that he has failed to adequately describe the plot as he has not given any land reference number or valid documents to prove ownership of the same. The defendant further states that it is its mandate to develop towns falling within its jurisdiction, that the plaintiff business is located on a road reserve and its presence is not sustainable in the wake of ongoing developments, particularly the opening up of access roads.
11. The defendant further states that adequate notice was issued to the plaintiff in accordance with the relevant provisions of the Law. The defendant states that the plaintiff's suit is not well founded, is not properly before the court is sham, frivolous and vexatious. It states that the directive to demolish the premises is for greater good for the greater number of people.
12. This is substantially the same defence raised against the application dated 20/2/2017 in the replying Affidavit of Lucy Kihamba sworn on 24/3/2017. In her affidavit she adds that the defendant, having embarked on a mission to tarmac all the access roads within Kitale town, has faced a challenge particularly from persons who, like the plaintiff have unlawfully occupied roads and subsequently laid claim over the same.
13. The defendant has therefore issued notices to all such encroaching persons informing them to relocate to pave the way for roads improvements. The defendant is of the opinion that the plaintiff has not demonstrated of the court justifiable grounds and reason to warrant the court to exercise its discretion to grant the orders of injunction.
14. In a further replying affidavit sworn by Lucy Kihamba on **20/5/2017** the development avers that the single business permit annexed to the plaintiff supporting Affidavit relates to plot No. **Kitale Municipality Block 4/415** measuring **0.0778Ha** located off Central Elgon road, far from the premises in dispute.
15. The deponent annexes to her Affidavit samples of the Notices which were sent to all affected persons. They are marked **'LK1 (a), (b) and (c)'**. **"LK1(a)"** is a Notice on the letterhead of the Public Works, Transport and Infrastructure Department of the County Government of Trans Nzoia. It is dated 19/2/1014. It is addressed to all Kiosk owners, Municipal Yard. It states in part:

"RE: TEMPORARY KIOSKS"

NOTICE is hereby given that all temporary kiosks surrounding the Municipal Yard are asked to remove them within seven (7) days from the date of this letter to enable the county erect the perimeter wall."

16. The Notice is signed by the County Executive Member for Transport and Infrastructure. **“LKI (b)”** is a Notice to G.H Tanna Company Limited dated 3/6/2016. It reads as follows:

“RE: Removal of materials.

The Department of Public Works Road Transport and Infrastructure has commenced on upgrading the Villa Hotel –Bongo-Mea Ltd-Highview Hotel Backstreet to bituminous surface.

As you are aware the contractors have commenced execution of the road works and is experiencing delays as a result of your hoarding materials around your ongoing construction work that have encroached on the road reserve.

You are therefore asked to remove the hoarding material and use the front part of the building you are constructing without interfering with other services and traffic”.

17. The Notice is signed by the Chief Officer, Transport and Infrastructure-Department of the County Government of Trans Nzoia. **“LKI(c)”** is a general notice to all Kiosk owners around the municipal yard, behind National Bank and behind Post Bank. It reads as follows:

“RE: Temporary Kiosks

NOTICE: is hereby given that all temporary kiosks surrounding the Municipal Yard, behind National Bank and Post Bank are asked to remove them within twenty one (21) days from the date of this letter to enable the County carry out routine road maintenance. Failure to do so will result in the County demolishing and you will incur (sic) the demolishing costs. There will be no further notice after the expiry of twenty one (21) days.

18. The Notice is signed by the Chief Officer Transport and Infrastructure Department of the County Government of Trans Nzoia. It is dated 16/1/17. The plaintiff has not responded to any of the allegations in the two replying Affidavits. The questions that need to be determined in order for an injunction to be issued in this matter are, first whether the plaintiff has demonstrated that he has prima facie case with probabilities of success, whether the plaintiff would suffer irreparable damage if the orders sought are not issued. If the court will be in doubt regarding these two questions it will rule and balance of conveniences.

19. I have examined the annexure to the supporting Affidavit and I find none that establishes that the Municipal Council of Kitale allocated the land to the plaintiff to hold for any particular period. What I find are single business permits issued to the plaintiff and ostensibly paid for. Business permits are distinct from allotment letters. The payments to the County Government of Trans Nzoia and Kitale Municipal Council are acknowledged by the defendant. They are dated **13/2/2017, 16/3/2016, 4/8/2014, 1/1/2018, 1/1/2006, & 1/1/2003**. No account is made by the plaintiff as to whether he paid any business permit fees in the other years falling between **1989** and **2017**. I also notice that the payments made for the County Government permits are in the name of the plaintiff and show on their face that the permitted business would be exclusively carried out off Central Elgon Road, on Plot N0.2116/XII/413.

20. The Kitale Municipal Council Business permits dated 1/1/2008 and 11/1/2003 show that the business would be conducted at a plot only known as 2116/413. The permit dated 3/4/06 shows that the business would be conducted at Plot No.443 in Zone XII. The discrepancy in plot Numbers is not explained by the plaintiff. The Plaintiff does not also insist that the said plot numbers refer to the parcel of land he is occupying. The court however observes that the defendant has been aware of the presence of the plaintiff on the road reserve for some time before the Notice was issued; Therefore, the discrepancies in plot numbers are not material to the present application as the plaintiff’s presence on the ground is undisputed. The defendant is also aware of the periodic nature of the permits it issued to the plaintiff over a period of several years. The only bone of contention is that there is no evidence that the land was allocated to the plaintiff as he alleges and that the execution of the development mandate of the defendant

would be hindered by any injunctive orders issued herein. However no documentation has been annexed to the two replying Affidavits of the defendant/respondents to show the imminence of execution of the development programme on the subject road to warrant immediate eviction of the plaintiff from the premises he now occupies. No development plan has been exhibited.

21. I must state that this court presumes, and properly so - for governmental authorities ordinarily engage in a great deal of in house consultations and procedures in development concerns - that development plans of County Governments do not occur to the mind of the Chief Officer suddenly. They must have been considered, contemplated, discussed, approved, and funded before their execution.

22. Where the County Government has committed itself by issuing business permits and accepting moneys for a certain period therefore, it cannot be said to have been unaware of such commitment for such period. Essentially, consideration of such commitment and how to handle it should form part and parcel of the planning that I have alluded to herein above.

23. In stating this I am aware that there is no evidence demonstrating that the plaintiff owns the land he is conducting his garage business on, but the court is also aware that business is conducted not for fun only but in most cases primarily to earn a livelihood. This must be the case for the plaintiff also.

24. It is necessary to apply caution when approaching the issue at hand which involves a business establishment, which the defendant does not deny that it has been conducted or such a road reserve for long, and with the defendant and defendant's predecessors express consent which is evidenced by the Business permits they issued at various times. Though the plaintiff's continued stay on the land would depend on the consent of the defendant, in my view, he has established a prima facie case. This is strengthened by the fact that the plaintiff has paid for the 2017 Single Business Licence.

25. As to the issue of whether any sudden demolition without any further notice would irreparably harm the plaintiff or his business, I have considered the extensive developments that he has described in his pleadings. I do not wish to comment further on the issue so as not to prejudice the hearing of the main suit. However, it is the opinion of this court that if immediate eviction of the plaintiff issues and his developments are demolished before the hearing of the suit, then he would suffer irreparable damage.

26. I therefore find that the plaintiff has demonstrated a prima facie case with probability of success and that he would suffer irreparable damage if his developments were demolished immediately. In order to safeguard against possible damage this court has to issue necessary orders. I therefore order that the orders of interim injunction issued as per prayer no **(b)** of the Notice of Motion earlier on in the suit are hereby confirmed pending the hearing and determination of the suit. However, in view of the importance of this matter, hereby order that the parties herein will have only 14 days from the date hereof to comply fully with Order 11 of the Civil Procedure Rules and hence make this suit ready for hearing in the first week of the new term beginning September, 2017.

It is so ordered.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017.**

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Wafula for Applicant

N/A for Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017