



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CASE NO. 187 OF 2015

ATMAN TAWA
MUTUNGA MUSYOKA Suing as official on
behalf of LIKONI FERRY MULOLONGO VENDORS SELF
GROUP.....PLAINTIFFS/APPLICANTS

VERSUS

MINISTRY OF LAND, HOUSING & URBAN DEVELOPMENT
HASIL CONSTRUCTION CO. LTD
THE COUNTY GOVERNMENT OF
MOMBASA.....DEFENDANTS/RESPONDENTS

AND

JOSHUA ARONI MAKIYA.....INTERESTED PARTY

RULING

1. The plaintiffs/applicants filed a suit in which they also filed the notice of motion dated 17th August 2015. The motion is anchored on the provisions of Article 20 and 23 of the Constitution, Order 40 of the Civil Procedure Rules and section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act. The applicants seeks the following order ;

1) Spent

2) Spent

3) That pending the hearing and determination of this matter this Honourable Court be pleased to issue a temporary injunction as against the Respondent by themselves, their servant, employee agents or whomsoever from constructing or erecting any building or structures on the suit property pending the hearing and determination of this Application.

4) That this Honourable Court be pleased to issue a mandatory injunction as against the Respondents by themselves, their servant, employee agents or whomsoever from evicting or interfering in any manner whatsoever the Applicants peaceful and quiet possession, occupation and or use of the suit property and or constructing or erecting any building or structures pending the hearing and determination of this suit.

5) Costs of the application be provided.

2. The application is supported by the 3 grounds on the face of it and the affidavit sworn by Athuman Twaha. Briefly the applicants state that they have carried on business on the suit premises from 2008 to date. That the unfenced construction to be put up by the Respondents will cause them hardship, inconvenience and great financial loss. The applicants deposed that the land in question belongs to the interested party who has consented to their staying on the suit premises.

3. The application is opposed only by the 3rd Respondent. The 3rd Respondent admits the planned construction but avers that there was public consultations where the applicants participated. Mr Kenedy Muturi swore the replying affidavit on behalf of the 3rd Respondent. He deposed that although the applicants have been carrying on business in the suit premises, the plot does not belong to the interested party as alleged. He deposed that the applicants were duly notified of the intended construction.

4. Mr Muturi deposed further that the project is so beneficial to the public as it will ease congestion and movement at Likoni ferry crossing channel and the allegations of unjust enrichment of the 3rd Respondent is unfounded. He also stated that the project is strictly being carried on a road reserve as per copy of the map he annexed and it is his contention that it is the plaintiffs' structures which are illegal. He urged the Court to dismiss the application.

5. The applicants and 3rd Respondent's advocates filed written submissions. The applicant submitted that their application meets the threshold set in the case of **Giella vs Cassman Brown**. They called upon the Court to consider the balance of convenience as being to preserve enjoying of rights ending hearing and determination of the suit. The applicants submit that articles 20, 21, 22 and 23 of the Constitution protects the applicants from possible harm, threatened or likely as in their case they will suffer a violation of social economic rights for want of an earning capacity before the hearing of their suit.

6. The 3rd Respondent on its part submitted that the application has not met the threshold for granting injunctions. On prima facie case, the 3rd respondent submitted that the applicants have admitted they are not registered proprietor of the suit parcel having been authorised to do business here by the interested party. Because of this, the 3rd Respondent avers the applicants have no locus to bring this suit.

7. The 3rd Respondent further submitted that the project is being undertaken on a road reserve. That if the applicants were aggrieved, then they ought to have approached the county government for alternative place to do business. The 3rd Respondent submits that the applicants are being selfish by trying to stop a project beneficial to the public. Lastly that the applicants have not demonstrated any loss to be suffered and that where loss is ascertainable, injunction should not be granted.

8. On the balance of convenience, that if the application is allowed, it will amount to defeating the public interest at large. That the levies the applicants are paying are for their daily business permit for operating and does not confer any proprietary rights over the road reserve area or at all. They urged the Court to dismiss the application. The 3rd Respondent cited the case of **Dennis Kuria & Others vs The Minister for Roads and Public Works Nairobi HCC Miscellaneous Application No 663 of 2006**.

9. I have considered the pleadings filed and submissions rendered. I will evaluate and analyse the same to see whether the applicants have established any of the principles for granting injunctions. In laying claim to the suit premises, the applicants pleaded that they have carried business at the place since 2008 to date. The documents they annexed to support this were receipts issued by the 3rd Respondent and a letter from

the interested party.

10. The receipts annexed are all dated 11th – 13th August 2015. The letter from Joshua Aroni is also dated 5th August 2015. In the letter, the interested Party granted the applicants permission to use the frontage of his plot to support themselves and provide for their families. In reading this letter, it is clear they are not carrying on business on the premises of the Interested Party but on its frontage.

11. If the business is on the frontage of the plot, does it lend credence to the 3rd Respondent's averment that the premises in dispute is a road reserve? Probably I would believe this averment because if the construction was to be on plot No M/S 1680 that the person to complain would be the registered proprietor and not the applicants. The 3rd Respondent also stated that before the construction began, they engaged all the stakeholders the applicants included and briefed them about the project. The applicants did not file any papers to counter this deposition. Therefore going by the facts that the applicants are not the owners of the land in question, that construction is not being undertaken on plot No 1680 and that notice was given by virtue of stakeholders' meetings. I am not satisfied that the applicants have put forth a prima facie case with a probability of succeeding.

12. On the principles of irreparable loss, the applicants complained that they will lose source of livelihood as they will be rendered jobless and destitute. The applicants' complaint is that they have not been given alternative place of business. The inference is that once an alternative place is offered, the applicants' dispute will have been resolved. It follows that the loss is not irreparable as compensation can be paid by giving an alternative place to do business.

13. The applicants submitted that the balance of convenience tilts in their favour as they are in possession. The 3rd Respondent however the convenience tilts in favour of the public as the project will decongest the Likoni ferry channel crossing. This Court takes judicial notice of the traffic and human jam usually experienced at the Likoni ferry especially when one of the vessels break down. It is indeed important that any decongestion at the ferry will be of public interest to benefit many the applicants included.

14. Consequently, I make a finding that the applicants have not proved any of the principles set for granting injunction. But they have shown that they have an interest on the land and should therefore not be completely disregarded. On this basis and on basis of the provisions of article 43 of the Constitution, the Court allows for extension of interim orders for such period of time until the Court directs and upon such time as 3rd Respondent would have relocated the applicants to an alternative site. For effectiveness of this order to be realised, the Court directs the applicants to present to this Court and to the 3rd respondent a list of their members carrying on business in the suit premises. This matter be mentioned on 5th September 2016 for further orders.

Ruling dated and delivered this 15th day of July 2016

A. OMOLLO

JUDGE