



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 782 OF 2013

MWANTHI MUGWE.....1ST PLAINTIFF
JOSEL KAMAU MWANGI.....2ND PLAINTIFF
DOMINIC WAMBUA 3RD PLAINTIFF

VERSUS

ALI SHEIKH MOHAMED... ..1ST DEFENDANT
FARAH MOHAMED BARROW2ND DEFENDANT
CITY COUNCIL OF NAIROBI3RD DEFENDANT
GOLDEN LIME INTERNATIONAL LTD.....4TH DEFENDANT
ABDI RASHIA ABSISHARIFO5TH DEFENDANT
ADAN HAJI ISSAK 6TH DEFENDANT
MOHAMUD SHEIK7TH DEFENDANT

AS CONSOLIDATED WITH

REPUBLIC

IN THE HIGH COURT OF KENYA A NAIROBI
CIVIL SUIT NO. 615 OF 2008

MWANGI MUGWE.....1ST PLAINTIFF
JOSEL KAMAU MWANGI.....2ND PLAINTIFF
DOMINIC WAMBUA 3RD PLAINTIFF

VERSUS

GOLDEN LIME INTERNATIONAL LTD1ST DEFENDANT

CITY COUNCIL OF NAIROBI2ND DEFENDANT

AS CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 589 OF 2008

ALI SHEIKH MOHAMED..... 1ST PLAINTIFF

FARAH MOHAMED BARROW..... 2ND PLAINTIFF

T/A ALFA TRADERS 3RD PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

GOLDEN LIME INTERNATIONAL LTD 1ST INTERESTED PARTY

MWANTHI MUGWE, JOEL KAMAU MWANGI &

DOMINIC WAMBUA2ND INTERESTED PARTY

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSITUTION & JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 37 OF 2009

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AN PROHIBITION**

REPUBLIC APPLICANT

VERSUS

THE REGISTRAR OF TITLES RESPONDENT

AND

THE CITY COUNCIL OF NAIROBI 1ST INTERESTED PARTY

BLUE SE SHOPPING MALL LTD2ND INTERESTED PARTY

GOLDEN LIME INTERNATIONAL LTD3RD INTERESTED PARTY

RULING

On 27/6/2013 **Hon. Justice Waweru** ordered transferred to the Environment and Land Court Division **HCCC NO. 24 of 2007** as consolidated with **HCCC NO. 615 of 2008** and **HCCC NO. 589 of 2008** and the consolidated suits were together renumbered **HCC ELC NO. 782 of 2013**. The Plaintiffs in **HCCC NO. 24 of 2007 and HCCC NO. 615** of 2008 are similar and both Golden Line International Ltd and the city Council of Nairobi are named as Defendants in both suits.

The application before the court for determination is the Notice of Motion application dated 19th June 2013 by the 1st Defendant, golden Line International Ltd, in **HCCC NO. 615 of 2008** and also the 4th Defendant in **HCCC NO. 24 of 2007**. The application is brought under order 1 rule 12 of the Civil Procedure Rules and sections 1,1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The application interalia seeks the following orders:-

1. The Honourable court be pleased to dismiss both the plaintiffs suit herein, that is **HCCC NO. 24 of 2007** and **615 of 2008** on account of fraudulent misrepresentation.
2. The Honourable court be pleased to dismiss all the plaintiffs suits herein that is **HCCC NO. 24 of 2007** and **HCCC NO. 615 of 2008** on account of non compliance with the mandatory provisions of the Law.
3. In the alternative to the above prayers, the 1st Defendant **Golden Line international Ltd**, who are in possession of the suit property **L.R. NO.36/VII/1037**, be allowed to proceed with the development of the suit property without interference by the Plaintiffs, their agents, employees or representatives.

The application is premised on the grounds appearing and set out on the face of the application and is further supported on the grounds contained in the affidavit of Mohamud Sheik Hussein a director of the 1st Defendant sworn on 19th June 2013. The Applicant contends that:-

- a. The consolidated suits herein RELATE TO SUIT PROPERTY **L.R. NO.36/VII/1037** which property is subject of a public private partnership Agreement dated 24th November 2008 entered into between the City Council of Nairobi and Golden Line International Limited.
- b. The plaintiffs in **HCCC 615 of 2008** and **HCCC 24 of 2007** are similar.
- c. That the suits herein are filed, or were filed, by and on behalf of persons who are deceased and not through their personal representatives as is by law required.
- d. That **HCCC 24 of 2007** and **HCCC 615 of 2008** have been filed without authority and or with purported authority obtained contrary to the Civil Procedure Rules.
- e. That the plaintiffs have not been keen to prosecute the suits and their indolence has occasioned financial loss to the 1st Defendant who continues to shoulder interests charges on the monies made available as loan to implement the project.
- f. The justice of the matter demands that the plaintiffs suits be dismissed to pave the way for the implementation of the development project.

The 2nd Defendant City Council of Nairobi through **Karisa Iha** their Director of Legal Affairs has sworn a replying affidavit dated 3rd July 2013 and supports the application by the 1st Defendant. The 2nd Defendant avers that the plaintiffs lack a Locus Standi to bring the suits as they have no ownership documents to the subject suit land and further contend that the suits do not qualify to be public interest suits as the plaintiffs endeavour to portray them. The 2nd Defendant aver that the primary objective of the public private partnership Agreement it entered into with the 1st Defendant was to improve the market to offer better services and improve the environment for all concerned parties including the plaintiffs. The 2nd Defendant argue the improved market would not only benefit the plaintiffs but also the wider public and thus the plaintiffs have no valid reason to hinder or prevent the implementation of the project.

The 2nd Defendant further aver that the plaintiffs have been lax in prosecuting the suit and have been content to cling on the interlocutory interim orders which they obtained barring the implementation of the project which state of affairs is prejudicial to the interests of the 1st and 2nd Defendants and the public at large who are being denied access to improved services of the market owing to the selfish personal interests of the plaintiffs in blocking the implementation of the project.

The plaintiffs filed a replying affidavit through one **Jackson Angwenyi Abuga** dated 12th July 2013 in opposition to the 1st Defendant's application. The plaintiffs admit the dispute between the parties relates to **L.R. NO. 36/V11/1037**. The plaintiffs aver that even though it is true that some of the plaintiffs stated to have given authority for the institution of this suit may be deceased that does not affect the validity of the suit herein and further denies that the plaintiff's have been lax in the prosecution of the suit. The parties on the directions of the court filed written submissions each articulating the respective parties positions.

The plaintiffs contention in the suit is that on or about 1981 they were each allocated separate portions of the suit property to conduct various businesses and trade in various goods by the City council of Nairobi in consideration for deposits paid to put up market stalls on the property. The plaintiffs claim the City Council of Nairobi wrongfully, unlawfully and fraudulently vested the suit property on the 1st Defendant for the purpose of implementing an illegal public private partnership agreement to the prejudice and detriment of the plaintiffs. The plaintiffs have sought a declaration that the vesting of the suit property in the name of Defendants is fraudulent, unlawful and null and void in law and seeks a permanent injunction against the Defendants restraining them from in any manner dealing with or interfering with the plaintiffs possession of the suit premises. The plaintiffs further seek general and special damages and loss of business income for the period the plaintiffs business was disrupted and/or interfered with.

The 1st Defendant has expressed its application to be brought under order 1 Rule 12 which clearly has no application to the instant application. From the context of the application the 1st Defendant must have intended the application to be predicated under order 1 rule 13 (1) and (2) which provide thus:-

13.(1) where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such in any proceeding and in like manner, where there are more defendant's than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

In the pending suits the 3 named plaintiffs purported to bring the suits for and on behalf of over 400 plaintiffs who allegedly had given authority to the plaintiffs to represent them. Such authority is signified by a purported signed list by all 403 plaintiffs but the 1st and 2nd Defendant has taken issue with the alleged list citing over 15 persons listed in that list as having given authority by signing yet these persons are dead and could not possibly have given authority by signing. The Defendants contend that the purported authority given to the plaintiffs is thus fraudulent as the plaintiffs have tendered the authority knowing that the same is not genuine. The plaintiffs have conceded that it is true that some of the plaintiffs who it is said had given their authority are indeed deceased but argue that the suit cannot be rendered defective for that reason alone since there are other plaintiffs who have given their authority and are ready and prepared to proceed with the case. There is no indication that the plaintiffs sought to regularize the legal capacity of the deceased plaintiffs through substitution or otherwise. Indeed the plaintiffs in the verifying affidavit depone that they have the authority of all the plaintiffs to bring the suit on their behalf and further verify the contents of the plaint to be true.

The applicant submits that the plaintiffs in the guise of complying with order 1 Rule 13 committed fraudulent acts aimed at misleading the court that they indeed had obtained the authority of all the plaintiffs to bring the suit. This included the plaintiffs purporting to have obtained signed authority from persons who were infact dead. Faced with hard evidence from the applicants that some of the plaintiffs they claimed to have given them written authority to sue were infact dead the plaintiffs conceded the fact

and this puts to question how the plaintiffs infact procured the authority of the plaintiffs if indeed dead peoples' signatures found their way in the document giving authority to the plaintiffs to sue. Clearly a dead person cannot sign a document.

The plaintiffs in their submissions state thus: -

“The plaintiffs herein number 403. They may not have given express authority in writing at time of filing the suit but it doesn't as of right infer that their suit is bad in law as they have a fair expectation to have their day in court. Their suit should therefore not be dismissed on a simple technicality since it doesn't go to the core of the respective claims by each of the plaintiffs”.

At the centre of this dispute is the parcel of land **L.R.NO.36/VII/1037** where the plaintiffs are said to be conducting their business as traders in sheds and/or stalls that they rent from the City Council of Nairobi. On the other hand the City Council of Nairobi has entered into a public private partnership Agreement with the 1st Defendant whereby the 1st Defendant would redevelop the market on the basis of Build-operate-Transfer (**BOT**) such that the market would be modernized with a view of offering additional services to the public and that the plaintiffs would be eligible to take stalls in the redeveloped market as would other members of the public.

The applicant and the City Council of Nairobi contend that in this case the plaintiffs are pursuing their own selfish private interests whereas the project is intended for the benefit not only of the plaintiffs but also the wider public. It is on account of this the applicants contend that once the plaintiffs were granted an interim order for the maintenance of the status quo they were content to sit back and do nothing towards the prosecution of the suit which has occasioned prejudice to the applicants and the City Council who continue to incur losses arising from the signed PPP Agreement which cannot be implemented owing to the existing injunctive orders.

The applicants contend that the plaintiffs in the lead up to the filing of the suit were prepared to do anything to procure an injunctive relief and in this regard the three plaintiffs representing the plaintiffs presented to the court fraudulent and misleading documents purporting that they had the authority of all the plaintiffs to bring this suit. The applicants have demonstrated, and the plaintiffs admit a good number of the plaintiffs who have been shown as having signed the authority to bring this suit were infact dead at the time they are supposed to have signed the authority. This is a serious indictment of the plaintiffs as it casts serious doubts as to the validity of the authority that the plaintiffs presented to court as authorizing them to file this suit on behalf of the alleged plaintiffs. Infact it puts to question whether the persons shown to have signed the authority are actually the ones who signed it.

In my view the authority that the plaintiffs used to file this suit as a representative suit was falsified and thus the question arises whether the plaintiffs could be relied upon to present a credible case if they could falter on the simplest of matters such as getting the authority to sue right. Are the 3 plaintiffs pleading their individual case or that of the 400 alleged plaintiffs? It is difficult to tell. The legitimacy of a representative suit flows from the authority that the individual parties to the suit have given. If the authority is found to be deficient then the suit cannot proceed as a representative suit. The authority to act and represent the parties to the suit is the foundation to the suit and if it is not there the suit is defective and incompetent. If the authority to file the suit is defective then the party seeking to file the representative suit in my view cannot swear a competent verifying affidavit to the suit since he cannot then have the authority to verify the contents of the plaint or counter-claim as the case maybe.

I am satisfied in the present case the authority to sue and act presented by the plaintiffs to bring this suit was defective as there was no way a dead person could sign the authority presented and that amounted to a misrepresentation to the court that the plaintiffs had the authority to file the suit and I therefore hold there was no compliance with order 13 rule 1 and 2 of the Civil Procedure Rules and consequently the suit filed by the plaintiffs is incompetent. Obviously if the Judge who heard the application for injunction at the exparte stage and the subsequent interpartes hearing had been aware that the authority presented was defective he would not have granted any interim orders.

In the premises and for the reasons set out above I find the 1st Defendants Notice of Motion dated 19th June 2013 to have merit and I accordingly order the plaintiffs suits **HCCC NO. 24 of 2007 and HCCC NO. 615 of 2008** struck out for being incompetent. I have considered the circumstances of this case and in regard to the costs of the application and the suits I order that each party meets their own costs.

Orders accordingly.

Ruling dated, signed and delivered in Nairobi this.....19th.....day of February.....
.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....for the Plaintiffs

.....for the Defendant