REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELC CIVIL CASE NO. 293 OF 2012

EMERG INVESTMENTS LIMITED …..... 1ST PLAINTIFF

CHERUTICH & COMPANY ADVOCATES ..…. 2ND PLAINTIFF

JOJEAN PROPERTIES LIMITED …..... 3RD PLAINTIFF

FORTRESS INSURANCE BROKERS LTD ….. 4TH PLAINTIFF

CAPITAL ACCOUNTING SERVICES …..... 5TH PLAITIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU …..... DEFENDANT

RULING

1.The plaintiffs/ applicants Notice of Motion dated 7th August, 2012 inter alia seeks the following orders:-

(i) spent

(ii) spent

(iii) That the Honorable Court be pleased to grant an order of permanent injunction restraining the defendant by its servants and/or employees and/or agents from collecting parking fees on motor vehicles parked at the parking space situate on Nakuru Municipality/ Block 9/34 and or from clamping or in any way interfering with the motor vehicles so parked, pending the hearing and determination of this suit.

(iv) That the Honorable Court makes a declaration that motor vehicles parked at the parking space situate on Nakuru Municipality/Block 9/34 should not be subjected to parking fees by the defendant.

(v) That cost be borne by the defendant.

2.The applicants' application is grounded on the supporting affidavit sworn by **Nalinkumar Meghji Shah** on 7th August, 2012. The deponent avers that she is a director of the 1st applicant, the registered proprietor of Nakuru Municipality/ Block 9/34 and the building erected thereon and known as Vickers House.

3.It is contended that an adjacent plot developed by previous owners as a parking lot and used by tenants of the Vickers House forms part of the premises. That the same has never been subject to charging parking fees by either the landlord and or the respondent until 30th July, 2012 when the respondent without prior notice started to charge parking fees on the premises. It is further contended that the respondent is estopped through its conduct from charging fees on motor vehicles parked on the plot. That the sudden and arbitrary actions by the respondent are oppressive and has inconvenienced the tenants. Moreover, the respondent has no jurisdiction over the subject property as the same is situated adjacent to a private property and has been utilized as a private parking space.

4.The Respondent opposed the application. It filed a Notice of Preliminary Objection dated 14th August, 2012 on the grounds that the court lacks jurisdiction; that the plaintiff's application is fatally defective and that there was a conflict of interest by the conduct of the matter by the firm of Sheth & Wathigo Advocates on behalf of the plaintiffs.

5.The Respondent further filed a Replying Affidavit sworn by **Samuel Mwaura,** the Engineer in charge of car parks within the Council of Nakuru on 21st August, 2012. He avers that the plot being referred to in the plaintiffs' application is an unsurveyed plot adjacent to **Nakuru Municipality Block 9/34**. As such, it lies within the jurisdiction of the respondent and does not form part of the 1st plaintiff's parcel of land. The Respondent vide Kenya gazette Notice no. 17, volume CII of 31st March, 2000 designated the area as parking area and it therefore denies that the parking charges were arbitrarily enforced and with ill motive to oppress the Plaintiffs. Further, he avers that the respondent's omission to charge parking fees before does not estoppel it from enjoying its facility now as mandated by the council's by-laws.

6. In response to the Preliminary Objection and the Replying Affidavit, the Applicants filed a supplementary affidavit sworn by **Nalinkumar Meghji Shah** on 27th August, 2012. He avers that the preliminary objection is incompetent, mischievous and an abuse of the court process. That the court has jurisdiction to hear and determine a matter concerning property and further it can make judgments declaratory of the rights of the applicants. He denied that there is conflict of interest as the firm of advocates on record is only but a tenant of the 1st plaintiff and represents the 1st plaintiff and is not a party.

7. Further, the 1st applicant deponed that the respondent in its replying affidavit did not offer any explanation where it had failed to exert its jurisdiction over the parking space or levy parking fees since it was gazetted as a parking space. Consequently, its action made the plaintiffs believe that the car park was not subject to the respondent's jurisdiction.

8. The applicants and respondent filed their written submissions on 18th April 2013 and 5th April 2013 respectively.

9. Let me start with the preliminary point by the defendant which is to the effect that there is not written authority given to Nalinkumar Meghji Shah to plead on behalf of the other plaintiffs. Order 1 Rule 13(1) and (2) of the Civil Procedure Rule provides as follows:

> **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 other in any proceeding.....**
>
> **(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.**

10. It is obvious from the reading of the above provision that it is couched in mandatory terms hence it may not be regarded as a technicality as the same goes to the root of the case. This court was faced with a similar issue in **John Kariuki & 347 Others vs John Mungai Njoroge & 8 Others Nakuru HCCC No. 152 of 2003 (Unreported)** where it stated as follows:

> **"The plain reading of the above rule (Order 1 Rule 12 of the Civil Procedure rules) is**

that where a party requires another party to appear, plead, or act on his behalf he has to give authority in writing before such a person filing suit can claim to be representing such person. The said written authority has to be signed by the person giving the authority and must be filed in court where the suit is to be filed. The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party may become bound by a court decision without his having any knowledge of the suit that led to the said decision. The court can envisage a scenario, where, let's say, after a dismissal of a suit, such plaintiff whose name has been included declined to settle the costs on the pretext that he did not authorize the suit to be filed in his name. In my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit from a court process without his say so."

11.Similarly, in the **High Court Petition No. 12 of 2010, in the matter of Nakuru Kadhi's Court Succession Cause no 4 of 2009 between Benard Koech Juma & Others,** the court stated as follows:

I have perused this court file and I do not see any authority filed by any of the plaintiffs acknowledging the filing of this application. Although Raymond deponed that he has authority, none is exhibited. The above provision is clear that where a party requires another to appear on his behalf, he must give written authority which must be filed with the suit. I do subscribe to the view of Justice Kimaru, that the mischief meant to be addressed was to prevent a situation where a party may become bound by a court decision without his/her knowledge and the second reason relates to costs. If the suit does not succeed, the party who did not issue written authority may decline to pay the costs for reasons that no authority was written and signed by him. I do agree with the interested party and do uphold the objection that Raymond cannot purport to appear on behalf of the 3 other plaintiffs for want of their authority.

12.The holding in the said two cases applies in our case. From the material placed before me, it cannot be ascertained that the plaintiffs herein authorized the director of the 1st Plaintiff to file the suit on their behalf and the present application. Neither can the court ascertain whether the Plaintiffs are privy to existence of this suit which is filed in their name. Therefore in the absence of a written authority authorizing the director of the 1st plaintiff to appear, act or plead on behalf of the Plaintiffs, I do find the suit and the motion are incurably defective and must be struck off.

13.The second limb of the preliminary objection states that the firm of Sheth and Wathigo Advocates cannot act for the plaintiffs for the same raises a conflict of interest. The Respondent did not however cover this ground in its submission and may have chosen to abandon the argument. However, I do wish to observe that whether a conflict of interest does or does not arise is a factual issue and not a pure point of law. I will rest the issue by referring to the decision in **National Bank of Kenya ltd vs Peter K. Korat & Anor (2005) eKLR,** where Gacheche J. stated:

Mr. Kuloba, learned counsel for the bank was however of the view that the preliminary objection is not sustainable, as the issues of conflict of interest cannot be raised by way of a preliminary objection. I am inclined to agree with him as the legal position regarding preliminary objection was well laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696, in which LAW JA stated that '… a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...' it is clear to me that the issues raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of preliminary objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained."

14. Despite my finding the motion to be defective for want of authority from the plaintiff, I also do wish

to make my observation on the merits of the Plaintiff's application.

15. The considerations to be taken by the court in an application for such interlocutory orders are clearly settled as explained in the case of **Giella vs Cassman Brown Ltd (1973) EA 358.** They are three. An applicant has to show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss that cannot be compensated adequately by way of damages. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

16. The first principle was for the applicants to demonstrate a prima facie case. The Applicant annexed a copy of agreement for sale of the suit property. I have perused the same and observed that the description of the property sold is the land known as Nakuru Municipality/ Block 9/34 together with the buildings and improvements erected thereon. The question therefore that flows from the above is whether the car park forms part of the property? From the material before the court, the car park and Nakuru Municipality/ Block 9/34 are two distinct properties. Though adjacent to each other, the car park is an unsurveyed parcel within the jurisdiction of the Respondent. There is no evidence to show that the 1st Applicant's predecessors in title developed and have maintained the car park since 1990. As such the applicants have failed to establish a prima facie case.

17. Furthermore, it is my humble view that the applicants would not have suffered irreparable loss that could not have be compensated adequately by way of damages because the car park charges are certain and so are the number of parking spaces available. The applicants could therefore make an estimate of the loss incurred for purposes of compensation by way of damages.

18. Having observed as such, the application for interlocutory orders would therefore not have succeeded even if the suit and motion were properly before the court.

19. Having said all the above, I hereby uphold the preliminary objection and find both the suit and Notice of Motion to be incompetent. They are hereby struck out with costs to the Respondent.

Dated and Signed at Nakuru this 4th day of April 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Omondi holding brief for Mr Orege

Mr Kisila for the plaintiffs

Emmanuel Maelo : Court Clerk

L N WAITHAKA

JUDGE