



No. 247

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 212 OF 2013

PHELGONA ADHIAMBO OBEL1ST PLAINTIFF

JAMES OTIENO NYAUKE2ND PLAINTIFF

NICHOLAS OKOTH OKECH on behalf of

KIRINDO VILLAGE COMMUNITY3RD PLAINTIFF

VERSUS

MEDS 25 INTERNATIONAL, KENYA CHAPTERDEFENDANT

RULING

1. The plaintiff's brought this suit against the defendant on 7th May 2013 seeking:- an order of injunction restraining the defendant from carrying out the construction a private commercial mortuary on land parcel No. Kasgunga/Kamreri/136 or establishing a commercial mortuary or any similar project on the said parcel of land, general damages together with interest and costs. In their plaint dated 22nd April, 2013, the plaintiffs averred that they are residents of Kirindo village, Kasgunga Central sub-location, Gembe West Location in Mbita District. The plaintiffs claimed that; sometimes in the year 2011, the defendant purchased the said parcel of land known as L.R. No. Kasgunga/ Kamreri/136 ("Plot No. 136") which is situated within Kirindo village. Upon purchase of the said parcel of land, the defendant represented to Kirindo village residents that it intended to put up a hospital on the said parcel of land for their benefit. On the basis of the said representations, the defendant commenced construction works in the said parcel of land without any objection from the area residents and completed the construction of the buildings which were to house the said proposed hospital in the year 2012. On the strength of the said representations, the defendant received full support, co-operation and assistance from the local community while carrying out the said construction works.
2. The plaintiffs claimed that in the month of January 2013, the plaintiffs discovered that they were duped by the defendant in that instead of putting up a hospital, the defendant's intention was to put up a mortuary. On realizing the defendant's real intention, the plaintiffs withdrew their support for the defendant's project and demanded that the defendant stop the setting up of a mortuary in the area. The plaintiffs who claim to have brought this suit on their own behalf and on behalf of the other members of Kirindo village have claimed that they are occupiers and proprietors of parcels of land neighbouring Plot No. 136 on which the defendant intends to set up the said

mortuary. The plaintiffs have claimed that Kirindo village is situated on the shores of Lake Victoria and that if the defendant is allowed to set up a mortuary in the village, the smell from the mortuary would be a nuisance to the area residents as the village suffers from constant power outages and the bodies kept at the mortuary are bound to decompose. The plaintiffs claimed also that they would be disturbed by ghosts and the spirits of the dead and that the pupils in the village primary and secondary schools would also be affected mentally and psychologically by the said mortuary. In addition, the plaintiffs claimed that the chemical wastes from the mortuary would pollute Lake Victoria. The plaintiffs claimed that the defendant was putting up the said mortuary without obtaining environmental impact assessment license from National Environment Management Authority (NEMA) and that the defendant intends to continue with the said project unless restrained by the court.

3. The defendant entered appearance and filed its statement of defence on 10th June, 2013. In its defence, the defendant denied inducing the members of Kirindo Community or making any representations to them in relation to its project on Plot No. 136 as claimed by the plaintiffs. The defendant contended that members of Kirindo village were well informed of the said project that was to be carried out in three (3) phases starting with mortuary, clinic and volunteer houses. The defendant contended that it is a not for profit organization and as such the intention of the project is to benefit the local community. The defendant contended that the members of Kirindo village were involved in every step of the project and gave their unreserved approval to the same. The defendant contended that all the requisite permits and approvals from the relevant government authorities for the construction works were obtained for the project through the involvement of the local community. The defendant contended that it had sought the environmental impact assessment license from NEMA and that it was at advanced stage of procuring the same. The defendant denied that the mortuary that it was putting up would pose any health or environmental hazard to the residents. The plaintiffs' claim that the said project would go against cultural taboos and cause mental and physiological stress to the members of Kirindo village and school going children was denied by the defendant. The defendant termed the plaintiffs suit fatally defective, an afterthought and an abuse of the process of the court. The defendant claimed further that the plaint discloses no or any reasonable cause of action against the defendant and denied that the plaintiffs are entitled to the reliefs sought in the plaint.
4. On 4th September 2013, the defendant filed a Notice of Preliminary Objection and an application by way of Notice of Motion both dated 2nd September 2013 seeking an order that the plaintiffs suit against the defendant be struck out for being frivolous, vexatious and an abuse of the process of the court. The defendant's Notice of Preliminary Objection was brought on the grounds that this court has no jurisdiction to hear and determine this suit while the Notice of Motion application was brought under Order 2 rule 15 (1) (a), (b), and (d) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The defendant's application was supported by affidavit and further affidavit sworn by Mari Anderson on 23rd August 2013 and 3rd November 2013 respectively. The later affidavit was filed without leave of the court. The defendant's application was opposed by the plaintiffs. The plaintiffs filed grounds of opposition dated 10th October 2013 and a replying affidavit sworn by the 1st plaintiff on 28th October 2013. The defendant's application was brought on the grounds that the plaintiffs' suit is frivolous, vexatious and an abuse of the process of the court. The application was also brought on the grounds that the suit herein discloses no or any reasonable cause of action against the defendant.
5. In her affidavit in support of the application, the defendant's director Mari Anderson deposed that after the ground breaking ceremony for the construction of the subject mortuary was conducted, the defendant started the process of securing an environmental impact assessment license and that as at the time when this suit was filed the process was on course. She deposed further that once the process of securing the said license commenced, the issues raised by the plaintiffs in this suit should have been addressed to the National Environmental Tribunal in the first instance. She deposed further that the defendant was waiting for the said license from NEMA before the construction of the mortuary could start. It is on account of the foregoing that the defendant is of the view that the plaintiff's suit herein is frivolous, vexatious and an abuse of the process of the court. In their grounds of opposition in opposition to the application, the plaintiffs contended that the defendant's application offends the provisions of order 2 rule 15 (2) of the Civil Procedure

Rules 2010. The plaintiffs contended further that in their suit, they have raised an issue of nuisance which is a triable issue. The plaintiffs contended further that the approval by NEMA if any for the project cannot give the defendant's project a clean bill of health and render the plaintiffs' suit which raises weighty issues frivolous. In her affidavit in reply to the application, the 1st plaintiff has deposed that the defendant's mortuary is being constructed very close to her residence and as such she is very apprehensive that the same would be a nuisance to her. The 1st plaintiff deposed further that the defendant has already constructed the building to be used as a mortuary even before obtaining the environmental impact assessment license from NEMA which construction was carried out even when NEMA's "stop order" was in force. In her further affidavit that was filed irregularly without leave of the court, Mari Anderson the defendant's director deposed that NEMA has since issued the defendant with a license to carry out the construction of the mortuary in dispute and that any issues that touches on NEMA's decision to issue the defendant with the environmental impact assessment permit can only be determined by National Environmental Tribunal. She maintained that the plaintiffs' suit is frivolous, vexatious and an abuse of the process of the court.

6. The parties' advocates agreed to argue the defendant's application and preliminary objection by way of written submissions. The defendant filed its written submissions with respect to its application and preliminary objection on 3rd December 2013 while the plaintiffs filed their submissions in reply to the defendant's submissions on both the preliminary objection and the said application on 17th December 2013. I have considered the defendant's preliminary objection and the application dated 2nd September 2013. I have also considered the affidavits sworn by Mari Anderson in support of the said application. I have similarly considered the grounds of opposition and replying affidavit filed by the plaintiffs in opposition to the defendant's preliminary objection and application seeking to strike out the suit herein. I have also considered the parties' respective submissions and the case law, the Constitution and statutes cited.
7. The defendant's attack against the plaintiffs' suit is too pronged. The preliminary objection is based on want of jurisdiction while the application is grounded on the fact that the plaintiffs' suit is frivolous, vexatious and amounts to an abuse of the process of the court. The defendant has also claimed that the plaintiffs' suit discloses no or any reasonable cause of action. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. In the quotation from Words and Phrases that was cited by Nyarangi, J. A in the case of **Owners of the Motor Vessel "Lilian" –vs- Caltex Oil (Kenya) Ltd [1989] KLR1** that was cited by the defendant's advocate, it was stated that:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

8. Due to the foregoing, I would wish to dispose of the jurisdiction point raised by the defendant before I consider its application because if I hold that this court has no jurisdiction to entertain the plaintiffs' suit, it would not be necessary to consider the application before me. In the case of, **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) E. A 696**, a preliminary objection was defined as **“Consisting of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit”**. The point of law raised by the defendant as a basis for its preliminary objection is that this court lacks the jurisdiction to hear and determine this suit. This issue has been pleaded by the defendant in its statement of defence. The defendant's argument is that the issues raised by the plaintiffs in this suit should have been taken up before the National Environment Tribunal (“Tribunal”) for determination pursuant to the provisions of section 129 of Environmental Management and Co-ordination Act, 1999 (“EMCA”) instead of being brought before this court. This according to the defendant is because once NEMA has issued an environmental impact assessment license any party aggrieved by the issuance of such license can only challenge the same before the Tribunal.
9. I am fully in agreement with the defendant that any person who is aggrieved by any decision made by NEMA has a recourse to the Tribunal in the first instance. The plaintiffs' complaint in this case however as I have set out at the beginning of this ruling is that the defendant was carrying out

the construction of a mortuary in a residential area which posed environmental and health hazard to the area residents without carrying out an environmental impact assessment and obtaining the necessary environmental impact assessment license from NEMA. As I have stated above, this suit was filed by the plaintiffs on 7th May 2013. According to paragraph 5 of the plaint, the construction of the defendant's mortuary was completed in the year 2012. The defendant in its statement of defence did not specifically deny this fact. In her further affidavit sworn on 30th November 2013, Mari Anderson deposed that the environmental impact assessment process had been finalized and the defendant issued with the necessary environmental impact assessment license. The license which is annexed to the said affidavit is dated 28th October 2013 and it was issued regarding "proposed" constructions of a mortuary".

10. It is clear from the foregoing that the defendant commenced the construction of the said mortuary without first carrying out environmental impact assessment study of the impact which the project would have on the area where it was to be hosted. The environmental impact assessment license was issued to the defendant after they had completed the construction of the mortuary building and while this suit was pending in court. When this suit was filed, NEMA had not made any decision which was objectionable to the plaintiffs. According to the record, the only order that had been made by NEMA was that which was made on 10th April 2013 before the filing of this suit through which the defendant was ordered to stop the construction of the subject mortuary before obtaining the environmental impact assessment license from NEMA which order according to the plaintiffs was ignored by the defendant who continued with the construction works. I am of the opinion that in the circumstances of this case, the plaintiffs had the right conferred upon them by section 3 of EMCA and Articles 42 and 70 (1) of the Constitution of Kenya, 2010 to move this court for a remedy. The tribunal had no jurisdiction on the matter since NEMA had not made any decision adverse to the plaintiffs when this suit was filed which the plaintiffs could have appealed to the tribunal. Due to the foregoing, I am persuaded by the submissions by the plaintiffs' advocates that his court has jurisdiction to hear and determine this suit.
11. The determination of the aforesaid issue of jurisdiction now paves the way for this court to consider the defendant's application seeking to strike out this suit. The defendant's application which is brought under order 2 rule 15(1) (a), (b), and (d) of the Civil Procedure Rules, 2010 is premised on the defendant's contention that the suit herein; discloses no reasonable cause of action against the defendant, it is scandalous, vexatious and frivolous and, that it is otherwise an abuse of the process of the court. The leading authority on striking out of suits is the case of **DT Dobie & Company (Kenya) Ltd -vs- Muchima [1982] KLR 1** where the Court of Appeal stated as follows at page 9:

"No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real live by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it".

What I need to determine in the application before me is first, whether the plaintiffs' case is so hopeless that it plainly and obviously discloses no reasonable cause of action against the defendant and secondly, whether the suit is scandalous, vexatious and an abuse of the process of the court.

12. As was held in the case of, **Jane Wanjiru Mburu -vs- G. K Waruhiu and 5 Others (NRB HCCC No. 2460 and 2461 of 1996 (consolidated) (Unreported)** that was cited by the plaintiffs' advocate, Kuloba J. (as he then was) stated that:-

"A reasonable cause of action is a cause of action with some chances of success when only the allegations in the pleading concerned are considered. The court is not concerned with the question whether a good cause of action or answer is disclosed: all that is needed is a disclosure of some reasonable or arguable point.....if an arguable point is there, a pleading is not to be struck out.....".

I had set out at the beginning of this ruling the plaintiffs' case and the defence that was put forward to it by the defendant. The plaintiffs claim against the defendant is that the defendant has put up a mortuary in a residential area which is occupied by the plaintiffs and that the said mortuary is an environmental hazard and poses health risks to the residents of the village or community where the plaintiffs reside. The plaintiffs' have claimed that; the smell from the mortuary would be a nuisance to the plaintiffs and the area residents, there is a likelihood of breakout of infectious diseases from the mortuary, the pupils in the schools in the area where the mortuary is being set up would be disturbed mentally and psychologically, the chemicals to be used to preserve the bodies at the said mortuary may pollute the nearby lake and that the said mortuary has been set up without the environmental impact assessment license from NEMA.

13.The defendant in its defence has denied all these allegations by the plaintiffs. The complaints put forward by the plaintiffs against the defendant if proved would entitle the plaintiffs to the reliefs sought against the defendant. The mere fact that the defendant has since the filing of this suit obtained an environmental impact assessment license does not render the plaintiffs' suit unmaintainable. In my view, the said license can only act as part of the defendant's defence to the plaintiffs' claim. It cannot stop the court from interrogating the claims raised herein against the defendant by the plaintiffs. I am satisfied that the plaintiffs' case raises several arguable points which should go to trial. The plaintiffs' case cannot be said to be plainly and obviously disclosing no cause of action. It is therefore my finding that the plaintiffs' suit discloses a cause of action which should go to trial.

14.From the description of what can be termed as scandalous, frivolous and vexatious pleadings set out in the book, **Bullen and Leake and Jacobs, Precedents of pleadings, 12th Edition** and the case of **Mpaka Road Development Ltd –vs- Kana [2004] 1 E.A 124** that were cited by the defendant, I am not convinced that the plaintiffs' suit herein is scandalous, frivolous and vexatious. The defendant has not pointed out any part of the plaint filed herein which is indecent or offensive. The defendant has not demonstrated that the suit herein is brought in bad faith for ulterior motives or to achieve a collateral advantage. In my view the plaint filed herein raises serious issues which touch on the preservation of the environment and public health and as such the same cannot be said to be trivial and lacking in seriousness. Once again, I am unable to agree with the defendant that this suit is scandalous, vexatious, frivolous and an abuse of the court process.

15.In conclusion, I find no merit in the defendant's preliminary objection and Notice of Motion application both dated 2nd September 2013. Both are hereby dismissed with costs to the plaintiffs.

Delivered, dated and signed at Kisii this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE