



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 418 OF 2013

SANJAY SOLANKI & 8 OTHERS.....PLAINTIFF

VERSUS

HIRJI KANJI PATEL1ST DEFENDANT

RAMADHAN LIBWEGE.....2ND DEFENDANT

PACE ASSOCIATES3RD DEFENDANT

SHAYAM WORLD ENTERPRICES.....4TH DEFENDANT

**THE DIRECTOR GENERAL NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY.....5TH DEFENDANT**

NAIROBI CITY COUNCIL.....6TH DEFENDANT

RULING

The 1st, 2nd, 3rd and 4th Defendants notice of preliminary objection dated 17th May 2013 raises 3 grounds namely:-

1. That the Plaintiff has no *locus standi* to institute and/or prosecute the suit either on their own behalf or on the behalf of members of Vekaria Estate of the public.
2. That the suit is a non-starter and is incompetent as the Plaintiffs have not complied with the mandatory provisions of Order 1 Rules 8 and 12 of the Civil Procedure Rules.
3. That the suit does not comply with the mandatory provisions of Order 4 of the Civil Procedure Rules.

The 6th Defendant filed grounds of opposition to the plaintiff's application dated 27th March, 2013 and under grounds 1 and 2 contended thus:-

1. That this Honourable Court has no jurisdiction to hear this case.
2. That the 4th (6th) Defendant will contend as a preliminary point of law to be determined in limine

that this Honourable court has no jurisdiction and the application and/or the suit does not disclose, any maintainable cause of action against the 6th Defendant.

The court directed parties to file written submissions on the preliminary objection and the 1st - 4th Defendants in submissions dated 31st May 2013 stated that since they have title to the suit property, they are the absolute and indefeasible owners as stipulated under section 26 of the Land Registration Act. The said Defendants submitted that the Plaintiffs have no interest or right to the suit property.

Counsel for the 1st - 4th Defendants argued that sections 29-35 of the Physical Planning Act confers the powers to control or prohibit use and development of land and buildings to the Local Authority and that the Defendants having sought and obtained approval for the development the plaintiffs have no basis to interfere with their development. The Defendants submitted that the said Defendants lacked *locus standi* to institute and/or prosecute the suit, either on their own behalf or the members of Vekaria estate or the public and the court was referred to the cases of **Njilux Motors Ltd -vs- Kenya Power & Lighting Co. Ltd & Nairobi City Council (2002) 2 EA 466** and **Law Society of Kenya -vs- Commissioner of Lands & 2 others(2001)KLR 700** where the applicants were found to have no *locus standi* to sue. It was further argued for the 1st - 4th Defendants that the Plaintiffs have recourse of making a complaint to the institution mandated by the Physical Planning Act and seek recall or revocation or amendment of the approvals already given.

The Defendants further submitted that the Plaintiffs only makes reference to one Plaintiff while there are 8 others who are not named or described in the Plaintiffs. Counsel stated that the Plaintiffs have not complied with the mandatory provisions of Order 1 Rules 4, 8 & 13 of the Civil Procedure Act. It was submitted that the authority to plead on behalf of the other Plaintiffs which was not executed by all the other 8 plaintiffs was invalid and therefore that the Plaintiffs and verifying affidavit was filed without a proper authority as required by Order 1 Rule 13 and Order 4 Rule 1(3) respectively.

The Plaintiffs written submissions dated 3rd June 2013 were filed in court on 4th June 2013. Counsel submitted that the Plaintiffs being occupants of Vekaria estate which included plot LR No. 209/11279/12 have locus to file the suit since illegal construction works upon the said plot impact on them. It was argued for the Plaintiffs that access to their massionettes that share the access road into the estate is impaired. Further, Counsel for the Plaintiffs submitted that parking space in the estate where the Plaintiffs reside is reduced since during working hours, the contractor uses the road in the estate to park machinery and therefore, that massionettes immediately opposite the construction have no parking.

The 1st Plaintiff submitted that he has consent from the other Vekaria estate residents to file suit on their behalf and further, that the suit as filed is not a public interest suit since the residents are suing on their own behalf. While submitting that he has filed the suit in his own behalf and on behalf of other residents who have signed a consent to allow him file suit on their behalf. The Plaintiff referred the court to Order 1 Rule 9 and relied on sections 3 and 3(A) of the Civil Procedure Act for the submission that the court should ensure that the ends of justice are met rather than dismissing the suit on technicalities. Counsel for the Plaintiff contended that the Plaintiffs have met the requirements of Order 4 and urged the court to exercise its authority as set out in Article 159(2) of the Constitution.

The issue for determination is whether the preliminary objection is merited.

The 1st -4th Defendants have submitted that under the Physical Planning Act, the Plaintiffs grievances lie to the Local Authority. Section 7 of the Physical Planning Act provides for the establishment of Physical Planning Liaison Committees in accordance with the provisions of Section 8 of the Act. Section 8 of the Act Constitutes the following physical planning liaison committees:-

- i. The National physical planning Liaison committee.
- ii. The Nairobi Physical Planning Liaison Committees.
- iii. District Physical Planning Liaison Committees.
- iv. Municipal Physical Planning Liaison Committees.

Under Section 10(1) the functions of the National Physical Planning Liaison Committee are inter alia:-

- a. *To hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committees;*
- b. *To determine and resolve physical planning matters referred to it by any of the other liaison committees.*

Under Section 10(2) the functions of the other liaison committees include:-

- a. *To inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities, in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;*
- b. *To inquire into and determine conflicting claims made in respect of application for development permission;*
- c. *To determine development applications for change of user or subdivision of land which may have significant impact on countingous land or be in breach of any condition registered against a title deed in respect of such land;*
- d.
- e. *To hear appeals lodged by persons aggrieved by decision made by the Director or local authorities under this Act.*

Part V of the Physical Planning Act Sections 29 to 40 make provisions for control of development by local authorities and that every person intent on carrying out any development in any land within the precints of a local authority is required to seek and obtain the requisite approval before commencing any development.

As observed the Physical Planning Act Cap 286 Laws of Kenya, makes elaborate procedures for approval of any development plans and provides a mechanism to address and resolve any grievances and/or disputes arising from the process of approval of the development plans. In the first instance the Physical Planning Act requires that appeals be made to the relevant physical planning liaison committee and it would therefore be premature for a party to come to the High Court before exhausting the mechanism provided by the Act. In the Court of Appeal decision in **SPEAKER OF NATIONAL ASSEMBLY VS. NJENGA KARUME [2008] 1 KLR 425** the court held that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed.

The composition of the members of the respective liaison committees under Section 8 is diverse and incorporates professionals from various disciplines who naturally would be well suited to make a determination in regard to any development proposal and in my view this is why they are entrusted with that responsibility. The court in the premises would not be the best forum for persons with grievances to resort to unless the mechanism provided under the Act has been exhausted or the matter is coming to court for judicial review. The court simply lacks the expertise and technical ability required to assess and determine whether or not a given development plan ought to be approved or not.

The matters the plaintiffs complain about in the plaint and in the application are matters that in my view would be suited for determination by way of an appeal before the relevant physical planning liaison committee and/or the National Physical Planning Liaison committee established under the provisions of the Physical Planning Act. In the premises I would hold that the plaintiff's instant suit is premature and the court lacks the jurisdiction to entertain it and to do so would be usurping roles of the organs set up under the provisions of the Act.

Article 159(2) of the Constitution while enjoining the courts to administer substantial justice without undue regard to procedural technicalities does not and cannot in my view aid the court to overlook express provisions of the law as set out in the Physical Planning Act. Indeed the Physical Planning Act is intended to regulate developments and more so in the urban areas. The organs established under the Act are composed of experts in their respective fields and these ought to be the persons who determine

whether a development should go on or not. The 1st – 4th Defendants title to the subject land is not disputed and that they have the requisite approval for the development is evident from the annexures to their replying affidavit and until that approval is rescinded and/or revoked it remains valid.

As I have decided that the court lacks the jurisdiction to entertain this suit I will not make any finding on whether or not the plaintiffs have a locus standi although the Defendants argued the point on the basis that he 1st to 4th Defendants were absolute owners of the suit property and the plaintiffs had no business to do with what the defendants did on their parcel of land provided the Defendants had approvals for the development they were under taking. To the extent that the plaintiff’s complaint touched and extended to environmental concerns under the provisions of Article 42, 69 and 70 of the Constitution the plaintiffs may find locus standi.

As concerns the joinder and/or misjoinder of parties my view is that any defect that there may have been could be cured by amendment of the pleadings and order 8 Rule 3 of the civil Procedure Rules provides for amendment of pleadings liberally.

In view of what I have stated and held as regards the provisions of the physical Planning Act Cap 286 of the Laws of Kenya this court lacks the jurisdiction to entertain the suit and I order that the same be struck out.

I have considered the attendant circumstances in this matter and I have elected to make no order as to costs and I direct that each party bears their own costs of the applications and t he suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants