



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL SUIT NO 147 OF 2007

1. LILIAN OLANGO & 29 OTHERS.....PLAINTIFF

VERSUS

SAMUEL KIMANI MAIGWA & 3 OTHERS.....DEFENDANT

RULING

The 30 plaintiffs are residents of Langalanga Estate in Nakuru where they own land as set out in paragraph 1-3 of the plaint. On 3/7/07 the plaintiffs filed this suit against the Samuel Kimani Maigwa, The Commissioner of Lands, Municipal Council of Nakuru and the National Environmental Management Authority(1st to 4th Defendants) seeking the following orders against the 1st and 2nd Defendants,

(a) Permanent injunction restraining the 1st defendant his Agents, servants and or employees from erecting any structures around NAKURU MUNICIPALITY BLOCK NO.1/1838 and /or blocking the plaintiffs

Plots number NAKURU/MUNICIPALITYBLOCK 1/1757,
NAKURU/LANGA-LANGA/BLOCK 1/176, NAKURU/LANGA –LANGA/BLOCK 1/178,
NAKURU/LANGA-LANGA/BLOCK 1/155, NAKURU/LANGA-LANGA /BLOCK
1/153,NAKURU/LANGA-LANGA/BLOCK 1/1726, NAKURU/LANGA-LANGA/BLOCK
1/1780

(b) A declaration that the allotment of Nakuru Municipality block 1/1838 by the 2nd defendant to the 1st defendant is illegal and/or irregular and obtained contrary to Environmental Management and Coordination Act 1999 and within the meaning of the Ndungu report.

(c) An order directing the 2nd defendant to cancel the title to NAKURU MUNICIPALITY BLOCK NO 1/1838.

The plaintiffs' complaint is that the 2nd defendant drew and maintained a physical plan no 298 for Langa-Langa Area of Nakuru with several plots including a public utility plot. The map also provided access to the plaintiffs' plots and accommodated the sewerage and water system. In 1992, the 2nd defendant started the survey of the plot and created plot no 12 within Langa-Langa phase 2 despite objection from the plaintiffs. The said plot was later registered in the name of the 1st

Defendant denying the residents of the area a playground and blocked access to the plaintiff's plots by vehicle. In June 2007, the 1st defendant fenced the plot. He started construction work on the plot which interfered with sewerage system causing raw sewer to be discharged in the premises interfering with the Plaintiff's rights to a clean environment. They argue that the said allotment of the land to the 1st defendant was illegal and irregular. The plaintiffs blame the 4th defendant for abducting its duty to ensure the Coordination of allotments of land and development policies and that it failed to perform its duty under section 9 of the Environmental Management and Coordination Act, herein referred to as EMCA. The defendant filed their defences. In its defence the 4th defendant reserved its right of seeking the striking out of the plaint. On 1/9/07, the 4th defendant filed the Chamber Summons seeking the following orders:-

- (a) That the Honourable Court be pleased to strike out the Plaint in so far as the same relates to the 4th defendant,
- (b) That in the alternative, and without prejudice to prayer (a) above, that the 4th defendant's name be struck off from these court proceedings.

The grounds upon which the application is premised are that the plaint does not disclose any cause of action as against the 4th defendant, that the cause of action arose prior to the coming into operation of the EMCA which created the 4th Defendant. It is also contended that the EMCA's mandate does not include allotment and registration of land and lastly that the court lacks the jurisdiction to determine the case in view of section 129 of EMCA. Mr Githui counsel for the respondent argued that the Act cannot act respectively.

Mr Mbeche counsel for the 1st Defendant supported the application. The plaintiff's counsel, Mrs Murithi in opposing the application urged that although the land was carved out in 1992, the developments did not commence until 2007 and by then the 4th Defendant was in-existence. She submitted that under section 9(2) of EMCA the 4th Defendant's mandate is to Coordinate development and manage environmental issues to improve the quality of human life. She urged that this being a Public Litigation issue, if struck out, it is the public who will suffer.

Having considered the application and submissions of counsel, I do agree with the applicant that in the prayers sought in the plaint, there is no order or prayer sought against the 1st and 2nd defendant.

At the time the land in issue was allotted to the 1st defendant in 1992, EMCA was not yet enacted and the 4th defendant had not been created. EMCA is an Act created in 1999. It commenced on 14/1/2000. Section 3 of the Act, guarantees every person in Kenya to enjoy a clean and healthy environment and imposes a duty on all person to safeguard and enhance the environment. Section 7 of the Act established that National Environmental Management Authority (NEMA) as a body corporate with perpetual succession and a common seal. The objects of NEMA are set out under section 9 of the Act. They are inter alia:

“a (1) The object and purpose for which the authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.

(2) Without prejudice to the generality of the foregoing, the Authority shall,
(a) Co-ordinate the various environmental Management activities being undertaken by the lead agencies and promote the integration of environmental considerations into developmental policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of

the quality of human life in Kenya;

(b) take stock of the natural resources In Kenya and their utilization and Conservation;

(c) establish and review in consultation with the relevant lead agencies, land use guidelines;

(d) examine land use patterns to determine their impact on the quantity of natural resources;

(e) carry out surveys which will assist in the proper management and conservation of the environment:

I do agree that NEMA is not involved in determining allotment and registration of land. At paragraph 18 to 22 of the plaint the plaintiff alleges that the 1st defendant started developments on the plot thus blocking access by the plaintiffs to their plots, denying the children access to the playground, and that the developments have interfered with the sewerage system causing the discharge of raw sewerage. Under section 9(1), the Authority's mandate is to exercise general supervision and co-ordination over all environmental matters. Under section 9(j) it is one of the duties of the authority to identify projects and programmes or type of projects for environmental monitoring or audit. Under section 59 of the Act, any proponent of a project before commencing, shall submit a project report to the Authority and the proponent of the project has undertake at there own expense an environmental impact assessment study and report. Unfortunately, the Court has not been told the nature of the developments that the 1st defendant is undertaking on the the suit land. Since that project has been undertaken since 2007 when NEMA had been created, it has the mandate to ensure that the said development does not interfere adversely with the environment. Emission of raw sewer is of great environmental concern that would need to be addressed by the Authority.

The applicant contends that by virtue of section 129 of EMCA, this Court has no jurisdiction to preside over the claim. That section provides a mechanism of appeal to the National Environmental Tribunal, established under Section 125 of the Act. Section 129 (1) sets out the nature of disputes that lie to the Tribunal. The section read as follows :

“Any person who is aggrieved by:

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder.

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder,

(e) the imposition against him of an environmental improvement order by the Authority under this Act or regulations made thereunder,

May within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”

The dispute that the Tribunal adjudicates upon relate to Licences issued under the Act. There is no evidence that the 4th Defendant has issued or offered to issue a licence to the applicant to warrant the filing a dispute at the tribunal. Section 129 of EMCA does not apply in this situation. Since the plaintiff's claim raises some environmental issues, I would be reluctant to strike out the claim against the 4th defendant at this stage. I do agree that no orders are sought against the said 4th defendant but the plaint can be amended if the plaintiff deems it fit to do so.

Striking out of pleadings is a draconian measure. The plaintiffs seem to have some genuine complaint and should be allowed to have their day in court.

For the above reasons I decline to grant the prayer to strike out the suit against the 4th defendant. The 4th defendant will be entitled to costs in the event it is found that it was wrongly joined to these proceedings. The application is hereby dismissed with costs being in the cause.

DATED AND DELIVERED THIS 13TH DAY OF MAY 2011

**R.P.V WENDOH
JUDGE**

PRESENT

Mr Kipkoech for the Plaintiff/Respondent

Mrs Mukira holding brief for Mereka for the 3rd Defendant

CC: Kennedy Oguma