



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NUMBER 473 OF 2011

**MEHMUDA H. ANJARWALLA (as the executor of the estate of Husseinbhai
Karimbhai) Anjarwalla.....PLAINTIFF/APPELLANT**

VERSUS

BUSINESSS LIAISON COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

Before me are the Defendant's Notice of Motion dated 5th September, 2011 ("the Motion"), and the Plaintiff's Notice of Preliminary Objection thereto ("the Objection") dated 27th September, 2011.

The Motion is brought under Order 2 Rule 5(1) for the striking out of the plaintiff's suit. The Orders sought are:

- "a) The Plaintiff's suit herein against the defendant be struck out since the same discloses no reasonable cause of action against the defendant.**
- b) Alternatively, and without prejudice to prayer (a) above, the said suit be struck out as the plaintiff lacks the locus standi to institute and sustain the same on her own without first obtaining the consent of the Attorney General to litigate on a public right.**
- c) Costs of this application and the suit be awarded to the defendant/Applicant."**

The grounds on which the application is based are:

- (i) The suit property, subdivision no. 5902/Sec. I/Mainland North is registered pursuant to the provisions of Registration of Titles Act, (Cap 281) Laws of Kenya, as evidenced by the plaintiff's own annexure "MHA3" of the supporting affidavit.**
- (ii) A Title duly issued pursuant to the Provisions of that Act (Cap 281) can only be impugned on grounds of fraud as particularly detailed in Section 23 thereof, and no more.**
- (iii) The plaintiff has not satisfied the mandatory requirements of that Section (i.e. Section 23) and**

is accordingly non-suited.

(iv) With regard to prayer (b) herein which is in the alternative, the defendant/Applicant refers to paragraph 7, 8, 9 and 21 of the plaint classifying the suit property as public land.

(v) The Applicant similarly refers to grounds (b), (c) and (d) of the Notice of Motion and Paragraphs 5, 6, 8 and 16 of the supporting affidavit whereat the suit property is described as public land or beach.

(vi) By reason of the matters set out in sub-paragraphs (iv) and (v) above, and in view of the mandatory provisions of Article 156(6) of the Constitution, it is only the Attorney General that can litigate on behalf of the public.

(vii) The Applicant shall contend that the Plaintiff (Respondent herein) could have only properly litigated in respect of a public right only with the fiat (consent) of the Attorney General being sought and obtained, in advance of instituting the present proceeding.

(viii) The present proceedings, not being at the relation of the Attorney General (as a relator action) are accordingly incompetent.

The Motion is supported by an affidavit sworn by Omar Bunu Famau, the Defendant's Operations Manager.

The Plaintiff's Objection asserts that the Motion is an omnibus application that is incurably defective by combining a relief that is based on a provision under Order 2 Rule 15(1) (a) by which no evidence is admissible with a relief that requires to be proved by evidence.

A temporary injunction is in place, restraining the Defendant, its servants, employees and agents from disposing by way of sale or otherwise, land parcel subdivision number 5902/Section/MN, wasting the same by way of constructing a perimeter wall thereon; erecting any building on the disputed land parcel; and/or in any other way dealing with the disputed land parcel in a way that would interfere with the plaintiff's quiet possession of her parcel of land known as subdivision number 852/section 1/Mainland North, pending the hearing and determination of that application.

At the hearing of the Motion and the Objection, the plaintiff was represented by Mr. Kabebe and the defendant by Mr. Buti.

Before dealing with the two applications, it is apt to briefly set out the background of this suit for clarification purposes based on the information contained in the Plaintiff's Affidavit dated 25th August, 2011 deponed in support of the application pursuant to which the temporary injunction herein, was granted.

The plaintiff is the wife and executor of the estate of the late Husseinbhai Anjarwalla. The deceased was owner of a parcel of land known as subdivision number 852/Section 1 MN (hereinafter "Parcel" "A") which was the matrimonial property. She alleges that Parcel A was a first row beach property at its acquisition in 1985, separated from the beach by public land and/or an access road. At this time, Parcel A was bounded by a straight stone wall.

In 1992 the public land/access separating Parcel A from the beach was, allegedly, unlawfully hived off. Its status changed from public land to private property, and was registered in the Defendant's name as subdivision Number 5902/Section 1/MN (hereinafter "the Disputed Parcel.").

Soon after the Disputed Parcel was created, and notwithstanding the plaintiff's complaints, the Disputed Parcel was occupied by African Safari Club Limited. They demolished the aforesaid boundary stone wall, and replaced it with a zig zag wall, allegedly encroaching onto the plaintiff's Parcel A, which actions she disputed. On 23rd August, 2011, the Defendant started bringing down the wall in dispute, dug

a trench beside it and started dumping building materials there with the object of constructing a higher wall. It was on the basis of these actions that the plaintiff sued the Defendant, and obtained the temporary injunction now in situ.

At the hearing of this Motion, the parties argued the Motion itself but not the Objection.

On the Motion before me, Mr. Buti argued firstly that the plaintiff's suit should be struck out because she has no locus standi. Essentially, Mr. Buti asserted that a member of the public is not entitled to sue on behalf of the public as the prosecution of such a suit is the exclusive preserve of the Attorney General. He cited Article 156 of Constitution. He referred to paragraphs 5, 7, 8 17 and 21 of the Plaint, in which the plaintiff alleges she had a first row beach plot separated from the sea by public land, and that the Defendant ought to be restrained from putting up buildings thereon due to public policy considerations.

Arguing that public policy issues are not for private litigation, Mr. Buti referred extensively to the House of the Lords case of **Gouriet and Others and HM Attorney General and Union of Post Office Workers (1978) AC 435. (Gouriet V UPW)**

Briefly, the relevant facts in that case are as follows: the Union of Post Office Workers publicly announced that they would not handle mails to South Africa in protest of its policy of apartheid. This action constituted an offence under both the Post Office Act and the Telegraph Act. Upon refusal of the Attorney General's consent to the plaintiff to act as plaintiff in relator proceedings for an injunction to restrain UPW, the plaintiff issued summons in his own name. It was held by the House of Lords that:

"1) ...Only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain an injury as a result of the public wrong, for the courts had no jurisdiction to entertain such claims by a private individual who had not suffered and would not suffer damage.

2) That the court had jurisdiction to declare public rights but only at the suit of the Attorney General ex officio or ex relatione, since he was the only person recognized by public law as entitled to represent the public in a court of justice."

Mr. Buti referred to the speeches of Lords Wilberforce at Page 480(G & H) and 481(A): that it is the exclusive right of the Attorney General to represent the public interest even where individuals might be interested in larger view of the matter; Viscount Dilhorne at page 494 Paragraph G & H: that the courts have no jurisdiction to entertain such claims by a private individual who has not suffered and will not suffer damage; Lord Diplock at Page 502 (D) that there is no authority that the court has jurisdiction at the suit of a private individual as plaintiff to make declarations of public rights as distinct from rights in private law to which the plaintiff claims to be entitled; and that the Attorney General is the only person recognized by the public law as entitled to represent the public in a court of justice.

Still on this first point, Mr. Buti also relied on the local case **Commissioner of Lands vs Kunste Hotel Limited** [1995-1998] EA 1 (CAK), in which the proprietor of Kunste Hotel had obtained assurances from the Commissioner of Lands that the public land in front of the hotel and fronting the Nairobi-Nakuru highway, would not be alienated but used as public land as a road reserve, but was subsequently alienated to a third party. That provoked Kunste Hotel Limited to seek orders of certiorari. Mr. Buti highlighted a portion on page 4 of that report, on the Hotel's assertion that members of the public who were using and enjoying the beauty of the plot as a road reserve will be denied use and enjoyment thereof. In respect thereof, Court of Appeal stated:

"We wish to observe at the outset that, in a suit strictly so called, the hotel could only, properly litigate on behalf of the general public with the written consent of the Attorney General in terms of Section 61 of the Civil Procedure Act..."

In my understanding, the upshot of the cases reviewed is that a public right is only enforceable at the

instance of the Attorney General and not a private person; but that where a private individual may suffer, or has suffered, damage on account of unlawful conduct of a public nature which infringes upon his private rights, the court may intervene.

Mr. Buti's second ground was that the Plaintiff discloses no cause of action for the reason that the disputed parcel is registered under the Registration of Titles Act, Chapter 281, and Section 23 thereof holds title to be indefeasible and sacrosanct, challengeable only on the ground of fraud or misrepresentation to which the holder is proved to be a party. He underpinned this argument by reliance on two cases:

Nairobi Permanent Markets Society and Others vs Salima Enterprises and 2 others Civil Appeal Number 185 of 1997. In that case the Court of Appeal re-stated the legal position enshrined in section 23 of the Registration of Titles Act, that the title holder's title is indefeasible save for fraud or misrepresentation to which it was a party, and, the company's rights could not be interfered with. **Lureck Motor Enterprises and the Commissioner of Lands and 3 others** Civil Appeal Number 71 of 1997. Where the Court of Appeal stated that the title of a bona fide purchaser for value and without notice of a defect therein, takes precedence and is supreme over all other alleged equitable rights of title, and that the Act is specific on this protection and sanctuaries title.

In his reply Mr. Kabebe pointed out that the Motion, being one seeking to strike out the plaintiff's suit, has extremely heavy implications on the plaintiff. The issue in dispute involves land and in a nutshell the gist of the plaintiff's case was that the use of the disputed parcel would, and does, affect the plaintiff's Parcel A. The plaintiff is therefore challenging the use of the Defendant's disputed parcel. Further, counsel pointed out that the defence of the Defendant does not address the issue of the encroachment of the disputed parcel onto the plaintiff's Parcel A.

Counsel added that the Plaintiff had not come to court to argue only public policy, but to vent her case that she now has no access to the beach, and has a legitimate entitlement to fight for such right which has been interfered with. Thus, before the court can strike out the Plaintiff's suit in its entirety, it would have find that the Plaintiff has an utterly unless case with no triable issues, and this would be a draconian action.

On the contention by the Defendant that the Plaintiff had slept on her rights and had been caught up by latches, Counsel stated that the court should be guided by Paragraph 16 of the Plaintiff which indicates that the Plaintiff commenced legal proceedings upon being prompted by the plaintiff's invasive actions of 23rd August, 2011. The Plaintiff's right of action accrued when the Defendant or its servants or agents pulled down the Plaintiff's wall. Such demolition of the wall was enough in itself to raise triable issues and the plaintiff should be given a hearing to vent the same.

I have given careful consideration to submissions of counsel for the parties. A close perusal of the Plaintiff confirms, as strongly argued by Mr. Buti in respect of Paragraphs 7, 8, 17 and 21, that the plaintiff seeks to vent issues on a matter of a public nature, namely, the alleged irregular or unlawful creation of a parcel of land, which matter is the exclusive preserve of the Attorney General to prosecute. Those issues, whether constituting elements of public interest or public nuisance or otherwise, can clearly only be litigated upon by or with the consent of the Attorney General. Article 156(6) of the Constitution vests in the Attorney General that right, and states:

“The Attorney General shall promote, protect and uphold the rule of law and defend the public interest.”

And Section 61 of the Civil Procedure Act provides as follows:

“In the case of a public nuisance, the Attorney General or two more persons having the consent of the Attorney General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.”

The statute therefore clearly upholds, or more correctly, the position set out in the authorities is in tandem with, our statutes. In my opinion, therefore, where the plaintiff has in the Plaintiff, sought prayers as against the Defendant on a public nuisance or a matter hinging upon public policy, the same must be litigated upon either by the Attorney General himself or by the Plaintiff in a relator action.

In this case, however, the Plaintiff has also vented through the Plaintiff issues disclosing direct infringement of rights that are personal to her property, namely, the longstanding right of access to the beach, the trespass upon her property, and the demolition of her wall. These may be considered private nuisances the like of which the court is beholden to protect irrespective of the position or involvement of the Attorney General. And they are alleged in various other paragraphs of the Plaintiff; for example at paragraphs 15, 16, 18 and so on, and prayer (ii) of the prayers in the Plaintiff.

Indeed, I have also noted that the Plaintiff was awake to the fact that the Attorney General and or the Commissioner of Lands ought to have been enjoined in the suit. This is stated in paragraph 19 of the Plaintiff in the following words:

“ 19. The Plaintiff avers that due to the urgency of this matter the plaintiff was not able to join the Commissioner of Lands and the Attorney General as parties to this suit at this point but the Plaintiff intends to join them for purposes of seeking a revocation of the title to the disputed property. The Plaintiff shall serve a copy of Notice of intention to join the Attorney General in those proceedings...”

In my view, therefore, the Motion is rather premature.

The court will protect a party that claims to have had its private rights infringed if the infringement is not asserted to be only a public wrong requiring only a public interest remedy.

With regard to striking out of the Plaintiff's suit, the law on the same is that striking out pleadings is a drastic remedy and the procedure can only be invoked in plain and obvious cases. Such jurisdiction must be exercised with extreme caution. This was stated by the Court of Appeal in **Nitin Properties Limited – VS- Kalsi and Another** [1995-1998] 2 EA 257. The Court of Appeal there also clarified there that a Plaintiff can be struck out only if the claim is incontestably or hopelessly bad. The court quoted the statement of Madan JA (as he then was) on the case **D T Dobie (K) and Co Ltd VS Muchina and Another [1978] LLR 9 CAK** as follows:

“ A Court of Justice should aim at sustaining a suit rather than terminating it by summary dismissal.”

In the **Nitin** case the Court of Appeal, pointing out that the Judge in the superior court was clearly wrong in striking out the whole suit, stated:

“ He(the judge) ought to have allowed the Plaintiff (Appellant) to breathe some life into the suit by calling him to withdraw those pleadings which refer to adverse possession of claim, amend the plaintiff accordingly, and to bring the Land Registrar into the suit if so advised to enable justice to be done. He ought in our view to have stayed the proceedings until the Attorney General's office or the Commissioner of Lands (as may be deemed proper) was brought into the suit and he should have ordered the status quo to be maintained for some time to allow the Appellant to put his house in order.”

For the foregoing reasons and the fact, as I stated earlier, that the Plaintiff here has averred in Paragraph 19 of her Plaintiff her intention to enjoin the Attorney General and the Commissioner, I am not inclined to strike out the Plaintiff. It clearly has an embryonic life which justice demands should not be snuffed out, but sustained. I therefore dismiss the Motion with costs to the Plaintiff.

As the Objection was not actively canvassed the same has lapsed and is hereby deemed spent. No costs are awarded on it.

The following orders commend themselves to me and it is ordered as follows:

1. The plaintiff is at liberty to elect whether to immediately enjoin the Commissioner for Lands, or to proceed with its claim based only on private infringement.
2. Subject to such notices as are requisite in law, the Plaintiff shall be at liberty to amend its Plaintiff and the amended Plaintiff shall be filed and served within fourteen (14) days of the date hereof; or from the date of such notices as are necessary, pursuant to the election taken under order 1 above.
3. The Defendant shall have a corresponding period of fourteen(4) days within which to respond to any such amended Plaintiff.
4. A mention shall be held within thirty(30) days from the date hereof for further directions on the hearing.
5. Interim orders remain in force.
6. Liberty to apply.

Dated and Delivered this ...2ndDay of ...December.....2011

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....