



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 434 of 2009

CEPHAS OSORO1ST PLAINTIFF
RUTH NGARUIYA.....2ND PLAINTIFF
CYNTHIA OLIWA.....3RD PLAINTIFF
SOPHIE MACHARIA.....4TH PLAINTIFF
(suing for and on behalf of

KAREN NGONG VIEW ESTATE ASSOCIATION)
VERSUS

DAVID N. THUKU1ST DEFENDANT
SUSAN THUKU.....2ND DEFENDANT
Both trading as Royal Palm Nurseries and Gardens)

RULING

1. By their Chamber Summons application dated 30/09/2009, the Plaintiffs/Applicants sought the following Orders:-

1. *THAT this application be certified as urgent and heard exparte at the first instance.*

2. *THAT the Applicants herein be authorized to prosecute this suit on behalf of all residents of Karen Ngong View Estate and all other interested persons.*

3. *THAT upon the grant of prayer (b) above the Applicants be at liberty to effect service upon all interested parties by way of a public advertisement in the Daily Nation within seven (7) days hereof.*

4. *THAT an order of temporary injunction be issued to restrain the Defendants by themselves, their agents and servants from using the suit property as a Wedding Ground or a place of entertainment of wedding parties and other social events pending hearing and determination of this application.*

5. *THAT an order of injunction be issued to restrain the Defendants by themselves, their agents and servants from using the suit property as a Wedding Ground or a place of entertainment of wedding parties and other social events pending hearing and determination of this suit.*

6. *THAT an order of temporary injunction be issued to prevent, stop or restrain the Respondents by themselves, agents and servants from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 published in Legal Notice No. 6 of 2009 vide Kenya Gazette Supplement No.*

31 dated 22nd May 2009 pending hearing and determination of this application.

7. *THAT an order of injunction be issued to prevent, stop or restrain the Respondents by themselves, agents and servants from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 published in Legal Notice No. 6 of 2009 vide Kenya Gazette Supplement No. 31 dated 22nd May 2009 pending hearing and determination of this suit.*

Of the 6 Orders sought, the court granted prayers 1 and 2 of the application and also issued a temporary injunction in terms of prayer 3 of the said application on the 2/10/2009. The Defendants were served by public advertisement which appeared in the DAILY NATION of Tuesday, 6/10/2009.

2. The application is premised on the sworn affidavit of **Cephas Osoro**, the 1st Applicant herein who is also the Chairman of the Karen Ngong View Estate Residents Association (the Association). The Association is described as an association of residents, living in the vicinity of LR No. 12882/9 Karen which is the subject matter of this suit. The Plaintiffs' complaint against the Defendant is that since mid-2008, the Defendants have engaged themselves in commercial activities on the suit property without a change of user licence from the City Council of Nairobi and also without the necessary approvals from the National Environmental Management Authority, which approvals include an Environmental Impact Assessment Licence (EIA). The Plaintiffs want the Defendants enjoined from carrying out the said commercial activities which activities the Plaintiffs allege, have and continue to cause noise pollution to the environment. The application is also supported by the grounds that appear on its face.

3. The application is opposed. The Replying Affidavit is sworn by David N. Thuku; the 1st Defendant herein. The deponent's argument is that the Plaintiffs' entire suit is a nullity on the ground that the Plaintiffs lack the locus standi to institute and maintain this suit. The deponent wants this court to strike out the Plaintiffs' entire suit.

4. The Defendant's filed their Preliminary Objection dated 16/10/2009 on the 19/10/2009, seeking to have the Plaintiff's suit struck out for lack of capacity to sue by the Plaintiffs. The parties put in written submissions to support their respective positions. At the hearing of the application, the Preliminary Objection and the application were taken together in an effort to save on Judicial time.

5. I shall first deal with the parties' arguments on the Preliminary Objection. For purposes of this particular segment of the ruling, the description of the Plaintiffs in the plaint and the capacity in which the Plaintiffs have brought this suit is crucial. At paragraph 4 of the plaint the Plaintiffs aver that:-

"4. The Plaintiffs have instituted this suit as officials of a welfare help group known as Karen Ngong Association whose objectives include taking care of the welfare of the residents of Karen Ngong View Estate Nairobi including their environmental and physical infrastructural concerns. The first Plaintiff, is the Chairman of the said Karen Ngong View Estate Association hereafter referred to as "The Association" whilst the second, third and fourth Plaintiffs are the treasurer, secretary and vice chairman of the Association respectively. The suit is also instituted on behalf of all the residents of the Karen Ngong View Estate."

The Plaintiffs also say in the plaint that they are suing "for and on behalf of Karen Ngong View Estate Association."

6. The ground in support of the Preliminary Objection is that the Association which is registered under the Ministry of Culture and Social Services is an illegal society because it has not complied with Section 9 of the Societies Act which provides that

"Every Society shall, in the prescribed manner and within 28 days after the formation thereof, make application to the Registrar for registration or for exemption from registration under the Act.", while

Section 4 of the Societies Act provides that

"Every Society which is not a registered society or an exempted Society is an unlawful Society."

7. From the Certificate of Registration of a Local Self Help (Harambee) Group Organization dated 20.08.1998, the Association ought to have applied for registration or exemption from registration within 28 days from 20/08/1998. It is admitted by the Plaintiffs that the Association

has never been registered in accordance with the Societies Act, but they contend that since they were registered under a Government Ministry, there is no illegality or unlawfulness about the Association's existence. On the basis of the fact that the Association is not duly registered, the Defendants urge the court to strike out the Plaintiffs' suit with costs to the Defendant. The Defendants relied on the persuasive authority in the case of **Dennis Oloigero & 2 Others – vs- The Art of Adventures Limited – Nrb HCCC No. 1358 of 2005** in which the court (Aluoch J as she then was) held that a society which did not comply with the provisions of Section 9 of the Societies Act was an illegal and unlawful society. The Plaintiff in the said suit had been registered as a Community Based Organization (CBO) and duly registered under the Ministry of Gender, Sports, Culture and Social Services. The CBO was found to lack capacity to institute and maintain a suit.

8. Learned counsel for the Plaintiffs in the instant suit contended that the Preliminary Objection has no merit on grounds that by 16/10/2009, the Plaintiffs had four different capacities in which they could sue:-

- (a) on their own behalf
- (b) on behalf of the Residents of the Estate
- (c) on behalf of other interested persons
- (d) on behalf of Karen Ngong View Estate Association which is an association registered by the Ministry of Culture and Social Services to inter alia, take care of the welfare of its members

9. Learned counsel for Plaintiffs also submitted that the **Dennis Oloigero case** (above) is distinguishable from the present suit which has been commenced by persons entitled to do so on their own behalf. Counsel relied on the case of **Ekirapa & 9 Others –vs- The Aga Khan Foundation – Nrb HCCC No. 455 of 2008**. When deciding the question of locus standi in the **Ekirapa case**, the court (Ali-Aroni J) referred to a number of other cases decided both by the Court of Appeal and the Superior Courts. The Plaintiffs in the **Ekirapa case** filed the suit on behalf of themselves and on behalf of the Parents Association (School Committee) of Aga Khan Primary School Nairobi). Some of the authorities relied upon in the **Ekirapa case** are **Law Society of Kenya –vs- Commissioner of Lands & 2 Others KLR (E & L) 1 p. 456**, **Aga Khan Education Service Kenya –vs- Ouma John Mark Onyango & 2 Others Kisumu HCCC No. 282 of 2001** and **Simu Vendors Association –vs The Town Clerk City Council of Nairobi [2005]e KLR**.

10. Learned counsel for the Plaintiffs in the instant suit submitted that the question of locus standi is one of mixed fact and law, so that it is not a proper issue for a Preliminary Objection. In the case of **Njau –vs- City Council of Nairobi [1983] KLR 625**, the Court of Appeal, held inter alia that

(1) *“Locus standi” literally means a place of standing and refers to the right to appear or be heard in court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”*

(2) -----

(3) -----

(4) -----

(5) *A resident of a housing estate owned by a local authority who claims to be affected by an alleged **ultra vires** decision made by the Council has sufficient interest to bring proceedings against the local authority.*

(6) *Capacity to sue is a matter of mixed law and fact, which is to be decided on legal principles (with common sense coming into it) and not a matter of discretion.*

(7) -----

(8) -----

(9) *(obiter Hancox JA) ----- this was an action by summons and plaint by people who had a distinct interest in the subject matter in respect of which they were seeking declarations and a mandatory injunction --- It did not involve any question as to the infringement of any right appertaining to the public at large but only to persons who were within a particular class.”*

11. In the same **Njau case**, Chesoni J (as he then was) held that a party who considers himself aggrieved by an action of another should not be shut out from coming to court for the

hearing of their grievances. The learned Judge held that such persons had capacity to be heard on their grievances and that that is what is meant by **locus standi**.

In the present suit counsel for the Plaintiff submitted that the Plaintiffs herein have the capacity to be heard in four different capacities so that even if they were to be disqualified in one of those capacities, they could still be heard in any of the other capacities.

12. I have considered the various authorities cited to court and find that if the Plaintiffs only interest was in the Association, they would definitely be shut out from being heard by this court. The Plaintiffs have however stated that they live in neighbouring houses to the suit property, and that they are aggrieved by the goings on in the said suit property especially by the noise. It would in my view, be unjust for the Plaintiffs to be shut out from the corridors of justice. The Plaintiffs had the capacity as the time of filing this suit to institute the suit in their own behalf and as was held by the Court of Appeal in the **Njau case** this whole question of capacity is one of mixed law and fact and those aggrieved must be given an opportunity to be heard before the issue can be finally decided.

13. Having disposed of the issue of capacity, I now turn to the application by the Plaintiffs. This suit has been necessitated by the Defendants attempt to change use of the suit property from residential to a conservation park. The Plaintiffs alleged, and it is not disputed by the Defendants, that the conservation park is used to host wedding parties and general entertainment to a paying public. The Plaintiffs allege that the Defendants have only a Single Business Permit from the City Council of Nairobi which does not allow them to do what they are doing and also that they do not yet have in their possession the Environmental Impact Assessment Licence. The Plaintiffs argued that without this EIA Licence, the Defendants cannot be heard to say that they are lawfully offering entertainment services from the suit property.

14. In response to the Plaintiffs' allegations, the Defendant submit that the Plaintiffs are not sure of which is the suit property because different properties are mentioned in different documents filed by the Plaintiffs and that some of the cited properties such as LR No. 12 882/9 belong to other persons who are not even parties to this suit.

15. Secondly, the Defendants have submitted that they have obtained all the necessary approvals, namely Change of User from the City Council of Nairobi and the National Environmental Management Authority (NEMA). Although the Defendants got NEMA's approval, they admit that they do not have the EIA licence. They only have a letter from NEMA approving the project subject to certain conditions. The Plaintiffs also submitted that the Notice about the Change of User was not served upon the Plaintiffs and other residents of Karen Ngong View Estate in accordance with the provisions of the Physical Planning Act. To this allegation, the Defendant submitted that the statutory notice was published on 1/07/2007 in **The People on Sunday** and in **The Kenya Times** in addition to being put on a wall on the suit property. The Plaintiffs have submitted that publication of the statutory notice was not sufficient because of the limited circulation of the papers in which the notice appeared.

16. In their own Replying Affidavit and the submissions the Defendants agree that they have only commenced compliance with the development conditions including hiring of consultants to design the proposed development.

The Defendants' contention that they have complied with NEMA conditions is based on NEMA's letter dated 20/05/2009. That letter specifically says that the Defendants proposed project for Wedding Grounds on Plot LR No. 12882/77 – 82 at Ololua Ridge Karen, Nairobi West District was approved **subject to the following mandatory conditions**

1. *The proponent shall ensure that the noise generated will not be a nuisance within a radius of beyond 30 metres.*

2. *The proponent shall ensure that waste disposal is in accordance with the Environmental Management & coordination (waste management) regulations.*

3. *The proponent shall ensure that construction activities are undertaken during the day (and not at night) – between 08.00 hours and 17.00 hours; and that transportation of construction materials to and from site are undertaken during weekdays (and not weekends) off peak hours.*

4. *The proponent shall ensure strict adherence to the Environmental Management Plan developed throughout the project cycle.*

5. *The proponent shall collaborate with the EIA Expert(s) and the constructor(s) to ensure that proposed mitigation measures are adhered to during the construction phase and where necessary appropriate mending-up activities undertaken and a report of the same submitted to NEMA. Emphasis must be given to control of dust, noise, vibrations, occupational hazards and provision of sanitary accommodation to construction workforce.*

6. *The proponent shall comply with the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of Ministry of Lands & Settlement, Ministry of Roads, Ministry of Public Health & Sanitations and other relevant Authorities.*

7. *The proponent shall ensure that the development adheres to zoning specifications issued for development of such a project within the jurisdiction of City Council of Nairobi with emphasis on approved land use for the area.*

8. *The proponent shall ensure that during the construction phase, the operations adhere to The Occupational Safety and Health Act No. 15 of 2007.*

9. *The proponent shall ensure that environmental protection facilities or measures to prevent pollution and ecological deterioration such as air pollution, noise pollution, solid and waste water management are designed, constructed and employed simultaneously with the proposed project.*

10. *The proponent shall ensure that records on conditions of licenses/approval and project monitoring and evaluation shall be kept on the project site for inspection by NEMA's Environmental Inspectors.*

11. *The proponent shall submit an Environmental Audit Report in the first year of occupation/operation/commissioning to confirm the efficacy and adequacy of the Environmental Management Plan.*

12. *The proponent shall comply with NEMA's improvement orders throughout the project cycle.*

17. The Plaintiffs in this case are complaining that the noise from the suit premises is causing a nuisance to them (Plaintiffs) and further that there is no EIA Licence and that no or no adequate notice of the Change of User was given to the Plaintiffs by the Defendants.

18. I have now considered the two contending views in this matter and make the following findings:-

(1) *That the Defendants do not have an EIA Licence in terms of the Environmental and Management Co-ordination Act. It is only a letter with many conditions that was issued by NEMA and which conditions are yet to be complied with.*

(2) *That the publication of the statutory notice about the change of user was not adequate since the publication was carried in newspapers of very limited circulation and further the Plaintiffs were not individually served with the notice to elicit their objections to the proposed development*

(3) *That by their letter of 15/06/2009, the Defendants only confirmed that "we shall comply with all the conditions contained therein [NEMA's letter of 20/05/2009], but there is no evidence of such compliance.*

(4) That there was no publication of the statutory notice in a Kiswahili newspaper as required by the Physical Planning Act.

(5) That the Defendants are not complaint with Legal Notice No. 6 of 2009 published vide Gazette Notice No. 31 dated 22/05/2009 (the Noise and Excessive Vibration Pollution (Control) Regulations 2009).

19. In light of the foregoing findings I am persuaded that the Plaintiffs have established a prima facie case with a probability of success as stated in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. Accordingly, I would allow the Plaintiff's application dated 30/09/2009 in terms of prayers 5 and 7 thereof, that is to say:-

THAT an order of injunction be and is hereby issued to restrain the Defendants by themselves, their agents and servants from using the suit property as a Wedding Ground or a place of entertainment of wedding parties and other social events pending hearing and determination of this suit.

THAT an order of injunction be and is hereby issued to prevent, stop or restrain the Respondents by themselves, agents and servants from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 published in Legal Notice No. 6 of 2009 vide Kenya Gazette Supplement No. 31 dated 22nd May, 2009 pending hearing and determination of this suit.

The Applicants shall have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of February, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Kibe Mungai (absent) for the Plaintiffs/Applicants

M/s Mumbi Ngugi for the Defendants/Respondents

Weche - court clerk