



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

**Environmental & Land Case 2195 of 2007**

**MUGUGA GREEN APARTMENTS MANAGEMENT LTD**

**(Suing on behalf of Residents/Owners of  
House on L. R. 209/8873/2 .....PLAINTIFF**

**V E R S U S**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT  
EMTOL PROPERTIES LTD.....2<sup>ND</sup> DEFENDANT  
FIDELITY COMMERCIAL BANK LTD.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

The Plaintiff has stated that it is a management company that was incorporated on 10<sup>th</sup> May, 1990 under the **Companies Act (Cap. 486)** by the residents and/or owners of houses on L.R. No. 209/8873/2 Grant No. 32798 to manage their houses and other properties and to coordinate their welfare. They brought this suit on behalf of their residents. The plaintiff claims that the land above previously belonged to **ORIENT TRADINGS LTD** who subdivided it and constructed maisonettes thereon which they sold to the residents. The approval to the subdivisions was on condition that two portions of it would be set aside for the residents to be used as a garden and a parking lot. Two certificates of title, one for each portion, were to be issued. The Plaintiff company was incorporated at this time and it was expected that the titles would be issued in the name of the company to be held in trust for the residents. One portion got title No. 209/12948 Grant 68692. The residents used it for parking and as a garden until 2001 when the 2<sup>nd</sup> Defendant came on it and constructed a wall blocking them from accessing it. It was discovered that the title had on 19<sup>th</sup> March, 1996 been issued to the 2<sup>nd</sup> Defendant by the Commissioner of Lands. It is alleged this allocation and transfer were fraudulent as the land was no longer available for alienation it being private land. The 2<sup>nd</sup> Defendant subsequently transferred the plot to the 3<sup>rd</sup> Defendant who, on 17<sup>th</sup> June, 2007, commissioned **MAZINGIRA SOLUTIONS** to carry out an environmental impact assessment report to pave the way for construction work. It is alleged that the 2<sup>nd</sup> Defendant had acquired the plot fraudulently and did not therefore pass a good title to the 3<sup>rd</sup> Defendant.

This suit was brought against the Defendants jointly and severally for:-

- (a) a declaration that L.R. No 209/12948 was a public utility land and no construction should be carried thereon.
- (b) an order that the title deed No. 209/12948 issued to the 2<sup>nd</sup> Defendant on 19<sup>th</sup> March, 1996 was fraudulent, illegal and wrongful and should be cancelled.
- (c) an order that the Commissioner of Lands be compelled to rectify the records by allocation to the Plaintiff Plot No. 209/12948 to hold in trust for the residents.

The Defendants filed their respective defences denying the Plaintiff's claims. The 1<sup>st</sup> Defendant pleaded that the public duty of the Commissioner of Lands was to effect the intentions of the parties in the transactions which it did in accordance with the law without any fraud. The 2<sup>nd</sup> Defendant pleaded that it was rightly and legally issued title to LR. No. 209/12948 by the Commissioner of Lands and therefore has an absolute and indefeasible claim to the plot which is protected by the Constitution. The 3<sup>rd</sup> Defendant claimed it has been wrongly joined to the suit as the Plaintiff has no cause of action against it.

Each Defendant pleaded that the Plaintiff's suit was procedurally incompetent and fatally defective on account of the incapacity of the Plaintiff to bring it and indicated they would bring up the issue at the earliest opportunity and have the suit struck out.

The Plaintiff filed reply to the defences maintaining that the suit had been properly filed and that it had capacity to bring it.

On 20<sup>th</sup> June, 2005 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed the present application under **Orders 1 rules 8 and 22; 6 rules 13(1) (a), (2) and 16; and 7 rules 1 (3) and 10** of the **Civil Procedure Rules** to have the plaint struck out and/or dismissed with costs, and/or alternatively the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be struck out and/or dismissed with costs. The application was based on the grounds that the Plaintiff is a busy body who lacked *locus standi*; that it was non-suited and lacked capacity to institute a representative suit; it had not obtained leave of court to institute the suit; and that the plaint did not disclose any reasonable cause of action against the Defendants, and, in particular, against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The Plaintiff filed grounds of opposition and also a replying affidavit sworn by **GROENEWEGEN THEODORUS GERADUS** who is a resident of **MUGUGA GREEN APARTMENTS** and also a director of the Plaintiff Company. The contention of the Plaintiff is that they have *locus standi* to bring the suit and that the application is premature and speculative.

The application was argued before me by Mr. Kanjama for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, Mr. Cherogony for the 1<sup>st</sup> Defendant and Mr. Kimani for the Plaintiff. Mr. Cherogony informed the court that they were not opposing the application.

The Plaintiff declared in the plaint that it was suing on behalf of the residents/owners of houses on L.R. No. 209/8873/2. I agree with the Defendants that under **Order 1 rule 12 (1) and (2)** of the **Civil Procedure Rules** the authority of each of these residents/owners was required to be provided in writing and to be filed at the time of the filing to the suit. (See **OLE UNUA OLE NKOYIEI & OTHERS –VS- SUKEI OLE NJOYIEI & OTHERS, Hccc No. 169 of 2004 at Nakuru**). No authority was filed. **GROENEWEGEN THEODORUS GERADUS** swore the verifying affidavit that accompanied the suit and deponed that he was a resident of **MUGUGA GREEN APARTMENTS** and also a director of the Plaintiff Company and was competent to swear the affidavit. He further deponed that, as resident and director; he had instructed the firm of M/s F. N. Kimani & Associates Advocates to file this suit. He makes no reference to any authority from the residents or from the company and no such authority was filed. The suit is consequently incompetent. Without the authority of the residents/owners of the plot, the Plaintiff lacks capacity to bring or maintain this suit against the Defendants.

Secondly, under **Order 1 rules 8** of the **Civil Procedure Rules** the Plaintiff required the authority of the court to bring this representative suit. He had no such authority.

However, I consider that this is a land matter involving several residents/owners of a developed urban, and therefore valuable, property. Considering the overriding objective of the **Civil Procedure Act** in **sections 1A and 1B** that seeks to have the court do substantial justice to the parties without undue regard to technicalities, and in view of the decision in **D. T. DOBIE & CO. LTD –VS- MUCHINA [1982] KLR 1** that encourages the court to sustain rather than terminate a suit unless it is so weak that it is beyond redemption and incurable by amendment, I allow the Plaintiff 14 days from today to appropriately amend and serve the plaint in compliance with the law. Following that, the Defendants will have 30 days to appropriately align their respective defences. If the Plaintiff fails to abide by this order the suit shall stand struck out with costs. The Plaintiff has been indulged and shall pay costs of this application.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL

**A. O. MUCHELULE**

**JUDGE**