



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 91 of 2008**

**THE COAST RESIDENTS' PLATFORM.....PLAINTIFF/RESPONDENT**  
**-VERSUS-**  
**MUNICIPAL COUNCIL OF MOMBASA.....1<sup>ST</sup> DEFENDANT**  
**KENYA AIRPORT PARKING SERVICES LTD (KAPS)...2<sup>ND</sup> DEFENDANT/APPLICANT**  
**KAPS MUNICIPAL PARKING SERVICES LIMITED.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

The plaintiff's plaint was initially dated **21<sup>st</sup> April, 2008** and filed on **22<sup>nd</sup> April, 2008**. The 1<sup>st</sup> defendant filed a statement of defence on **20<sup>th</sup> May, 2008**; 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a memorandum of appearance on **5<sup>th</sup> May, 2008**, and a statement of defence on **19<sup>th</sup> May, 2008** – to which the plaintiff filed a reply to defence on **27<sup>th</sup> May, 2008**, while filing another reply of the same date to 1<sup>st</sup> defendant's statement of defence.

Following the filing of pleadings, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed the instant application by Chamber Summons dated **13<sup>th</sup> June, 2008**. This application was brought under Order VI, rule 13 (1) (a), (b) and (d) of the Civil Procedure Rules, and carried one main prayer: "**THAT the plaint dated 21<sup>st</sup> April, 2008 filed herein be struck out and the plaintiff's suit be dismissed with costs**".

The application is founded on the following grounds: that the plaintiff lacks **locus standi**; that the plaintiff has exhibited no written authority from the Coast residents; that there is no proper service of the suit documents; that the plaintiff has no right in law to meddle in private contract involving entities endowed with legal capacity to enter into such contract; that the proper forum for challenging the agreement between 1<sup>st</sup> and 2<sup>nd</sup> defendants is the Public Procurement Administrative Review Board set up under the Public Procurement and Disposal Act, 2005 (Act No. 3 of 2005); that this Court has no jurisdiction to entertain the suit; that the plaint discloses no – or no reasonable – cause of action against the defendants; that the suit is otherwise an abuse of the process of the Court.

**David Kihumba**, the Mombasa Branch Manager of 2<sup>nd</sup> and 3<sup>rd</sup> defendants, swore a lengthy affidavit on 17<sup>th</sup> June, 2008 providing the evidentiary basis for the application.

**Raphael Livu**, the Programme Co-ordinator of Coast Residents' Platform, a Non-Governmental Organisation, swore a replying affidavit on 21<sup>st</sup> October, 2008: he denies the legality of the agreement between 2<sup>nd</sup> and 3<sup>rd</sup> defendants; questions the **bona fides** of the application; declaims the suit to be a competent one, raising "**bona fide triable issues**".

Learned counsel, **Mr. Koech** who appeared for 2<sup>nd</sup> and 3<sup>rd</sup> defendants, presented the affidavit evidence, and urged that the plaintiff had no **locus standi** to institute the suit, especially as the suit purported to be a representative suit, but there was no evidence of authority from those on whose behalf the suit had been filed, whereas Order VII, rule 4(1) of the Civil Procedure Rules required that where a plaintiff sues in a representative capacity, the plaintiff is to state the capacity and its basis. It was urged that the plaintiff had failed in that test; and that, consequently, the plaintiff lacked the capacity to sue, and so the suit was a nullity and should be struck out and dismissed.

Learned counsel **Mr. Owino**, who appeared for the plaintiff, elected to rely exclusively on the replying affidavit and to let it speak for itself.

It is deponed in the evidence, that the applicants herein are in the business of providing parking services for motor vehicles; in January, 2006 1<sup>st</sup> defendant had put an advertisement calling for proposals from interested companies to enter into partnership with it, in the management of motor vehicle parking within the municipality; on **14<sup>th</sup> January, 2006** 2<sup>nd</sup> defendant responded to the advertisement by submitting its proposal; on **15<sup>th</sup> May, 2006** 1<sup>st</sup> defendant notified 2<sup>nd</sup> defendant that 2<sup>nd</sup> defendant's proposal had been accepted; 1<sup>st</sup> defendant's tender committee had first evaluated 2<sup>nd</sup>

defendant's proposal; 2<sup>nd</sup> defendant and 1<sup>st</sup> defendant entered into a public-private partnership agreement for the management of the parking of motor vehicles; the said agreement led to the formation of "another limited liability company.....to carry [out] the services envisaged under the agreement, the shareholding in that company, the duration of the agreement, the obligations and duties of each party and the termination of the agreement"; the outcome was that 3<sup>rd</sup> defendant was formed as "a purpose vehicle for the implementation of the partnership agreement"; 1<sup>st</sup> defendant's staff who were working in the motor vehicle parking department were seconded by 1<sup>st</sup> defendant to work for 3<sup>rd</sup> defendant; 3<sup>rd</sup> defendant is responsible for paying the salaries and other benefits for the said employees; 2<sup>nd</sup> and 3<sup>rd</sup> defendants "carried out massive investment in manpower and machine installations before the project could take off"; 1<sup>st</sup> defendant made no capital contribution to the partnership venture, and its shares in 3<sup>rd</sup> defendant were allotted free of charge; since 3<sup>rd</sup> defendant began operations, it has been paying to 1<sup>st</sup> defendant a sum of Kenya Shillings 1,000,000/= every month, as a share in the profits of the partnership venture; as between 2<sup>nd</sup>, 3<sup>rd</sup> and 1<sup>st</sup> defendants, there has been no "material disagreement over the terms of the said partnership since it commenced in the year 2006".

It is deponed for the applicants that the plaintiff/respondent is a stranger to the said partnership agreement, and that the plaintiff has not stated in its pleadings, in what manner it has been personally affected by the partnership agreement. The deponent believes to be true the advice of the applicants' advocate, that the plaintiff has no *locus standi* to institute these proceedings against 2<sup>nd</sup> and 3<sup>rd</sup> defendants as the matters in question do not concern the plaintiff personally.

The deponent, on behalf of the applicants, avers that 2<sup>nd</sup> and 3<sup>rd</sup> defendants' operations are "so far" limited to Mombasa Island, and the partnership agreement "only concerns the management of [the] parking of motor vehicles within Mombasa Municipality": and that, consequently, "the residents of the entire Coast province would have no interest in these proceedings". It is deponed that "the agreement between 1<sup>st</sup> and 2<sup>nd</sup> defendants had been in force for over one year during which the plaintiff has not taken any issue with it".

The deponent believes to be true the advice of the applicants' advocate, that "any person who was aggrieved by the manner in which 2<sup>nd</sup> defendant won the tender to enter into the public-private partnership agreement with 1<sup>st</sup> defendant ....had the right to challenge the award within the prescribed time at the Public Procurement Administrative Review Board".

It is further deponed that the same advocate has advised that "any person who felt...the process by which 1<sup>st</sup> defendant has awarded the said tender to 2<sup>nd</sup> defendant was wrong or unlawful had the right to challenge the same by way of Judicial Review"; and that "no person challenged the tender that was awarded to 2<sup>nd</sup> defendant either at [the] Public Procurement Tribunal or by way of Judicial Review".

The deponent avers that since 2<sup>nd</sup> and 3<sup>rd</sup> defendants commenced their operations, "no motorist has taken them to Court alleging any wrong-doing or illegal [activity] on their part or on the part of their employees".

The deponent states that "the plaintiff has no business challenging a private contract between two persons with legal capacities to enter into such contract and which contract has no personal implication upon the plaintiff", and consequently, that the plaintiff's case is "misconceived, frivolous, vexatious and amounts to an abuse of the process of the Court".

In the replying affidavit by **Raphael Livu**, the Programmes Co-ordinator of the Coast Residents Platform, it is deponed that the plaintiff has instituted the suit on its behalf and on behalf of Mombasa rate-payers, and not on behalf of the entire Coast Province.

It is deponed for the plaintiff that 1<sup>st</sup> and 2<sup>nd</sup> defendants have contracted 3<sup>rd</sup> defendant who collects charges "in both undesignated and designated areas and [charges] a further fee of Kshs. 2,600/= per car to declamp, which is not only illegal but exorbitant".

From the outlines of the instant application; from the evidence in the form of depositions; and from the apparent inclination on the part of counsel to forbear to articulate the vital dimensions of their clients' cases, I have found it necessary to take a broader view of the interlocutory case. Firstly, I have come to the conclusion that the immediate gravamen has to do with the *procedure adopted by 1<sup>st</sup> defendant* in passing on rewarding contractual arrangements to certain private entities, (particularly) 2<sup>nd</sup> defendant, and 3<sup>rd</sup> defendant. Secondly, and more important in terms of the provision of *public utilities*, there is an issue about private-sector players assuming dominant control in the arrangement.

Upon considering the plaint filed on **22<sup>nd</sup> April, 2008**, I found that the plaintiff is a duly registered Non-Governmental Organisation, capable of standing as a juridical person, and suing in that capacity. It also emerges from the pleadings that

the plaintiff is entitled to have an interest in the proper functioning of 1<sup>st</sup> defendant, as (para. 4) “one of the functions of 1<sup>st</sup> defendant is to designate parking areas and to charge the users and consumers of the said designated and maintained parking areas within 1<sup>st</sup> defendant’s jurisdiction”.

The plaintiff raises an important question of a triable nature (para.8):

***“The plaintiff states that this agreement was and is in its [entirety] unfair and illegal, calculated only to benefit 2<sup>nd</sup> defendant at the expense of the rate-payers of MombasaTown”.***

Of a similar character is para. 11 of the plaintiff:

***“The plaintiff states that.....the 1<sup>st</sup> and 2<sup>nd</sup> defendants have formed and/or contracted the 3<sup>rd</sup> defendant to collect parking charges or fees in all designated areas and in so doing, have continued to so charge parking [fees] even in undesignated areas.”***

From this sampling of the content of the plaintiff, the conclusion is to be drawn that there are serious ***litigious points*** being raised, and this means that a ***lis*** exists, and therefore, the matter falls to the jurisdiction of this Court.

Indeed, such a position is confirmed by some of the pleadings in the statement of defence dated 19<sup>th</sup> May, 2008. It is thus stated in para. 11 of the statement of defence:

***“The 1<sup>st</sup> defendant is a public authority and its decisions can only be challenged by way of Judicial Review proceedings. The plaintiff’s claim herein does not lie and the same is for dismissal”.***

In the two sets of pleadings, the issues are clearly joined, and it is the obligation of this Court to ensure the cause is sustained, and determined on the merits.

Consequently, the application of 2<sup>nd</sup> and 3<sup>rd</sup> defendants by Chamber Summons of 13<sup>th</sup> June, 2008, is dismissed, with costs to the plaintiff/respondent.

***Orders accordingly.***

**DATED and DELIVERED at MOMBASA this 25<sup>th</sup> day of June, 2010.**

**J. B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For Plaintiff/Respondent:

For 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants: