REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 226 OF 2009

MAHAN DHARIWAL (Chairman New Muthaiga Residents Association)

DILIP BAKRANIA (Secretary New Muthaiga Residents Association)

USHA SHAH (Treasurer New Muthaiga Residents Association)

Suing on behalf of NEW MUTHAIGA RESIDENTS ASSOCIATION.....PLAINTIFF

VERSUS

GEMINI PROPERTIES LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING NO. 2

The plaintiffs/applicants filed their plaint dated 14th day of May 2009 and filed the same date. Simultaneously with the filing of the plaint was filed a chamber summons brought under section 63 of the CPA and order 39 rule 2 of the CPR and under the inherent powers of this Honourable court.

When the application came up for hearing interparties, issue was raised as to whether the preliminary objection raised by the first respondent objector could be incorporated in the replying affidavit in opposition to the interim application or to be argued distinctly. This court, in its ruling delivered on the 15th day of June 2009 at page 6 line 9 from the bottom made the following observation:-

"Turning to the request to have the preliminary objection heard first, the court, is of the opinion that, had it not been for the allegation of the suit being a nullity, and the plaintiff/applicants having no locus standi, the court would have safely ruled that the preliminary objection be incorporated in the opposition to the interim application. However by reason that if there is some tangible grounds on the basis of which it can be demonstrated that the suit is a nullity and the plaintiff/applicants have no locus standi, then the two issues have to be taken on as preliminary points because in this courts', view, a suit which is a nullity, cannot anchor an interim application. Likewise a party without locus standi cannot complain or agitate any rights before the court of law. For this reason the preliminary objection will be argued first and forthwith"

It was on the basis of the above observation that the court, allowed parties to agitate and present

points for and against the preliminary objection. The said preliminary objection is dated 9th day of June 2009 and filed the same date. 8 objections were put forward:-

(a) "The deponent of the verifying affidavit and the supporting affidavit has not annexed authority of other applicants allowing him to swear the affidavit on their behalf and the affidavits and entire suit should then be struck off.

(b) The entire suit is a nullity, bad in law and amounts to an abuse of the court, process as the applicants have not exhausted the remedies available to them before invoking the jurisdiction of this honourable court.

(c) The suit is time bared.

(d) The suit is fatally defective as against the 1st defendant and the application lacks nexus with the suit.

(e) The suit is defective for misjoinder of parties.

(f) The suit is vexatious as the applicants have invoked the wrong procedure.

(g) The applicants have no locus standi to institute this suit.

(h) The application is outside the provision of the civil procedure Act"

In order to understand why the objection has been raised, it is necessary to set out the salient features of the plaint and the interim reliefs sought in order to understand what aspects of the plaint are being objected to and why.

- Vide paragraphs 1,2,3, and 4 of the plaint, the plaintiff in these proceedings is described as New Muthaiga Residents Association which is duly registered Association under the Societies Act, filing the action through its officials namely the Chairman, Secretary and Treasurer which action is being brought on their own behalf and on behalf of other Residents of New Muthaiga.

- What the Association stands for is set out in paragraph 8 of the plaint.

- Concede vide paragraph 9 that the 1st defendant is the registered owner of the suit property LR NO. 20/9295 which had formally been part of the parcel of land number LR NO. 209/8000 comprised in NO. LR 25232 comprising 66.18 hectares which was later subdivided into plots and sold out to various individuals. There was however one parcel number LR NO. 209/8000/84 which was surrendered back to the government of Kenya as a public utility plot by the Malela Limited.

- The said allocation to the 1st defendant changed to a new number LR number 209/9295 whose conditions number 5 specified that the property was to be used for a clinic and a nursery.

- They intend to contend that the said allocation of public land was illegal.

- Vide paragraph 14 that by reason of matters a foresaid above, they intend to aver that the 1st defendant holds the said property for the citizens of Kenya and themselves.

- There were attempts to have the property leased, additional construction of two floors put on the existing one but objections were lodged with the Nairobi [provincial physical planning liaison committee which restrained the 1st defendant from further developing the property to which the 1st defendant objected vide Misc application number 793 of 2004 to quash the decision of the Nairobi Provincial Physical planning liaison committee by way of judicial review..

- The orders given by Kariuki J when granting leave to apply for judicial review were that:-

(i).*That the applicants be and are hereby restrained from making any further developments on the property LR Number 209/9295 until the hearing and determination of the substantive motion.*

(ii). *That stay herein granted, is conditional upon the applicant restraining from carrying out further renovation and or developments of the said property until orders of the court."*

- The said Misc Application No. 793/2004 afore mentioned is yet to be determined and according to the plaintiff/applicants the orders granted therein are therefore still in force.

- That in 2007 the defendant made a move to develop the property for commercial use, a move which was opposed by the plaintiffs association culminating in the matter being reported to Nema, matter went to the Nema tribunal which revoked the approval to convert the building into commercial premises, on 15th February 2008. But not withstanding the said revocation the defendants have continued with the development as particularized in paragraph 21 of the plaint, allegedly with approval of the 2nd defendant which approval the plaintiffs allege to be illegally and fraudulently obtained as particularized in paragraph 22 of the plaint.

In consequence thereof the plaintiffs seek the reliefs specified in paragraph 24 namely:-

(i). *A permanent injunction to restrain the 1st defendant, its servants, agents or successors in title from converting the premises into shops, offices, stalls or for any other commercial use.*

(ii). *An injunction to restrain the 1st defendant, its agents or whosoever from developing the property in any way whatsoever pending, the hearing and determination of HCCC Misc Application number 793/2004.*

(iii). *A declaration that LR number 209/8000/84 is public land and cannot be used for any other purpose other than that for which it was reserved at the time of surrender to the city council of Nairobi through the government of Kenya, that it is for a nursery school or clinic.*

(iv). *A declaration that the 1st defendant is holding the title and ownership of LR No. 209/8000/84 in trust for the citizens of Kenya.*

(v). *A revocation of the title of LR 209/8000/84 issued to the 1st defendant.*

(vi). *An injunction to restrain the 1st defendant from developing or converting LR No. 209/8000/84 into commercial or other use until requisite approvals have been obtained from the national environment management Authority and from the 2nd defendant.*

(vii). *An injunction directing the 1st and 2nd defendants by themselves, their agents, workers or otherwise to demolish the illegally constructed building on the suit property.*

(viii). *A permanent injunction to restrain the 2nd defendant from approving and granting any change of user of LR NO. 209/8000/84 for commercial use or any other use save for a nursery school or clinic.*

(ix). *Damages and costs.*

Simultaneously with the filing of the plaint is an interim application dated 14th day of May 2009 and filed on the same date. It seeks five prayers namely:-

1. *That this application be certified as urgent and heard exparte in the first instance.*

2. *Prayer 2 that an injunction do issue to restrain the 1st defendant, its servants or successor in title from building, developing or converting LR 209/9295 into shops, offices, stalls or for any other*

commercial use pending the hearing and determination of this application and there after this suit.

3. That an injunction do issue to restrain the 1st defendants, its agents, workers, servants or otherwise from continuing with the un authorized development on LR. 209/9295 in any way until the hearing and determination of this application and thereafter this suit.

4. That an injunction do issue against the 2nd defendant restraining it from approving any change of user application, in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit.

5. That an injunction do issue against the 2nd defendant restraining it from approving and/or licensing any kind of development in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit.

6. Costs be in the cause.

This application is still pending hearing and determination. The reason for the pendence of the disposal is because the first defendant gave a notice of preliminary objection dated 9th June 2009 and filed the same date. A total of 6 objections are raised. These are as set out earlier on herein on the record:-

Oral representations have been made on the same. The points raised by the objector are.

- Vide annexture MC1 and MD7 there is annexed a certificate of title showing that the 1st defendant is the registered proprietor of title No. LR 209/9295 and the other side is not disputing this fact, which title was issued on 1.1.78.

- By reasons of this registration, the 1st defendant is guaranteed sanctity of title by reason of section 23 and 24 of the RTA cap 281 laws of Kenya.

- The said title can only be defeated on grounds of fraud error, misdescription.

- The remedies for any grievances against the title lies in damages only which does not tie up with the prayers sought in the plaint. Namely injunctive relief, declaration and revocation of title which in the objectors opinion are null and void, abinitio and has no basis in law and as such it is a proper candidate for striking out.

2. It is the stand of the objector that the suit is a nullity and bad in law because it goes against clear provisions of the law.

3. The suit is time barred as the law requires that any challenge to land ownership be done within 12 years. It therefore follows that for a title issued on 1/1/1978 a period of 12 years warranting the challenging of the said title lapsed long time ago. By the plaintiff coming to court, in the year 2009, they are more than time barred. They should not be indulged by this court, as they have sat set on their rights since 17/11/88. further vide paragraphs 18,21,22,23,27,28,29,30,31,32-34 whose content go to show that in addition to knowledge of the existence of title, they were also aware of the advertisement for change of user of the same suit property as early as 25/3/99. All these ingredients go to prove that the applicants' suit is time barred.

3. On the issue of locus standi, of the applicants to bring the suit herein is because the suit and all the documentation they have presented in support of the interim application, does not demonstrate that they have any claim as to ownership of the suit property. Neither do they demonstrate by those deponements how they are going to be affected by the proposed changes on the user of the suit property.

(b) Lack of locus standi has also arisen on by reason of the fact that by reason of the content in the paragraph 8 of the affidavit, the applicants are attempting to champion duties not vested in them but in

another entity mandated by the physical planning Act.

(C) Lack of locus standi is further evidenced by the fact that a better way of challenging wrongful exercise of power by the 2nd defendant should have been by way of judicial Review.

(d) Lack of locus standi is further demonstrated by the fact that they are championing the interests of other Kenyans, a role vested in the Attorney General by virtue of section 26 of the constitution of Kenya.

(e) Lack of locus standi is further demonstrated by the fact that the Association has not displayed any document to show that they have capacity to sue in their own name, neither is their evidence demonstrated that the three named plaintiffs have the mandate of the other residents to file this action on their behalf.

(f) The plaintiff/applicant further stands non suited in so far as they seek injunctive reliefs against the 2nd defendant.

(g) Further lack of locus standi is demonstrated by the fact that they have come to court before they exhaust the available avenues of moving to the liaison committee to challenge the change of user of the suit land before moving to the high court, by way of invoking the high courts appellate jurisdiction as opposed to invoking the high court original jurisdiction in the manner they have done.

Turning to the 2nd defendant/respondent he turned paragraph 3 and 4 of the replying affidavit into a preliminary objection and stressed that no injunction can be issued against the 2nd defendants.

(2) The physical planning Act lays out the procedure to follow when seeking redress arising from approvals on developments and change of user. The forum for doing so is outside the court forum and with the national physical planning liaison committee.

In response to those objections, counsel for the plaintiff/applicants controverted the objection on the following points;-

- The objections are non starter because in terms of the decisions in the Mukisa case, a preliminary objection can only be sustained if the facts pleaded by the other side are not in dispute.

- Lack of authority to depone on the verifying affidavits even if it is true, it is not fatal. Room exists for filing the required authority even after the suit has been filed.

- Provisions of the section 23 of the RTA has no application to the interim application as they are not challenging title, but they are challenging the manner the suit property is being used in so far as it gors to affect the applicants.

- It is their stand that , claming a relief that one is not titled to, is not a candidate for a preliminary objection as that is a matter for adduction of evidence, which evidence has to be analyzed and then ruled upon.

- They have an issue for interrogation by this court, both at the interim stage and at the final level as they intend to challenge the user, in that they intend to demonstrate that all they intend to bring on board is that the land was set aside for public use and not the intended use.

- By reason of the counsel for the preliminary objection referring to many paragraphs in the supporting affidavit, is proof that what the counsel is dealing with are issues of facts and not law and as such the preliminary objection is a non starter.

- It is their stand that they have exhausted the avenue open to them under the physical planning Act, as the matter went up to the liaison committee, which moved to the high court to stop the development. The

court, issued court orders stopping the developments from going on which orders were disobeyed by the defendants forcing the applicants to move the court to stop a court order from being flouted.

- Contend that the issue of limitation does not arise.

- Contend that even if the court cannot grant an interim injunction against the 2nd defendant, that does not render the suit to be a nullity.

- Alternative process has been exhausted a matter which has not been denied by the respondents. This has also been demonstrated by annextures relied upon.

- On locus standi, there is in existence the provisions of the Nema Act which empowers citizens to champion litigation for the benefit of the community at large.

In response counsel, for the preliminary objector reiterated the earlier sentiments and then stressed the following:-

- Still maintain that the issue of change of user having been granted that cannot be in dispute herein.

- The issue of challenge to title having been settled long ago it is beyond the jurisdiction of this court.

- Still maintain that the reliefs in the plaint are challenging the title in one way or the other.

- Contend that provisions of NEMA Act does not aid the plaintiff as that has not been pleaded by the applicants but raised during the submission.

- In so far as the applicants intend to vindicate contempt of orders granted in Misc Application No. 793/04, the best forum to redress that, should be the very proceedings where these orders were made as opposed to institution of fresh proceedings.

- The authority to act on behalf of others is required by order 1 rule 12 (2) CPR to be given in writing and filed in court.

- Concede that there is in existence civil appeal No. 478/08 through which issues linked to Nema Act provisions can be addressed in that appeal.

- Still maintain that an injunction can not lie in so far as the same is sought under 3A CPR and not section 3 of the EMCA Act.

- Maintain that the preliminary objection has merit and the same should be upheld.

Case law was also relied upon. There is the case of **MUREITHI VERSUS CITY COUNCIL OF NAIROBI** decided by the CA on July 11, 1979 where it was held interalia that:-

(i)."*The conditions for granting of an interlocutory injunction are: - Existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and a balance of convenience.*

(ii). *An injunction cannot be granted where damages would be an adequate remedy."*

The case of **ALI AND 3 OTHERS VERSUS CITY COUNCIL OF NAIROBI (2003) KLR 596** decided by Ang'awa J on September 9, 2003 in which the learned judge held interalia that:-

1. Where one is dissatisfied with the decision of local authority declining permission to undertake development, on a specified parcel of land, he is entitled to appeal against the said decision pursuant to the physical planning Act (cap 286)

2. The city council of Nairobi is a local authority and just like the government no injunction can be against it and its remedy in such cause would be with an application by way of judicial review.

The case **of MBOTHU AND 8 OTHERS VERSUS WAITINU AND 11 OTHERS (1986) KLR 171** decided by the CA. The CA held interalia that:-

-Under section 23 (1) of the registration of tiles Act, a certificate of title issued to a purchase of land upon a transfer or transmission by the proprietor is conclusive evidence of proprietorship and the title of the proprietors shall not be subject to challenge except on the ground of fraud, misrepresentation to which he is proved to have been a party.

- The courts' will not imply a trust save in order to give effect to the intentions of the parties and such intentions must clearly be determined before hand."

The case of **MAATHAI AND 2 OTHERS VERSUS CITY COUNCIL OF NAIROBI AND 2 OTHERS** decided by Ole Keiwa J as he then was (now JA) on March 17, 1994. In this case, the plaintiffs moved to court, as rate payers to the Nairobi city council seeking inter alia an injunction to restrain the 3rd defendant from selling or carrying out construction upon a particular piece of land due to its alleged illegal acquisition. The 3rd defendants raised objection citing that the plaintiff had no locus standi to bring the suit. It was held interalia that:-

1. "The plaintiffs had no locus standi to seek injunctive relief as they did not have sufficient interest to bring the action.

2. Only Attorney General could sue on behalf of the public for the purpose of preventing public wrongs.

3. The title issued to the 3rd defendant could not be challenged in the absence of the matters set out in section 23 of the Registration of titles Act."

The case of **REGINA KAVENYA MUTUKU AND 3 OTHERS VERSUS UNITED INSURANCE COMPANY LIMITED NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 1994 OF 2000** decided from A.G. Ringera judge as he then was on the 24th day of May 2002. On an application to strike out a defence. At page 6 of the ruling line 10 from the bottom, the learned judge had this to say:-

"*Be that as it may, I am in agreement with the submission that an un signed pleading cannot be valid in law. To my mind it is the signature of the appropriate person on a pleading which authenticates the same. An un authenticated document is not a pleading of anybody it is a nullity"*

The case of **EVANGELINE KARUGWATA VERSUS CYPRIANO KANJI GIKOMO MERU HCCC NO. 26 OF 2006** decided by Ouko J on the 12th day of October 2007. On a preliminary point of law, at page 2 of the ruling, line 2, from the top the learned judge quoted with approval the decision in the case of **MUKISA 19 BISCUIT MANUFACTURING COMPANY LTD VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696** which laid down what constitutes a preliminary objection. At 4 the learned judge observed:-

" *First it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It is a point which if argued as a preliminary point may dispose off the suit. But it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*

The case of **WRECK MOTORS ENTERPRISE VERSUS THE COMMISSIONER OF LANDS AND OTHERS NAIROBI CA NO. 71 OF 1997** decided on the 24th day of October 1997. At page 6 of the judgement the CA, quoted with approval the provision of section 23 (1) of the RTA thus:-

"*the certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by*

the proprietor, thereof, shall be a conclusive evidence that the person named there in as proprietor, of the land, is the absolute and indefeasible owner thereof, subject to the encumbrances, easement, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misinterpretation to which he is proved to be a party"

Turning to the applicants list of Authorities , there is the case of **PETER KINUTHIA MWANIKI AND 2 OTHERS VERSUS PETER NJUGUNA GICHEHA AND 3 OTHERS NAIROBI HCCC NO 313 OF 2000** decided by Aluoch J as she then was (formerly JA now her Highness of the ICC) on the 9th day of June 2006. At page 2 of the judgement paragraph 3, it is observed that vide paragraph 4 thereof, the plaintiffs had pleaded that:-

"*Further the plaintiff aver that in failing to comply with the above stated environmental statutory provisions, the defendants' acts are likely to cause injury to the plaintiffs and is a violation of the plaintiffs basic right to a clean and healthy environment"* at page 3 3rd paragraph, it is observed that : " *He produced as exhibits in court, the letters of complaint which he wrote to Limuru Municipal Council, Nema, the Ministry of Environment and the Ministry of livestock and the then Njonjo Commission on land, which was the only body which replied to his letter of complaint"* At page 5-6 in summary, it is observed that complaints had been raised with, Limuru Municipal Council resolved that the construction of the slaughter house should not continue, but the defendants did not heed this, but just continued with the construction whose plan had not been presented for approval to the relevant authority. The matter went to the area Liaison Committee which resolved that the construction should not go on but this too was defied. A decision by the area Council was taken to direct that the slaughter house be pulled down. At page 8 line 3 from the bottom the learned judge as she then was observed:-

"*Evidence on record has shown that the defendants defied all discretions and continued with the construction of the butchery which is almost completed at the date of the hearing of this suit*". At page 9 3rd paragraph from the bottom, the learned judge as she then was went on thus:-

" *Though the matter of "locus" was not raised in the defence or the issue filed in court, I never the less feel that I must refer to it, and say that the plaintiffs though not owners of the land in dispute, never the less have the authority to sue. Such authority being derived from section 3 (3) of the environmental Management and coordinators Act 1999……In this case I am satisfied that the plaintiffs have locus to file this suit in the high court, because their entitlement to a clean and healthy environment is likely to be contravened if the defendants who are members of the Limuru Butchers Union start their operations of the slaughter of animals in the butchery they have built, and in defiance of all directions to stop the construction of a butchery, whose operations will breach the provisions of the suit"*

The case of **DANIEL NGUMBA KARANJA VERSUS BEATRICE WAMBUI MBOGO NAIROBI HCCC NO. 495 OF 2006** also decided by Aluoch J as she then was (formerly JA and now her highness with the ICC). *The suit sought an injunction to restrain the defendant from carrying out quarry blasting which were allegedly being carried out without an environmental impact assessment audit having been carried out. At page 4 of the ruling it is observed that section 148 of the Act provides that where the provisions of any such law conflicts with any provisions of this Act, the provision of this Act shall apply"* At page 7 line 5 from the top the learned judge ruled:-

"*The defendant raised the issue of ownership of the plot by the plaintiff but the decision of **PETER KINUTHIA MWANIKI VERSUS PETER NJUGUNA GICHEHA (HCCC NO. 313 OF 2000**) Produced and relied on does show that the court, settled the issue of locus to bring suits under EMCA, the Environmental and management and coordination Act 1999, by the provisions of section 3 (3) of the Act.*

Reference was also made to Halisburys laws of England, Fourth Edition volume 7 at page 33 paragraph 53 where it is stated:-

"***Disobedience to process**. It is a civil contempt of court, to rwfuse or neglect to do an Act required by a judgement or order of the court, within the time specified in the judgement or order, or to disobey a*

judgement or order requiring a person to abstain from doing a specified act or to ac,t in breach of an undertaking given to the court by a person on the faith of which the courts sanctions a particular course of action or in action.

Paragraph 55 page 35:-

*' **Orders improperly obtained.** The opinion has been expressed that the fact that an order ought not to have been made is not a sufficient excuse for disobeying it, that disobedience to it constitutes a contempt, and that the party aggrieved should apply to the court, for relief from compliance with the order.*

Paragraph 60 page 3 6:-

***Mandatory orders:** As a general rule, a judgement or order which requires a person to do an act, must specify the time after service of the judgement or order, or some other time, within which the act is to be done. A time need not be specified in a judgement or order which requires a person to pay money to some other person or to give possession of any land or deliver any goods but the judgement or order in such a case may specify a time and must do so before committing or sequestration can issue."*

The case of **REFRIGERATOR AND KITCHEN UTENCILS VERSUS GULABCHAND POPATLAL SHAH AND OTHERS AND SHANTILAL KHETSI SHAH AND OTHERS NAIROBI CA NO. 39 OF 1990** decided by the CA on the 13th day of July 1990. on an application for an injunction, the law lords of the CA cited with approval own decision in the case of **MWANGI WANGONDU VERSUS NAIROBI CITY COUNCIL** where it was held*:- ….That no order of court, requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order must be indorsed with a notice informing the person on whom the copy is served, that if he disobeys the order, he is liable to the process of execution to compel him to obey it…. (page 6) that in cases of alleged contempt the breach for which the alleged contemnor is cited must not only be precisely defined but proved to a standard which is higher than proof on a balance of probability but not as high as proof beyond reasonable doubt……..It is essential for the maintenance of the rule of law, and good order that the authority and dignity of our courts are upheld at all times. This court, will not condone deliberate disobedience of its order and will not shy away from its responsibility to deal firmly with proved contemnors"*

The case of **GODFREY NJERU VERSUS REPUBLIC NAIROBI CRIMINAL APPEAL NO. 20 OF 1993** decided by the CA in 1993. At page 2 of the judgement, the law lords of the CA quoted with approval the case of **ATTORNEY GENERAL VERSUS TIMES NEWSPAPER LTD (1974) AC 273** at page 307 letter G. by lord Diplock thus;-

"*Contempt of court, is a generic term descriptive of conduct in relation to particular proceedings in a court, of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlements of their disputes….. contempt of court, is the means by which the law vindicate the public interest in the administration of justice, that is in the resolution of disputes, not by free or by private or public influence, but by independent adjudication in courts of law according to an objective code……..The importance of it is:- of all places where law and order must be maintained. It is herein these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundation of our society.*

(paragraph 3) ……In interfering with the administration of the law, in impending and perverting the course of justice…..It is not the dignity of the court which is offended a pretty and misleading view of the issue involved. It is the fundamental supremacy of the law which is challenged"

Reference was also made to Gangulys civil court practice and procedure fourth Edition page 193 line 26 from the top. It is stated thus:-

"***Un registered Association**. An unregistered body club or association cannot maintain a suit by any*

person be he president, secretary or both, unless an authorized representative is appointed by all the members of the association to file the suit on behalf of such as un registered association, the suit is not maintainable.

The case of **KENYA AIRWAYS CORPORATION LTD VERSUS TOBIA OGANYA AUMA AND 5 OTHERS NAIROBI HCCC Number 350 of 2002** decided by the CA on the 23rd day of November 2007. At page 8 of the judgement line 9 from the bottom when constructing order 1 rule 8 CPR observed thus:-

"*It is also clear that there is no requirement that a person seeking to institute a suit in a representative capacity must establish that he had obtained the sanction of the persons interested on whose behalf the suit is proposed to be instituted"*

The case of **KENYA BANKERS ASSOCIATION AND OTHERS VERSUS MINISTER FOR FINANCE AND ANOTHER (NO. 4) (2002) 1 KLR 61** decided by Kuloba and Mbaluto JJ as they were where it was held inter alia that:-

"*4 The general principle relating to public interest litigation is that what gives locus standi is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population.*

5. Representative suits by organizations on behalf of its members are permissible provided that:-

(a) The members have a legal standing to sue in their own right or that the organization may have an interest of its own in its own right.

(b) The interest sought to be protected are germane to the organizations purpose.

(c) And that neither the claim nor the relief sought requires individual participation of members.

(d) The only prequisites to the maintenance of a representative suit or class action are a sufficient numerosity of parties, a communality of issues, a communality of claims or defences, a communality of interests, of sufficient nexus between representative and the class of defined ascertained or ascertainable group, represented and the good faith of the representative parties.

10. The paramount guide in deciding issues of standing to sue or defend are good faith of the person bringing the suit and the culpable in action of the public officials charged with the duty proceeding the constitutions in seeking judicial intervention.

12. Where an association or other organization exists for its members who are defined or are ascertainable, and its constitutional document provides for it and it is not contrary to a relevant registration statute governing the organization, it is generally the organization or association which is better placed to litigate for or on behalf of the members.

(13) It would be un just to require by an unbending rule individual members to sue or defend when the constitution of the association or organization says that legal proceedings may be taken or defended in the name of the association or organization or of the specified officials of that body."

The case of **KISERIAN ISINYA PIPELINE ROAD RESIDENT ASSOCIATION KIPRA AND OTHERS VERSUS JAMII BORA CHARITABLE TRUST AND OTHERS (2006) LLR 6003 (HCK)** decided by Visram J as he then was (now JA) where at page 3 line 16 from the bottom, it is observed that:-

"*Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of order 1 rule 8 CPR"*

The case of **DAMESA ASOCIATION VERSUS COUNTY COUNCIL OF ISIOLO AND OTHERS (2007) LLR 6177 (HCK)** where at page 2 line 24 from the bottom, it is observed that;-

"*In an un incorporated body such as a society, where they are numerous members, the office bearers would file suit in their names suing on behalf of the association. As plaintiffs, they need not seek the leave of the court, to bring a representative suit. The effect of the said plaintiffs suing is that they are suing in a representative capacity as well as under their own right……. Legally the members of an association is permitted either alone or with others to bring a suit on behalf of the association……...The suit must be filed by the chairperson and or office bearers on behalf of the association as a plaintiff.*"

In RE Pritchard (1963) IAER 878 page 879 PRE it is observed:-

"*It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in her majesty supreme court, to be defeated by any mere technicality any slip, any mistaken step in his litigation*"

Lastly the case of **MUKISA BISCUITS MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696 page 700** Law JA as he then was at paragraph D-F had this to say:-

"*So far as I am aware a preliminary objection consists of points of law which has been pleaded, or which arise by clear implication out of pleadings and which if argued as a preliminary point, may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration*"

Sir Charles New Bold P. in the same decision at page 701 paragraph B-C had this to s ay:-

"*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop*"

On the courts', assessment of the facts herein, after hearing the rival arguments for and against the preliminary objections raised, it is clear that the preliminary objection herein has not only been raised to the interim application but also to the main suit. That being the case the court, is required to exercise caution when making a determination of the preliminary objection so that it does not pre-empt the outcome of the interim application should the objection fail.

It is common ground that leave to argue the preliminary objection before the interim application stems from this courts ruling delivered herein on the 15th day of June 2009 whereby this court, made observations that issues of lack of locus standi of the plaintiff/applicants and issues of nullity of the suit in which the interim application is anchored, needed to be interrogated first because in this courts', view, a suit which is null and void cannot form an anchor for an interim application. Likewise a litigant who has no locus standi cannot agitate any cause of action before a court of law.

The rival arguments for and against the preliminary objections have already been extensively set out herein. In a summary form, the preliminary objection has raised objection both to the suit and the interim application because of the following:-

1. The suit land is registered in the name of the 1st defendant/respondent and as such the said title is un assailable as the same could only be assailed on grounds of error, fraud, misdescription, matter the applicants are not relying on.

2. The deponent of the verifying affidavit and supporting affidavit has not demonstrated authority to depone those affidavits on behalf of the rest.

3. The applicants stand non suited because they have not exhausted alternative remedies available to them under the physical planning Act.

4. Issues of contempt of court orders of the orders issued by Kariuki J in Misc Application No. 793/2004 should be addressed in the said forum and not herein.

5. In addition to the existence of Misc application No. 793/2004 there is in place High court civil appeal No. 478/08 which is still pending and through which the applicants can ventilate their grievances.

6. The injunctive relief being sought by the applicant against both respondents cannot lie against the first defendant/respondent in the first instance because the ingredients for granting such a relief namely:-

(i). Demonstration of existence of a prima facie case with a probability of success, suffering of loss which cannot be compensated for by way of damages and balance of convenience are all in favour of the 1st defendant/respondent because the

- Title is in the 1st defendant's name.

- The applicants are not challenging the said title on the grounds that the law says such title could be challenged.

- They have been aware of the change of user for a long time.

- The balance of convenience tilts in favour of the 1st defendants/respondent.

In the second instance no injunctive relief can issue against the 2nd defendant/respondent as it is agovernment institution.

7. The plaintiff/applicants cannot avail themselves of the provisions of the EMCA Act on class (mass) action as the same has not been pleaded, their action therefore falls into the category of public interest actions that can only be championed by the Attorney General as provided for in section 26 of the Kenya constitution.

Due considerations has been made by this court, as concerns the issue raised above, and the same have been considered by this court in the light of the Rival arguments on the record and principles of case law cited to this court, and the court, proceeds to make findings on the same as set out here under:-

(ii) It is now settled law, that is trite that there is no known legal provisions specifying what set of facts constitute and what set of facts do not constitute a sustainable preliminary objection. As such it has now become an accepted fact as a matter of judicial notoriety that the yard stick of what constitutes a sustainable preliminary objection has now been established by principles of case law as established by the court of Appeal formally Eastern African currently Kenya court of appeal and as dutifully followed by the superior courts of this land. This yard stick is found in the now famous decision in the case of **MUKISA BISCUITMANUFACTURING CO. LIMITED VERSUS WEST DISTRIBUTORS LIMITED (SUPRA)**. The ingredient established are that:-

-The preliminary point raised must be on a pure points of law.

-It must be cemented on the grounds that the facts pleaded by the other side are true and are not in contest.

- It should be capable of disposing off the litigation in issue.

-It must not be seeking the exercise of the courts;, discretion whereby the court is likely to have a discretion to decline or accept the relief being sought

When the afore set out ingredients are applied to own framed questions set out above, it clear that indeed issues of the title to the suit land being registered under the RTA is a pure point of law. However issues relating to whether the plaintiff/applicants herein stand non suited on account of the same title being indefeasible by reason of the attack on it not being based on the acceptable statutory attacks namely fraud, error and misdescription, one needs to turn to evidence either to prove or disprove the existence or non existence of those ingredients. This would definitely call for the adduction of evidence and cross examination of the disputants and their witnesses', assessment of evidence followed by a ruling and or judgement. This is therefore not a matter of pure points of law. It falls into the category of issues that can safely be termed as issues of mixed law and fact.

2. Regarding issues of Authority to depone both the verifying affidavit and the supporting affidavits are no doubt issues of law. However issues of whether the authority exists or does not exist is a matter of evidence. One has to scour the record to determine the existence or none existence.

As to whether failure to annex the same is fatal to the entire proceeding, is a matter that can be established by revisiting the legal provisions on the subject and case law interpreting those provisions. The provisions that deal with authority to act on behalf of others that this court, has judicial notice of, is found in the provisions of order 1 rule 12 (2) of the CPR. It reads:-

"*Order 1 rule 12 (1) where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings and inlike manner where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case". This provision does not make it mandatory that this authority, must be filed at the same time as the filing of the suit. It therefore leaves room for the filing of the authority at any stage of the proceedings. It therefore follows that failure to file the authority to act on behalf of other plaintiffs, where a suit has more than one plaintiff and is filed. Simultaneously with the filing of the suit is not fatal. It becomes fatal if there is failure to take action upon being alerted of the defect. It therefore follows that the absence of a filed authority to act on behalf of the listed plaintiffs by the participating plaintiffs does not render the suit a nullity as the omission can be remedied. The provision does not say that a defaulting party has to apply either orally or formally to rectify the default. It therefore follows that the Authority can be filed at any stage of the proceedings.

Issues was also raised about lack of authority to depone a verifying affidavit on behalf of the parties. As submitted by counsel for the applicant, this too is not fatal to the suit as the error can be rectified. The requirement of a verifying affidavit is provided for in order VII rule 1 (2) CPR. It reads:-

"*Order VII Rule 1 (2) the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint"*

The consequences for non compliance with this rule is not in built. But this has now been settled by the court of appeal in its decision in the case of **REASERCH INTERNATIONAL EAST AFRICA LIMITED VERSUS JULIUS ARISI AND 213 NAIROBI CA 321 OF 203.** At page 7 of the judgement line 14 from the top the law lords of the CA made the following observations:-

"*It is true as submitted by the respective counsels that rule 1 (2) of order VII CP rules is silent whether each plaintiff in cases where there are numerous plaintiff should file a verifying affidavit"*

At page 10 line 10 from the top, the law lords went on to state thus:-

"*In our view, the true construction of rule 1 (2) of order VII civil procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorized any of the co-plaintiffs or some of them, in writing, and filed such authority in the case to file a verifying affidavit on his behalf in which case such*

a verifying affidavit would be sufficient compliance with the rule:

*More over, **the Grace Ndegwas' case** (supra) and rule 12 (1) of order 1 CP rules leave no doubt that one or more of the co-plaintiffs can validity file an affidavit verifying the correctness of the averments of the plaint on behalf of other co-plaintiffs with their authority in writing.*

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of order viii CPR and that their suit was liable to be struck out by the superior court under rule 1 (3) of order VII CP Rules.

The superior court however has a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule"

Rule 1 (3) of order VII CPR provides:-

1. "*The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule"*

The centrol command to the court, in this sub rule is found in the words:- "*The court may"* A s the CA found in the above cited case, there is jurisdiction to strike out the plaint on account of non compliance with that provision. But with a corresponding jurisdiction to allow the defaulting party comply with that provision. Applying this reasoning to the facts herein, the court, is of the opinion that a part from laying objection that other plaintiffs have not complied with the rules, no material was put before this court, to justify the denial of the courts discretion to allow the parties comply with that provision. In this courts', considered opinion, the weighty issues raised herein would require the court, to exercise its discretion in favour of the defaulting party to file the authority both to act and depone on behalf of the many. The court, therefore agrees with the submission of the plaintiffs counsel, that any defect in the verifying affidavit is curable and does not in itself render the pending suit a nullity.

(3) The 3rd objection outlined herein is to the effect that the plaintiff stood non suited by reason of failure to exhaust all the available avenues for redress laid down in the physical planning Act. Due consideration has been made by this court, of this and this court is of the opinion that without scrutiny of the documentation on the record, this court, is not in a position to tell whether the applicants have exhausted all the available avenues for redress as laid down in the physical planning Act or not. Such an exercise is an exercise involving scrutiny of facts or evidences and not scrutiny of law or issues of law, notwithstanding that the evidence to be scrutinized will be so scrutinized on the basis of the legal frame work comprising the physical planning Act.

(4) As regards the issue of contempt of court, orders, granted by Kairuki J in HCCC Misc application 793/04 being proper candidate for the proceedings in the forum in which they were made as opposed to this forum, this court, is of the opinion that indeed the objector has a valid argument. But this argument can only hold in so far as those orders are sought to be enforced in these proceedings in their raw form, that is, in the manner and form in which they were granted. However in a situation where a party is merely pleading them to show a sequence of events culminating in the filing of the proceedings herein, such a pleading cannot amount to importation of those orders as these proceedings are not seeking the adoption and enforcement of those orders herein. This, as submitted by the plaintiffs counsel, does not render the entire suit a nullity and void abinitio, Nor does it render the plaintiff to have lack of locus standi in so far the entire claim is concerned. If anything should the court, find that there is misjoinder of issues, then the available remedy is to apply to stricke out the misjoined issues and then allow the remainder of the issues to go to trial. But before doing so the court, will have to scrutinize the evidence for and against. This is therefore not a pure point of law.

(5) As regards the existence of HCCC Misc Application 793/2004 and HCCC 478/08 as alternative avenues through which the applicants can ventilate their grievances, this too is a mater of evidence, in that

the court, will have to scrutinize the documentation in those proceedings to determine whether the claim herein is fully covered in those proceedings or not. Such an exercise can best be termed as scrutiny of evidence as opposed to scrutiny of the law.

(6) As regards the granting of the injunctive relief against the first defendant not being available to the applicants, this court, is alive that a determination of whether an injunctive relief is available to a litigant or not is a matter of determination whether the evidence relied upon by the applicant to on record satisfies the ingredients for granting of an injunction or not. This is also a matter of evidence.

As regards the issuance of an injunctive relief against the 2nd defendant, the court, is of the opinion that although this is a pure point of law, it alone cannot unseat the claim because the authority relied upon is a high court decision and not binding on this court, which has a concurrent jurisdiction with the deciding court. Rooms therefore exists for this court, to revisit that issue and arrive at its own conclusion. Room exists for a determination as to whether the actions sought to be injuncted can fully be clothed in official dom in which case, the officer or officers concerned are fully shielded by that immunity or whether they over stepped their bounds, and can therefore be pinned down with blame worthiness in their individual capacity. Once again this is a matter which can only be resolved by a scrutiny of the evidence on how the activities complained of were executed.

(7) As regards the assertion that the plaintiffs stand non suited because they can not take refuge under the EMCA Act, because those provisions are not pleaded, though a point of law does, not operate to unseat the claim on grounds of nullity and lack of locus standi because they can take refuge under the provisions of order VI rule 7 CPR which governs pleadings generally. It provides:- *"A party may in his pleading raise any points of law".* The centrol command in this provision are the words "**party may**" It leaves room open for a party to plead points of law, or fail to plead them but rely on them. 2ndly disqualification would also only a rise if the parent Act specifically makes provision either in the substantive provisions, of regulations that in order to rely on those provisions, the Act has to be specifically pleaded.

For the reasons given in the assessment the preliminary objection raised herein be and is hereby dismissed with costs to the plaintiff/applicants who were respondents to it for the reason that it was not wholly on pure points of law for the following reasons:-

1. Although it is correctly submitted by 1st defendant preliminary objector that section 23 of the Registration of Titles Act cap 281 protects the sanctity of the title issued under that Act, which is a legal document, where the title is being challenged, one needs to go to the evidence relied upon by the challenger to determine whether the same is to be unseated or not on account of fraud or error or misdescription. The arguments on this point was therefore not on a pure point of law but on both law and facts and therefore does not hold as a preliminary objection. Pleading the sanctity of the title alone can not dispose off the suit. What would dispose off the suit are the facts or evidence which would go to prove and or disprove the existence or non existent of those elements.

2. Failure to file the Authority to depone both the verifying affidavit and supporting affidavit and act generally in the matter by the plaintiffs on board on behalf of the many others, at the time the suit was filed or soon their after is not totaly fatal. The provisions of law and case law from the CA relevant to the subject demonstrate that this procedural step can be taken at any stage of the proceedings. Therefore a party in default in this aspect does not suffer the consequences of being termed as one who has no locus standi and whose suit can be adjudged a nullity.

(II) This is a matter of evidence as one need to scrutinize the record to determine in the first instance that the suit is a proper candidate for the filing of such an authority, and in the second instance that the same has not been filed.

3. As regards failure to exhaust all the available remedies under the physical planning Act, this is not explicit on the face of the pleadings one needs to examine the documentations relied upon to determine whether all the steps have been exhausted or not.

4. Issues of vindication of contempt of court orders issued in HCCC Misc application 793/04 being championed in the wrong forum though legal, cannot be disposed off, as a purely point of law. One needs to examine the record and the annexed documents to determine in which aspect they are being pleaded herein.

5. The ingredients required to be demonstrated before one can earn an injunctive relief are not prescribed in order 39 CPR, Which is the substantive legal provision on this relief. These have been developed by case law. As such they cannot be proved by pleading alone. One needs to examine the documentation relied upon to determine whether these have been demonstrated or not. This is therefore a matter of evidence and not a pure point of law.

6. As regards the issues of the plaintiff/applicants being non suited because they cannot take refuge under the provisions of EMCA (Environmental Management Cordination Act, because they have not pleaded the same, order V rule7 CPR on pleading absolves them of any default as it states clearly that points of law "***may be pleaded"*** meaning that failure to plead does not render ones suit in valid, and it is not a bar to reliance on any point of law not pleaded.

(ii) Since the suit is in its infancy the default and or error if any can be cured by way of amendment if need be.

7. As regards the non availability of an injunctive relief against the second defendant, the case law relied upon is a decision of a court of concurrent jurisdiction, therefore not binding on this court. This court is at liberty to revisit that issue and then arrive at its own conclusion on the matter. This is therefore not a matter that can be used to unseat the claim against the 2nd defendant at an interlocutory stage room therefore exist to scrutinize the record and determine the mode of execution of the action complained of, and determine whether the officials were within the official bounds and therefore shielded by official immunity. Or alternatively, they overstepped their official bounds in which case they can be held liable in their individual capacity.

8. The plaintiff/applicants who are the respondents to the preliminary objection will have costs of the preliminary objection.

DATED, READ AND DELIVEERED AT NAIROBI THIS 24TH DAY OFJULY 2009.

R.N. NAMBUYE

JUDGE