



REPUBLIC OF KENYA

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

Civil Case 266 of 2009

STRATHMORE EDUCATION TRUST

REGISTERED TRUSTEES1ST PLAINTIFF

STRATHMORE UNIVERSITY.....2ND PLAINTIFF

VERSUS

MILE-ED ENTERPRISES LIMITED.....DEFENDANT

1. The application before me is the Chamber Summons dated 8/06/2009. The application is expressed to be brought under Order XXXIX Rules 1(a), 2 and 9 of the Civil Procedure Rules and seeks the following orders:-

1. *Now spent*

2. *Now spent*

3. *THAT the Defendant/Respondent be and is hereby restrained whether by itself or by its directors, officers, servants, agents employees, invitees and or otherwise howsoever and the said directors, officers, servants, agents, employees, invitees whether for themselves or for the Defendant/Respondent company from entering into or being upon or taking possession of or remaining upon or digging or excavating soil therefrom or constructing any structure upon or thereunder or doing anything that would amount to wastage or dereliction of the suit property that is to say Land Reference Number 209/11613 or any part or portion thereof pending the hearing and determination of the instant application.*

4. *THAT the Defendant/Respondent be and is hereby restrained whether by itself or by its directors, officers, servants, agents employees, invitees and or otherwise howsoever and the said directors, officers, servants, agents, employees, invitees whether for themselves or for the Defendant/Respondent company from entering into or being upon or taking possession of or remaining upon or digging or excavating soil therefrom or constructing any structures upon or thereunder or doing anything that would amount to wastage or dereliction of the suit property that is to say Land Reference Number 209/11613 or any part or portion thereof pending the hearing and determination of the instant suit.*

5. *THAT the costs of this application be provided for.*

Prayer 3 of the application was granted at the ex parte hearing on the 8/06/2009. This ruling concerns prayers 4 and 5 of the application.

2. The application is supported by the sworn affidavit of **PETER KWENJERA** dated 8/06/2009; and also by the grounds appearing on the face of the application, that is to say:-

1. THAT on 2nd June 2009, the Defendant/Respondent by its directors, officers, servants, agents, employees, invitees and otherwise, and without the consent of the Plaintiffs/Applicants wrongfully unlawfully and illegally entered into a portion of the suit property and or took possession of it and or remained in occupation of it and or dug a trench across a portion thereof and or excavated soil therefrom and or otherwise did acts which in law amounted to wastage of the suit property or a portion thereof.
2. THAT the acts aforesaid amount in law to trespass and the Plaintiffs have suffered loss and damage.
3. THAT Defendant's/Respondent's threatens and intends unless restrained by this Honourable Court to repeat the said acts of trespass complained of.
4. THAT the Defendant's/Respondent's conduct is inconsistent with and indeed violates the protection accorded to the 1st Plaintiff/1st Applicant under section 76(1) of the Constitution from entry by any person into its property without its consent.
5. THAT in the circumstances this Honourable Court should be pleased to issue an order of injunction to restrain the Defendant/Respondent from entering into or remaining upon or taking possession of the suit property or any part thereof in utter violation of the 1st Plaintiffs/1st Applicant's fundamental right under section 76(1) of the Constitution.
6. THAT the 2nd Plaintiff/2nd Applicant has the possession, control and custody of the suit property and is seized thereof for and on behalf of the 1st Plaintiff/1st Applicant and for the purpose of inter alia advancement of education and or religious and social welfare of the residents of Kenya in accordance with the provisions of the Strathmore University Charter 2008.
7. THAT the 2nd Plaintiff/2nd Applicant operates an educational establishment upon the suit property known as Strathmore University in fulfillment of its obligation under section 4(1) of the Strathmore University Charter 2008 to wit advancement of education through *inter alia* teaching by providing an all round quality education in an atmosphere of freedom and responsibility, creating a culture of continuous improvement, fostering high moral standards and developing a spirit of service and respect for others.
8. THAT the acts of the Defendant/Respondent complained of hereinbefore unless restrained by this Honourable Court impede and disrupt the discharge by the 2nd Plaintiff/2nd Applicant of its responsibilities under the Strathmore University Charter 2008 notably of providing an all round quality education in an atmosphere of freedom and responsibility, creating a culture of continuous improvement, fostering high moral standards and developing a spirit of service and respect for others.
9. THAT unless the Defendant/Respondent is restrained by this Honourable Court, it might by its directors officers servants employees or agents re-enter into the suit property thereby disrupting the activities of the 2nd Plaintiff/2nd Applicant and the 2nd Plaintiff/Applicant shall be gravely prejudiced since it shall not be able to discharge its obligations under the Strathmore University Charter 2008 either effectively efficiently or at all in an atmosphere of freedom and responsibility as its is enjoined to do under section 4(1) thereof. (sic)
10. THAT the damage the 2nd Plaintiff/2nd Applicant stands to suffer (unless the Defendant/Respondent is restrained by an interlocutory injunction from committing the acts complained of) to wit grave prejudice and inconvenience, disruption of operations and quiet possession of the suit property and effective and efficient discharge of its obligations under the Strathmore University Charter 2008, unless the Defendant/Respondent is restrained by an order of injunction from re-entering into or taking possession of or remaining in the suit property or any part thereof cannot be compensated at all and much less by an award of damages.
11. THAT the damage the 1st Plaintiff/1st Applicant stands to suffer (unless the

Defendant/Respondent is restrained by an award of injunction from committing the acts complained of) to wit gross dereliction and wastage of its property and violation of its fundamental right under section 76(1) of the Constitution cannot be compensated at all and much less by an award of damages.

3. The supporting affidavit dated 8/06/2009 sworn by Peter Kwenj`era gives a summary of the Plaintiff's case, that is to say that:-

(a) *the 1st Plaintiff/1st Applicant (1st Plaintiff) is a body corporate established under the provisions of the Trustee (Perpetual-Success) Act Cap 164 Laws of Kenya as per the Certificate of Incorporation issued to the 2nd Plaintiff on 23/10/1986.*

(b) *The 2nd Plaintiff/2nd Applicant is duly registered under the provisions of the Strathmore University Charter 2008 pursuant to Section 12 of Universities Act, Cap 210B*

(c) *the 2nd Plaintiff is the registered proprietor of all that piece and parcel of land known as LR No. 209/11613 (the suit property) situate in the city of Nairobi in the Nairobi Area measuring five decimal eight three four (5.834) hectares or thereabouts,*

(d) *the 2nd Plaintiff is also seized of the possession of the suit property for and on behalf of the 1st Plaintiff and for the purpose of inter alia, advancement of education and of religious and social welfare of the residents of Kenya in accordance with the provisions of the Strathmore University Charter, 2008*

(e) *on 21/05/2009, the Defendant/Respondent expressed its intention to start civil works and a proposed sewerage reticulation plan on the sewer line which is to run along the river which runs across the suit property and that neither of the two Plaintiffs nor any of their servants/agents or employees gave or communicated their consent or concurrence at any time at all for the proposed civil works to be undertaken by the Defendant/Respondent*

(f) *despite absence of consent or concurrence by the two Plaintiffs, the Defendant did on or about 2/06/2009 enter upon a portion of the suit property with a bull dozer, temporarily took possession of and excavated soil therefrom and did other acts that amount to wastage of a portion of the suit property, which acts amount to trespass,*

(g) *unless the Defendant/Respondent is restrained by this Honourable Court as prayed by the Plaintiffs/Applicants, it is likely to repeat its wanton acts of wastage on the suit property and thereby to violate the 1st Plaintiff's rights to property as enshrined under Section 76(1) of the Constitution.*

(h) *the continued wanton acts of the Defendant/Respondent unless restrained by this Honourable Court are likely to disrupt, and impede the discharge by the 2nd Plaintiff of its responsibilities under the Strathmore University Charter 2008, notably of providing an all round quality education in an atmosphere of freedom and responsibility, creating a culture of continuous improvement, fostering high moral standards and developing a spirit of service and respect for others.*

(i) *unless restrained, the acts of the Defendant/Respondent as above stated, shall cause great prejudice to the 2nd Plaintiff since it shall not be able to discharge its obligations under the Strathmore University Charter, 2008 and that such prejudice cannot be compensated at all and much less by an award of damages*

(j) *unless the Defendant/Respondent is restrained by an award of an injunction from committing the acts complained of to wit gross dereliction and wastage of the suit property, the 1st Plaintiff shall suffer violation of its fundamental property rights under Section 76(1) of the Constitution and that such violation cannot be compensated at all and much less by an award of damages.*

4. The application is opposed. The Replying Affidavit is sworn by Mathew Mundia Mugwe, a Director of the Defendant Company. In the affidavit dated 17/06/2009, the deponent gives the Defendant's case

that is to say that:-

(a) He served the Plaintiff/Applicant with a Notice of Construction of the sewer line under the name Mile-ed Enterprises (a sole proprietor) and that he is the one carrying out the construction of the said sewer line

(b) Since the Defendant is not the one carrying out the sewer line construction, it is wrongly sued and that the suit is thus fatally defective

(c) The proprietors of title No. L.R. No. 209/6705/2 namely M/s IDM Homes Company Limited should have been enjoined in the suit.

(d) The developers of the project complained of obtained the requisite approval namely SEWER LINE Reticulation from the NAIROBI CITY WATER AND SEWERAGE COMPANY as REG NO. P.D.S. No. 2100 of 11/05/2008. Annexure PK 4(b) to Peter Kwenjera's Supporting Affidavit is the approval referred to herein and the same was served upon the Plaintiff's/Applicants by the Defendant's letter dated 21/05/2009 which letter reads:-

"May 21, 2009

Strathmore Univesity

P. O. Box 6061555-00200

NAIROBI – KENYA

Attn: Raul Figuero

RE: SEWER LINE-NOTICE TO COMMENCE WORK

We refer to the above as well as approved drawing number SL 1/3 Reg. No. P.D.S. 2100 (find attached a copy of the same). We would like to bring to your attention that we shall begin works on the sewer line that runs next to along the river adjacent to your plot number 209/11613 on Thursday May 26, 2009.

Your co-operation will be highly appreciated.

Mundia Mugwe

Managing Director"

(e) The developer obtained all requisite approvals from the relevant authorities namely approvals for:-

Nairobi

- i. Sub-division and Domestic Buildings proposed plans from City Council of Nairobi

- ii. Sewer reticulation from Nairobi City Water and Sewerage Company

- iii. Road works and storm water drainage from City Council of Nairobi

- iv. Street lighting from City Council of Nairobi

- v. Water Reticulation drawings from Nairobi City Water and Sewerage Company

(f) The area under construction is very steep, requiring the sewer and storm reticulation to have a natural flow and that the approved Sewer and Storm reticulation drawings flow along the

riparian river which flows across the Plaintiff's title but on the riparian way leaf (sic) before adjoining the City Council of Nairobi Man Hole.

(g) The Applicant's title, a copy of which is annexed to Peter Kwenjera's Supporting Affidavit as annexure "PK 3" is subject to the special conditions given on the grant, more particularly paragraph 13 thereof which gives local authorities the

"right to enter upon the land and lay and have access to water mains services pipes and drains telephone or telegraph wires and electric mains of all description whether overhead or underground and the grantee shall not erect any building in such away as to cover or interfere with any existing alignment of main or service pipes or telephone or telegraph wires and electric mains."

(h) The sewer line construction though carried out at the expense of the developers is under the control and is vested in the City Council of Nairobi or Nairobi City Water and Sewerage Company

(i) Both the Sewer and Storm Reticulation have been approved by National Environmental Management Authority (NEMA). Annexure marked "NMM 9" to Mr. Mugwe's Replying Affidavit is NEMA's letter dated 28/04/2009 in which NEMA says it is satisfied with after the Environmental Impact Assessment (EIA) Project Report of the proposed development of domestic building on LR No. 209/6705/2 off Mbagathi Road, Nairobi and goes ahead to approve the proposed project subject to a number of mandatory conditions, namely:-

1. The proponent shall take measures to ensure that all excavated waste and debris from the project are handled as per the Environmental Management and Coordination (Waste Management) Regulations 2006.

2. The proponent shall ensure that proper measures to mitigate environmental nuisances such as air pollution, noise and excessive vibrations are put in place

3. The proponent shall submit design drawings for water and sewerage reticulation to the Nairobi City Water and Sewerage Company for evaluation and approval.

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

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

6. 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.

7. The proponent shall comply with the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of City Council of Nairobi, Ministry of Labour, Ministry of Housing, Ministry of Public Health and Sanitation and other relevant Authorities.

8. 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.

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

10. *The proponent shall ensure that environmental protection facilities or measures to prevent pollution and ecological deterioration such as noise and dust pollution control mechanism, energy and water saving fixtures, storm water drains, fire prevention fighting facilities are designed, constructed and employed simultaneously with the proposed project.*

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

12. *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.*

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

(j) *None of the approvals given by the City Council of Nairobi, Nairobi City Water and Sewerage Company and NEMA have been challenged by the Plaintiffs*

(k) *Though the Plaintiff's have built a perimeter wall around their title, they have not obstructed the Riparian river flows, and that the said riparian river has not been obstructed before or after its passage across the Plaintiffs/Applicants title*

5. The Defendant/Respondent wants the Plaintiff's application for injunction dismissed so that they can continue to complete the works on behalf of their principals, IDM Homes Company Ltd. who are not a party to this suit. It is to be noted here that the approval given by the Nairobi City Water and Sewerage Company Ltd., vide the letter dated 9/07/2008 says specifically that the proposed water reticulation drawings have been approved subject to the conditions set out therein, one of which is that it is the sole responsibility of the developer to obtain wayleave for the proposed water reticulation.

6. In response to the Defendant's Replying Affidavit, Mr. Peter Kwenjera of the Plaintiffs swore a Further Affidavit dated 24/06/2009 and filed in court on the same 24/06/2009. He makes the following points, that is to say:-

(a) *That the Notice of Construction of a sewer line dated 21/05/2009 was written by Mathew Mundia Mugwe in his capacity as Managing Director of Mile-Ed enterprises Building and Road Contractors, so that Mr. Mathew Mundia Mugwe cannot now say that he has nothing to do with the Defendant company herein*

(b) *That the Building Agreement upon which the Defendant wants to rely is not duly stamped as required under the Stamp Duty Act as read with the provisions of the Schedule thereto, and in particular Section 6(1) of the Stamp Duty Act, Cap 480, and that consequently the court should not admit the said Building Contract in the instant proceedings*

(c) *That mere fact of the Defendant being sued (if that be the case) cannot defeat the Plaintiff's suit by virtue of the express provisions of Order 1 Rule 9 of the Civil Procedure Rules, and that an amendment of the plaint would cure the apparent anomaly.*

(d) *That the mere fact that the Sewerage Reticulation Plan was duly approved by the Nairobi City Water and Sewerage Company on 11/07/2005 did not, does not and cannot by itself in law grant to the Defendant or any other person a right or power to enter upon the suit property for the purpose of surveying, setting out and marking the line of any intended Sewer, drain or pipeline, and that such power to enter, survey, set out and mark the line of any intended sewer, drain or pipeline is vested upon any person in the service of the Government of Kenya by virtue of the provisions of Section 7 of the Way Leaves Act (Cap 292), and that the Defendant is not such a person in the Government Service as is envisaged by Section 7 of Cap 292. Section 7 reads:-*

“7. Any person in the service of the Government and any contractor executing any work for the Government, together with his agents and servants, may at any time upon any land for the purpose of surveying, setting out and marking the line of any intended sewer, drain or pipeline, or for the purpose of inspecting, repairing, removing, re-laying or cleaning any sewer, drain or pipeline the property of the Government or for any other purpose under this Act.”

(e) That the Defendant neither sought nor obtained the prior written approval of the 1st and 2nd Plaintiffs to enter upon the suit property for the purpose of surveying intended sewer, drain or pipeline or any other purpose, nor did it obtain any authorization from the 1st and 2nd Defendant in respect of a sewer or drainage way leave over the suit property

(f) That having failed to obtain the necessary way leave authorizations, the Defendant is in breach of all the approvals given to it by the relevant authorities, and further that the approval by NEMA does not grant to the Defendant or any other person any right to enter upon the suit property for the purpose of surveying, setting out and marking the line of any intended sewer, drain or pipeline; and that such power is vested in the Government of Kenya under Sections 3 and 4 thereof.

(g) That section 5(1) of the Way leaves Act, Cap 292 requires that the land owner, lessee, or occupier over whose property the Government proposes to carry out any sewer drain or pipeline must give consent, and that in the instant suit, the Defendant has neglected, refused or failed to obtain a way leave over the suit property for the purpose of carrying out a sewer, drain or pipeline into through over or thereunder and that as such the Defendant is in breach of all the approvals given to it.

(h) That not being a riparian owner of land, IDM Homes Ltd. does not enjoy the rights and privileges reserved unto riparian owners only.

7. The facts of this case are the 1st Plaintiff is the registered proprietor of all that piece of land known as LR No. 209/11613 (the suit property) and is also the promoter of the 2nd Plaintiff. That on 2/06/2009, “the Defendant by its directors, officers, servants, agents, employees, invitees and otherwise and without the consent of the Plaintiffs wrongfully unlawfully and illegally entered into a portion of the suit property and or took possession of it and or remained in occupation of it and or dug a trench across a portion thereof and excavated soil therefrom and or otherwise did acts which in law amounted to wastage of the suit property or a portion thereof”. That the Defendant has threatened to repeat the acts complained of. The Plaintiffs by their plaint dated 8/06/2009 and filed in court on the same day, pray for judgment against the Defendant for:-

(a) general damages

(b) a permanent injunction restraining the Defendant by its directors officers, servants, agents employees, invitees whether for themselves or for the Defendant company from entering into or being upon or taking possession of or remaining upon or digging or excavated (sic) soil therefrom or constructing any structure upon or thereunder or doing anything that would amount to wastage or dereliction of the suit property that is to say Land Reference Number 209/11613 or any part thereof

(c) costs of this suit

(d) interests on (a) and (c) from the date of judgment until payment in full

(e) such further remedy or consequential order as this Honourable Court deems fit and just.

8. The Defendant is yet to file its defence, but at the hearing of the application, Mr. Michuki advocate duly instructed by M/s A.F. GROSS & COMPANY ADVOCATES ventilated the Plaintiffs’ case on the basis of the grounds set out on the face of the application and also in the Supporting and Further Affidavits sworn by Peter Kwenjera on 8/06/2009 and 24/06/2009 respectively. Mr. Sagana, advocate of the firm of Ahmednasir Abdikadir & Company Advocates appeared for the Defendant and also ventilated

the Defendant's case based on the averments in the Replying Affidavit sworn by Mathew Mundia Mugwe on 17/06/2009. Since I have already set out the details of the various affidavits and also the averments in the plaint, I shall not repeat them here.

9. All said and done, what I must determine now is whether the Plaintiff's/Applicants have brought themselves within the ambit of the law on injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. In other words, have the Plaintiffs/Applicants shown that they have a prima facie case with a probability of success; that unless the order sought is granted, they are likely to suffer irreparable loss and damage and finally whether, in case of doubt on the first two questions, the balance of convenience tilts in their favour in this case. Counsel for the Applicant, Mr. Michuki submitted that the Plaintiffs have shown that they are the owners of the suit property and that the Defendant has carried out illegal actions on the said property to the utter detriment of the Plaintiffs and finally that unless the order of injunction sought is granted, the Plaintiffs will suffer irreparable loss and damage in that they will be unable to carry out the educational duties conferred upon them under the Strathmore University Charter – Legal Notice No. 86 of 23/06/2008. The objects and functions of the University are set out in section 5 of the Charter. The objects of the University

“is to provide an all-round quality education to qualified students of all backgrounds and to achieve excellence in research and academics”

while one of the functions of the University is

“to develop and offer courses of instruction beyond secondary school level”

through a number of avenues enumerated thereunder. Counsel for the Plaintiffs also argued that the balance of convenience would tilt in favour of the Plaintiffs for the reason that the Defendant has not followed the laid down procedure of Cap 292 – the Way leaves Act – in entering upon the suit property and carrying out the acts complained of.

10. On his part, Mr. Sagana counsel for the Defendant submitted that the Plaintiff's will not suffer any loss and/or damage whatsoever because the approved sewer lines will run along the riparian. Mr. Sagana commented on a number of authorities cited by the Plaintiffs for the assistance of the court. In the case of **Kamau –vs- Kamau, [1984] KLR**, Mr. Michael Kamau, in consideration of a debt due to his son Gregory Kamau, agreed to give the latter one acre of his land on which was said to stand his turbine and building. In addition and for the same consideration, Michael agreed to allow Gregory access to the one acre of land and to allow him to run a water furrow through his plot. This state of affairs was set out in an agreement between the two. The turbine operated a posho mill which was also on the one acre of land transferred and the flow of water along the furrow to the river was necessary for the purpose of running the turbine. The source of the water was a river which flowed past both pieces of property, Michael's property being upstream. The Respondent continued to enjoy the rights given to him even after Michael's death in 1968. Upon Gregory's death, the Respondent's son maliciously damaged the diesel pump in the posho mill and allegedly broke the bridge which the furrow intersected the pathway leading across that which was formerly Michael's land, and consequently, the furrow was blocked with earth so that the water from it no longer powered the mill.

11. In 1978, Gregory's widow brought an action against the Respondent, alleging interference with the easement and claiming declarations as to the right of way, the water furrow, orders of the removal of the obstructions thereto, registration of the alleged rights and damages for the closure of the posho mill. Trial judge dismissed the Appellant's claim for the declarations sought. On appeal, it was held, inter alia, that

“A right of way and a right to take water are affirmative easements for they authorize the commission of acts which are injurious to another and can be the subject of an action if their enjoyment is obstructed”.

and

“The right of way across the Respondent's land was a necessity for the Appellant, whereas the right to

the flow of water along the artificial furrow was not and it was for a temporary purpose, namely to work the mill. A temporary purpose is not confined to a purpose that lasts for few days only, but includes a purpose which is temporary in the sense that it may in the reasonable contemplation of the parties come to an end because it is limited to the period for which the owner of the mill used it”

11. Mr. Sagana argued that in the instant case, there is a need to create an easement of necessity to allow the Defendants proceed with and complete the works.

12. In **Volume 1 of compendium of Judicial Decisions on Matters Related to Environment, paragraph 4** thereof deals with **“The Protection of the Riparian owner’s right to water.”** It is stated that though under common law, a landowner is presumed to own everything on the land **“up to the sky and down to the centre of the earth,” “running water, air, and light are considered to be ‘things’ the property of which belongs to no person but the use to all”** (see **Liggins V Inge (1813) 131 E.R 263, 268**). All that a landowner has in these elements is to use them. In this regard,”

“The scope of the riparian owner’s rights extends to access, quantity and quality. Access enables the riparian owner to navigate, embark and disembark on his land. Quality enables the riparian owner to abstract, divert, obstruct or impound the water to the extent of its natural quantity. ---- On quality the riparian owner is entitled to have the water in its natural state of purity ----- If any of these rights are interfered with the riparian owner has a cause of action.” The injury suffered must however be strictly proved.

13. In the case of **Nairobi Golf Hotels (Kenya) Ltd V Pelican Engineering and construction Co. Ltd**, HCCC No. 706 of 1997, the Plaintiff filed suit against the Defendant claiming damages and a permanent injunction to restrain the Defendant from constructing a dam across a river and from trespassing on the Plaintiff’s land. The Plaintiff’s suit was based on its ownership of land along whose boundary was a river from which with the permission of the Water Apartment Board, it obstructed water for use on its property. The Defendant’s land did not border the river but it proceeded to erect a dam on the river for use to irrigate his land. The Defendant argued, as under the relevant statute water was vested in the Government, the Plaintiff had no *locus standi* to bring the suit.

14. The court held that under common law, a riparian owner had a right to take reasonable amount of water from the river as it flowed past his land for domestic use and that the Plaintiff, by being a riparian owner, could apply for an injunction under common law to restrain the Defendant from using water for irrigation purposes.

15. Mr. Sagana for the Defendant in the instant suit argues that the riparian river on the suit property is for the public use, whether or not such a river runs through a person’s land.

16. After carefully considering the plaint as filed, the affidavits in support and against the Plaintiff’s application. I am not persuaded that the Plaintiff’s have fulfilled the conditions for the granting the injunctions sought, though of course they were perfectly right to file the same. The evidence on record shows that the Defendant has obtained all requisite approvals for the carrying out of the proposed works, and has also duly informed the Plaintiffs about the proposed works, so that the issue of trespassing onto the suit property does not, in my view arise. It is also my view that the City Council of Nairobi has the power to carry out such works at the expense of the developer. The Plaintiff’s have contended that the approvals given to the Defendant are null and void because the Defendant has not complied with the conditions set out in those approvals and with provisions of Cap 292. I have read all the approvals, the relevant sections of Cap 292 and the authorities cited, and have reached the conclusion that compliance with the conditions occurs contemporaneously with the works as they progress.

17. I also find that the Plaintiff’s are not alleging that the Defendant is interfering with their right to the water of the riparian river nor are they saying in what way the activities by the Defendant are going to interfere with their task of providing a sound education to their students. Granted that there may be some noise during the construction of the sewer, but the Defendant’s are under strict liability to ensure that the mandatory conditions set by NEMA, the City, Council of Nairobi and the Nairobi City Water and

Sewerage company are complied with. I believe that the **Polluter Pays Principle** is applicable in this case so that if the Defendant in carrying out their works should cause any injury to the suit property, they would be absolutely responsible to compensate the Plaintiffs for any harm done in respect of the area, the soil and to the underground water as conditioned by all the approving authorities, and in particular in complying with the provisions of the Environmental Management and Co-ordination Act, 1999 and the rules made thereunder. I therefore found and hold that though the Plaintiffs are interested parties in what the Defendant is doing by virtue of being owners of the suit property, they cannot deny the Defendant access to the riparian river for only a temporary period. In any event, the evidence that is before me is that the proposed sewer line is going to run along the riparian river according to the approved building plans and not across it. There are no allegations by the Plaintiffs that the Defendant intends to divert the water from the riparian river for its own use. All that the Defendant is looking for is access to the City Council of Nairobi manhole. This fact is not dispute by the Plaintiffs.

18. Finally, if the Defendant has not complied with the Way Leaves Act, I think that the same Act provides the procedure to be followed by the Plaintiffs in objecting to the contravention of the Act. It is to be noted that works similar to what the Defendant proposes to do on the suit property are going on all the time, and if such works were to stall on grounds similar to those put forth by the Plaintiff's herein, then the construction industry could come to a halt. I do not think that such a move would be in the best interest of the national economy.

19. In the result, I find that the Plaintiff's application for injunction dated 8/06/2009 lacks merit. The same is hereby dismissed. As for costs, each party shall bear their own costs.

It is so ordered.

Dated and delivered in Nairobi this 4th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Onyango (present) for the Plaintiff/Applicant

Mr. Sagana (absent) for the Defendant/Respondent

Weche – Court clerk