REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 329 of 2007

1. CHIMBA MBEO

2. KAHASHA MANGALE

3. LWAMBI CHIMBIO …………………………………. PLAINTIFFS

- Versus -

1. HACIENDA DEVELOPMENT HOLDINGS LTD.

2. MUNICIPAL COUNCIL OF MOMBASA …………………………………. DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Ndegwa for Applicant

Mr. Noorani for 1st Respondent

Mr. Kibara for 2nd Respondent

R U L I N G

This suit was commenced by a plaint dated and filed in court on 24th December, 2007. The three plaintiffs pray for judgment against the defendants for –

(a) A declaration that the subject piece of land upon which the 1st defendant is digging trenches, constructing and/or otherwise developing is public land and a public garbage dumping site.

(b) A declaration that the Grant, Title, if any, held by the 1st defendant, its servants and/or agents is illegal, null and void and does not confer any proprietary rights upon the 1st defendant.

(c) A permanent prohibitory injunction restraining the 1st defendant by itself, its servants, employees and/or agents from forthwith constructing, digging trenches, alienating, disposing of and/or undertaking any other activity on the suit premises.

(d) A permanent prohibitory injunction restraining the 2nd defendant by itself, its servants and or agents

from accepting, approving any development applications for the suit property from the 1st defendant, their servants and or agents, successors in title and assigns and or issuing any development permission to the same.

(e) Any other relief that this Honourable court may deem fit.

(f) Costs of this suit.

By an application by chamber summons dated 24th December, 2007 and filed in court on the same date as the plaint, the plaintiffs sought three orders –

(a) That owing to the urgency of the matter, the application be heard during the vacation.

(b) That a temporary prohibitory injunction do issue to forthwith restrain the 1st defendant/respondent by itself, its servants, agents and/or employees from digging trenches, constructing a perimeter wall, fencing, erecting structures, developing, restricting access or in any other way dealing with the suit premises, which is public land and a public garbage dumpsite pending the inter partes hearing and/or determination of this application and/or suit.

(c) That the costs of this application provided for.

The application was made under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and Rule 3(1) and (2) of the High Court Practice & Procedure Rules. It was supported by the annexed affidavit of CHIMBA MBEO, the 1st plaintiff, and is based on some seven specific grounds to which I shall revert shortly. When the matter first came to court on 7th January, 2008, under a certificate of urgency, it was certified urgent and an ex parte interim injunction granted for 14 days in terms of prayer (b) above. It is this injunction which seems to have sent especially the 1st defendant livid with rage. No doubt it partly provoked the filing of the consequent notice of preliminary objection, by which the 1st defendant notified the plaintiffs that it would raise objections to the application dated 24th December, 2007, and the ex parte order made on 7th January, 2008.

The preliminary objections are as follows –

1. That this court had no basis to either entertain the said application or to make the said order on the following grounds –

(a) That the plaint discloses no reasonable cause of action against the first defendant.

(b) That the plaintiffs have no locus standi to bring this suit:

(i) in the absence of any consent in writing to commence such an action from the Honourable the Attorney General under section 61 the Civil Procedure Act; and

(ii) in the absence of any evidence to show that the plaintiffs or any one of them have suffered any greater harm or prejudice than other members of the public; and

(c) that the plaintiff's case for an interim injunction does not fall within the parameters of Order XXXIX rules 1 and 2 of the Civil Procedure Rules.

2. That, without prejudice to the foregoing, the said order be discharged on the basis that the said application and the evidence led in support thereof fails –

(a) to establish the precise interest of the plaintiffs in the land forming the subject matter of the suit, or to show that the said land was public land or to provide any or any sufficient particularity of the nature

and extent of the damage that they have either suffered or said to suffer; or

(b) to condescend to setting out the precise particulars of the fraud allegedly perpetrated by the 1st defendant.

3. That the suit is, in any event, incompetent by reasons of the failure by the plaintiffs to include the Commissioner of Lands as a party and, that being the case, there is no basis upon which the said application could possibly have been entertained.

4. Assuming without admitting that the said application lays out an arguable case suggesting a fraudulent acquisition by the 1st defendant of the land forming the subject matter of the suit:

(a) the plaintiffs, by themselves, have no actionable right to bring this suit in any event; and

(b) even if (which is denied) the plaintiffs had the right to bring this suit on this ground, the provisions of section 24 of the Registration of titles Act limits any relief capable of being obtained by the plaintiffs to damages alone – thus disqualifying them from the right to be granted an interim injunction in terms of the said application.

During the oral canvassing of the preliminary objection, Mr. Inamdar appeared with Mr. Noorani for the first defendant, Mr. Kibara for the second defendant, and Mr. Ndegwa for the plaintiff. For the first defendant, Mr. Noorani argued the preliminary objection and was supported by Mr. Kibara. Mr. Ndegwa responded for the plaintiff, and Mr. Inamdar replied for the first defendant, and Mr. Kibara supported that reply. Each counsel cited authorities liberally. Arising from the pleadings and the lengthy submissions, the main issue to be determined is whether the plaintiffs have an actionable right to bring these proceedings against the defendants. In the absence of such a right, the proceedings cannot be sustained.

There is no dispute among the parties that the 1st defendant holds a grant to the subject piece of land. However, it is the plaintiff's case that the same is public land and therefore the grant is null and void and does not confer any proprietary rights upon the first defendant. It is for this reason that their prayers for judgment include one for a permanent prohibitory injunction restraining the 1st defendant forthwith from alienating or undertaking any activity on the suit premises. It is the 1st defendant's case, which is supported by the second defendant, that the plaintiffs have no cause of action against the defendants, and that they have no locus standi to institute these proceedings. In his submission on this point, Mr. Noorani for the 1st defendant argued that the plaint does not disclose what private rights the plaintiffs have, whether in law or otherwise, which are being infringed by the defendants. On that point he referred the court to <u>NGUGI WAMAI & 7 OTHERS</u> v. <u>KURIA KIMANI & 2 ORS</u>. [2001] LLR 1658 (HCK). If anything is disclosed, counsel further argued, it is not a private right to these plaintiffs but a public right. Mr. Noorani also submitted that the plaint as a whole shows clearly that what the plaintiffs are agitating for is relief from public nuisance, yet, they have not established that they have suffered any particular damage other than and beyond the general inconvenience and injury suffered by the public. He maintained that the public have no right to dump garbage on any land and referred to section 116 of the Public Health Act. He then contended that the plaintiffs have come to court without disclosing a cause of action and therefore the court has no jurisdiction to deal with the application or to make an ex-parte order. For this proposition, he relied on <u>GOURIET</u> v. <u>UNION OF POST OFFICE WORKERS</u> [1977]3 ALL ER 70. He then argued that the plaintiffs have no locus standi to appear in this suit, and on the importance of locus he cited <u>LAW SOCIETY OF KENYA</u> v. <u>COMMISSIONER OF LANDS & 2 OTHERS</u> KLR (E & L), 456. He submitted that the plaintiffs had not demonstrated sufficient interest and added that they could, however, have brought this suit as a relator action either through the Attorney-General or with his permission. Finally, on the point of lack of failure to establish a cause of action and locus standi, counsel submitted that in their application, the plaintiffs had not brought themselves within Order XXXIX rules 1 and 2 of the Civil Procedure Rules which is concerned with private rights and not public rights.

Supporting the preliminary objection, Mr. Kibara for the 2nd defendant argued that this suit is based

on public nuisance in which case the authority of the Attorney-General is required. Such authority not having been sought and granted, no right lay on the plaintiffs to bring this action on an alleged breach of public right. For that purpose he referred to section 61 of the Civil Procedure Act. He submitted that the plaintiffs were busy bodies because there was no allegation that their private rights had been violated, and the suit did not seek to vindicate the infringement of any personal rights, and therefore the chamber summons as well as the plaint should be struck out.

In his response to these arguments, Mr. Ndegwa for the plaintiffs argued that the allegation that the plaintiffs had no locus standi was founded on a misunderstanding of section 61 of the Civil Procedure Act in the context of the plaintiffs' case. As summarised in paragraphs 11 to 14 of the plaint, their case is that the defendants' actions have caused outbreak of diseases and rendered their homes uninhabitable. The defendants' actions are a breach of the plaintiffs' rights to a clean and healthy environment which is a statutory right enshrined in section 3(1) of the Environmental Management and Co-ordination Act. Section 3(3) of the said Act allows a person to seek redress from the High Court, and therefore the plaintiffs have locus under that section.

Furthermore, the Physical Planning Act was not complied with as if it had been complied with, the plaintiffs would have had an opportunity to object. Counsel submitted that this Act also gave his client another leg on which to stand. If he was wrong on that, then he would rely on KENYA BANKERS ASSOCIATION & OTHERS v. MINISTER FOR FINANCE & ANOTHER (NO.4) [2002]1 KLR 61 for the proposition that what is required is for a plaintiff to demonstrate a minimal interest. He also referred to EL-BUSAIDY v. COMMISSIONER OF LANDS & 2 OTHERS [2002] KLR 1.

On the consent of the Attorney General, Mr. Ndegwa submitted that the plaintiffs did not require any consent to bring the suit because section 148 of the Environmental Management and Co-ordination Act provides that if any written law is inconsistent with that Act, then the provisions of that Act would prevail. It also provides that the inconsistent law would be interpreted so as to give effect to the Environmental Management and Co-ordination Act. The plaintiffs complaint is not founded on public nuisance and therefore the issue of section 61 of the Civil Procedure Act does not arise. Mr. Ndegwa then cited INSURANCE COMPANY OF EAST AFRICA v. ATTORNEY GENERAL & 4 OTHERS KLR (E & L)1 486 and quoted thereupon the phrase: "the ogre of locus standi had been laid to rest by the Environmental Management and Co-ordination Act, and the plaintiffs do not need the consent of the Attorney-General." He also referred to section 3(4) of the Environmental Management and Co-ordination Act and submitted that a person complaining of an infringement of his right can come to court even if he can't show that the defendant's action has subjected him to personal suffering. He further argued that all that is required is for such a person to establish a minimal personal interest, for which point he referred to KENYA BANKERS ASSOCIATION AND OTHERS v. ATTORNEY-GENERAL, Civil Suit No. 135 of 1998.

In addition to the above, Mr. Ndegwa also argued that under sections 19(2) and 26 of the Physical Planning Act, Cap. 286 of the Laws of Kenya, the defendants were under a duty to gazette the change of user and other changes expected in the Kenya Gazette and give the plaintiffs a whole 60 days notice to object. In paragraph 7(j) of the plaint, the plaintiffs have pleaded that this was not done, and this Act gives them another leg on which they can stand.

In a lengthy reply to these points, Mr. Inamdar for the 1st defendant submitted that Mr. Ndegwa's response had not met the defendant's arguments on the preliminary objection and observed that counsel for the plaintiffs had found a new home for the cause of action in the Environmental Management and Co-ordination Act which, he argued, was clearly an afterthought. He dealt extensively on the provisions of the Environmental Management and Co-ordination Act.

Up to this point, the issue is whether the plaintiffs have established a cause of action against the defendants and whether they have any locus standi. In NGUGI WAMAI & 7 ORS. v. KURIA KIMANI & 2 ORS. [2001]LLR 1658 (HCK), Visram J. said regarding the disclosing of a cause of action –

"The very first thing a party has to do to maintain any action in any court is to show that he has a cause of

action. Where this is not shown, it would be futile to allow the action to proceed to hearing. In deciding whether a party has a cause of action or not, the court can do nothing more than to look at that party's pleading …"

This position had been taken earlier by the Court of Appeal for East Africa in NYAGAH v. NYAMU & ANOR [1976] KLR 73 in which Mustafa JA said at p. 75 –

"In dealing with a submission of no cause of action, it is trite law that only the plaint is to be looked at …"

And on his own part, Law, VP said at p. 76 –

"On a preliminary objection that a plaint does not disclose a cause of action, only the plaint can be looked at."

On the basis of these authoritative pronouncements, it follows that what we have to do is to scan the plaint in this matter in order to determine whether the plaintiffs have established a cause of action against the defendants or not. In other words, what is the wrong which these defendants have done to these plaintiffs to warrant a court action?

As I understand it, the plaintiff's case is that the only site where they were dumping their garbage and other waste was public land which has since been allocated to the 1st defendant. This has left the plaintiffs without a place to dump their garbage, thereby exposing them to health hazards owing to the wanton dumping of waste and refuse near homesteads and on undesignated areas. By so doing, the defendants have wrongfully deprived the plaintiffs of their right to use the public land to dispose of their waste on the public dumpsite. By reason of this state of affairs, the plaintiffs pray for judgment against the defendants for declarations that the subject piece of land is public land and a public garbage dumping site; that the grant or title, if any, held by the 1st defendant is illegal, null and void; a permanent injunction restraining the 1st defendant from alienating, disposing of or undertaking any other activity on the suit premises; and a permanent injunction restraining the 2nd defendant from approving any development applications for the suit property from the 1st defendant.

It is self evident from these prayers that the only remedies sought relate to the title and user of the suit property. And even though some of the issues raised, like health hazards arising out of dumping waste all over the place, relate to the environment, no orders have been prayed for in respect thereof. From that perspective, it seems that the plaintiffs' primary focus is not the environment, but the perceived improper allotment of the suit plot to the 1st defendant.

The acknowledgment by the plaintiffs that the plot in dispute is public land raises a fundamental issue. If it is, indeed, public land as they contend, the rights to its user are public rights. Then what is their locus? On what basis do they come to court to enforce a public right? In the English case of GOURIET v. UNION OF POST OFFICE WORKERS [1977]3 ALL ER 70, it was held that it was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney-General representing the public. Except where a statute otherwise provides, a private person can only bring an action to restrain a threatened breach of the law if his claim is based on an allegation that the threatened breach would constitute an infringement of private rights or would inflict special damage on him. Accordingly, a private person is not entitled to bring an action in his own name for the purpose of preventing public wrongs and, therefore, the court has no jurisdiction to grant relief, whether interlocutory or final, or whether by way of an injunction or declaration, in such an action. This view has been adopted and applied locally in, inter alia, WANGARI MATHAI v. NAIROBI CITY COUNCIL; and LAW SOCIETY OF KENYA v. COMMISSIONER OF LANDS & 2 OTHERS KLR (E&L)1, 456. It was emphasized in MAATHAI v. KENYA TIMES MEDIA TRUST LTD. KLR (E&L)1 164, where the court said that it was well established that only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs. This principle is expressed in section 61 of the Civil Procedure Act, and applies unless a potential plaintiff can show that his private rights have been violated, or that he

stands to suffer over and above the other members of the community. In the instant case, the interests of all the parties are at par, and it has not been alleged or established that the three plaintiffs have any more minimal interest in the matter than the other Municipal residents. I therefore find and hold that the plaintiffs' locus standi in this matter is wanting.

Mr. Ndegwa for the plaintiffs ably argued, and correctly so, that under section 3(3) of the Environmental Management and Co-ordination Act empowers an individual to move the court for appropriate orders. This right stems from subsection (1) which states –

"3(1) every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment."

Subsection 3 then proceeds as follows –

"3(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate."

Under this subsection, a person who qualifies under subsection (1) is clearly entitled to come to court and plead his case without reference to the Attorney-General. This is in consonance with section 61(2) of the Civil Procedure Act which states as follows –

"(2) Nothing in this section shall limit or otherwise affect any right of suit which may exist independently of its provisions."

The right of suit under section 3(3) of the Environmental Management and Co-ordination Act is one such right as was envisaged in section 61(2) of the Civil Procedure Act (Cap 21). The plaintiffs therefore had a right to move the court under section 3(3) of the Environmental Act. But, did they do so?

A scan of the plaint discloses quite clearly that nowhere therein did the plaintiffs state, even once, that their rights under section 3(3) of the Environmental Management and Co-ordination Act were being compromised. In the contemporaneous application by which they sought an interim injunction, they did not refer to the Environmental Management and Co-ordination Act. Instead, they came under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, which would normally be invoked in respect of property in respect of which an applicant claims some proprietary interest. Yet, the plaintiffs do not have and do not even pretend to have any proprietary interest in the suit property. Their only interest is to use that land as a dumpsite alongside with everybody else in the Municipality of Mombasa. If their intention was to protect their rights under the Environmental Management and Co-ordination Act, they should have invoked the court's jurisdiction under that Act, but not under Order XXXIX rules 1 and 2 which, at any rate, do not apply to this matter. In its present format, the plaint does not disclose a cause of action against the defendants, and therefore they did not have the locus to apply for the ex parte injunction without the consent in writing of the Attorney-General. Locus standi is to a litigant what jurisdiction is to a court. Just as a court cannot proceed without jurisdiction, so a litigant cannot proceed without locus standi.

Counsel for the plaintiffs also submitted that the plaintiffs could stand on a leg offered by the Physical Planning Act on the ground that the defendants were under a duty to gazette the change of user and other changes expected in the Kenya Gazette and give the plaintiffs 60 days notice to object, but that the defendants did not comply. Factually and legally, this is incorrect. The duties specified in sections 19(2) and 24(1) of the aforesaid Act are imposed upon the Director of Planning, and not the defendants. And even then, the wording of those sections suggests that the discharge of those duties by the Director is discretionary. And if and when those sections are breached, the right person to pursue any court remedies would not be the plaintiffs, but would still remain the Attorney General, or those whom he may authorise in writing to do so. This, again, deprives the plaintiffs of the requisite locus.

Having found that the plaintiffs do not have the requisite locus standi, I don't think that it is necessary to delve into the issues of the alleged irregularity in the grant of the title to the suit property, or even the joinder or non-joinder of the Commissioner for Lands, since the plaintiffs lack the locus to plead those issues.

For the above reasons, I uphold the preliminary objection, strike out the application by chamber summons dated 24th December, 2007, and discharge the ex parte injunction made therein on 7th January, 2008. It is so ordered. Costs of Preliminary Objection shall be met by the plaintiffs.

Dated and delivered at Mombasa this 22nd day of February, 2008.

L. NJAGI

JUDGE