



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 39 OF 2007

FULVIO COSSU .....1<sup>ST</sup> PLAINTIFF

PAOLA BUFALINI.....2<sup>ND</sup> PLAINTIFF

VERSUS

SAID ALI BWANAMKUU.....1<sup>ST</sup> DEFENDANT

IBRAHIM SAID T/A (TIKI WOODWORKS).....2<sup>ND</sup> DEFENDANT

### R U L I N G

By an application by way of chamber summons, pursuant to the provisions of order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the applicant seeks orders:

(a) *That pending the hearing and determination of the suit herein, the defendant, the defendant's officers, hirelings, servants and or agents or any one of them be restrained by an order of injunction from carrying on with their workshop activity pending the production of an environmental audit in accordance with Environmental Management and Co-ordination Act, No. 8 of 1999.*

(b) *Costs of and incidental to this application be provided for.*

The application is based on the grounds:-

1) *The 1<sup>st</sup> plaintiff is registered as proprietor of all those pieces of land known as Plot No. 623 and Plot No. 624 Watamu where upon the plaintiff has caused to be developed residential premises with all the usual amenities. The defendants are neighbours of the plaintiffs and they too have developed a residential house on their land. Separating the plaintiff's house from the defendants' is a path measuring about 5 to 6 metres.*

2) *Sometimes in November unknown to the plaintiffs, the defendants, their servants and or agents caused to be installed in their residential premises wood working equipment and machinery and thereby converted the said house into a wood workshop.*

3) *Further to the above by so doing the defendants, their servants and or agents converted a hitherto residential area to an industrial area and in so doing they have interfered with the plaintiffs' quite*

*possession and use of his home.*

- 4) ***Further*** to the above, the use of the said premises as a workshop is injurious to the plaintiffs and is unlawful for the following reasons:-
  - a) ***The*** defendants premises are located within a residential area and are not suited for use as wood workshop.
  - b) ***The*** introduction of heavy duty machinery in a residential area precipitates both noise and air pollution.
  - c) ***The*** use of the heavy equipment is causing a lot of vibrations in the area threatening the physical integrity of the 1<sup>st</sup> plaintiff's house which was built without the anticipation of the changes of use of the premises from residential to industrial.
  - d) ***The*** use of the defendants premises as a workshop without installation of fire fighting equipment is an enduring threat to the safety of the plaintiffs' house.
  - e) ***The*** continued use of the defendant premises as a workshop will reduce the value of the plaintiff's investment and this will cause the plaintiff irreparable loss and damage.
- 5) ***Further*** and in the alternative, and without prejudice to the foregoing the defendants, their servants and/ or agents were guilty of negligence in commencing and carrying out the work of a workshop in premises that are not suitable as particularized in (i) to (vi)
- 6) ***The*** conversion of the use of premises and the land from residential to industrial is indeed a transformation of the use and character of the land within the meaning of sect 58(1) (4) of the Environmental Management and Co-ordination Act, Act No. 8 of 1999 and the 2<sup>nd</sup> Schedule thereto.
- 7) ***The*** defendant, their servants and agents have not produced an Environmental Impact Assessment Plan as contemplated by the Law aforesaid.
- 8) ***On*** the 20<sup>th</sup> of November 2006 the plaintiff and his neighbours wrote to the Municipal Council of Malindi complaining about the defendants work and on the 30<sup>th</sup> of November 2006 the defendants were required by the Municipal Council of Malindi to stop the development they were undertaking on their premises and on the 12<sup>th</sup> January 2007 the defendants were required to abate the nuisance they were causing in the area. The defendants ignored the notice whereupon the Municipal Council commenced proceedings against the defendants in the court at Malindi vide Criminal case No. 52 of 2007 Republic -VS- Said Ali BwanaMkuu and Ibrahim Said (T/A Tiki Workshop). The said action is pending hearing and determination before the Principal Magistrates Court at Malindi.
- 9) ***In*** spite of the foregoing the defendants have refused to cease their illegal and unauthorized activities upon the residential area and they threaten to continue to commit the nuisance aforesaid.
- 10) ***Further***, by reason of the matters aforesaid, the plaintiff's quiet possession and enjoyment of his holiday home has been considerably hampered and interfered with and the plaintiffs have suffered considerable trouble, inconvenience and discomfort and have thereby suffered loss and damage.

The application is predicated upon the annexed affidavit of Fulvio Cossu sworn on the 28<sup>th</sup> day of May 2007.

For the applicant it was argued, that he is the proprietor of plot No. 23 and plot no. 624 Watamu on which he has developed a residential premises. The defendants, who are neighbours, have equally developed a residential house on their land. That there is a path measuring about 5 to 6 metres separating the two plots. In support of ownership he exhibited rates receipts marked "**PEX1**".

The applicant stays in Italy. On 26<sup>th</sup> day of October 2006 while on vacation he came to Kenya and discovered that the defendant has installed in their residential premises woodworking equipment and machinery thereby converting their said house into a wood workshop.

The applicant's complaint to Municipal Council of Malindi culminated into the arrest, charging and prosecution of the defendants in **Malindi Senior Principal Magistrate Cr.case No. 52 of 2007 Republic Vs. Said BwanaMkuu and Ibrahim Said (T/A Tiki workshop) as per exhibit "PEx2"**.

The applicant contends that the conversion of the use of the premises from residential to industrial is indeed a transformation of the use and character of the land within the meaning of section 58 (1) (4) of the Environmental and Co-ordination Act, No. 8 of 1999, and the schedules made thereunder.

That as a neighbour to the respondents, he is an interested party within the meaning of the said Act but have not received a request for presentation of his views for the changes in the use of this land. That the defendants their servants and agents have not produced an Environmental Impact Assessment flow as envisioned by Environmental Management and Co-ordination Act, No. 8 of 1999, and the schedules made thereunder.

That the proceedings in the criminal court have not resulted in the abatement of the nuisance created in the area by the existence of the workshop. As a result the applicant and the entire neighbourhood has endured unbearable nuisance that has completely destroyed the peace and tranquility in this area.

Effectively, the defendants have converted a hitherto residential area into an industrial area with all the attendant consequences as aforesaid. For those reasons the applicant prayed for an injunction order to issue against the defendants. In addition the applicant sought an order that the respondents do comply with the Environmental Management and Co-ordination Act No. 8 of 1999.

The respondents filed replying affidavit, sworn by one Ibrahim Said T/A (Tiki Woodworks), on 11<sup>th</sup> June 2007 and relied wholly on the same in addition to counsels oral submissions.

For the respondent it was argued, that the business of Tiki Woodworks has been in existence since the year 2006 as evidenced by a copy of a license for the year 2007 issued by the Municipal Council of Malindi and exhibited as "**SABI**". Accordingly the prosecution of the respondent is a public relations exercise.

That in any case the land tenure in the subject area is commercial-cum-residential hence the requirement under Environmental Management and Coordination Act No. 8 of 1999 is unnecessary for the granting of a license to operate a carpentry workshop.

That the alleged noise does not emanate from the respondent premises only. There exists another similar wood workshop within the proximity of the applicant's premises. Accordingly, the applicants application for injunction is misplaced, premature, an abuse of the court process and selective hence brought in bad faith.

The law on injunctions is now well settled. **One**, the applicant must show a prima-facie case with probability of success. **Two**, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable injury. **Three**, when the court is in doubt, it will decide the application on a balance of probability. See **GIELLA V. CASSMAN BROWN & CO, LTD. {1973} E.A. 358**.

Proceeding on the above premise, I hold the view that on the evidence on record there is no *prima facie* case with a probability of success that the applicant/plaintiff is the owner of the plot No. 623 Watamu on which is a residential plot. Exhibit "**PEX1**" are rates receipts for one **Litlello Ramando C/o Cossu Paole Bafallini** in respect of plot No. 624 and Cossu Fulvio in respect of plot No. 623. It is not therefore true that Cossu Fulvio the first applicant/plaintiff owns both plots. The first applicant/plaintiff is thus economical with the truth. He who desires equity must come with clean hands. Furthermore, there is no title or search certificate in respect of land parcel 624 Watamu exhibited on the application as

evidence of ownership. Hence the applicants/plaintiffs have not shown any right or *locus-standi* to bring this application and by extension the suit. All said and done that would be the ideal situation in a case which has no public rights and environmental implications.

However, the applicant contends that this case raises issues of “public rights and environmental implications”. That when it comes to environmental matters, the *ogre* of *locus standi* must be tamed [*see INSURANCE COMPANY OF EAST AFRICA VS. ATTORNEY GENERAL & 4 OTHERS KLR [EXL] 1.*]

Our Parliament in 1999 enacted the Environmental Management and Co-ordination Acts No. 8 of 1999 which came into force on 14<sup>th</sup> January 2000.

Section 111 of that Act states:

- (1) Without prejudice to the power of the authority jurisdiction may, in proceedings brought by any person, issue and environmental restoration order against any person who has harmed, is harming is reasonably likely to harm the environment.**
- (2) For the avoidance of doubt, it shall not be necessary for the plaintiff under this section to show that he has a right or interest in the property, environment or land alledged to have been or likely to be harmed”**

It was contended on behalf of the applicant that under section 58 of the Environmental Management Co-ordination Act, it is mandatory that before change of user from residential to commercial or vice-versa certificate of change of user must first be sought for and obtained. That no Environmental Assessment Report as enjoined by section 58(1) has been obtained or if obtained, not exhibited.

Section 58 of the Environmental Management Co-ordination Act provides:-

- 1) Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceedings with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.**
- 2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.**
- 3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.**
- 4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.**
- 5) Environmental impact assessment studies and reports under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.**
- 6) The Director-General may, in consultation with the Standards Enforcement and Review**

**Committee, approve any applications by an expert wishing to be authorized to undertake environmental impact assessment.**

**Such application shall be made in the prescribed manner and accompanied by any fees that may be required.**

**7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.**

**8) The Director-General shall respond to the applications for environmental impact assessment licence within three months.**

**9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.**

True, section 3 of the Environmental Management and Co-ordination Act entitles every person to a clean environment. There is no claim or evidence by the applicant/plaintiff that the respondent/defendants are polluting the environment. The claim is that the introduction of heavy machinery in a residential area precipitates noise and air pollution. That vibrations emanating therefrom is threatening the physical integrity of the first plaintiff's house. That the workshop has been built without fire fighting equipment thereby threatening the safety of the neighbourhood. Last but not least, that the respondents are guilty of negligence in commencing a workshop in a premises not meant for that purpose. To my mind, the causes of action disclosed by the pleadings are negligence and nuisance. The said causes of action, to my mind, are disclosed in Section 101 as read together with Section 102 of the Environmental Management Act No. 8 of 1999.

Section 101 of the said Act provides:

***“The Standards and Enforcement Review Committee shall, in consultation with the relevant lead agencies –***

***(a) recommend to the Authority minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment;***

***(b) establish and submit to the Authority criteria and procedures for the measurement of noise and vibration pollution into the environment;***

***(c) establish and submit to the Authority criteria and procedures for the measurement of subsonic vibrations;***

***(d) establish and submit to the Authority standards for the emission of sub-sonic vibrations which are likely to have a significant impact on the environment;***

***(e) recommend to the Authority guidelines for the minimization of sub-sonic vibrations, referred to in paragraph (d) from existing and future sources;***

***(f) establish and submit to the Authority noise level and noise emission standards applicable to construction sites, plants, machinery, motor vehicles, aircraft including sonic bonus, industrial and commercial activities;***

***(g) recommend to the Authority measures necessary to ensure the abatement and control of noise from sources referred to in paragraph (f);***

***(h) measure the levels of noise emanating from the sources referred to in paragraph (f) details of which measurements shall be given to the owner or occupier of the premises from which the measurement was taken; and***

***(i) recommend to the Authority guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.”***

Section 102 of the said Act provides:

***Subject to the provisions of the Civil Aviation Act any person who emits noise in excess of the noise emission standards established under this Part commits an offence.”***

In respect of the complaint herein it would be necessary for the authority to issue Environmental Restriction Order in terms of the provisions of Section 108 as read together with Section 109 of the Act.

Without prejudice to the powers of the authority under this Act, this court has jurisdiction to issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment (See Section 111(I) of the Environmental Management and Coordination Act (Supra).

It is axiomatic that a court of law only gives effect to the request of the parties. In this case, I have been asked to grant an injunction against the defendant pending the production of an environmental assessment report in accordance with section 58(1) of the Act. I have carefully considered the application together with the exhibits annexed and the replying affidavit and respective counsel's submission. Having done so, I am constrained to grant the injunction pending a compliance with Section 58(1) of the Environmental Management and Co-ordination Act No. 8 of 1999. Costs shall be in the cause.

**Dated and delivered Malindi this 27<sup>th</sup> day of February 2007**

**N. R. O. OMBIJA**

**JUDGE**