



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1331 of 2003

ATTORNEY GENERAL.....PLAINTIFF

VERSUS

COSMOS LIMITED DEFENDANT

CITY COUNCIL OF NAIROBI THIRD PARTY

RULING

This Ruling is made in the Defendant's Chamber Summons dated 8th December, 2004 brought primarily under Orders I Rule 10(2) VI Rule 3(1) (b) (c) and (d) and L Rule 1 of the Civil Procedure Rules. In it the applicant seeks orders as follows:

1. **THAT** the suit against the Defendant be struck out on the ground that the Defendant is improperly sued.
2. **THAT** in the alternative the Plaintiff's claim against the Defendant be struck out.
3. **THAT** costs of the application be in the cause.

The applicants contend that there is no privity of contract between the Plaintiffs and the Defendant to warrant the filing of an action against the Defendant wherein the Plaintiff seeks restraining orders against the Defendant and that the Defendant has no legal or equitable interest and in the subject matter of the suit namely parcel No.L.R.11195.

The facts of the Plaintiffs' case as pleaded in paragraphs 3 and 5 are that the Defendant, being the owner of L.R. No. 11195 which is adjacent to the claimants' parcels of land (or housing estate) deliberately interfered with the natural flow of surface water through the construction of an earth lump with a view to preventing surface water from entering his said parcel of land with the result that water held back by the bump has instead found its way into the Plaintiffs' parcels of land and caused damage to property therein, general discomfort to the plaintiffs, causing flooding and damage to roads and other infrastructures and exposing the Plaintiffs to a health hazard. The Plaintiffs have therefore sought restraining orders against the Defendant and damages for nuisance. In support of the application the Defendant's director Mr. Vimal Patel has sworn an affidavit filed alongside the application to which is annexed a copy of the Title to the property in which the nuisance is said to have been committed. The said document shows that the

Defendant/Applicant transferred the suit Land to Prakash K. Patel and Sumaben P. Patel on 2nd September 1997, who clearly were the owners of the property at the time this suit was filed on 17th December 2003. The Plaintiff dated 17th December 2003 does not say when the action complained of occurred or commenced.

In opposing this application the Plaintiffs/Respondents do admit that the Respondent owned the property in 1996 and have annexed to the Supporting Affidavit of James Howard Archer, and as proof of that contention, the Applicants' advocates letter dated sometime in October, 1996 (the exact date is obscured by the photocopy). My perusal of the said letter annexed as "JHA I" shows that the letter was raising a complaint to the City Engineers, Nairobi City Council regarding the illegal drainage of surface water into the Applicant's plot through an open drain created by the developers of Lake View Estate, in which the Respondents reside, contrary to City Council bye laws. If anything, the contents of the said letter which was copied to the Respondents herein is a clear demonstration that some other party and not the Applicant is to blame for their predicament. It is not clear why in the presence of the Applicants' own protestation, the Plaintiffs would turn around and sue the Applicants for the same nuisance they themselves are seen to have complained about and to so bring action six years after the Applicant had ceased being the owner of the property. The contents of the said exhibit "JHA I," is a clear contradiction of the deposition by James Howard Archer in paragraph 6 of the Replying Affidavit that the nuisance complained of came into being after the applicant began to develop parcel No.11195. In the said letter the then advocate for the applicant says in part -

"My client is totally unable to develop the said plot as a direct result of encroachment on its land by such discharge and the area is prone to health hazard."

In his submissions counsel for the Respondents Mr. Gitau Singh informed the court that he had filed, on behalf of his clients an application to join the current owners of the subject parcel of land and a proposed Amended Plaintiff which Miss Kanyiri asked me to ignore. I considered it prudent to peruse the said application and Amended Plaintiff for any assistance the same may offer towards the better determination of this application. What struck me is the deposition in the Supporting Affidavit of James Howard Archer of 7th June, 2005 to the effect that upto the time of filing suit the Plaintiff,

"was of the mistaken belief that the defendants were still the registered owner(s) of the parcel land Reference Number 11195".

I am not persuaded that I should take this deposition seriously since matters of land ownership are not matters of belief but of fact which can and ought to be ascertained by the exercise of due diligence.

The suit herein being primarily one where the Equitable relief of injunction is sought, I find that the Applicants, not being the owner and not having an Equitable interest in the land in question, the filing of the suit against them is not supportable. I find this to be an incurable defect being a matter of law. This being the case I do not consider that the argument by counsel for the Respondents that the Applicants ought to have elected which provision of Order VI Rule 13 (b) (c) and (d) they were relying on in seeking the alternative remedy for striking out carries much weight as to make me exercise my discretion otherwise than in allowing the application. It is clear from all facts herein that the Applicants are not the correct parties to have been sued which makes the proceedings void *ab initio*. It would be neither just nor fair to allow the Plaintiffs to ride on their shoulders as they pursue their intended tortfeasors. I allow the application dated 8th December, 2004 having found the suit to be misconceived having been improperly filed against the wrong party, a factors which renders the same scandalous, vexatious and an abuse of the process of this court.

Accordingly the Plaintiff against COSMOS LIMITED is hereby struck out and the suit dismissed with no order as to costs.

Dated and delivered at Nairobi this 2nd day of February, 2007

M.G. MUGO

JUDGE

Ruling delivered in the presence of:

For the Plaintiff: Mr. Anambo holding for G. Singh

For the Defendant: No appearance.