



Mwaniki & 2 others v Gicheha & 3 others

High Court, at Nairobi June 9, 2006

Aluoch J

Civil Case No 313 of 2000

***Locus standi** - right to a clean and healthy environment – whether complainants who are not land owners have a right to commence action in the High Court to enforce their rights – provision of section 3(3) of the Environmental Management and Coordination Act, 1999.*

The plaintiffs filed a suit against the defendant seeking a permanent injunction to restrain the defendants from constructing or continuing to construct a slaughter house in the parcel of land known as Plot No. Zone 6 within Limuru Township. Their case was grounded on the fact that the construction was in contravention of the law specially particularly 58 and 75 of the Environmental Management and Co-ordination Act, 1999, as they had neither sought nor obtained a license to discharge effluent, nor had they undertaken an environmental impact assessment. They also complained that the failure to comply with these statutory provisions was likely to cause injury to them and was a violation of the plaintiff's basic right to a clean and healthy environment.

In their evidence, which was not challenged due to the non-attendance by the defendants, it was stated that the slaughter house was bound to affect negatively the lives of the people neighbouring it when it starts to operate as it was close to their homes and the smell and affluent would be too much for them to bear. This was in light of the fact that no sewage had

been built for the disposal of waste from the slaughter house. In any event, there was a probability that diseases may be spread to their families. The plaintiffs attempts to notify the National Environmental Management Authority of their conduct had not been heeded.

The defendants, in their defence, stated that the slaughter house was being constructed to international standards and with specific regard to waste disposal and in accordance with all relevant provisions of the law and council by laws.

Held:

1. The defendants were likely to contravene the provisions of section 75 of the Environmental Management and Co-ordination Act, 1999, as they had not made any provisions for disposal of effluent discharge, yet their butchery was almost ready for use.

2. The plaintiffs, though not the owners of the land in dispute, nevertheless had the authority to sue, such authority being derived from section 3 (3) of the Environmental Management and Co-ordination Act, 1999, which states if a person alleges that the entitlement under subsection (1) to a (clean and healthy environment) has been, 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 directions as it may deem appropriate, to prevent, stop, or discontinue any act or omission deleterious to the environment.

Application allowed.

Cases

No cases referred to.

Statutes

1. Environmental Management and Co-ordination Act (No 8 of 1999)

sections 3(3); 58; 75

2. Public Health Act (cap 242)

3. Physical Planning Act 1996 (Act No 6 of 1996)

June 9, 2006, **Aluoch J** delivered the following Judgment.

The 3 plaintiffs, namely Peter Kinuthia Mwaniki, Thomas Njoroge Kamau

and Jackson Keya Gathu, sued the 4 defendants namely Peter Njuguna

Gicheha, James Matara Chege, James Chogi Thotho and Limuru Butchers

Union, jointly and severally, seeking

“a permanent injunction to restrain the defendants, their

agents and servants from constructing or continuing to

construct a slaughter house in the parcel of 1 and known

as Plot No Zone 6 within Limuru Township. The

plaintiffs also prayed for costs of the suit”.

The plaintiff’s suit is grounded on the fact that the defendants have

contravened the law in that their act of building a slaughter-house in the

neighbourhood,

“is in contravention of sections 58 and 75 of the

Environmental Management and Co-ordination Act, as

they have neither sought and/or obtained a license to

discharge effluent, nor have they undertaken an

environmental impact assessment, or obtained an

environmental impact assessment license...”

The plaintiff claimed further in para 14 of the plaint,

“Further, the plaintiffs 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”.

The defendants denied the plaintiff’s claim in the defence and at para 8 thereof stated,

“Further, the defendant state that the Environmental Management and Co-ordination Act does not apply retrospectively, but in any event the defendants have not breached any of its provisions”.

Together with the filing of the suit, the plaintiff’s also moved the court for an injunction order to stop the construction of the slaughter house.

However, their application was dismissed on 21st March, 2000, when the court found that the defendants had spent more than Kshs 3,000,000/= for the project, and the plaintiffs had not provided security for costs, to warrant the grant of the injunction order sought.

The plaintiffs and their witnesses were present in court for the hearing of this suit on 16.5.2006, but not the defendants or their lawyer who had been served with a hearing notice. The affidavit of service was in the court file. No explanation was given why neither the defendants nor the lawyer was in court. In the circumstances, I proceeded with the hearing of the suit, and recorded the evidence of all the 3 plaintiffs plus their witnesses.

They all confirmed that the slaughter house is almost completed, but no work has started in it.

The complaint in their evidence was that the slaughter house will affect peoples lives negatively when it starts to operate. That there will be blood flowing from there which will obviously mix with sand and mud and spill onto their homes and farm land. All the 3 said that the slaughter house is very close to their homes. That they all share a fence with the slaughter house which also borders a church and children’s home.

The 1st plaintiff complained that the smell and affluent from the slaughter house will be too much for him as his house is very close to the slaughter house.

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 letters of complaint.

The 1st plaintiff produced 3 photos showing the proximity of the slaughter house to its neighbours, such as his home and the Children's home and the church. The 1st plaintiff asked the court to stop the defendants from starting the slaughter animals in the building already constructed and is near completion, and stop them from completing it.

The 2nd plaintiff too, testified that the slaughter house will be a nuisance when the slaughter of animals start. That the foul smell from the slaughter house will affect him and his family, and being a farmer, his home will be affected as the cattle for slaughter will be walking past his home to the slaughter house. He was concerned with the fact that such animals will drop ticks around his farm and this is likely to bring diseases to his family. He testified further that no sewage has been built for disposal of waste from the slaughter house. He confirmed the evidence of the 1st plaintiff that they have been writing letters to various authorities including NEMA to stop the construction of the slaughter house, but to no avail.

The 3rd defendant lives about 500 meters from the slaughter house, which is on the east side and his home is on the western side.

He complained that the wind will be blowing the smell and dirt from the slaughter house to his home and the church as well as the Children's home. He feared that the operations of the slaughter house might start soon, as the building is completed and is currently being painted, ready to

start work. He confirmed that there is no sewage disposal system built together with the slaughter house, as such, he lamented that the dirty water from the slaughter house will flow onto his farm as well as those of other neighbours, and the cemetery on the lower side. He also lamented that the dirty water will damage his crops, that is why he together with other neighbours are trying to stop the operations of the slaughter house.

Joseph Mburu Waiganjo lives in Limuru, and is also an immediate neighbour with the 4th defendant, the Limuru Butchery Union. He too, like the other complainants share a fence with the slaughter house, and his fear is that since he lives on the lower side of the land which slopes to his side (home), the affluent from the slaughter house including the run off likely to flow from the slaughter-house will be washed to his farm land, and because he is a farmer, he fears that pests like ticks from cattle coming for slaughter will find their way to his animals and infect them.

The witness confirmed that it is the first, second and third defendants who are directing the construction of the slaughter house, as they are members of the 4th defendant. He also confirmed that the slaughter house borders the public cemetery, which the residents use for burial. That it also borders St Anthony's Women and Children Home as well as St. Francis of Assissi Church. He fears that the slaughter house will produce foul smell, and further, that his children might be traumatized by the slaughter of animals and the blood flowing from the slaughter house as no drainage system for waste has been provided by the defendants.

The witness confirmed that their complaint to NEMA was not responded to, not even the one to the Limuru Municipality, whom they asked to stop the construction of the slaughter house in the neighbourhood.

The photos produced in court as exhibits were shown to him and from them he identified the slaughter house. The photo 4(b) shows St. Anthony

Women Centre, which is separated from the slaughter-house only by a road. In photo 4(a) is a cemetery which shares the same fence with the slaughter house. The witnesses's home is just behind the slaughter house. All the witnesses referred to the minutes of a meeting produced as Ex 3 a meeting of Limuru Municipality where they were all represented by a Catholic father from St. Francis Catholic church, their neighbour.

According to the minutes, the meeting resolved that the building of the slaughter house should not continue, but the defendants did not heed this as they just continued with the construction.

The witness prayed the court not to allow the slaughter house to start operations, because it poses

“a huge danger to him and his family and the neighbours, and indeed the community living around it. That the danger posed is pollution...”

It was this witness who signed the letter of complaint written on behalf of the plaintiffs and the neighbours on 6.2.2006 to the Director General of NEMA. The complaint was that when the District Environmental Committee came to inspect the slaughter house, the community living around including the plaintiffs were not allowed in the inspection tour, so they did not give their views.

That subsequently the community asked for an environmental assessment report, but this too was denied. The Director General of NEMA did not respond to the letter, and the neighbours therefore feel desperate and helpless in this matter, and that is why they are turning to the court to stop the slaughter house from beginning its operations.

Finally was a witness from Limuru Municipal Council, Councilor Peter Njuguna Mwangi of Limuru Central Ward.

He is aware of the presence of the slaughter house built in Kamirithu

ward, which neighbours his ward. He is also aware of the complaints of the plaintiffs and several other neighbours.

He confirmed that as per the records of the council, the slaughter house has been built on a plot which was earmarked for a cemetery, so the same was not allocated to anybody.

That the council expected Limuru Butchers Union, the 4th defendant to present building plans to the council for approval, but this was not done. Councilor Peter Njuguna Mwangi knows the first 3 defendants who are members of Limuru Butchers Union, and who have built the slaughter house, however, he did not know who authorized the building of the slaughter house in that plot.

He testified further that normally, building plans would first be presented to the District Health Officer, the District Physician Planning Officer for approval. He is the Chairman of the Land repossession committee, which deals with irregularly and illegally acquired plots. He confirmed that according to the council records, the plot where the slaughter house is built was reserved for a cemetery and must have been acquired illegally.

He recalled sometime in 2000, when the 4th defendant, the Limuru Butchers Union and St Francis Catholic church came to the council, having a dispute over this matter because the Union wanted to build a slaughter house and the church protested. The council held an informal meeting at which the Union (4th defendant) was asked to produce evidence of ownership of the plot, but they were unable to do so, and the council directed them not to undertake any construction on the plot as it was a cemetery. The Union defied and started construction which is almost completed by now.

The witness was present at the meeting held by the council on 14.7.2005. This was a meeting of the Ordinary Works Town Planning and Housing Committee. The meeting deliberated on the slaughter house which was

already under construction, and resolved that the Union should pull down and demolish the slaughter house as they had failed to produce documents of ownership. The witness produced as exhibit 6 the deliberation of that meeting which he attended. The Butchers Union defied the council resolution and continued with the construction.

After the meeting on 14.7.2005, the matter was put before the full council meeting in March, 2006. The decision of the committee that the Butchers Union stops construction and pulls down the slaughter house was accepted by the full council.

The witness was aware of the meeting of 29.9.99, whose minutes were produced as Exh.3 in court. This was a liaison committee meeting chaired by the District Commissioner Kiambu. It was deliberating on the issue of the slaughter house. It was attended by 3 council members and a catholic father from the neighbouring St. Francis Church. One of the resolutions reached at that meeting was that Limuru Butchers Union should stop the construction of the slaughter house, since they had no document of ownership.

The councilor confirmed that the slaughter house is an illegal structure which the council would have pulled down had it not been for the meeting of 28.7.2005, chaired by the DC Kiambu who wanted both Limuru Butchers Union and the Catholic Church to come to some arrangement on the way forward and gave them time to discuss the matter further.

The DC's meeting nevertheless resolved that an "impact assessment" be undertaken by the District Environmental Committee, comprising all departmental heads in Limuru Municipality.

The records at the council show that the "impact assessment", was done but the report has never been tabled before the full council. Also the community living around the slaughter house were not involved,, so they

complained to the Director General of NEMA, who did not respond to their complaints.

According to the witness, the decision of the council still stands that the slaughter house should be pulled down, as the Union has never produced to the council authentic evidence to show that it was allocated this plot by the Commissioner of Lands.

The defendant's filed a defence to this suit on 30th August, 2001. It is dated 17th August, 2001. Para 7 thereof the defendants stated,

“The defendants deny the contents of para 13 and state

that the slaughter house is being constructed to

International Standards and with specific regard to

water, waste disposal and in accordance with all relevant

provisions of the law and council by-laws”.

I had already outlined the contents of para 8 earlier in this judgment.

Counsel for the plaintiff filed written submissions at his request to the court. He summarized his client's case, from the oral evidence adduced and on the law, he submitted that, apart from the provisions of the Public Health Act, cap 242, Laws of Kenya, and the Physical Planning Act cap 286, Laws of Kenya which the witnesses said had not been complied with by the defendants, the advocate also submitted that Section 3 of the Environmental and Management and Coordination Act, 1999, had been breached. The section provides,

“Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment”.

The advocate also drew the court's attention to section 58 and 75 of the Act, which deal with assessment license and license to discharge effluents respectively, as the witnesses testified that the defendants have not

complied with the requirements of these sections of the Law.

As I stated earlier in this judgment, neither the defendants nor their lawyer appeared in court, though they had been served. Because of this, the evidence of the 3 plaintiffs and their witnesses was not challenged, so I accepted it as true.

I also examined the exhibits produced by the witnesses which show that the dispute between the plaintiffs and other members of Kihingo Community in Limuru Municipality and the defendants over construction of a slaughter house started quite sometime back and in 1999, the District Commissioner, Kiambu intervened, when he chaired a meeting of the Limuru Municipal Council Physical Planning Liason Committee in his office on 29.9.99. All heads of departments in the Municipality, including the Mayor and Town Clerk as well as the Father in Charge of the Catholic church, were present. The main agenda of the meeting was given as,

“to resolve the conflict between the Limuru Catholic Church and the Limuru Butchers Union on the proposed slaughter house”

and as evidence already given in court shows, the Limuru Butchers Union was ordered

“to stop forthwith with effect from 29.9.1999 any further construction of the proposed slaughter house... until they obtain a letter of allotment from the Commissioner of Lands, and also submit for approval their building plans as required under the Physical Planning Act from Kiambu County Council and other relevant authorities...”

Evidence on record has shown that the defendants defied all directions and continued with the construction of the butchery which is almost

completed as at the date of the hearing of this suit.

Turning to the defence filed, and particularly at paragraphs 7 and 8 which I outlined in this judgment, I find that no evidence was adduced in court to show that the

“slaughter house was being constructed to International Standards, with specific regard to water, waste disposal....”.

I reject this defence, going by the evidence on record which shows that no system of waste disposal has been provided by the defendants. I also reject the defence in para 8 because I believe the plaintiffs’ evidence which shows that the defendant breached the relevant provisions of the Environmental Management and Coordination Act, 1999, especially sections 58 of the application for an Environment Impact Assessment License, which the defendants did not and still do not have.

As the defendants have not made any provisions for disposal of effluent discharge, yet their butchery is almost ready for use, I find that they are likely to contravene the provisions of Section 75 of the Act.

Though the matter of “locus” was not raised in the defence or the issues filed in court, I nevertheless feel that I must refer to it, and say that the plaintiffs, though not the owners of the land in dispute, nevertheless have the authority to sue, such authority being derived from Section 3(3) of the Environmental Management and Co-ordination Act, 1999 which states,

“If a person alleges that the entitlement under subsection (1) (to a clean and healthy environment) has been, 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

make orders, issues such writs or give directions as it may deem appropriate,

(a) “to prevent, stop or discontinue any act or omission deleterious to the environment”,

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 provision of the Act.

For this reason I proceed to grant as was prayed “a permanent injunction order to restrain the defendant, their agents, and servants from continuing to construct a slaughter house in the parcel of land known as Plot No Zone 6, within Limuru Township”

Though the building is near completion the plaintiffs did not pray for an order for its demolition, that is why I have not gone that far. The suit was filed in the year 2000, before the construction of the butchery started.

Litigation has taken sometime and the building is now near completion, so the threat of the butchery beginning its operations of slaughtering of animals is real. In order to preserve a “clean and healthy environment”, in this locality, as spelt out in the Act, I grant a further injunction order to restrain the defendants, their agents and or servants from commencing the slaughter of animals in the building they have been constructing and are about to complete.

Finally, I direct that this judgment be forwarded to the Director General of NEMA, as the evidence on record showed that the plaintiffs cried out to him for help as late as February, this year (2006) by writing to him

personally and drawing to his attention their plight of a possible environmental pollution likely to be caused by the defendants who had disobeyed orders from all quarters, to stop the construction of the butchery. The situation was made difficult for the plaintiffs when the District Environmental Committee excluded them from the visit to the site, and also refused to listen to their complaints, and yet purported to prepare a report which would have led to the issuance of an Environmental Impact Assessment license, though according to the Act, this should have preceded the project.

I also award the plaintiffs the costs of this suit.