REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 115 of 2006

1. SAMSON LEREYA

2. NGAMIA LEMEIGURAN

3. JOEL OLE SAAYA

4. SHAOLIN LERICHE MEIGURAN

5. CLEMENT NASHURU (Together with the annexed list containing other 796 names on their behalf and on behalf of the affected residents of Marigat Division in Baringo District)….. PLAINTIFFS

VERSUS

THE HONOURABLE ATTORNEY GENERAL…….....….1ST DEFENDANT

THE MINISTER FOR ENVIRONMENT AND NATURAL RESOURCES……..... 2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY…….....….. 3RD DEFENDANT

R U L I N G

This Ruling relates to a preliminary objection raised by counsel for the 1st and 2nd defendants to this court hearing or entertaining the suit herein, whose central prayer is the eradication of a weed called *Prosopis Juliflora*, which is said to be invasive, from Marigat and Mugutani Administrative Divisions of Baringo District of the Rift Valley Province. The preliminary objection, of which notice had been given, was raised at the commencement of hearing of this case on 10th July, 2006.

The plaintiffs were represented at the hearing by learned counsel, Mr T. Letangule while the 1st and 2nd defendants were represented by learned counsel, Mr M. Njoroge. The 3rd defendant was represented by learned counsel, Mrs Macharia, who supported the preliminary objection.

The grounds on which the preliminary objection are based are essentially as follows:-

a) That no statutory notice of intention to sue was served on the Attorney – General under section 13

A of the Government Proceedings Act, Cap. 40.

b) That the cause of action arose in 1983 and that the suit, having been filed on 8th February, 2006 is barred by statutory limitation.

c) That the plaintiffs have no specific interest in the subject matter and, therefore, lack *locus standi*.

d) That there is mis-joinder of the 2nd defendant as the said defendant is not capable of being sued under the provisions of section 12 of the Government Proceedings Act.

With regard to ground (a) relating to notice, it was the contention of counsel for the 1st and 2nd defendants that no notice was served on the Attorney–General as mandatorily required by the Government Proceedings Act. In this regard we advert to sections 12 and 13 A of the Act, so far as relevant:

'12. (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney – General, as the case may be.

13 A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars –

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have occurred;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.'

It is clear to us from the above provisions that the issuance of a statutory notice and its service upon the Government through its duly authorized agent is a condition precedent to the validity of a suit against the Government. By virtue of section 12 (1) of the Government Proceedings Act, the Attorney – General is the authorized agent.

In reply to the objection by the Attorney – General, the plaintiffs/respondents furnished to this court a photocopy of statutory notice addressed to the Hon. Attorney – General. It is typed on the letterheads of Letangule and Co. Advocates and bears the Reference TL/CIV/66/05. Below the said Advocates address at the top right hand corner appears the typed date '28/09/05'. The date inserted by hand at the end of the text of the notice is, however, '29th day of September, 2005.' It is signed by Thomas Letangule Advocate 'On behalf of the intended plaintiffs/claimants' and copied to 10 persons or institutions. We take the date of signature to be 29th September, 2005. Some 4 rubber stamps in photocopy form appear above the heading of the statutory notice but our immediate interest is the rubber stamp ascribed to the Attorney – General, which bears the date '28 SEP 2005'. It is to be recalled that counsel for the 1st and 2nd defendants informed this court that the Attorney – General (1st defendant) denies being served with any statutory notice. The question arising in our mind is this: How on earth could a notice signed on 29th September, 2005 have been served and received at the Attorney – General's Chambers a day before, i.e.

on 28th September, 2005? This discrepancy lends credence to the Attorney – General's denial of service of the said notice upon him.

Another aspect of the statutory notice intriguing us is that it is stated to have been issued by trustees of Ilchamus Community Development Trust, but the trustees are not named in the notice. It has not been shown if the said trustees are the plaintiffs who issued the notice and subsequently filed the present suit. No evidence has been provided to our satisfaction linking the plaintiffs with the notice. Vide paragraph 3 of the supporting affidavit of Shaolin Leriche Meiguran (4th plaintiff), it is stated that the plaintiffs have registered a trust known as Ilchamus Community Development Trust. If that be so, we would have thought that the trust would have been a party to the suit, but it is not. No evidence has been availed to our satisfaction that the plaint and chamber summons filed simultaneously with it on 8th February, 2006 were filed by those who purportedly gave the statutory notice.

In view of the foregoing, we find the statutory notice hereinabove described does not constitute the requisite notice for the purposes of this suit.

The second ground of preliminary objection by the 1st and 2nd defendants is that the suit is barred by statutory limitation. The basis for the plea of limitation is in essence that since the Government of Kenya is said to have introduced the weed *Prosopis Juliflora* into the subject are in 1983 and the present suit was filed on 8th February, 2006, i.e. over 20 years later, the suit is time-barred. The counter – argument made by the plaintiffs before us is that the environmental harm subject matter of the suit is on-going. In the latter regard, paragraphs 7 and 8 of the plaint are instructive. They state:

'**7 On or about the year 1983, the Government of Kenya through the Ministry of Agriculture, sanctioned and authorized the introduction of the weed *Prosopis Juliflora* in Ng'ambo Location of Marigat Division, Baringo District by the Food Agricultural Organization (F.A.O.) in conjunction with the 2nd Defendant and/or its predecessor ostensibly to curb desertification.**

8. After the introduction of the weed *Prosopis Juliflora* the weed which is invasive in nature easily went out of control and spread at an alarming rate and now twenty (20) years after its introduction it has completely overgrown in the entire landscape of Marigat and Mugutani Divisions of Baringo District and it continues to spread at an alarming rate.'

Additionally, at paragraph 10 of the plaint the plaintiffs aver, inter alia, as follows:

'**10. The Government of Kenya (read 1st and 2nd Defendants) is liable for the damage and loss brought about by the weed *Prosopis Juliflora*.**

And at sub-paragraph (a) of the same paragraph 10, the plaintiffs, by way of particulars, accuse the Government of –

'**Knowingly allowing the introduction of the weed while knowing or ought to have known its impact on the environment in the long term.'**

The last example we wish to cite in the above series is paragraph 11 of the plaint, which avers:

'**11. The continued decimation of natural biodiversity in the affected areas continues unabated contrary to Kenya's obligations as a party to the international conventions particularly to the Convention on Biological Diversity of 1992, to which Kenya is a party.'**

Interestingly, the response of the 1st and 2nd defendants to the foregoing averments on the on-going nature of the weed in question includes the following paragraphs in the amended defence of the 1st and 2nd defendants filed on 21st June, 2006:

'7. In the alternative the Defendants further aver that though *Prosopis Juliflora* existed in other parts of Kenya before it was recorded in Baringo District <u>its long term effects on the environment were not known or foreseeable</u> and could not have been known or foreseeable nor was it or its planting proscribed under any legal statute.

20. In response to paragraphs 14 the defendants plead that the plaintiffs themselves have admitted that *Prosopis* is of an "intractable" or "uncontrollable" nature and further aver that proper measures have already been initiated to protect the country from any further spread of *Prosopis Juliflora*.

22. In response to paragraph 18 of the plaint and without prejudice to the foregoing defendants aver that prior to the invasion by *Prosopis Juliflora* the areas occupied by the plaintiffs were arid or semi-arid and were of quite low wealth creation capacity than they are after the spread of *Prosopis Juliflora*. The defendants further aver that a lot of problems associated or originating with aridity in the area subject matter of this suit were, and are still being solved, by reliance on *Prosopis Juliflora* <u>despite the fact that the species are invasive in nature</u>.'

The emerging scenario from the amended defence illustrated by the paragraphs we have cited above is that the 1st and 2nd defendants, who pleaded limitation, do in fact concede that the weed in question is invasive and that its effect on the environment is long-term or continuing. In the premise, we are unable to appreciate why the 1st and 2nd defendants pleaded limitation. The preliminary objection on the ground of limitation lacks merit and it is hereby dismissed.

The third ground of preliminary objection is that the plaintiffs have no specific interest in the subject matter and that, therefore, they lack *locus standi*. For this proposition, the 1st and 2nd defendants sought to rely on High Court Miscellaneous Application No.1446 of 1994, <u>Lawrence Nginyo Kariuki –vs- County Council of Kiambu & Another</u>. The copy of the judgment furnished to us is on the whole illegible. What we can glean from the judgment, however, is that the learned Judge (M. Ole Keiwua, J – as he then was) made the point in the said judgment that for the plaintiff to succeed, he had to show a distinct interest in the subject matter; that the sufficiency of the plaintiff's interest must be looked at with regard to the kind of the premises the suit land was; and that the plaintiff's interest in the matter was restricted by, among other things, the statute law of Kenya. On the other hand, plaintiff's counsel countered by referring to High Court Civil Case No.313 of 2000, <u>Peter Kinuthia Mwaniki & 2 others -vs- Peter Njuguna Gicheha & 3 others</u>, decided on 9th June, 2006, in which the High Court (Aluoch, J) held, *obiter*, essentially that consequent upon enactment of the Environmental Management and co-ordination Act, No. 8 of 1999 (which came into force on 14th January, 2000) the plaintiffs in that case, though not owners of the land in dispute, nevertheless had *locus standi* to bring the suit on environmental grounds. That holding was premised on the Environmental Management and Co-ordination Act aforesaid. We wish to observe here that Nginyo Kariuki's case*(supra)* was decided before enactment of the Environmental Management and Co-ordination Act. There was at the time no specific statutory provision in Kenyan law addressing the issue of *locus standi* in matters environmental. The Environmental Management and Co-ordination Act subsequently filled the gap. For the record, the provisions relevant to the present case are section 3 (3) (a) and (4) - wrongly printed in the Act as another (3). Section 3 opens in subsection (1) with the broad statement that every person in Kenya is entitled to a clean and healthy environment and that he/she has a duty to safeguard and enhance the environment. And sub-sections (3) and (4), so far as relevant, are in the undermentioned terms:

'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 writes or give such directions as it may deem appropriate ….'

And sub-section 4 – wrongly printed as another (3) – provides as follows:

‘**(4) A person proceeding under sub-section (3) of this section shall have the capacity to bring an action notwithstanding hat such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action –**

(a) is not frivolous or vexatious; or

(b) is not an abusive of the court process.’

There is no plea in the present suit that it is frivolous, vexatious or an abuse of the court process.

On the basis of section 3 (3) and (4) of the Environmental

Management and Co-ordination Act, we hold that the preliminary objection based on the ground of lack of *locus standi* has no merit and it is hereby also dismissed.

The last ground of preliminary objection raised by the 1st and2nd defendants is that there has been misjoinder of the 2nd defendant, i.e. the Minister for Environment and Natural Resources. We find this to be a grey area, with no clear – cut answer. The expression ‘the Government’ is not defined in the Government Proceedings Act but it is defined in the Interpretation and General Proceedings Act (Cap. 2) to mean the Government of Kenya. There are, however, certain hints given in section 2 (3) of the Government Proceedings Act, which seem to shed some light on what the expression entails: The said sub-section (3) is in the following terms:

‘**2. (3) Any reference in Part IV or Part V to civil proceedings by or against the Government, or to civil proceedings to which the Government is a party, shall be construed to include a reference to civil proceedings to which the Attorney-General, or <u>any Government department,</u> or any officer of the Government as such, is a party’.**

The attempt to define ‘the Government’ in section 2 (3) is with specific reference to Parts IV and V of the Act. Sections 12 and 13 A, which are central to this Ruling, are in Part III of the Act. The attempted definition would not, therefore, ordinarily apply to sections 12 and 13 A of the Act. Yet we think that it would not be out of line to conceive of the expression ‘the Government’ employed in sections 12 and 13 A of the Act in the same vein as it is conceived in section 2 (3) of the Act. We further note in the context of the case before us, which concerns the environment, that one of the expressions defined in section 2 of the Environmental Management and Co-ordination Act is that of “lead agency”, which is defined to mean:

‘**any <u>Government ministry, department</u>, parastatal, state corporation or local authority; in which any law vests functions of control or management of any element of the environment or natural resource’.**

While we think it would have been sufficient to cite only the Attorney – General as a party in so far as the Government is concerned, we find nothing prejudicial in also citing the Ministry of Environment and Natural Resources as a party, having regard to its central position in environmental management issues. We would not, therefore, fault the suit merely because the said Ministry has been cited as a party. The preliminary objection based on the ground of misjoinder of the Ministry of Environment and Natural Resources also fails and the same is likewise dismissed.

The end result is that we dismiss, in reverse order, grounds (d), (c) and (b) of the preliminary objection but uphold the preliminary objection on ground (a) relating to failure to serve the mandatory notice on the Government. Since failure to serve the mandatory notice is fatal to any proceedings against the Government, we find that the present suit cannot stand as against the 1st and 2nd defendants. Consequently the same is hereby struck out as against the 1st and 2nd defendants. Each party to bear their own costs.

Orders accordingly.

Dated at Nairobi this 11th day of July, 2006.

JOYCE ALUOCH

JUDGE

B.P. KUBO

JUDGE

M. MUGO

JUDGE