REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
HCC NO. 85 OF 2004

ANDREW MUGUNA & 16 OTHERS …… PLAINTIFFS

VERSUS

MERU CENTRAL COUNTY

COUNCIL & 2 OTHERS …… DEFENDANTS

RULING OF THE COURT

The plaintiffs/applicants filed the chamber summons dated 18.10.2004 on the 19.10.2004, seeking the following orders:-

1. That this honourable court be pleased to certify this matter as urgent.

2. That this honourable court be pleased to grant an order of inhibition in respect of parcel of land No. KIIRUA/NAARI/200 which is the subject matter herein pending the hearing of this suit.

3. That this honourable court be pleased to grant on order of temporary injunction against the defendants, their agents or servants from alienating, disposing, subdividing, construction or making any further developments on LR KIIRUA/NAARI/200 pending the hearing of this suit.

4. That the costs of this application be provided for.

The application was brought under Order 39 Rules 1, 2 and 3 and Order 50 Rule 2 of the Civil Procedure Rules, Sections 3, 3A and 63 of the Civil Procedure Act.

The application was premised on the grounds that land parcel No.

KIIRUA/NAARI/200 is public land which was set aside for public use with a purpose; that the respondents have no rights to alienate, dispose or make development which is contrary to the purposes for which the land was reserved; and that the applicants are likely to suffer irreparable loss and damage if the said trust land is disposed off or otherwise alienated. The application was also supported by the affidavit made and sworn by LACTON KIUGU on 18.10.2004. Mr. Kiugu avers that the plaintiff's/applicants are residents of Runkuru sub-location where the suit land is located and that the suit land was/is preserved as a public utility measuring 0.68ha. A copy of the green card was produced as annexture "LKI". The green card shows that the suit land was registered in the name of Meru County council on 6.1.65 and that the land is reserved for a water tank. On 9.3.99 the suit land was cautioned by one Obadiah Kibiti Mugwika

and on 29.6.2001 restrictions to any dealings in the land were registered against the title. It is further averred that the suit land was registered in the name of MERU COUNTY COUNCIL 1st defendant as a trustee on behalf of the public and that the plaintiffs have been using the suit land as such public utility for cattle dips and various public water tanks among other public projects. That the 1st defendant has breached the trust bestowed upon it by authorizing private developers namely, the 2nd and 3rd defendants to take over the suit land with a view to alienating the same to the 2nd and 3rd defendants who have made attempts to start construction for a big church whose construction the plaintiffs allege will defeat the public interest of the plaintiffs.

That efforts at an amicable settlement of the brewing dispute between the parties have failed. At paragraph 13 of the affidavit, the deponent avers that the plaintiffs/applicants filed an earlier suit being Meru CMCC No. 408/97 and though the 1st defendant was not a party thereto the other two defendants were defendants in that earlier suit. That the 2nd and 3rd defendants have defied the orders issued in the said earlier suit and that the 1st defendant in allocating the suit land to the 2nd and 3rd defendants must have acted out of ignorance of the court orders in CMCC 408 of 1997. On these grounds the plaintiffs/applicants urged the court to grant the orders sought as to order otherwise would be prejudicial to the plaintiffs/applicants interests in the suit land.

Contemporaneously filed with the application was a plaint dated 18.10.2004 by which the plaintiffs/applicants sued the 1st, 2nd and 3rd defendants respectively. The 1st defendant was sued in its capacity as a duly constituted local authority under the provisions of the Local Government Act, Cap 265 Laws of Kenya, while the 2nd defendant was sued on behalf of St. Dominic Catholic Church in the process of being imposed on a public utility land while the 3rd defendant was sued as the Catholic Diocese of Meru under whose jurisdiction the 2nd defendant falls. That the 1st defendant is registered as trustee of the public utility plot known as L.P. No. KIIRUA/NAARI/200 on which various public utility projects stand. At paragraph 7 of the plaint it is alleged as follows:-

> **“7. The contention of the plaintiffs on their own behalf and that of the people within Naari area utilizing this land for public use is that the said land is a trust land held by and vested in the 1st defendant in trust for the plaintiffs who are ordinarily resident within the surrounding area by virtue of section 115 of the Constitution of Kenya and Trust Land Act, Cap 288 Laws of Kenya.”**

and that inspite of such trust, the 1st defendant through the instigation and at the instance of the 2nd and 3rd defendants has breached the trust by allocating the suit land to the 2nd and 3rd defendants without following the laid down procedures. Paragraph 14 of the plaint averred as follows:-

> **“14. There is no other suit pending in court between the plaintiffs and the defendants over the same subject matter save for CMCC No. 408 of 1997 which did not include the 1st defendant and which was concluded.”**

The plaintiffs prayed for judgment against the defendants jointly and severally for:-

> (a) A declaration that L.R. No. KIIRUA/NAARI/200 is a trust and public utility property which the 1st defendant has no capacity to allocate for private purposes and any allocation to the 2nd defendant and 3rd defendant is illegal, null and void abinitio and an order of eviction of the 2nd defendant from this land.
>
> (b) Costs and interest.

Meru CMCC No. 408 of 1997 was filed on 25.4.97. Of the seven plaintiffs in that suit were Andrew Muguna (1st plaintiff herein), Jeremiah Rwito (2nd plaintiff herein), Daniel Mutea (3rd plaintiff herein) and Lacton Kiugu, (the 8th plaintiff herein) and they sued the Catholic Diocese of Meru Registered Trustees as 1st defendant (3rd defendants herein) and Joseph Gichuku, Kiirua Parish (Bishop of Meru) as the 2nd defendant. It was alleged therein that land parcel No. KIIRUA/NAARI/200 was registered in the name of Meru County Council (the 1st defendant herein) with a registered easement of the plaintiff’s

water tanks and that the plaintiffs had built their water tanks and connected their water supply thereon since 1956. The seven plaintiffs were said to have sued on their own behalf and on behalf of the other seventy (70) applicants being members of water projects in NAARI location. The plaintiffs prayed for judgment against the defendants jointly and severally for:-

> (a) A permanent injunction against the defendants, their servants, agents or chief from damaging the plaintiffs water tanks, borehole, pipes or otherwise construct anything on parcel of land No. KIIRUA/NAARI/200, special, punitive and general damages.
>
> (b) Costs and interest.

It is admitted by the plaintiffs/applicants that Meru CMCC No. 408/97 was heard and concluded. In his judgment the learned senior resident magistrate (Mr. N.H. Oundu) said the following after considering the whole evidence adduced before him:-

> **"The defendants to continue using the area they have always occupied and the existing structures. The tanks to remain where they are and the cattle dip to remain where it is. Access roads to remain open. The water pipes to be left intact. In effect the status quo to be maintained until Meru County Council equitably distributes the available space to the existing community projects competing for KIIRUA/NAARI/200. In the circumstances, parties will bear their own costs for these proceedings."**

That is the background to the plaintiffs' application. The same was opposed. The defendants filed the 1st replying affidavit sworn by Francis Maitethia Mutuambae the chairman of the 2nd defendant. The main contention of the defendants is that the matter in dispute now was adjudicated upon in Meru CMCC No. 408/97. Annexed to the 1st replying affidavit and marked "FMI-6" are copies of plaint, defence, application for injunction, replying affidavits, order of temporary injunction and judgment in the said Meru CMCC No. 408 of 1997. That consequent upon the judgment as given in Meru CMCC 408 of 1997, the 1st defendant visited the suit land on 11.3.2004 on the invitation of all the interested parties after which the 1st defendant took the decision now complained of by the plaintiffs/applicants of allocating the suit land to the 2nd and 3rd defendants.

Before the hearing of the application, the defendants through their advocates Kiautha Arithi & Co., filed notice of preliminary objection on points of law. The notice was dated 9.11.2004 and was filed on the same day. It was that preliminary objection that was canvassed before me on 15.12.2004.

The grounds upon which the preliminary objection was based were that:-

> 1. The plaintiffs cannot in law agitate for public rights and the suit offends section 61 of the Civil Procedure Act, Chapter 21 laws of Kenya.
>
> 2. The suit is res judicata Meru CMCC No. 408 of 1997 (Andrew Muguna & 8 others V. Catholic Diocese of Meru & another).
>
> 3. The suit is otherwise an abuse of the court process.

Mr. Arithi who appeared for the defendants/respondents contended on their behalf in respect of ground one of the preliminary objection that the plaintiff's suit offends the provisions of section 61 of the Civil Procedure Act. The section provides as follows:-

> **"61(1) In the case of a public nuisance, the Attorney General or two or more persons having the consent in writing of the Attorney General may institute a suit though no special damage has been caused for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.**
>
> **(2) Nothing in this section shall limit or otherwise affect any right of suit which**

may exist independently of its provisions."

That in view of the provisions of the said section, the seventeen plaintiffs lack the locus standi to bring this suit as the plaintiffs have not sought and obtained the written consent of the Attorney General. Secondly, that the application does not disclose what private interests the plaintiffs seek to protect. That the plaintiffs are mere busy bodies who should be stopped in their tracks in their drive to satisfy their egos and from abusing the due process of the court. Mr. Arithi relied on the following case:-

- HCCC No. 72 of 1994 – PROF. WANGARI MAATHAI & 2 OTHERS V. CITY COUNCIL OF NAIROBI & 2 OTHERS.

That in light of the decision in the above case, it is the exclusive right of the Attorney General to represent public interests. In this regard he cited the following case:-

- HCCC No. 464 of 2000 – LAW SOCIETY OF KENYA V. COMMISSIONER OF LANDS & 2 OTHERS;

especially on the point that the plaintiffs herein have not demonstrated to this court what individual rights of theirs have been or are being violated by the defendants/respondents. That the plaintiffs' interests do not go beyond the interests of other Kenyans living in the Naari area and that for this reason, the first ground of the preliminary objection should be upheld.

On ground two, it was contended for the defendants/respondents that this case is res judicata Meru CMCC No. 408 of 1997. That the record of the lower court annexed to the replying affidavit by Francis Maitethia Mutuambae as annexture "FMI – 6" is sufficient to show and prove to this court that the provisions of section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya should be found applicable in this case. It was contended further that CMCC No. 408 of 1997 having been concluded between the same parties and on the same subject matter, the same suit cannot be sneaked back into court by coming to the High Court and that indeed what the plaintiffs/applicants have done by re-instituting a matter that has already been adjudicated upon amounts to an abuse of the due process of the court. Section 7 of the Civil Procedure Act provides as follows:-

> **"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."**

Mr. Gikunda Anampiu appeared for the plaintiffs/applicants and submitted on their behalf that the preliminary objection was misplaced particularly in view of the provisions of section 61(2) of the Civil Procedure Act, which provide a safety value for private persons to protect their rights over public land. That the WANGARI MAATHAI case (supra) relied upon by the defendants/respondents was no longer good law. He relied on HCCC No. 464 of 2000 – LAW SOCIETY OF KENYA (LSK) case (supra) and also distinguished the circumstances of that case from the present one in that the LSK had not complied with Rules 8 and 12 of Order 1 of the Civil Procedure Rules. That the plaintiffs/applicants herein have shown that they would suffer over and above the other 30 million Kenyans in that the suit land is admittedly public utility land. That there is no dispute that the suit land has been allocated to a private body, the 2nd defendant/respondent and that since the 1st respondent has no authority to allocate the suit land to 3rd parties such allocation is prejudicial to the interests of the plaintiffs. It was further contended that it would be draconian to strike out the plaintiff's suit at this stage since such a ruling would deny the plaintiffs the opportunity to be heard. In this regardMr. Gikunda relied on Milimani HCCC No. 723 of 2002 – FURSYS (KENYA) LIMITED V. SOUTHERN CREDIT BANKING CORP. LTD.

On the issue of judicata, it was contended on behalf of the applicants that the issues decided in CMCC No. 408 of 1997 on 17.12.98 were different from the issues herein. On this issue Mr. Gikunda cited the

following case:-

- Nairobi HC Misc. application No. 1446 of 1994 LAWRENCE NGINYO KARIUKI V. COUNTY COUNCIL OF KIAMBU & ANOTHER.

In reply, Mr. Arithi submitted that nowhere throughout the pleadings have the plaintiffs/applicants shown that they will suffer over and above others so as to be conferred with the jurisdiction to file this suit. That the defendants have shown by their pleadings (paragraph 5 of the defence) that the projects for which the 1st defendant/respondent has allocated the suit land to the 2nd and 3rd defendants/respondents are all for the benefit of the public, namely a church, cattle dip, dairy and water tank, and that such allocation of the suit land by the 1st defendant/respondent cannot be termed illegal. Paragraph 5 of the defendants' joint statement of defence avers:-

> **"5. By way of defence the defendants aver and shall maintain that the only public projects that have had a presence on land parcel No.KIIRUA/NAARI/200 have been:-**

(a) Catholic Church

(b) Water tank

(c) Cattle dip

(d) Dairy

That what the 1st defendant did was in accordance with the court orders dated 17.12.98 in Meru CMCC No. 408 of 1997 and in keeping with section 115 of the Constitution of Kenya. It was further contended that if indeed CMCC No. 408 of 1997 was not concluded as alleged by the applicants, then it is not clear why the applicant have not appealed. It was also submitted that the Catholic Church is attended by residents of Naari Area on whose behalf the applicants purport to have filed this suit and the accompanying application. Mr. Arithi urged the court to find that the applicants are mere busy bodies and that both their suit and application have no merit and to strike out those pleadings at this stage.

I shall first deal with the issue of res judicata. In deciding whether the applicants' suit is res judicata Meru CMCC No. 408 of 1997, the three ingredients to be considered are whether there is an earlier decision on the issue, and whether a final judgment on the merits has been given and finally whether the same parties or parties in privity with the original parties are involved. It is admitted by the applicants that CMCC No. 408 of 1997 was determined (see paragraph 14 of the plaint) save that the 1st defendant was not a party to the suit. I need not look anywhere else to confirm the fact that CMCC No. 408 of 1997 involved the same subject matter as the one in this suit; that a decision has been made on that issue and that some of the parties in this suit are indeed parties in privity with the original parties. In his submission, Mr. Gikunda submitted that CMCC No. 408 of 1997 was not concluded, yet the applicant's pleading at paragraph 14 of the plaint spoke for itself. In the EFURSYS (KENYA) LTD V. SOUTHERN CREDIT BANKING LTD case (supra) Nyamu J reproduced a quotation from the unreported case of POP IN (KENYA) LTD & 3 OTHERS V. HABIB BANK A.G. ZURICH at page thereof which I find relevant in this case:-

> **"The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact ……. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end except when legal ingenuity is exhausted. It is a principle of law that cannot be permitted."**

In view of the above elucidation and the admission by the applicants at paragraph 14 of the plaint, does section 7 of the Civil Procedure Act apply? I think so. A copy of the judgment together with the plaint

and defence in CMCC No. 408 of 1997 forms part of the pleadings in this case. If the applicants were dissatisfied with the judgment as given on 17.12.1998, they should have appealed against it. The fact that the 1st defendant was not a party to that suit does not open doors for the applicants to file fresh suits against the defendants. In my view what the applicants have done amounts to an abuse of the process of the court. I do fully agree with the passage from the POP IN (KENYA) LTD case which I have set out above. The three essential elements of res judicata cases are all present in this suit and for that reason, the second limb of the respondents' preliminary objection succeeds. In any event, judgment in CMCC No. 408 of 1997 was delivered on 17.12.1998. This suit was not filed until 19.10.2004. My own reading of the applicants decision to file this case was a disguised appeal against the judgment of 17.12.1998 in CMCC No. 408 of 1997. It is clear to me, and I agree with Mr. Arithi for the respondents, that the applicants are mere busy bodies and mischief makers whose only aim of bringing this suit was to abuse the due process of the court.

The first limb of the preliminary objection was that the applicants had no locus standi in bringing this suit before court. The applicants submitted that theirs was a public duty in an endeavour to preserve public utility land which has been allocated to unscrupulous third parties in the persons of the 2nd and 3rd defendants. On this issue I was referred to the PROF. WANGARI MAATHAI, and the LSK V. LIMA LIMITED and another cases (supra). Mr. Arithi also relied on section 61 of the Civil Procedure Act which section vests the power of instituting public interest cases in the Attorney General unless those bringing the suit have obtained the attorney General's written consent for them to do so. In the LSK case, the following portion of the judgment of the court (Ombija J) which is of persuasive authority to this court expressed itself this:-

> **"……..for the preposition that for a party to have locus standi in a matter, he ought to show that his own interest particularly has been prejudiced or about to be prejudiced. If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on that matter. Otherwise public interests are litigated upon by the Attorney General or such other body as the law sets out in that regard."**

Mr. Arithi put this same proposition to me and urged the court to find that the applicants have not demonstrated that they have suffered or are likely to suffer injury over and above the injury suffered or likely to be suffered by the rest of the residents of Naari area. My finding is that the applicants have not demonstrated to me on the evidence and by the pleadings before me that their own individual interests have been injured over and above the interests of the other people. In any event, there is no evidence that the respondents have interfered in any way with the public utilities that have been enjoyed by the applicants and others since 1956. The water tank, the cattle dip, the dairy and the church are still intact. It is also clear from the evidence and the pleadings that none of the applicants has an individual right in the preservation of the subject matter. If there are any grievances by the applicants (which unfortunately are non-existent because the case is found to be res judicata CMCC No. 408 (1997) those grievances can only lie to the office of the Attorney General under section 61 of the Civil Procedure Act. For these reasons, I find that the applicants have no locus standi to institute and prosecute this suit on their own behalf and on behalf of the other alleged seventy or so members and/or on behalf of other members of the public in general.

If indeed the applicants felt compelled to bring this suit on their own behalf and on behalf of other members of the public and assuming that the same was not resjudicata then they should have sought and obtained the written consent of the Attorney General to be able to do so.

In the result, I find that both limbs of the preliminary objection are well founded and must succeed. I allow the preliminary objection. I accordingly strike out the plaintiffs' suit with costs to the defendants/respondents. It is so ordered.

Dated and delivered at Meru this 9th day of February 2005.

RUTH N. SITATI

Ag JUDGE