



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Case 178 of 2004**

1. MR. K. KIMANI
2. DR. J.M. CHAMIA
3. P. KIBINJA
4. J. KAGURU
5. A. MARAMI
6. N. GOSHIL
7. MOSES M. MUKURA
8. T.M. LUBUMA
9. DR. KAREGA
10. DR. E. MAINA
11. EVASONS MWAKIO
12. Mr. C. KAMANDE.....PLAINTIFFS

**Versus**

1. NYALI MASJID TRUST (REGISTERED TRUSTEE)
2. ABDULHAMED ABDULRAHIM
3. AHMED ALI TAIB
4. YUSUFALI ESMAILJI & HUZEFA YUSUFALI ESMAILJI)
5. ABDULKADIR ABDULAHI FARAH
6. JAMA ABDINUR

7. NYALI TRUSTEE (REGISTERED TRUSTEE) .....  
.....DEFENDANTS

**RULING**

The plaintiffs are several persons (12) named individually against Defendants (7) who are named individually in the plaint. It is not therefore correct to say that “there are numerous persons having the same interest in one suit one or more such persons may sue or be sued or may be authorized by the court to defend in such a suit”. Order 1 rule 8 does not apply here.

The other objection raised here is under section 61 of the Civil Procedure Act whose marginal note “Public Nuisance” The Section provides “ in case of a public nuisance the Attorney General or two or more persons with consent of Attorney General ... may initiate a suit though no special damage has been caused ...”.

The facts of this case are that the Plaintiffs own separately 9 properties in Nyali. These plaintiffs plots adjoin several plots belonging to defendants.

It is sworn in the affidavit of Dr. Chamia (Second plaintiff) that the plaintiffs reside in their respective plots with their families enjoying peace and quiet in this density area.

However, he swears that the defendants have brought construction materials upon their plots and have started constructing mosques flats and or religious institutions contrary to laws affecting low density areas.

The plaintiffs have raised objections to the Municipal Council to damage of user urging these changes which is under consideration by the Council.

The complainants raised by the plaintiffs is that there will be overcrowding, thieves will move in causing fear and panic to the plaintiffs and their families, road congestion and poor flow of motor vehicles making access difficult and causing inconvenience to road users.

The defendants therefore say that the plaintiffs have no locus standi to bring this suit since according to them this is a public nuisance and the Attorney General has not given the plaintiffs consent.

The case of Nairobi Mamba Village -vs- National Bank of Kenya HCC No. 1838/01 at Commercial courts Milimani which is cited here concerned a dispute over charge property by a guarantor (not a party) to secure a loan advanced to the Plaintiff by the defendant. The Court found that there was no locus standi. This was in connection of private contracts and not a matter of public interest or nuisance.

However, the court found that the Plaintiff had no proprietary interest and therefore no locus. Authority No. 3 is a Ugandan case where the suit was in respect of environment issues that a factory near the residence of Appeal was emitting obnoxious and poisonous smoke in contamination of National Environment Statute. The court found that the power to sue under the statute was vested only on the Authority (NEMA) and therefore the Plaintiff complainant had no locus standi as he was given none by the statute.

The English or Empire Digest Volume 36 on Nuisance page 256 Para.68 it is described what amounts to public nuisance.

“to constitute a public nuisance the thing must be since as in its nature or its consequences is an injury or a damage to all persons who came within the sphere of its operation so it may be so in a greater degree to some than it is to others ... . If however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations but is no nuisance or inconvenience what and or is even advantageous or pleasurable to those who are more removed from it there I conceive, it does not come within the meaning of the term public nuisance.

A peal of bells may be and no doubt it is an extreme nuisance and perhaps an intolerable nuisance to a person who lives within a very few feet or yards of them but to a person who lives at a distance from them although he is within the reach of their sound, so far from its being a nuisance or an inconvenience it may be a positive pleasure. At paragraph 69 what amounts to private nuisance – interference with any shall number no indictment will be for that which is a nuisance only to a few inhabitants of a particular place.

In the present case the complainants are a few in number all inhabiting same place with the defendants. Therefore in accordance with the above stated there is no public nuisance here. The matter affects a small group of persons. The plaintiffs say there will be degradation of the quality of their residential houses.

By pleading that the suit is under section 61 of Civil Procedure Act the defendants admit that there is existence of nuisance by their Acts.

It is my considered view that this suit concerns private nuisance and notwithstanding the plaintiff do not deem special damage. The plaintiff are entitled to present their case in court without having to involve the Attorney General.

I have already said that the provision of Order 1 rule 8 are not applicable here.

The result is therefore that the Preliminary Objection is rejected. Costs shall go to the plaintiffs.

Delivered and dated at Mombasa this 2<sup>nd</sup> day of February 2005

J. KHAMINWA

J U D G E

2/3/05

**Coram:**

Khaminwa J

Mr. Abeid

Mr. Busieka holding brief for Abuodha Advocate

J. KHAMINWA, J

Read in their presence in court.

Mr. Busieka

We apply for certified copy of the ruling. Let it be supplied on payment of copying charges.

J. KHAMINWA, J

