REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 786 OF 2003

JOHN NDUNG'U ……………………………………… PLAINTIFF

VERSUS

THE ATTORNEY GENERAL AND 2 OTHERS … DEFENDANTS

R U L I N G

The Plaintiff filed suit on 30th July 2003. By his Plaint the Plaintiff brought action against 3 Defendants.

After the 3rd Defendant had filed her Defence, the plaintiff filed an application on 6th November 2003, seeking leave to amend the Plaint.

One of the significant steps that the Plaintiff undertook was to file an application to withdraw the suit against the 1st and 2nd Defendants. The Plaintiff's said application came up for hearing before the Principal Deputy Registrar, Mrs Matheka, on 23/1/04, and the parties recorded a consent order, granting the prayers sought. In effect, there was only one Defendant in this case by the time that the matter came.

The application that was canvassed before me was the Defendant's chamber summons dated 8/10/03. By the said application, the Defendant was seeking orders to dismiss the suit and all proceedings predicated on it, including the plaintiff's application dated 12/8/03.

During the hearing of the application, the Plaintiff's advocate, Mr. Seneti pointed out to the court that the application dated 12/8/03 had been withdrawn, through a Notice filed in court on 28/10/03. I have ascertained from the court records that the Plaintiff did file a "Notice of Withdrawal of Application dated 12th August 2003". To that extent therefore, Mr. Seneti was completely correct to say that the prayer for the dismissal of that particular application (dated 12/8/03) had been overtaken by events.

Should the suit itself be dismissed, summarily?

The Defendant has submitted that the suit must be dismissed for 4 reasons:

(a) The Plaintiff has no locus standi to bring these proceedings,

(b) The suit is time-barred,

(c) Any such proceedings could only have been brought by way of judicial review, and

(d) The prayers sought cannot be granted, as it would otherwise be tantamount to granting an injunction against government.

Locus standi

It is the contention of the Defendant that the suit land is Government property. The said land is clearly described by the Plaintiff as being a road reserve and public utility land That being the case, the Defendant faults the Plaintiff for trying to agitate for rights over public land. As far as the Defendant is concerned, the only person who could have any colour of right to institute legal proceedings in respect of the suit property is the Commissioner of Lands. Section 130 of the Government Lands Act, Cap 280, is cited as the foundation for that preposition. The said section provides as follows:

> "(1) When any person without right, title or licence, or whose right, title or licence has expired or been forfeited or cancelled, is in occupation of unalienated Government Land, the Commissioner or some person appointed by him in writing may enter to a suit in any court of competent jurisdiction to recover possession thereof".

To my mind this section relates to Government Land, which has not been alienated. Thus if the suit property fitted that description, and the Government wished to recover possession of it from the Defendants, the only person who could institute legal proceedings in that regard would the Commissioner of Lands.

Mr. Seneti Advocate has submitted that the land in issue is a portion of a bigger piece of land that had been purchased by the Kwirera Housing Company, of which the Plaintiff is a member. In effect, although the material before me is insufficient for determining the question of ownership of the suit property, there appears to be a distinct possibility that the land in issue may not be Government Land.

The Plaintiff's contention is that Kwirera Housing Company did subdivide the land, and allotted the subdivisions to its members. A few parcels of land were apparently set aside for public utility, including a right of way. The Plaintiff has brought these proceedings to try and have the Defendant compelled to re-establish the said right of way. As far as I can see, the said action is not intended to have be suit property given to either the Plaintiff or the Government of Kenya.

Therefore, I am unable to accept the Defendant's contention that in order to institute this kind of action, the Plaintiff would have needed to adduce evidence that he had been authorized or instructed by the Commissioner of Lands.

Time-barred?

Section 136 of the Government Lands Act (Cap 280) stipulates as follows;

> "(1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards".

The Defendant submits that the suit is time-barred because the structures about which the Plaintiff is complaining were constructed in 1992. In effect, the suit should have been instituted before the end of the year 1993. The court holds the view that the defendant would be correct if the proceedings herein were in respect of something done under Cap 280. However, as I have indicated earlier in this Ruing, there is a real possibility that that statute may not have an application to the suit property.

But then the Defendant has gone further to submit that even if the proceedings are founded on tort, the suit would still be time-barred. I must say that this submission sounds very attractive. Obviously, if the Defendant's structures have been on the suit property since 1992, the Plaintiff is going to find it very difficult to explain the delay of 11 years, before he instituted legal proceedings. It may very well be that the suit will ultimately be dismissed on that ground, however, I decline to do that at this stage. I have arrived at this conclusion because I did not find any assertion by the Plaintiff that the actions of the

Defendant were founded on tort. The Plaint seeks a declaration that the Plaintiff is entitled to a right of way though the suit property, upon which the Defendant has built some structures. The Plaintiff also seeks injunctive relief against the Defendant, so that they do not continue to block the plaintiff's right of way. These claims are not said to be founded on trespass or such other tortuous actions attributable to the Defendant. But then again, what is the cause of action founded on? The Plaint does not appear to provide any ready answer to this question. It is for that reason that I expressed the view that the case might ultimately fail, when the Plaintiff is faced with the question as to the legal basis for the case. But until that stage is reached, the court chooses not to assume that the case is founded on tort.

Wrong Procedure?

The Defendant submitted that the Plaintiff's only possible recourse would have been by way of judicial review directed at the Government authorities, so as to compel them to perform their obligations.

The Defendant has also submitted that the injunctive relief sought would effectively be directed against the Government. It was therefore pointed out that as section 16 (2) of The Government Proceedings Act (Cap 40) precludes the court from granting injunctive relief against the government, this suit was bound to fail. I am not sure that I understood this submission, as the Government is not a party, nor is any relief sought against it. Perhaps the submission was advanced because the application was filed at a time when there were still 3 Defendants, including The Attorney General. However, by the time the application was being canvassed in court, the suit against The City Council of Nairobi and The Attorney General had been withdrawn.

Insofar as the Defendant is concerned, the Plaintiff ought to have instituted judicial Review proceedings, to compel the Government authorities to take action to re-establish the right of way. In that respect, the Defendant, once again, has an attractive preposition. But whereas that might have been an easier and more direct way of achieving the ends sought by the Plaintiff, does that mean that the route chosen by the Plaintiff herein is fatally flawed? Not necessarily.

I think that the introduction of the Environmental Management and Co-ordination Act 1999 has given residents of Kenya a much greater legal say in issues touching on the environment. I say no more on that statute for now. However, I am not prepared to summarily shut out the Plaintiff from ventilating his claims for legal relief. I should think that the legal interests of the parties herein would be best served through a full trial. I say so, because my reading of the pleadings does indicate that the Defendant does not appear to be saying that she owns the suit property. On the other hand, it does appear that the Defences are largely technical. Although I am not suggesting that technical defences should not be used, if available to a Defendant. I would nonetheless hope that in situations such as that prevailing in this case, wherein a person appears to have utilized public utility land for his own benefit, the said person should actually be required to tender the justification of their action. And whereas there might be other forums at which such an explanation may be demanded, I believe that the best place for doing so is the judicial system, as by law established.

In conclusion, I dismiss the application dated 8/10/03.

However, I do order that the costs of the said application shall be in the cause, as the application was not wholly unmeritorious. The parties are directed to take appropriate action to enable the trial of this suit proceed soonest possible.

Dated at Nairobi this 1st day of March 2004.

FRED A. OCHENG

Ag. JUDGE