REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 438 OF 2004

PARK VIEW SHOPPING ARCADE LTD ……PLAINTIFF/APPLICANT

-VERSUS-

CHARLES M. KANGETHE…….1ST DEFENDANT/RESPONDENT

WILFRED M. KIMEU……..…2ND DEFENDANT/RESPONDENT

NJAI KAMAU…….3RD DEFENDANT/RESPONDENT

RULING

1. The Application, the Prayers, the Depositions

The Plaintiff's application by Chamber Summons is dated 29th April, 2004 and was filed on 30th April, 2004. It was brought under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The application carried the following prayers:

> (a) that, the Defendants/Respondents by themselves, their servants, agents and/or persons authorized by them and all trespassing persons in occupation of L.R. No. 209/12174 belonging to the Plaintiff, be restrained from further trespassing upon the suit land;
>
> (b) that, Orders granted under prayer (a) above be enforced by way of forcible eviction forthwith of the Respondents, their servants, agents and/or persons authorized by them and all persons trespassing and being in occupation of L.R. No. 209/12174;
>
> (c) that, the officer in charge of Parklands Police Station or any other Police station in whose jurisdiction the property lies and the Provincial Commissioner, Nairobi do assist in the implementation of the Orders and/or in the eviction as ordered.
>
> (d) That costs be in the cause.

The following grounds are set out on the face of the Chamber Summons:

> (i) that, the Plaintiff/Applicant is the bona fide registered proprietor of the suit property;
>
> (ii) that, the Respondents have, without any right, trespassed upon and remained in occupation of the suit premises thereby depriving the Plaintiff of his rightful use and enjoyment of the property;
>
> (iii) that, the Respondents' continued trespass is unlawful;

(iv) that, the Respondents have previously been notified to vacate the suit land but have refused to do so;

(v) that, the Plaintiff has suffered and continues to suffer irreparable loss unless the Court intervenes.

Depositions in further support of the application are found in the affidavit of Kenneth Kiptoo Boit, sworn on 29th April, 2004 and filed with the application. The deponent avers that he is a project manger in the employ of the Plaintiff, and is in charge of oversight of construction and physical developments on the suit property. He further deposes as follows:

(a) that, he has learnt that the Plaintiff purchased the suit land from the initial grantee thereof, and became the registered proprietor in 1996;

(b) that, he is aware that the Respondents have trespassed and remained in occupation of the suit property, and there they carry on their businesses along with their employees and other persons authorized by them;

(c) that, he is aware that the Plaintiff has for several years expended its effort and resources to secure the voluntary removal of the Respondents and all persons authorized by them who are in occupation of the suit land, but they have refused to move.

(d) that, the Plaintiff has been paying rents and rates every year chargeable on the suit property;

(e) that, the Plaintiff's development plans which had been duly approved by the relevant authorities, are now stalled due to occupation of the suit property by the trespassers;

(f) that, the Plaintiff has spent large sums of money in the purchase of the property and further in obtaining necessary approvals as well as paying rates, rents and other charges attached to the suit property;

(g) that, the Plaintiff's right of enjoyment, occupation and use of the suit property has been negated by the trespassers;

(h) that, the Respondents and other trespassers have defied all previous efforts, including those of the Provincial Administration, and this would necessitate the Provincial Commissioner for Nairobi and officers of the Parklands Police Station being authorized to assist in enforcing the Orders of the Court.

For the Defendants/Respondents, a replying affidavit by Charles M. Kangethe dated 24th May, 2004 was filed on the same date. The main elements in this affidavit are as follows:

(i) that, the deponent is the Chairman of an organization known as Westlands Environmental Caretaker Self-Help Group, registered with the Ministry of Culture and Social Services as a "Local Self-Help (Harambee) Group" on 23rd February, 1993 and having as its object "the establishment of sustainable environmental management principles in protecting and conserving the environment";

(ii) that, the suit land, L.R. No. 209/12174, is a riverbed, marshland and wetland along one of the tributaries of the Nairobi River;

(iii) that, the Self-Help Group has 52 members most of whom have been growing flowers, plants and trees in pots on the land since 1982;

(iv) that, members of the Self-Help Group have a business permit from the City Council of Nairobi;

(v) that, prior to the allocation of the suit land to the person who sold it to the Plaintiff, Sobhajchand Chandulal Shah, in 1994, the suit land was public land;

(vi) that, the Defendants were occupying the suit land prior to the transfer of the same to the Plaintiff and that the Defendants are not trespassers;

(vii) that, the activities of the Defendants have enhanced the quality of the environment in the local area;

(viii) that, the Defendants have referred the dispute over the suit land to the National Environment Management Authority, which is yet to state its position;

(ix) that, the Defendants also did lodge a complaint with the Commission of Inquiry into the Land Law System of Kenya, which gave the warning that the suit land was public land;

(x) that, the Plaintiff has since the 1995 – 96 period been using the Police and the Provincial Administration in a bid to evict the Defendants from the suit land;

(xi) that, the deponent believes that the construction proposed by the Plaintiff would be a threat to the clean and healthy environment whose protection is guaranteed under the Environmental Management and Co-ordination Act, 1999;

(xii) that, the Plaintiff has not exhibited any authority, approval or consent from the National Environment Management Authority (MEMA) approving the intended constructions on the suit land;

(xiii) that, the Defendants do, for their part, have approval from the National Environment Management Authority to continue with their environmental conservation initiatives.

2. Fundamental Issues Emerging from the Pleadings

The Defendants' affidavit, as I will underline further, later on, reveals the complexity of the issues for determination in the instant matter and indeed in the main suit, commenced by the Plaint of 29th April, 2004. This affidavit exemplifies several phenomena of special relevance to the sanctity of the law, and to the development and reform of the law in Kenya today and in the future. I can immediately identify the following such phenomena:

(a) the extent to which the economic and pecuniary needs of not only private individuals but also the impoverished public authorities, has led to a random mode of extracting cash in licence fees, registration fees or trade arrangements in respect of lands commonly perceived as ***public lands;***

(b) the preparedness of public authorities of different kinds to assert their jurisdiction in mutual competition over spontaneous activities taking place in such commonly-perceived public lands;

(c) the absence of governing jurisdictional law or regulations regarding such commonly-perceived public lands;

(d) a confusion in the regulation of such commonly-perceived public lands, which is thought to justify a duplicity in ownership and control yardsticks;

(e) a clear threat which such confusion in jurisdiction poses for the traditional legal principles attached to ***private property;***

(f) the attractiveness of such a confused ownership and control regime to numbers of the economically – underprivileged, who begin to assert new kinds of title under the umbrella of ***public cause***, and who invariably buttress their claim with resistance or potential civil disobedience.

3. Joinder of Issues: Public Land and Environment *versus* the

Sanctity of Private Property

It is not a plain task resolving this application on the basis only of the depositions on record and of the submissions of counsel, as it is obvious that Mr. Kenneth Kiptoo Boit's supporting affidavit rests on the traditional principles of the sanctity of private property, pure and simple; whereas the replying affidavit of Mr. Charles M. Kangethe is founded on entirely novel considerations appearing to invoke major public-interest themes associated with the environment. The Defendants have attempted, just as much as the Plaintiff, to anchor their claim in some ***legal framework*** wherein different public authorities are not only involved but clearly interested.

Against this background, it is hardly surprising that Mr. Kenneth Kiptoo Boit could not avoid filing a further supporting affidavit, which is dated 11th June, 2004 and filed on the same date. It is worthwhile setting out the essential content of this affidavit:

> (a) that, there has been no alteration made to the grant of the suit land, which is legally and rightfully owned by the Plaintiff ***as a sole proprietor***;
>
> (b) that, the suit land is ***private property***, and consequently any permit or licences issued to the Respondents were so issued irregularly;
>
> (c) that, the deponent believes the Plaintiff's Advocates who have informed him that illegal occupation of the suit land will not confer any right of ownership upon the Defendants or convey good title to the Defendants.

The issues are thus clearly joined, with the Applicant restating its conventional property rights, even as the Defendants anchor their riposte in the public interest and the apparent recognition by public authorities which have their foundations in established legal arrangements.

On 21st May, 2004 the Defendants defined the legal basis of their case by filing grounds of objection, under Order L rule 16 of the Civil Procedure Rules. The material ones of these grounds are set out below:

> (i) that, the suit land is riverbed and wetland under the Environmental Management and Co-ordination Act, 1999 and is not capable of being alienated to any individual as it is the common heritage of mankind;
>
> (ii) that, the Defendants and 49 others have conserved the riverbed and wetland by enhancing its environmental quality and growing trees, plants and flowers in pots and beautifying the area;
>
> (iii) that, the Defendants and others have occupied the land with the express authorization and licences from the City Council of Nairobi;
>
> (iv) that, the issue of the allocation of the land is pending before the Public Complaints Committee of the National Environment Management Authority;
>
> (v) that, the Ministry of Environment, Natural Resources and Wildlife has directed that the suit land being part of the marshland along one of the tributaries of the Nairobi River, be preserved as public land;
>
> (vi) that, the Ministry of Environment, Natural Resources and Wildlife has noted that the activities of the Defendants and others have enhanced the environmental quality of the local area;
>
> (vii) that, consequently the ***Plaintiff does not have a good title to the land*** as it is liable to be revoked by the Government, this being public land;

(viii) that, the suit land sits on a riparian reserve, which should be preserved;

(ix) that, the Plaintiff has not obtained the necessary authorizations, consents and approvals from the National Environment Management Authority;

(x) that, the Plaintiff's intended activity would be a threat to the Defendant's right to a clean and healthy environment guaranteed to every Kenyan under the relevant Act;

(xi) that, the Plaintiff has not carried out the requisite environmental impact assessment as a basis for its proposed developments;

(xii) that, the orders sought should not be granted, because they would determine the suit at an interlocutory stage.

(xiii) that, the Plaintiff is not seeking to maintain the ***status quo*** but to evict the Defendants without the benefit of a full-scale trial;

(ix) that, the balance of convenience lies in favour of the Defendants and the other 49.

4. Submissions of Counsel: The Applicant's Case

Mr. Lilan for the Plaintiff remarked that the Plaintiff was the legal owner of the suit land which had been registered in its name in 1996. Counsel stated that the Respondents were in occupation of the suit land without the authority of the owner, and have resisted efforts to have them move out, and with the consequence that the Plaintiff has been unable to enjoy or develop the suit property.

Counsel took clear positions on the claim by the Respondents that they had been in occupation of the suit land before the Plaintiff became the registered proprietor; that the suit land is public land; that the Respondents are lawfully on the land and have been issued with trading licences. Counsel had a clear riposte: ***a registered proprietor of land with title is the indefeasible, absolute owner to the exclusion of all others, and any other interests on the same land are subordinate to the proprietor's title***. Any licence attached to the said land was, perforce, extinguished if not issued by the rightful owner, and thus, counsel submitted, the Respondents have no valid, legally-recognized interest on the suit land and they cannot remain there against the wishes of the registered owner. Counsel cited Section 23(1) of the Registration of Titles Act (Cap. 281) as the governing law on the exclusive title of the registered owner. Counsel relied on annexure "KKB1" to Kenneth Kiptoo Boit's affidavit of 29th April, 2004 which showed that the suit plot had been transferred to the Plaintiff on 21st December, 1994. He then cited the case, ***Michael Githinji Kimotho v. Nicholas Muratha Mugo***, Civil Appeal No. 53 of 1995 in which the Court of Appeal held (P.4):

> *"The issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the Commissioner of Lands and the respondent. The protected rights of a proprietor under S.28 of the Registered Land Act cannot be defeated except as provided in that Act, and* ***certainly not at the instance of the appellant."***

On the claim that the suit land is public land and that title thereto had been issued irregularly, counsel submitted that the Respondents had no ***locus standi*** and could not raise the issue; they could only challenge the Commissioner of Lands; on the authority of ***Michael Githinji Kimotho v. Nicholas Muratha Mugo***, they could not challenge the Plaintiff's title.

On the claim that the Defendants had been on the suit land prior to its being registered in the name of the Plaintiff, counsel submitted that they could only have been there ***on a licence,*** and this would be terminable without notice; and once the title changes hands, licensees thereupon lose their licence; ***the licence does not follow the title***; and hence the Defendants and those in occupation with them, were transformed into trespassers. In support of this argument, counsel cited the case, ***Magdaline Wambui Muhia v. Joseph Mwangi Wanjau & Two Others***, HCCC No. 2424 of 1995. I will quote here the

relevant passage, in the Ruling of the Honourable Mr. Justice Mbito (pp. 3 –4):

> *"According to S. 23(1) [of the Registration of Titles Act]…a certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the 'absolute and indefeasible' owner thereof and the title shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. Further by the provisions of S.24 of the said Act, it is provided that a party deprived of land through fraud or error, can claim damages. It makes no provision for recovery of the land in dispute.*
>
> *"In the instant case, the respondents are shown by registration to be the proprietors of the suit premises. By force of the said provisions, they are thus the indefeasible owners of the said premises and their title cannot be challenged except [for] fraud. And even if challenged, such a party is only entitled to claim damages but not land. On the other hand, the applicant is a mere licensee of the Council and has no registered interest in the suit premises. It is clear therefore that she cannot maintain the suit for damages. It is observed that the applicant is a mere licensee of the premises [deriving her interest from] a party who does not own them.* ***If she were required to move out, she could get alternative accommodation by the Council****… On the other hand the respondents are* ***proprietors and are the indefeasible owners of the suit premises and if denied occupation, it would be tantamount to appropriating their assets without compensation, which is contrary to law****. I am not therefore satisfied that the applicant would suffer an injury which cannot be adequately compensated by damages if she were not protected by an injunction.*
>
> *"Finally on balance of convenience, it is observed that the* ***applicant is a licensee*** *[of] a third party, namely the Council, which is ready to house her. On the other hand, the respondents are* ***being kept out of [their] property without prompt compensation, which is contrary to the Constitution****… In this regard… I find that it would be better for a licensee to be inconvenienced as she had nothing to lose other than satisfaction that [the] law was followed in the transfer, than to* ***make an owner suffer without prompt compensation as provided by law****."*

I have quoted liberally from the ***Magdaline Wambui Muhia*** case, because it so well lays out the legal ***status quo*** on property rights; the essence of the ***sanctity of private property***; the importance of the ***Land Office records*** showing legal ownership; the ***obligation of the Courts to uphold the records***; the ***constitutional rights to full and fair compensation*** where a private person's property is taken for public use; the ***superiority of the registered proprietor's title to the claims of a licensee;*** etc.

Counsel for the Applicant submitted that he had established a ***prima facie*** case with a probability of success. He pleaded that the Applicant had a valid title, while the Respondents had none and further had no permission to remain on the suit land. He submitted that the Plaintiff's being denied the opportunity to use the suit land which is prime commercial property, could not be compensated by damages. He submitted further that the balance of convenience stood in favour of the Plaintiff, a party which had demonstrated a strong case with a probability of success. He prayed for Orders as set out in the application.

5. Submissions of Counsel: The Respondents' Case

Mr. Kabaka for the Respondents stated what is true, with respect, that the Plaintiff's case is against three named persons only, whereas the body of which they are the officials has 52 members. The relevant prayer in the Chamber Summons is that -

> "*the Defendants/Respondents by themselves, their servants, agents and/or persons authorized by them and all trespassing persons in occupation of L.R. No. 209/12174 belonging to the Plaintiff, be restrained from further trespassing upon the suit land*."

If the Order prayed for were to be issued, then, in my view, it would be made against the Defendants/Respondents, or their servants or agents or those authorized by them to occupy the suit land.

And what about the other 49 persons acknowledged by the Defendants to be in occupation of the suit land? Are these 49 the servants of the Defendants? Or are they the agents of the Defendants? Or, have these 49 been authorized by the three Defendants to occupy the suit land?

In the Plaint dated 29th April, 2004 the Defendants are referred to in the following terms (paragraph 4):

> *"The Defendants on unknown dates prior to the filing of this suit, by themselves, their employees, servants, agents and/or persons authorized by them, wrongfully entered the said land and premises and have wrongfully taken possession of the same and erected structures whereupon they continue to carry on assorted business; and have thereby trespassed and are still trespassing thereon."*

There has not been, in my view, a proper identification of the 52 acknowledged occupants of the suit land as a body clothed with legal personality, nor has it been shown that the unidentified 49 are indeed the servants or agents of, or persons authorized by the three Defendants. On file is a "Certificate of Local Self-Help (Harambee) Group Organization, Nairobi Area", which describes a group known as "Westlands Environmental Caretaker Group (Self-Help)." This certificate is issued by the Ministry of Culture and Social Services. I have to take judicial notice that a certificate of this kind bears a purely social and moral character, and is not by any means a legal instrument constituting a corporate body with legal personality and with ***locus standi*** before the Court. It then follows that no evidence has been placed before me, or submissions made, that the said certificate constituted all the 52 occupants of the suit land into a legal person, or created such a legal relationship among them and ***vis-à-vis*** the three Defendants, that any Orders made against the Defendants would apply to them. I have to conclude that the other 49 occupants have not been sufficiently identified, for the purpose of this application. I have noted, however, that the Defendants have readily admitted that they are occupying the suit land in league with the other 49; and so in principle any Orders made against the three should apply equally to the 49. But, enforcement against the 49 could prove difficult if these persons are not specifically identified.

Although Mr. Kabaka invoked the "registered status" of the occupants of the suit land, I must hold that the registration in reference is not one that imports ***juridical status*** and that connotes ***locus standi*** before a Court of law. It is on record that counsel stated that the group of 52 persons occupying the suit land is registered under the Societies Act (Cap. 108); but this is doubtful, as no evidence was given to that effect.

Mr. Kabaka attempted to attribute legality to the activities of the occupants of the suit land, on the basis that: they have been in possession of the land since 1982; and they have been obtaining operation licences from the City Council of Nairobi on a regular basis.

There is evidence, of course, that the occupants of the suit land have been obtaining licences. For example, the City Council licence of 9th December, 2002 for which Kshs.8000/= had been paid, is in the name of "Westlands Environmental Caretaker Group (Self Help)"; the licensed activity is "Flowers/Plants & Pots"; and the expiry date of the licence is 31st December, 2003. The licence dated 2nd February, 2001 is expressed to expire on 31st December, 2001; it is in the name of "Westlands Environmental Caretaker Group (Self-Help)"; the licensed activities are "Flower/Plants, Nurseries and pots"; the fee paid is Kshs.8000/=.

On the basis of the foregoing submissions, has counsel succeeded in establishing that the Defendants, or even the "Westlands Environmental Caretaker Group", has a legal right to be in occupation of L.R. No. 209/12174? I think he has ***not.*** All counsel has done is to show that the Defendants were licensees, and licensees not of the registered owner of the suit land, namely the Plaintiff, but of the City Council of Nairobi. Earlier on I discussed with approval the principles laid earlier by this Court in the case ***Magdaline Wambui Muhia v. Joseph Mwangi Wanjau and Two Others***, HCCC No. 2424 of 1995. On well-recognized principles of law, and on the basis of the cognate case of ***Magdaline Wambui Muhia***, the Defendants would have no rights capable of being matched against the superior title of the Plaintiff.

6. The Defendants' Novel Case: How do the claims of Public Land and the Environment stand, in relation to the Plaintiff's Private property Rights?

It is clear already that under what may generally be regarded as the applicable law of property, which provides constitutional protection (Constitution of Kenya, Section 75) for property rights, the position of the Respondents would be utterly untenable. Therefore, in an ordinary situation I would have upheld the Plaintiff/Applicant's application without hesitation, at this point. The Judge's mandate, however, requires a thoroughgoing consideration of all the questions canvassed by the parties. And the backbone of the Respondents' case is that the suit land is ***public land***; that it is a wetland; that it is an ecologically sensitive zone lying by a river tributary and a protected area which cannot rightly be the property of the Plaintiff; that the allocation of the suit land to the Plaintiff was wrongful and a breach of the law; that the Respondents have a better title because they operate as custodians of the environment at the suit land, in the ***public interest.*** Before assessing the legal import of these contentions, I will set out the pertinent submissions of counsel.

Mr. Kabaka submitted that the suit land is a wetland and was, on this account, public land before it was sold to the Plaintiff. Counsel invokes the name of the National Environment Management Authority, as a body now considering the dispute over the allocation of the suit land, and argues that the matter is pending before the ***legally authorized*** public agency. No hard evidence is, however, given of the pendency of this matter before NEMA; no time-frame is stated when NEMA might complete any inquiry it may now be making; and no submission has been made on how any NEMA decision could affect the authority of the Commissioner of Lands and of the Lands Registry, regarding the creation of title for the suit land.

Counsel also invokes the name of the Ministry of Environment, Natural Resources & Wildlife, asserting that the Ministry has recommended that the suit land be preserved as public land. The only evidence in this regard is a letter (which bears no date) from the Honourable Assistant Minister for Environment, Natural Resources & Wildlife (as it then was), addressed to the erstwhile Commission of Inquiry into Illegal and Irregularly Allocated Public Lands. The relevant part of this letter reads as follows:

> *"…this matter has been outstanding for a long period of time and the Public Complaints Committee of NEMA has in the past received a number of matters and protests from various organizations including the Green Belt Movement.*
>
> *"These protests have been made with the intention of preventing … construction on the above marshland along one of the tributaries of the Nairobi River. The above land should be preserved as public land.*
>
> *"I am aware of a group (Westlands Environment Caretakers Group) that has continued to produce tree seedlings and flowers on the above land. This activity has enhanced the quality of the environment in the area and in Nairobi in general. This group has not put up any construction or structures on the above parcel of land.*
>
> …..
>
> *"I hereby seek your immediate intervention and investigation of this matter with a view to saving this riverbed and in order that the sanctity of the environment and the environmentally-sensitive lands can be conserved."*

On 10th December, 2002 the Joint Secretaries to the Commission of Inquiry into the Land Law System of Kenya wrote to the Secretary, Westlands Environmental Caretaker Self-Help Group, indicating that their final Report had already been submitted to His Excellency the President on 25th November, 2002 and thus it would not be possible for the Commission to conduct an inquiry into the complaint regarding the suit land. The Joint Secretaries indicated: "however, your file will be handed over to the Office of the President for follow-up action."

Counsel did not suggest how the two communications should be regarded, in terms of their legal import, and especially in relation to accrued property rights such as were being claimed by the Plaintiff/Applicant. In what capacity was the Honourable Assistant Minister writing? Did she put in place

any process that would lead to ***legal decisions*** at the level of the Lands Office? If so, were any time-frames specified, such as would ensure that the Plaintiff/Applicant's rights were safeguarded?

Counsel also contended that the suit land falls in the category of lands under investigation, in relation to the regularity of the mode of grant of title? What legal expression does such a concept, "lands under investigation", take? If it takes any recognized legal form, is there a time-frame prescribed, and how does such investigation affect accrued land interests already duly registered in the Lands Office? Counsel did not address these questions, even though they contain the very essence of safeguards for property rights, as prescribed under the law.

Mr. Kabaka contended that the Plaintiff/Applicant did not have a good title to the suit land, and he was calling for the revocation of the title. He argued that the Plaintiff had no authority from the National Environment Management Authority for ownership and for conducting developments at the suit land. This argument, however, lacked persuasive force, as counsel did not make any submissions on the authority of NEMA under the Environmental Management and Co-ordination Act, 1999 or show how such authority related to the protection of property titles issued by the Registrar of Lands.

Mr. Kabaka disputed the Applicant's claim to ownership of the suit land, on the basis that this was a river-bed which was being properly cared for and protected by the Defendants through the propagation of flowers and seedlings, but which the Plaintiff's activities were certain to imperil.

This submission is clearly a venturesome one. It was not at all submitted that any specific environmental standards or measures had been proclaimed for lands such as the suit land, and so it remained unclear whether the Defendants were being guided by the best and the approved scientific principles of environmental conservation. It was not shown that the obligation of environmental conservation ***could only be conducted by the Defendants*** and not by anyone else and also not by the Plaintiff/Applicant. No authoritative information or evidence was produced as to the Government's stand regarding the suit land as an environmental conservation unit. It was not shown how expected actions by NEMA or of the City Council of Nairobi or any other public agency, related to the legal authority of the Commissioner of Lands to issue indefeasible titles such as that now held by the Plaintiff/Applicant.

Counsel for the Respondents, however, submitted that the Applicant had failed to make a *prima facie* case warranting the issue of the Orders sought. He contended that this was a matter to be disposed of at the full hearing, and prayed that the suit be dismissed with costs.

7. Conventional Property Law: The Plaintiff/Applicant's Reply

Mr. Lilan returned to the principle of the sanctity of private property, which as I have already remarked, is secured under Section 75 of the Constitution. Counsel contended that, even had the Plaintiff attempted to eject the Defendants (as averred in paragraphs 11 and 12 of the first Defendant's replying affidavit of 21st May, 2004), he would have a common law right so to do. He submitted that the rightful owner should not be prevented from taking possession of its own property. He urged that if the rightful owner of the suit land could obtain justice at this interlocutory stage, then the Orders prayed for should be granted. He submitted that such interlocutory remedy would not undermine the main suit, as the claim for damages would still have to be tried.

Mr. Lilan disputed the assertion made for the Defendants/Respondents, that the suit land was public land. He submitted that this was an unsubstantiated claim which should not be allowed to compromise the Plaintiff's accrued legal rights – especially because no document had been produced stating authoritatively that it was public land. It ceased to be public land, if it ever was, counsel urged, the moment a private title was issued. He submitted that the references to "wetland", "marshland", "riverbed" were no more than legally-pregnant fictions deviced for the purpose of supporting untenable claims by the Defendants.

Counsel further contested the invocation of names of public agencies, such as the National Environment Management Authority, to justify denial of the Plaintiff's right to possession and use of its own land. He

submitted that no document at all had been produced to show that any developer in the area where the suit land is located, is required to obtain the authority of NEMA before undertaking any physical development. He contended that, were such authority to be required, it ought not to be thought that the Plaintiff as the land-owner would have no capacity to seek and obtain the same. This submission, in my view, does carry force and coincides with my earlier observation that it is not easy to see how the Defendants alone became the right people to safeguard the environment at the suit land, while even the legal owner could not be charged with the role of providing such safeguards.

Mr. Lilan submitted, and quite persuasively, that any genuine grievance on the part of the Defendants ought to have been brought before the ***Commissioner of Lands***, who is the custodian of the issuance of property titles; and indeed, if need be a case could have been made for ***compulsory acquisition in the public interest***, subject to the applicable constitutional guarantees.

8. Final Analysis and Orders

This is a truly seminal case on the relationship between, on the one hand, current constitutional guarantees of ownership and enjoyment by individuals of ***private property***, and on the other, the collective interests and legal rights of communities in public resources or amenities such as the environmental resources. In the common law tradition, which is part of our heritage of legal culture, and under commonplace constitutional principles considered an essential element in political civilization, the sanctity of private property is a virtue. In the present case the Plaintiff is stating a simple fact, that he is the owner of the suit land, having been duly recognized as such by the duly authorized agency of the state. On the face of it this is an unanswerable claim. But the Defendants contest this otherwise valid claim, relying on environmental, public interest principles said to be spawned by the peculiarities of the suit land, the fact that the City Council has recognized their occupancy of the suit land, and the fact that they have called upon the National Environment Management Authority to come to their aid and to keep out the registered owner.

Environmental conservation, by its intrinsic character, cannot be supposed to be a task for Government alone, and all citizens have a right and a duty to make an input. Indeed, the Environmental Management and Co-ordination Act (Act No. 8 of 1999), Section 3(1) thus provides:

> *"Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment."*

On the basis of that provision, if nothing else is taken into account, the Defendants/Respondents in the instant case could very well contend that by denying the Plaintiff/Applicant access to his own land they are protecting the environment. But I have already discounted the validity of such an argument, especially because no evidence was brought, or submission made before me that only the Defendants have the capacity to ensure such protection. I should add that, although "every person" has been empowered by Section 3(1) of the Act aforesaid to "Safeguard and enhance the environment", this must be subject to the State's policy and management directions. This is essential for efficacious and well-ordered environmental management, and for compliance with the governing law, the relevant Ministerial regulations, and the authoritative provisions of the Constitution. Once this principle is observed, then it will be readily seen that the claims now being made by the Defendants/Respondents must be subjected to the Constitution. The claims of the Defendants cannot be upheld if they run counter to the express provisions of the Constitution.

Section 75(1) of the Constitution thus stipulates:

> *"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied -*
>
> *(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or*

utilization of property so as to promote the public benefit; and

(b) ……..

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

Subject to the limitations to acquisition of private property set out above, it is provided in sub-section (6) of the Constitution that where a specific law so provides, private property may be acquired [S.75(6)(vii)] -

"for the purposes of the carrying out thereon of work of ***soil conservation or the conservation of other natural resources*** *or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out)…"*

The effect of the foregoing qualifications to the guarantees of private property rights in Section 75, is that it is indeed possible for the State in a proper case, to acquire L.R. No. 209/12174 which is currently registered in the name of the Plaintiff/Applicant.

If, therefore, the Defendants/Respondents had genuinely wished to pursue the cause of environmental protection, by virtue of the empowerment they have under Section 3(1) of the Environmental Management and Co-ordination Act (Act No. 8 of 1999), then the logical and correct cause of action for them would have been to approach the Ministry of Environment and plead for compulsory acquisition of the suit land, under Section 75(6) of the Constitution. It is not acceptable that they should forcibly occupy the suit land and then plead the public interest in environmental conservation, to keep out the registered owner. The effect of their action is to deprive the registered owner of his land, without full and fair compensation. Since this act of deprivation is coming from private persons rather than from the State, its unlawfulness is stark and beyond dispute.

The Defendants have, in effect, taken it upon themselves to declare the environmental status of the suit land, but this can only be validly done by ***the Minister***. Section 42(2) of the Environmental Management and Co-ordination Act thus provides:

"The Minister may, by notice in the Gazette, declare a lake shore, wetland, coastal zone or river bank to be a protected area and impose such restrictions as he considers necessary, to protect the lake shore, wetland, coastal zone [or] river bank, from environmental degradation…"

The Act also empowers the Minister to determine the modes of environmental protection and the standards thereof, at the environmentally-sensitive areas. Section 42(3) thus provides:

"The Minister may, by notice in the Gazette, issue general and specific orders, regulations or standards for the management of river banks, lake shores, wetlands or coastal zones and such orders, regulations or standards may include management, protection, or conservation measures in respect of any area at risk of environmental degradation…"

From this provision it is clear that the Defendants/Respondents cannot arrogate the authority to determine standards and modes of environmental protection at the suit land. They have sought to usurp the functions of the Minister, and this must be held to be ***unlawful.***

From the foregoing analysis I find that the following Orders are appropriate:

1. The Defendants/Respondents by themselves, their servants, agents and/or persons authorized by them and all trespassing persons in occupation of L.R. No. 209/12174 registered in the name of the Plaintiff, are hereby restrained from further trespassing upon the suit land, pending the hearing and determination of the main suit.

2. The Minister responsible for the Environment shall, within 90 days of the date hereof, ensure the conduct of a professional and policy assessment of L.R. No. 209/12174 (the suit land) in accordance with Section 42 of the Environmental Management and Co-ordination Act, 1999 (Act No. 8 of 1999) and shall, taking into account the relevant laws and in particular the provisions of Section 75 of the Constitution, issue any necessary directions regarding the said suit land.

3. The persons affected by Order No. 1 hereof shall duly comply within 60 days of the date hereof, and if they shall fail so to do, their compliance shall be ensured with the assistance of the Officer Commanding the Parklands Police Station or any other Police Station in whose jurisdiction the suit land lies.

4. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 24th September, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.,

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Lilan, instructed by M/s. Kipkenda, Lilan & Co. Advocates

For the Defendants/Respondents: Mr. Kabaka, instructed by M/s. Ng'ang'a Thiongo & Co. Advocates