REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1266 OF 2002

GARDEN SQUARE LTD ……..……..PLAINTIFF

VERSUS

KOGO & ANOTHER……..DEFENDANT

RULING

At the commencement of the hearing of plaintiff's application for interlocutory injunctive relief dated 20.12.2002, the defendants advocate took a preliminary objection thereto and to the suit itself on the grounds

(i) the suit filed is *res judicata*; (ii) as a mere director of the 2nd defendant, no claim has been made and none is sustainable against the 1st defendant who must be discharged from the suit forthwith; (iii) the plaintiff lacks *locus standi* and competence to raise or sustain the issues raised in the suit; (iv) the plaint and the supporting affidavit dated 20.12.2002 and the application of even date are fundamentally and incurably defective; and

(v) the plaintiff has failed to comply with the mandatory requirements of order XXXIX rule 3(3).

I have now had the opportunity of perusing the plaint filed and considering the arguments advanced by the learned advocates for the parties. From the material on record the pertinent background for the parties. From the material on record the pertinent background is as follows. In High Court Civil Suit No 2470 of 1996, the present plaintiff sued the present 2nd defendant, who was the only defendant in 'that suit, to restrain it from developing the defendant's Plot No LR No 209/9063 other than in accordance with the part development plan thereof of 18.11.74 which made it a special purposes plot. The plaintiff also sought an order restraining the defendant from cultivating the said plot or building houses thereon and/or interfering with sewage, storm water drainage and/or high voltage power lines. The plaintiff also complained that the defendant had unlawfully erected a perimeter wall around the said plot which wall had encroached on the ten meter wide road which served the plaintiff's neighbouring plot No 209/9062. The said suit was according to the defendant's replying affidavit and in particular exhibit "KOG 2" settled on the terms –

(a) That the defendant shall utilize his plot LR No 209/ 6093 as special purpose plot for a car wash and recreation purposes only in accordance with Ministry of Lands and Settlement P D O (Part Development Plan)

Ref No 42/8/73 dated 18th November, 1974 and in conformity with the defendant's building plans approved by Nairobi City Council and registered as No DF 826 dated 29th October 1997.

(b) That the ten metre (10) road separating the plaintiff's plot LR No 209/9062 and the defendant's plot LR No

209/6093 be preserved as a public road and be not encroached by either party.

(c) That the defendant, his servants and agents be and are hereby restrained from interfering with sewer and storm water drainage on plot LR 209/9063 without permission or authority of the City Council of Nairobi.

(d) Each part to bear its own costs.

The reference to LR No 6093 as the defendant's plot is obviously a typing error and the correct number is LR No 209/9063. In the present suit, the plaintiff has sued the defendant in the earlier suit as the 2nd defendant.

The 2nd defendant's Managing Director and principal shareholder is sued as the 1st defendant. It is averred that in terms of the grant issued to the 2nd defendant in respect of the property in question, the 2nd defendant was required under special condition number 5 to utilize the plot for a petrol service station. It is further averred that in breach of the consent order recorded in the earlier suit and in breach of the special condition in the grant, the defendants or either of them have (a) embarked on the erection of structures upon LR No 209/9063 that resemble market stalls, (b) failed to erect a car wash and recreational park in terms of the consent recorded in the earlier suit, and (c) ignored a notice issued on the 31st October 2002 by the City Council of Nairobi enjoining them to stop infringing by law 252 (1) Building Order 1968. The plaintiff contends that if the defendants are not restrained from continuing with the unlawful construction their illegal acts shall lead to depression of the value of the adjacent properties and in particular LR No 209/9062 belonging to the plaintiff. The reliefs sought are injunctions to restrain the defendants from continuing to act in breach of the consent order made on 28th May 1998 or from erecting structures upon LR No 209/9063 in breach of the special conditions endorsed on Grant IR 66044. I now turn to a consideration of the grounds of preliminary objection against that background.

Is the present suit *res judicata*? Now, although the defendant's counsel invoked both the provisions of sections 6 and 7 of the Civil Procedure

Act to support his argument that the suit was *res judicata*, section 6 is not strictly relevant. It provides for stay of a subsequently filed suit where the same issues are directly and substantially in issue in a previously instituted suit between the same parties. The relevant provision is section 7 which bars a court from trying any suit or issue in which the matter directly and substantially in issue therein was a matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim and the said matter was heard and determined by a court of competent jurisdiction. In that regard it is evident that among the things the plaintiff sought to prevent in HCCC No 2470 of 1996 was the defendant's development of its own plot in a manner which would change its character from a special purposes plot to an ordinary commercial plot. In particular the plaintiff sought to prevent the defendant from erecting houses thereon and from interfering with sewage and storm water drainage and/or high voltage power lines. That is substantially the same relief which is sought in the present suit and application. The plaintiff does not want the defendants to develop the plot other than as a petrol station or as a car wash and/or recreational facility. The bone of contention is as to what use the defendants can put the plot in question. Seen that way, I am in agreement with the submissions of counsel for the defendants that those issues having been resolved by way of the consent order recorded in the earlier suit in the terms I have already set out, the present suit is *res judicata* and is for striking out. Having reached that conclusion, it is unnecessary to decide on the other grounds of preliminary objection.

However as counsel spent sometime on them I will deal with them shortly. Is the 1st defendant properly enjoined in the suit? I agree with the submissions by counsel for the defendant that to enjoin the 1st defendant in this suit is a violation of the basic principle of company law that a limited liability company is a distinct and separate entity from its shareholders or d1irectors. The latter cannot be sued for alleged wrongs by the company. In the instant matter no claim is made and none in the circumstances could be

sustained against the 1st defendant. However the point raised is not a proper point of preliminary objection for the misjoinder could not itself defeat the suit. The substance of the defendant's argument ought to have been canvassed in a substantive application for striking out the name of the 1st defendant from the suit. Raising it as a preliminary objection is a misconception of what constitutes a true preliminary objection, namely a pure point of law which if successfully taken, would have the effect of disposing the suit or application entirely.

On whether the plaintiff has *locus standi*, I would agree with the submission of its counsel that as the plaintiff's grievance is partly rooted in the alleged noncompliance or violation of a consent order recorded between it and the 2nd defendant, the plaintiff has *locus standi* to ventilate the said grievance and seek appropriate relief. That point of preliminary objection is accordingly overruled. However whether or not the plaintiff could ventilate such grievance in this suit or should have done so in the suit in which the consent was recorded would have been a different matter altogether. In my opinion a party cannot enforce a consent decree by filing a subsequent suit for the purpose. Non-compliance with such a decree would have been a meet and proper subject matter of contempt proceedings.

The fourth ground of preliminary objection is also not a true point of preliminary objection. Even if paragraph 10 of the plaint did not strictly comply with the provisions of order VIII rule 1 (e) – and on the contrary I think it does – such non compliance would not have been fatal to the suit as it was capable of being cured by an amendment. And the objections to paragraphs 9 and 10 of the plaintiff's supporting affidavit are also not true points of preliminary objections. They are just objections to those paragraphs of the affidavit which if successful would result in the two paragraphs being struck out and not the entire application or suit. However for whatever it is worth, I would express my complete agreement with the submissions of counsel for the defendants that the two paragraphs though couched in the form of a deposition of matters which the plaintiff is personally cognisant of are in reality a deposition of matters of which the plaintiff had been informed by someone at City Hall who is not disclosed. To that extent they offend the provisions of order XVIII rule 3

(1) of the Civil Procedure Rules and would have been for striking out. The last point of objection is also, I am afraid, not a true preliminary objection. Whether or not the application and order had been served on the defendants within the time limited by order XXXIX rule 3(3) is not a point which would defeat the suit or the application. Be that as it may, I think the submission of counsel for the plaintiff that the order having been formally issued on 30.12.2002 and the same having been served on 3.1.2003 it was served within the time limited by the rule would have been for rejection. The reason is this. The rule requires that the order be served within three days from the date thereof. In my discernment, the date of the order is not the date when it is issued but he date when it is given. In this case, the order was given on 24.12.2002 and service thereof on 3.1.2003 was clearly beyond the time prescribed by the rule. Further more the purported service took the form of affixing the order at a construction site. Such mode of service is unknown to the law as it does not accord with the provisions of order V relating to service on an individual defendant or on a corporation. It was thus ineffective service.

What the consequence of such ineffective service would have been is a matter best left for argument on an appropriate occasion.

The upshot of my consideration of the preliminary objections is this. Although I find that the plaintiff had *locus standi* to institute the suit, the said suit and the appurtenant application for injunction are struck out with costs to the defendants on the ground that the suit is *res judicata.*

Dated and delivered at Nairobi this 16th day of January, 2003

A.G. RINGERA

…….

JUDGE