REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 135 OF 1998

INSURANCE COMPANY OF EAST AFRICA……PLAINTIFF

VERSUS

1. THE ATTORNEY GENERAL ……..1ST DEFENDANT

2. THE MUNICIPAL COUNCIL OF MSA …...2nd DEFENDANT

3. ZAHERALI BAHADURALI BHANJI …….3rd DEFENDANT

4. FAIZA ZAHERALI BAHADURALI ……4th DEFENDANT

R U L I N G

This Ruling has taken sometime coming and I must profusely apologize to the parties and their Counsel.

It is a Chamber Summons dated 4.5.98 seeking the following orders under Order 39 r 1,2 & 3 of the Civil Procedure Rules:

> *" (i) An injunction restraining the 3 rd and 4 th Defendants by themselves or by or through their servants, agents or independent contractors from developing and/or carrying out a ny construction on Parcel No. MN/1/10036 whatsoever".*
>
> *(ii) An injunction to restrain the 3 rd and 4 th Defendants by themselves or by or through their servants, agents or independent contractors from obstructing or interfering in any way whatsoever with the right of access to the Indian Ocean through the delineated Access Road enjoyed by the Plaintiff and its lessees, tenants, their employees , visitors and guests.*
>
> *(iii) A mandatory injunction ordering the 3 rd and 4 th Defendants to remove the structure under construction in Parcel No.MN/1/10036.*
>
> *(iv) An injunction to refrain the 3 rd and 4 th Defendants by themselves or by their servants, agents from sell ing, transferring, assigning, charging Parcel No. MN/1/10036 or creating any interest therein in favour of a third party".*

Henceforth I shall refer to the plaintiff/Applicant as "ICEA", the 1st Defendant/Respondent as "The AG", the 2nd Defendant/Respondent as "the Council", the 3rd and 4th Defendant/Respondents as "the Bhanjis"' who are husband and wife.

The remarkable feature about the application is that parties on the one side accuse the other of "unlawful, illegal and fraudulent land- grabbing" with the suggestion perhaps that the two wrongs should

make it right for both of them, but one refuses to budge and has come to court!.

The background for the application as far as I can gather from the material before me is this: Prior to the year 1932 there used to be a huge parcel of freehold land on the mainland North of Mombasa Island known as LR 67/221, Section 1. It was owned by M/s NYALI BRIDGE AND DEVELOPMENT COMPANY LTD, (NYALI LTD). A Subdivision Scheme was then presented to the Government (or the Council) by Nyali Ltd. and was approved for sub-division into more than 60 sub-plots numbered as original 67/169-232 but registered as Plots 553 – 616. As a pre-condition for the approval of the subdivision, the Government (or the Council) insisted that a strip of land fronting the Indian Ocean within the said Scheme be ceded to it to be reserved as "Open Space" for use as a Public utility. It was so reserved and registered as LR 67/R. The rest of the plots were sold to Individuals including plot MN/1/605 (Plot No. 605). By diverse Instruments of Sale, Mortgages, discharges and transfer, it fell into the hands of ICEA in 1979. More about this plot later.

It is alleged however, and I can only say alleged since the matter is not capable of adjudication or making findings at this stage, that a conspiracy was hatched between the Commissioner of Lands, one Arthur Kinyanjui Magugu (Magugu) who was then a Minister in the Government and ICEA to have the Public utility land reserved as open-space shared out between Magugu and ICEA. The two plots created and dished out were 5906 and 5907 to Magugu and ICEA respectively. Between the two plots however a space was left out which ICEA refers to as "a road reserve" and the Bhanji's as "a Cul-de-Sac". Whatever its name it was part of the original land reserved as Public Utility land. All that was happening is 1989.

That scenario however is denied strongly by ICEA who assert that there was no land ceded to the Government upon approval of the sub-division Scheme. The reversionary rights remained with the original owner of the land, Nyali Ltd., (as a remainder LR 67/R) which the Company left as open space but still owned. In 1974 the Government acquired through purchase the open space, as it did all other land belonging to NYALI LTD, and it became Government Land. It is the remaining Nyali Ltd Land, including that open space that was sub-divided and was allocated to individuals. The open space was subdivided into 3 and was earmarked for (a) "Hindu Community Shrine" (b) "Residential purposes" and (c) "Cottages and Hotel". ICEA applied for and and was lawfully allocated the Residential Plot (5907) since it was abutting their other plot No. 605. At the time of allocation there was no space between the ICEA plot (5907) and plot 5906, Magugu's. The Part Development Plan (PDP) used to make the allocations shows that. But ICEA says it surrendered the open space as a road of access to the Ocean before the Titles were issued. In view of all this, ICEA says the raising of the issue of validity of allocation of Plot 5907 is a deliberate attempt to obfuscate the real issue at hand, since their allocation of Plot 5907 had been standing for more that 10 years without challenge as it was lawful.

Soon after 1989 (i.e. 1990) ICEA submitted Architectural plans for three cottages on Plot No. 5907 to the Council and on approval thereof, completed their development which had direct access to the Indian ocean. As far as they knew there was also direct access to the Indian Ocean for land owners on the first row through the open space between their land and Magugu's ceded by themselves as a continuation of the existing Greenwood Lane. Land survey plans in their possession indeed so indicated and confirmation was made by private surveyors Commissioned to confirm that fact, that is M/s Hime & Zimmerlin.

As soon as they completed development of Plot 5907, ICEA embarked on the development of Plot 605 after submitting Architectural plans which were approved by the Council for putting up some high class Apartments for Commercial purposes. They were to be let out to Tourists and Upper Middle-Class tenants. They would retain their value because they are on the first row from the Ocean – separated only by a road from plot 5907- and there was access to the Ocean through Greenwood Lane. Through that open space there would also be circulation of fresh air.

ICEA was putting up the final touches to these Apartments when in 1998 they saw some strangers commencing construction of the open space or road reserve. Searches and enquiries soon established that the space had been Surveyed and a Title issued to the Bhanjis by the Commissioner of Lands. The plot carved out covered the entire space of the road reserve save for a space 3 meters wide or thereabouts

leading to the Ocean. It was referred to as plot No. 10036 and Grant No. 29320 for a Lease term of 99 years from 1.9.96 was issued under the Registration of Titles Act (RTA) (Cap 281). ICEA served notices immediately to have the intended construction stopped and further asked the Commissioner of Lands to nullify and cancel the allocation. No heed was taken and therefore they came to Court on 5.5.98 and obtained temporary orders pending the hearing of theApplication now the subject matter of this Ruling.

The contention by ICEA through learned Counsel Ms. Deche was that the Grant to the Bhanjis was made in contravention of the Law, particularly the Government Lands Act and the Local Government Act, and therefore the whole process was a nullity as was the Title. ICEA was entitled to expect that the road or road reserve or open space leading to the ocean between plot 5906 and 5907 would remain uninterferred with for the benefit of all plot owners on the first row including itself and other members of the public in the area wishing to access the ocean at that point. As a road reserve it was entrusted to the Council under S.182 of Cap 265 and it was not meant for alienation as it was already alienated.

The Government Lands Act would not apply to sanction such alienation unless part III of the Government Lands Act Cap 280 was followed, which was not. The whole process was therefore a nullity. As such there is no protection of any Title issued under the RTA since S.23 thereof protects only Titles issued in accordance with the Law, and one that is free from fraud or misrepresentation. The Commissioner of Lands represented here by the Attorney General, the Council and the Bhanjis all knew that the space was a road reserve. The Bhanjis indeed went further before the allotment to say that they spoke to the neighbours of the open space, meaning that they were aware that it was space left for the benefit of the neighbours long before they sought allocation to themselves. As for the intended user of the plot, Ms. Deche submitted that it would have a towering block of flats which are only 3 metres away from ICEA's cottages with their open swimming pools. It would mean the end of privacy for the Tourists who occupy them and devaluation of ICEA's development on that plot. There would be devaluation of the Apartments in Plot 605 also which are not only of high quality but the occupants would now lack easy access to the Ocean. An injunction should therefore issue.

Learned Counsel for the Bhanjis Mr. Khanna in response took up three technical objections first before moving on to more substantive issues. I may dispose of them in passing. He submitted firstly that the Application was incompetent as it does not comply with O 50 r 7 Civil Procedure Rules which requires that the grounds of the application being made shall be stated thereon. He cited CA 211/96 National Bank of Kenya Ltd. V Ndungu Njau (UR) for that proposition.

That may well be so. But the rigours of the Ndungu Njau Case have been tempered in subsequent decisions and even in that case itself by the adoption of broader interests of Justice where the court has proceeded to hear the substance of the Application the defect in procedure notwithstanding. I would overrule that objection.

Secondly, it is submitted that O 39 r 1,2& 3 which are invoked do not apply to the application. That is because on the reading of those provisions and considering the application itself, nothing is being wasted, damaged or alienated nor is there breach of contract or injury of any other kind.

With respect I think that is a misreading of the application and the Rules. Through the eye of the developer, the activities complained of may not amount to waste but to improvement. Those however who complain allege that the open space will be of no further use for the intended purpose if it is interfered with. An "injury to estate" which is one dictionary meaning of "Waste" will have occurred. There are allegations that The Bhanjis may well alienate or encumber the subject-matter of the suit before it is heard. It is not unreasonable to be that apprehensive or to seek a restraining order before that eventuality occurs. Then there are allegations that the Applicants will suffer direct injury, particulars whereof are given, which is reason enough to seek restraining orders. I overrule the objection.

Thirdly, it is argued that there is no cause of action disclosed in the plaint against the Bhanji's and therefore no injunction can lie. Mr. Khanna went through the plaint and pointed out that there was only a general accusation made against the two that they were party to the transgressions alleged against the Commissioner of Lands and the Council. But the requirement of Law is that if fraud and/or

misrepresentation are alleged then particulars thereof should be pleaded. Only particulars of loss and damage are pleaded specifically but even these are not borne out by the facts on the ground.

He cited for support O 6 r 8 Civil Procedure Rules and Bullen & Leake & Jacobs, Precedent of Pleadings 13th Edn, page 425 – 429. At Pg 427 it is stated by the Authors:

> "***Where fraud is intended to be charged, there must be a clear and distinct allegation of frau d upon the pleadings , and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident al [1989] 1 Lloyd's Rep. 305,308).***
>
> ***The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrance V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".***

And Pg. 428

> ***"Full particulars of any Misrepresentation relied on must be given in the Pleading (R.S.C. Order 18 r 12(1)(a). Any charge of fraud or Misrepresentation must be pleaded with utmost particularity ."***

That is the state of the law and it is evident that the particulars of fraud and/or misrepresentation alleged against the Bhanjis are not stated. Is that fatal to the Plaintiffs' case? I think not.

The same issue arose in the Court of Appeal Case of THE TOWN COUNCIL OF OL'KALOU VS NG'ANG'A GENERAL HARDWARE CA 269/97(UR) where a Grant of Title, as in this case had been issued to the Respondent under the Registration of Titles Act for a Public utility parcel of land, a "Bus-Park". One of the issues that arose for determination was whether in the absence of express pleading relating to fraud and/or misrepresentation, the High Court should have, as it did, dismissed the suit summarily. The Commissioner of Lands was not even joined as a party although the issues to be determined in the main suit involved the legality or lack of it, of allocating the land and whether there was protection under S.23(1) of the Registration of Titles Act (RTA).

It was submitted before the Judges of Appeal that the ***"defendants' suit cannot be so weak as to be beyond redempt ion and incurable by amendment."*** That is echoing the words of Madan JA (as he then was) in D.T. Dobie & Co (K) Ltd. V. Joseph Muchina & Anor (CA 37/78) (UR)

Omolo J.A. posed a pertinent question in view of the inadequate pleading, while accepting that submission and Madan J.A's caveat that "Cases ought to go on when they have a cause of action and so long as ***"real-life****" can be injected into them by an amendment" :*

> *"Who is to inject " real-life in pleadings by amendment?" Is it the Parties themselves or the Courts?"*

In his view, in an Adversarial System of Administration of Justice, it is the party whose pleading has no real-life who should apply to amend. If a pleading as presented to the Court has no cause of action or chances of succeeding, then it ought to be struck out summarily. The Court is under no legal or moral obligation to direct the appellant making such request. On this however, Omolo J.A. was alone.

The majority (Gicheru/Shah JJA) found that the defence was not beyond redemption by

amendment and remitted the suit to the High Court for trial. Shah J.A. stated:

> *"I would not succumb to the temptation of not granting an interlocutory equitable remedy for want to proper pleading. The plaint, as I have pointed out, can be amended, more so when there is evidence on record to justify such an amendment and here such evidence was provided by the landlord h imself. I would not drive a party away from the judgement seat when the facts of the matter call out for obvious righting of a wrong"*

And further:

> *"What it all boils down to is this: Whilst considering Order 6 rule 13(1) applications the court has a discretion to order an amendment in proper cases rather that strike out a pleading as striking out is normally a drastic remedy*".

And so it is with the submissions made by Mr. Khanna. On this Authority, which needless to say is binding on me, I do not see how I can at this stage make a finding that there is no Cause of action and therefore no probability of success of the main suit. The suit is not beyond redemption by amendment even if the defects noted exist. I would again overrule the technical objection made.

Mr. Khanna then moved on to more substantive Submissions. Firstly, the Submission that this Court cannot begin even to consider an Application presented by one as the plaintiffs herein who have unclean hands. Unclean hands because they were involved in a conspiracy to 'grab' the open space meant to benefit the purchasers of the plots abutting that space who would have easy access to the Indian Ocean. The consideration paid for those plots included the benefit of using the open space which the plot owners were deprived of by ICEA and Magugu. The two should be held out as Trustees for the open space and not the Leasehold owners they purport to be of plots 5907 and 5906 respectively. Secondly, this court has no jurisdiction to hear the matter since there is already a Grant of Title issued to the Bhanjis which gives them absolute protection under S.23 of the RTA. There was no obligation for the Bhanjis to enquire whether the Government which granted them the Title was in breach of any law. So it matters not that the space referred to was a road, open space, public road or road reserve. At any rate it was neither of those descriptions.

The plaintiffs have no interest in the disputed area nor did they have any right of access through the open space before bringing the action. Their right of access exists through Plot 5907 and is unhindered. There was no one deprived of any access from plot 605 since the Apartments there were yet to be completed and occupied. So injunction does not lie.

The space complained about cannot in any event have been meant for access to the ocean by road or at all. It leads to a Cliff which has a 15 m vertical drop. There is no existing road; so calling it a "road reserve" would be a misnomer. It is open space over which the plaintiffs have no overriding interest or any interest at all and so no locus standi to seek an injunction. They cannot speak for other members of the public. Only the Attorney General can do so. As for damages, Mr. Khanna submitted that there was none shown at all since there was no total blockage of the open space.

Finally, on a balance of convenience, Mr. Khanna submitted that there was substantial construction on the suit premises. There was delay in bringing the action. The Bhanjis would suffer more from the injunction and it should therefore not issue.

Neither the Attorney General nor the Council who were served made any submissions in the matter.

I have only attempted to summarise what were otherwise extensive and incisive submissions of both Counsel for ICEA and the Bhanjis. In support of these submissions they cited numerous authorities, among them:

> *"1. The Civil Procedure Act Cap 21, Laws of Kenya.*

2. The Government Lands Act Cap. 280, Laws of Kenya,

3. The Local Government Act Cap. 265, Laws of Kenya.

4. Handbook on land use Planning, Administration and Development Procedures – Ministry of Lands and Housing, 1991.

5. The Supreme Court Practise Vol.I.

6. Principles of injunctions by Richard Kuloba (OUP) 1987

7. Giella vs Cassman Brown & Co. Ltd. 1973 (E.A.) P. 358.

8. Niaz Mohammed Jan Mohammed v s Commissioner of Lands & Others HCCC No. 423 of 1996 (unreported)".

9. Bullen & Leake & Jacobs (Sweet & Maxwell) 13 th Edition Pages 425 to 427.

10. HCCC No. 71 of 1997 – Nyali Air -Conditioning Refrigeration Services Limited vs. Municipal Council of Mombasa.

11. HCC No. 428 of 1997 Wiston Business Centre Vs John Muntu Kigwe (unreported)

12. Cap 2 Laws of Kenya.

By (ICEA), and

"1. Boyce vs Paddington Borough Council [1903] 1 ch.109. 2. Australian Conservation Foundation vs the

Commonwealth [1980] 146 CLR 493

3. Prof. Wangari Maathai & 2 ors Vs. City Council of Nairobi & 2 ors HCCC (Nbi) (Unreported)

4. Nairobi Permanent Markets Society & 11 ors. Vs Salima Enterprises & 2 ors Civ. App. No. 185 of 1997 (Nbi) (Unreported)."

5. National Bank of Kenya Limited Vs Ndun gu Njau Civ. App. No. 211 of 1996 unreported) (Nairobi)

6. The Public Roads and Roads of Access Act (Cap 399, Laws of Kenya)

7. Streets Adoption Act (Cap 406, Laws of Kenya)

8. Bullen & Leake & Jacobs Precedent of Pleadings 13 th Edition pages 425 to 429

9. C.A. No . 71 of 1997 – Wreck Motor Enterprises vs. The Commissioner of Lands and 3 others.

10. Registration of Titles Act (Cap 281).

11.Government Lands Act (Cap 280).

12.Halbury's Law of England Vol.24, para 1058

13.Pashito Holdings Ltd. & Anor vs Paul N. Ndungu & 2 others Civil App. 138 of 1997.

14.Dr. Joseph N.K. Ng'ok vs Justice Moijo Ole Keiwua & 4 others Civil Appl. 60 of 1997 (unreported) (Nairobi)

15.Kalia vs. Leli HCCC 6888 of 1996.

16.Giella vs. Cassman Brown & Co. Ltd. [1973] E.A. 358

By the Bhanjis

If I do not refer to all those authorities, it is not out of disrespect for their efforts.

It is common ground that the approach to the application is for the court to be satisfied on the tests laid down in the Giella case (above). That is to say; the Applicants have to satisfy the Court that they have a prima facie case with a probability of success, even if that be so, that they will suffer damage that is in compensable in damages, and if there are any doubts,where the balance of convenience tilts. In applying these tests, I must remind myself that I am not at liberty to make conclusive findings of fact as these will be assessed at the trial after the evidence is tested in cross-examination. I need only say enough to satisfy myself that the relief sought is or is not appropriate.

The most formidable argument advanced by Mr. Khanna was that the Grant issued to the Bhanjis had absolute legal insulation and cannot be questioned except on grounds of fraud or misrepresentation in which the Bhanjis were parties to, but there is no allegation made in that regard anywhere in the pleadings. There is therefore a complete answer to the plaintiff's claim which has no chance of success. For this proposition Mr. Khanna cited several Court of Appeal decisions notably wreck Motor Enterprises vs. The Commissioner of Lands & Others CA 71/97, Dr. Joseph Ng'ok V Justice Ole Keiwua & Others CA NAI 60/97 (UR), Nairobi Permanent Markets Society & others Vs Salima Enterprises & 2 others, Pashito Holdings Ltd. & Anor. V. Paul Nderitu Ndungu & others CA 138/97 (UR). All are related to the sanctity of Title issued to an innocent Purchaser of land for value without notice of any irregularities.

Ms Deche however, submitted that the Authorities cited were irrelevant since the plaintiffs were not challenging a Certificate of Title issued to a Purchaser of land upon transfer by the proprietor. The section in its plain reading confines itself to a Certificate of Title which is not defined under the Act. Only a "Grant" is defined to include Certificate of Title. It follows that a certificate of Title is not a Grant. A Grant flows directly from the government while a certificate of Title is issued after a transfer by the proprietor. "Proprietor" is defined in Section as 2 as:

"*the person ….. registered under this Act as the owner of Land or as a Lessee from the Government".*

It must therefore follow, Ms. Deche submitted, that there is no protection under the Act of a Grantee of Title directly from the Government and it is therefore open to the plaintiffs to challenge the process adopted by the Commissioner of Lands is issuing the Grant.

She cited no authorities for such profound submissions but it seems that the arguments have the support of the Court of Appeal.

Considering the same Section of RTA in the Town Council of Ol Kalou Case (Supra) Shah J.A. said:-

"During the course of arguments before the learned Judge the respondent relied heavily upon the provision in section 23 of the Act. This section in material part reads:

"23(1) The 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 proprieto r of the land is the absolute and indefeasible

owner thereof…..”

The just reproduced subsection gives an indefeasible title to a purchaser of land upon a transfer or transmission thereof by the proprietor thereof but it does not seem to give such title to the first allottee. The purchasers’ indefeasible title is certainly there as was stated by this Court in the case of Wreck Motor Enterprises Vs the Commissioner of Lands & others, Civil Appeal No. 71 of 1997, (unreported) as well as in the case of Dr. Jos eph Ng’ok V. Justice Moijo Ole Keiwua & others, Civil Application No.NAI 60 of 1977, (unreported). But these two cases do not deal with the first allotee of land which allotment itself is challenged on the grounds that the Commissioner had no right to all ocate such land as is the subject matter of this appeal”.

Shah J.A. Continued:

“I am not unmindful of the fact that there are many instances, in our republic, of public utility lands being allocated to persons when the primary duty of the Commissioner in c ases such as these is to cater for public rights also. The trial court will have to examine how the process of allotment was effected. That is one issue which cannot be decided on a striking out application.

……..

…….. …..

In this appeal the attention of the Court was drawn to the requirement of sections 12 and 13 of the Government Lands Act which requirements are more demanding than merely an obligation to hear all those who were likely to be affected by the Commission er’s decision to allot a public bus park to an individual when it is probably known that at the time of the allotment the plot was being used as a public bus park. Putting it simply, for the purposes of this appeal, this is an issue requiring a full diss ertation by the trial court.”

And with that I am afraid, the wind is taken out of the sails of Mr. Khanna’s prime argument.

There is nothing to show what legal procedures under the Government Lands Act, if any, were followed in allocating the subject matter of this suit. If it is a road reserve, there is nothing shown by the Council that it has complied with the Law to preserve it. The plaintiffs may well succeed in their case which I find, prima facie, exists.

I do not think much about the two other prongs of argument advanced.

The matter of unclean hands cannot be decided merely by hurling general and unsubstantiated allegations against the plaintiffs. These are contained in a defence and counterclaim which may be 10 years too late. I am skeptical about the chances of success of the counterclaim but that is the province of the trial Court. I make no findings thereon.

One view of that principle of equity was stated in “Principles of Injunctions” cited by the plaintiffs above: “

the obligation to be fulfilled by the plaintiff must be owed to the defendant and related directly to the obligation sought to be enforced; the conduct of the plaintiff is to be judged in relation to the relief sought. To be held not to have clean hands , the plaintiff must have done something or omitted to do something that has affected the merits of his own case or the rights and liabilities of the defendant or otherwise done something in the matter that is unfair to the defendant”.

The matter of “unclean hands” here is not cut and dried as it were. Lastly the issue of locus standi.

It is contended in this matter that the plaintiffs have no interest to assert in the subject matter of the suit but only a claim of access to the Ocean as a member of the Public. In such event it is only the Attorney General who can pursue the matter in a relator action.

I did state at the outset when I granted the ex parte injunction that the case raises issues of "Public rights and environmental implications". When it comes to environmental matters, I think with respect, that the ogre of locus standi which has for a long time shackled Courts of Law must be tamed. Happily, it was expressly tamed by Parliament in the legislation enacted in 1999, THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT 1999 which came into effect on 14.01.00. S.111 of that Act states:

> *"(1) Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person , issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment. (2)For the avoidance of doubt, it shall not be necessary for a plaintiff under this section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed".*

Underlining is mine.

The "Environmental restoration order" referred to may under S. 108 of the Act, require, the person to inter alia;

> *"4(b) restore land, i ncluding the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological,. Archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in t he particular order;"*

I am aware that the Act was not in existence when this application was filed and argued. But Kenya is a signatory to International Treaties and Conventions relating to the Environment and there are many pursuasive decisions made the world over pursuant to those Conventions where a liberal and purposive Construction of Locus standi has been adopted. Those decisions have helped in promotion of international goals for the global environment that is to say, sustainable use and development, and Intergenerational Justice. Simply put: Human generations at any one point in time MUST use and exploit natural resources in a manner that accommodates their needs without compromising those of future generations. The focus the world over is no longer on the use of natural resources but their Management and Conservation in their totality. In some countries (Uganda for example) it is a "human rights and Dignity Issue".

And so it is that decisions have been made to give locus standi to "minors representing their generation as well as generations yet unborn" to stop commercial logging. (OPOSA v FACTORAN GR No. 101083 30.7.1993, (in the Philippines) and to some villagers in Malaysia to stop an Hydroelectric Power Project (Kajing Tubek & Ors V Ekran Eld & Ors (1996) 2 Malayan Law Journal (Malaysia).

In HCCC 423/96 Niaz Mohamed Vs Commissioner of Lands & others (UR) which was before the enactment of the Act (October 1996), I rejected the notion that it is the Attorney General who has the Locus Standi in all matters to protect Public rights including public or common nuisance. I posed the querry, what if the Attorney General is the Cause of the nuisance? Or I might now add, he or those he advises including renegade Commissioners of Lands neither have the will nor the inclination to comply with the Law? Does it make what has been done right or does it mean that there is no remedy whatsoever? By all means let mere busy bodies who are interfering with things which do not concern them be turned down by the Courts, but I think it would be a frightening prospect to know that the courts would have no remedy for a genuine wrong committed against humanity within its jurisdiction.

The trial court in this matter may well, in dealing with the private rights of the plaintiff which I think are validly advanced, and therefore there is *Locus Standi* , grapple with the environmental issue as to whether this country will clog its Coast line from Lunga Lunga to Kiwayuu with concrete and mortar

which is the desire of a privileged and wealthy few, and deprive millions of its citizens the God-given right of access The Indian Ocean waters, coral cliffs and beaches unhindered. Do we need to preserve portions of that natural asset for future generations?

The subject matter of this suit is only a microcosm of that environmental issue of colossal maginitude. Whatever name may be given to it, “open space”, “road”, “road reserve”, “cul-de-sac” and whoever had an interest in it after God Creator - Nyali Ltd, the Government, the Council, ICEA-it remained undisturbed until the actions complained of in 1998.

I am inclined to grant a temporary injunction until the suit is heard and determined for the reasons given above. I need not consider the balance of convenience but if I had, I would still have given the same reasons I gave in issuing the ex-parte injunction. I and the parties and Counsel visited the site subsequent thereto but nothing I saw on the ground persuades me to change the terms of my order. All I decline to grant at this stage is the prayer for a mandatory injunction.

The three other prayers are granted. Costs in the Cause.

Dated at Mombasa this 19th day of January, 2001

P.N. WAKI

J U D G E