



Mitikenda Residents Association v Njuguna & 3 others (Environment & Land Case 624 of 2017) [2023] KEELC 2021 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEELC 2021 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 624 OF 2017
BM EBOSO, J
SEPTEMBER 19, 2023**

BETWEEN

MITIKENDA RESIDENTS ASSOCIATION PLAINTIFF

AND

SALOME WANJIRU NJUGUNA 1ST DEFENDANT

MANAGEMENT AUTHORITY 2ND DEFENDANT

THE COUNTY GOVERNMENT OF KIAMBU 3RD DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY 4TH DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around a construction that the 1st defendant initiated on land parcel number Ruiru/Kiu Block 2/17049 [hereinafter referred to as the suit property]. The said land is registered in the name of the 1st defendant. She was, at all material times, in the process of developing a four-storey building on the land. Mitikenda Residents Association [the plaintiff] which is a registered residents association in the area where the land is located was unhappy with the said construction. It brought this suit to stop the development.

Plaintiff's Case

2. Through a plaint dated 4/8/2016, the plaintiff contended that it was comprised of members who owned land in Ruiru Bypass locality and whose objective was to ensure that the residents' welfare and interests were protected. The plaintiff further contended that the Ruiru Bypass area was designated by the County Government of Kiambu [the 3rd defendant] as a low-density area and was zoned for residential single dwelling units, adding that multiple dwelling units were not permitted in the appeal.



3. The plaintiff averred that on or about May 2016, it got information that the 1st defendant had commenced construction of a four-storey building on the suit property without a change of user approval from the 3rd defendant and without the requisite environmental impact assessment licence from the National Environment Management Authority [the 2nd defendant]. The plaintiff further contended that the 1st defendant had flouted various statutory requirements and processes. The plaintiff specifically faulted the 1st defendant on account of: (i) failure to obtain environmental impact assessment licence contrary to Section 58 of the *Environmental Management and Co-ordination Act, 1999*; (ii) failure to publish, for two successive weeks, a notice in the Kenya Gazette and in a newspaper in terms of Section 59 of *Environmental Management and Co-ordination Act, 1999*; (iii) failure to give notice to the plaintiff in terms of the same Section; (iv) failure to adhere to the mandatory provisions of Section 32 (3), 41(3) and 52 of the Physical Planning Act (Cap 286) Laws of Kenya; and (v) infringing Section 3 of the *Environmental Management and Co-ordination Act*.
4. The plaintiff sought the following permanent injunctive orders against the defendants:
 - a. A permanent injunction restraining the defendants, their employees, servants or agents from undertaking any further construction on L.R. No. Ruiru/ Kiu Block 2/17049.
 - b. A permanent order against the 2nd, 3rd and 4th defendants from issuing any environmental impact assessment license, change of user, development permit and approvals of development plans to the 1st defendant over L.R. No. Ruiru/ Kiu Block 2/17049.
5. At trial, Isaac Muingi Nderitu testified as PW1. He adopted his written witness statement dated 12/1/2021 as part of his sworn evidence-in-chief. His evidence was that he was a member of the plaintiff association and that he owned land parcel number Ruiru/Kiu Block 2/12611, situated directly opposite the suit property. He stated that both properties were located in a low-density area zoned for residential single dwelling units and not multiple dwelling units. He further stated that sometime in May 2016, the 1st defendant started construction of a flat with four floors on the suit property without the relevant licenses and approvals from the 2nd, 3rd and 4th defendants. PW1 added that, as at January 2022, the 1st defendant had undertaken construction of the building on the suit property upto the 1st floor and was collecting rents from tenants who occupied the units in the building. PW1 added that the plaintiff was opposed to further construction of the building at the suit property and that the relevant authorities should demolish the structure. He produced the title deed relating to land parcel number Ruiru/Kiu Block 2/12611 registered in his name.
6. Jacob Waweru Ng'ang'a testified as PW2. He adopted his witness statement dated 14/1/2022 as part of his sworn evidence-in-chief. He reiterated the statements made by PW1 and added that his property was also directly opposite the suit property and that the two properties were separated by an access road. He produced a copy of the certificate of registration for Mitikenda Residents Association and the title deed relating to land parcel number Ruiru/Kiu Block 2/12610, registered in his name.

1st Defendant's Case

7. Salome Wanjiru Njuguna [the 1st defendant] filed a statement of defence dated 28/9/2017. Her case was that she was the absolute owner of the suit property and that she had applied for and obtained all the relevant approvals from her co-defendants, authorising construction of the building on the suit property. She added that the plaintiff was the one interfering with her constitutional right to own and develop her property. She urged the court to dismiss the plaintiff's suit with costs to the defendants.
8. Salome Wanjiru Njuguna [the 1st defendant] testified as DW2. She adopted her written witness statement dated 28/9/2017 as part of her sworn evidence-in-chief. Her evidence was that she was



the registered proprietor of the suit property. She stated that the area where the suit property was located was not a controlled development area as alleged by the plaintiff. She added that she had obtained a change of user and all the relevant approvals required from her co-defendants for the project. She further stated that she was not a member of the plaintiff association and that she belonged to Gatong'ora Ward Residents' Association. She further testified that the plaintiff had no locus to bring the suit since it did not have any property registered in its name. She produced the following documents: (i) Copy of a sale agreement dated 14/8/2015; (ii) Copy of a title deed for land parcel number Ruiru/Kiu Block 2/17049 registered in her name; (iii) Copies of approved designs for the building erected on the suit property; (iv) Acknowledgement of receipt of environmental impact assessment report and receipts; (v) A copy of application for regularization of change of user; (vi) Proposed project; (vii) Copies of letters by the plaintiff group to the 1st defendant's employer; and (viii) Minutes by Gatong'ora Ward Residents.

9. During cross-examination, she admitted that she did not have an environmental impact assessment licence from the 2nd defendant. She also admitted that she did not have an approval from the 4th defendant and that the 4th defendant had suspended construction works on the suit property. She added that she continued with the construction after complying with the requirements contained in the letter dated 21/7/2016 received from the 4th defendant. She further stated that she intended to build four floors but she had only done up to the 1st floor.
10. Peter Mwaura Wanjiku testified as DW3. He adopted his witness statement dated 18/7/2019 as part of his sworn evidence-in-chief. His case was that he was a shareholder of Githunguri Constituency Ranching Company Limited and that he bought his property through the said company. He added that he knew the 1st defendant since they were both shareholders of the said company. He added that his property, land parcel number Ruiru/Kiu Block 2/4256, was located near the suit property and that he had built a flat on it. DW3 stated that the area where the suit property was located was not a controlled development area. He stated that he was not a member of the plaintiff association, adding that shareholders of Githunguri Constituency Ranching Company Limited had held several meetings and had invited the plaintiff to the meeting to introduce themselves but they had never showed up.

2nd Defendant's Case

11. The National Environment Management Authority [the 2nd defendant] filed a statement of defence dated 25/1/2022. Its case was that it had not approved the impugned project and that the project was being undertaken by the 1st defendant without the requisite environmental impact assessment license. It added that it discharged its statutory mandate by issuing a stop order, stopping construction of the illegal structure.
12. The 2nd defendant led evidence by Stephen Kalonzo Kimitu who testified as DW1. He adopted his witness statement dated 25/1/2022 as part of his sworn evidence-in-chief. He stated that he was an employee of the National Environment Management Authority [NEMA] and that at all material times to the suit, he worked as the County Director of Environment, Kiambu County. He stated that his Office received complaints to the effect that the 1st defendant was undertaking development activities on the suit property without an EIA license. He further stated that following the complaints, an inspection on the suit property was done on 23/8/2016 and as a result of the inspection, the 1st defendant was ordered to stop further construction and submit an EIA report. DW1 added that the 1st defendant's project had not been licensed and the construction was being undertaken in contravention of the *Environmental Management and Co-ordination Act* and the Environmental Impact Assessment Regulations. He produced the following documents: (i) A copy of the inspection report dated 23/8/2016; (ii) Copies of extracts from the EIA Project Report, acknowledgement letter



and payment receipt; (iii) A copy showing the acknowledgement of receipt of the EIA report dated 13/6/2016; and (iv) A copy of the letter raising issues to be addressed by the 1st defendant, dated 5/11/2016.

4th Defendant's Case

13. The 4th defendant filed a statement of defence dated 11/3/2019 in which it averred that its officers visited the 1st defendant's construction site on several occasions and observed lack of adherence to the National Authority Act and Regulations. It added that the construction works did not have the requisite compliance certificate by the 4th defendant. Consequently, it issued a suspension notice dated 21/7/2016, stopping all ongoing construction works.
14. During the trial, the 4th defendant led evidence by Arch. Stephen Mwilu who testified as DW4. He adopted his witness statement dated 3/9/2019 in which he stated that he was the acting General Manager Research, Training and Capacity Building at the National Construction Authority [NCA]. He stated that the investigation officers of the 4th defendant visited the 1st defendant's construction site on several occasions and observed lack of adherence to the provisions of the National Construction Authority Act and Regulations. He further stated that on 21/7/2016, the 4th defendant issued a suspension notice to the 1st defendant requiring her to stop the ongoing construction until she took remedial measures in compliance with the law. He added that the 4th defendant did not have an enforcement mechanism in law to address the continued breach by the 1st defendant, hence it depended on other Government Agencies to enforce compliance. He produced the suspension notice issued by the 4th defendant on 21/7/2016.

Plaintiff's Submissions

15. The plaintiff filed written submissions dated 31/10/2022, through M/s S. N Thuku & Associates Advocates. Counsel for the plaintiff identified the following as the five issues that fell for determination in the suit: (i) Whether the 1st defendant had approved building plans from Kiambu County Government; (ii) Whether the 1st defendant had an environmental impact assessment license from NEMA; (iii) Whether the 1st defendant had a compliance certificate and/or authorization from the National Construction Authority; (iv) Whether the 1st defendant's project was in a zoned area where the current infrastructure could accommodate the project; and (v) Whether the developer had a board/sign on the property showing the owner, contractor, structural engineer, electrical engineer and NEMA licence number.
16. On the first issue, counsel submitted that despite the 1st defendant stating that she had been granted a change of user licence and that she placed a public notice in the Standard Newspaper on 17/9/2015, neither of the two aforementioned documents was produced in court by the 1st defendant.
17. On whether the 1st defendant had an environmental impact assessment license pursuant to Section 58 of the Environmental Management and Co-ordination Act 1999, counsel submitted that the 1st defendant admitted that she had not obtained a license from NEMA to commence construction and that the 1st defendant also admitted to not having complied with the letter dated 5/11/2016. Counsel added that the 1st defendant never provided the court with the approved plans and the experts' licences.
18. On whether the 1st defendant had a compliance certificate or authorization from the National Construction Authority, counsel submitted that the 1st defendant admitted that she did not obtain one, a fact which was confirmed by the 4th defendant's witness. Counsel argued that the quality of the project was in doubt since the team on site could not be verified as registered and licensed. Lastly, on the 5th issue, counsel submitted that the 4th defendant was correct in ensuring the project was halted since there was no sign board on site showing the name of the contractor, the name of the structural



or electrical engineer, the NEMA licence approval number, the NCA compliance certificate number, and the name of the developer. Counsel added that the absence of signage on the site could only lead to the inference that the 1st defendant never had any approvals to display on site.

Defendants' Submissions

19. The 1st defendant filed written submissions dated 16/1/2023, through M/s Kanyi Kiruchi & Co Advocates. Counsel for the 1st defendant deciphered the following as the four issues that fell for determination in the suit: (i) Whether the plaintiff had locus standi to bring the suit; (ii) Whether the 1st defendant's land was located in a controlled development area and if relevant approvals were obtained; (iii) Whether the plaintiff was fraudulently interfering with the 1st defendant's right to property; and (iv) the question relating to costs of the suit.
20. On whether the 1st defendant had locus standi to bring the suit, counsel argued that the plaintiff as a resident association had no capacity to sue in its own name, thus making the suit incompetent, defective and bad in law. Counsel submitted that Section 41 (1) of the *Societies Act* Cap 108 Laws of Kenya provided the manner in which proceedings by or against a society were to be instituted. Counsel relied on the decisions in *Republic v Registrar of Societies Ex-parte Narok Muslim Welfare Association [2017]eKLR* and *Kiserian Isinya Pipeline Road Resident Association & others v Jamii Bora Charitable Trust & Another*.
21. On whether the 1st defendant's land was located in a controlled development area and if relevant approvals were obtained, counsel submitted that the plaintiff's assertions that the suit land was located in a low-density area and was zoned for residential single dwelling units and not multiple dwelling units was not proved by way of evidence. Counsel added that proof of facts was governed by Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. Counsel further submitted that the 1st defendant had duly complied with all the relevant requirements of the law.
22. On whether the plaintiff was fraudulently interfering with the 1st defendant's right to property, counsel relied on Article 40 (1) of *the Constitution* of Kenya 2010. Counsel added that the plaintiff was interfering with the 1st defendant's use of the suit property in the following ways: (i) creating an amorphous group purporting to control the residents; (ii) creating a group acting ultra vires to control the development of the area; (iii) forming or imaging rules and regulations imposing that the area is controlled zoned area without any backing of evidence (sic); (vi) usurping the powers of the 3rd defendant; and (v) interfering with the 1st defendant's property without any lawful justification. Counsel for the 1st defendant urged the court to dismiss the suit and award costs to the 1st defendant.

4th Defendant's Submissions

23. The 4th defendant filed written submissions dated 1/11/2022, through M/s Munyao, Muthama & Kashindi Advocates. Counsel for the 4th defendant identified one issue for determination by the court – the question as to whether the suit disclosed any reasonable cause of action as against the 4th defendant. Counsel submitted that the plaintiff had not disclosed any reasonable cause of action against the 4th defendant, hence the suit against the 4th defendant should be dismissed. Counsel added that no wrong-doing by the 4th defendant had been specifically pleaded by the plaintiff to warrant liability on the part of the 4th defendant.

Analysis and Determination

24. I have considered the parties' pleadings, evidence and submissions. I have also considered the legal frameworks and jurisprudence relevant to the key issues that fall for determination in this suit. Parties to the suit did not file a common set of issues that the court was required to determine.



25. Taking into account the pleadings, evidence and submissions that were tendered in this suit, the following are the key issues that fall for determination in the suit: (i) Whether this suit is fatally defective on the ground of lack of locus standi on part of the plaintiff; (ii) Whether the 1st defendant's development on land parcel number Ruiru/Kiu Block 2/17049 contravened the mandatory requirements of the *Environmental Management and Co-ordination Act* [the EMCA]; (iii) Whether the said development contravened the mandatory requirements of the Physical Planning Act 1996 [now repealed]; (iv) Whether the said development contravened the mandatory requirements of the National Construction Act, No 41 of 2011; (v) Whether the reliefs that are sought in the plaint are available in the circumstances of this case?; and (vi) What order should be made in relation to costs of this suit. I will dispose the six issues sequentially in the above order.
26. The first issue relates to the locus standi of the plaintiff to initiate and maintain this suit. The 1st defendant contends that this suit is fatally incompetent on the ground of want of locus standi on part of the plaintiff. The 1st defendant relies on the certificate of Registration which the plaintiff exhibited, showing that the plaintiff is a society registered under The *Societies Act*, chapter 108 of the Law of Kenya. It is the 1st defendant's case that where a claimant in a suit lacks locus standi, the claimant has no basis to claim anything before the court and it is irrelevant that the claimant may have a meritorious case.
27. The issue of locus standi was first raised as a pleading in paragraph 11 of the 1st defendant's statement of defence dated 28/9/2017. The issue was consistently raised by the 1st defendant's counsel during cross-examination of the plaintiff's witnesses. It was subsequently raised as the first issue that the 1st defendant invited the court to determine.
28. On its part, the plaintiff pleaded in paragraph 1 of the plaint that the plaintiff existed as a registered association. During trial, PW1 confirmed that the plaintiff existed as a society registered under the *Societies Act*. PW2 produced the certificate of registration, showing that the plaintiff existed as a society registered under the *Societies Act*, Chapter 108 of the Laws of Kenya. PW2 confirmed this fact orally during cross-examination.
29. Despite the issue of the plaintiff's locus standi being raised as a key issue in the pleadings; during trial; and in the 1st defendant's written submissions, the plaintiff elected to say nothing about the issue. Against the above background, this court is required to make a determination on the issue.
30. Did the plaintiff, a society registered under the *Societies Act*, have the locus standi to initiate and maintain this suit in its own name? Is this suit fatally incompetent as contended by the 1st defendant? Regrettably, the answer to the first question is in the negative and the answer to the second question is in the affirmative.
31. Our superior courts have, in a line of decisions, been unequivocal that a society registered under the *Societies Act* is an unincorporated entity and does not have the locus standi to sue or to be sued in its own name. Our courts have made it clear that societies established and existing under the *Societies Act* sue and are to be sued through its registered officials.
32. In the case of Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others [2011] eKLR it was held thus:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers.



33. Similarly, in *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992* Justice Bosire (as he then was) stated thus:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.”

34. It is clear from the prevailing jurisprudence that a society established and existing under the *Societies Act* lacks the locus standi to sue or be sued in its own name. Should such a society have a claim or a cause of action to ventilate, it is required to initiate proceedings in the names of its officials in tandem with the provisions of Order 1 rule 8 of the Civil Procedure Rules. Regrettably, the plaintiff ignored the above law and initiated this suit in its own name. It similarly ignored the issue of locus standi when it was first raised through the 1st defendant’s statement of defence. Without locus standi, this suit was and remains a non-starter. The suit is fatally incompetent. That is the finding of the court on the first issue.

35. Locus standi is a jurisdictional issue because whenever the court finds that the suit before it is fatally defective, it strikes out the suit without venturing into the merits of the substantive issues that are raised in the suit. The court downs its tools without venturing into the issues raised in the suit because it does not have a proper platform on which to consider the substantive issues. Consequently, I will down my tools in tandem with the principle in *Owners of Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989]eKLR*.

36. On the issue of costs of the suit, it did emerge from the evidence of the 1st defendant during cross-examination that the 1st defendant initiated the impugned developments without the requisite approvals and licences from NEMA and NCA. The abortive suit may never have been contemplated if the 1st defendant had complied with the requirements of the law. Given the above conduct of the 1st defendant, I will not reward her with an award of costs. The other defendants are public entities that should have been at the forefront in enforcing the law. I will similarly not award them costs.

37. For the avoidance of doubt, the order striking out this suit does not in any way invalidate the decisions and actions that were taken by the regulatory bodies in relation to the impugned development. That is to say, the striking out of this suit does not vacate the stop order that NEMA issued and the suspension notice that the National Construction Authority issued. Unless lifted as by law provided, they remain in force.

38. In the end, this suit is struck out on the ground that the plaintiff, a society registered and existing under the *Societies Act*, did not have and does not have the locus standi to initiate and maintain this suit in its own name. Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF SEPTEMBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr S N Thuku for the Plaintiff

Mr Wachira for the 1st Defendant



Mr Karimu for the 2nd Defendant

Mr Aringa for the 4th Defendant

Court Assistant: Hinga

