



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 518 OF 2018

NELLY WANJIKU THIONGO (*Acting as Administrator of the estate of George Thiong'o Kuria deceased*).....1ST PLAINTIFF

MARY NJAMBI KARUNGO.....2ND PLAINTIFF

STELLA WAITHERA NJOROGE.....3RD PLAINTIFF

WAMBAIRE WAWERU.....4TH PLAINTIFF

REUBEN MUIRURI (*Acting as Administrator of the estate of Patrick Ng'ang'a deceased*).....5TH PLAINTIFF

IRENE NJAMBI NJOROGE (*Acting as Administrator of the estate of Jane Wanjiku Njoroge deceased*).....6TH PLAINTIFF

ROSE KAMAU.....7TH PLAINTIFF

GEORGE NJOROGE.....8TH PLAINTIFF

ALEXANDER NJOROGE.....9TH PLAINTIFF

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST DEFENDANT

HON. MAURICE OCHIENG ONYANGO.....2ND DEFENDANT

UBA CONSTRUCTION LIMITED.....3RD DEFENDANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 30/11/2018.

On 24/2/2020, they filed an amended plaint dated 18/2/2020. Their case was that they were the registered owners and proprietors of 3.5 acres of ancestral land surveyed and registered as **Parcel Number Dagoretti/Kangemi/265**, located at the T-Junction of Thiongo Road and Gishagi Road in Kangemi, Nairobi (**the suit property**). Their family had subdivided the said parcel of land and was in quiet possession of the land until 2018. In 2018, without their consent, the defendants commenced the construction of a public drainage intended to drain storm/waste water from the entire Kangemi Area into the Nairobi River. The said public drainage cut across the suit property. The plaintiffs contended that due to the construction of the public drainage through the suit property, they were unable to peacefully enjoy their property because the offensive odour emanating from the drainage had rendered the suit property unhealthy for occupation and unsuitable for agricultural use. They had been forced to seek alternative accommodation. Consequently, they sought the following verbatim reliefs against the defendants:-

(a) *The immediate return of the suit property into habitable condition.*

(b) *An order directing the defendants herein to remove, demolish the purported drainage system constructed on the suit*

property failure to which the plaintiffs be at liberty to demolish the same at a cost recoverable from the defendant.

(c) General damages for trespass, nuisance and loss suffered by the plaintiff.

(d) A mandatory order prohibiting the defendants from constructing a road through the suit property.

(e) Costs

(f) Interest on the above at court rates.

2. Upon being served with the suit papers, the 1st defendant brought a chamber summons application dated 23/11/2020, seeking the following verbatim orders against the plaintiffs:-

(a) That the honourable court be pleased to strike out the 1st defendant/applicant as a party to the suit herein;

(b) That the plaintiffs herein have no locus standing capacity to institute the instant suit.

(c) That the instant suit is an abuse of the court process.

(d) That the costs of this application be borne by the plaintiffs.

3. The above chamber summons application is the subject of this ruling.

The application was supported by an affidavit sworn on 23/11/2020 by Geoffrey Cheruiyot, the 1st defendant's Director of the Department of Lands. He deposed that the 1st defendant had never initiated or authorized the impugned project and was unaware of the project, hence it was an unnecessary party to this suit. He added that because the plaintiffs had failed to exhibit title documents relating to the suit property, they could not maintain a cause of action against the defendants. Lastly, he deposed that the plaintiffs had filed a parallel suit in the Chief Magistrate Court at Milimani where they had obtained injunctive orders, to wit, **Nairobi CMCC No. 10703 of 2018**. He contended that suit herein was an abuse of the process of the court.

4. The plaintiffs opposed the application through a replying affidavit sworn on 12/2/2021 by their advocate, Pauline Otsyula. She deposed that, as the advocate on record for the plaintiffs, she was suited to swear the affidavit. She added that the 1st defendant was the approving authority in relation to constructions undertaken in Nairobi City County. She further deposed that the 1st defendant had advertised on its website a tender for the construction of Thiongo Road together with the impugned drainage. She added that in their 2017/2018 County Annual Development Plan, the 1st defendant stated that they intended to rehabilitate Thiongo Road and do a drainage system. She further deposed that vide a notice of withdrawal dated 13/5/2019, the plaintiffs withdrew **Nairobi CMCCC No. 10703/2018 on 13/5/2019**. To prove that the plaintiffs had *locus standi* and a cause of action in this suit, she exhibited one copy of a title deed relating to Parcel Number **Dagoretti/Kangemi/ 1626** measuring 0.075 hectares and bearing the name of George T.T Kuria as the registered proprietor. She urged the court to dismiss the application.

5. The application was canvassed through written submissions dated 1/3/2021, filed by the firm of **Abdullahi Gitari Odhiambo Advocates LLP**. Counsel for the applicant identified the following as the two issues falling for determination in the application: *(i) Whether the plaintiffs/respondents have capacity to sue; and (ii) Whether the 1st defendant/applicant is a necessary party to the suit.*

6. On whether the plaintiffs/respondents have capacity to sue, counsel submitted that whereas the plaintiffs sued in their personal capacity or representative capacity, seeking to enforce their proprietary rights in **Dagoretti/Kangemi/265** against the defendants, they did not exhibit any title document or succession documents linking them to the suit property. Counsel added that the title annexed to the replying affidavit of Pauline Otsyula did not relate to the suit property. Counsel argued that for one to maintain a claim relating to land, the claimant must demonstrate a legal or equitable interest in the land.

7. On whether the 1st defendant was a necessary party to this suit, counsel submitted that the 1st defendant was not a necessary party to this suit because it had not authorized the impugned construction works. Counsel urged the court to grant the orders sought in the application.

8. The plaintiffs/respondents filed written submissions dated 31/5/2021 through the firm of **Otsyula & Limbere Advocates**. Counsel for the plaintiffs/respondents identified the following as the two issues falling for determination in the application; *(i) Whether the plaintiffs/respondents have locus standing to institute this suit, and (ii) Whether the 1st defendant/applicant should be struck out as a party to the suit.*

9. On whether the plaintiffs/respondents had *locus standi* to institute this suit, counsel cited the decision in **National Environmental Tribunal v Overlook Management Limited & 5 others [2019] eKLR** in which the court held that: to have *locus standi*, a claimant must demonstrate that his civil rights and obligations had been or were in danger of being infringed; the fact that a case may not succeed did not negate the *locus standi* of a claimant; whether one's civil rights and obligations have been affected turns on the facts of each case; and that the court should not give an unduly restrictive interpretation to *locus standi*. Counsel added that the plaintiffs inherited the suit property and were yet to be issued with new titles in their names. Lastly, counsel submitted that the plaintiffs' failure to exhibit a grant of letter of administrate or probate in good time did not negate the fact that the suit property was theirs.

10. On whether the 1st defendant/applicant should be struck out as a party, counsel for the plaintiffs submitted that the 1st defendant was the approving authority in relation to construction works undertaken within the City County of Nairobi and was therefore a necessary party. Counsel added that in August 2016, the 1st defendant advertised on their website a tender for the impugned construction works, hence they

were a necessary party. Counsel urged the court to dismiss the application.

11. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues falling for determination in the application. Two issues fall for determination. The first issue is whether the plaintiffs have demonstrated sufficient interest in the suit property to entitle them to bring and maintain this suit against the defendants. The second issue is whether the 1st defendant is a necessary party to this suit. I will make brief sequential analysis and pronouncements on the two issues in the above order.

12. The first issue is whether the plaintiffs have demonstrated sufficient interest in the suit property to entitle them to bring and maintain this suit against the defendants. I have looked at the plaintiffs' pleadings, witness statements, list of documents, and replying affidavit. In their pleadings, they pleaded at paragraph 5 of the amended plaint that they were **"the registered owners and proprietors of 3.5 acres of ancestral land known as Dagoretti/Kangemi/265 now subdivided by the family, located opposite T-Junction, along Thiongo Road and Gishangi Road in Kangemi Area, Nairobi County."** They sought the following reliefs in relation to Parcel Number **Dagoretti /Kangemi/265**:

(a) The immediate return of the suit property into habitable condition stop of the construction of the sewerline through the suit property.

(b) An order directing the defendants herein to remove, demolish the purported drainage system construction on the suit property failure to which the plaintiffs be at liberty to demolish the same at a cost recoverable from the defendant.

(c) General damages for trespass, nuisance and loss suffered by the plaintiff.

(d) A mandatory order prohibiting the defendants from constructing a road through the suit property.

(e) Costs

(f) Interest on the above at court rates.

13. It does emerge from the plaintiffs' pleadings that the plaintiffs seek to protect what they consider to be their proprietary interest in the suit property. However, no certified copy of either the title or the parcel register relating to the suit property was exhibited to demonstrate the plaintiffs' interest in the suit property. No official search was exhibited. No evidence of legal or equitable interest in the suit property was presented. The plaintiffs' counsel swore a replying affidavit to which she annexed only one title deed, relating to Parcel Number **Dagoretti/Kangemi/1626**. She said nothing to link the above title to the suit property. All she said in relation to the plaintiffs' interest in the suit property was as follows:-

"That the plaintiffs/applicants were the registered proprietors of the suit property and as such they have the capacity to institute this suit. (Annexed hereto and marked NWT 3 are copies of the Title deed as proof of ownership)."

14. No attempt was made to demonstrate that the plaintiffs who purport to sue on behalf of certain estates of deceased persons have capacity under the relevant succession law to bring and maintain this suit.

15. To maintain a cause of action based on the pleadings before court in this suit, each of the plaintiffs was obligated to demonstrate a legal or equitable interest in the suit property. Those purporting to sue on behalf of estates of deceased persons were obligated to demonstrate that they had grants of letters of administration entitling them to sue on behalf of those estates.

16. At the time of filing this suit, the plaintiffs filed what they described as "LIST OF DOCUMENTS". Itemized under it was one item that reads thus:

"1. Any documents".

17. If the requirements of **Order 3 rule 2** of the Civil Procedure Rules which relate to documents which must be filed together with the plaint did not provoke the plaintiffs to demonstrate their interest in the suit property, the present application should have provoked them to do so. Their *locus standi* was challenged through this application. They failed to present evidence to demonstrate their interest in the suit property. The inevitable finding, in the circumstances, is that the plaintiffs have not demonstrated sufficient interest in the suit property, **Dagoretti/ Kangemi/265**, to entitle them to bring and maintain this suit against the defendants.

18. On the issue as to whether the 1st defendant is a necessary party to this suit, I do not agree with the 1st defendant in its contention that because it neither authorised the impugned works nor was aware of the works, it was not a necessary party to the suit. As the regulatory and approving authority under various laws, the 1st defendant was supposed to know and approve all construction works within the County. The fact that the 1st defendant neither approved the impugned works nor was aware of them is in fact sufficient reason to make it a necessary party to this suit for the complete and effectual adjudication of the dispute relating to the impugned works. Were it not for the fact that the plaintiffs failed to demonstrate the requisite *locus standi*, I would have retained the 1st defendant as a party to the suit. That is the finding of the court on the second issue.

19. In the end, the chamber summons application dated 23/11/2020 succeeds in terms of prayer 2 and the suit herein is struck out in its entirety on the ground that the plaintiffs have not demonstrated a *locus standi* to bring or maintain this suit. The plaintiffs will bear costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF SEPTEMBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Ms Edith Limbere for the Plaintiffs/Respondents

Mr Kaaya for the 1st Defendant/Applicant

NOTE:

The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.

B M EBOSO

JUDGE