



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2755 of 1996

WAINAINA KIGATHI MUNGAIPLAINTIFF

VESUS

IRADE PAN REALITY LTD AND ANOTHER.....DEFENDANT

RULING NO.1

The plaint in this matter is dated 6th day of November 1996. In this suit, the plaintiff sought the following reliefs:-

1. *An injunction to restrain the defendants' by themselves, their servants or agents from destroying or poisoning the plaintiffs fence, trees or flowers, or from diverting River Ruaka from its natural course, and directing it on to the plaintiffs' land or from destroying or removing the gabion or wall put up against the said River by the plaintiff.*
2. *An injunction to restrain the defendants by themselves, their agents or servants from harassing the plaintiff and interfering with his quiet possession of his plot No. 7785/74, by cutting telephone wires, keeping traditional goats or any other livestock pheasants or turkeys on their plot number 7785/73 and from abusing and threatening the plaintiff with violence or physical harm.*
3. *An injunction to restrain the defendants either by themselves, their servants or agents from putting, the illegal structure near the common boundary thus interfering with the plaintiffs privacy and quiet possession of his premises.*
4. *Damages for nuisance and trespass to the plaintiffs parcel of land.*
5. *Costs of the suit.*
6. *Interest on 4 and 5 above from the date of judgement until payment in full.*
7. *Any other or further relief that this court may deem fit to grant.*

The filing of the plaint was accompanied by an interim application seeking restraint orders which were granted on the 21st day of November 1996 and extracted on 25th day of November 1996 which this court, has been informed that they are still in place.

Summons to enter appearance were served. The defendants herein entered appearance dated 11th day of March 1997 and filed the same date. The defence and counterclaim is undated but filed on 1st April 1997, but it is signed. The court, has been informed that the main suit has not been heard.

Parties are before the court on account of two applications one dated 26/10/2007 and another dated 30/4/2009. Both were heard separately. This first ruling is in respect of the application dated 26/10/2007 and filed on 31st day of October 2007. It is by way of notice of motion, brought under section 3, 3A of the CPR, order L of the CPR and all other enabling provisions of the law. It seeks three prayers namely:-

(i). Prayer 1 is spent.

(ii). That further hearing and proceedings in the main suit be stayed pending determination of the National Environmental Management Authority of the complaint lodged on behalf of the plaintiff with the Authority on the issue of diversion of River Ruaka.

(iii). That costs of this application be in the cause.

The grounds in support are set out in the body of the application, supporting affidavit annexures, provisions of law, and oral high lights and the major ones are as follows:-

- The main proceedings pending herein touch on an alleged diversion of River Ruaka. The result of that diversion is that, this has been causing flooding on to the plaintiffs' land.
- By the time the proceedings herein were filed, the Environmental Management and coordination Act was not in force. The Act came into force on 6th January 2000.
- The Act has created a body called Nema, which is mandated to deal with issues concerning Environmental Management. It is also mandated vide section 42 (4) and 68 to deal with issues of investigation and determine whether the course of the River has been interfered with by the defendants or not.
- That the determination of the issue by Nema and the filing of the resultant report, by the said body will go along way in assisting in the resolution of the issues herein and in the process quicken the judicial process.
- They contend that they are within the law and they should be granted the orders being sought.

Turning to the grounds of opposition to this application, dated 9th day of June 2008 and filed on 10th day of June 2008, counsel for the plaintiff/applicant took issue with them, stating that they are invalid as the counsel M/S JK Kinyanjui and Co. Advocates for the defendants did not have a practising certificate then. As such the court, is urged to treat the plaintiff's application as being unopposed and allow the same.

In his response counsel for the defence did not contest the plaintiffs assertion that they had no practising certificate as at the time they filed the grounds of opposition. But stated that the Environmental Cordination Act which came into force after the suit had been filed would not have any retrospective effect on the proceedings. By this reason the orders sought can not be granted.

In response to that, counsel for the applicant stated that the diversion of the River is continuing and as such the complaint is within the Act. They have already lodged a complaint with Nema, and it is only proper that the proceeding herein should be stayed and to await the findings of Nema.

On the courts', assessment of the facts herein, it is clear that the applicants counsel has raised two issues one a technical one, and the other one on the merits of the application. The technical issue touches on the ground of opposition to the application. It is on record that the said ground of opposition were filed by a firm of advocates. when confronted with allegation of lack of practising certificate, as at the time the same were filed, the concerned counsel remained silent. To this courts' view silence would mean that the allegations are true. If true, then the said firm lacked legitimacy to file the said grounds of opposition. If there was no legitimacy to file the same, then the same are in valid and proper candidates for striking out and they are so struck out along side the counsel's purported representation.

The striking out of the grounds of opposition, does not give the applicant a clean bill of success, as regards the merits of the application; The applicants' grounds have to support the same. There is no doubt that reliance has been placed on the provision of the relevant Act No. 8 of 1999. Vide section 7 thereof, Nema is established as a body corporate with power to sue and to be sued in its corporate name. The objects of the Authority are set out in section 9 of the Act. The mandate is expansive. Those that appear to be relevant to the subject of inquiry herein is section 9 (1) and 9 (2) (e) namely:-

(i). *The Authority to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.*

(ii). *Carry out surveys which will assist in the proper management and conservation of the environment"*

The same Act set up a complaints committee to receive complaints. Section 42 (1) (f) makes provision that:-

"No person shall without prior written approval of the Director General given after an environmental direct or block

any river, lake or wetland from its natural or normal course”

Section 68 (1) on the other hand provides:-

“68 (1) the Authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment”

Indeed all the above provisions of law, relied upon by the applicants do not specify existence of a provision to the effect that the Act has any retrospective effect. However this courts', own construction of these provision is that, in a situation where an activity commenced before the commencement of the Act, but is still continuing like an alleged diversion of a river, whose diverted course if at all diverted, still continues after the Act came into effect, such continuation of the course, in an alleged diverted form is a proper candidate for investigation. The application is therefore proper.

For the reasons given in the assessment, the court, proceeds to make an order that:-

1. The defendants grounds of opposition dated 9th day of June 2008 and filed on 10th June 2008 be and are hereby struck out by reason of the defendants failure to controvert the applicants assertion that the same were filed when the counsel who filed them had no practising certificate.
2. For the reasons given in the assessment, prayer 2 of the application dated 26th October 2007 and filed on 31st October 2007 is conditionally allowed.
3. Order number 2 above is conditional to the investigation report in pursuance to annexure WKM1 being filed in court, within 90 days from the date of the reading of this ruling.
4. In default of No. 3 above the orders granted in respect of No. 2 above shall stand lapsed.
5. Costs in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2009

R.N. NAMBUYE

JUDGE