REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 226 of 2009

MOHAN DHARIWAL (Chairman New Muthaiga Residents Association)

DILIP BAKRANIA (Secretary New Muthaiga Residents Association)

USHA SHAH (Treasurer New Muthaiga Residents Association)

Suing on behalf of

NEW MUTHAIGA RESIDENTS ASSOCIATION……..…….……..PLAINTIFF

VERSUS

GEMINI PROPERTIES LIMITED……..……..1ST DEFENDANT

CITY COUNCIL OF NAIROBI…..……..……2ND DEFENDANT

R U L I N G

1. The Applicants commenced this suit by way of a plaint dated 14/05/2009 and filed in court on the same day. Together with the plaint, the Plaintiff filed a Chamber Summons Application expressed to be brought under Section 63 of the Civil Procedure Act and Order 39 Rule 2 of the Civil Procedure Rules and under the Inherent Powers of the Court. In the plaint, vide paragraphs 1,2,3 and 4, the Plaintiff is described as **New Muthaiga Residents Association**, a duly registered association under the Societies Act. Mohan Dhariwal, Dilip Bakrania and Usha Shah are respectively described as the Chairman, Secretary and Treasurer of the Plaintiff. The dispute in this case revolves around land parcel No. L.R. 209/9295 (hereinafter described as the suit property) situated within the New Muthaiga Estate in Nairobi and comprised in original Grant Number IR 33069. The Plaintiff says that the suit property was originally part of a property owned by Maiella Limited, which was number LR 209/8000 comprised in Grant No. IR 25232 and measuring 66.18 hectares which property was subsequently subdivided into plots and sold.

2. The Plaintiff also avers that as a condition of the subdivision, Maiella Limited was ordered to surrender a portion of their property, LR 209/8000/84 to the Government of Kenya as a public utility plot for the construction of a nursery school and clinic. The Plaintiff alleges that the public plot was allocated to the 1st Defendant with a new LR Number being 209/9295 in place of the original LR 209/8000/84, subject however to certain special conditions and in particular condition Number 5 which was to the

effect that the suit property would be used for a clinic and day nursery school. It is the Plaintiff's case that the allocation of the suit property, which the Plaintiff says consisted of a public utility, was illegal and that accordingly the 1st Defendant holds the suit property in trust for the citizens of Kenya and for the residents of New Muthaiga in particular.

3. The Plaintiff further alleges that in or about 2007, the 1st Defendant sought to develop the suit property as commercial shops/stalls to the detriment of the Plaintiff and of the residents of New Muthaiga as a result of which the Plaintiff and members of the Plaintiff have suffered and will suffer loss and damage as more particularly set out under paragraph 22 of the plaint. The Plaintiff also alleges that the change of user of the suit property purportedly given by the 2nd Defendant to the 1st Defendant was illegal and was fraudulently obtained as more particularly set out under para 22 of the plaint. On the basis of the above averments, the Plaintiff prays for judgment against the 1st and 2nd Defendants for:-

(i) A permanent injunction to restrain the 1st Defendant, its servants, agents or successors in title from converting the premises into shops, offices, stalls or for any other commercial use.

(ii) An injunction to restrain the 1st Defendant, its agents or whosoever from developing the property in any way whatsoever pending the hearing and determination of HCCC Misc. Application Number 78 of 2004.

(iii) A declaration that LR Number 209/8000/84 is a public land and cannot be used for any other purpose other than for which it was reserved at the time of surrender to the City Council of Nairobi through the Government of Kenya that is for a nursery school or clinic.

(iv) A declaration that the 1st Defendant is holding the title and ownership of LR No. 209/8000/84 in trust for the citizens of Kenya.

(v) A revocation of the title of LR No. 209/8000/84 issued to the 1st Defendant.

(vi) An injunction to restrain the 1st Defendant from developing or converting LR Number 209/8000/84 into commercial or other use until requite approvals have been obtained from the National Environment Management Authority and from the 2nd Defendant.

(vii) An injunction directing the 1st and 2nd Defendants by themselves, their agents, workers or otherwise to demolish the illegally constructed building on the suit property.

(viii) A permanent injunction to restrain the 2nd Defendant from approving and granting any change of user for LR No. 209/8000/84 for commercial use or any other use save for a nursery school or clinic.

(ix) Damages and costs

4. At paragraphs 17, 19 and 24 of the plaint, the Plaintiff refers to two other suits between the parties herein; **HCCC Misc. Application Number 793 of 2004.** This was an application by the 1st Defendant herein for leave to apply for orders of prohibition and certiorari to challenge the decision of the Nairobi Province Physical Planning Liaison Committee that the 1st Defendant cease further developments on the suit property. The matter was heard exparte before **Kihara Kariuki J** who, while granting leave to the Applicant therein (1st Defendant herein) to commence Judicial Review Proceedings for the purpose of staying the enforcement of the injunctive orders of the Nairobi Province Physical Planning Committee, made the following two orders:-

1. That the Applicant be and are hereby restrained from making any further developments on the property number L.R. 209/9295 until the hearing and determination of the substantive motion.

2. That stay herein if granted, is conditional upon the Applicant restraining from carrying out further

renovations and or developments of the said property until orders of the court.

5. The Plaintiff avers that the 1st Defendant did not obey the orders issued by Kihara Kariuki J but has instead continued to develop the suit property and intents to let it out as commercial shops/stalls to the utter detriment of the Plaintiff and the residents of New Muthaiga. The said suit is yet to be determined.

6. The Plaintiff also says that there are two other suits pending between the parties namely HCCC No. 2227 of 2007 – **Gemini Properties vs Mohan Dhariwal & Others** and HCCA No. 478 o 2008. The Plaintiff however avers that the issues of law involved in these two suits are distinct and distinguishable.

The Application

7. The Applicants chamber summons application expressed to be brought under Section 63 of the Civil Procedure Act and order 39 Rule 2 of the Civil Procedure Rules and all other inherent powers of this honourable court seeks the following orders:-

1. THAT this application be certified as urgent and heard exparte in the first instance.

2. THAT an injunction do issue to restrain the 1st Defendant, its servants or successors in title from building, developing or converting LR 209/9295 into shops, offices, stalls or for any other commercial use pending the hearing and determination of this application and thereafter this suit.

3. THAT an injunction do issue to restrain the 1st Defendant, its agents, workers, servants or otherwise from continuing with the unauthorized development on LR 209/9295 in any way until the hearing and determination of this application and thereafter this suit.

4. THAT an injunction do issue against the 2nd Defendant restraining it from approving any change of user applications in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit.

5. THAT an injunction do issue against the 2nd Defendant restraining it from approving and/or licensing any kind of development in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit.

6. THAT costs be in the cause.

8. The application is based on 9 grounds that appear on the face of the application, that is to say-

1. THAT LR No. 209/9295 (the suit property) was originally LR Number 209/8000/84 and was reserved as a public utility plot for a nursery school and clinic.

2. THAT the 1st Defendant was allocated LR No. 209/9295 (the suit property) irregularly.

3. THAT the 1st Defendant has used the said property L.R No. 209/9295 for purposes other than for public utility.

4. THAT the 2nd Defendant has irregularly permitted the unlawful user of LR No. 209/9295.

5. THAT the 1st Defendant is now illegally and in contravention of court orders subdividing the illegally constructed structure on the suit property and intends to let them out as shops.

6. THAT the building on LR 209/9295 has been constructed without planning permission and is structurally unsound.

7. THAT if this application is not heard forthwith and the orders sought granted, the plaintiff and members of the plaintiff shall suffer injury and irreparable harm.

8. THAT orders have been issued by Justice Kihara in HCCC 793 of 2004 restraining the 1st Defendant from making any developments in the suit property.

9. THAT the works are being carried out without the requisite approvals from the City Council of Nairobi and from the National Environment Management Authority.

9. There is also a 92 paragraph affidavit sworn by Mohan Dhariwal, the Chairman of the Plaintiff. Among the matters deponed to by Mr. Dhariwal are the following; that is to say that –

(a) he makes the affidavit on his own behalf as a resident of New Muthaiga and that he is also duly authorized by the Association (read Plaintiff) to swear the affidavit on its behalf and on behalf of all members of the Association for purposes of protecting the Plaintiff's interest

(b) the Plaintiff is an association duly registered under the Societies Act on 27/03/2001 (see annextures MDI) with the following core functions:

(i) To provide an organization whereby the owners of property and residents within the area of membership of the Association can jointly promote and protect the general interests of members and general upkeep of the area as considered necessary by the Members.

(ii) To discuss and agree on such steps as may be deemed necessary to ensure that both the Government and, in particular, the Local Government Authority, responsible for the provision of services, the protection of property, the strict enforcement of planning regulations and the general management of the area including adjoining surburbs, forests and estates, carry out their duties and responsibilities with diligence and in accordance with all appropriate Laws, Rules and Regulations for the general benefit of Members.

(iii) To represent the interests of members in all matters in which other organizations provide services to Members;

(iv) To promote and protect the interest of employees of members who work or are resident within the area of the Association.

(v) To do all such things which are or are deemed to be incidental or conducive to the attainment of the objectives of the Association.

(vi) To discuss and co-operate with other Associations and Organizations having similar objectives for the better attainment of such objectives.

10. The deponent alludes to other matters that are highlighted in the submissions made by counsel on behalf of the Applicants. The deponent has annextured to his affidavit a copy of the Plaintiff's Constitution and Rules. The document is marked MDI. The Document marked MD2 is a copy of the title in respect of LR Number 209/8000 in the name of Mailella Limited. The document is dated 01/05/1970. Details of the other averments of the Supporting Affidavit shall become apparent in the following pages.

11. In response to the application, there is a Replying Affidavit for the 1st Defendant is sworn by **MADATALI CHATUR**. It is dated 8/06/2009. The deponent says that the Applicants application is bad in law and amounts to an abuse of the court process on grounds that:-

(a) injunctive orders cannot be issued against the 2nd Defendant

(b) the powers of the Commissioner of Lands cannot be challenged except by way of Judicial Review.

(c) the Plaintiff's suit is incompetent and time barred;

(d) the 2nd Defendants' approval of Change of User issued on 19/12/2000 can only be challenged by way of Judicial Review

(e) because of the existence of other suits and especially HCC Misc. 793/04 this suit should be struck out with costs

(f) because of non-joinder of parties, and especially the Commissioner of Lands and the Nairobi Liaison Committee, this suit should be struck off.

12. The deponent of the 1st Defendant's Replying affidavit also avers that the Plaintiff lacks the locus standi in respect of this suit and that the complaints raised by the Applicants are non-existent because the building which the Applicants are trying to stop the construction of is admittedly a building that has been standing on the suit property long before the dispute herein arose. Mr. Chatur also depones that the friction between the parties is the result of the 1st Defendant's refusal to sell the suit property to the Applicants on diverse dates between 19/11/2005 and 1/11/2006 when the 1st Defendant was forced to report the matter to the police for reasons of threats issued against the shareholders of the 1st Defendant by the Plaintiff/Applicant.

11. Mr. Chatur also depones that the Plaintiff's case has no basis because the Plaintiff has not exhausted all the mechanisms open to it under the Physical Planning Act, namely that the Plaintiff has failed to disclose that their appeal was heard by the Nairobi Physical Planning Liaison committee and found to be unmerited and dismissed.

12. Regarding issues to do with the National Environmental Management Authority (NEMA), Mr. Chatur for the 1st Defendant says that all these issues, which issues will become more clear from the submissions made by counsel on behalf of the 1st Defendant, are matters for the NEMA's Tribunal and not for litigation before the Honourable Court. In any event, the deponent says that the authority for change of user was given so log time ago that the Plaintiff/Applicant cannot be heard to complain about it now. In the 1st Defendant's view, the Applicants as busy bodies whose only aim is to derail the 1st Defendants investments.

13. The 2nd Defendant did not file any Replying Affidavit to the Plaintiff's application, but made both oral and written submissions on the law touching on the issues raised by the Plaintiff/Applicant. The court will return to all these submissions later in this ruling.

Preliminary Objection

14. Before this application could be heard before Nambuye, J when the same came up for interpartes hearing on 10/06/2009, the Defendant raised a Preliminary Objection to the Applicants application and to the entire suit. The Preliminary Objection dated 9/10/2009 raised the following grounds:-

(a) The deponent of the verifying affidavit and the supporting affidavit has not annexed authority of other Applicants allowing him to swear the affidavit on their behalf and the affidavits and entire suit should then be struck off.

(b) The entire suit is a nullity, bad in law and amounts to an abuse of the court process as the Applicants have not exhausted the remedies available to them before invoking the jurisdiction of this honourable court.

(c) The suit is time barred.

(d) The suit is fatally defective as against the 1st Defendant and the application lacks vexus with the suit.

(e) The suit is defective for misjoinder of parties.

(f) The suit is vexatious as the applicants have invoked the wrong procedure.

(g) The applicants have no locus standi to institute this suit

(h) The application is outside the provision of the Civil Procedure Act.

15. The Preliminary Objection was canvassed at length before Nambuye J and on the 24/07/2009, the learned Judge ruled that the Preliminary Objection could not stand and the same was dismissed with cost to the Plaintiff/Applicants. On the 23/07/2009, the parties agreed to proceed with interpartes hearing of the application dated 14/05/2009 on the 26/08/2009. When the matter came up before Ochieng J on the 26/08/2009, it could not proceed to hearing because the Applicant had not complied with the vacation rules. By consent of the parties, the application was set down for interpartes hearing on 28/09/2009. By that date, Nambuye J who was previously seized of the matter had been moved to the Family Division and that is how I came to be seized of this matter.

Submissions by the Applicants

16. The Applicants' initial submissions were made by Mr. O.P. Nagpal who stated that the Applicant as an association is charged with the responsibility of ensuring compliance with Government and Local Government Authority Regulations. He submitted that the Applicants consider the development being undertaken by the 1st Defendant to be illegal and unauthorized, the main reason being that the suit land is a designated public utility land. To support his argument, Mr. Nagpal referred the court to the following documents:-

(a) Annexture MD 16 at pages 49 – 65 of the Applicants' application and bundle of documents. This is a report of the Structural Investigations of New Muthaiga School Building for United States Agency for International Development (USAID)

17. The conclusions of the investigations are found at page 11 of MD 16 and these are that:-

(1) Most of the cracking observed on site is not of a structural nature. Design checks however indicate over stress in certain areas but no corresponding cracking was observed in these. This does not necessarily mean that the building has adequate design strength, but could mean that the code stipulated factor of safety has not been eaten away.

(2) No cracking was observed through reinforced concrete members, other than opening up of construction joints.

(3) The in situ concrete strength in the building of an average of 8.7N/mm^2 is well below the required values of at least 30N/mm2 for class 25 concrete. The Schmidt hammer results at 25.9N/mm^2 are more satisfactory, but they are not acceptance tests. On the basis of these results, the in situ strength of the concrete is unacceptable.

(4) The existing building frame has adequate lateral stiffness against earthquake, but has inadequate reinforcement within the columns to accommodate the resultant stresses. USAID's security requirement of a 200mm reinforced concrete wall along the building periphery would obviate this problem by acting as shear walls if they are continued to at least the 2nd floor level.

18. The recommendations made by the Investigation team was that the structural condition of the building as it then stood could not meet USAID's requirements and that "Extensive strengthening works involving demolitions, foundation excavations and extensions constructions of new reinforced concrete works, and modification to the existing roof wall be required" Mr. Nagpal also referred to another report by the Ministry of Roads Public Works and Housing dated July 2003 (MD 19) and said that this report

also condemned the building on the suit property as unfit [for human habitation].

(b) Annexture MD 7 – a copy of the Certificate of Title. Condition 5 thereof reads:-

"*5. Land and buildings shall only be used for clinic and a day nursery school and two residences for the teacher and doctor in charge.*"

(c) Annexture MD 20 – a Notice dated 24/07 2000 from the Nairobi City Council in respect of LR No.209/9295, Thigiri Ridge New Muthaiga. The notice refers to some infringement of the by-laws, namely that there was unauthorized

- Construction of new septic tank

- Partitioning of existing classrooms on 1st, 2nd and 3rd floors making them smaller, possibly intended for offices

- Construction of additional 3rd floor and toilet facilities on 2nd and 3rd floors

- Erection of communications tower and generator

- Addition of an access gate.

Without City Councils approval contrary to by-law 252 parts (1) and (2).

(d) Annexture MD 40 – a letter dated 17/04/2003 from Nairobi City Council regarding change of use – Plot LR 209/9295. The letter reads:-

"*17th April 2003*

Gemini Properties Ltd.

P.O. Box 49434

NAIROBI.

RE: CHANGE OF USE – PLOT LR. 209/9295

THIGIRI RIDGE RD NEW MUTHAIGA ESTATE

Reference is made to our notification of approval of development permission dated 24th April, 2002 in respect of the above.

It has come to our attention that the existing physical investment on site had been tested and found to be structurally weak to ensure safety of users. It has therefore been decided that your change of use to primary and secondary school which was approved by this council on 30th November 2000 has been nullified forthwith. You are advised not to carry any building operations on the basis of the said change of use approval. In the meantime you are requested to liaise with our development control office and the Ministry of Roads & Public Works to arrange for evaluation of the structures on the site to determine their structural firmness before you put them into occupation again.

P.T. ODONGO

FOR: DIRECTOR CITY PLANNING DEPT.

Cc

Chairman

New Muthaiga Residents Association

P. O. Box 14031

NAIROBI – 00800

Director Physical Planning

P.O. Box 45025

NAIROBI."

(e) Annexture MD 41 – This is a letter from the City Planning Department of the Nairobi City Council dated 27/05/2003 addressed to the 1st Defendant pointing out that as owner of the suit premises, the 1st Defendant was in breach of the By-laws in that the 1st Defendant had undertaken the construction of a 4 – storey building upto completion without approval of the NCC and secondly that the 1st Defendant had constructed the Kencell Cellular Base Station without approval of the NCC. The 1st Defendant was ordered to stop construction/demolish the said construction within 7 days failing which the NCC may demolish the same or take legal action at the 1st Defendant's cost

(f) Annexture MD 44 – This is a document issued by the City Council of Nairobi under the Physical Planning act (Cap 286 Laws of Kenya (Appeals) Against Development Planning Decision). This was an appeal by the Applicants against the decision made by the Director of Physical Planning/City Council of Nairobi regarding development on LR 209/9295. The Applicant's complaints are –

1. Extension of material "Change of User" for a Communication base tour without the involvement of the Residents.

2. Serious defects in the structural integrity of the building to meet adequate safety standards for human occupation.

3. Post construction approval granted by the authorities.

The appeal is dated 1/04/2004 to the Nairobi Province Liaison Committee.

(g) Annextures at p. 288 of the application which is a letter dated 31/07/2000 from the Office of the President and signed by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service. The letter is addressed to Mr. Geoffrey Mate, then Ag/Town Clerk Nairobi City Council. The writer asked Mr. Mate for "a brief as to the adequacy of the review and planning process on the concerns already identified by the Council. The author of the letter concluded the letter by saying -

"*There is an increasing need for complete transparency and I would welcome your investigation."*

(h) A letter dated 11/08/2000 from the Nairobi City Council in response to the letter of 31/07/2000 by the P/S – Secretary to the Cabinet. Mr. Mate, then Town Clerk confirmed that the Council had carried out

investigations into the Applicant's concerns on the developments on the subject plot and established, inter alia,

(i) that the 4-Storey building standing on the suit premises was constructed illegally in disregard of the plan approved by the NCC on 9/11/1988 and further that the said block has been occupied illegally without certificate of completion,

(ii) that the owner/tenant of the suit property was proposing to convert the 4-stroey block into a primary and secondary school infrastructure with boarding facilities.

19. The Town clerk also says in his letter that the construction of a 42m. high communication tower for cellular phones had caused material change in the use of the land and that all these changes/construction have been done without development permission/approval by the Nairobi City Council, in addition to the Council's view that the "existing physical investments are not only illegally constructed but functionally, insufficient to accommodate the activities of primary and secondary schools". Mr. Mate informed Mr. Leakey that there were plans a foot "to halt all illegal functions on the subject plot".

20. In the penultimate paragraph of his letter, Mr. Mate said that any changes on the suit plot and the building standing thereon must be undertaken in consultation with and acceptance by the residents of the intended change of user, as well as compliance with the existing planning policies. Mr. Mate confirmed that the landowner had not applied for a change of use hence the Councils decision to halt the developments.

(i) Annexture MD 69 is a letter dated 5/06/2007 from the City Council of Nairobi to the 1st Defendant regarding the 1st Defendants Plan No. EI 992, EH 512 for the proposed Domestic Building – Shops Restaurant and Hotel rooms proposed to be erected on LR 209/9295. The letter approved the plan subject to, among other things -

(a) access to the plot being constructed to the satisfaction of the City Engineer

(b) An environmental impact assessment to be approved by NEMA and Council before commencement of works.

(j) Annexture MD 5 – is a letter dated 8/01/1977 to the City Treasurer from Maiella Ltd, the original owners of plot 209/8000/84. Maiella Ltd objected to payment of rates in respect of the said plot 84 which they said was reserved for the NCC, special purposes, clinic, nursery. The letter said that Maiella Limited considered that parcel of land to belong to the council.

(k) Annexture MD 50 – being an order by Hon. Mr. Justice Kariuki Kihara dated 5/07/2004 in Misc. Application 793 of 2004. This was an application by Gemini Properties Limited (the 1st Defendant herein) for leave to commence JR Proceedings.

(l) Annexture – MD 46 – is a letter dated 2/04/2004 from the Nairobi Physical Planning Liaison Committee, Nairobi Province to the Chairman of the Nairobi Physical Planning Dept of the NCC regarding the objection to development on plot LR No. 209/9295 – New Muthaiga. The author of the letter signed the letter on behalf of the Director of City Planning Department. The letter says that the developer had been "requested to stop any further development determination of the appeal. The letter also informed the addressee that the City Council of Nairobi had been advised pertaining to the development including issuance of occupation permit.

21. Mr. Nagpal submitted that with or without the withdrawal orders of Kihara J, the position still remains clear that no construction was to take place on the site.

(m) annexture MD 14 – letter dated 13/04/1999 from the NCC (City Planning Council Department) to the Applicants regarding the application for change of use from school to offices on LR 209/9295. The Applicants were informed the objections were scrutinized and upheld.

(n) Annexture MD 25 – a statutory Notice from Nairobi City Council dated 11/08/2000 by which the developer/contractor on LR 209/9295 was ordered to stop, remove and pull down the work already constructed on the suit property without approval of the NCC.

(o) Annexture MD 67, a letter dated 20/12/2007 from National Environment Tribunal to the 1st Defendant's Directors regarding Appeal No. NET/24/12/2007.

22. Counsel for the Applicants referred the court to a number of authorities. In the case of **Peter Kinuthia Mwaniki & 2 Others –vs- Peter Njuguna Gicheha & 3 Others** (HCCC No. 313 of 2000 [2006] e KLR – AI, an issue arose as to whether failure to comply with environmental statutory requirements amounted to an infringement of the Plaintiff's basic right to a clean and healthy environment. Referring to section 3(3) of Environmental Management Cordination Act (EMCA) 1999, the court found for the Plaintiffs/Applicants "in order to preserve a clean and healthy environment in the locality where the action of constructing a slaughter house was situate. Section 3(3) of EMCA reads:-

"3(3) If a person alleges that the entitlement under subsection (1) to a clean and healthy environment has been or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the High Court for redress and the High Court may make orders, issue such writs or give directions as it may deem appropriate.

(a) to prevent, stop or discontinue any act or omission deleterious to the environment."

23. It was also the finding of the court in the **Kinuthia case,** as well as in the case of **Daniel Ngumba Karanja –vs- Beatrice Wambui Mbogu [2006]e KLR,** that any person who alleges that his entitlement to a clean and healthy environment is being violated has the locus standi to bring suits under EMCA. It is to be remembered that the above two cases are of persuasive authority only, as they were made by courts of concurrent with this court. **Ganguly's Civil Court Practice and Procedure** [12th Ed) – CI brings out two issues that are relevant to this application –

(i) On permission to sue or be sued in a representative capacity, the author says the following at page 193, of the publication: –

"*It is not necessary that a person suing in representative character should have requisite authority from others. The provisions of Order 1 r.8 will apply where there are numerous persons having the same interest in one suit and one or more person or persons may with the permission of the court sue or be sued in a representative capacity for or on behalf of or for the benefit of all persons so interested."*

Regarding an Unregistered association, the authors say that

"*An unregistered body, club or association cannot maintain a suit by any person be he the President, Secretary or both. Unless an authorized representative is appointed by all the members of the association to file the suit on behalf of such unregistered association, the suit is not maintainable."*

24. In the case of **Kenya Airways Corporation Ltd. –vs- Tobias Oganya Auma & 5 Others –** Civil Appeal No. 350 of 2002 [2007]e KLR the Court of Appeal reiterated the principle "that there is no requirement that a person seeking to institute a suit in a representative capacity must establish that he had obtained the sanction of the person interested on whose behalf the suit is proposed to be instituted." (p. 8 of the court's judgment)

25. The case of **Kenya Bankers Association & Others –vs- Minister for Finance & Another (No. 4) [2002] 1 KLR 61** dealt with the issue of public interest litigation following a constitutional reference by the Applicants under Sections 46(6), 60(1), 75 and 77(4) of the Constitution of Kenya, Section 3A of the Civil Procedure Act, Cap 21 and section 13 of the Revision of Laws Act (Cap 1) for declarations that the subject Act was null and void and inconsistent with, the Constitution incapable of implementation and had retrospective operation. The court held, inter alia, at holdings No. 4, 5 and 7 that

"4. The general principal (sic) relating to public interest litigation is that what gives locus standi is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population.

"5. Representative suits by organizations on behalf of its members are permissible provided that

(a) the members have legal standing to sue in their own right or that the organization may have an interest of its own in its own right

(b) the interests sought to be protected are germane to the organizations' purpose

(c) and that neither the claim nor the relief sought requires individual participation of members

"*7. The only prerequisites to the maintenance of a representative suit or class action are: a sufficient numerosity of parties, a commonality of issues, a commonality of claims or defences, a commonality of interest, a sufficient nexus between representatives and the class defined ascertained or ascertainable group represented and the good faith of the representative parties."*

26. Counsel for the Applicants referred to other authorities. The court has considered all of them and found them helpful in reaching the decision that the court is about to make in this matter.

The 1st Defendant's Submissions

27. The 1st Defendant made both written and oral submissions. This situation arose when counsel for the 1st Defendant, led by Mr. Okong'o Omogeni, was unable to proceed with the hearing on the 26/10/2009. Counsel submitted that the gist of the Applicant's case is an attempt to challenge the change of user endorsed on the property and that therefore their case is not one to do with environmental issues. Counsel for the 1st Defendant has given 15 reasons for holding the above view and for these reasons which the court shall highlight presently. Counsel for the 1st Defendant asked the court to dismiss the Applicants' application. The reasons are:-

(a) The application is incompetent on the ground that there is no nexus between the application and the prayers sought in the plaint. The 1st Defendant's argument is that the LR Number in the application being No. 209/9295 for which a title deed is annexed as annexture MD 7 is different from the property referred to in the plaint as LR No. 209/8000/84

(b) the Applicants are guilty of laches, in view of the Applicants allegation that the 1st Defendant commenced construction of two floors upon the existing building way back in 1999. Counsel for the 1st Defendant referred to annexture MD 11 to the supporting affidavit and said that the building in dispute has been around from before 7/11/1988 when the said annexture was written. For purposes of clarity, the letter which was addressed to the City Planning and Architecture Department of the NCC referred to LR 209/8000/84. The author of the letter is one S. Kapila of Ardiplan Associates Kenya. He informed the NCC at paragraph d of the letter that

"*the building has reached 3 floor and work to 4th floor has just been commenced. I strongly advice that this must be stopped."*

Counsel for the 1st Defendant submitted that the delay by the Applicants in bringing this application and the suit in general is inordinate and urged the court to dismiss both the application and the suit with costs to the 1st Defendant. Counsel also referred the court to annexture MD 13 comprising 3 letters of complaint signed by some residents of the Plaintiff association. All the 3 letters are dated 28/03/1999. Counsel submitted that the 1st Defendant cannot at this late hour be injuncted from developing a property that was constructed over 10 years ago.

(c) the Applicants have not enjoined the Commissioner of Lands in this suit and that as such the Applicants should not be allowed to attack the powers of the Commissioner of Lands without first affording him an opportunity to defend himself. The court was referred to the Court of Appeal decision in **Pashito Holdings and Another vs Ndungu & 2 Others – Civil Appeal No. 138 of 1997** where the court at p. 236 said the following:-

"*The gravamen of the Respondents' suit was that the Commissioner had no right to alienate public land to any person for any user other than that for which it had been reserved. The Respondent could not have established a prima facie case with probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The High Court should have directed that the Commissioner was a proper party without whom the relief sought against him would not be granted."*

(d) by the provisions of section 23(1) of the Registration of Titles Act, Cap 281 Laws of Kenya, the 1st Defendant's title of the suit land, duly issued by the Commissioner of Lands give the 1st Defendant an absolute and indefeasible right challengeable only on grounds of fraud. Counsel for the 1st Defendant argued that no grounds of fraud have been made against the 1st Defendant. Counsel also submitted that if the Applicants are aggrieved, they should seek damages. Section 23(1) of Cap 281 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 proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

(Also see **Wreck Motor Enterprises –vs- The Commissioner of Lands & 3 Others** Court of Appeal – Civil Appeal No. 71 of 1997)

28. Counsel for the 1st Defendant further submitted that the 1st Defendants rights to his private property are safeguarded in the Constitution and that for this reason the Applicants cannot purport to stop the 1st Defendant from enjoying his property for a building that has been on the site for over 10 years. (see the case of **Park View Shopping Arcade –vs- Kangethe & 2 Others, KLR (E & L) 591**. Counsel urged the court to uphold the supremacy of the Constitution; and find and hold that the Applicants' actions are aimed at depriving the owner of the land of the use of that land without full and fair compensation.

29. Counsel for the 1st Defendant also submitted that the Applicant's case is disguised as seeking environmental orders when the truth of the matter is that the Applicants are challenging change of user; a complaint that has been put in black and white by the Applicants since 1988 (see annexture MD 11 to Applicant's supporting affidavit – letter dated 7/11/1988. Counsel submitted that the mischief targeted by the Applicants is a matter of futuristic conjunctive.

(e) Section 3(4) of the Environmental Management Co-ordination Act 2003 (EMCA) does not allow a party to commence proceedings that are frivolous or vexatious or that are an abuse of the process of the court. Counsel for 1st Defendant submitted that the Applicants suit is frivolous and vexatious on grounds that the 1st Defendant's Certificate of Title – shown as annexture MC 1 to the Replying Affidavit of **Madatali Chatur** contains an endorsement to show that the land and buildings shall be used only for shops and offices. On the same title issued on 14/03/2008 by the Commissioner of Lands, condition number 5 of the original grant was revoked. Counsel submitted on behalf of the 1st Defendant that the only remedy open to the Applicants is to sue the Commissioner of Lands for cancellation of the title that was issued in 1978. Counsel submitted that the channel open to the Applicants is through Judicial Review.

30. Counsel further submitted that Applicants submissions that the 1st Defendant is constructing a new building is not supported by the available evidence and in particular that annexture MD 16 (supra) shows that the building in dispute was at 4th floor way back in November 1998. The court has been urged to disregard the Applicants submissions whose aim is to mislead the court.

(f) the complaints raised by the Applicants are within the domain of the National Environmental Management Authority (NEMA) under section 130(2) and 130(3) and that it is only the Director General (DG) of NEMA who can halt any constructions that may be undertaken by offending parties. The two subsections of Section 130 of EMCA provide as follows:-

"*130(2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced until the appeal has been determined.*

130(3) Notwithstanding the provisions of subsection (2) where the Director General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking until the appeal is finalized or the time for appeal has expired."

31. On the authority of the DG, counsel for the 1st Defendant contended that reference to the DG in section 130(3) means the DG appointed under S.10 of EMCA unless under section 10(13) the President has appointed a substitute to act instead of the DG. Counsel submitted that this whole suit should be struck out for reasons that the Applicants have not availed any evidence to show that the DG has failed to act in accordance with the EMCA, and that even if there were such evidence, the remedy available to the Applicants is to apply for orders of mandamus.

(g) the issue of change of user on which the Applicants are clinging for the orders sought can only be dealt with under the Physical Planning Act, 1996 and not under the Civil Procedure Act. Counsel argued that the Physical Planning Act is replete with avenues for resolving issues on change of user and in particular section 13(1) and (10). Counsel submitted that the Applicant's appeal against change of user was heard and dismissed by the 37th session of the Nairobi Physical Planning Liaison Committee meeting and thereafter, by a letter dated 16/11/2006 attached to Replying Affidavit and marked MC3 the Applicants were duly informed. Paragraphs 6 and 7 of the said letter addressed to the Applicants are pertinent to the issues in hand, and the two paragraphs read

6. You are well aware that you lodged an appeal with the Nairobi Physical Planning Liaison Committee (NPPLC) 2004. When this was done, the matter was automatically removed from the council as NPPLC is a superior institution to the Council, and therefore it has to await the decision of NPPLC on the matter. It is strange that you have not made reference to your appeal to NPPLC in which you had a sitting. This reflects bad faith on your part as far as information sharing with the Council and the public is concerned.

7. It is strange that in all your letters you have never made reference to the developer upon whom the complaint is based on. Interestingly, in a letter dated 14th December 2005 from your chairperson Anish Herainia and an email dated 19th November 2005 both sent to Mr. Chatur Madat you had among other things asked the developer to apply for change of user to commercial. It is then hypocritical that you are objecting to the proposed commercial development.

32. Counsel for the 1st Defendant was of the view that having gone through a full circle with the appeal to the Nairobi Physical Planning Liaison Committee, the Applicants are being vexatious by coming back to this court for the orders sought. Counsel further submitted that all the available evidence shows that the 1st Defendant had complied with all the requirements for change of user and that what the Applicants are now doing through this suit is to frustrate the 1st Defendant's quest for quiet possession of the suit property. Counsel argued that the Applicant's actions are a vendetta machination to try and force the 1st Defendant to sell the suit property to the Applicants. In summing up the written submissions, counsel for

the 1st Defendant urged the court to strike out the following annextures from the Applicants' supporting affidavit:-

(i) annexture MD 30 a letter dated 5/05/2002 by Applicants to the Town Clerk Nairobi City Council on grounds that the letter has no page 2 and is also not signed.

(ii) annexture MD 31 – a letter by the Applicants dated 24/09/2002 on grounds that the letter is not dated.

(iii) Annexture MD 34 – a letter dated 20/05/2003 by one Paul Mbau for not being signed. However the court notes that this letter is signed.

(iv) Annexture MD 39 – a letter by the Applicants Chair dated 30/12/2003 for not being signed.

(v) Annexture MD 45 – a letter from the Office of the President dated 1/04/2004 on grounds that the letter is undated.

(vi) Annexture MD 56 – a letter by the Applicants dated 17/03/2006 which letter the 1st Defendant says is not signed.

(vii) Annextures MD 58, 67 and the document at page 436 of the Applicant's bundle – Inspection Report for 03/04/2009 for bearing no signatures.

33. Counsel for the 1st Defendant also highlighted his written submissions at length and urged the court to dismiss the Applicant's application on grounds that the Applicants have also fallen short of the requirements of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** for the granting of interlocutory injunctions

Submissions by the 2nd Defendant

34. The 2nd Defendant filed its written submissions on 27/10/2009. Mr. Eric Abwao ventilated the case on behalf of the 2nd Defendant. Counsel for 2nd Defendant submitted that the orders sought against the 2nd Defendant, namely,

1. To restrain the 2nd Defendant from approving any change of user applications in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit.

2. To restrain the 2nd Defendant from approving and/or licensing any kind of development in regard to the suit property or any portion thereof pending the hearing and determination of this application and thereafter this suit

are incapable of being granted for reasons that the issue of Change of user is a matter to be handled under the Physical Planning Act regime and that in the circumstances, the Applicants should have enjoined the Director of Physical Planning in this suit. Counsel for the 2nd Defendant submitted that the Nairobi Physical Planning Liaison Committee approved change of user at its 37th meeting held on 24/01/2007 for the reason

"*that since there is no other commercial/social facilities in the vicinity with the nearest being Village Market and Westlands, Change of User to commercial be allowed."*

35. Counsel for the 2nd Defendant contended that once the Nairobi Physical Planning Liaison Committee had made the decision and passed it on to the 2nd Defendant, the 2nd Defendant had no option but to implement the decision in accordance with the provisions of Section 10(2) (c) of the Physical

Planning Act (PPA) which sets out the functions of the Liaison Committee as follows:-

"*To determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a Title Deed in respect of such land."*

36. Counsel for the 2nd Defendant went on to say that any party aggrieved by a decision under the PPA would appeal against such a decision to the National Liaison Committee under the provisions of Section 15(1) of the PPA. Counsel for the 2nd Defendant further submitted that the Applicants did not challenge the decision of the Director of City Planning in approving change of user. In counsel's view, the court should not issue orders against the 2nd Defendant when the Applicants have not enjoined the party which made the decision that appears to have aggrieved the Applicants, namely the Nairobi Physical Planning Liaison Committee.

37. Regarding the second prayer by the Applicants against the 2nd Defendant, counsel submitted that the power to issue such an order lies within the ambit of the Physical Planning Liaison Committee as provided under section 10(2) of the PPA; that the decision was made by the Nairobi Physical Planning Liaison Committee on the 24/01/2007 at its 37th meeting; and that any grievances arising from the decision of the Nairobi Physical Planning Liaison Committee was appealable to the National Liaison Committee. In support of the arguments for the 2nd Defendant's case counsel relied on the decision in the persuasive authority in HCCC No. 820 of 2003 – **Ali & 3 Others vs City Council of Nairobi.**

The Applicant's Submissions in reply

38. In reply to the submissions by the 1st and 2nd Defendants, the Applicants tendered a lengthy reply. Regarding the submissions by the 2nd Defendant, counsel for the Applicants submitted that all the points raised by counsel were argued during the hearing of the Preliminary Objection before Nambuye J and further that all developments by the 1st Defendant were ordered stopped by Kariuki Kihara J. Counsel for the Applicants also submitted that it is not the Applicants but the 1st Defendant who ignored the provisions of the PPA, and especially in view of the enforcement notice issued by the 2nd Defendant to the 1st Defendant. Counsel for the Applicants downplayed the discrepancy in the description of the suit property, arguing that LR No. 209/8000/84 was the original number and that in any event any such misdescripton is curable under the provisions of section 100 of the Civil Procedure Act.

39. On whether or not Applicants ought to have leave of the court before bringing this action, counsel for the Applicants argued that this was not necessary. On whether or not NEMA issued a licence for the work being undertaken by the 1st Defendant, counsel for the Applicant contended that no such licence was in place. Counsel relied on annexture MD 68, to the Applicant's supporting affidavit being the ruling by the National Environmental Tribunal at Nairobi in Tribunal Appeal No. NET/24/2007. The Appellant in the Appeal was the Plaintiff/Applicant herein while the Respondents were the DG, NEMA and the 1st Respondent herein. The appeal was against NEMA's approval and licensing of the 2nd Respondents (1st Defendant herein) conversion of plot No. LR 209/9295 in New Muthaiga Estate in Nairobi to a commercial centre by construction thereon of a shopping complex. The Appellants appeal was premised on the grounds contained in the Appellants letter dated 8/08/2007 namely, that:-

(i) *the area where the 2nd Respondent proposes to build a commercial centre is an exclusive residential area and it is inappropriate to have a commercial centre in its midst;*

(ii) the area is adequately served by shopping centres existing within its proximity and therefore the intended shopping complex would not fill any vacuum for shopping facilities.

(iii) the proposed shopping complex would strain limited resources in the area including water, electricity, roads and other infrastructure;

(iv) if established, the shopping complex would increase insecurity in the area; accommodate increased human and vehicular traffic during construction and after the project;

(v) the road in the area, specifically, Thigiri Ridge Road, is too narrow to accommodate increased human and vehicular traffic during construction and after the project;

(vi) the 2nd Respondent's proposal to dual Thigiri Ridge Road is impractical because there is no room for expansion of the road, in any case, the 2nd Respondent would be ill-equipped to dual the Road;

(vii) the proposed construction would increase noise pollution in a generally quiet and serene area;

(viii) the proposed construction would increase air pollution due to dust emanating from construction works and vehicular traffic during and after construction;

(ix) if not properly managed, water generated from the proposed facility would pollute water used by residents of New Muthaiga Estate for domestic purposes and;

(x) that in the past, the 2nd Respondent has disregarded the wishes of the Appellant's members by, among other things, changing use of the plot in question, which, originally, was construction of a clinic, a day nursery school and two residential houses for a teacher and a doctor in-charge and by allowing the erection of four cellular phone masts in one concentrated area on the plot on question (sic), which constitutes a health hazard for residents and school children due to radioactive emissions.

40. In opposition to the appeal, the 2nd Respondent (1st Defendant herein) raised the following grounds:-

(i) the appeal is frivolous, vexatious and an abuse of the process of the Tribunal,

(ii) objections to grant EIA licences are made prior to and not after grant of an EIA licence,

(iii) objections to change of user are made to Physical Planning authorities and not to the National Environment Tribunal.

(iv) objections to change of user are made prior to and not after approval of change of user,

(v) the Appellant had many opportunities to present objections to change of user before Physical Planning authorities but did not make use of the opportunities,

(vi) Appellant had opportunities to object to the issuance of an EIA licence but did not make use of them,

(vii) the Appellant cannot lawfully institute proceedings in the Tribunal if the object and effect of the proceedings is to defeat, vitiate, circumvent and otherwise undermine court orders, and

(viii) that filing of the appeal in the Tribunal was contemptuous of the High Cout of Kenya.

41. The Tribunal's findings are at page 28 of the ruling. These are that

(a) The Environment Impact Assessment (EIA) in respect of the 2nd Respondent's proposed development was flawed, both within NEMA and on the ground;

(b) NEMA approved the development against recommendations of the DEC and Mr. Njura

(c) The 2nd Respondent failed to disclose material facts about the proposed development and NEMA approved the development without all necessary information

(d) The proposed project had four other major components that required a comprehensive EIA with all components

(e) The EIA licence issued for the 2nd Respondent's existing borehole was clearly for the supply for domestic water and was not and could not be understood to be a borehole for the supply of water for a commercial facility of the kind envisaged by the 2nd Respondent.

42. Accordingly the 1st Respondent's approval of the project conveyed by the letter dated 28/08/2008 was revoked. The Tribunal also cancelled the EIA licence issued for the proposed construction dated 26/11/2007.

43. In addition, counsel for the Applicants submitted that without a NEMA licence and under the provisions of Section 58(1) of EMCA, no development should be undertaken by the 1st Defendant. In summary, counsel for the Applicants submitted that unless the orders sought are granted, the Applicants will suffer irreparable loss, and that such loss cannot be compensated by payment of damages.

The Issues and Findings

44. The court has now considered the pleadings, the submissions and the law. From the above, a number of issues arise for determination. These issues are basically along the same lines of the points that were raised by the Defendants at the hearing of the Preliminary Objection before Nambuye J. The point before Nambuye J was whether or not on the basis of those issues the Applicants could be locked out of the hearing of their application on the merits. The court overruled the Preliminary Objection on the ground that the court would still have to investigate into most of the points raised before determining whether or not the objection could be upheld.

45. The first issue for determination is whether the Applicants have locus standi in this matter. The 1st Defendant has raised two points on this issue. One is that the Applicants have not demonstrated that they are a duly registered society with capacity to sue and secondly that the three officials who have instituted this suit have not demonstrated that they obtained requisite authority from the association to institute the suit. The Applicants' response is that it was not necessary for the Applicants to obtain authority from anyone. The Applicants also contend that the Defendants have done battle with the Applicants for a long time now and that the legal existence of the Applicants is not in doubt. The law on this issue as stated earlier on in this ruling is that it is not necessary for the Applicants to have obtained authority from the membership to institute this suit. What matters in such a case is the numerosity of the membership and the commonality of the interest being pursued. There is evidence on record to show that the three officials are part of that general body known as New Muthaiga Residents Association who have come together for the promotion and protection of the general welfare of the membership. The court therefore finds that the Applicants have the locus standi to bring both the suit and this application before this court.

46. The second issue that has arisen is whether the discrepancy between the prayers being sought in the plaint and those in the application is fatal to the Applicants case. It is not disputed by the Applicants that the prayers in the plaint relate to a property known as LR No. 209/8000/84, while the prayers in the application are in respect of a property known as LR 209/9295. The 1st Defendant argues that the prayer for injunction sought by the Applicants should not be granted for the reason that it is made in respect of a totally different Land Reference Number. The 1st Defendant also argues that each party must be bound by their pleadings and that in this case the Applicants have not shown which of the two properties they wish to get an injunction on. On their part, the Applicants contend that this anomaly can be rectified under the provisions of Section 100 of the Civil Procedure Act which provides:-

"*100. The court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.*"

47. The proper description of suit property in this case is fundamental to both the Applicants' and the

Defendants' cases. LR No. 209/8000/84 is alleged by the Applicants to be a public utility plot, which they say was set aside and retained by the 2nd Defendant herein for a nursery school and a clinic plus two houses, one for the teacher and one for the doctor resident on site. LR No. 209/9295 on the other hand is private property duly registered in the name of the 1st Defendant and on which property the Applicants allege the Defendant is trying to put up a commercial centre. The court has considered the rival arguments on this point and finds that the Applicants either know or do not know which property they are pursuing the Defendants for. If indeed LR No. 209/8000/84 is the suit property, then pursuant to the decision in the case of **Maathai & 2 Others –vs- The City Council of Nairobi & 2 Others** KLR (E & L) 1, it is the Attorney General and not any other individual who should bring a suit in respect of that property. That would mean that the Applicants would automatically lose their locus standi with respect to their claims on LR 209/8000/84. It is therefore not just a question of the court applying Section 100 of the Civil Procedure Act to rectify the anomaly in the Applicant's pleadings. Neither the court nor the Defendants in this case should be expected to state the Applicant's case. Further the Defendants should at the outset know what battle they are fighting – is it a public interest battle or is it a private interest battle? In the circumstances of this case, the Defendants are ambushed by the Applicant's pleadings. The court therefore finds that the anomaly in the applicants pleadings in so grievous that it goes to the root of their case against the Defendants and for this reason, the Applicants application for injunction must fail.

48. The third issue that has arisen for determination is whether the Applicants in this case are concerned with the change of user of LR No. 209/9295 or whether they have raised genuine environmental issues. The position of the 1st Defendant is that the Applicant's main concern is the Change of user which they (Applicants) allege was illegal and unauthorized. From the documents on record, the issue of change of user has been a bone of contention between the parties from as early as 1999. There is also evidence that the 4 storey building which is the subject of these proceedings standing on LR 209/9295 has been on site since 1988. A letter dated7/11/1988 and marked MD 11 to the Applicants supporting affidavit testifies to this fact. On the 14/03/2008, a new title deed was issued to the 1st Defendant in which the original use of nursery school and clinic was revoked and instead, the use of the suit property was changed to commercial purposes namely offices and shops.

49. The Defendants argument on this point is that the Applicants have slept for too long on what appears to have been a problem to them and secondly that since the Applicants' complaint is basically against change of user of the suit property, the Applicants ought to have enjoined the Commissioner of Lands who would then be in a position to say how and why the change of user was given. The 2nd Defendant also argues that the Applicants' main complaint is against the change of user of the suit property. Counsel submitted that this issue of change of user went through the hands of Nairobi Physical Planning Liaison Committee on whose advice the 2nd Defendant granted the approval for change of user. The two Defendants contend that the Applicants should have enjoined both the Commissioner of Lands and the Nairobi Physical Planning Liaison Committee so that the court can effectually determine the issues in controversy. The Defendants also argue that the environmental issue raised by the Applicants is a side issue and that even if the Applicants were to pursue it, they should first of all exhaust all the machinery available to them under the Physical Planning Act and if the Applicants are dissatisfied with any orders made under the Physical Planning Act, they should seek to have such decisions quashed by way of Judicial Review Proceedings.

50. I have considered the authorities cited to the court on joinder of parties and in particular the **Pashito Holdings case** (above). The finding the court makes on this issue is that the Applicants whether in pursuit of the Defendants on the Change of User or matters of the environment, ought to have enjoined the Commissioner of Lands and the Nairobi Physical Planning Liaison Committee both of whom have been left out of these proceedings. The court is also of the view that the National Environmental Management Authority (NEMA) would be a necessary party to these proceedings. In the circumstances of this case, the court does not have the benefit of the pleadings of these missing parties to help it determine the real issue in the application before court. Both the Applicants and the Defendants have made certain allegations against the Commissioner of Lands, NEMA and the Nairobi Physical Planning Liaison Committee, but there is no response from any of those parties to assist the court in knowing who is saying the truth. The law says that, the failure by the Applicants to enjoin these missing parties in their

suit is fatal to their application for the injunctive orders sought in these proceedings. The court is alive to the fact that the Applicants have made serious allegations against the Defendants touching on the environment, but these allegations are not just against the Defendants but they are also against the missing parties to this suit. Questions still remain unanswered as to why approvals are given today and they are revoked tomorrow and renewed the next day. Those parties must be made parties to this suit so that they can also explain their position. In the absence of those parties, the Applicants' case for injunctive orders against the Defendants is weakened and the same must fail.

51. The court has also considered the rival views on whether or not the 1st Respondent is undertaking a new project or is adding onto the building that is already existing. The Applicants say that the 1st Defendant is converting the existing building, while the 1st Defendant says that the project that is being undertaken is totally new and is not the same whose licence by NEMA was revoked. The documents on the file reveal that the proposed project is not the same as the existing project for which the licence was revoked. The Applicants concede that the 4-stroey building has been on site since before 1988. From an analysis of the evidence on record, these issues have been ventilated in different fora between the parties; and the court finds no merit in the Applicants' application about the same issues.

52. Regarding the provisions of EMCA and how those provisions are being violated by the 1st Defendant, counsel for 1st Defendant submitted that there is no contention in the plaint that any of the EMCA provisions are being violated. And further, counsel for the 1st Defendant argues that since LR No. 209/9295 is private property belonging to the 1st Defendant as provided under section 23(1) of Cap 281, the Applicants cannot purport to question the 1st Defendant's use of what belongs to him. The court has already said that the issue of title and whether it can be revoked so that it ceases to be a threat to the environment is a matter on which the Commissioner of Lands should be taken to task. The Commissioner of Lands is not a party to this suit. It would therefore be unfair and unjust for the court to grant the orders sought by the Applicants herein without hearing the missing parties. The court is of the view that the provisions of EMCA must be read in line with the Constitutional provisions and in particular section 75 of the Constitution, and that all parties adversely mentioned in these proceedings should be given an opportunity to be heard.

53. Is this suit frivolous and vexatious? After hearing counsel on this issue, and in particular submissions on the discrepancy between the prayers in the plaint and those in the application the court notes that the reliefs sought by the Applicants relate to events that have already taken place and which cannot be reversed unless the Applicants call such decisions into the High Court for quashing. If the court were to grant prayers 4 and 5 of the application for example, such orders would be made in vain, the reason being that the approvals for change of user have already been given and developments on the suit property have been approved. In any event, no injunctive orders can issue against the 2nd Defendant. As regards prayers 2 and 3 of the application, the court has already said that for the court to grant these orders, it needs to hear from the Commissioner of Lands in respect of prayer 2 and from the Nairobi Physical Planning Liaison Committee on prayer 3. As submitted by the Defendants, the best option open to the Applicants was to exhaust the entire dispute settlement machinery under the Physical Planning Act before coming to this court, and even then only by way of Judicial Review and not by way of these proceedings. The court also notes and it is conceded by the Applicants that there are several other suits between the parties thereby compounding the issues of vexatious litigation and abuse of the court process.

54. Finally, in light of the above, can it be said that the Applicants have satisfied the conditions set out in the **Giella –vs- Cassman Brown case** for the granting of injunctions? The answer to this question is in the negative. First the Applicants have not demonstrated that they have a prima facie case with a probability of success. The Applicants are not sure over which property they want the Defendants injuncted. Is it LR 209/8000/84 which is a public utility plot or is it 209/9295 which is private property duly registered in the name of the 1st Defendant? If they pursue an injunction on LR 209/8000/84, they are unlikely to succeed because it is only the Attorney General who can bring such a claim. If they pursue LR 209/9295, they are not likely to succeed either unless they enjoin the Commissioner of Lands to these proceedings. Whichever way one looks at it the Applicants case does not have a probability of

success.

55. Secondly, the Applicants have not demonstrated to this court what damage if any, they are likely to suffer, which damage is not compensated by damages, if the orders sought are not granted. The 4-storey building has been around since the late 1980's. The said building has been let out to tenants with the Applicants knowledge; and they cannot now be heard to allege that they will suffer irreparable damage if the building is turned into commercial premises. The building is already operating as commercial premises. The court also finds that the balance of convenience in this case would tilt in favour of the Defendants.

Conclusion

56. For the reasons given above, the court finds and holds that the Applicants' application dated 14/05/2009 lacks merit. The same is hereby dismissed with costs to the Defendants. As for the suit, the court refrains from taking the drastic step of striking it out and grants the parties liberty` to apply generally.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of November, 2009.

R.N. SITATI

JUDGE

Ruling read and delivered in the presence of:-

Mr. James Singh (present) for the Plaintiffs/Applicants

Mr. Mwangi Kigotho (present) for the 1st Defendant/Respondent

Mr. E. Abwayo (present) for 2nd Defendant/Respondent

Weche – court clerk