



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 59 of 1992

ATTANA WAMBUA

ATTORNEY GENERAL.....APPELLANT

- VERSUS -

SAMWEL MUTISO MULANDI

TIMOTHY M. KIMEU

JULIUS NDIKU

ALFONCE MUANGE.....RESPONDENTS

Coram: J. W. Mwera J

Mrs. Ntarangwi Advocate for Applicant Mr. Mbindyo Advocate for Respondent Court Clerk Ndolo

JUDGEMENT

This appeal arose from the ruling of the learned Principal Magistrate in the civil suit No. 211 of 1992 which he delivered on 21st July 1992 granting an injunction to the Respondents (Plaintiff; in the lower court) against the Applicants/Defendants. A brief history of the case may be of use. On or about 29th March, 1992 the Respondents sued the Appellants. They described themselves as being officials of Mwenhya Muusiini Funeral Self Help Group of registration No. MKS/CD/1/R/S/G 0929 with the Ministry of Culture and Social Services. The 1st Appellant was described as an Assistant Chief within Kalama Location Machakos, while the 2nd Appellants were described as Chairman and Committee Members of a development project also registered with the Ministry of Culture & Social Services in Machakos District.

The 3rd Appellant, the Honourable the Attorney General was simply sued on behalf of the Government of Kenya

plaint stated that the Plaintiffs were at all material times the owners and entitled to possession and use of water catchments projects at Makilu and Syauni rivers to preserve and control the use and harvest of sand at the said projects. It should be observed from the onset that the location of the said two rivers, their lengths or areas within which the Plaintiff has use and preservation of these rivers was not stated. Not

even the kind and location of the projects on those rivers.

However, it was averred that w.e.f. 10th August 1991 the 1st and 2nd Defendants unlawfully trespassed and harvested sand from the two rivers water catchments areas causing the Plaintiffs' projects to run dry of water causing much loss and damage to the Plaintiffs.

Further that the 1st and 2nd Defendants had since August 1991 also threatened the Plaintiffs. Nothing was said of the reason why the 3rd Appellant was joined as a party but the Respondents prayed for remedies including an injunction to restrain the Defendants (now Appellants) from sand harvesting on the Makilu and Syuuni rivers and threatening the Respondents.

A Chamber Summons in respect of the injunction was filed on the same day. It spoke of restraining the 1st and 2nd Defendants from harvesting and selling sand from the said two rivers. An affidavit in support was filed by the 1st Plaintiff that they had water projects along the two rivers for water used by them for domestic needs and stock watering. The Plaintiffs' project was not sand harvesting but preservation and improvement on water collection both programmes which sand harvesting threatens. That the Defendants had not only done just that but that the 1st Defendant had threatened the Plaintiffs with arrest if they resisted sand harvesting. They were all to be duly restrained.

On July 22, 1992, the Attorney-General's office at Machakos filed a defence, apparently for all Defendants. It denied that the Plaintiffs had any projects on the said two rivers and/or that the Defendants had trespassed on any of them. The Defendants stated that they harvested sand along the 2 rivers on authority of the local council and thus there was nothing unlawful or wrongful with their acts, which they carried out at identified points on the rivers and at no time did the rivers run dry of water causing loss and damage to the Plaintiffs and their animals. A replying affidavit from the Defendants, stated that the 1st Defendant was a local administrator mandated to supervise community development projects in the sub-location. That the 2nd Defendants were authorised to harvest sand, and that the labour thereof was charged in order to finance the community projects. That there was sufficient water for domestic and livestock use at Makulani dam within the village. So the Defendants desired that sand harvesting had to go on so that the community projects too, - a police post, a sub chief's office and a dispensary would go on, and on completion benefit the Plaintiffs also.

The learned Principal Magistrate heard the parties and granted the injunction. In the 7 - ground appeal Mrs. Ntarangwi appeared for the Appellants while Mr. Mbindyo argued for the Respondents. In the first ground, the court heard that the injunction should not have issued against the Defendants at all apparently because they were a government body and no injunction issues against the Government under S. 16 (1) (i) of the Government Proceedings Act. Mr. Mbindyo supported the learned trial magistrate's conclusion that the 2nd Appellant particularly was not a government department in the meaning of the Government Proceedings Act. That it was a self-help group, which if registered under the relevant ministry did not even exhibit its certificate of registration. Mr. Mbindyo added that his clients moved against the 1st Appellant only for his threats and that the main claim lay against the 2nd Appellants for the trespass and harvesting of sand in the two river beds. This may not be entirely so as the gist of the pleadings quoted above also claim that the 1st Appellant jointly with the 2nd Appellants committed the offending acts of trespass and said harvesting. Anyway the threats by the 1st Appellant were alluded to in the affidavit in support of the injunction application. In any case who 10 is the government under the Government Proceedings Act (Cap. 40). Beginning from the Act itself what constitutes government is not defined. Reference is however made to civil proceedings by/against the government to:

"Include civil proceedings to which the Attorney General, or any Government department or any officer of the Government as such is a party."

(see S. 2(3))

That section also defines an officer in relation to the government to include the President, the Vice President, a Minister, An Assistant Minister any servant of the Government. An agent when sued in relation to the government includes an independent contractor employed by it.

Still on the same issue, the interpretation and General Provisions Act (Cap 2) simply defines the Government as the Government of Kenya and in spite of all it provides for regarding the governance of the Republic of Kenya, the Constitution does not give a definition of the Government of Kenya and specifically who constitute it. This may be an interesting aspect to delve in further but are the Appellants "the Government of Kenya" as intended under the Government Proceedings Act? The 1st Appellant is said to be an Assistant Chief - a rank in the provincial administration of the Government. Fair enough. The 3rd Appellant is the servant of the Government of Kenya as its chief legal advisor and that is not in doubt. What of the 2nd Appellant? These are the Chairman and Committee Members of self-help group of Kiitini Development Project. That project although engaged in public and community project is surely said to be registered with the relevant government ministry. Due documents were not availed but it will be believed to be so. Registration is a procedural and probably mandatory step by such a body for various reasons including government recognition, some funding and working in cooperation but it is not a government department or agent at all. This was neither demonstrated satisfactorily here nor in the court below. It is therefore proper that the lower court's conclusion about the official or non-official status of the 2nd Appellant remains undisturbed. The 2nd Appellant did not thus stand to be protected from injunctions under S. 16(1) (i) of the Government Proceedings Act at all and this ground fails.

In the second ground of appeal it was submitted that the learned trial magistrate erred when he concluded that the Appellants admitted that they harvested sand. Well. The Appellants harvested sand along the 2 rivers and they said so in their pleadings. What is not clear to this court are the sites of the Plaintiff's projects and that should be a matter of evidence at the full trial.

The ground that a prima facie case was not made out to warrant the injunction, holds some substance. On perusing the pleadings, the submissions, affidavits and all, it is not clear that the Respondents either own or otherwise have rights over part or the entire courses of the two rivers and/or at what points they have projects plus the nature and number of projects. Probably that will emerge at the trial but at the interlocutory stage of the injunction, this court is not satisfied that much was put forth to make out a prima facie case with a probability of success. It forms part of grounds (3) and (7).

As for the threats by the 1st Appellant, the Plaintiff said nothing of this but the affidavit in support of the application said so and that was not denied in the replying affidavit. The learned trial magistrate was right to find as he did - issue a restraining order and wait for proof on the hearing. It cannot be said that threats by an Assistant Chief, if surely issued, form part of his official duties for which an injunction should not issue under S. 16 (1) (i) of Cap. 40. And sixth, it was argued that the injunction should not have issued even on a balance of convenience and or monetary compensation (see grounds (6) and (5)). It is not easy to assess in monetary terms the loss suffered by a party who has been deprived of water for domestic and other uses due to the acts of another. And if the learned trial magistrate was of the view that the Respondents would be more inconvenienced than the Appellants, he had the evidence to do so. He weighed the inconvenience of loss, damage and suffering to be sustained by the Respondents when the 10 water tables fell due to sand harvesting by the Appellants and the Appellant's community projects stalling. This court is of the view that he arrived at a proper conclusion and it has not been demonstrated here that he incorporated or omitted a proper basis in doing so. These two grounds are too dismissed.

A prima facie case with chances of success may not have been made out but the learned trial magistrate was convinced that no money could compensate the Respondents of their loss and damage due to the acts complained of and that on balance of convenience the Respondents were favoured.

In sum the appeal is dismissed with costs.

Judgment accordingly.

Delivered on 15th May, 1996.

J. W. MWERA

JUDGE