



## **Maathai & 2 others v City Council of Nairobi & 2 others**

High Court, at Nairobi March 17, 1994

Ole Keiwua J

Civil Case No 72 of 1994

***Civil Procedure and Practice*** - preliminary objection – *locus standi* –  
*capacity of the plaintiffs to sue for the purpose of preventing public wrongs*  
***Land*** – title - *indefeasibility of title* –*Registration of Titles Act (cap 281)*  
*section 23*

The plaintiffs moved to court as rate payers to the Nairobi City Council seeking *inter alia* an injunction to restrain the 3rd defendant from selling or carrying out construction upon a particular piece of land, due to its alleged illegal acquisition. The 3rd defendant raised a preliminary objection citing that the plaintiff had no *locus standi* to bring the suit.

### **Held:**

1. The plaintiffs had no *locus standi* to seek injunctive relief as they did not have sufficient interest to bring the action.
2. Only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs.
3. A private individual is able to sue on behalf of the public where he has sustained particular injury as a result of a public wrong.
4. The plaintiffs in this case failed to show that there had been any failure of any public duty in which they alone had a unique interest as opposed to that of the general public.
5. The title issued to the 3rd defendant could not be challenged in the

absence of the matters set out in Section 23 of the Registration of Titles Act.

*Suit dismissed*

### **Cases**

1. *Gouriet v Union of Posts Office Workers* [1977] 3 All ER 70; [1978] AC 435; [1977] 3 WLR 300
2. *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; [1981] 2 All ER 93; [1981] 2 WLR 722

### **Texts**

1. Wade, HRW (1982) *Administrative Law* London: Stevens & Sons 5th Edn
2. Jowell, JL; McAuslan, JP (1984) *The Judge and the Law* London: Sweet and Maxwell

### **Statutes**

1. Registration of Titles Act (cap 281) sections 24, 23
2. Local Government Act 1972 section 222

### **Advocates**

*Mr Khaminwa* for the Plaintiffs

March 17, 1994, **Ole Keiwua J** delivered the following Ruling.

The plaintiffs sued the defendants and sought these declarations:-

- (a) That the subdivision, sale and transfer of LR 209/1855/2 - LR 57271 is irregular and breached special condition in the grant dated 1.8.1928. It is *ultra vires* the powers of the first defendant which is Nairobi City Council.
- (b) That the issuance of certificates of title by the Commissioner of Lands is irregular and contrary to law.
- (c) The revocation of subdivision of Land Ref 209/1855

- IR 2562 together with revocation of sale thereof.

(d) An injunction to restrain the 3rd defendant from selling or carrying out any construction work on LR 209/1855/2. A chamber summons dated 7.1.1994 has been filed in court and seeks an injunction against the third defendant to restrain it from constructing anything on the plot in question. It is supported by the affidavit of the first plaintiff which swears that the plot is in danger of being alienated. The plaintiffs will be obstructed in execution of any decree that they may obtain against the defendants if construction work is permitted to continue unabated.

In its grounds of opposition dated 17.1.1994 the third defendant denies that it is disposing off the plot and says, an injunction will cause hardship to the third defendant because the approval of the building plans by the Nairobi City Council is valid only for a year. The third defendant's title is guaranteed by the provisions of the Registration of Titles Act cap 281 under which the title has been issued. An injunction if granted will render the provisions of the Registration of Titles Act nugatory.

The third defendant also filed the application dated 17.1.1994 for an injunction against the plaintiffs. The second defendant filed an affidavit in which it is deponed that the Nairobi City Council applied for the subdivision of the plot in question and the approval was given in the normal way. In their grounds of opposition the plaintiffs said they do not intend to damage the plot in question save by way of lawful litigation in courts of law.

The third defendant alone had filed a defence. It denies breach of the 1928 special condition upon which the suit is based. It denies a sale to it

of the plot but claims a lawful allocation thereof which conferred good title. In paragraph 16 of this defence it is pleaded:-

“This third defendant contends that the plaintiffs herein have no *locus standi* to bring the proceedings now before the court and shall at the appropriate time move the Honourable Court to strike out this suit”.

There is also paragraph 19 which pleads:-

“The third defendant shall rely on the provisions of section 23 of the Registration of Titles Act Cap 201 which provides *inter alia*, that the certificate of Title issued by the Registrar to a purchaser of land upon a transfer shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the indefeasible owner thereof .... and the title to that proprietor shall not be subject to challenge.”

There is of course section 24 of the Registration of Titles Act which says that the remedy of a person aggrieved by such registration as that of the 3rd defendant is in damages only.

As pleaded in paragraph 16 of the defence of the third defendant the time to raise the issue of *locus standi*, came on 27.1.1994 when the point was taken by the third defendant that the plaintiffs had no right to appear and be heard in this case and their suit be struck out. For this proposition of lack of standing Mr Muigua relied on the House of Lords decision in *Gouriet and others v HM Attorney General and Union of Posts Office Engineering Union* [sic] [1971] AC 435 at pages 437 Letter C:

Held: Allowing the appeals by the defendants and dismissing the plaintiff's appeal.

(1) That save and in so far as the local Government Act

1972, section 222 gave local authorities a limited power to do so, only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain injury as a result of a public wrong, for the courts had no jurisdiction to entertain such claims by private individuals who had not suffered and would not suffer damage (Post pp 481A 494 FG) page 481.

But in the present case, the transgression of those limits inflicts no private wrong upon these plaintiffs and although the plaintiffs, in common with the rest of the public might be interested in the larger view of the question yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by private individuals.

“That it is the exclusive right of the Attorney General to represent the public interest even where individuals might be interested in the larger view of the matter it is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise”.

It was submitted on behalf of the third defendant that the present case should have been brought by way of a relator action if the Attorney General saw it fit to do so. The plaintiffs have not shown that they suffer any private injury if the proposed multi storey car park building is built. The basis of the plaintiff’s action is they allege that they are rate payers in the City of Nairobi. The third defendant had submitted that these elements of rate paying are unsupported because no amount of rate is indicated, when paid, in respect of what property the plaintiffs are concerned with. Even

rate paying alone, does not entitle the plaintiffs to sue unless they show that they stand to suffer injury or damage over and above other rate payers if the building is constructed. As pleaded in paragraph 19 of the third defendant's defence section 23 of the Registration of Titles Act Cap 281 require that a certificate of title issued by the Registrar to the purchaser upon transfer shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the indefeasible owner thereof/and the title to that proprietor shall not be subject to challenge. This is however subject to encumbrances, easements, restrictions and conditions, contained or endorsed on such certificate. There is the First of August 1928 special condition to which the third defendant says it has not been breached because the present plot L.R. 209/1855 - I.R. 2562 has been continually used as a municipal market, but the portion now known as L.R. 209/1855/2 I.R. 57271 has always been used as a parking area. In paragraphs 8 and 10 of the 3rd defendant's defence it is stated that the suit premises were not purchased by the third defendant but allocated to it and made payment of KShs 2 million by way of stand premium as opposed to any purchase price. In paragraph 9 of this defence fraud on the part of the defendants is denied in that the first defendant, Nairobi City Council acted legally and within its powers when it applied for the subdivision. It is said the third defendant is a stranger to the plaintiff's allegations that the plaintiffs are aggrieved by the said allocation, subdivision and transfer to the third defendant of LR No 209/1855/2. In that connection the third defendant contends that the plaintiffs have no *locus standi* to bring these proceedings.

On the basis of lack of standing and the provision of section 23 of the Registration of Titles Act I was urged to hold that the plaintiffs had no right to sue, no right to appear, no right to be heard in these proceedings.

On the other hand Mr. Khaminwa for the plaintiffs, submitted in relation to the attack and lack of evidence of details of rate paying, that they had intended to call oral evidence of this at the hearing of the application for injunction and the present preliminary point has come prematurely and at the wrong time because the 3rd defendant must wait to give the plaintiffs the opportunity to show by oral evidence that the plaintiffs have a standing. Mr Khaminwa thinks the provision of section 23 cannot be looked at this stage when dealing with whether the plaintiffs have a right to speak against an owner of a title registered under the Registration of Titles Act.

A number of authorities were cited by Mr Khaminwa. One of this is the *Inland Revenue Commissioners v National Federation of Self Employed* [1985] AC 617 page 653.

“Suffice it to refer to the judgement of Lord Parker CJ in *Reg v Thames Magistrate’s Court ....*” a cause of certiorari; and to the words of Lord Wilberforce in *Gouriet Vs Union of Post Office Workers* [1978] AC 435, 482 where he stated the modern position in relation to the prerogative orders: “These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of *Locus Standi*.

The one legal principle which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant’s interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant’s interest without regard to the matter of his complaint. If he fails to show, when

he applies for leave, a *prima facie* case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The limb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks, and other mischief makers. I do not see any further purpose served by the requirement for leave”.

According to the plaintiffs the matter of their complaint here is the subdivision, allocation and transfer and registration of the suit premises in the name of the third defendant. The sufficiency of the plaintiffs’ interest must be looked at with regard to the kind of premises the suit land is. As already stated that the title issued to the 3rd defendant herein cannot be challenged in the absence of the matters set out in section 23 of the Act. This is the subject matter of the plaintiff’s complaint in respect whereof the third defendant has rightly raised a preliminary point that the applicants have no right to be heard to challenge, whether as rate payers, the third defendant’s title. In my considered view there is no further investigation required to ascertain what the subject of the plaintiffs’ complaint is. It is there in their plaint, in their chamber summons. At this stage the plaintiffs must show, and they have failed to show, that there has been any failure of any public duty in which they alone have a unique interest as opposed to that of the public generally.

I have been referred to a passage in Wade, *Administrative Law* which in itself cries for answer. In the Lord Denning book: *The Judge and the Law* I was referred to a passage like that of the *Inland Revenue Commissioner’s*

case which deals with: “Exceptions had been made, particularly in applications for certiorari or prohibition, but by and large standing was narrowly construed”. The plaintiffs are not before the court on any matter of certiorari or prohibition but by way of an ordinary suit by plaintiff restricted by the nature of the statute law in Kenya and restricted by their own interest in the subject matter of complaint namely as rate payers which they have not been able to make out a case.

I am therefore satisfied that the plaintiffs have no *locus standi* in this case and they should not be heard. Accordingly the plaintiff’s suit is struck out as urged in the preliminary objection. The plaintiffs will pay all the defendants the costs of this suit.