IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA, Chesoni & Platt Ag JJA)

CIVIL APPEAL NO. 80 OF 1982

KARUGI & ANOTHER ……....……APPELLANTS

VERSUS

KABIYA & 3 OTHERS…….RESPONDENTS

(Appeal from the High Court at Nyeri, O'Kubasu J)

JUDGMENT

The appellants are the registered proprietors of plot No. 18A Kiawarigi Market, Mathira Division of Nyeri District. The plot was allocated to them in 1946 and the respondents say they were co-allottees with the appellants. The appellants who in their plaint said that they had developed

the plot so that its value was Kshs.100,000 at the time of the trial of their suit, were further developing the plot when the County Council of Nyeri,the District Officer for Mathira Division and the Chief of Konyu Location at Karatina instructed them in writing between November and December 1980, to stop all construction work on the plot. The appellants complied and as a result of that interference they had suffered loss. The appellants contended that the Council, District Officer and Chief on the instructions of the respondents. That was why the appellants filed a suit in the High Court at Nyeri against the respondents and asked for an order to enable them proceed with the further development of their plot, a perpetual injunction restraining the respondents from interfering with the plaintiff's possession and quiet enjoyment of the plot,

General Damages, Special Damages of Kshs.11,500 and costs. The High Court (O'Kubasu J) dismissed the suit on the ground that the appellants had sued the wrong party as they should have sued the Council, the D.O. and the chief who stopped them from further developing the plot. They had not proved, and, indeed the evidence on record supports that view, that the Council, D.O. and Chief acted on the respondent's instructions and, even if that had been proved the appellants could not have proceeded against the respondents in this matter without joining the Council, D.O. and Chief. It was not enough to merely allege that theappellants, had made inquiries, which might have been hearsay and inadmissible. There was no cause of action against the respondents and this was not a case to be saved by Order 1 r. 9 of the Civil Procedure

Rules. The learned judge correctly dismissed the suit. I would dismiss this appeal, but make no order as to costs.

Hancox JA. The appellants sued the persons named as respondents to this appeal claiming that orders emanating from the Nyeri County Council, the District Officer, Mathira Division, and the Chief of Konyu Location, requiring them to cease construction and development on Plot No. 18A Kiawarigi Market, were at the request and instance of the respondents. The appellants *inter alia*, claimed damages against the respondents, who were also named as defendants to the action in the High Court. The orders concerned were contained in letters written in the month of November and December 1980 and produced as exhibits 2, 3 and 4 in the formal proof proceedings.

Mr Waweru, on behalf of the appellants, sought to persuade us that as there was no valid memorandum of appearance, and consequently no valid defence to the plaint, the learned judge should have acted on the sworn testimony of the first plaintiff that he had made enquiries and had discovered that the letters in question had been written at the request of the respondents: in other words that it was sufficient for the mere assertion to be made in the plaint, followed by uncontradicted evidence to be given in support thereof, for the burden on the plaintiff to be discharged in a case going by way of formal proof. Moreover, Mr Waweru said, it was a misdirection for the judge to refer, as he did in his judgment, to the terms under which the plot of land was allocated to the appellants. Despite Mr Waweru's valiant attempt to cover the gap in the evidence and to show the nexus between the Council, the District Officer and th Chief on the one hand, with the respondents on the other, I regret I cannot agree with his submissions. I wholly agree with Chesoni Ag JA (whose judgment I have had the advantage of reading in draft), that there was not a shred of admissible evidence to connect the respondents with that which was done by the authorities concerned. I agree with the trial judge that, on the available material, it was they who should have been sued. Neither can I agree with Mr Waweru that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge. For these reasons I would dismiss the appeal, but, in the circumstances, I would make no order as to costs. As Platt Ag JA also agrees there will be an order in the terms proposed by Chesoni Ag JA.

Platt Ag JA. I agree with the judgments that have been read, and would only like to emphasise two points. The first is that I am not surprised that the words "formal proof" have once again led to misunderstanding. They should not be used as they are no longer part of the Civil Procedure Rules. Orders IXA & IXB of those Rules do not employ them. As will be seen for Order IXA Rules 8 & 9, when any party does not appear or defend the plaintiff may set down the suit for hearing under Order IXB Rule 1. In the latter rule the plaintiff sets the suit down for hearing having given reasonable notice to every defendant who has appeared. There was an appearance in this case. Then under Order IXB rule 3, when the plaintiff only has attended, the court may proceed "*ex parte*". The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be.

The result in this appeal is that the nexus between the defendant and other parties (who actually gave the orders, which caused the plaintiff alleged loss) was not proved.

The second point is that care must always be taken when a public body acts in its own discretion. The learned judge was quite right to insist that the person who actually gave the order impugned be impleaded in the first place. They may have acted quite independently of persons who have caused the dispute.

I agree that the appeal be dismissed.

Dated and Delivered at Nairobi on this 16th Day of November , 1983

A.R.W. HANCOX

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JUDGE OF APPEAL

Z.R. CHESONI

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AG JUDGE OF APPEAL

H.G PLATT

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Ag JUDGE OF APPEAL