



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

LAND CASE NO. 390 OF 2015

LAWRENCE OGARO ONYIEGO1ST PLAINTIFF

JAMES MANONO ONYIEGO 2ND PLAINTIFF

VERSUS

SAMWEL MINIKA 1ST DEFENDANT

COUNTY GOVERNMENT OF KISII 2ND DEFENDANT

RULING

1. This ruling is in respect of two applications being the plaintiffs' application dated 12th November 2015 by which the plaintiff seeks an injunction to restrain the defendants from demolishing the plaintiffs' house and other structures or in any other manner interfering with land parcel number **South Mugirango/Bosinange/4306** and/or any portion thereof. The other application is the 1st defendant's application dated 29th March 2016 by which the 1st defendant prays that the plaintiffs' suit be struck out.

2. The plaintiffs' application for injunction is premised on the grounds set out on the body of the application and on the supporting affidavit sworn by the 2nd plaintiff. The plaintiffs aver that the 1st plaintiff is the registered owner of land parcel number **South Mugirango/Bosinange/4306** and the 2nd plaintiff has interest on the same by way of being a purchaser. The plaintiffs assert that the defendants have entered onto the suit land and are forcefully using tractors to construct a road of access through the suit premises when there is no such a road. The plaintiffs aver that the defendants have damaged a gate leading to the suit premises and have destroyed crops that have been cultivated thereon and there is threat that they will demolish the plaintiffs' permanent house unless they are restrained.

3. The 1st defendant filed a statement of grounds of opposition dated 29th March 2016 to oppose the plaintiffs application in the following terms:-

1. The application does not meet the conditions for granting injunctive reliefs.

2. The application is frivolous, vexatious and otherwise amounts to an abuse of the court process.

The 1st defendant at the same time filed his application dated 29th March 2016.

4. The 2nd defendant for its part filed grounds of opposition to the plaintiffs application and interalia raised the following grounds:-

1. No notice of intention to sue was issued against the 2nd defendant before filing the suit as required under Section 13 of the Government Proceedings Act Cap 40 Laws of Kenya.

2. The 2nd defendant is a body corporate and its constitutional and statutory mandate cannot be curtailed on mere presumptions.

3. The orders of injunction cannot be granted against the 2nd defendant as per the Government Proceedings Act.

4. The plaintiffs have not disclosed reasonable cause of action against the 2nd defendant.

5. The plaintiffs have not produced evidence of demolition of their property by the 2nd defendant and the 2nd defendant has no intention to do so unless the plaintiffs have encroached onto public road.

5. The 1st defendant's application dated 29th March 2016 made under Order 2 Rule 15, Order 4 Rule 3 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act is predicated on the following grounds set out on the face of the application and on the 1st defendant's supporting affidavit sworn on 29th March 2016:

(i) The suit herein concerns the County Government Act, a government within the meaning of the Constitution and the Government Proceedings Act.

(ii) No notice of intention to sue was issued before filing of the instant suit as required under Section 13 of the Government Proceedings Act.

(iii) The suit discloses no reasonable cause of action against the 1st defendant.

(iv) The suit is otherwise an abuse of the court processes.

6. In the sworn affidavit in support, the 1st defendant avers that the plaintiffs have not shown how the 1st defendant is connected to the suit and no nexus between the 1st defendant and the 2nd defendant has been demonstrated. The plaintiffs in their grounds of opposition dated 14th April 2016 contended that the 1st defendant not being a government cannot plead the provisions of Cap 40 Laws of Kenya to challenge the competency of the suit and at any rate asserted that Cap 40 has no application to County Governments as it only applies to the National Government where the Attorney General represents the Government.

7. On 18th May 2016 the court directed the two applications dated 12th November 2015 and 29th March 2016 to be argued together, by way of written submissions. The parties have filed their respective submissions. As the 1st defendant's application dated 29th March 2016 is in the nature of a preliminary objection as it seeks the striking out of the plaintiffs' suit I will deal with it first.

8. The 1st defendant's application is in the main predicated on the non service of statutory notice under Section 13A (1) of the Government Proceedings Act, Cap 40 Laws of Kenya which provides as follows:-

“NO proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”

9. The 1st defendant has submitted that service of a statutory notice under Section 13A (1) of the Act is mandatory and lack of service renders the suit incurably defective. The 1st defendant referred the court to the case of the **Council of Governors and 6 Others –vs- Senate [2015] eKLR where, J J. Isaac Lenaola, Mumbi Ngugi and George Odunga** reviewed various court decisions where the courts had

considered the application of Section 13A (1) notably the case of **Orengo –vs- Attorney General [2007] eKLR** where it was held **“that Section 13A(1) of the Government Proceedings Act creates a mandatory obligation on every person prior to filing any litigation against the government to issue the required 30 days notice to the Attorney General”**.

10. The Judges further referred to the case of **Hudson Laise Walumbwa –vs- Attorney General HCCC No. 2714 of 1987** where **Ringera, J.** stated thus:-

“Section 13 of the Government Proceedings Act is in clear and mandatory terms that do not permit of any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government, under the Government Proceedings Act, can be or be instituted before the statutory Notice has been given and expired.....

..... This Section is not in the nature of a statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to institution and the trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the court. And it matters not why it was not complied with. As a party of substantive law, the defendant may or may not plead it.”

11. The three judge bench however upheld the holding of **Majaja J.** in the case of **Kenya Bus Service Ltd & Another –vs- Minister for Transport & 2 Others [2012] eKLR** where the Judge held Section 13A(1) to be unconstitutional for being in contravention of Article 48 of the Constitution. The Judges’ cited portions of the judgment of **Majaja, J.** in extenso and inter alia cited the observation by the Judge where he stated:-

“The provisions for demanding prior notice before suing the government is justified on the basis that the Government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.”

12. The three Judge bench further agreed with the conclusion of **Majaja, J.** where he stated thus:-

“Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the Government Proceedings Act provides an impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Common Wealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement, violates the provisions of Article 48.”

The Judge in the case of **Council of Governors & 6 Others –vs- Senate (Supra)** in approving the holding by **Majanja, J.** stated thus:-

“We agree with the learned judge and we see no reason to depart from his finding as we find the same to be sound in law.”

13. I equally would have no basis to disagree with my brothers and sister Judges on the application of

Section 13A of the Government Proceedings Act. The strict application of Section 13A of the Act doubtlessly would impede access to justice. It is worth noting that the Government Proceedings Act was enacted when we had only one National Government as opposed to the position today when we have forty seven County Governments and the National Government, courtesy of devolution. While the application of Section 13A may have had justification during the era when there was only the National Government whose activities were centralized the same cannot be said to be the case today when apart from the National Government there are other 47 County Governments.

14. Section 12 of the Government Proceedings Act envisaged the Attorney to be the party to sue and/or be sued on behalf of the Government. Section 12 (1) provides:-

12(1) Subject to the provisions of any other law, civil proceedings by or against the government shall be instituted by or against the Attorney General, as the case may be.

Following the creation of the devolved units (County Governments) the Government Proceedings Act was not amended to align it to the new reality. The result is that if the Act is applied as is, it would result in absurdity as for instance Section 13 of the Act requires service of all documents relating to suits to be served on the Attorney General. Section 13 provides as follows:-

“All documents requiring to be served on the Government for the purposes of or in connection with any civil proceedings by or against the government in accordance with the provisions of this Act shall be served on the Attorney General.”

15. Under Article 156 (4) of the Constitution the Attorney General is only mandated to act for and represent the National Government. Article 156 (4) of the Constitution provides:-

156(4) The Attorney General-

(a) Is the principal legal advisor to the government;

(b) Shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings and,

(c) Shall perform any other functions conferred on the office by an Act of parliament or by the president.

The Attorney General cannot represent the County Government and hence the notice under Section 13 and 13A of the Government Proceedings Act cannot properly be served on the Attorney General. Thus in my view, even if Section 13A had not been declared unconstitutional it would have no application to County Governments and I so hold.

16. As relates to the 1st defendant's argument that he has not been properly sued and that the suit against him ought to be struck out I would only observe that misjoinder and non-joinder of a party cannot invalidate a suit as provided under Order 1 rule 9 which provides thus:-

1(9) No suit shall be defeated by reason of the misjoinder or non joinder of parties, and the court may in every suit deal with the matter in controversy so far as the rights and interests of the parties actually before it.

17. Striking out of a suit is a draconian step which ought only to be taken as a last step. As much as possible the court should exercise its discretion in sustaining the suit so that the suit is determined on its merits. While the plaintiffs claim against the 1st defendant is at best blurred, the court will afford the plaintiffs the opportunity to establish their claim, if any, at the trial. In case they fail to do so the claim against the 1st defendant will be dismissed and he will be compensated by an award of costs.

18. The 2nd defendant has additionally argued an order of injunction cannot issue against it by virtue of Section 16 (2) of the Government Proceedings Act which provides as follows:-

16(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of government, if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.

19. Hon. Justice Obaga in the case of **James Muigai Thugu –vs- County Government of Tran Nzoia & 2 Other [2015] eKLR** considered the application of the aforesaid provision and in his ruling held as follows:-

“The aforesaid Act forbids courts from giving an injunction against the government. The section quoted hereinabove extends the same protection to Government Officers. The Act was in place even before the devolved system of Government came into force. The question that arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention then the Government Proceedings Act would have been amended expressly to include County Governments. I therefore do not find that the County Government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers.”

20. Judicial opinion is divergent whether or not the Government Proceedings Act applies to County Governments and/or the extent to which it applies. **Muchemi, J.** in the case of **Josephat Gatheo Kibuchi –vs- Kirinyaga County Council [2015] eKLR** held that:-

“...A County Government is part of the state or government. The Constitution of Kenya establishes two levels of government being the National and County Government. The provisions of Section 21 of the Government proceedings Act are therefore applicable to proceedings relating to a County Government.”

21. I have observed earlier in this ruling that the Government Proceedings Act was not amended following the creation of the devolved units to align the same with the new reality. The creation of County Governments came with peculiar and unique challenges which the Government Proceedings Act could not have anticipated. With the decentralization of power to the counties where the County Government was now dealing directly with the citizenry the application of the Government proceedings Act which was tailored to deal with one monolithic government was always going to pose a challenge and my position is that the Act cannot wholesale apply to the counties without modification. My view is that Section 16 (2) of the Government Proceedings Act would be inapplicable to the County Governments. It is therefore my holding that Section 16(2) of the Government Proceedings Act would be inapplicable to County Governments and hence Section 16(2) of the Government Proceedings Act would not be a bar to an order of injunction being granted against a County Government.

22. Turning to the facts of the present case, the question to pose is whether the applicants have satisfied the conditions for grant of a temporary injunction to warrant the court to grant one in their favour. The case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** established the principles that the courts have consistently applied as I guide in determining applications for grant of injunction. These principles are:-

(i) The applicant must establish a prima facie case with a probability of success.

(ii) The applicant must demonstrate that he stands to suffer irreparable loss or damage that cannot be compensated for by an award of damages, if the injunction is not granted.

(iii) That where the court is in doubt, the application may be determined on consideration of the balance of convenience.

23. While the plaintiffs' have demonstrated that the 1st plaintiff is the registered owner of land parcel number **South Mugirango/Bosinange/4306** there is no evidence tendered to show that the 2nd defendant is constructing an access road on the suit land. The photographs annexed as "**JM01**" showing road works are ongoing cannot be evidence that the works are being carried out on land parcel No. **South Mugirango/Bosinange/4306**. It could well be on the land reserved for the access road. The abstract of the survey map annexed as "**JM04**" does not offer any assistance as it does not show any marking where the alleged access road is being constructed on the said land parcel. If anything it appears to show there is a road separating parcels **4306** and **3302**. Is this the road that was being opened up? The applicants needed to exhibit a surveyor's report to illustrate where the road works were being carried out. The court cannot presume that the road works must have been on the plaintiffs land parcel. I am therefore not persuaded the applicants have demonstrated a prima facie case with a probability of success.

24. On the second limb on whether or not the applicants stand to suffer irreparable damage that cannot be compensated for in damages, I am not satisfied that the applicants have demonstrated they would suffer irreparable harm or damage. In the event the applicants are successful at the trial, any damage to property they may have incurred could be easily computed and ascertained. The applicants under prayer (b) in the plaint have prayed for "**general damages and loss of the properties destroyed by the respondents**" denoting that an award of damages was feasible.

25. The upshot is that the applicants have not satisfied the conditions for grant of a temporary injunction and I therefore decline to grant the order of injunction sought in the plaintiffs' application dated 12th November 2015. The net result is that both the plaintiffs' application and the 1st defendant's application are dismissed. I will make no orders for costs and each party will bear their own costs for the applicants.

26. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 24th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiffs

..... for the 1st defendant

..... for the 2nd defendant

..... Court assistant

J. M. MUTUNGI

JUDGE