



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
THIKA LAW COURTS
ELC.12 OF 2017(OS)
(FORMERLY ELC.4 OF 2017 NRB)

CHARLES M. WAIHANYA

PETER WANJOHI

EVANS MUREITHI (Suing as officials of Damview

Estate, Kiamumbi Residents Association.....PLAINTIFFS/APPLICANTS

- VERSUS -

MARY WANJIKU NJOROGE.....1st DEFENDANT/RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....2nd DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....3rd DEFENDANT/RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....4th DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants herein suing as officials of *Damview Estate Kiamumbi, Residents Association*, brought on *Originating Summons* dated *2nd January 2017*, against the Defendants herein and sought for various determination. Among the determinations sought are:-

a) Whether a declaration should be issued that the development in Kiambu Municipality/Kiamumbi (Block 5/2849) are not in conformity with the law and are against public interest and particularly the interests of the members of the Plaintiff.

Simultaneously, the Applicants also filed a *Notice of Motion* application even dated and sought for the following orders:-

1) Spent.

2) Spent.

3) *A temporary injunction be issued restraining the 1st Defendant/Respondent, her employees, servants, agents, or any other person claiming through her for engaging in any further or other building works, construction, deliver of construction material or in any way, further developments whatsoever, on the property known as Kiambu Municipality/Kiamumbi (Block 5/2849) pending the hearing and determination of this suit.*

4) *The costs of this application be provided for.*

This **Notice of Motion** application is premised upon the grounds stated on the face of the application and the **Supporting Affidavit** of **Peter Wanjohi**. The Grounds in support are:-

a. The 1st Defendant/Respondent has commenced the construction of a high density residence flats without the necessary approvals and authority by the 2nd, 3rd and 4th Defendants/Respondents.

b. The Plaintiffs/Applicants contends the said construction unless stopped will severely and irretrievably alter the nature and character of the estate and the neighbourhood, to the great detriment of the members of the Plaintiffs/Applicants.

c. That is necessary that this application and the suit be heard and determined on their merits before the 1st Defendant/Respondent incurs expenses in the development, which may ultimately be disallowed by this Honourable Court.

d. The 1st Defendant/Respondent has completely ignored the directions of the 1st and 2nd Defendants/Respondents that he stops construction of the structure.

e. It is in the interest of justice and the dignity and the honour of this Honourable Court that the orders sought herein ought to be granted.

In his **Supporting Affidavit**, the deponent, **Peter Wanjohi**, who is a **Secretary** of **Damview Estate Kiamumbi Residents Association**, averred that the referred **Association** was registered on **9th January 2015**, and among its objective is to promote the general welfare of its members and enforce by-laws as relates to use of land within **Damview Estate**. It was also his averments that **Damview** area is designed as a low density residential area and the uses generally provided for are those of single family residences.

Further that the 1st Defendant is the registered proprietor of all that piece of land known as **Kiambu Municipality/Kiamumbi (Block 5/2849)**, situated along **Kahawa Road, Damview Estate Kiamumbi**. He also contended that the 1st Defendant has commenced without any lawful authority the construction of high density flats in the said property without the necessary approvals from the 2nd, 3rd and 4th Defendants. Further, that the said approvals also required public and stakeholders participation but the Association legitimate expectation was thwarted when their contributions were not obtained before the said approvals if any. He also alleged that no Environment Impact Assessment (E.I.A) was ever done and the concerns of the stakeholders heard, but the said developments has now been done upto ground floor.

Though the Plaintiffs/Applicants wrote to the Respondents complaining about the said development, nothing has been done to stop the said non-compliance by the 1st Development. It was his contention that for the public interest and the Association herein, it was the requirement of the law that all residents within its jurisdiction do adhere to all the construction and development standards. It was also contended that unless the development is stopped, the Plaintiffs/Applicants are apprehensive that the same will severely affect the environment and the neighbourhood, considering among other things that the estate does not have adequate social amenities such as schools, health facilities and playground to support such high density development. The deponent urged the Court to allow the instant application.

All the Defendants/Respondents entered appearance through different advocates but only the 1st Defendant filed a **Replying Affidavit** through **Francis Njoroge Kabui**, her appointed **Attorney**. The 1st Respondent averred that the instant application is misconceived and an abuse of the court process and he urged the Court to dismiss it with costs. He also averred that he is the registered proprietor of **Plot No. Kiambu Municipality/Kiamumbi/ Block 5/2849** and also a resident of **Kiamumbi Estate**. It was his contention that prior to **December 2016**, he had never heard of the **Damview Estate Association**. He also contended that it is ironical that the Applicants are running a **Private Members Club** disguised as **Residents Association** with an aim of frustrating residents of **Kiamumbi**. She averred that she has managed her parcel of land all along without interference and she cannot now be subjected to an amorphous organization wherein she is not a member. Further that the residents of **Kiamumbi Estate** have petitioned the **County Government of Kiambu** over their plight in the area. He urged the Court to dismiss the instant application.

The Court directed that the said application be **canvassed by way of written submissions**. The **Applicants** filed their written submissions on **23rd May 2017**, and relied on various decided cases among them the case of **Wainaina Kinyanjui & 2 others...Vs...Andrew Nganga (2013) eKLR**, where the Court held that:-

“Section 30(1) of the Physical Planning Act provides that no person shall carry out development within the area of local authority without a development permission granted by the local authority. Development is defined under Section 3 of the Act to include the making of material change in the use or density of any building or land”.

The Applicants urged the Court to allow their application.

The **1st Respondent** filed her written submissions on **10th July 2017**, and submitted that the Applicant did not have *locus standi* to bring this suit against the Defendants. She submitted that though the application is brought on behalf of the **Damview Estate Association**, there was no **Written Authority**, duly signed and executed by the said residents filed in court. She relied on Order 1 Rule 13(1) and (II) of the Civil Procedure Rules which provides:-

13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

She also submitted that the Plaintiff has not met the threshold for grant of injunctive orders as were set out in the case of **Giella...Vs...Cassman Brown (1973 EA 358)** as follows:-

“The conditions for the grant of interlocutory injunction are now, I think well settled in East Africa, First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

This Court has now carefully considered the instant application and the written submissions herein. The Court has also considered the general pleadings and the relevant provisions of law and it makes the following findings:-

Indeed there are two issues for determination.

i. Whether the Plaintiffs/Applicants have any locus standi to file this suit.

ii. Whether the Plaintiffs/Applicants are entitled to orders of injunction sought.

i) Whether the Plaintiffs/Applicants have locus standi to file the suit herein.

A look at the **Originating Summons** filed herein, it is indeed correct that the Plaintiffs/Applicants have brought this suit suing as officials of **Damview Estate Kiamumbi Residents Association**. From **annexture PW2**, the Association herein is registered under the Societies Act. The suit herein is allegedly filed on behalf of the residents of **Damview Estate**, through the officials of the said **Damview Estate, Kiamumbi Residents Association**. The residents of **Damview Estate Kiamumbi** allegedly have the same interest in this proceedings and the officials of the said Residents Association have brought this suit on their behalf.

The Court has perused the **Originating Summons** and the instant **Notice of Motion**, and has not seen any annexture specifying or giving the names of all the Residents of **Kiamumbi Estate** who are allegedly represented by the **Damview Estate Association**. The 1st Defendant has alleged that the Plaintiffs are a **Private Members Club** and an amorphous group which does not have the mandate of the **Kiamumbi Residents** to act on their behalf. The Applicants needed to confirm the said mandate by attaching the particulars of the members of the said **Kiamumbi Residents Association** with their signatures confirming that they have authorized or mandated the Plaintiffs/Applicants herein to sue or bring these proceedings on their behalf.

Order 1 Rule 13 (1) states that **where there are more than one Plaintiffs, they may authorize any one of them to appear and plead on their behalf in any proceedings**. Further Order 1 Rule 13(ii) states that:-

“The authority shall be in writing signed by the party giving it and shall be filed in the case”

The filing of written authority is a mandatory requirement which the Plaintiffs/Applicants have not met. Though the Plaintiffs/Applicants have stated that they are suing as officials of **Damview Estate Kiamumbi Residents Association**, the particulars of who these residents are, have not been availed. Do these residents exist or the Plaintiffs just a private member club? The Applicants have also not attached the mandatory written authority mandating them to file these proceedings. The 1st Defendant has submitted that *locus standi* goes to the root of any suit and

without *locus standi*, a party has no standing in court.

Black Law Dictionary 9th Edition defines **Locus Standi** as:-

‘place of standing’. The right to bring an action or to be heard in a given forum”

Therefore from the above description, without that right to bring an action, the party bringing the action cannot be heard. See the case of **El Bussaidy...Vs...Commissioner of Lands & Others (2002) 1KLR 508**, where the Court held that:-

“Where there are numerous persons having the same interest in one suit and one of such persons wishes to sue, he has to do so for himself and on behalf of the other in a representative capacity as per the requirements of Order 1 Rule 8 of Civil Procedure Rules”.

Further in the case of **Law Society of Kenya...Vs...Commissioner of Lands & Others, Nakuru HCCC No.464 of 2000 (2007) KLR 706**, the Court held that:-

“Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law”

For the Plaintiffs herein to have *locus standi* to sue on behalf of the **Damview Estate, Kiamumbi Residents Association**, they ought to have obtained their permissions and also specify the said Residents. See the case of **Joseph Kariuki & Others...Vs...Juma Aweyo, Kisumu HCCC NO.124 of 2003 (2003)**

KLR 8199, where the Court also held that:-

“Where the Plaintiffs are not suing in their capacity but protecting the interest of the society in which they claim to represent, it is important as the law requires to seek and obtain permission and leave to represent on behalf of all the members and the absence and/or lack of representative order in respect of the Plaintiffs would be in contravention of the express provision of Order 1 Rule 8(1) and is fatal as it is an abuse of the court process”.

Equally, in this case, the Court finds that the Plaintiffs/Applicants who are

allegedly suing on behalf of ***Damview Estate, Kiamumbi Residents Association***, ought to have specified who are these residents and obtained their mandate or authority to do so. The Plaintiffs/Applicants failed to do so and so that omission is fatal to their suit. The Court therefore will concur with the 1st Defendant’s submissions, that the Plaintiffs/Applicants ***have no locus standi to bring this application and the whole suit in general.***

The Court consequently upholds the 1st Defendants ***Preliminary Objection*** which has been capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. See the ***Mukisa Biscuits Manufacturing Ltd... Vs...West End Distributors Ltd (1969) EA 697.***

Having found that the Plaintiffs herein have no *locus standi* to bring this suit, the ***Court finds that the whole suit herein cannot stand and it is consequently struck out for being an abuse of the court process as Plaintiffs lacked locus standi to bring up these proceedings.***

ii) Whether the Plaintiffs/Applicants are entitled to the injunctive orders sought.

Even if the suit has been struck out, the Court needs to answer whether the Applicants would have succeeded in their prayers, had they been found to have *locus standi*. In answering this issue, the Court will be guided by the threshold or criteria for grant of injunctive orders as was set out in the

case of ***Giella...Vs...Cassman Brown & Co. Ltd (supra).***

The Plaintiffs/Applicants have alleged that the 1st Defendant should be restrained from engaging in further construction on her suit property ***Kiambu Municipality (Block 5/2849)***, because she has carried out such development without approvals or authority from the 2nd, 3rd, and 4th

Defendants/Respondents. However even if the said 2nd, 3rd, and 4th Defendants entered appearance, they did not file their responses to the instant application to confirm that indeed the 1st Defendant/Respondent did not have approvals or authority from them to carry out the said construction. Without any evidence from the 2nd, 3rd and 4th Defendants that indeed 1st Defendant has no such authority or approvals, the ***Court finds that the Plaintiffs/Applicants have not established that they have a prima-facie case with probability of success at the trial.***

Having found that the Plaintiffs have not established that they have a *prima-facie* case with probability of success at the trial, the Court finds that there is no need of considering the other criteria since the said conditions are sequential. See the case of ***The Attorney General...Vs...Kenya Commercial Bank Ltd, Afraha Educational Development Co. Ltd & Others, Nakuru CCC No.260 of 2004***, where the Court held that:-

“The Judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has not registered interest in the land comprised in the title in dispute and therefore has not demonstrated that it has a prima-facie case with probability of success, no interlocutory injunction would be available.”

Having now considered the available evidence, the Court finds that it would not have granted an order of injunction in the event the suit had not been

struck out.

However, the Court finds that the Plaintiffs herein have no *locus standi* to bring up these proceedings and consequently, ***the suit herein is hereby struck out with costs to the 1st Defendant.***

It is so ordered.

Dated, Signed and Delivered at Thika this **8th** of ***December 2017.***

L. GACHERU

JUDGE

In the presence of

Mr. Kimathi holding brief for Mr. D. K. Githinji for Plaintiffs/Applicants

No appearance for 1st Defendant

No appearance for 2nd Defendant

M/S Senayati holding brief for Mr. Ranja for 3rd Defendant

No appearance for 4th Defendant

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

8/12/2017

L. GACHERU

JUDGE