



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS

ELC NO. 398 OF 2009

NOOR AHMED NOOR & 158 OTHERS.....PLAINTIFF

=VERSUS=

KENYA RAILWAYS.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

The Defendants filed Preliminary Objections against the Plaintiff's application dated **27th July 2009** and the entire suit as follows.

The objection by the 1st Defendant is dated **4th March 2010** on grounds that:

- 1. The Plaintiff's suit is incompetent for failure to comply with the mandatory provisions of Order 1 Rule 12(1) of the Civil Procedure Rules.***
- 2. The suit is therefore incompetent, fatally defective, offends the mandatory provisions of the Civil Procedure Rules and is an abuse of the Court process.***
- 3. The Plaintiffs' suit, the substratum upon which the instant application is premised is incompetent fatally and hopelessly defective thus, both the application and the entire suit should be struck out in limine and be dismissed with costs.***

The objection by the 2nd Defendant is dated **2nd September 2014** on grounds that:-

- 1. The application as drawn is incurably defective.***
- 2. The orders sought therein if granted will determine the suit without going into substantive examination of the issues in the main suit.***
- 3. The order sought therein is final and it's not clear at which party's instance will the Court give 'further orders'.***
- 4. This is a mischievous attempt to dispose this suit.***

These objections were canvassed by way of written submissions. Miller & Company Advocates for the 1st

Defendant filed submissions dated **10th December 2012**. Counsel submitted that **Order 1 Rule 12 (now Rule 13) of the Civil Procedure Rules** requires that where there are more Plaintiffs than one or Defendants, one or more of them may be authorized by the others to appear, plead or act for them in any pleading and that such authority shall be in writing signed by the party giving it and shall be filed in the case. It was submitted that in this instance, the Plaintiff filed an authority that did not bear the signatures of the authorizing persons. He subsequently resorted to having various signatures attached to the authorization document which in itself did not confer such rights as they did not fall within the ambit of the main body of the document. Further, that the authorization also lacked descriptions such as ‘drawn and filed by’, ‘to whom it is to be served upon’ and ‘date of issuance’. Counsel also submitted that the only endorsement of the authorization document was that of the Plaintiffs’ advocates and which bore no responsibility on the said Noor Ahmed Noor in acting as the representative of his co-plaintiffs.

Counsel also submitted that the suit having been instituted on **14th August 2009** following the letter of demand dated **17th June 2009** was an outright defiance of **Section 87(b) of the Kenya Railways Corporation Act** which stipulates that an action or legal proceedings cannot be instituted unless it is commenced within **12 months** next after the act, neglect or default complained of. In respect to the Plaintiffs’ right to ownership to the suit property, counsel submitted that the Plaintiffs were mere allottees, without any title rights thereof and therefore lacked the prerequisite locus in seeking a temporary injunction.

There were no written submissions filed by the 2nd Defendant, despite severally having been given an opportunity to do so.

Garane & Associates filed submissions dated **28th November 2013** on behalf of the Plaintiffs. Counsel submitted that the Plaintiffs were in full compliance with **Order 1 Rule 13** as all the Plaintiffs appended their signatures to the instruction note giving one of them the authority to appear and execute on their behalf as annexed in their bundle of documents. With respect to the applicability of the Railways Corporation Act, counsel submitted that the said Act was solely to govern the relationship between the Kenya Railways and its employees and its business associates. It was submitted that the parties herein are neither employees nor business associates of the Railways Corporation and as such cannot be governed by the laws enacted to regulate and control interactions with Railways Corporation. It was also submitted that had the Plaintiffs waited for **12 months** before filing this suit, they would have lost out on the land lawfully allotted to them. Counsel submitted that in so far as **Section 87(b)** curtailed the Plaintiffs’ right to seek refuge in Court, the same was null and void for being inconsistent with the Constitution.

With respect to the allotment letter, counsel submitted that the letter is a pre-condition to obtaining title to land. However, that once land had been allotted, it cannot be alienated then re-issued to another before the initial allotment is cancelled. Therefore, the Plaintiffs should be deemed owners thereof having shown their letters of allotment and produced evidence of regular payment of statutory fees.

Having carefully considered the grounds of the Preliminary objections filed by the Defendants and considered submissions, the points for determination are as follows:

- i. The drafting of the prayer for interlocutory injunction.*
- ii. Compliance of Order 1 Rule 13 of the Civil Procedure Rules.*
- iii. The applicability of the Kenya Railways Corporation Act and the interpretation of Section 87 thereof.*

The Plaintiff sought an order restraining the 1st Defendant, “until further orders of the Court”. The 2nd Defendant is of the view that the orders sought if granted will determine the suit at the interlocutory stage thereby disposing off the suit. An injunction order is an equitable relief which is given by the Court upon exercising its discretion. Further, this Court derives its power to exercise the discretion of granting injunction orders under Order 40 of the Civil Procedure Rules which expressly states that such order can

be granted until the disposal of the suit or until further orders. It is therefore upon the Court to grant such orders as it deems fit. In that regard, this point fails.

On the second issue, Order 1 Rule 13 provides as follows:

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, 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.

From the foregoing, the salient requirements of an appearance of one of several Plaintiffs or Defendants, are to have a (i) written document (ii) signed by Plaintiffs or Defendants authorizing one of them to (iii) appear, plead or act, which must be (iv) filed in the case. On perusal of the Plaintiffs' bundle of documents in the Court record, there is a document titled "Authority to Act (Under Order 1 Rule 12 of the Civil Procedure Rules). The content therein is very clear, that: the undersigned from the date thereof until the determination of the suit authorize Noor Ahmed Noor the 1st Plaintiff, to act, appear, execute/sign documents/pleadings relating to the suit and to instruct counsel/advocate on their behalf to prosecute the suit. The Authority is accompanied by a list of all the Plaintiffs who appended their signatures. Whilst it is not an express requirement, the Authority also has the descriptions of the firm from which it is drawn and filed and whom to be served upon. I am satisfied that the provisions of Order 1 Rule 13 have been met and consequently find that the point of objection fails.

On the last issue of the applicability of the Kenya Railways Corporation Act, the Defendant is a state corporation established under the said Act. The cause of action arises out of a notice to vacate served upon the Plaintiffs by the 1st Defendant on premise that the disputed property is an important corridor for the Standard Gauge Railway project. The construction of rail is the core function of the 1st Defendant. The Preamble of the Act specifies that the Act makes provision for, inter-alia, the functions of the corporation. I therefore find that the Act is applicable. Counsel for the 1st Defendant submitted that the Plaintiffs in instituting this suit against the 1st Defendant did not adhere to the condition of Section 87(b) of the Act. It would be vital to reproduce the entire section, which reads:

87. Limitation

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

a. the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and

b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

Section 87 of the Act provides gives the limitation period within which an action can be brought against the 1st Defendant. Part (a) requires that a notice of one month be given to the Managing Director of the Corporation before a suit is filed. The Plaintiffs' bundle of documents contains a copy of the notice dated 17th June 2009 as required. Part (b) is very clear that an action must be brought within 12 months after the occurrence of an act, neglect or default complained of or 6 months in case of a continuing injury or damage. The provision does not state that an action can only be brought after 12 months. In fact a suit commenced after 12 months, would be time barred in accordance with this act. This point of objection also fails.

There was also submission made with respect to the Plaintiffs' right to ownership of the disputed property. It is not in dispute that the Plaintiffs have no titles to the property. They have in their possession allotment letters. It is also trite law that an allotment does not confer title over the property and that it is a transient to acquiring a title. However, an allotment letter is in my view, sufficient to show an interest over property. I say so because once a parcel has been allotted, unless the letter is revoked, it cannot be allotted to another. On this basis, an allottee has a right to approach court and obtain injunction orders pending the determination of a case.

For the reasons outlined hereinabove, I find no merit in both Preliminary Objections and consequently dismiss the same with no orders as to costs.

Dated, Signed and Delivered this **26th** day of **September, 2016**.

L.GACHERU

JUDGE

In the Presence of:-

Mr Cheloti for the Plaintiffs/Applicant

M/s Kihumba holding brief for Mr Wene the 1st Defendant

None attendance for the 2nd Defendant/Respondent

Hilda :Court Clerk

Court: Ruling read in open court.

L.GACHERU

JUDGE