



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 176 OF 2016

**KIPKORIR MENJO.....1ST
PLAINTIFF**

**ISAAC LABOSO.....2ND
PLAINTIFF**

**LINA JEBET.....3RD
PLAINTIFF**

DAVID GACHANJA

KARIOKI.....4TH PLAINTIFF

**SAMWEL OMBATI.....5TH
PLAINTIFF**

VERSUS

**PRAYOSHA VENTURES LTD.....1ST
DEFENDANT**

**KINGS SQUARE LTD.....2ND
DEFENDANT**

**THE C.E.C. DEPARTMENT OF WATER ENERGY AND NATURAL RESOURCES, UASIN
GISHU...3RD DEFENDANT**

**ELDORET WATER AND SANITATION COMPANY
LTD.....4TH DEFENDANT**

**THE COUNTY GOVERNMENT OF UASIN
GISHU.....5TH DEFENDANT**

RULING

The plaintiffs brought this suit on their own behalf and on behalf of the residents of Racecourse Ward, Kapsaret Constituency, Uasin Gishu County. They claim to have been and are still residents of Racecourse Estate for so many years and have established permanent residences there and established business namely Hotels and restaurants, medical facilities, shops, petrol stations, guest residents, farming e.t.c. The plaintiffs have in the meantime been making individual and private construction of septic tanks and respectively meeting the cost of sucking and transferring the waste as per requirement and exercise which is not only very involving but also very costly. That the plaintiffs aver that the 1st and 2nd

defendants recently acquired parcel of land known as Pioneer/Langas Block 1 situated off the Eldoret-Kapsabet Road at Race Course Ward, Kapsaret Constituency and have developed thereon some business and residential units. On or about May, the 1st and 2nd defendants, commenced the construction of purportedly private sewer line, intended to deliver waste from the 1st and 2nd defendants' residential premises to the Uasin Gishu sewer deposit dam.

The 1st and 2nd defendants' construction has been purportedly licensed by the 3rd, 4th and 5th defendants to pass through the plaintiff's geographical area of residence and business premises, and will expressly or by implication affect each one of them. The plaintiff avers that they were never involved at all in the defendants arrangement and no public participation whatsoever was conducted to obtain their views required or at all and the defendants activities are prejudicial to them. The plaintiffs aver further that they are legally entitled to participate and to equally enjoy the provision of the sewer line by equal measure with the 1st and 2nd defendants and for the 3rd, 4th and 5th defendants to purport to favour the 1st and 2nd defendant for the enjoyment of service to the exclusion of the plaintiff is out right discrimination is unconstitutional and illegal. The plaintiffs aver that despite repeated demands and requests for the provision of the service and recently for the inclusion of the service along side the 1st and 2nd defendants, the defendants have totally refused to comply hence this suit.

The plaintiffs' claims therefore is for an order of mandatory injunction to issue to compel the defendants jointly and severally to include all the plaintiffs and residence of Racecourse Ward the provision and enjoyment of the sewer line service and for the 3rd, 4th and 5th defendants to make provisions for fresh site plans and necessary facilities for drawing approvals to include the plaintiffs. The plaintiff's further claim is for an order to compel the 3rd and 5th defendants to conduct an all inclusive public participatory meetings with the residents of Racecourse Ward and Kapsaret Constituency and Eldoret South Constituency for the plaintiff's participation and views. The plaintiff's claim is for an order of permanent injunction to issue against the 1st and 2nd defendants from carrying out any further developments on the project and more specifically of the sewer line. That as result of the defendant's actions or omissions, the plaintiffs have suffered and continue to suffer damage which they now claim from the defendants.

The plaintiffs pray for an order of mandatory injunction to issue to compel the defendants jointly and severally to include all the plaintiffs and residence of Racecourse Ward the provision and enjoyment of the sewer line service and for the 3rd, 4th and 5th defendants to make provisions for fresh site plans and necessary facilities for drawing approvals to include the plaintiffs and an order compelling the 3rd and 5th defendants 3rd and 5th defendants to conduct an all inclusive public participatory meetings with the residents of Racecourse Ward and Kapsaret Constituency and Eldoret South Constituency for the plaintiff's participation and views. Finally, an order of permanent injunction to issue against the 1st and 2nd defendants from carrying out any further developments on the project and more specifically of the sewer line. The plaintiffs also pray for General damages.

The suit is accompanied with an application for an order of temporary injunction to restrain the 1st and 2nd defendants by themselves, their agents or servants or by any one whatsoever claiming to act on their behalf from planning, digging trenches, laying pipes, fixing, constructing or in any other way whatsoever dealing with the sewer line project from the 1st and 2nd defendants' premises at parcel No. Pioneer/Langas Block 1 pending the hearing and determination of the suit.

The plaintiffs claim that the applicants are prejudiced by licencing of the 1st and 2nd defendants and that the applicants are entitled to access the sewerage line and that damages will not be a sufficient remedy. The plaintiff further states that licensing the 3rd, 4th and 5th defendants is unconstitutional and illegal.

The supporting affidavit is sworn by **Mr. Isaac Laboso** who has been a resident since 1994. the plaintiffs own properties and business such as hotels and restaurants, medical facilities, grocery shops, guest houses. According to the plaintiffs, the then Eldoret Municipality Council had not planned for a sewerage facility but had always been aware of the need. They are still depending on septic tanks which costs the residents Kshs.3,000/= for each trip for emptying the tanks. They are afraid that they will be forgotten once the authority starts planning for the service line. The plaintiffs are opposed to the construction of the private sewerage line exclusively for the 1st and 2nd defendants. They have met the defendants for a way

forward but all in vain.

The plaintiff states that the sewerage passes at their door steps though on public land and yet they cannot benefit because of the individual public developer. It is argued that the defendants Nos. 3, 4 and 5 are giving out licenses to the 1st and 2nd defendants for whatever reasons to the exclusion of the rest of the plaintiffs. There was no public participation in the process. The plaintiffs' grievance is that they should have been considered for the sewer line. It is stated that if the residents of Racecourse are not considered, they will suffer irreparable loss for it will take a long time and more money to replace the sewer line with a bigger one to some entire public. Although the sewer line means the plaintiffs paying highly for sucking services.

The 2nd respondent filed a replying affidavit sworn by Zoher Dawoodbhai Hassanali who states that the 2nd defendant applied for a permit to construct a pump sewer line vide a letter dated 6th April, 2016 to ELDOWAS, the 4th defendant herein and the same was approved vide a letter dated 17th of May, 2016 licensing the applicant herein to commence construction work of a pump sewer line to serve LR Number Pioneer/Langas Block 1/(Malel)/405 as mandated by the Water Act Cap. 2002 (Revised Edition, 2012).

The 4th defendant did issue conditions vide their letter dated 17th May, 2016 and which the respondents indicated their intention to fully comply with the said conditions vide their letter to them dated 20th May, 2016. They did engage the services of Mickkon Enterprises Limited a company duly incorporated and licensed by the National Construction Authority and Building Contractors Registration Committee to construct and lay down the sewer pipe. That construction of the sewer line from LR. No. Pioneer/Langas Block 1/(Malel)/405 commenced on 19th May, 2016 along Kisumu Road upto Corner Mbaya junction on a reserve road and therefore the allegations by the Plaintiffs/Respondents that the sewer system passes their private land is not only malicious but misleading to this Honourable Court. That it was imperative and completely necessary for them to construct a pump sewer line from LR. No. Pioneer/Langas Block 1/(Malel)/405 because it was not possible to construct a normal gravity line as the topographical levels of the site is lower than the point of discharge. Further, the 3rd, 4th and 5th defendants who are statutory obligated to develop sewer infrastructure within the County are financially constrained and therefore they were obligated to privately finance a pump sewer line which was approved for construction by the 4th defendant to serve the apartments and maisonettes situated on LR No. Pioneer/Langas Block 1/(Malel)/405. That construction of 1.2 kilometres of the pump sewer line has so far been done by their contractors out of a possible 1.8 kilometres.

On 28th of May, 2016, the plaintiffs and other unknown members of the public armed with pangas and rungas did illegally, unlawfully and without justification and by use of threats, proceed to stop the construction of the pump sewer line demanding to know why the same facility had not been provided to them. The company through the contractor did report this incident to the 4th defendant and a meeting was thereafter arranged between itself and the plaintiffs/respondents who failed to attend and air grievances.

That on 23rd June 2016, he instructed his workers to resume with the construction of the sewer line after he was given the green light by the Managing Director of the 4th defendant but they were confronted by a mob of irate youths acting under the instructions of the plaintiffs/respondents who threatened his employees and without lawful cause, in contravention of legally laid down procedure and said mob began backfilling the trenches that had already been dug, subsequently stopping his workers from laying pipes and that his workers fled the scene of construction fearing for their lives and reported the wanton and illegal destruction of property to the Langas Police Station under OB 21/23/6/016.

They have constructed over 300 apartments and maisonettes and have sold a large portion of the said properties having been fully paid for and the completion date been set for 1st of July, 2016 and failure to complete construction of the sewer line will greatly prejudiced the applicant who is not only about to suffer serious financial losses but faces a real possibility of multiplicity of suits running to the tune of billions of Kenya Shillings when sued by purchasers for failure to meet its obligations. That despite the fact that the applicants/respondents have followed all necessary procedures to obtain approval for construction of the sewer line and paid all relevant fees for the same, the construction of the sewer line has been disrupted severally by the plaintiffs/respondents and or their agents, servants and employees

motivated by malicious interference and threats to violence. According to the defendants the plaintiffs/respondents can be sufficiently compensated by an award of damages.

The plaintiff submits that the construction of the sewer line is without their participation and is irrelevant. The plaintiffs argue that failure to involve them in the project was an affront to the constitution of Kenya, 2010 and the County Government Act. The said action is discriminatory, illegal and totally inappropriate. The plaintiffs argue that a grant of injunction would be the adequate remedy as damages cannot be quantified.

The 2nd defendant argues that the plaintiffs have not established a prima facie case with a probability of success as they have not produced any iota of evidence. Moreover, that the sewer line does not pass through the plaintiffs' land. The 2nd defendant has undertaken the construction of the sewer line as the 3rd, 4th and 5th defendants claim to be cash trapped. It is argued that such rights can only be progressively realized. According to the 2nd plaintiff, it has no responsibility to provide solid waste disposal services for the plaintiff as that falls within the ambit of the County Government.

Secondly, the 2nd defendant argues that the plaintiff has not demonstrated that he is likely to suffer irreparable injury which would not be adequately compensated by award of damages. According to the 2nd defendant, it is the 2nd defendant who is likely to suffer irreparable loss and will be subjected to claims for breach of contract and would subsequently be unable to sell or rent the said houses as it has been deemed in its activities.

On the issue of balance of convenience, the 2nd defendant argues that since he is likely to suffer more harm than them, the plaintiffs' balance of convenience should be exercised in its favour.

I have considered the application for injunction, the reply and rival submissions and do find that on the issue of prima facie case, the plaintiffs have failed to demonstrate that they are residents of Racecourse and therefore entitled to remedies sought. The plaintiffs should have at least annexed documents showing that they are land owners or rate payers or rent payers in the Racecourse area. The plaintiffs have also failed to annex on their affidavit any document to show that they have constructed septic tanks and therefore, have engaged sucking services. There is no evidence by the plaintiffs that they either applied for the provisions of sewerage services to Racecourse Area. There is no single communication between the plaintiff and the 3rd-5th defendants. The claim that the plaintiffs are being discriminated has not been proved on a prima facie basis. As opposed to the plaintiff, the 2nd defendant has proved that he applied for a licence and was issued with one. The plaintiffs never applied for one and never received any.

On the issue of irreparable loss, the plaintiffs' complaint appears that they were not considered and yet they are interested. In the grounds supporting the application, they appear to state that they are entitled to access the sewerage line. Indeed in the prayers in the plaint, the plaintiffs seek an order of mandatory injunction to issue to compel the defendants jointly and severally to include all the plaintiffs and residence of Racecourse Ward the provision and enjoyment of the sewer line service and for the 3rd, 4th and 5th defendants to make provisions for fresh site plans and necessary facilities for drawing approvals to include the plaintiffs. It appears that the plaintiffs are intended to benefit from the same sewerage project that they are opposing and therefore, there is no demonstration of irreparable loss on the part of the plaintiffs as the benefit can be secured progressively. The 3rd, 4th and 5th defendants can be ordered to expand the project or to provide the sewerage services to the plaintiffs at the conclusion of the matter without interfering with the plaintiffs project. On the balance of convenience, it tilts towards allowing the defendant's to carry on with the project due to fact that the defendants is likely to suffer more harm having invested heavily in the housing project. Ultimately, the application is dismissed with costs in the cause.

DATED AND DELIVERED AT ELDORET ON 14TH DAY OF DECEMBER, 2016.

ANTONY OMBWAYO

JUDGE