



IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 255 OF 2009

SKY AFRICA HOLDINGS LTD..... PLAINTIFF

VERSUS

BELLWAY VILLAS LTD.....1ST DEFENDANT

NAIROBI WATER & SEWERAGE COMPANY 2ND DEFENDANT

RULING

The Plaintiff in the present suit vide a plaint dated 16th April 2009 against the 1st and 2nd Defendants sought the following orders:-

- a. A permanent injunction restraining the Defendant's whether by themselves, their servants and/or agents from trespassing upon or in any manner whatsoever interfering with the plaintiff's property known as Land Reference 22842 and in particular entering into or upon the said property and erecting and/or carrying out any construction works thereon.
- b. Costs
- c. Interest

Mboghli Msagha, J on 15th October 2009 granted a mandatory order of injunction against the plaintiff in the following terms:-

1. **That an order of mandatory injunction be and is hereby issued directed to the plaintiff ordering and/or compelling the plaintiff to give and/or its authorized representative and/or the main service provider for water and sewerage in the City of Nairobi, the second Defendant herein, access, entry for purposes of accessing the main manhole for water and sewerage pipe that is on the plaintiff's property L.R. NO.22842 for purposes of extending there from the said water and sewerage line to the property of the first defendant known as L.R. NO. 209/7938.**

The plaintiff apparently did not comply with this order which provoked an application for contempt by the 1st Defendant dated 5th February 2010 directed against **Bipin Manjee**, a director of the plaintiff company. **Mboghli Msagha J**, heard the contempt application and on 19th October 2010 rendered a ruling finding Mr. **Bipin Manjee** to be in contempt of the court order of 15th October 2009 and fined him Kshs.100,000/- or in default to serve three months imprisonment and to additionally purge the contempt.

By a Notice of Motion dated 19th February 2010 the plaintiff applied to stay the court order made on the 15th October 2009 and to have the same reviewed so that the application dated 31st July 2009 is reheard. This application by the plaintiff dated 19/2/2010 was scheduled for hearing on 5th June 2014 when it transpired that the firm of **Wachakana & company Advocates** had filed an application dated 23rd May 2014 seeking to have leave granted to enjoin one **Hon. Ngengi Muigai** as a 3rd Defendant in the suit alongside the National Environment Management Authority. The court directed the application for joinder to be heard first and thus it is that application which the subject of this ruling.

The application by the proposed 3rd Defendant is premised on the ground that the applicant is aware of the existence of the court order of 15th October 2009 which compelled the plaintiff to allow and grant access to the 1st Defendant and the 2nd Defendant onto property **L.R. NO.22842** for purposes of accessing the main manhole for water and sewerage pipe for purposes of extending it. The proposed 3rd Defendant states the order has not been complied with and or implemented and that is affecting him as the immediate neighbour to the 1st Defendant. In an affidavit sworn in support of the application by **Hon. Ngengi Muigai** on 23/5/2014 under paragraphs 2 and 3 the deponent deposes as follows:-

2. **That I am aware of the order of this Honourable court dated 15th October 2009 compelling the plaintiff i.e “Sky Africa Holdings Ltd” through its director Bipin Manjee to grant the 1st Defendant and or its authorized agents access to the main manhole for water and sewerage pipe.**
3. **That I am an immediate neighbour to the said 1st Defendant and the continued blockage of the main manhole for water and sewerage pipe by Bipin Manjee is causing a public nuisance, torture, harassment and damage to me and my family.**

The plaintiff opposes the application for joinder and one **Anthony Kitua** has filed a replying affidavit dated 16th June 2014 in opposition thereto.

The plaintiff's contention is that the proposed 3rd Defendant is a stranger to the plaintiff and the plaintiff has no claim against him and there is no basis therefore for him to be joined as a defendant in the suit.

The parties filed written submissions to ventilate their respective positions. I have considered the application and the affidavits in support and in opposition and the parties submissions and indeed the issue for the court to determine is whether the applicant can satisfy the requirement of Order 1 Rule 10 (2) of the Civil Procedure Rules 2010 to be enjoined as a party. The test is whether he has demonstrated that he has such an interest in the suit which renders his presence before the court necessary to enable the court to effectually and completely adjudicate upon and settle all questions and/or issues involved.

The intended applicant has stated that he is the immediate neighbour of the 1st Defendant and that the court order granted on 15th October 2009 is of direct relevance to him as a neighbour. The issue in contention involves the opening up of the main water and sewerage pipe manhole stated to be located in the plaintiff's parcel of land for extension purposes. The proposed interested party states that the blockage of the manhole is causing public nuisance. Indeed in case there is raw spillage of sewerage it can be understood how the nuisance does or could arise. The 2nd Defendant has a statutory mandate to ensure the water and sewerage services are rendered to the members of the public and that the requisite health standards are met and adhered. The proposed interested party is such a member of the public and being an immediate neighbour to both the plaintiff and the 1st Defendant that makes him a party who could be directly affected by the outcome of this suit. As I understand it the matter herein raises the issue of a clean and healthy environment which every person has a right to under the provisions of Article 42 of the Constitution. Article 42 provides thus:-

42. Every person has the right to a clean and healthy environment which includes the right-

(a) to have the environment protected for the benefit of the present and future generations through legislation and other measures, particularly those contemplated in Article 69, and

(b) to have obligations relating to the environment fulfilled under Article 70.

Quite clearly under Articles 42, 69 and 70 of the constitution the applicant does not have to establish any locus standi to join an action that touches on environment such as the present one if he perceives his right or interest to have a clean and healthy environment may be under some threat.

In the premises I would admit **Hon. Ngengi Muigai** to participate in these proceedings but not as a Defendant but as an interested party. As such an interested party he is entitled to participate in the proceedings and may file pleadings in form of affidavits to ventilate his interest. I have considered the question of the National Environment Management Authority (**NEMA**) being enjoined as a party and I do not find any basis and will not grant any leave for them to be enjoined. If any party considers that there is any breach of any provisions of the Environment Management and coordination Act (EMCA) he would be free to invite NEMA to investigate and deal as appropriate.

I therefore grant leave to **Hon. Ngengi Muigai** to be enjoined as an interested party in these proceedings and hereby grant him leave of 15 days from the date of this ruling to file his response. The matter is hereby fixed for mention on 13th November 2014 for directions on the disposal of the plaintiff's application dated 19th February 2010.

The costs of the application shall be in the cause.

Ruling dated, signed and delivered at Nairobi this.....**9th**day of.....
October.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

MS Kibera for Amolo.....for the Plaintiff

Mr. Bhullar for 1st..... Defendant

Waitha for..... 2nd Defendant

Mr. Wachakanafor Applicant