



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND COURT CASE NO. 1103 OF 2014**

**KIGWE COMPLEX LTD ..... PLAINTIFF/APPLICANT**

**VERSUS**

**JEREMIAH GITHIGO IREGI ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MICHAEL WAWERU ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**TITUS KAMAU KARIUKI ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AND**

**OCPD KASARANI ..... 4<sup>TH</sup> RESPONDENT**

**MR. MUNYAMBU ..... 5<sup>TH</sup> RESPONDENT**

**MR. WAMBUGU ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**MR. GATONYE AND OVER 200 OTHERS ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> INTERESTED PARTY**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The plaintiff/applicant's Notice of Motion dated 12<sup>th</sup> August 2014 is before me for determination. The application is predicated on sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The application inter alia seeks the following orders:-

1. That a temporary injunction do issue restraining the defendants/applicants, their agents

- or any other persons acting in their name or any other person whatsoever from occupying, constructing structures or conducting any activities that is blocking or in any way likely to block the applicant's property, parking lot and shops on LR No. 209/14470 and the KPLC Way leave, adjoining the said plaintiff/applicants property pending the hearing and determination of this suit.
2. That a temporary injunction do issue restraining the defendants/applicants, their agents or any other person acting in their name or any other person whatsoever from occupying, constructing structures or conducting any activity that is blocking in any way likely to block the plaintiff/applicant from constructing a modern kiosk in the KPLC Way leave adjoining the applicants property on LR No. 209/14470 pending the hearing and determination of this suit.
  3. That a temporary order of eviction does issue against the defendant/respondents to enable the plaintiff/applicant construct a modern kiosk as authorized by the Kenya Power & Lighting letter dated 12<sup>th</sup> June 2014.
  4. That the OCPD Kasarani, the Director of Inspectorate Nairobi County. The Director of Health Services Nairobi County, The County Environment Officer, Nairobi County do help in enforcing the orders.

2. The plaintiff's application is supported by the grounds set out in the face of the application and the supporting affidavit sworn by one David W. Kigwe on 12<sup>th</sup> August 2014. The application came before honourable **Lady Justice Mary Gitumbi** on 15<sup>th</sup> August 2014 when she certified the same urgent and directed interpartes hearing of the same on 25<sup>th</sup> August 2015. On 25<sup>th</sup> August 2014 the matter was listed for hearing before me and only the plaintiff appeared and stated the defendants had been served but had not appeared and/or filed any response to the application. The plaintiff in urging the court to grant the orders sought in the application disclosed that the invasion of the access and front yard of its building by the defendants had resulted in denial of access to the septic tanks and that the plaintiff could therefore not exhaust them and thus raw sewage was leaking from the septic tanks as the trucks to exhaust/empty the tanks could not access them.
3. On the basis that the defendants had been served and had not appeared and/or filed any response to the plaintiff's application I granted the plaintiff's application in terms of the prayers set out above. In granting the orders I observed thus:-

**“The defendants’ acts are certainly causing environmental degradation as they obstruct the plaintiff from accessing the septic tanks for purposes of exhausting them such that raw sewage is flowing from the filled up tanks. That definitely poses a health hazard and prevents the occupants of the plaintiff from living in a healthy and safe environment.”**

The court therefore at that stage became aware it was seized of a matter that concerned the protection of the environment and had to be alive to the constitutional obligations and dictates provided under articles 42, 69 and 70 of the Constitution.

4. The defendants on 29<sup>th</sup> August, 2014 filed a Notice of Motion seeking orders setting aside the ex parte orders granted in favour of the plaintiff on the grounds that they had not been served with the plaintiff's application dated 12<sup>th</sup> August 2014 and crucially on the ground that there was concealment on the part of the plaintiff material facts notably that the defendants were but part of a group of more than 200 small scale traders who were carrying on business lawfully at the premises and they were duly licensed by the County Government of Nairobi. On 5<sup>th</sup> September 2014, the Nairobi City County applied to be enjoined to the suit as an interested party on the ground that the frontage space of the plaintiff's property LR No. 209/14470 was a Way leave and

its occupancy was disputed and the dispute could not be resolved without the participation of the Nairobi City County within whose jurisdiction the property was situated.

5. Before the defendants application and the application by the interested party were heard the plaintiff on 2<sup>nd</sup> October 2014 filed an application dated the same date seeking to have the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and 4<sup>th</sup> to the 6<sup>th</sup> **respondents** in the application being persons who were supposed to give effect and implement the court order issued by the court directing the eviction of the defendants cited and punished for contempt of court for disobeying the court order. Interestingly the plaintiff/applicant also included as persons to be cited for contempt the 7<sup>th</sup> **respondent** one **Joseph Gatonye & over 200 others** as per the list attached to the affidavit sworn in support of the plaintiff's application. The application by the plaintiff served to bring to the fore that the matter before the court went beyond the parties initially named in the suit being the plaintiff and the 3 defendants. For instance it became clear that the matter affected a large group of persons who were not party to the suit and was infact a matter that affected and impacted on the public.
6. On 3<sup>rd</sup> October 2014 the court after hearing submissions from the parties advocates held the view that both the **Nairobi County Government** and the **National Environment Management Authority (NEMA)** were necessary parties to the proceedings and ordered that they be enjoined as interested parties on the basis that the Nairobi County Government was responsible for licensing and ensuring planning requirements were met while NEMA was responsible for ensuring environmental concerns were addressed and met by developers of all projects. The court at the same time directed all the parties including the newly enjoined parties to engage in consultations with a view of resolving the multiple issues of occupation by the hawkers, access by the plaintiff to his premises and environmental issues occasioned by waste and sewage disposal. The court ordered a stay of the orders previously granted in the matter to allow for consultations and negotiations.
7. The parties failed to reach any settlement and the court directed the parties to file their respective responses and submissions respecting the plaintiff's notice of motion dated 12<sup>th</sup> August 2014. The 2<sup>nd</sup> interested party (NEMA) filed a comprehensive replying affidavit sworn on 19<sup>th</sup> March 2015 by one, Titus W. Simiyu the County Director of Environment in charge of Nairobi County Environmental issues in opposition to the plaintiff's application. The 2<sup>nd</sup> interested party stated that the plaintiff only came to court after they had been served with an enforcement order for the restoration of the environment. The 2<sup>nd</sup> interested party averred there had been for a period of about 5 years insistent breach of environmental requirements by the plaintiff. The 2<sup>nd</sup> interested party outlined a chronological sequence of events to illustrate breach of environmental requirements since 2010. For instance the 2<sup>nd</sup> interested party states that in October 2010 the plaintiff's premises were inspected following complaints of environmental pollution (effluent discharge) and following the inspection by NEMA the plaintiff was issued with an environmental restoration order vide letter dated 27<sup>th</sup> October 2010 annexed and marked "TWA1", interlia:

**The plaintiff was required to cease discharging sewage effluent into the open environment; install proper waste water management system for the residential complex; and to submit an environmental audit.**

8. The 2<sup>nd</sup> interested party averred that the residential flats within the area including those in the plaintiff's residential complex were discharging their waste into Gatharaini River and this posed a health risk to the public. The plaintiff however, refuted the claims by NEMA stating that they had in place a proper and approved waste water management system for their residential blocks. The plaintiff stated their water management system was located on the power way leave and had been approved by KPLC.
9. The 2<sup>nd</sup> interested party avers that following a ground inspection of the plaintiff's residential flats

known as "Goshen Gardens" in Kasarani on 23<sup>rd</sup> July 2014 the following field observations were noted:-

1. **Flat was discharging raw sewage (black water) from a filled up conservancy tank within the confines of the plot.**
2. **Raw sewage was spilling out from the plot to the environment hence causing a health hazard.**
3. **There was no evidence of the following documentation and licenses;**
  - i. **Current environment audit**
  - ii. **Effluent discharge license**

10. This prompted the 2<sup>nd</sup> interested party to issue an environmental restoration order against the plaintiff vide the letter dated 23<sup>rd</sup> July 2014 annexed and marked "TWS 6" which required the plaintiff to do the following:-

1. Cease discharging raw sewage to the environment immediately and exhaust the conservancy tank.
2. Submit within 3 days a letter of commitment and schedule of exhausting waste water (sewer water) and/or pumping to the sewer line to ensure proper control to future storages.
3. Restore the degraded environment according to section 108 (4) (a) of EMCA 1999 within 30 days.
4. Conduct an environment audit of the facility and submit it to the authority within 7 days (this should encompass an effluent discharge control plan (EDCP).
5. Submit a letter of commitment to the authority that you will comply with the above requirements within 3 days from the date of receipt of this letter.
6. Call environmental inspectors from NEMA to inspect the level of compliance which should be to the satisfaction of the authority on such terms and conditions as may be deemed appropriate and necessary.

11. The parties have filed written submissions which I have reviewed and considered together with the filed affidavits in support and in opposition to the plaintiff's application dated 12<sup>th</sup> August 2014. It is clear particularly following the enjoinder of the Nairobi county Government and NEMA as interested parties that the issue before the court is really not one of encroachment of the defendants onto the open space fronting the plaintiff's premises but one of environmental degradation concerns. The suit by the plaintiff must have to a large extent been triggered by the environmental enforcement order issued against them on 23<sup>rd</sup> July 2014. The issue leading to the environmental concerns has been exacerbated by the occupation by hawkers of the power Way leave where the plaintiff states their septic tanks are located and cannot be accessed owing to the presence of the hawkers. The occupation of the Way leave which is said to be owned by KPLC by the hawkers is also controversial as the hawkers hold temporary occupation licences (TOL) allegedly secured by the area County Representative no doubt with a view of enhancing his political standing. The 2<sup>nd</sup> interested party has elaborated that they have been having issues with the plaintiff in regard to sewage disposal since 2010 and various efforts have been made to sort the issue which has now escalated owing to the occupation of the frontage of the plaintiff's premises and the Way leave where the sewage tanks are located by the hawkers who are allegedly licensed to carry on their businesses threat.

12. The issue of environment is one of public interest and the court is of the view that the same needs to be addressed within the context of the plaintiff's application. If the issue of the environmental degradation is allowed to escalate without being checked it can pose a serious

health challenge to the public to the detriment of the wider public. Under Article 42 of the Constitution every person has a right to a clean and healthy environment which includes the right:-

- a. **To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**
- b. **To have obligations relating to the environment fulfilled under Article 70.**

Under Article 69 (2) of the Constitution:

**(2) “Every person has a duty to conserve the environment and ensure ecologically sustainable development and use of natural resources.”**

13. The National Environment Management Authority (NEMA) established under section 7 of the Environmental Management and Co-ordination Act (EMCA) is the agency mandated to protect, manage and conserve the environment. NEMA in carrying out inspection of the plaintiff's premises on 23<sup>rd</sup> July 2014 was carrying out its statutory mandate as it is entitled to do. Article 42 of the Constitution provides that **“every person has the right to clean and healthy environment.”** In the circumstances of this matter NEMA was perfectly entitled to carry out the inspection to ascertain the status of the premises and the result of the inspection showed that the premises were in a pathetic state as there was discharge of raw sewage and raw sewage was spilling out from the plot. Under article 69 (2) of the Constitution every person who in one way or the other would have contributed to the state of affairs would be required to co-operate to protect and conserve the environment. If left unchecked the matter could escalate into a catastrophe in terms of health concerns. There was indication the raw sewage could be finding its way to a river which water no doubt is being used by members of the public downstream and clearly therefore many members of the public could be exposed to environmental risk health wise if the nuisance is not promptly dealt with. It would be irresponsible on the part of the court if it failed to deal with the issue decisively.
14. The hawkers have argued that they are lawfully in occupation of the Way leave having been permitted to carry on their business thereat by the Nairobi County Government. There is no indication that the KPLC have allowed the hawkers to occupy the Way leave. Be it as it may be, the environmental concerns must be addressed as a priority as even the said hawkers would not be immune if a health catastrophe for instance like Cholera, Waterborne diseases etc were to break out. In such a situation fingers would be pointed to the County Government and NEMA for not arresting the situation before it got out of control. We need not wait for a disaster to occur to deal with the problem. NEMA has played its part in issuing the environmental restoration order dated 23<sup>rd</sup> July 2014 directed to the plaintiff as the owner of the premises which the plaintiffs says it is unable to comply with owing to the hawkers who have virtually invaded and occupied all the available space at the frontage of his premises and the Way leave where its septic tanks are sited. The other agencies and persons must co-operate to ensure the environment is protected, restored and conserved. The other agencies and persons in this case include the Nairobi County Government, KPLC, the Police and the hawkers. If the hawkers must do business on parts of the Way leave, the same must be properly planned and set apart so as not to cause any obstruction to accessing the plaintiff's sewerage tanks and thereby posing potential threat to the environment. The court holds that this is a matter of public interest and the court has a duty to protect and safeguard public interest and to make interventions as may be necessary in the wider public interest as opposed to private interests. Where private interest competes with public interest of necessity private interest ought to give way to public interest on the basis that public interest is for the benefit of the wider public and not the narrow private interest.

15. In the premises I make the following orders:-

1. **The plaintiff complies with the environmental restoration order issued by NEMA on 23<sup>rd</sup> July 2014 within 60 days from the date of this ruling.**
2. **That the County Government Nairobi revokes/cancels the temporary occupation licences (TOL) issued to the hawkers to carry on businesses on the KPLC Way leave forthwith and to require the hawkers to vacate the site within 15 days of being served a notice to vacate which notice should be served forthwith failing which an eviction order directed at the hawkers to issue.**
3. **The OCPD Kasarani Police Station, the Directorate Nairobi County Government and The County Environment Officer, Nairobi County to oversee the implementation of the orders issued herein.**
4. **Each party to bear their own costs of the application.**

**Ruling dated and signed at Kisii this 11<sup>th</sup> day of November 2015.**

**J. M MUTUNGI**

**JUDGE**

**Ruling delivered at Nairobi this 11<sup>th</sup> day of December 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Juma h/b for Mambui for the plaintiff

N/A for the 1<sup>st</sup> to 7<sup>th</sup> defendants

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties

**S. OKONG'O**

**JUDGE**



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