REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 5403 OF 1989

WANGARI MAATHAI.....PLAINTIFF

VERSUS

KENYA TIMES MEDIA TRUST LTD.....DEFENDANT

RULING

December 11, 1989, **Dugdale J** delivered the following Ruling.

A chamber summons was filed on 27 November 1989 by the Applicant/Plaintiff seeking a temporary injunction restraining the Defendant Company from embarking further on the construction of the proposed Kenya Times complex at Uhuru Park until determination of the suit or further orders of the court.

The Applicant/Plaintiff is one Professor Wangari Maathai and she is described as co-ordinator Green Belt movement. Appearing for the Plaintiff is Professor Ooko Ombaka and he is assisted by Mr Gegu Mirugi and Mr Mohammed Nyaoga. Mr Oraro appears for the Defendant.

Mr Oraro has raised a preliminary objection and by a Chamber summons dated 1 December 1989 he sought to strike out the plaint on 7 grounds but learned counsel wishes to proceed on 2 grounds only for the purposes of his preliminary objection.

“1. That the plaint discloses no cause of action against the Defendant and

2. That the plaintiff has no *locus standi* to file the suit or the application.”

Professor Ombaka who was content to be addressed as Mr Ombaka had raised objections to the hearing of the preliminary objection and the grounds are contained in a document dated 4 December 1989. Mr Ombaka asked for his objections to the preliminary points to be heard first and after discussions with learned counsel the court adjourned to consider the various points that had been raised.

The court ruled that the preliminary objection would proceed first and informed Mr Ombaka that whatever subject matter he raised in his answer was up to himself providing it was relevant. Mr Ombaka in his grounds of objection alleged *inter alia* that:

“1. The Chamber Summons and the grounds of objection annexed thereto were totally without merit and intended to grevant a fair hearing of the issues raised and are contrary to Public Policy.

2. The suit was for certain declarations and the Law was that no cause of action need to be disclosed (although in fact such cause of action is actually disclosed)

3. That the plaint has not yet been served on the Defendant as provided by law and consequently the plaintiff can amend her plaint should she so wish at her sole discretion. The application to strike out the plaint is thus premature and is an abuse of the court process”.

Mr Oraro commenced his preliminary objection and addressed the court with his arguments based on the two grounds that he had chosen and which grounds are opposed and objected to by Mr Ombaka. Learned counsel Mr Oraro said it was trite rule of law that before a person applies for a temporary injunction her or she must show a cause of action which is dependant on the validity of the plaint.

In the present case the plaintiff filed her plaint but refused to serve the plaint on the Defendant. In fact learned counsel said that the Plaintiff proudly stated (through her advocate Mr Ombaka) that the Defendant could not object to her plaint (Mr Oraro said “invalid” plaint) because it had not yet been served. The criticism of non-service of the plaint uponthe Defendant must be merited. Mr Oraro would have been entitled to ask for an adjournment apart from other remedies available to him but learned counsel has elected to proceed and he has a copy of the plaint. It is noted that the 3 grounds of objection made by Mr Ombaka in writing states the plaint has not been served on the Defendant as provided by law and consequently the Plaintiff can amend her plaint should she so wish at her sole discretion. The application to strike out her plaint is thus premature and is an abuse of the court process.

This court will set out the appropriate orders and rules shortly so that the plaintiff can be aware of the wrongful submissions being put forward based on misinterpretation of the very clear orders and rules to be forced in the Civil Procedure Act at the Civil Procedure Rules.

It is difficult to see how, if a plaint has not been served on a defendant, the Defendant can possibly have any idea of the cause against him. For that matter how can it be that non-service of a plaint can be ‘as provided by law" How can it be an abuse of the court process to make an application to strike out a plaint" Mr Oraro said he had a simple legal answer to the objections of Mr Ombaka and he referred to Orders VI rule 13 (1) of the Civil Procedure Rules which reads:

“At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that:

“(a) it discloses no reasonable cause of action or defence”.

At some stage in this answer to Mr Oraro’s submissions Mr Ombaka submitted that an interlocutory court (meaning this court) cannot decide on the merits of a suit which the court has not been able assess the merits by way of trial. The court notes that Order VI rule 13 (2) provides “no evidence shall be admissible on an application under sub-rule 1(2) but the application should state the grounds on which it is made”. There is no question of this court hearing the plaint on its merits and assessing the same. No evidence is admissible on the precise application now being made. The court now refers to Order IV rule 1. The Marginal note is headed “institution of suit and issue of summons” (2 notes placed by the court. So also is the underlining). “Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”. Order IV rule 3 (1) reads, “when a suit has been filed summons shall issue.” Order IV rule 3“every summons shall be accompanied by a copy of the plaint”.

Mr Oraro says the suit must be a valid suit – not an invalid suit to be amended later. Mr Ombaka seems to think that he can keep the material facts of his claim away from the defence by not serving the plaint. If a layman wanted to file a suit and he was enabled to look at the three Civil Procedure Rules commencing under the marginal note, institution of suit and issue of proceedings namely Order IV rule 1 and, rule 3(3) he would face three simple sentences. Is it possible that a trained advocate who is entitled to call himself professor and/or doctor assisted by two other trained advocates can put forward such erroneous arguments based on simple straightforward rules in respect of which they are supposed to be experts"

Mr Ombaka submitted that Order VI rule 13 (he actually said Order V rule 13) must be read in the context of the entire code and in particular to order VI rule 1 which empowers a party to amend once before the pleadings are closed. Learned counsel submitted that any other interpretation which does not give effect to order VIA rule 1 also does not make sense. He said moving to strike down a claim when it could be amended without leave of the court would render Order VIA rule 1 nugatory. It would defeat the course of justice.

The court has dealt with Order VI rule 13 which it finds does not have to be read in the context of the entire code or Order VIA rule 1 and this submission is dismissed. Mr Oraro had referred to Order XXXV rule 1 to show that a judgment could be obtained by summary procedure and that there was more than one way to obtain a ruling or judgment without trial and he asked the court to contrast the order with the application being made under Order VI rule 13. Mr Ombaka said the reference to the order was unnecessary because it related to summary procedure.

Mr Oraro for the Defendant Company had addressed the court on the basis the Plaintiff had brought the action in a private capacity. In order to arrive at this conclusion he had dealt at length with representative actions and showed that the plaintiff had not complied with the Civil Procedure Rules for taking representative actions and the contents of the plaint did not show any such intention. Learned counsel dealt with many authorities and he supplied the court with copies of those authorities. Mr Oraro then switched his address and dealt with relative actions and showed that on good authorities only the Attorney General could file and prosecute an action on behalf of the public. Here again leaned counsel supplied the court and the Plaintiff’s advocate with copies of the authorities. Learned counsel further concluded that the plaintiff could not file a relator action or otherwise on behalf of the public. Mr Ombaka in his answer made positive statements that the Plaintiff’s action was not a relator action and it is not a representative action. Learned counsel said it is a personal action against Kenya Times Limited. There is no claim in the suit that the Plaintiff is bringing that suit on behalf of anyone else other than herself.

Learned Counsel further said that anything else in the plaint does not mean anyone but herself. ‘Coordinator’ merely describes herself. Mr Ombaka said it may strengthen her standing before the court because of the subject matter of the suit. There had been a suggestion that the plaint may have been brought on moral or social grounds. He would support that. Learned counsel said his friend puts an interlocutory court in a position whereby a trial court would be hearing the evidence. The court remarks that this latter point has already been dealt with when discussing the position under Order VI Rule 13 and other rules and no further comments will be made.

The court now looks again at the three grounds of objection filed by Mr Ombaka against the preliminary objection raised by Mr Oraro. The court discussed the third ground in some detail and after full consideration all 3 grounds of objection are dismissed with costs.

This leaves the preliminary objection to be considered on the two grounds put forward. They are each to be considered separately. The first ground is that the plaint shows no reasonable cause of action against

the Defendant. It is noted that the description “reasonable’ is not used. Mr Ombaka in the second ground of his grounds of objection (which have been dismissed) stated that “in this case such cause of action is actually disclosed.”.

The court now turns to the plaint itself to ascertain the cause of action. Paragraph 1 describes the Plaintiff as a co-ordinator but as her learned counsel has said this term merely describes herself. Paragraph 2 describes the Defendant as a company limited by decree. Paragraph 3.1 records that the Plaintiff’s application for a licence to organize a demonstration to protest against the location of the complex has not been granted:

“b. refers to the support for the complex

c. refers to opposition for the complex

d. refers to violation of the green belt.

e. refers to fencing and the ground breaking ceremony.

A breach of the Land Planning Act and regulations and building bylaws is alleged”.

It is further alleged that consent has not been applied for but goes on to allege that consent cannot be legally given. It is further alleged that the Defendant has committed an offence under regulation 10 of the Development and Use of Land (Planning) Regulation 1961.

Paragraph 4 refers to the constitution and democracy.

The Court has now perused the plaint and finds that the plaint discloses no cause of action against the Defendant. This finding is sufficient for the court to strike out the plaint. However, the court will also consider thesecond ground which alleged that the plaintiff has no *locus standi* to file the suit or the application.

Under sub paragraph (e) it is alleged that there are breaches of Government or Local Government laws, Regulations and Bylaws. It is not alleged that the Plaintiff is able or has any right to bring an action in respect of these alleged breaches of law. Nor is it alleged that the defendant company is in breach of any rights, public or private. There is no allegation of damage or anticipated damage or injury. In particular it is not alleged that the Defendant Company is in breach of any rights, public or private. There is no allegation of damage or anticipated damage or injury. In particular it is not alleged that the Defendant Company is in breach of any rights, public or private in relation to the plaintiff nor has the Company caused damage to her nor does she anticipate any damage or injury. It is well established that only the Attorney General can sue on behalf of the public but in any event the plaintiff does not wish to bring an action on behalf of anyone else. In the plaint there is no allegation that the plaintiff has a right of action against the Defendant Company.

Mr Ombaka had said it may strengthen her (plaintiff’s) standing before the court because of the subject matter of the suit had he adopted what he said had been a suggestion that the plaint may have been brought on moral or social grounds. This may be so. The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interest of many people who had not been directly consulted. Of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this, is a special case. Her personal views are immaterial. The court finds that the Plaintiff has no right of action against the Defendant Company and

hence she has no *locus standi*.

While only one of these two findings would suffice, the court strikes out the plaint on both grounds, (i) that the plaint discloses no reasonable cause of action against the Defendant, and (2) the Plaintiff has no *locus standi*. Orders accordingly. The plaintiff will pay the costs of the Defendant.

The application filed on 27 November 1989 seeking a temporary injunction is dismissed with costs. This dismissal follows the striking out of the plaint leaving no sub-stratum for the application. In any event the application would have been dismissed because it does not comply with the conditions laid down in Order XXIX which are necessary to bring an application under the Order. Further the undated affidavit in support of the application does not comply with the provisions of Order XVIII of the Civil Procedure Rules. In other words the application for a temporary injunction was a non-starter from the date of filing.

For the sake of clarity the court repeats.

The preliminary objection made by Oraro for the defence and dated 1 December 1989 is upheld on the 2 grounds that were argued. The court found:

“(1) that the plaint disclosed no reasonable cause of action against the Defendant; and

(2) That the plaintiff has no *locus standi* to file the suit or the application”.

The plaint is struck out on both grounds with costs to be paid to the Defendant.

The application filed by the plaintiff on 27 November 1989 seeking a temporary injunction is dismissed with costs. The grounds of objection to the preliminary point filed by the plaintiff on 4 December 1989 are dismissed with costs. There will be orders accordingly.

Dated and Delivered at Nairobi this 11th day of December, 1989

N. DUGDALE

JUDGE