



REPUBLIC OF KENYA

High Court at Malindi

Civil Case 133 of 2012

KWANZA ESTATES LTD.....PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES.....DEFENDANTS

RULING

1. The Plaintiff moved this court by way of a Plaint which was filed on 15th August, 2012. Contemporaneously with the said Plaint, the Plaintiff filed a Notice of Motion dated 14th August 2012 seeking for the following orders:

i) That this application be certified as urgent and service be dispensed with in the first instance.

ii) That this court do grant leave to the applicant to have the notice of motion heard during the court's vacation.

iii) That the Defendant/Respondent and or its agents be temporarily restrained from erecting, constructing and or use of the public toilet on the beach front next to Kilulu Island and Blue Bay Watamu pending the hearing and determination of this application.

iv) That the Defendant/Respondent and or its agents be temporarily restrained from erecting, constructing and or use of the public toilet on the beach front next to Kilulu Island and Blue Bay Watamu pending the hearing and determination of this suit.

v) The costs of this application be provided for.

1. The Application was supported by the Affidavit of John Odongo Odegi, the Plaintiff's Director and on the following grounds:

1. THAT the Plaintiff/Applicant is the owner of that property known as Kilulu Island being

plot number 654 Watamu – CR. 13086.

2. THAT the Defendant / Respondent has commenced constructing a public toilet right at the entrance of the said property.

3. THAT the toilet when in use shall bring adverse environmental effect and as a result lead to devaluation of the plaintiff/applicants prime property emanating loss of paying guests that have already booked to stay on the property starting this August.

3. The Application dated 14th August 2012 was filed under a certificate of urgency and was certified as such by Hon. Lady Justice Odero who was sitting in Mombasa. The Court also granted the applicant temporary orders of injunction pending inter-parties hearing which was to be fixed in the High Court registry at Malindi on priority basis. The date for the said application was fixed for hearing on 27th November 2012.

4. On 11th October 2012, the Plaintiff counsel moved the court vide his Notice of Motion dated 10th October 2012 in which he was seeking for the warrants of arrest as against the Director of Kenya Wildlife Services for disobeying the interim Orders of injunction that were given by Hon. Justice Odero on 16th August 2012. The Application for contempt was certified as urgent and the court directed that the applications dated 14th August 2012 and 11th October, 2012 be heard on 27th November 2012.

5. When the Parties appeared before me on 27th November 2012, I directed the parties to agree on the application that they would want to argue first because, in my view, the application for contempt dated 10th October 2012 could not be argued together the application for injunctive orders dated 14th August 2012. Mr. Nyakoe, counsel for the Plaintiff/Applicant agreed to argue his application dated 14th August 2012 first. The parties subsequently agreed to dispose the application dated 14th August 2012 by way of written submissions which have since been filed.

6. As indicated earlier on, the Notice of Motion dated 14/8/2012 is supported by the affidavit of John Odongo Odegi, the Plaintiff's director. The depositions of the Plaintiff are that the applicant is the owner of plot number 64 Watamu. On the said plot, the Plaintiff has constructed a resort known "*Kilulu Island Resort*".

7. The Plaintiff's complaint against the Defendant is that the Defendant has begun putting up a public toilet and is speeding constructing it without due consideration of the consequences of such facility right in front of the entrance of the Plaintiff's Kilulu Island Resort. To support this position, the Plaintiff has annexed photographs of the construction.

8. The Plaintiff's director further depones that he is apprehensive that if the public toilet is constructed and is put in use, it shall have adverse environmental consequences as a result of the discharge of effluent emanating from the toilet into the sea which will result to a devaluation of the Plaintiff's prime property.

9. The Plaintiff's Director finally depones that he raised his concerns in writing to the Defendant but he has not received any response; that the actions of the Defendant defies the law of natural justice and environmental law as the public toilet will be a menace to the Plaintiff's property users and the other people who use the beach.

10. Consequently, the Plaintiff prays that injunctive orders do issue to stop the Defendant from constructing the public toilet.

11. The Defendant filed its Replying Affidavit in response to the application 14th August, 2012 dated on 23rd November 2012. The main depositions of Dickson Korir. The Warder-in-charge of Watamu Marine National Park were that there has been a joint construction effort between the Defendant and the local community through Watamu Beach Volunteers Group and Watamu Association of Boat Owners for the construction of a block of toilets on the beach.

12. The Defendant has further deponed that the unit consists of two toilets for the ladies and two toilets for the gentlemen in addition to two showers respectively; that being a public beach, the need to preserve the environment of the beach users is what caused the construction of the units; that the construction of the toilets is not being done on the Plaintiff's property and finally that if the court grants the injunction order, it shall condemn the Plaintiff, the citizenry and the local population to an environment that is unhygienic, filthy and dirty.

13. The Plaintiff filed its submissions through its advocate on 14 December 2013 while the Defendant filed its submissions through its advocate on 20th December 2012.

14. I have carefully considered the Applicants' application dated 14th August, 2012, the Respondent's Replying Affidavit dated 23rd December 2012 and the written submissions.

15. My task at this stage of the proceedings is to determine whether the Applicant has established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the suit and to determine whether, even if such a case exists, the Applicant has shown that it will suffer loss that is incapable of compensation by an award of damages and if in doubt, I am supposed to decide the application on a balance of convenience. These are the well established principles in the **Giella Vs. Cassman Brown (1973) EA 358 case.**

16. It is not in dispute that the Plaintiff is the registered owner of Plot Number 64, Watamu. The Plaintiff has annexed a copy of the Postal search to support this position. It is also not in dispute that on the said plot a resort known as Kilulu has been constructed and the same is in use as a business venture.

17. The Defendant has also not disputed that he is constructing a public toilet next to the Plaintiff's Resort. What is in dispute, and what this court has been called upon to decide by the Plaintiff is whether the construction of the public toilet next to the "Resort" shall cause adverse environmental effect thus devaluing the Plaintiff's otherwise prime property.

18. None of the parties to the suit has addressed me in detail on the law pertaining to land use as stipulated in the Physical Planning Act, No. 6 of 1996. In his submissions, the Plaintiff's advocate has submitted that the Defendant has not annexed any document to show that an Environmental Impact Assessment Report was ever prepared before the construction of the public toilet on the beach commenced or whether the National Environmental Management Authority licensed the construction of the said public toilet.

19. According to the Defendant's advocate, the Plaintiff's suit seeks to infringe on the Defendant's rights as enshrined in Articles 42 and 69 (1) (a) (d) (g) (h) and (2) of the Constitution to "utilize" the environment and natural resources for the benefit of the people of Kenya. Article 42 of the Constitution states as follows:-

"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 legislative and other measures, particularly those contemplated in Article 69.”

20. Under Article 70 (1) of the Constitution, any person may apply to court for redress if that person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened. Upon such an application being made, the court has the Constitutional duty, at Article 70 (2) to prevent, stop or discontinue any act or omissions that is harmful to the environment.

21. It is true that the public are entitled to a toilet at the public beach. Indeed, it is in the public interest that every public beach must have toilets accessible to the members of the public.

22. The Protection of the environment for the benefit of the present and future generations is supposed to be done in a structured manner, and the legal framework that governs the protection of the Environment is the Environmental Management and Co-ordination Act (EMCA) 1999, amongst other Acts and Regulations.

23. The Environmental Management and Co-ordination Act, 1999 (EMCA) provides novel provisions for the implementation of the general principles by stipulating that in exercising the jurisdiction conferred upon the court under Section 3, the court shall be guided by principles of sustainable development such as public participation amongst others.

24. The Essential principle of public participation while dealing with the issue of sustainable Management of the Environment is also provided for in Articles 69 (10) (d) of the Constitution. Public Participation is one of the principles that informed the requirement that before one finances and commences the carrying out of any undertaking specified in the second schedule of the EMCA, he must submit to NEMA an Environmental Impact Assessment Report.

25. Environment Impact Assessment (EIA) is a tool that helps those involved in decision making concerning development programmes or projects to make their decisions based on knowledge of the likely impacts that will be caused on the environment. Where the impacts are negative and likely to result in significant harm, decision makers will be able to decide what kind of mitigating measures should be taken to eliminate or minimize the harm. The projects that are potentially subject to EIA are specified in the second schedule of EMCA and they include an activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use.

25. The importance of public participation in decision making in environmental matters is highlighted by the requirement that EIA study report be published for two successive weeks in the Gazette and in a newspaper circulating in the area of the project and the public to be given a maximum of sixty days for submissions of oral or written comments on the same. EIA process gives individuals like the Plaintiff in this case, a voice in issues that may bear directly on their health and welfare and entitlement to a clean and healthy environment.

26. In addition to the requirements of the Constitution and the EMCA that the public must be involved in the development of policies, plans and processes for the management of the environment, the Environment and Land Court Act, No. 19 of 2011 at section 18 also reinstates that position. The other principle of sustainable development that must guide this court in the exercise of its jurisdiction is the precautionary principle. This principle states that if an action or policy has a suspected risk of causing harm to the environment, in the absence of scientific consensus that the action is harmful, the burden of proof that it is not harmful falls on those undertaking the act. This principle is a statutory requirement under

EMCA and the Environment and Land Court Act.

27. The Defendant in this matter has not annexed any document to show that it received the approval of NEMA to construct the public toilet at the beach. There is no report by an environmental expert on how the effluent from the said toilet is to be disposed or treated before draining the same to the ocean. The report which has been annexed on the Replying Affidavit by one Benard O. Mbeda, a buildings Engineer dated 20th September, 2012 was prepared after the said construction had started and after the Plaintiff had filed the present suit.

28. There is also no indication that the Said Benard O. Mbeda is an expert authorised to prepare such reports by NEMA pursuant to the provisions of section 59 (5) of EMCA.

29. In the absence of an Environmental Impact Assessment Report for the construction of the toilets duly approved by NEMA, I do hold and find that the Plaintiff has established a *prima facie* case with chances of success. I also hold and find that unless the order of injunction is granted as prayed, the Plaintiff, and the users of the beach and the ocean are likely to suffer irreparable damage if the toilets being constructed are used before proper mechanism are put in place to mitigate the environmental pollution that may occur. Consequently I do allow the application dated 14th August, 2012. Each party shall bear its own costs.

Dated and delivered in Malindi this 8th day of March, 2013.

O. A. Angote,

JUDGE



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