20-9-2007
IN THE SUPERIOR COURT OF JUDICATURE, THE HIGH COURT OF JUSTICE HELD AT TEMA ON THURSDAY, THE 20TH DAY OF SEPTEMBER, 2007 BEFORE HIS LORDSHIP F.G KORBIEH, J.

SUIT No. E12/91/07

CENTER FOR PUBLIC INTEREST LAW AND ANOR
VS.
TEMA OIL REFINERY

R U L I N G

The 1st plaintiff/respondent herein, according to their own statement of claim, is "a not-for-profit non-governmental organization duly incorporated and limited by guarantee and is primarily engaged in the promotion of human rights and public interest litigation". The 2nd plaintiff/respondent is "an indigene of Tema and a resident of Tema Manhean in the Tema Municipality". The defendant/applicant is a limited liability company set up and owned solely by the government of Ghana to refine crude oil into petroleum products for national consumption. On the 13/6/2007, the plaintiffs issued a writ against the defendant claiming the following reliefs:

(a) A declaration that the defendant was negligent in spilling oil into the Chemu lagoon;

(b) A declaration that the oil spillage into the Chemu lagoon is a violation of the rights of the inhabitants of Chemu particularly the rights of those who are settled along the banks of the lagoon to a clean and healthy environment under the constitution and under international law;

(c) An order enjoining the defendant to clean up the Chemu lagoon under the supervision of the EPA;

(d) An order of perpetual injunction to restrain the defendant from further pollution of the aforesaid lagoon through oil spillage or other means.

The defendant responded to the plaintiffs' claim by filing an entry of conditional appearance and the present application asking the Court to dismiss the suit for the following three reasons: (i) want of capacity, (ii) want of reasonable cause of action and

(iii) procedural irregularities. The motion paper is headed "Notice of Application to Dismiss Suit Under Order 11 Rule 18(1)(a) of the High Court (Civil Procedure) Rules 2004 (C.I.47)." The afore-mentioned rule reads as follows:

"(1) The Court may at any stage of the proceedings order any pleading or anything in any pleadings to be struck out on the grounds that

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass, or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence whatsoever shall be admissible on an application under sub-rule (1)(a)".

Even before the motion could be moved, counsel for the respondent raised the preliminary point that since the application was brought under Order 11 rule 18 specifically, counsel for the applicant had to restrict himself to just the provisions of that rule and so could not include grounds in his motion not covered by those provisions. The response of counsel for the applicant was that he intended to invoke the inherent jurisdiction of the Court in the case of the other grounds. I over-ruled the preliminary objection because the inherent jurisdiction of the Court can be invoked at any time and so counsel could base the arguments for the other grounds on the authority of the inherent jurisdiction of the Court. In the case of the **Republic v. High Court, Accra; ex parte Aryeetey [2003/04] SCGLR 398,** the Supreme Court held (in holding 3) that a conditional appearance was to enable the defendant who intended to object to the issue or service of the writ or notice of the writ on him, or to object to the jurisdiction of the court, to apply to the court to set aside the writ, or notice of the writ or the service thereof on him. But the Supreme Court went on to say that the court had the inherent jurisdiction to stay an action it considered to be frivolous, vexatious and an abuse of the court process and in exercising that jurisdiction, the court could consider all the facts including affidavit evidence.

Counsel for the applicant then proceeded to move his application. His argument may be summarized as follows: (i) the plaintiffs have mounted a representative action which

they have no capacity to do as neither of them has demonstrated any injury suffered by them; (ii) were the defendant to raise a counter –claim and obtain judgment, there would be no one to enforce the judgment against; (iii) if the action is a class action, then the plaintiff ought to have stated clearly on the writ as demanded by the rules and case law; (i) the plaintiffs do not have the mandate of Ghanaians as a whole or the inhabitants of Tema Manhean to bring this action; (v) once a party lacks capacity, he can have no reasonable cause of action.

I have to observe that nowhere in his arguments or submissions did counsel for the defendant question the individual capacity of the plaintiffs to bring this action except to say that they are busybodies seeking cheap popularity.

The response of counsel for the plaintiffs/respondents may be summarized as follows; (i) the plaintiffs have not brought a representative action, they have sued in their individual capacities; (ii) the damage to the flora and fauna of the Chemu lagoon is a matter of public interest; (iii) public interest, as can be seen in article 296 of the constitution, consists of rights and privileges that inure to the people of Ghana as a whole; (iv) the 1st plaintiff is made up of citizens of this country who are entitled to bring an action to protect the public interest and was incorporated specifically to initiate actions on behalf of the general public in Ghana; (v) in any case one member of a class may bring an action which is what the plaintiffs have done; (vi) since the constitution guarantees a right to life, its should be interpreted expansively to include right to a clean environment; (ii) Ghana is a signatory to the African Charter on Human and Peoples Rights, article 24 of which guarantees the people' right to clean and healthy environment.

Quite a number of points have been raised in this application and I propose to take them one by one. The first and probably the most fundamental point is the issue whether the plaintiffs have the capacity to institute this action. It is provided in Order 4 rule 1(1) that

> "Subject to these Rules, any person may begin and carry on proceedings in person or by a lawyer".

What this means is that except of the limitations stated in Rules, any person can institute an action. The limitation or restriction to bring an action is therefore the exception and not the rule. I believe it was for that reason that counsel for the defendant resorted to the rule that says that you can only bring a class or representative action under certain conditions which he alleged the plaintiffs had failed to meet. I really do not see anything in either the writ of summons or the statement of claim that says or even suggests that the action is either a representative action or class action. The plaintiffs have clearly stated the capacity in which they bring this action and it does not include either representing anyone or being a member of any class. If counsel for the defendant had wanted to bring the suit under the ambit of a class or representative action, he ought to have convinced the court why the action is necessarily a class or representative action. His reason for dubbing the action a representative action is that paragraphs 10, 11 and 13 of the statement of claim suggests so. The said paragraphs read as follows:

> "10. The pollution of the Chemu II lagoon by the defendant company is hazardous to the health of the citizens of Ghana especially those who have settled along the banks of the said lagoon.
> 11. The plaintiffs contend that the persistent pollution of the Chemu II lagoon by the defendant company has made the inhabitants of Tema Manhean who are predominately fishermen destitute as they can no longer carry out fishing activities in the lagoon due to the annihilation of all life forms in the aforesaid lagoon.
> 13. The plaintiffs also contend that the pollution of the Chemu II lagoon by the defendant company infringes on the rights of the inhabitants of Tema Manhean particularly those who have settled along the banks of the Chemu II lagoon to clean environment as guaranteed under the constitution and international law."

I do not see how those pleadings make this action a representative action. And nowhere are the plaintiffs claiming to represent anyone. The plaintiffs have clearly shown in paragraphs 1 and 2 of the statement of claim the capacity in which they have sued. What counsel for

the defendants tried to do was rather disingenuous. He foisted the tag of "representative action" or "class action" on the plaintiffs' suit and then proceeded to say that it had not met the conditions of a representative action or class action. What one has to look at is whether the plaintiffs, in their own capacities, have a cause of action against the defendant and not whether they have fulfilled the requirements of a representative action. The fact that a positive outcome of this case may inure to the benefit of all Ghanaians or at least people other than the plaintiffs does not make it a class or representative action. I therefore hold that this is neither a class action nor a representative action and that the rules and authorities referred to by counsel for the defendant do not apply to this suit.

The next issue to determine is whether the plaintiffs have a cause of action against the defendants. It is the defendant's argument that the plaintiffs are mere busybodies only out to court cheap popularity. The plaintiffs insist that as Ghanaians they have the right to protect the environment and are enjoined by the constitution to do so. So the question is: when does a cause of action arise? I will begin by finding out what a cause of action is in the first place. In the case of **Leteng v. Cooper [1960] 2 All ER 929**, a cause of action was described as "A factual situation, the existence of which entitles one person to obtain from the court a remedy against another person." Counsel for the defendant has argued that once a party lacks the capacity to bring an action, then he cannot have a cause of action. He further argued that no factual situation had arisen to entitle the plaintiffs to seek a remedy from the court. Counsel seemed to be oblivious to the allegations made by the plaintiffs against the defendant. If the defendant has spilled oil into the Chemu II lagoon as alleged by the plaintiffs, it has indeed created an environmental problem which gives rise to a factual situation that needs a remedy. What is pertinent is whether the plaintiffs can be said to have suffered an injury or a damage from that factual situation that is actionable. This is a matter of fact that only the evidence can establish. The plaintiffs' contention that they are citizens of Ghana and even more so are resident in Ghana have not been challenged. Their argument is that the constitution of Ghana guarantees Ghanaians the right to life and by implication the right to a clean and healthy environment; such that the defendant's act in spilling oil into the Chemu lagoon will deprive Ghanaians of the constitutional right to a clean and healthy environment. They also argue that the same constitution stipulates in

article 33(1) that where a person alleges that any provision relating to his right or freedom has been contravened or is likely to be contravened, he may seek redress in the High Court. This is the reason why they are in court. The plaintiffs counsel have urged on me the argument advanced by G.A Sarpong, Esq. who contends (in his article entitled "Environmental Justice in Ghana" published in the (1996-2000) 20 RGL 91 at page 94 that the 1992 Constitution does not accord Ghanaians a right to a healthy environment but, instead, it imposes an obligation on every citizen to protect and safeguard the environment. The learned author quotes article 41(k) of the constitution to support his position. He further contends that there are "procedural rights" within the constitution that allow people "to freely associated with others to protect the environment; to protect the rights of others affected by environmental harm; to take collective action in support of environmental cases."
(See page 99). He goes on to say at the same page 99 that:

> "Thus from the purely constitutional perspective, and in the light of the relevant rules of public international law, the Constitution, 1992 provides some substantive and procedural basis for dealing with environmental problems. The recognition of the right to a wholesome environment as a fundamental right offers the plaintiff the advantage of a remedy which is cheap and expeditious for the redress of environmental grievance."

These arguments, in my view, are a progressive way to look at the constitutional provisions relating to environmental issues. As I will demonstrate later, they accord with quite widely-held views that the courts must become proactive when handling cases involving environmental issues.

But those arguments aside, the 2nd plaintiff is an inhabitant of Tema Manhean. His action could very well be founded on the common law tort of public nuisance. It is not until evidence is led that one can say whether he has a case or not. I do not see any rule of procedure that says he cannot mount an action on his own or together with the 1st plaintiff. The 2nd plaintiff and his counsel have argued that the plaintiffs could have chosen to commence the action under Order 4 rule 11 of C.1.47 as a representative of all the

inhabitants of Tema Manhean but that they chose to come on his own steam together with the 1st plaintiff. I see nothing procedurally wrong with that. The defendant's argument that were it to bring a counter-claim and won, there would be no one to enforce the judgment against has no legal legs to stand on. Both plaintiffs are legal persons against whom a judgment can be enforced. In any case, the fact of what the defendant may choose to do or not do cannot ipso facto deprive the plaintiffs of their locus standi.

I also want to look at the issue vis-à-vis the definition of cause of action as given in **Leteng v Cooper (supra).** If the allegations made by the plaintiffs in their statement of claim are anything to go by, then a factual situation has arisen which entitles some one to seek a remedy from the court a remedy against the defendant. The question then is whether the plaintiffs are the right people to demand this remedy from the court. The plaintiffs have resorted to the constitution of Ghana to say that they qualify to take this action. They argue that various provisions in the constitution of Ghana to say that they qualify to take this action. They argue that various provisions in the constitution give them the right to initiate this action by virtue of the fact that they are protecting public interest. I will proceed to look at these constitutional provisions that they rely on. It is provided in article 295 of the constitution as follows: "public interest" includes any right or advantage which inures to the benefit or is intended to inure to the benefit generally of the whole of the people of Ghana." So is an environmentally clean Chemu lagoon a right or advantage that inures to the benefit of Ghana generally? I would answer this question in the affirmative. Part of the plaintiffs' claim is that due to the oil spillage in the lagoon the flora and fauna are dying and the consequence is that the fisher-folk living around the lagoon have become destitute. Issues of environmental degradation or pollution cannot be the concern on only the people directly affected by the hazard. An example is the topical issue of the Akosombo Dam. The water-level in the dam went down drastically because of the inadequate rainfall in places far removed from the dam itself. (This is a notorious fact that I can take judicial notice of). Yet the effect was felt by people throughout Ghana and further afield. So how can anyone say that the effect of environmental degradation or pollution is the concern of only specific people close to the location of the degradation or pollution? The environment is unlike any other thing; it cannot be put into compartments because an occurrence in one

place can have far-reaching effects on another place quite distant from the location. The effects of environmental pollution or degradation have a knack for rearing their ugly heads at the most unlikely of places. They should therefore be everybody's concern. So it cannot be said that unless you live near the Chemu lagoon you have no right to be concerned about polluting it.

In any case, the 1st plaintiff says it is in the business of protecting human rights and litigating on public interest issues. Public interest litigation seems to be a new concept in our jurisprudence and it ought, in my considered opinion, to be encouraged. I believe it is an antidote to the problem of direct victims of acts of environmental degradation or pollution being unable to take such cases to court. In view of the dearth of authorities within our jurisdiction in cases such as this one and in line with current practice, I have had recourse to other common law jurisdictions to see what pertains there. In the English case of **R. v Inspectorate of Pollution and Anor, ex parte Greenpeace Ltd [1994] All ER 329, Otten J** held that in deciding whether an applicant for judicial review had sufficient interest in the matter to which the application related, the court should take into account the nature of the applicant, the extent of his interest in the issues raised, the remedy which he sought to achieve and nature of the relief sought. As I have already intimated, the 1st is therefore by its functional nature the right person to take up an issue such as the the pollution of the Chemu lagoon, especially in view of the fact that the people inhabiting the immediate environs of the lagoon may be either too ignorant or too poor to initiate action on the issue. Were the plaintiffs to be denied *locus standi* in this case, the inhabitants of the lagoon area may not have an effective means of bringing their concerns before the court. In India and the United States, both common law countries, the concept of public interest litigation is relatively well developed. According to Dr. Iwona Rummel-Bulska, Principle Legal Officer and Chief Environmental Law Branch, UNEP, in a paper entitled "Environmental Jurisprudence" presented at the Sub-regional Sensitization Training Programme on Environmental Law for Judges held on the 16-17 March, 2006 in Accra, "the development of public interest litigation in India particularly in regard to the right to life and social and economic rights has been due to the wide provision contained in Article 32 of the Constitution of that country". The learned author then went on to cite the cases of

S.P Gupta & Ors. v. President of India (1982) A.I..R (S.C) 149 and People's Union for Democratic Rights v. Union of India (1982) A.I.R (S.C) 1473 and continued as follows:

> "These two judgments expanded the concept of *locus standi* in the judicial process and gave a permanent place to public interest litigation in Indian administrative and constitutional jurisprudence. Petitions on public interest matters affecting particularly the poorer sections of the society who have no means of litigating their grievances have been filed mainly by Bar Associations, social workers and bodies interested in fundamental and human rights as well as statutory and constitutional rights of citizens. These petitions seek to check the abuse of power by state agencies detrimental to the ordinary citizen and to compel them to carry out their duties and obligations under the constitution and other statutes."

I am sufficiently persuaded by those arguments and the practices in other common law jurisdictions to want to follow suit. The idea of looking to other common law jurisdictions in times of uncertainty is not new. In the case of **Archibold v C.F.A.O [1966] GLR 79, Hayfon-Benjamin J** (as he then was) held that the categories of tortious actions were not closed and courts would recognize a new cause of action if justice so required; mere novelty was no longer a bar in view of section 17(4) of the Interpretation Act, 1960, which empowers the courts in case of doubt on a point of common law and equity to seek assistance from the decisions of the courts in any country. At the just-ended Commonwealth Law Conference held in Nairobi, Kenya, several speakers advocated the need for public interest litigation for several reasons, one being the fact that quite often the people directly affected by environmental pollution or degradation are either too ignorant or too poor to initiate litigation themselves. They also emphasized the need for lawyers to do more pro bono cases so as to make the law and justice generally more accessible to the people, including people who can ill-afford paid legal services. I see in what the 1st plaintiff is trying to do both of these laudable objectives advocated by the Commonwealth Law Conference.

I therefore also hold that the plaintiffs have a cause of action against the defendant. For the foregoing reasons I do not see my way clear to granting the defendant's application. It is accordingly hereby refused.

I award costs of GH¢300 against the defendant/applicant.

(SGD) **(F.G. Korbieh)**
Justice of the High Court

COUNSEL:

Agyabeng Akrasi for the defendant/applicant
Dr. Dominic Ayine (with him James Agalga) for the plaintiffs/respondents.

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