HUMAN RIGHTS CASE NOTES

CENTER FOR PUBLIC INTEREST LAW

Volume 1 SEPTEMBER 2008

IN THIS ISSUE

UNDP

United Nations Democracy Fund

The Centre for Public Interest Law (CEPIL) is a rights based non-governmental not for profit organization established in 1999 and incorporated under the Companies Code 1963 (Act 179) as a company limited by guarantee.

CEPIL was born out of joint efforts by two other NGOs - the Integrated Social Development Center (ISODEC) and the Third World Network (TWN) and currently operates as an affiliate of ISODEC. It was established with the main aim of using the law as a tool to make justice accessible and affordable to poor and marginalized communities and individuals. The Center also aims at making government and private actors accountable for their actions or inactions which adversely advert individuals and communities.

Mission Statement

To continually strive for justice and fairness especially for the poor and marginalised in society by working to improve democratic governance, rule of law and ensuring accountability of public and private actors through advocacy, litigation, social mobilisation and research.

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Editorial

The struggle of ordinary citizens for the realization of their basic human rights occurs on a daily basis. Citizens 'fight' against the infringement of their fundamental rights by other citizens, corporations and the state and its various agencies on a regular basis. Most of that fight occurs within communities, in the media and in the court system. Yet, it has been the case that character and intensity of the struggle for the realization of rights is often not captured in documentary form, except when it occurs in the electronic or print media.

It is the belief of the Centre for Public Interest Law (CEPIL) that the realization of fundamental rights depends in part on the creation of awareness about the nature and content of rights, the remedies available to victims of human rights violations and the response of state institutions to requests by ordinary citizens for the enforcement of rights. It is this belief that animates the publication of this first edition of Human Rights Case Notes under the auspices of the United Nations Democracy Fund (UNDEF) Project for the Promotion and Protection of Human Rights and Freedoms in Ghana. The Case Notes are designed as a tool for educating human rights advocacy organizations about the legal battles that ordinary people (and also CEPIL as an advocacy organization) fight within the judicial system so as to highlight the critical issues that arise in the course of litigation.

In the first of the two cases in this volume, CEPIL assisted forty-five (45) members of the Nkwantakrom community in the Western Region in their fight to obtain compensation from Ghana Australian Goldfields Limited. One would have thought that given the constitutional guarantee of the right to compensation for property takings, an issue such as this would have been quickly resolved in order to ensure the realization of the community of their right to compensation. But that was not to be! It took the community eight years and quite a bit of resources from CEPIL and its funders (especially Oxfam America an the Rights and Voice Initiative (RAVI) Fund) to win this battle.

The second case note concerns CEPIL's attempt to exact accountability for the violation of certain human rights of the communities living in and around the Chemu Lagoon in Tema by the Tema Oil Refinery (TOR). TOR had polluted the Chemu through spillage and CEPIL sued before the High Court alleging violation of the right to a clean and healthy environment, among others. TOR objected to CEPIL's right to do so. The Court, after hearing arguments, ruled in favour of CEPIL. This ruling is groundbreaking because it is the first in Ghana relating to the 'standing' of human rights organization to bring a court action even though it is not directly affected by the acts of violation complained of. The consequence is that civil society organizations can bring actions in their own right to enforce human rights violations on behalf of their 'constituents'.

It is the hope of CEPIL that these case notes would go a long way to educate human rights advocates and ordinary citizens about the remedies available under our law and Constitution for the realization of basic rights and freedoms.

Case Note 1

Nana Kofi Karikari & 44 Others v Ghanaian Australian Goldfields (GAG) Ltd. (High Court of Justice, Tarkwa, 20 Dec 2007).

I. Background

The Plaintiffs are 45 residents and lawful owners of unnumbered buildings at Nkwantakrom, a village near Tarkwa in the Western Region of the Republic of Ghana. The Defendants, AngloGold Ashanti hold a mining concession in that region. Nkwantakrom village falls within blasting zone five, as set out by AngloGold Ashanti.

On, or around, 27 June 1997 the homes of the residents of the Nkwantakrom village, the plaintiffs, were demolished and their personal belongings were either destroyed or looted. The demolition acts were carried out by DISEC, armed security men and thugs.

On 8 December 1997, the plaintiffs filed a writ of summons and a statement of claim against AngloGold Ashanti asking for: special and general damages for the unlawful demolition of their property; an order from the court for the appointment of valuers to value the demolished buildings so that the plaintiffs can apply to the Minister for Mines and Energy for compensation under the Minerals and Mining Law, 1986 (PNDCL); a perpetual injunction to prevent the defendants from continuing the demolition of the plaintiffs' buildings, conducting activities which prevent the plaintiffs from performing their farming activities, and/or causing armed policemen to threaten and torture the plaintiffs; and costs.

Since January 1998, appearances have been made before the court every year, and frequently on a monthly basis, up until the judgment was delivered on 20 December 2007. On cember 2007, His Lordship Justice Poku delivered a final judgment which was generally in favour of the plaintiffs, aside from general damages and an injunction. Following this judgment, on 20 December 2007, the defendants/applicants filed a motion with the High Court for a stay of execution for the orders within the judgment. The motion was dismissed, and the defendants/ applicants were ordered to pay one-third—5000 cedis—of the costs to each plaintiff prior to proceeding with an appeal. Upon this

dismissal the defendants/applicants on 18 March 2008 filed the motion for a stay of execution and an appeal with the Court of Appeal. The Court of Appeal ordered the defendants/applicants to pay 2000 cedis prior to advancing an appeal. At the time of this publication, the appeal was still pending.

II. Legal/ Human Rights Issues Raised:

Five distinct legal issues were raised and discussed in this case. The first was whether Nkwantakrom existed before the defendants obtained their license. The second was whether or not the defendant caused the demolition of the plaintiffs' building. The third was whether or not the demolition of the plaintiffs' buildings by the defendant company was unlawful. The fourth issue assessed whether or not the allegedly unlawful demolition of the plaintiffs' building by the defendant company caused any loss to the plaintiffs. The fifth issue encompassed any additional issues arising from the pleadings, and is the issue which included discussion of damages and the injunction. In settling these issues, the plaintiffs submitted arguments based on the fundamental rights to property and housing.

III. Brief discussion of evidence.

Given the magnitude of the circumstances of this case, both the plaintiffs and the defendants submitted numerous exhibits for evidence. The plaintiffs' evidence consisted of tenancy agreements proving the existence of Nkwantakrom prior to the concession of the mining rights by the defendants. These documents included: a document dated 12 June 1968 which conveyed the land of Nkwantakrom to plaintiff one ("P1"), the Odikro of Nkwantakrom, from the chief of the Opanin Nuako area. Subsequently, P1 tendered land to the other plaintiffs and formed Nkwantakrom. To prove this, a tenancy agreement between P1 and another plaintiff was submitted to the court. The plaintiffs' evidence also consisted of letters to police, written by plaintiffs and the Nkwnatakrom Development Committee, which notified the commander of the demolition and loss of their items.

The letters included an inventory of the lost items for each plaintiff and the corresponding total value of their destroyed or stolen property. The total value amouonted to 26 475 000.000 cedis. Plaintiffs also provided pictures of the demolished houses.

Testimony from the plaintiffs documented the demolition and the fact that they were forced out of their homes and the school to watch the destruction of their property. There was no time provided to collect their belongings or engage in a dialogue. Testimonies were given confirming the facts that P1 lived in Nkwantakrom prior to the arrival of the defendants and he allotted land to the other plaintiffs through tenancy agreements. As witnesses, the plaintiffs provided testimony from one of the farmers that the defendants alleged had been compensated and left the area prior to the arrival of the plaintiffs. This testimony confirmed the evidence and testimony of the plaintiffs, affirming that P1 lived in Nkwantakrom prior to the arrival of the defendants and that it was P1 who brought him to the village.

He also states that the compensation he received was for a portion of his farm that was destroyed by the defendants when they built a road. He denied the defendants' claim that he received compensation to leave Nkwantakrom. He denied knowing any of the other people the defendant claimed were compensated with him in order to leave Nkwantakrom.

Largely, the judge accepted the plaintiffs' evidence. The evidence proved valuable in proving the existence of Nkwantakrom prior to the arrival of the defendants, and played a role in discrediting the defendants' facts. The inventory list was similarly important in determining appropriate compensation, as the land was not valued prior to the demolition. The consistency of the testimonies throughout the cross examination gave the testimonies and witnesses credibility.

The defendants' introduced evidence as an attempt to prove that Nkwantakrom did not exist at the time they acquired the concession, and that those structures that were in the concession and blasting zone received proper compensation. The

defendants submitted crop compensation claims/receipts paid to the five farmers who received compensation. They presented letters they had sent to inhabitants of adjacent communities who had complained about the unauthorized development adjacent to block 5. Lastly, they presented a letter dated 20 April 1997 from the defendant company to the District Chief Executive Waasa West District Assembly which was titled, “demolition of structures at Diwbrekrom and its surrounding area.”

The defence used a former environmental officer of the defendants as a witness. His statements stressed the fact that the demolition did not involve any of the defendants' company equipment, and that the chief linguist organized a team to carry out the demolition. He also notes that marked structures were not demolished, the defendants have aerial photographs of the concession taken in 1994, and that Nkwantakrom does not appear in the photographs.

The judge dismissed the majority of the defendants' submitted evidence. The addresses of the letters they sent to inhabitants were not to any residents in Nkwantakrom, thus the judge held that the letters were irrelevant.

The letters do not demonstrate that the defendants provided sufficient notice of the demolition to the plaintiffs. The defendants and their witness mention the aerial photographs, but despite the fact that these items would have proved to be valuable evidence and the plaintiffs requested these photographs, the defendants did not submit them as evidence.

Nor did they submit the mining lease with the accompanying map, which also would have depicted the locations of the settlements located in their concessions. For these reasons, the evidence submitted by the defendants did not further their case. The evidence failed to show that Nkwantakrom did not exist at the time the defendants acquired the mining concession, and the letters and compensation slips were not addressed to residents of Nkwartakrom or any of the plaintiffs in this case.

Ultimately, the defendants' evidence was not strong, and in fact helped further the plaintiffs' case.

IV. Judgment and analysis

Judgment:

The judgment issued was largely in favour of the plaintiffs, as they received special damages compensating them for their lost goods and a relocation allowance. However, they did not receive general damages or an injunction. The issues raised in this case were interconnected and in order for the ruling to be reached, the judge had to rule on the various issues successively, beginning with the issue of whether or not Nkwantakrom existed before the defendants obtained their mining concession. To determine this issue the judge followed the legal presumption that the defendants' failure to submit the photographs they claimed they had taken and their mining lease with its accompanying map—evidence which would have conclusively determined the matter—indicated that the contents of those documents were not in their favour.

Thus, the judge held that the photos or lease would likely show that Nkwantakrom was present prior to the obtaining of the concession. To support this presumption the judge used the photographs submitted by the plaintiffs which showed the devastated village. In the background of these photographs were very tall coconut trees indicating that Nkwantakrom was indeed an old and established village and not a recent settlement.

Having established that Nkwantakrom existed prior to the defendants obtaining the mining concession, on the second issue the judge ruled that the defendants did cause the demolition of the plaintiffs' buildings. The judge held that regardless of the fact that the demolition was carried out by DISEC, armed policeman, and thugs, they were all acting as agents for the defendants and thus the defendants did indeed cause the demolition. With support from past cases, the judge held that

any person who authorizes or procures a tort to be committed by another person is responsible for the tort as if he had committed it himself. The principal

and the agents in such circumstances are both jointly and severally liable as joint tortfeasors for the wrong authorized or procured by the former for the latter.
With fault attributed to the defendants, the judge ruled that the demolition was unlawful. The rights of both the plaintiffs and the defendants derive from the Minerals and Mining Act PNDCL 153 Section 70 subsections (1), (2), and (4). These provisions govern the relationship between the owners of the surface rights and the mineral rights. The holders right is not absolute, they must compensate for disturbances of an owners surface right.

The above provisions read in tandem with Section 49 of the Local Government Act, 1992 Act 462, which mandates that regardless of when the structures were built—prior to or after the owner obtains the mineral rights—sufficient, thorough, adequate or due notice must be given to the inhabitants before destroying their property. To determine what constitutes "sufficient" notice, the judge looked at the Local Government Act and the case of Moses Armah v Wassa West District Assembly to conclude that it entails providing written notice, or providing notice at a public forum. Print or electronic media are not adequate.

The surface owner must then have time to reply to such notice, so that a proper dialogue can ensue. In this case, the judge found that the defendants did not give sufficient notice to the residents of Nkwantakrom. The defendants issued letters to residents of neighbouring areas, but not to the residents of Nkwantakrom, and also did not provide notice at a public forum. Failing to fulfill a condition necessary to commence a subsequent act renders the subsequent act invalid.

In this circumstance, the judge held that the defendants failed to provide sufficient notice to the residents of Nkwantakrom before demolishing their property, and hence they failed to comply with PNDCL 153 and the Local Government Act. Therefore, the act of demolition was unlawful and unconstitutional and the defendants abused their mineral holding right.

The fourth issue was whether or not the unlawful demolition of the plaintiffs' buildings by the defendant company caused any loss to the plaintiffs. All the plaintiffs' houses were demolished along with the community's school, church and mosque. In addition to the loss of their homes, the items in their homes were stolen or destroyed and the land and crops were ruined. The judge held that the defendants caused them a grave inconvenience.

Fifth, the issues of damages and the injunction were resolved. The judge held that the plaintiffs could not recover general damages for the demolition of their houses and the devastation of their crops. Entering the plaintiffs' land was not an illegal act for the defendants, because they had lawful authority and a license to enter the land. As such, any acts performed pursuant to that license cannot be subject to general damages in trespass; thus, the defendants' entry and disturbance of the plaintiffs' surface right was not held to be a trespass.

Special damages for the demolition of the plaintiffs' property and relocation allowance were attributed. Special damages need to be proved conclusively; since the receipts were destroyed, the judge accepted the inventory list prepared soon after the destruction to represent the amount of the items lost in the attack.

The total attributed was 26, 475, 000.00 plus 10% interest per anum from 27 June 1997 to the date of the final payment. The PNDCL 153 governs the compensation formula for the disturbance of the surface rights – destruction of the buildings and the crops. Under these provisions, the plaintiffs were entitled to resettlement or relocation allowance; the plaintiffs chose relocation allowance.

The plaintiffs should thus be restored to the position they were in prior to the demolition. Following the replacement cost method and accounting for inflation, the judge held that each plaintiff should receive GH 13 000.00 as cash compensation and GH 2000 as relocation allowance. The judge felt that GH 2000 would be an appropriate amount to provide the plaintiffs with a durable, self--contained flat that can withstand the impact of the defendants'

operations. The judge ordered GH 2000 to be paid to the founder of the church, the founder of the mosque, and to the first plaintiff—the founder of Nkwantakrom—for and on behalf of the community to reconstruct a school. Costs were also calculated at GH 4000. The injunction was not granted because the defendants are permitted by law to operate in the concession due to the mining lease; the judge held that there was no justification to halt their lawful activities.

Analysis:
This judgment is both a victory for the protection of human rights, and a reminder of the obstacles that still need to be overcome in the fight against multinational corporate impunity. However, this victory can only be viewed as a partial victory. It is a victory because through the use of the domestic Minerals and Mining Law the plaintiffs were able to receive an order for monetary compensation for the unlawful acts committed by the mining corporation. The judgment shows the judges recognition of the need to defend the powerless community's rights in the face of a multinational corporation's abuse.

However, the judgment did not go far enough in protecting the fundamental human rights violated in this case. The judge sidelined any mention of fundamental human rights as protected in the Constitution and international covenants. Additionally, this victory should not overshadow the issue of a hierarchy of privileges—the privilege of a concessionaire over a surface owners rights—which are touched upon in this judgment. Looking beyond the surface of the decision thus reveals the larger obstacles still present in the fight to overcome corporate impunity and to protect human rights.

The judgment in favor of the plaintiff is a victory. As the first case with a judgment against a mining corporation in Ghana it seeks to signal a message to sister mining companies and corporations. From the onset, the judge set a strong tone and indicated that the power differences between the two parties would not give the defendants any advantage. In analyzing the uncooperative behaviour of the defendants the judge stated, it appears from the attitude shown by the defendant right from the day of the invasion that the defendant thinks of the plaintiffs as weak and voiceless who would never be able to litigate them and that they should therefore keep quiet if a wealthy and influential multinational company demolishes their places of abode and uses their land in the way it likes against the wishes of the poverty-stricken rural dwellers.

This statement is an important message; it signals to corporations that they will be held accountable for their actions. This company and others cannot take advantage of the "poverty-stricken rural dwellers."

Overall, this decision displays sound legal reasoning and judgment and concludes with an appropriate decision following the laws stipulated in the Minerals and Mining Law. The judge dealt with a difficult situation as the defendants refused to turn over necessary evidence: the photographs and mining lease with the accompanying map. Moreover, because the property was demolished, valuation was difficult and conclusive proof of lost items was not available. Given this situation the judge provided a strong analysis and justification for all decisions. The was appropriately analyzed to support the holding, particularly the fact that Nkwantakrom existed prior to the defendants' acquisition of the mining concession, and to calculate special damages. One could have determined that without definitive evidence the property and lost items could not receive a set value. But, the judge chose to grapple with the provisions of the PNDCL to create a compensation and valuation formula that would advance the plaintiffs' needs.

Despite this, there are still statements which demean the plaintiffs' situation and indicate a lack of true recognition of the human rights violated in this case. For instance, the destruction of Nkwantakrom was not just a mere inconvenience; it was the destruction of the means of livelihood for many of these plaintiffs. Their community and way of life was destroyed, and many of them have become internally displaced persons over the past ten years. The severity of the situation was not sufficiently illustrated in this judgment.

Though it is important to use domestic laws to achieve the advancement of human rights, these laws should be used in tandem with those that protect fundamental human rights. In this case, these laws were merely glossed over. While addressing the third issue, the judge noted the plaintiffs' assertion that the demolition violated the plaintiffs' fundamental human right to housing and constituted forced eviction. However, the judge resolved this issue using PNDCL 153, and classifying the issue as one of mineral owners' rights rather than an issue of surface owners' rights. Thus, the violations of fundamental human rights were essentially sidelined.

The compensation ordered in the judgment is only a portion of the total requested compensation and actions. The plaintiffs did not receive the injunction or general damages. This is not due to incorrect legal reasoning on the part of the judge, but rather inequality institutionalized by the country's laws. The defendant forcefully displaced people from their homes, brutally destroyed their community and looted their property, but because the defendants have a license, the entry or disturbance of the owners' surface rights are held to not be a trespass.

The rights the Concessions Ordinance confers on concessionaires are wide-reaching. If any other person destroys one's homes or crops, the affected individual can seek damages. In contrast, concessionaires are not considered to be tortfeasors and receive the legal protection to disturb an owner's surface rights. This and many other judgments highlight the need for this right of concessionaires to be qualified.

Further, because the concessionaires are not considered tortfeasors and their actions are considered legal, an injunction cannot be granted. A judgment cannot be a full victory if the companies are still permitted to carry out activities which disrupt others' abilities to enjoy their basic human rights, or cause armed policeman to threaten and torture them. Freedom from torture and forced displacement are fundamental human rights which are protected in the Ghanaian Constitution and international conventions, and are sacrificed in situations like this case.

This judgment also draws attention to potential inequalities within the compensation formula. Plaintiffs have the option to choose either resettlement or relocation. Resettlement is when the holder of the mineral right construct a new structure on “suitable alternate land with due regard to their economic well-being and socio cultural value.” In this case and in many others the plaintiffs live in abode homes, which are of relatively little value. In constructing a new home, materials of superior quality are likely to be used and in exchange, there may be less rooms in the new structure. Using superior materials is mandated by the state, but it is the displaced individuals who suffer from a lower quantity of rooms. These realities lend to the question of whether this can be fair compensation? In this situation, the plaintiffs chose to receive relocation allowance, but in the future others may choose resettlement and this is a potential problem.

V. Emerging International Human Rights Law and Jurisprudence

Though international human rights issues are embedded within this case, the issues and judgments were primarily decided upon the Minerals and Mining Law and did not incorporate recognition of such fundamental human rights. This is the first case resulting in a victory for the plaintiffs against a mining corporation and as such there is no specific jurisprudence to follow; rather,this case will serve as precedent for future cases. By ruling on the relationship between those with mineral rights and those with surface rights, the judgment indirectly affirmed the fundamental right to property.

The rights of a mineral owner are not absolute; they must compensate a surface right owner for the loss or destruction of their property. Similarly, the right to property, as submitted in the plaintiffs address, is protected in Article 18 of the 1992 Constitution and Article 14 of the African Charter on Human and People's Rights. These Articles guarantee the right

to property, and the right to compensation if the property right is interfered with, even if for a public purpose or authorized by the law.

Other fundamental human rights issues related to this case are the right to housing, which includes freedom from forced eviction and respect for human dignity. The right to housing is embedded within the right to an adequate standard of living and is protected by both the Universal Declaration of Human Rights Article 25 (1), and the International Covenant on Economic Social and Cultural Rights Article 11 (1).

The United Nations Human Rights Commission Resolution 1993/77 declared the practice of forced eviction, as in this case, to be a gross violation of human rights, particularly the right to adequate housing. Despite this declaration and the plaintiffs' submission, the judge did not base his decision on these fundamental human rights. Irrespective of the fact that the right to housing is not an explicit right guaranteed under the Constitution, it is protected by the Constitution by virtue of Article 33(5). This Article holds that Constitution protects those fundamental rights and freedoms which are not contained in the Constitution but are considered to be "inherent in a democracy and intended to secure the freedom and dignity of man."

As such, the right to housing is guaranteed by the Constitution. Despite the fact that the plaintiffs' raised the violation of the right to housing in their submission, the judge chose not to base the judgment on this right.

Two rights that were violated and not mentioned in the judgment or the submission are the right to respect for human dignity and the right to be free from trespass from other persons. Article 15 of the Constitution guarantees the respect for human dignity. This protection entails that, "no person shall be subjected to any condition that detracts or is likely to detract from his dignity and worth as a human being."

The demolition of the plaintiffs' property and their community tarnished their human dignity and sense of worth. This was illustrated by the harsh manner in which the defendants conducted the demolition.

Lastly, the manner in which the demolition was carried out resulted in trespass to some of the plaintiffs. Some of the plaintiffs were forcefully removed from their property and, as such, suffered injuries to their bodies. These injuries could have been brought forth to the court under a trespass to persons action, as opposed to trespass to land. In future cases, these issues can be raised as means to contravene the impunity protected by the Mining Act.

VI. Conclusion

In the larger struggle against corporate impunity this case sets an important foundation. It is the first case to receive a judgment against a mining corporation operating in Ghana, and this deserves recognition. The Minerals and Mining Law was used to advance the protection of human rights and to order AngloGold Ashanti to compensate the inhabitants of Nkwantakrom for demolishing their property. However, this judgment also highlights the barriers that still exist to receiving true recognition of the fundamental human rights that are protected in the Constitution and in international conventions to which Ghana is a party. The Minerals and Mining Law provides privileges to mineral owners that exceed those of surface owners, which violates fundamental human rights. The goal for future cases should be to obtain judgments that are based upon both the domestic Minerals and Mining Act and international fundamental human rights.

Case Note 2

Centre for Public Interest Law and Anor. vs. Tema Oil Refinery

I. Background

The Tema Oil Refinery, the Defendant in this case, is a publicly owned company that refines crude oil for national consumption. It was established in the 1960s and operates in the Tema municipality at the source of the Chemu II Lagoon. The Lagoon serves as a habitat for numerous animals and plants as well as a valuable supply of food and other resources for the surrounding communities.

The Defendant company has repeatedly spilt oil in the Lagoon due to faulty or inefficient equipment. The spills have polluted the water of the Lagoon, killed wildlife, and affected the lives of the residents of the region.

The second Plaintiff is a resident of the Tema area who has suffered as a consequence of the pollution caused by the Defendant. He is a fisherman and depends on the Lagoon for his livelihood. He has been unable to utilise this resource due to its exposure to toxic waste as a result of the Defendant's actions. Furthermore, these chemicals are a health hazard for all residents living along the Lagoon and exposure to them can have serious effects on human health.

The first Plaintiff is the Centre for Public Interest Law (CEPIL), a not-for-profit organisation dedicated to human rights and public interest litigation. With the second Plaintiff, CEPIL commenced this action against the Defendant for its negligent operations and the subsequent damages to the community of Tema as well as to the Ghanaian public at large.

This action was commenced on 6 June 2007 at the High Court in Tema. The Defendant opposed the application and filed an Application to Dismiss Suit. On September 20, 2007, his Lordship F.G. Korbieh ruled on this preliminary Application. The Plaintiffs now have to file a Notice of Intention to Proceed to continue with their original application.

II. Legal/Human Rights Issues Raise

Before discussing the human rights issues raised by the Plaintiffs' application, it is important to consider the legal issues raised by the Defendant's Application to Dismiss Suit.

Defendant's Application to Dismiss Suit

Following the Plaintiffs' Statement of Claim, the Defendant filed an Application to Dismiss Suit as a challenge to the Plaintiffs' case. The Defendant claimed, as a first legal issue, that the Plaintiffs lack the capacity to proceed. It argued that they did not have the standing to initiate the action and that the case should therefore be dismissed. Second, it claimed that the Plaintiffs did not have a reasonable cause of action. It alleged that there was no real evidence of the resulting injuries and that the Plaintiffs' only motivation was to receive recognition for this case. Finally, the Defendant argued that there are procedural irregularities with the Plaintiffs' application. It contended that, since

the Plaintiffs had no individual standing to bring this action forward, a class action lawsuit should have been filed. Consequently, the procedure followed by the Plaintiffs does not meet the required procedure for a representative action.

Plaintiffs' Statement of Claim

In their Statement of Claim, the Plaintiffs raised several human rights issues. They first referred to the right to life under Article 13 of the 1992 Constitution of Ghana. They argued that the right to life, if interpreted liberally, includes the right to a clean environment. The Plaintiffs thus claimed that their right to a good life had been violated by the Defendant company's actions.

Furthermore, the Plaintiffs claimed that the Defendant violated Article 24 of the African Charter on Human and Peoples' Rights. This Article states that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." The Plaintiffs thus contend that, by polluting the Lagoon, the Defendant did not meet its international obligation under the Charter.

To bring forward this action, the Plaintiffs based their action on Article 33(1) of the Ghanaian Constitution, which stipulates that a person can seek redress in court when a human rights violation has occurred. The Plaintiffs sought a declaration that the Defendant was negligent in spilling oil into the Lagoon, a declaration that the spillage was a violation of the human rights of the people living along the banks of the Lagoon, an order requiring the Defendant to clean up the Lagoon under the supervision of the Environmental Protection Agency (EPA), an order of perpetual injunction restraining the Defendant from polluting the Chemu Lagoon, and punitive damages.

III. Analysis of the Decision

The judge's decision with regards to the Defendant's Application to Dismiss Suit introduces several important legal issues. First, the judge analysed the issue of the Plaintiffs' legal standing. The Defendant claimed that the Plaintiffs do not have the legal capacity to bring forward a class action suit since neither of them has shown that they have suffered any direct injury. The judge, however, accurately noted that the Plaintiffs never claimed to be proceeding with a representative action. They always maintained that they were acting in their own individual capacity and, as such, they had proceeded lawfully.

The Defendant argued that this case should be classified as a representative action because the Plaintiffs' Statement of Claim contends that the case affects all the residents of the Tema region. However, the judge concluded that the fact that the action could benefit all the residents of the region does not mean that it was started on their behalf. The judge found that the two Plaintiffs acted in their own capacity, the first as a public interest law organisation and the second as a private citizen of the Tema municipality.

Under those circumstances, the Plaintiffs have the legal right and standing to proceed with this action. The judge commented that if the Defendant thought the case should have been instituted as a class action, it should have convinced the court of the validity of that argument, which it did not.

Once there was a determination on the issue of standing, the judge examined whether or not the Plaintiffs had a valid cause of action. The Defendant claimed that the Plaintiffs did not have a substantive case and that they only brought this action forward to attract attention and bring notoriety to the Defendant.

The Plaintiffs however argued that, as Ghanaians, they have the right to act to protect their environment. The judge thus had to decide whether a proper cause of action existed. In other words, he had to decide if a factual situation existed that required a remedy and if the Plaintiffs suffered an injury as a consequence of that situation. The judge concluded that environmental degradation due to an oil spill is a factual situation that could lead to an award of damages. He added that the case requires further analysis by a court to determine whether the Defendant is at fault and if the attribution of redress to the Plaintiffs is appropriate. The judge noted, however, that such a matter can only be established by presenting evidence during a trial. Accordingly, the judge found that the factual

situation is such that it allows the Plaintiffs to proceed with their cause of action.

On the issues of standing and the existence of a proper cause of action, the judge's findings were correct and just. The Plaintiffs never alleged to be acting on behalf of the residents of Tema. The Defendant imputed that presumption on them and then argued that their proceedings did not meet the requirements for a representative action. The Plaintiffs had the right to bring forward any action in which they feel their interests had been violated. In this case, the Defendants damaged the Plaintiffs' right to a clean environment and the Plaintiffs thus deserve remedies. Further, the judge correctly determined that there was a valid cause of action because it is clear from the Plaintiffs' allegations that there was a set of facts that led to the pollution of the water in the Lagoon.

It was the court's responsibility to determine whether the damage to the water resource was the Defendant's fault and whether they should thus compensate the Plaintiffs. Regardless of the final findings, the Plaintiffs still had a basic cause of action that allows them to proceed.

After the judge decided on these preliminary issues, he examined the human rights contentions that were raised. He accepted the Plaintiffs' argument that the right to life, as defined by Article 13 of the Ghanaian Constitution, included the right to a clean and healthy environment. He agreed that the Constitution imposes an obligation on every citizen to protect the environment and that the Plaintiffs were acting to safeguard that right. In fact, the judge stated that the second Plaintiff was acting as a private citizen of Tema and could have based his action on the tort of public nuisance. On the other hand, the first Plaintiff was acting in the public interest, which is defined under Article 295 of the Constitution as “any right or advantage which is intended to the benefit generally of the whole of the people of Ghana.”

In addition, the judge specifically recognised the emergence of a public interest law branch and stated that the first Plaintiff had the right to operate within it. He even stated that public interest litigation should be encouraged and permitted as a way to proceed with issues that affect the public at large. We believe that the learned judge made the correct finding in that respect.

Where the injured are numerous, it is necessary to have an organisation willing and able to speak on behalf of the public. Without such organisations, many people would not have access to justice and would not be compensated for the damages suffered. Thus, it is essential that public interest litigation remains an accepted and an encouraged form of instituting a claim.

In the present case, the environment can be classified as a matter of public interest. The degradation of natural resources is of concern to the public as a whole. An oil spill can have negative repercussions on a multitude of people in a multitude of areas. The judge was thus correct in noting that the environment needs to be a societal concern and should be defended by any organisation or person that sees itself injured by its degradation. CEPIL further believes that the courts should follow the example of the learned judge in this case and be more proactive in placing the environment at the centre of the right to life. The courts should also make it a national priority that receives protection. In fact, they need to recognise the right to a clean and healthy environment as an integral part of people's right to live, to provide for themselves, and to enjoy their surroundings. They need to be aware that further purposeful degradation of the environment by companies affects the rights of all Ghanaian citizens and accordingly should be reprimanded.

IV. Emerging International Human Rights Law and Jurisprudence

In his decision, the judge referred to international jurisprudence to support his findings. On the matter of locus standi, the judge based himself on the English case of R. vs. Inspectorate of Pollution and Anor, ex parte Greenpeace Ltd, to recognise the first Plaintiff's legal capacity. This case established the required criteria to determine whether an

applicant has sufficient interest in a matter to institute it. The Court held that it should consider the applicant's nature, his interest in the issue, and the remedy sought to determine if he is the appropriate person to proceed with the action. In this case, the first Plaintiff's central mission was the defence of human rights and the public interest. Its participation in this case thus falls directly within the organisation's nature.

On the issue of public interest litigation, the judge cites the two Indian cases of S.P. Gupta & Ors vs. President of India and People's Union for Democratic Rights vs. Union of India. These two judgments expanded the notion of legal capacity and made public interest litigation a permanent part of the Indian legal system. Public interest litigation was particularly favoured when it helped the most disadvantaged parts of society voice their problems and potentially receive awards for damages.

The cases further added that any petition brought against a public official contributed to reducing abuses of power since such an action would bring to light an official's weaknesses and obligate the individual to be more conscious and lawful. In the present case, the fact that the first Plaintiff was allowed to bring forward the action keeps public officials, notably the Tema Oil Refinery, in check and sends the message that they are to be accountable to the public for their actions.

In addition, the judge in this case utilized recent international conferences to discuss the emerging international consensus on the issues of the environment and public interest litigation. He referred to the Sub-regional Sensitization Training Programme on Environmental Law for Judges where Dr. Iwona Rummel-Bulska, Principal Legal Officer and Chief of the Environmental Law Branch of the United Nations Environmental Program noted that public interest litigation is well established in the United States and in India.

The judge also referred to the 2007 Commonwealth Law Conference, held in Nairobi, Kenya, where many countries advocated the importance of public interest litigation. They also underlined the need to protect the environment and the need for more lawyers to engage in pro bono cases. The first Plaintiff's work on this case falls within these two categories and should thus be encouraged.

Finally, international treaties, such as the African Charter on Human and Peoples' Rights, recognise the importance of the environment and its protection. In fact, Article 24 of the Charter includes the right to an environment conducive to development as a fundamental human right.

V. Conclusion

In conclusion, the present case highlighted important legal and human rights issues. It recognised the Plaintiffs' legal capacity to proceed and found them to have a legitimate cause of action. It also recognised the first Plaintiff's right to proceed based on its public interest approach and even commented on the importance of such a branch of law. Moreover, this case is important for the protection of the environment since it recognised it as an integral part of the right to life. This interpretation is progressive and liberal and is a positive advancement for any case involving environmental issues.

The Centre for Public Interest Law (CEPIL) is a rights based non-governmental not for profit organization established in 1999 and incorporated under the Companies Code 1963 (Act 179) as a company limited by guarantee.

Our Vision

CEPIL's vision is to have a society that is free of injustice, oppression and social inequity and where people live a life of dignity irrespective of sex, class, colour, race and geographical location.

Objectives

Seeks to increase accountability of public decision makers
Obtain and/or improve access to justice
Enhance the quality of public decision making
Research into public interest law and publication of research findings

Staff & Executive Council Members

CEPIL has staff strength of Thirteen (13) comprising six (6) lawyers, four (4) administrative support staff, two (2) interns from Ghana School of Law and one (1) Monitoring and Evaluation officer.

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