



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ENVIRONMENT AND LAND CASE NO. 175 OF 2013**

**JOSEPH OTURA ALLAH .....  
PLAINTIFF/APPLICANT**

**VERSUS**

**CHINA OVERSEAS ENGINEERING GROUP .....  
DEFENDANT/RESPONDENT**

**RULING**

Before me is an application by way of Notice of Motion dated 12<sup>th</sup> June 2013 brought by the plaintiff under Section 1A, 1B, 3A of the Civil Procedure Act (Cap. 21), Order 40 of the Civil Procedure Rules 2010, and Section 3 of the Environment Management and Coordination Act. Prayers (a) and (b) are spent. The prayers that are now for my decision are (c) (d) and (e) as follows-

- a. Spent
- b. Spent.
- c. That this court does issue an order of temporary injunction restraining the defendant and or its agents, servants or employees from blasting rocks using explosives in land reference number KAKAMEGA MASANA/1156 and KAKAMEGA/MASANA/1155 pending hearing of the suit.
- d. That this court be pleased to issue any order that it deems fit to avert environmental degradation of the suit lands.
- e. That costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn on 12<sup>th</sup> June 2013 by the plaintiff/applicant.

The application is opposed. The defendant/respondent filed an affidavit sworn on 19<sup>th</sup> June 2013 by Zhang Yu Hua, its Project Manager. The plaintiff also filed a further affidavit which he swore on 5<sup>th</sup> July 2013.

The plaintiff's counsel filed written submissions on 16h July 2013, while the defendant's counsel filed written submissions a day earlier on 15<sup>th</sup> July 2013. On the hearing date, Mr. Ojuro for the plaintiff and Mr. Thuku for the defendant relied upon the written submissions filed. Mr. Thuku added orally that his client was suffering due to the interim orders currently in force, due to idle machinery which they had hired.

In the written submissions of the plaintiff, counsel emphasized that under section 3 of the Environmental Management and Coordination Act, every person in Kenya was entitled to a clean and healthy environment and had a duty to safeguard and enhance the environment, and that the court had wide powers under **Section 3 (5)** to deal with such issues. Reliance was placed on the case of **Giella –vs- Cassman Brown Ltd** on the request for injunctive orders. Counsel emphasized that the land that the plaintiff owns (by succession) which is **KAKAMEGA/MASANA/1156**, was adjacent to the land where blasting by the defendant was to take place, that is **KAKAMEGA/MASANA/1155**, and both parcels of land shared a common perimeter wall.

Counsel submitted that, though, a Technical Committee meeting was held on the Environment Impact Assessment (EIA) report REFERENCE NEMA/PR/2/EIA/008 – that meeting was not inclusive, as the affected people did not participate. Alternatively, the recommendations therefrom were not implemented including the recommendation – **“that the company make arrangements to compensate and relocate all families and homesteads within 200m from the proposed quarry fence.”** It was submitted that the plaintiff was one of the affected people covered by the said recommendations.

With regard to valuation reports done by the Ministry of Housing and Ministry of Agriculture, it was submitted that parcel KAKAMEGA/MASANA/1156 owned by the plaintiff was not included in the said valuation.

It was lastly submitted that the plaintiff was not compensated or relocated as alleged by the defendant and that since parcel KAKAMEGA/MASANA/1156 was not valued, no compensation amount on the same could have been arrived at. Reliance was placed on the case of **Peter Waweru –vs- Republic – Nbi HC.Misc. Appl. 118 of 2004** in which a three Judge bench considered issues on environment degradation at length and laid down the parameters for consideration by courts.

The defendant’s counsel on the other hand, contended that the defendant had been contracted by the Kenya National Highways Authority for the rehabilitating the Kisumu-Kakamega road and had identified plot KAKAMEGA/MASANA/1155 for blasting rocks and stone extraction to be used for the project. It was admitted that Plot KAKAMEGA/MASANA/1156 belonging to the plaintiff was an adjacent plot.

Counsel submitted that the plaintiff had not satisfied the parameters for the grant of temporary injunctive orders as enunciated in the case of **Giella –vs- Cassman Brown & Co. [1973] EA 358.**

On prima facie case, counsel relied on the case of **Mrao Ltd. –vs- First American Bank of Kenya Ltd [2003] KLR 125** and **Section 107(1)** of the **Evidence Act**. Counsel argued that the plaintiff had not been able to establish the allegations he was relying on to ask for injunctive orders. Therefore no prima facie case had been established to warrant the grant of injunctive orders.

On the requirement of the plaintiff establishing that he would suffer irreparable loss or damage, counsel relied upon the “Precautionary Principle” under the Environment Management Coordination Act No. 8 of 1999, and stated that his client had in fact put in place adequate compensatory and remedial measures on any loss or damage that may affect any neighbours such as the plaintiff. In any case, counsel argued, the plaintiff had filed a valuation report therein which was an indication that the plaintiff’s loss, if any, could be adequately compensated in damages.

On the balance of convenience, counsel argued that the plaintiff had not, in his pleadings, stated what he wanted. Since the defendant had offered him compensation in the sum of Kshs.28,000/= as assessed by the Ministry of Agriculture, the balance of convenience was in favour of the defendant. It was contended further that other 23 affected persons had already been paid. It was only the plaintiff who had not accepted the payments. All this in counsel’s view showed that the balance of convenience was in favour of the defendant. Reliance was placed on the case of **Kwanza Estates Ltd. –vs- Kenya Wildlife Services [2013] eKLR**, the case of **Samuel K. Muema –vs- NEMA & Another – Nbi HC J/R Misc. Application No. 92 of 2010;** and **Sheila Mapenzi Saidi -vs- Julilus Kipketer & Another – [2006] eKLR.**

Those were the submissions on behalf of the parties.

I have considered the application, documents filed and the submissions as well as the authorities cited to me by counsel for both parties. In the plaint dated 12<sup>th</sup> June 2013, the plaintiff asks for the following orders –

- a. a permanent injunction against China Overseas Engineering Group Company restraining them from otherwise mining stones with the use of explosives in the nearby land reference number KAKAMEGA/MASANA/1155 and/or loss of any other land adjacent to KAKAMEGA/MASANA/1155;
- b. costs of this suit;
- c. interest on (c) above.
- d. any other relief this court may deem just and expedient.

Now the plaintiff has come to this court through this application requesting the grant of interlocutory injunctive orders pending the hearing and determination of the main case.

The parameters for the grant of an interlocutory injunction have been settled since the decision in the now famous case of **Giella –vs- Cassman Brown Ltd. (supra)**. An applicant for such orders has to establish firstly a prima facie case with probability of success. Secondly, the applicant has to show that he or she will suffer irreparable damage or loss that cannot be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the matter (application) on the balance of convenience.

Has the plaintiff shown a prima facie case with probability of success? It is agreed by all parties that the plaintiff is an adjacent land owner. That he will somehow be affected by the blasting to be carried out by the defendant. That the defendant offered the plaintiff compensation of Kshs.28,000/= for any environmental damage to be suffered by him as an adjacent land owner. The plaintiff rejected the amount of Kshs.28,000/= as compensation. The plaintiff claims that the amount offered is not adequate compensation for the environmental degradation and inconvenience to be suffered by him. He says that he has buildings on his subject land. The plaintiff states that the purported evaluation for the compensation offered to him, was done by the Ministry of Agriculture on a crop which he had planted on another plot nearby, not on the subject plot.

From the foregoing facts, I am of the view that the plaintiff has established a prima facie case with probability of success. He definitely has an environmental interest in the intended blasting of rocks for the road works. He owns or occupies an adjacent plot. A prima facie case is merely one which might or might not succeed. This is one of such a case. He has in effect satisfied the first requirement for the grant of interim injunctive orders.

Will he suffer irreparable loss or damage which is not capable of being adequately compensated in the form of damages if the injunctive orders are not granted? From the documents filed and the submissions of the plaintiff's counsel, no evidence has been placed before this court which suggests that the plaintiff will suffer any loss which is not capable of being compensated in damages if the blasting goes on. He does not for example, say that he or his family or neighbours will suffer health problems. He does not give any description of any damage that will be caused in the surrounding area or the environment, that might be of long term effect. Infact, he seems to be harping on the inadequacy of compensation. In my view, any damage, including damage to his buildings as disclosed herein, can be adequately compensated in the form of damages. The plaintiff has therefore failed to satisfy the second requirement for the grant of interlocutory injunctive orders. On this basis alone, the application cannot succeed as an applicant for interlocutory injunctive orders has to satisfy both the requirement for a prima facie case with probability of success and the requirement for suffering irreparable loss or damage not capable of being adequately compensated in monetary damages.

What about the balance of convenience? Indeed the plaintiff as an individual is environmentally

protected, both under the Environment Management Act of 1999, and the Constitution of Kenya 2010 Chapter 5, Articles 69 to 72. However, balancing the issues and facts disclosed to me at this application stage, in my view, the balance of convenience is not in favour of the plaintiff. The project in question is the rehabilitation of a public road. The issues which the plaintiff is raising have to do with the adequacy of monetary compensation, which he can pursue legally if he so wishes, and the court will therein make appropriate decisions on the same. In my view, the balance of convenience from the facts disclosed herein, is in favour of the public road project proceeding. Stopping the blasting will have the effect of stalling the project.

Finally, let me state that the case of **Peter Waweru –vs- Republic** (supra) relied upon by the plaintiff, is not applicable herein. That case was a Constitutional Reference. The Republic was a party, unlike in the present case which is between private persons. That is why orders were issued therein against public institutions, which cannot be done in the present case as the Republic is not a party, nor is there a public office or officer who is a party herein. In addition, the pleadings and facts disclosed in that matter were in relation to serious water pollution which would affect not only the petitioner but also the general public at Kiserian and downstream on the banks of the Athi River. That case therefore is distinguishable from the present case.

In the result, I find no merits in the application. It is hereby dismissed. The costs of the application will however, follow the decision in the pending main suit herein. Any interim orders granted are hereby vacated.

*Dated and delivered at Kakamega this 22<sup>nd</sup> day of July, 2013*

**George Dulu**

**J U D G E**