



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 445 OF 2013

**NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY.....PLAINTIFF/APPLICANT**

VERSUS

**ELIZABETH NJERI HINGA.....DEFENDANT/
RESPONDENT**

PETER KIMANI MUNANO

FREDRICK MWENDA

KIMONYI

MARTIN THUO GITAU

**BEING THE CHAIR, SECRETARY & TREASURER RESPECTIVELY OF MIREMA
FARM QUARRY OWNERS**

**SELF HELP GROUP.....1ST INTERESTED
PARTY**

**BALCON HOUSING COMPANY LIMITED.....2ND INTERESTED
PARTY**

JOHN KAMAU

MAINA

JOHN WAITHAKA WANJIKU

**VIELINA WAITHERA MWANIKI3RD INTERESTED
PARTY**

(REPRESENTING HINGA RESIDENTS ASSOCIATION)

RULING

Coming before me for determination is the Notice of Motion dated 10th April 2013 seeking for an interlocutory injunction restraining the Defendant/Respondent from:

- a. Conducting blasting, digging, shoveling, scooping or any other quarry activity on the land parcel known as L.R. No. 11478 Mirema Drive (hereinafter referred to as the “Suit Property”);
- b. Transportation of stones and any other quarry products and by products to and from the Suit Property;
- c. Marshalling or assembling labourers for any quarry purposes on the Suit Property pending the hearing and determination of this application and suit together with costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Benjamin Langwen, the Director in charge of compliance and enforcement at the employment of the Plaintiff. He averred that as early as 4th August 2011, the Plaintiff issued an environmental restoration order to the Defendant requiring her to stop all quarrying activities on the Suit Property until she has gone through the environmental impact assessment process and obtained approval from the Plaintiff which the Defendant ignored and continued with her activities with impunity. He further averred that this led the Plaintiff to institute criminal proceedings against the Defendant first in Kibera Criminal Case No. 1907 of 2012 and later in Kibera Criminal Case No. 4429 of 2012 due to the continuance by the Defendant in the prohibited activities. He further averred that electricity posts on the Suit Property have been left dangling dangerously in the air as the surrounding soil and stone has been excavated by the Defendant. He further averred that the danger caused by the Defendant included noise pollution, flooding/pooling of rain and dirty water in the cavities, electricity interruption from fallen electricity poles and collapse of housing units all of which affect the right to a clean and healthy environment to the public at large.

The Application is contested. The Defendant filed her Replying Affidavit sworn on 24th April 2013 in which she averred that on 25th March 2011, the Plaintiff through its District Environment Officer wrote to her a letter directing that the quarrying activities on the Suit Property should be stopped until an Environmental Audit is submitted. She further averred that in compliance therewith, an Environmental Audit was submitted to the Plaintiff. She further averred that upon receipt of the Environmental Audit, the Plaintiff demanded from her evidence of ownership of the Suit Property which she supplied. She further averred that the quarrying activities on the Suit Property were being conducted even before 1999 when the Environmental Management and Coordination Act establishing the Plaintiff was enacted and that as a result, all she was required to submit are Environmental Audits. She further stated that one of the criminal cases instituted against her by the Plaintiff, namely Criminal Case No. 1907 of 2012 was quashed via a ruling delivered in court. She further contended that it is not true that electricity posts on the Suit Property have been affected in any adverse manner by her quarrying activities and that the other alleged dangers cited by the Plaintiff are not backed with any evidence.

The Plaintiff, 1st, 2nd and 3rd Interested Parties and the Defendant filed their written submissions which have been read and taken into consideration by this court.

In deciding whether to grant the sought after temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it

will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of ***MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125***, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

According to **section 9(1)** of the Environmental Management and Co-ordination Act, the main object and purpose of the Plaintiff is to exercise general supervision and coordination over all matters relating to the environment in Kenya. It is in exercise of this power that the Plaintiff has been involved in the use of the Suit Property by the Defendant. In further exercise of powers conferred upon it under section 108 of the same statute, the Plaintiff issued an environmental restoration order to the Defendant, which the Defendant has failed to comply with. In this case, the environmental restoration order required the Defendant to cease her quarry activities on the Suit Property, which she ignored and continued with business as usual. Though her ownership of the Suit Property is not disputed, she is bound by the law cited above to comply with the environmental restoration order issued to her. To that extent therefore, I find that the Plaintiff has established a prima facie case with high chances of success at the main trial. As to whether the Plaintiff can be adequately compensated with an award of damages, I find that its interest in the preservation of the Suit Property cannot be equated in monetary terms. As I am not in doubt, I do not have to determine in whose favour the balance of convenience tilts.

Accordingly, I hereby allow this application with costs to the Plaintiff.

SIGNED AND DELIVERED IN NAIROBI THE 20TH DAY OF SEPTEMBER 2013

MARY M. GITUMBI

JUDGE