



**Mohamed & 171 others v National Environment Management Authority & 4 others; Member of Parliament Ganze Constituency & 2 others (Interested Parties) (Petition E12 of 2020) [2022] KEELC 3091 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3091 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**PETITION E12 OF 2020**

**MAO ODENY, J**

**MAY 11, 2022**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL PURSUANT TO ARTICLE 69 AS READ WITH ARTICLE 70 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL RIGHTS OF KAUMA COMMUNITY RESIDENTS IN GANZE CONSTITUENCY TO FAIR ADMINISTRATIVE ACTION, A CLEAN ENVIRONMENT AND HUMAN DIGNITY PURSUANT TO ARTICLE 47, ARTICLE 42 AS READ WITH ARTICLES 69 AND 70 AND ARTICLE 28 OF THE CONSTITUTION OF**

**KENYA, 2010**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO. 8 OF 1999, THE MINING ACT NO. 12 OF 2016, THE MINING (COMMUNITY DEVELOPMENT AGREEMENT)**

**REGULATIONS, 2017**

**BETWEEN**

**MIRIAM M MOHAMED ..... 1<sup>ST</sup> PETITIONER**

**WALTER CHILUMO ..... 2<sup>ND</sup> PETITIONER**

**CATHERINE M CHILUMO (BEING SECRETARY, CHAIRMAN AND TREASURER OF KAUMA COMMUNITY BASED ORGANIZATION, SUING IN THE INTEREST OF ITS UNDER LISTED MEMBERS) ..... 3<sup>RD</sup> PETITIONER**



DERI KIRINGI & 168 OTHERS ..... 4<sup>TH</sup> PETITIONER

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT

MINISTER OF ENVIRONMENT & FORESTRY ..... 2<sup>ND</sup> RESPONDENT

MINISTER FOR MINING ..... 3<sup>RD</sup> RESPONDENT

COUNTY GOVERNMENT OF KILIFI ..... 4<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT

AND

MEMBER OF PARLIAMENT GANZE CONSTITUENCY . INTERESTED PARTY

SENATOR, KILIFI COUNTY ..... INTERESTED PARTY

MEMBER COUNTY ASSEMBLY JARIBUNI WARD ..... INTERESTED PARTY

### RULING

1. This ruling is in respect of a Notice of Motion dated 31<sup>st</sup> August 2021 by the Petitioners seeking the following orders;
  1. Spent.
  2. That a conservatory order by way of injunction does issue against the 4<sup>th</sup> respondent herein the County Government of Kilifi restraining them and their agents, servants, any other person acting under their instructions from further continuing with mining minerals activities at Jaribuni, Ganze Sub county/constituency, Kilifi pending inter partes hearing and or determination of the application/petition.
  3. That the OCS Kilifi Police Station to provide security when enforcing the orders.
  4. That costs of the application be provided for.
2. Counsel agreed to canvas the application vide written submissions of which only the 4<sup>th</sup> Respondent filed. The 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> Respondents filed a replying affidavit in support of the application for conservatory orders on the ground that they did not issue mining permits or licenses to the parties undertaking the mining activities and that any mining activities are illegal as it does not comply with the *Mining Act* of 2016.
3. The 1<sup>st</sup> respondent also filed a response to the petition and stated at paragraph 1 that they are in support of the application for conservatory orders by the petitioners. The 1<sup>st</sup> respondent also confirmed that after the filing of the petition and the application, they carried out investigation which revealed that no Environmental Impact Assessment (EIA) application was ever submitted to their office for processing and therefore the proponent who undertook the artisanal small scale mining activities is not known. Further that there was no incident of artisanal small scale mining of iron ore reported or recorded in the 1<sup>st</sup> Respondent's incident register by the petitioners or the community.



## Petitioners' Case\*

4. The application is based on the sworn affidavit of Walter Chilumo, a resident of Jaribuni Ward and the secretary of the Kauma Community Based organization and deponed that the land where the Kauma people reside is Community Land within the meaning provided for in the Constitution of Kenya.
5. He further deponed that the Ganze community is blessed with bountiful deposits of Iron Ore which unfortunately has caused distress to the residents after continued mining which has caused environmental degradation which will eventually lead to desertification if not stemmed.
6. It is the applicant's Case that the petitioners' health has been gravely affected by the noise air and dust pollution emanating from the mining activities which are unlicensed. The applicant stated that the mining has not contributed to the growth of the area in terms of infrastructure but has resulted in heavy deposits of dust which cause constant pollution. That the mining is not carried out in accordance with EMCA 1999, the Mining Act and the Constitution of Kenya. The applicant urged the court to grant conservatory orders pending the hearing and determination of this petition.
7. The 4<sup>th</sup> respondent filed grounds of opposition dated 13<sup>th</sup> October 2021 and stated that the application is misconceived and does not meet the threshold for grant of injunctive orders and has been brought under the wrong provisions of law.

## 4<sup>TH</sup> Respondent's Submissions

8. Counsel for the 4<sup>th</sup> respondent filed submissions and identified two issues for determination by the court namely, whether an injunction can issue against the County Government of Kilifi and whether the Petitioners have met the threshold for the grant of injunctive orders.
9. On the first issue counsel relied on Section 2 of The Government Proceedings (Amendment) Act No. 35 of 2015 and Order 29 Rule (2) (d) of the Civil Procedure Rules 2010 and submitted that an injunction cannot issue against the County government. Counsel further relied on the cases of County Government of Isiolo V Sharrif Ibrahim Farah [2019] eKLR.
10. On the second issue as to whether the petitioners have met the threshold for grant of injunctive orders counsel submitted that petitioners have not identified who is involved in the mining activities and that they have not joined any of the mining companies in this matter as parties.
11. Mr Kenga submitted that the County Government of Kilifi is not involved in the mining activities therefore the prayer can therefore only be issued against the entities involved in mining and who are not parties to this suit. That the court cannot grant orders in vain which cannot be implemented and relied on the cases of B vs. Attorney General [2004] 1 KLR 431 and Kalya Soi Farmers Cooperative Society v Paul Kirui & another [2013] eKLR.
12. Mr Kenga submitted that the Petitioners have neither provided any evidence to show that the land belongs to the community presently nor have they shown that it belonged to them before the enactment of the Constitution of Kenya 2010 and the Community Land Act 2016 hence they have not met the threshold for grant of injunctions as per the principles in *Giella Casman Brown Case*

## Analysis and Determination

13. The issues for determination are as to whether an injunction can issue against the County government and whether the petitioners have met the threshold for grant of conservatory injunctive orders against a County government.



14. On the first issue as to whether an injunction can issue against a County government, it is trite law that Section 16 (2) of the *Government Proceedings Act* does not apply to County governments and so it would not bar, injunctive orders against county governments as was held by Mutungi J in the case of *Lawrence Ogaro Onyiego & Another vs Samwel Minika & Another* [2017] eKLR.

15. Similarly in the case of *James Muigai Thungu vs County government of Trans Nzoia & 2 Others* [2017] Obaga J was of the same view and stated that :

There is no provision in the County Government Act of 2012, which protects (county government) from injunctive orders. I do not think that it was the intention of the legislature that..... County governments were to enjoy the same status as the national government. If this was the intention then the Government Proceedings Act would have been amended expressly to include county governments. I therefore do not find that the county government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers”

16. I therefore find that there is no law or procedure barring the court from issuing orders of injunctions against County governments.

17. On the second issue as to whether the petitioners have met the threshold for grant of conservatory orders of injunction against the 4<sup>th</sup> respondent who is the County government of Kilifi, the principles to be satisfied in granting of a conservatory order were expressed by Justice Onguto J. in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR are as follows

In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

18. Further the Supreme Court of Kenya also rendered itself on conservatory orders in the Case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

19. It is incumbent upon the court to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the *Centre for Rights Education and*



*Awareness (CREAW) & 7 others v Attorney General*, Nairobi High Court Petition No. 16 of 2011; [2011] eKLR:

At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

20. The petitioners/applicants cite environmental degradation and dust pollution from the mining activities which the county government is a party to by collecting cess from the mining activities. The petitioners blame the County government for inaction, having protested and written many complaint letters but the 3<sup>rd</sup> and 4<sup>th</sup> respondents have not acted accordingly. The activities are sanctioned by the respondents as there is no way mining can take place in a county without the officials concerned knowing and in this case the county is alleged to be collecting revenue in terms of cess from the miners hence being part of the environmental degradation without mitigation measures.
21. It is also on record that the 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> Respondents filed a replying affidavit in support of the application for conservatory orders on the ground that they did not issue mining permits or licenses to the parties undertaking the mining activities and that any mining activities are illegal as it does not comply with the *Mining Act* of 2016.
22. The 1<sup>st</sup> respondent also filed a response to the petition and stated at paragraph 1 that they are in support of the application for conservatory orders by the petitioners. The 1<sup>st</sup> respondent also confirmed that after the filing of the petition and the application, they carried out investigation which revealed that that no Environmental Impact Assessment (EIA) application was ever submitted to their office for processing and therefore the proponent who undertook the artisanal small scale mining activities is not known. Further that there was no incident of artisanal small scale mining of iron ore reported or recorded in the 1<sup>st</sup> Respondent’s incident register by the petitioners or the community.
23. It is trite law that conservatory orders are of a public law nature where the court issues the order to ensure proper functioning within the public agencies and to uphold the authority of the court. It is not linked to private party issues which can be dealt with by interlocutory injunctions where a party must establish the principles for grant of injunctions.
24. In the case of *Judicial Service Commission v Speaker of the National Assembly & Another* {2013} eKLR, the purpose of conservatory orders was expressed that:

Conservatory orders are in my view not ordinary civil Law remedies but are remedies provided for under the Constitution, the Supreme Law of the Land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which only attach to a particular person.”X
25. Conservatory orders appear in Article 23 as one of the instruments that the Courts can use in order to protect the enforcement of Constitutional Rights. The order is to maintain the status quo to ensure that circumstances do not change while a matter is before a Court of law pending judgment.
26. The court is not invited to make any conclusive findings of fact or Law on the dispute but to examine and evaluate the materials before as the definite determination will be made when the petition is heard. In granting conservatory orders, the danger looming over the realization of rights must be imminent,



real and not theoretical. In this case the danger of dust pollution and environmental degradation affects the realization of the right to clean and healthy environment together with right to health.

27. What constitutes imminent danger was dealt with in the case the case of *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others* [2014]eKLR, where the court stated as follows:

To those erudite words I would only highlight the importance of demonstration of “real danger.” The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

28. I have considered the application and submissions by counsel and find that it would be in the interest of justice to grant conservatory orders pending the hearing and determination of this petition. The parties involved are at liberty to engage in mediation to see whether they can amicably settle this matter.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF MAY, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

