



**Wemali v Mutuku; National Environment Management Authority & 2 others (Interested Parties)
(Environment & Land Petition E047 of 2021) [2022] KEELC 2765 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E047 OF 2021
EK WABWOTO, J
JUNE 30, 2022
IN THE MATTER ARTICLES
2,19,20,21,22,23,42,60,62,67,68,69,70,258 & 259(1) OF
THE CONSTITUTION OF KENYA 2010
IN THE MATTER CONTRAVENTION OF ARTICLES
42,60,62,67,69 OF THE CONSTITUTION
IN THE MATTER CONTRAVENTION OF THE ENVIRONMENT
MANAGEMENT AND COORDINATION ACT, 1999
IN THE MATTER OF THE FOREST CONSERVATION AND
MANAGEMENT ACT, 2016
AND
IN THE MATTER OF CONTRAVENTION OF SECTIONS 4, 8, 12,
13, 14, 19, 22, 24, 25(1) 26, 28, 29(6), 31, 36, 66 & 73 OF
THE LAND ACT 2012**

BETWEEN

BENSON WEMALI PETITIONER

AND

JOSEPH MUTUKU RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY



RULING

1. This ruling is in respect to three applications which include; the petitioner's application dated November 5, 2021, the respondent applications dated November 16, 2021 and February 2, 2022.
2. The petitioner herein commenced this petition vide a petition dated November 5, 2022 seeking for various reliefs. Contemporaneously to the filing of the petition, he also filed a notice of motion application where he sought for temporary injunction orders against the respondent pending the hearing and determination of both the application and the main petition. The injunctive orders that were sought were in respect to the carrying out of further construction activities on the subject parcel of land adjoining Karura forest and generally known as plot No. 4419, situated at Karura forest along Tara Road, off Kiambu Road. The Petitioner's application was supported by grounds stated on its face as well as the supporting affidavit of the Petitioner sworn on November 5, 2021.
3. Upon service of the petition and the application above said, the respondent filed an application dated November 16, 2021 seeking for prayers that the orders of temporary injunction issued on the 5th of November 2021 be discharged.
4. The said application was supported by the affidavit sworn by the respondent on the same date as the application. While the said application was still pending for determination, the respondent further moved this court vide another application dated February 2, 2022 the substratum of which equally sought for discharging of the orders issued on the November 5, 2021.
5. In response to the two applications filed by the respondent, the petitioner filed a replying affidavit sworn by the petitioner on May 13, 2022. In the said affidavit the petitioner pointed out to the court that the respondent had not responded to their application dated 5th November 2021 and the same ought to be allowed.
6. The petitioner also averred that the respondent had embarked on the construction on the suit property in contravention of the law and no EIA report had been attached upon which an EIA license was later issued.
7. The petitioner contended that there was no evidence before this court confirming that the proper procedure was followed before the issuance of the EIA licence and the respondent cannot sanitize his actions to cure an already litigious matter before this court.
8. The petitioner further maintained that the respondent was yet to get all the necessary permits from the relevant regulatory bodies and yet he had started felling trees at the suit property.
9. It was also deposed that the respondent's action of commencing the project on a forest land remains a threat to conservation of Karura forest and is a violation of articles 60, 62 and 69 of the *Constitution* together with the applicable provisions of *Environmental Management and Coordination Act* (EMCA) and the *Forest Conservation and Management Act*.
10. Pursuant to the directions of the court issued on February 3, 2022 and March 24, 2022, the court directed all the applications to be heard together and the parties were at liberty to file their written submissions.



11. During the plenary hearing of the application, Learned Counsel Ms. Nanjira appeared on behalf of the petitioner, learned counsel Mr. Ogunde appeared for the respondent. Ms. Mwangi learned counsel appeared for the 1st interested party and Ms. Mwalozi learned counsel appeared for the 3rd interested party. There was no representation from the 2nd interested party.
12. It was the petitioner's submission that they had sought for various orders in the application dated 5th November 2021 which application was not opposed by the respondent. Counsel submitted that the Respondent had opted to file two applications seeking to discharge the existing interim orders instead of responding specifically to their application and hence the court should not allow their application for discharge of the interim orders which were issued on November 5, 2021.
13. Learned Counsel Mr. Ogunde submitted that the respondent had responded to the petitioner's application vide their supporting affidavit that was filed in support of his application and that the same was not an issue herein.
14. It was also submitted that the main contention by the petitioner was that the respondent was undertaking a project inside a forest. Counsel argued that the Kenya Forest Service had stated that the said project is not inside the forest.
15. As regards to the impact of the project to the environment, counsel submitted that, the respondent had annexed an EIA licence which was issued by NEMA allowing the project to continue and further that there was no challenge nor any existing appeal in respect to the said licence which the petitioner had notice to the same. Counsel concluded his submissions by urging the court to allow the respondent applications and discharge the existing interim orders.
16. Learned counsel ms. mwangi for the 1st interested party and Learned Counsel Ms. Mwalozi for the 3rd interested party did not oppose the applications filed by the respondent.
17. The court has carefully considered the applications as well as the parties' affidavits and oral submissions made for and against the applications. The court has also considered the written submissions that were filed by the petitioner dated December 20, 2021 and in my humble view, the main issue for determination which if considered will dispose off all the three applications is whether this court should set aside the interim orders issued on November 5, 2021.
18. Rule 23 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) 2013 (The Mutunga Rules) provides as follows: -

Rule 23;

“Conservatory or interim orders

(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

(3) The orders issued in sub-rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the court.”



19. On setting aside of conservatory orders, rule 25 of Mutunga rules provides as follows: -

“Setting aside, varying or discharge an order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on Application by a party dissatisfied with the order.”

It is thus evident that the Mutunga Rules do not specifically provide for the form in which a conservatory order may be set aside or reviewed. However, the Civil Procedure Rules still remain the parent rules for reference, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules apply.

20. In the instance case, the interim orders were issued on November 5, 2021 to restrain the respondent from undertaking of any construction activities in the suit property pending the hearing and determination of the said application.
21. The respondent has premised his application inter alia on the grounds that the suit property is not listed in public records as any of those properties that are part of Karura Forest and further that the 3rd interested party has unequivocally stated that the suit property is not part of Karura forest. The respondent has also deposed that the project that he seeks to undertake has been issued with the necessary EIA licence by the 1st Interested party.
22. In the submissions and replying affidavit filed by the petitioner it was contended that the petitioner deserved the interim conservatory orders issued and that the same should not be set aside on the reasons that the respondent violated article 42 of the Constitution by destroying the natural ecosystem that has provided support and guaranteed a clean and healthy environment to every person living around Karura Forest and further that by constructing permanent structures on the subject land, it only tampers with the ecosystem but also introduces the problem of waste management from the town houses being constructed which will pose a challenge to a clean and healthy environment in the future which is a right protected by the Constitution. It was also submitted that the respondent has violated the principles of land policy under article 60 of the Constitution by carrying out activities on the subject land that are contrary to sound conservation and protection of ecologically sensitive areas being part of Karura forest.
23. Article 42 of the Constitution of Kenya stipulates that every person is entitled to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations. Article 69(2) of the Constitution further stipulates that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
24. Being guided by the above provision, I note that the respondent in his two applications has sought to have the interim conservatory orders issued on November 5, 2021 be discharged. Conservatory orders in a constitutional petition in my view are 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 may only attach to a particular person. See the case of Judicial Service Commission-vs-Speaker of the National Assembly & Another (2013) eKLR.
25. Accordingly, it is clear that conservatory orders are issued not to aid a party but to preserve the status quo that is being challenged by the petitioner. I do note that the basis of the instant petition is inter



alia, that the respondent intends to construct town houses in the suit property which is incompatible with the principles of land management set out in our Constitution.

26. I have carefully considered the contents of the respondent's applications that the project has been licensed by the 1st interested party vide an EIA licence issued on January 21, 2022 and further that the same is not within Karura forest vis a vis the objection raised by the petitioner who maintained that the indeed at the time of filing this petition, no EIA licence had been issued and further that the EIA licence having been issued during the pendency of this litigation amounted to an irregularity and is contrary to the law and hence the existing interim orders should not be discharged at this point and further that if the project is allowed to proceed, the same will still be undertaken contrary to the existing land use and management policy as outlined in our Constitution.
27. In considering whether or not to discharge the existing interim orders at this stage pending the hearing of the main petition, I wish to refer to section 8 of the Environment and Land Court Act No. 19 of 2011 which sets out the guiding principles of the Environment and Land Court and it includes the principles of sustainable development including the pre-cautionary principle.
28. Section 2 of EMCA defines the precautionary principle as the principle which postulates that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This section mirrors Principle 15 of the Rio Declaration on Environment and Development.
29. The Rio Declaration on Environment and Development, 1992 states that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities
30. Professor Gitanjali Nain Gill in his article 'The Precautionary principle, its interpretation and application by the Indian Judiciary: 'When I use a word it means just what I choose it to mean-neither more nor less' *Humpty Dumpty*' published in *Environmental Law Review* 2019, Vol. 21(4) 292–308 described the application of the principle by the Indian courts as follows:

“The precautionary principle is invoked and followed by judicial and expert members as a normative commitment. It thereby directs the judges, particularly the technical expert judges, to offer scientifically based structural solutions and policies that respond creatively to weak, ineffective regulation even in the absence of regulation. Adoption of a variety of procedures, including investigative, stakeholder consultation and appointment of specialised committees, helps in the application of the precautionary principle. This improves active participation through dialogue, argument and norms for eliciting factual realities and expert knowledge to respond to environmental problems. Expert members by on-spot site inspection can evaluate contradictory claims, positions and reports filed by the parties. The stakeholder consultative process is applicable to cases of wider ramification involving major issues including river cleaning and air pollution.

The specialised committees promote the accountability of different authorities for the implementation of the rules under the National Green Tribunal Act 2010.²³ Thus, the precautionary principle in India mandates well-judged usage in favour of observing, preventing and mitigating potential threats. Indeed, modern risk factors have become more complex, far reaching and adversely affect public health and environment. The principle is employed as a tool within Indian environmental governance to promote better health and environmental decisions.”



31. Section 3(1) of *EMCA* provides that every person in Kenya is entitled to a clean and healthy environment in accordance with *the Constitution* and relevant laws, and is required to safeguard and enhance the environment. Section 3(2A) of *EMCA* provides that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources.
32. Alongside the statutory responsibility, Kenyans owe future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to *the Constitution*. As earlier stated, the court is required by section 3 of *EMCA* to be guided by principles of intergenerational and intragenerational equity and the precautionary principle when exercising its jurisdiction in claims where a person alleges that the right to a clean and healthy environment has been denied or violated and or is threatened. It behoves every person, including the parties herein to ensure that the environment is protected.
33. In further reference to article 70 of *the Constitution*, which stipulates that, if a person alleges that a right to a clean and healthy environment recognized and protected under article 42 of *the Constitution* has been or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any legal remedies that are available. The said provision further provides that an applicant moving the court under this provision does not have to demonstrate that any person has incurred loss or suffered injury.
34. Being guided by the above provision and the precautionary principle which is a guiding principle for this court as set out at Section 8 of the *Environment and Land Act* and further having perused the orders issued on November 5, 2021, it is evident that this court was satisfied that there was a prima facie case warranting the specific interim orders that was issued. Save for filing the two applications dated November 16, 2021 and February 2, 2022 the petitioner is yet to file his response to the main petition despite having been accorded an opportunity to do so. Equally none of the interested party had filed their response to either the main petition or the pending applications. In view of the foregoing, it would not be in the best interest of administration of justice to set aside and or discharge the orders in existence at this stage before hearing the main petition since doing so would have the effect of rendering the Petitioner herein mere pious sojourner or explorer in pursuit to compliance with constitutional values and in effect render the petition otiose. The petitioner and the respondent including the all the Interested parties will still have an opportunity to ventilate their respective cases during the hearing and determination of the main petition.
35. Consequently, the petitioner's application dated November 5, 2021 and the respondents' applications dated November 16, 2021 and February 2, 2022 are disposed in the following terms; -
 - i. The respondents applications dated 16th November 2021 and 2nd February 2021 are not merited and the same are dismissed.
 - ii. The orders issued herein on November 5, 2021 shall remain in force pending the hearing and determination of the main petition.
 - iii. Each party to bear their own costs of the applications.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE



In the presence of:-

Learned Counsel Mr. Okaalo for the Petitioner instructed by ALP Advocates.

Learned Counsel Mr. Ogunde for the Respondent instructed by Walker Kontos Advocates.

N/A for the 1st Interested party.

N/A for the 2nd Interested party.

N/A for the 3rd Interested party.

E. K. WABWOTO

JUDGE

