



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION 149 OF 2012

IN THE MATTER OF ARTICLE 22, 23 & 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
UNDER ARTICLE 42 OF THE CONSTITUTION

BETWEEN

OASIS PARK SELF HELP GROUP petitioning through

JOHN MUTINDA

MONICA KILONZO

HARRIET NGARUTHI PETITIONER

VERSUS

JOINVEN INVESTMENTS LTD.

MUNICIPAL COUNCIL OF MAVOKO

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY RESPONDENTS

R U L I N G

On 4th June 2012 this court granted orders restraining the 1st respondent from further construction of apartments and or perimeter wall or putting up structures on all that parcel of land known as LR 12715/288 and LR 12715/289 situate at Syokimau area in Mavoko, pending the hearing and determination of an application dated 2nd May 2012, but also granted liberty to apply on the restraining orders granted.

Consequent to the above orders, the 1st respondent filed a Notice of Motion dated 8th June 2012 under certificate of urgency. The prayers in the application are as follows:-

- 1. That this application be certified urgent and be heard ex-parte in the first instance.**
- 2. That pending the hearing of this application *inter-partes* there be a stay of execution of the orders of this Honourable court granted on 4th June 2012.**
- 3. That the orders granted by this Honourable court on 4th June 2012 be set aside.**
- 4. That the petitioners be ordered to provide security for costs for the suit.**
- 5. That costs be in the cause.**

The application has grounds on the face of the Notice of Motion. The grounds are:-

- (a) The 1st respondent stands to suffer substantial economic losses for which the petitioners have not provided security.**
- (b) That the 1st respondent stands to an average losses amounting to Kshs.15,000,000/= per month.**
- (c) The 1st respondent will loose to the weather and through theft all the materials that have been delivered to the construction site for use during the month of June. Moreover the payments to the suppliers have been made through loans borrowed from the banks. The total costs of materials on site are estimated at Kshs.31,418,720.00.**
- (d) The construction on the site employs an average of 600 casual labour and 200 skilled labour mainly drawn from the vicinity of Syokimau and Athi River Area. These 800 people stand to loose their daily income and the 1st respondent shall be faced with labour related issues and cases as it cannot afford to retain the huge workforce when no construction is ongoing.**
- (e) That the 1st respondent was not given an opportunity to be heard and to ventilate its case before these orders were granted.**
- (f) That majority of the units being constructed have been sold offline to 3rd parties with committed handover deadline of 31st December 2012 and the delay in construction will move the deadline to next year exposing the 1st respondent to suits from buyers.**
- (g) That presently the rains have subsided and there is no threat of flash floods which was the cause of the flooding subject matter of this suit.**
- (h) That the flooding subject matter of this suit was a natural disaster for which the 1st respondent should not be penalized as it too suffered major losses on the construction due to the flooding.**
- (i) That there is no natural river, seasonal river channel, stream, or water body that by passes the 1st respondent's land which has been cut across by the 1st respondent's perimeter wall.**
- (j) That there are no documents or expert opinion to support the petitioners' claim that a natural river, seasonal river channel, stream, or water body exists on or across the 1st respondent's land.**
- (k) That the 1st respondent is ready and willing to work with the petitioners and the other respondents to find a lasting solution to the problem of flooding but should not be penalized for an Act of God.**
- (l) That the 1st respondent's properties LR No. 12715/289 and LR No. 12715/288 are not within the vicinity of the petitioners' properties LR No. 12715/255.**

(m) That the pleadings of this matter were served on 14th day of May 2012 and the 1st respondent required time to conduct proper study on the land before filing the replying affidavit only two weeks before the matter was set for hearing.

(n) That this matter was filed on 2nd May 2012 and the respondent should as a matter of law have been served within seven (7) days of such filing which was not the case in this matter.

(o) That it is in the interests of justice that the orders herein be granted.

The application was filed with a supporting affidavit sworn by Yusuf M Adanje, the Project Manager of the 1st respondent on 8th June 2012. It was deponed, *inter alia*, that when the matter came up for hearing on 4th June 2012, the 1st respondent's advocate sought time to file a replying affidavit as the documents filed raised substantive technical issues. That the orders to stop construction were granted without the 1st respondent's counsel being given an opportunity to reply to the request by the Petitioners' counsel for the said orders. That the court had on 2nd May 2012, when the application was filed, ordered that parties had to be heard first before granting any orders. That the 1st respondent stood to suffer major substantial and social economic losses if the orders in the present application were not granted. That upon service of the application herein, the 1st respondent commissioned the services of a surveyor to advise on the topography of the land and investigate whether in fact a seasonal river or any form of water body flows through the land. That Hekima Surveyors Ltd had studied the area and found it to be flat and that no form of water body exists in the entire Syokimau area. That the rain in April was so heavy that water stagnated in the flat area and that flooding was not caused by the 1st respondent's perimeter wall. That even the petitioners had erected walls around their premises which interfered with the smooth rain water flow in the area. That there were large amounts of debris and garbage dumped in the area which interfered with the smooth flow of the rain water through the channels provided. That the properties of the petitioners were far from the property of the 1st respondent. That the project was constructed in accordance with approved plans. That the Mombasa – Nairobi highway diverted the storm water to the area in question, thus increasing the effect of flooding. That the 1st respondent had allowed the flow of water through the plots by way of “weep”, and that by the time the rains came in April construction at the site in question had only commenced and could therefore not be the cause of flooding. That the 1st respondent stood to suffer substantial losses that is labour related Kshs.15,000,000/= and materials delivered for use in the month of June Kshs.31,414,720/=. That if the project was not completed in December, the 1st respondent would suffer substantial losses as it would continue paying rent and huge interest on mortgages as well as suits by the purchasers. Annexed to the affidavit were a number of technical documents and reports.

The 1st respondent also filed a further affidavit sworn by the same deponent on 19th June 2012. It was deponed in this further affidavit *inter alia*, that the wall of the 1st respondent collapsed due to the rains which had now ceased, that the 1st respondent had commenced excavation for a channel to drain water through the plots, that the 1st respondent obtained a variation of Clause g of the terms of approval by the Municipal Council of Mavoko in the terms – **“To observe 6m building line along all roads and develop proper drainage works as per designs and specifications approved by the Municipal Engineer”**, and that the 1st respondent had drawn and presented the requisite drawings to the Municipal Council of Mavoko for approval. Several photographs of the project and the land, and the collapsed wall were annexed. The photographs were however not numbered. A letter dated 13th June 2012 from the Municipal Council of Mavoko signed by DK Arithi, Deputy Planner on the revision of Clause G of the approved plan was also annexed.

The 2nd respondent, the Municipal Council of Mavoko filed a replying affidavit sworn on 19th June 2012 by Joshua Sitienei, its Town Clerk. It was deponed that the construction undertaken by the 1st respondent had been approved by the 2nd respondent. That the 1st respondent applied for a revision of Clause Number (g) citing challenges it faced with complying with the said clause. That the 2nd respondent considered the application and decided to revise the same as per the letter of 13th June 2012 signed by the

Deputy Planner. That upon the said revision of Clause (g), the 1st respondent submitted a plan of proposed storm water drain for approval. That the 2nd respondent was studying the plan with a view to approving the same with or without amendments. That the 2nd respondent, as supervisor for compliance of the approved plan, was committed to ensuring that all projects undertaken within its area of jurisdiction were done in a manner that complies with its approval. That they were aware of the flooding that had hit Syokimau area. That the same was as a result of the Mombasa – Nairobi highway, which diverted the storm drain towards the area where the 1st respondent's project was situated. That the solution required a concerted effort between the 2nd respondent, the government and the community. That the 2nd respondent was working on modalities to address the issue of drainage in the area, together with the relevant authorities and the community at large. That the orders granted by the court on 4th June 2012 were unnecessary as the flooding had nothing to do with the project, and same should be discharged.

The application is opposed. The petitioner filed a replying affidavit sworn on 15th June 2012 by John Mutinda, described as Chairman of the petitioner. It was deponed, *inter alia*, that the court initially did not give interim orders and ordered that the application be served. That between service on 14th May 2012 and 4th June 2012, the 1st respondent merely entered appearance. That counsel for the 1st respondent came to court on 4th June 2012, and was set to adjourn the matter despite its magnitude as regards the environment. That the 1st respondent wanted to hand over the construction to 3rd parties once it completed the project, and therefore the claim against them would have been defeated as third parties could not be held accountable for acts of the 1st respondent. That it was not in dispute that on 27th May 2011, the 2nd respondent directed the 1st respondent to **“build a 10 meter ground tunnel to drain the seasonal rain water flow across the parcels”**. That the 1st respondent did not comply with the said pre condition. That the 1st respondent deliberately and knowingly commenced construction on the water channel. That the 1st respondent was merely concerned with economic loss not the massive losses that the petitioner's members would suffer. That the 1st respondent commenced work in September 2011 before the National Environment Management Authority (NEMA) approval was given in February 2012. That the District Physical Planner Machakos, had in a letter Ref. PPD/MKS/SR/2(360) dated 29/9/2011, raised objection to the project. That it was not true that the Syokimau area was flat, otherwise the government would not have put waterways and five (5) culverts within a space of three (3) kilometers. That the accumulated debris and garbage was not the cause of the recent flooding as it had been there for long. That the petitioner's land was a stone throw away. That there was nothing to show the existence of weep holes, and in any case, such holes would not solve the problem.

On the hearing date on 19th June 2012, Mr Wandabwa, addressed the court on behalf of the 1st respondent. Mr Mwangi, addressed the court on behalf of the 2nd respondent. Nobody was present for the 3rd respondent NEMA. Mr Thuita, addressed the court on behalf of the Petitioner.

Mr Wandabwa, addressed the court at a length. Counsel dwelt on factual issues of the case and technical issues on the project and drainage, as well as efforts being taken by the 1st and 2nd respondents to resolve the problem of water drainage in the area. Counsel emphasized that the issue revolved around the resolution of two opposing Constitutional rights, the right of the 1st respondent to enjoyment and development of its property, and the rights of the petitioners to have a clean environment. Counsel emphasized that the rights conferred by Article 24 of the Constitution were not absolute. It was counsel's position that the orders granted by the court prejudiced the rights of the 1st respondent, and that there were other less restrictive ways of alleviating the problem, which his clients were trying to pursue.

Mr Mwangi, for the 2nd respondent supported the submissions of Mr Wandabwa. Counsel contended that the project had been approved. The problem of drainage created by the construction of the Mombasa highway needed concerted efforts and these were being explored for remedial action. Maintaining the court orders would not solve the problem. Counsel contended that the main problem created by the effects of the Mombasa road was discovered when the rain came.

Mr Thuita, for the petitioners also addressed the court at length. Counsel dwelt on factual issues and technical issues regarding the project and the effect to the natural water flow created by the project and the wall. Counsel also highlighted delays in responding to the case and their application by the 1st respondent.

This is an application for the court to vacate or vary interim orders granted pending the hearing of an application dated 2nd May 2012. That application has other pending substantive prayers. This application is only in relation to my grant of prayer 2.

Indeed, Article 24 of the Constitution provide the limiting factors to the enjoyment of rights and fundamental freedoms. Article 70, on the other hand, provides for the enforcement of environmental rights. It provides that everybody has a right to a clean and healthy environment. Article 24(1) (d) is specifically important in our present case. It provides that one of the matters to be taken into account in limiting rights and fundamental freedoms is the fact that:-

“24(1) (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and”

It is quite clear to me that the 1st respondent’s project is being constructed in the neighbourhood of the petitioners. It is quite clear also that there is a water flow problem. Whether there is a river, seasonal canal or water stream or passage, is not the real issue. The issue is that, when it rains, the water has to pass and will definitely pass at the lowest level. The 2nd respondent has admitted that there is such a problem in the whole area. They are the regulator. It is apparent that some important environmental factors were not taken into account at the commencement and construction stage. They need to be addressed. That is why the 2nd respondent has, through an application made by the 1st respondent after the filing of these proceedings, approved a variation of condition (g) of the original conditions of the building plans.

The 1st respondent must have also realized that there is a problem of water passage. Their wall has collapsed. I have not been told when. However, they seem to have sought technical advice and variation of clause g from the 2nd respondent, only after this application was filed and served, and not in April when they claim the rains were very heavy, and presumably their wall collapsed then. There is definitely an issue of the environment which needs to be addressed. It is for the benefit of all. All agree.

The order which I granted, stops the whole project. Counsel for the petitioner has stated in submissions, that their major problem is with block 15 and 18 of phase 2 and the wall. Since the court is yet to deal with the main prayer in the application dated 2nd May 2012, which are prayers 3, 4, this court has a duty at this stage to make appropriate orders that protect the environment and balances the interests of the parties. It is unfortunate that it is being contended by parties in this matter that the Mombasa – Nairobi highway is an environmental hazard. It was constructed on behalf of the Central Government which should be the real protector of the environment on behalf of citizens and investors. NEMA, the institution created by the Government to lead in protection of the environment which is a party, has not bothered to file any papers. Having perused the photographs and reports filed by the 1st respondent, I consider that lifting the orders in total will not be in the best interests of justice. It will not amount to protection of the environment. Part of the project appears to be at the lowest point of the land, which in my view, is the most likely place that water, in its natural state, will flow to or pass through. Rain is a recurrent phenomenon. Even if it has stopped now, it will come again. I will vacate the orders, but issue a fresh varied order.

The 1st respondent has asked the court to grant orders for security of costs for the suit. I do not find such orders to be appropriate or called for at this stage, considering that the orders I am now making are only applicable till the hearing and determination of the application. Secondly, this being a Constitutional matter, courts should be slow to grant such orders.

Consequently, I am persuaded to vacate the orders issued on 4th June 2012 and vary them to read as follows:-

1. The 1st respondent, its agents, servants, employees, representatives assigns and successors in title is restrained from further constructing of blocks 15 and 18 of the apartments and or the perimeter wall, including the already collapsed part of the wall, on parcel of land known as LR 12715/288 and 12715/289 situate in Syokimau area in Mavoko pending the hearing and determination of the application dated 2nd May 2012.

2. Costs in the cause.

Dated and delivered this 25th day of **June** 2012.

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George Dulu
Judge

In the presence of:

Ms. Manegene & Ms. Kamau for 1st Respondent/Applicant

Ms. Manegene holding brief for Mr Kithi for 1st Respondent

Mr Thuita for Petitioner

N/a for 3rd Respondent

Nyalo – Court clerk.