



**Lone Tree Limited v Water Resources Authority (Petition
E031 of 2021) [2022] KEELC 3311 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION E031 OF 2021
LC KOMINGOI, J
JUNE 9, 2022**

BETWEEN

LONE TREE LIMITED APPLICANT

AND

WATER RESOURCES AUTHORITY RESPONDENT

RULING

1. The Petitioner instituted this suit by way of the petition dated 3rd August 2021. Simultaneously with the petition, it filed a Notice of Motion of even date seeking conservatory orders. On 5th August 2021, the said application was heard ex parte and the court directed that it be served for interparties hearing.
2. The petitioner then filed the Notice of Motion application dated 6th August 2021 seeking to set aside the orders of 5th August 2021. The application was heard ex parte on 6th August 2021 and interim conservatory orders sought were granted. The said application is for determination before this court.
3. It is brought under Articles 22,23,40,47,159 of *the Constitution* of Kenya, Section 9(4) of the *Fair Administrative Action Act*, Sections 1A, 1B, 3A, 63E of the *Civil Procedure Act*, Order 45 and 18 Rule 9(1) of the *Civil Procedure Rules, Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 and all enabling provisions of the Law.)
4. The Petitioner seeks orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.



- e. That pending the hearing and determination of the petition filed herein a conservatory order do issue directed at the Respondent restraining it, whether by itself, its employees and agents or through other persons or agencies acting on its authority or on the basis of its notices and pronouncements from entering into, demolishing, seizing or in any other way interfering with the Petitioner's quiet enjoyment of the property comprised in L.R No.21/1/22.
 - f. That this court be pleased to issue any other order it deems mete and just in the circumstances.
 - g. That the costs of this application be provided for.
5. The application is supported by grounds on its face and the supporting affidavit sworn on 6th August 2021 by Amip Patel, a director of the Applicant. He deponed that the Respondent has boldly taken omnious steps to actualize its intention to destroy the Petitioner's property by way of demolition as it has marked it with the word, "Demolish", "Remove from River". He further deponed that the said events occurred after the petition was filed and contended that the subject development is not on a river or riparian land and that the Applicant has not in any manner diverted any stream or river. He added that in-stream works carried out on the suit property are wholly approved by the Respondent including by the letters of approval dated 13th and 15th June 2021. He prayed that the court reviews its orders of 5th August 2021 and issues conservatory orders sought in the interest of justice.
 6. The application is opposed by the Respondent vide its replying affidavit sworn by John Kinyanjui who described himself as its manager. He deponed that the Respondent is responsible for regulating the management and use of water resources in the country by dint of the Water Act, 2016. He further deponed that by a letter dated 31st August 2018, the Applicant sought guidance as to whether a water resource was located on its land and that by a further letter dated 24th March 2019, it indicated its intention to construct a canal and sought the Authority's authorization. He added that in response, the Respondent enumerated various conditions that the Applicant had to comply with prior to issuance of an approval to undertake works.
 7. He further deponed that instead of complying with the conditions, the Applicant, without a permit, illegally purported to undertake construction works on the suit property resulting in the construction of a permanent structure on a stream and the intended diversion of a stream which forms a tributary of Rui Ruaka River, contravening Section 13 of the Water Act and Rule 118 of the Water Resource Management Rules, 2013.
 8. It was deponed that pursuant to Rule 119 of the Water Resource Management Rules 2013, the Respondent issued an order on 23rd June 2021 requiring the Applicant to stop work until the said works were regularized as relates to acquisition of authorization and compliance with the law. He added that the said order was not complied with, prompting the Respondent to issue a second communication on 15th July 2021. He deponed that during a follow up visit on 9th July 2021, the Respondent was still carrying out construction on the stream, its riparian reserve and had also gone ahead to create a water cause on the suit property creating a drainage effect without approval thus the Respondent demanded that the Applicant demolishes all offending structures on the stream and the riparian reserve vide its letter dated 28th July 2021. He added that letters alluded to by the Applicant do not constitute approvals or authorization as the nature and form of authorizations are prescribed under the Water Resource Management Rules, 2013.



9. He deponed that water resources constitute public land within the meaning of Article 66 and 69 of *the Constitution* and that construction of permanent structures on a water course and its riparian reserve has a deleterious effect on the flow of the stream with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to the stream which is a tributary of Rui Ruaka River.
10. On the 30th September 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Petitioner's/Applicant's submissions

11. They are dated 28th December 2021. Counsel for the Applicant submitted that the Applicant's issues are summed up as follows:-
 - a. This court has jurisdiction to grant the conservatory orders sought before it.
 - b. The Petitioner has demonstrated that it has met the threshold for the grant of the conservatory orders sought.
 - c. Unless the conservatory orders sought are granted, he substram of the petition may be demolished and the petition rendered nugatory.
12. It was counsel for the Applicant's submission the Applicant has satisfied the principles for grant of conservatory orders as set in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] e KLR. He pointed out that the Applicant has a prima facie case as it has demonstrated that it lawfully commenced the subject works with the approval of the Respondent. He added that the petitioner will be prejudiced in the absence of a conservatory order.
13. It was his submission that grant of a conservatory order sought herein will ensure that the rights articulated under Article 40 and 47 of *the Constitution* will be enhanced. He relied on the case of *Kimitei Samoei v Michael Ngige & 2 Others* [2021]e KLR. He added that since the Respondent exercises a public role, then the Applicant relying on the actions of the Respondent must be able to hold it to account.

The Respondent's submissions

14. They are dated 9th March 2022. Counsel for the Respondent submitted that the sole issue for determination is:-
 - a. Whether the Petitioner is entitled to the reliefs sought.
15. It was his submission that the measures taken by the Respondent in this matter are in tandem with its obligations under the *Water Act*, 2016 which was enacted in compliance with Article 66 of *the Constitution*. He also stated that the Respondent's decisions were in tandem with Articles 42 of *the Constitution* which secures the right to a clean and healthy environment and places upon the state the obligation to ensure that the right is protected through legislative means. He added that Article 69 creates a positive obligation on all persons to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
16. He also submitted that Article 70 of *the Constitution* recognizes the precautionary principle which requires that where there are threats of damage to the environment, whether serious or



irreversible, immediate, urgent and effective measures be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment.

17. In support of the submissions, Counsel invited the Court to take into account the decisions in the case of:-

- a. [*Milimani Splendor Management Limited v National Environment Management Authority & 4 others*](#)[2019]e KLR.
- b. [*Kenya Association of Manufacturers & 2 others v Cabinet Secretary-Ministry of Environment and Natural Resources & 3 others*](#)[2017]e KLR
- c. [*V/D Berg Roses Agro Lease Limited v Attorney General & Mineral Resources*](#) [2016] e KLR
- d. [*Baljit Sokhil & Charity Ngilu, Cabinet Secretary, Ministry of Lands, Housing and Urban Development & Another*](#)[2021]e KLR.
- e. [*Nzioka & 2 Others v Tiomin Kenya Limited*](#) [2001]e KLR.
- f. [*Edith Wangari Gitata v Athi Water Service Board*](#) [2012]e KLR.

18. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are:-

- i. Whether this court has jurisdiction to hear and determine this Petition.
- ii. Is the Petitioner entitled to conservatory orders?
- iii. Who should bear costs of this application?

19. I rely on the cases of [*Anarita Karimi Njeru vs Republic*](#) [1976 -80] IKLR 1272; [*Mumo Matemu vs Trusted Society of Human Rights Alliance, Civil Appeal No 290 of 2012*](#). These decisions must be read in light of Article 22 (3) (b) and (d) of [*the Constitution*](#). From the above cases the Petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.

20. The Petitioner was issued with a stop order No.46838 dated 23rd June 2021 by the Respondent on allegation of constructing on the suit land without fulfilling conditions set by the Respondent under the [*Water Act*](#), 2016. Vide the letter dated 28th July 2021, the Respondent required the Applicant to comply with the aforementioned stop order, failure to which the Respondent would take action in accordance with Section 144 of the [*Water Act*](#), 2016.

21. Section 144 of the [*Water Act*](#) provides:-

“(1) Without prejudice to any other remedy or course of action, if a person contravenes any provision under this Act, then, the Authority, the Regulatory Board, the county government executive concerned or the licensee concerned may, by order served on the person concerned, require that person within a reasonable time specified in the order to remedy the contravention and in particular

- a. to clean up any pollution or make good any other harm identified in the order which was caused to any water resource by reason of the contravention; or



- b. to remove or destroy any works, plant or machinery employed for the purposes of the contravention.
- (2) Where the order in subsection (1) has not been complied with, the Authority, the Regulatory Board, the concerned county government executive or the licensee may take such steps as are necessary to remedy the contravention, and the expenses incurred in doing so shall be recoverable at the instance of the Authority, the Regulatory Board, the concerned county government executive or the licensee concerned through an application to the Tribunal.
- (3) A person aggrieved by an order under this section may appeal to the Tribunal.”
22. The Tribunal created under the *Water Act*, 2016 has jurisdiction under Section 144 of the Act reproduced above to hear this dispute. The circumstances of this case as canvassed by the petitioner are not befitting the ambit prescribed under Article 22 and 23 of *the Constitution*. The claim surrounds the Authority’s order issued under Section 144. The Authority is at the first instance vested in the tribunal to adjudicate the type of controversy in the claim.
23. At paragraph 35 of the petition, the Petitioner contends that there are exceptional circumstances in this matter; one of them being that the allegations by the Respondent cannot be properly adjudicated upon by the Water Tribunal as it has not been fully constituted. There is however, no provision that this court can usurp the Tribunal’s jurisdiction if and when it is not fully constituted.
24. Be that as it may, The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kibinji & 2 Others* [2014] eKLR stated as follows on conservatory orders: “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”.
25. In *Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR the court stated; “In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”
26. Applying the above decision to this matter, the Petitioner has established a prima facie case. There is evidence that it owns the suit property and therefore it is protected under Article 40 of *the Constitution*. It has also demonstrated that it is carrying out construction thereon.
27. The Petitioner/Applicant has also established that it will suffer prejudice if the orders are not granted. There is real danger looming over its right to property as the Respondent has issued a notice to demolish the property and even earmarked it for demolition. The Petitioner is accused of carrying out



construction on the water cause of Rui Ruaka River and its riparian reserve which is public land. It is the public interest to prevent further dealings.

28. In conclusion, I find merit in this application and the same is allowed in the following terms:-

- a. That a conservatory order is hereby issued directed at the Respondent, restraining it, whether by itself, its employees, and agents or through other persons or agents acting on its authority or on the basis of its notices and pronouncements from entering into, demolishing, seizing or in any other way interfering with the Petitioners quiet enjoyment of the property comprised of LR No 21/1/22.
- b. That costs of this application do abide the outcome of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 9TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Petitioner

Ms Makori for the Respondent

Steve - Court Assistant

