



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

LAND AND ENVIRONMENTAL DIVISION

ELC SUIT NO. 74 OF 2011

MOSES NGATIA MUGO	}
WILLIAM KARIUKI	}
BEATRICE W. NJERU	}
CATHERINE N. MURIUKI	}
ANASTASIOS THOMAS	}
ELIUD NJERU	}
FANUEL NJIRU	}

NATHANIEL K. NJOROGE }.....PLAI

NTFFS

NERBAT MURIUKI	}
NALEA MBUCU NTHIA	}
BETTY WACHUKA	}
N. M. NTHIA	}
ROLF SCHIMIDT	}
MARY MURANGI MUGO	}
GEORGE KIAMA	}

VERSUS

1.KIRTESH SHAH }

2.NATIONAL

ENVIRONMENTAL }.....DEFENDANTS

MANAGEMENT AUTHORITY }

RULING

(1) In the Complaint dated the 24th March 2011 and filed on the 28th March 2011, the Plaintiffs pray for

judgment against the Defendants for:

“ I) An order of permanent injunction restraining the 1st Defendant by himself, employees, agents from constructing, continuing with construction or in any way proceeding with the proposed project of 6 No. go downs and a factory for manufacturing and processing of animal feeds or such other industrial project on L.R. NO. KAJIADO/KITENGELA/20344.

I) A mandatory injunction compelling the 1st defendant to pull down and demolish all commercial/industrial structures, go downs and or offices erected (whether partial or complete) on L.R. NO. KAJIADO/KITENGELA/20344 at their own cost.

II) An order directing the 2nd defendant to pull down and demolish all commercial/industrial structures, go downs and or offices erected (whether partial or complete) on L. R. NO. KAJIADO/KITENGELA/20344 at the cost of the 1st and or 2nd defendant in the event of non compliance with (No. 1) and (II) above.

III) An order that the officer commanding RONGAI police station do enforce compliance of the above orders.

IV) Such other relief as the court may deem fit to grant in the circumstances of the case.

V) Costs of this suit to be borne by the defendants.”

(2) It is the Plaintiffs case that the first Defendant, the owner of the pieces of land known as Plots Title Nos. Kajiado/Kitengela/20344 and or 20334 in Kajiado District has commenced construction of six go downs and a factory for manufacturing and processing animal feeds before the project had undergone full audit and without the necessary licence from the second Defendant which is the statutory corporation empowered to exercise general suspension and co-ordination over all matters relating to the environment under the Environment Management Co-ordination Act (“**the Act**”). The Plaintiffs, as owners of pieces of land adjacent to and around the first Defendant’s said properties, contend that despite their objection to the project, the second Defendant ignored and or trivialized the same and approved the project without any reference to the Plaintiffs. As a result, the Plaintiffs’ entitlement to a clean and healthy environment is being or is likely to be contravened by the construction of the go downs or operation of an animal feeds factory in the area which is predominantly residential and agricultural. In particular, the Plaintiffs aver that they will suffer irreparable damage by way of noise pollution from machines running the factory; air pollution and smoke; surface and ground water pollution; intrusion of rodents and other pests and degradation of the scenic beauty, among others.

(3) Simultaneously with the filing of the Plaint, the Plaintiffs took out a Chamber Summons under section 3 and 129(4) of the Act, section 1, 1a, 3, 3a and 63(c) and (e) of the Civil Procedure Act and Order 40 rule 2 of the Civil Procedure Rules seeking a temporary injunction to restrain the first Defendant from constructing or continuing to construct the go downs and animal feeds factory pending the hearing and final determination of the suit. The application is brought on the grounds that the first Defendant’s project is likely to contravene the Plaintiffs’ entitlement to a clean and healthy environment; that the second Defendant’s approval to the project was obtained fraudulently, unprocedurally and unlawfully and without the Plaintiffs being afforded opportunity to be heard on their objection; that there is a pending appeal to the Tribunal established under the Act and that the first Defendant has failed to obey the “**stop order**” issued by that Tribunal under section 129 of the Act.

In the supporting affidavit made on the 24th March 2011 by Moses Ngatia Mugo, the first Plaintiff, which he swears on his own behalf as well as on behalf of the Plaintiffs, the Plaintiffs reiterate the averments made in the Plaint.

(4) The application was served on the second Defendant on the 31st March 2011 but it did not appear thereon on file any replying affidavit and on grounds in opposition thereto.

The first Defendant, however, filed a Notice of Preliminary Objection on the 4th April 2011 contending that the court lacks jurisdiction to hear the matter as the same is **sub-judice**; that the court lacks original jurisdiction to hear the matter under the Act; and that the suit is an abuse of court process, frivolous and vexatious.

The first Defendant also filed his own replying affidavit sworn on the 4th April 2011. He reiterates the grounds in the notice of preliminary objection and contends that the Plaintiffs having submitted to the jurisdiction of the Tribunal established under the Act, the High Court is only a court of appellate jurisdiction pursuant to section 130 of the Act and has no jurisdiction to grant the reliefs sought by the Plaintiffs as in any event, the Plaintiffs already enjoy a mandatory stay until the determination of the appeal before the Tribunal.

(5) I have considered the application in light of the supporting and replying affidavit respectively as well as the grounds raised in the notice of preliminary objection and the respective submissions of both learned counsel. The first Defendant argues that the Plaintiffs have invoked the provisions of section 129 of the Act, this court lack jurisdiction to entertain this suit as the matters are **sub-judice**.

Under the provisions of section 3 of the Act, every person in Kenya is entitled to a clean and healthy environment any may apply to the High Court for redress if such person alleges that the entitlement is being or is likely to be contravened in relation to him and without prejudice to any other action with respect to the same matter which is lawfully available. In such circumstances, the High Court is empowered, **inter alia**, to grant orders to prevent, stop or discontinue any act of omission deleterious to the environment.

The provision in section 129(1) of the Act, on the other hand, entitles a person aggrieved by a decision of the Tribunal to appeal within sixty days which is what the Plaintiffs have done. I cannot, and with due respect to the first Defendant see an ouster of the court's jurisdiction under section 3 of the Act in this provision. For instance, a party wishing to appeal to the High Court pursuant to section 130 of the Act may well argue that the right of appeal can be properly exercised only if there was due process before the decision being appealed against was reached and that an enquiry into the manner in which such decision was reached can be enquired into by the High Court only by way of judicial review.

(6) In the present application before me, the Plaintiffs have already appealed to the Tribunal under section 129 of the Act and concede that by virtue of sub-section (4), the first Defendant must maintain the *status quo* of any matter or activity the subject of their appeal. While I do not agree with and reject the first Respondents argument that this court lacks the jurisdiction to deal with the matter, I find and hold that the Plaintiffs having duly preferred their appeal to the Tribunal, they are now precluded from bringing the application under section 3 of the Act as the Plaintiffs are already benefitting from a similar remedy to the one sought in the application by virtue of section 129(4) of the Act. This preclusion is quite different from the first Defendant's claim that this court has no jurisdiction to hear an application under section 3 of the Act.

(7) In the result, and for the reasons which I have given, the Plaintiffs' Chamber Summons application dated the 24th March 2011 fails and is hereby dismissed with costs to the first Defendant only. The temporary orders of injunction granted on the 28th March 2011 be and are hereby vacated and discharged. For the avoidance of any doubt, the **status quo** of any matter or activity, which is the subject of the pending appeal before the National Environment Tribunal at Nairobi in Tribunal Appeal Number NET/70/2011, shall be maintained until the appeal is determined.

Orders accordingly.

Dated and delivered at Machakos this 31st day of **May** , 2011.

P. Kihara Kariuki

Judge.