



Kimani & 10 others v Athi Water Works Development Agency & another (Environment & Land Case 147 of 2021) [2022] KEELC 4906 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 147 OF 2021
BM EBOSO, J
SEPTEMBER 21, 2022**

BETWEEN

**WAMUGUNDA KIMANI 1ST PLAINTIFF
PETER GACHAGUA MWARIRI 2ND PLAINTIFF
MWAURA KIMANI 3RD PLAINTIFF
DOMINIC KIMANI GICHURU 4TH PLAINTIFF
TERESIA NYAMWANGO WAWERU 5TH PLAINTIFF
LUCY NJOKI MWANGI 6TH PLAINTIFF
SIMON NDUNGU MWANGI 7TH PLAINTIFF
JOHN GITAU MWANGI 8TH PLAINTIFF
JOHN NDUNGU KIRURI 9TH PLAINTIFF
MWAURA GICHIRU 10TH PLAINTIFF
JOHN MCHARIA RUGANO 11TH PLAINTIFF**

AND

**ATHI WATER WORKS DEVELOPMENT AGENCY 1ST DEFENDANT
AVIC INTERNATIONAL AFRICA LIMITED 2ND DEFENDANT**

RULING

1. The eleven plaintiffs initiated this suit through a plaint dated November 15, 2021. They subsequently filed an amended plaint dated 8/2/2022. They sought the following reliefs against the defendants:



- (i) A declaration that the defendants' actions in undertaking construction works at Karimenu Water Dam had caused them to suffer damages and were in violation of their "quiet enjoyment of their properties."
 - (ii) A permanent injunction restraining the defendants against undertaking construction works relating to the dam;
 - (iii) An award of Kshs 18,060,000 as special damages;
 - (iv) General damages; and
 - (v) Costs of the suit.
2. Together with the original plaint, the plaintiffs brought a notice of motion dated November 15, 2021, in which they sought an order of temporary injunction restraining the defendants against undertaking further construction works on Karimenu Water Dam Project [hereinafter referred to as the "the project"]. The said application is the subject of this ruling. The application was supported by an affidavit sworn on November 18, 2021 by Dominic Kimani Gichuru. It was canvassed through written submissions dated 16/2/2022.
3. The case of the applicants was that, at all material times, they were in quiet occupation and undertook commercial activities in their respective properties located in Karimenu Area within a radius of 2 kilometres from the site of the project. In May 2019, the 2nd defendant, under the instructions and authority of the 1st defendant, began construction works on the project. Owing to the negligent acts of the two defendants, the construction works adversely affected them and they suffered damages in the tune of millions of shillings as a direct consequence of the construction works. The alleged damages included: (i) cracks on the concrete walls of their houses and business premises; (ii) collapse of boreholes; and (iii) loss of livestock. Through their advocates, they demanded compensation for the damages but the defendants failed to accede to their demands. As a consequence, they brought this suit.
4. Besides filing a defence to the suit, the 1st defendant opposed the application through a replying affidavit sworn on 16/2/2022 by Eng Joseph Kamau, its Chief Manager in charge of Water and Sewerage Services. The 2nd defendant filed a defence and opposed the application through a replying affidavit sworn on 31/1/2022 by Mutune Kisilu, its Project Manager. The two defendants/respondents filed joint written submissions dated 22/3/2022 through M/s Sina Law Advocates.
5. The case of the defendants/respondents was that they were implementing the project on behalf of the Government of Kenya. The dam was a flagship project financed through a loan from China Exim Bank and funds from the National Exchequer of the Republic of Kenya. The contract sum of the project was Kshs 23.6 billion. The object of the project was to supply water to 1,000,000 people residing in Ruiru, Juja, Gatundu and parts of Nairobi.
6. At the time of filing their replying affidavits in February 2022, they contended that construction works on the project commenced on 2/5/2019 and the project was scheduled for completion by 2/5/2022. As at February 2022, approximately 76% of the project works had been completed and what was remaining was the clearance of vegetation around the dam. They contended that at that advanced stage of the project, they were not engaged in any activity that would cause damage or destruction to any property.
7. The respondents further contended that prior to commencing construction works, the 1st respondent obtained all requisite approvals, including an EIA licence by the National Environment Management Authority (NEMA). They added that the project activities were lawful. It was the case of the



respondents that it was in the public interest that the project should be completed within the contractual timelines to alleviate the problem of water shortage in the targeted areas.

8. The 2nd respondent contended that grant of an interlocutory injunction was going to prejudice them because they would be required to, *inter alia*, lay off the contracted workers; pay contractual penalties; pay idle expatriates; and pay for idle machines and equipment. They contended that the applicants had not met the criteria for grant of an interlocutory injunction. They added that the balance of convenience did not favour grant of an injunction.
9. I have considered the application, the responses to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The single issue to be determined in this application is whether the applicants have satisfied the criteria for grant of an interlocutory injunction.
10. The relevant criteria was outlined in the case of *Giella v Cassman Brown Co Ltd* 1973 EA 358. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant demonstrates that he stands to suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience. Lastly, it is now an established principle that when considering an application for interlocutory injunction, the court does not make conclusive or definitive pronouncements on the contested issues in the suit.
11. The plaintiffs' case in the present application is that construction works on the project caused their houses to crack; boreholes to collapse; and livestock to die. They quantified their losses and made liquidated claims and claims for general damages. Besides the above claims, they pleaded for a permanent injunction. In their demand letter dated 12/4/2021, they alleged that they suffered damages from the time the construction works began. In their statement of claim, they stated that the construction works began in May 2019. They exhibited a demand letter which was written in April 2021. This suit was subsequently filed in December 2021.
12. On their part, the respondents contend that the project was approved by all the relevant regulatory authorities and was to be implemented from 2/5/2019 to 2/5/2022. On this, the court notes that the contractual period has already lapsed and there is no evidence that the impugned works are still ongoing. Further, the defendants contend that the plaintiffs' claims essentially relate to damages that were allegedly suffered by the plaintiffs in the past. Those damages have been quantified.
13. It is apparent from the above circumstances that there may not be a reasonable probability that the claim for a permanent injunction would ultimately succeed at the end of the trial, given that the project was implemented between 2/5/2019 and 2/5/2022. Put differently, the court has doubts relating to the plaintiffs' plea for a permanent injunction in this suit, given the fact that they came to court too late when 76% of the impugned project works had been implemented.
14. On the inadequacy of damages, it is apparent from the plaintiff's demand letter and from the pleadings before this court that were the plaintiffs' claims to succeed, damages would be an adequate remedy. Indeed, they have pleaded and quantified special damages. They have also pleaded general damages.
15. On the aspect of balance of convenience, I do not think the circumstances of this suit would favour grant of an interlocutory injunction at this stage. I say so because, first the plaintiffs waited until the project was nearing completion. Second, they quantified their claims and sought monetary compensation. Third, it is apparent that even if the project is still ongoing at this point in time, grant of an injunction in the circumstances of this case would prejudice the 1,000,000 Kenyans targeted to benefit from the water project. Fourth, grant of an interlocutory injunction in the circumstances of



this case would prejudice the Kenyan tax payers who are funding the project. Fifth, the implementing agencies who would have to spend money on idle professional labour and idle equipment will be highly prejudiced. The balance of convenience, in my view, does not favour grant of an interlocutory injunction at this stage and in the above circumstances.

16. The result is that I do not find merit in the plaintiffs' application dated November 15, 2021. The same is rejected. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF SEPTEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Okulo for the Plaintiffs

Mr Ondego for the Defendants

Court Assistant: Sydney

