Maika & 2 others v Kalio (Environment & Land Case 441 of 2017)
[2022] KEELC 14872 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14872 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 441 OF 2017

FM NJOROGE, J

NOVEMBER 17, 2022

BETWEEN

LENKISHON KIMIREI MAIKA ..... 1ST PLAINTIFF

KOSGEI CHIRCHIR KOLIL ..... 2ND PLAINTIFF

LUKA CHEMWETICH ROTICH ..... 3RD PLAINTIFF

AND

A. M. KALIO ..... DEFENDANT

RULING

1. This suit was filed by the plaintiffs on November 22, 2017, that is about 5 years ago, claiming for an order of demolition of the defendant's building being put up next to their respective plots. They claimed that the completion of the defendant's building would *inter-alia* lead to access challenges be an inconvenience, have inadequate parking, and attract reduced quality of residents in the vicinity thus leading to insecurity. They considered it an eyesore. Some of their complaints were that the building's wall is directly on the boundary between the 1st plaintiff's plot and he has not issued consent to his boundary being used in such a manner, and that he is affected as his limited space is infringed and he cannot put up a wall on the said boundary or construct a building without moving in substantially inwards into his plot.

2. The defendant's defence filed on December 19, 2017 claimed that his building is not unique in the area as there are others in the vicinity, some of allegedly inferior quality to his, and that he had secured all the necessary approvals prior to construction of the high-rise building.

3. In the same defence the defendant sought to dispute the alleged impression given by paragraph 7 of the plaint that it was a case of public interest and averred that it was a case of the plaintiffs seeking a private right that does not lie; and that the kind of relief alluded to by the plaintiff can only be sought by or with the express authority of the Attorney General who has not been joined in the proceedings

as by law required. The defendant averred at paragraph 7(v) of the defence that the issue of a public nuisance can only be urged by the Attorney General and cannot be pursued by a private citizen.

4. By an amendment dated 17/7/2018 the plaintiffs joined the National Environment Management Authority and the National Construction Authority and the County Government of Nakuru in that order. The 2nd and 3rd defendants thereafter denied the claim in their respective defences.

5. The 4th defendant does not appear to have filed any defence in the matter.

6. I have considered the pleas from both sides concerning costs of the instant suit. In making an order on costs this court must consider the law. The law in Section 3 of the *Environmental Management and Co-ordination Act* provides that any person may approach the court for relief regarding whatever he considers as a threat to the environment or actual violation of the environment. The *Constitution of Kenya* at Article 70 also grants the same right.

7. Whatever developments are conducted by humans must be considered from an environmental angle hence the law in Section 58 of the *Environmental Management and Co-ordination Act* which provides for an Environmental Impact Assessment before any project described in Schedule 2 of the *EMCA* is financed or commenced. That Section provides that notwithstanding any other approvals the Environmental Impact Assessment Licence under *EMCA* is mandatory for such a project.

8. I have considered the fact that the present suit was not heard on its merits. I have also considered that the defendant's building was bound to affect the environment and that the scale of that effect was, due to the non-hearing of the case, not made clear.

9. I have finally considered that this case should be viewed purely from an environmental angle and that under the provisions of Section 3 of the *Environmental Management and Co-ordination Act* and Article 70 of *the Constitution* one does not have to demonstrate that he would personally suffer any loss or damage in order to be deemed to have locus to institute any environmental litigation before court that is calculated at protecting the environment.

10. Finally, I have considered that the National Environment Management Authority at paragraph 11 of its defence filed on 6/6/2019 stated that the project proponent, that is the 1st defendant, failed or neglected to furnish it with all necessary approvals and building plans alongside the EIA licence application and that consequently it did not issue the 1st defendant with any EIA Licence under Section 58 of *EMCA*. This being the case, how can the 1st defendant be said to have observed all the laws of the land? I consider the 1st defendant to be only lucky that the suit against it has been now marked as withdrawn before any hearing.

11. I must state that awards of costs against plaintiffs or petitioners who bring purely environmental litigation would hinder the spirit of environmental protection intended to be promoted by the provisions of Article 70 of *the Constitution* as well as Section 3 of *EMCA* and they ought not be encouraged in this country if we are to safeguard the environment including the built environment which most local authorities vested with planning powers, have failed to safeguard for many decades. That way, we may combat the runaway destruction of the environment and prevent ourselves from creating greater disorder in our urban planning in future.

12. I have said enough. The upshot of the foregoing is that I do not find any reason to award any of the defendants any costs in this matter, and I hereby order that each party shall bear their respective costs of the withdrawn suit.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 17TH DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU