



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 10 OF 2020

IN THE MATTER OF: CHAPTER FOUR AND FIVE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 22, 23, 42 AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF: SULISULI-NGOWE OR MAKABURINI ROAD

AND

IN THE MATTER OF: PETITION BY A RESIDENT OF MALINDI CENTRAL RESIDENTIAL AREA CHALLENGING INFRINGEMENT OF CONSTITUTIONAL RIGHTS BY DIVERTING A BYPASS OF HEAVY COMMERCIAL VEHICLES THROUGH A RESIDENTIAL AREA WITHOUT ANY DUE REGARD TO THE CONSTITUTION AND THE ROAD TRANSPORT AND SAFETY REGULATIONS

BETWEEN

FRANCO ESPOSITO.....PETITIONER

VERSUS

1. COUNTY GOVERNMENT OF KILIFI.....1ST RESPONDENT

2. KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

3. KENYA URBAN ROADS AUTHORITY.....3RD RESPONDENT

4. THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By this Notice of Motion application dated 7th October 2020 and filed herein on 16th October 2020, Franco Esposito (the Petitioner) prays that an injunction order be issued restraining the County Government of Kilifi (the 1st Respondent) from diverting all heavy commercial vehicles from the main Saba Saba (A7) Road to the Suli Suli- Ngowe Road through the Petitioner's residence and provide a proper bypass for such vehicles pending the hearing and determination of this Petition.

2. The application which is supported by an affidavit sworn by the Petitioner is premised on the grounds: -

i) That the Petitioner is a resident of Malindi Central cum Mtangani area residing on land parcel known as Portion No. 1966 Malindi;

ii) That the said residential area has all along been quiet, peaceful with a calm clean environment, noise free, light traffic with a

beautiful enjoyment residential atmosphere;

iii) That the said residential area is accessible with a Class E Road which goes through the said residential area serving all residents within the estate;

iv) That sometimes in the year 2019, the 1st Respondent in total violation of the Constitutional rights of the Petitioner and all residents of the area to a clean and healthy environment as provided under Article 42 of the Constitution diverted heavy commercial vehicles from the main Saba Saba- Malindi (A7) which is a B8 road into Suli Suli –Ngowe Road which is a Class E residential road;

v) That the Petitioner's residence and the entire Central area is now full of discomfort, noise pollution, dusty with a lot of vibration and generally uncomfortable;

vi) That the Petitioner has severally petitioned the Respondents to urgently address the matter but the matter remains unresolved to-date and the situation on the ground is now unbearable.

3. The County Government of Kilifi (the 1st Respondent) is however opposed to the grant of the orders sought. In a Replying Affidavit sworn and filed herein on its behalf by its Chief Officer, Department of Public Works, Roads and Transport Kenneth Kazungu, the 1st Respondent avers that the Petitioner is essentially asking this Court to decide which public roads within Malindi can be used by the public and which ones cannot. The 1st Respondent accuses the Petitioner of shamelessly using this Court to shield himself from road traffic on the public road passing next to his property.

4. The 1st Respondent further avers that by this application, the Petitioner appears to be seeking the aid of this Court in ensuring that all other roads users are stopped from using the said public road so that it can remain empty and possibly reserved for his own private use. It asserts that to the extent that the Applicant wishes this Court to regulate and direct how traffic flows on public roads within Malindi Town and how roads within Malindi should be used, the application and the entire Petition are clearly misconceived, idle and spurious.

5. The 1st Respondent avers that both Saba Saba Road and the Suli Suli- Ngowe Road are public roads capable of accommodating any nature of road traffic, including commercial traffic incidental to the normal usage of a road. It further avers that the temporary closure of another road within the town for upgrading necessitated the temporary diversion of traffic to avoid congestion within the town.

6. The Kenya National Highways Authority, the Kenya Urban Roads Authority and the Honourable the Attorney General (the 2nd, 3rd and 4th Respondents) have also responded to the application. In a Replying Affidavit sworn and filed herein on their behalf on 2nd November 2020 through the 3rd Defendants Deputy Director in charge of the Coast Region Eng. David Ndirangu Mutuohoro, the Respondents aver that they received the Petitioner's request and directed the same to the 1st Respondent for action.

7. I have perused and considered the Motion and the response thereto. I have similarly taken into consideration the oral submissions made before me by the Learned Advocates for the parties.

8. The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongly sold in execution of a decree or that the defendant threatens or intends to remove or dispose of the property."

9. As the Court of Appeal stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

a) Establish his case only at a prima facie level,

b) Demonstrate irreparable injury if a temporary injunction is not granted;

c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

10. Accordingly, the first issue for my consideration is whether given the material placed before me, the Petitioner has established a prima facie case with a probability of success. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 3 Others (2003) eKLR*, a prima facie case was defined as:

“...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. In the matter before me, the Petitioner accuses the Respondents of diverting all heavy commercial vehicles from the main A7 Saba Saba Road in Malindi to a Class E residential road known as Suli Suli- Ngowe Road and which Class E road passes within the residential area wherein the Petitioner resides. It is the Petitioner's case that the said residential area has all along been quiet, peaceful with a calm clean environment and that by such diversion, their area of residence is now full of discomfort, noise, pollution, dust and lots of vibration generally making the environment uncomfortable.

12. There was however very little material placed before me by way of evidence to demonstrate that the said diversion had occasioned such an amount of dust or noise pollution and vibration to the extent that the Petitioner and other residents of the concerned area could no longer inhabit their residences.

13. As the 1st Respondent submitted herein, the Petitioner did not claim that the diversion had encroached into his own land parcel No. 1966 Malindi. On the contrary, the Suli Suli-Ngowe Road upon which traffic had been diverted was a public road and the Petitioner did not place anything before me to demonstrate that it could not handle the sort of traffic being diverted thereto.

14. In my mind, I did not think that the use of any road could be without some level of noise or vibration. Thus in order to be persuaded that what the Petitioner was complaining about was not the natural consequence of the existence of a road in his neighbourhood, the Petitioner needed to come out more clearly on how the impugned diversion had threatened to damage or waste his portion of land.

15. While it is indeed true that the Constitution guarantees a right to a clean and healthy environment, I did not think that those rights were capable of protections by way of a temporary injunction application in the manner sought herein. While the application before me does not cite any provisions of the law pursuant to which it was brought, what the Applicant sought before me was an ordinary interlocutory injunction and not the grant of a conservatory order within the framework of Article 23 of the Constitution.

16. In the premises, I did not find merit in the application and I hereby dismiss the same with costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE