REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURTOF KENYA AT MIGORI

ELC PETITION NO. E1. OF 2020

IN THE MATTER OF ENVIRONMENTAL DAMAGE AND VIOLATION OF THE RIGHT TO CLEAN HEALTHY ENVIRONMENT AND THE RIGHT TO PROPERTY

AND

IN THE MATTER OF REDRESS OF VIOLATION OF RIGHTS UNDER ARTICLE 27, 40(3) 42, 43, 47, 54 AND 70 OF THE CONSTITUTION OF KENYA UNDER, 2010

BETWEEN

PRISCA ALUOCH ODONGO.....PETITIONER/APPLICANT

AND

NATIONAL IRRIGATION AUTHORITY.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....2ND RESPONDENT

CABINET SECRETARY MINISTRY

OF LANDS AND PHYSICAL PLANNING.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

RULING

A. THE GIST OF THE APPLICANT'S CASE

1. The instant Notice of Motion dated 1st October 2020 was mounted under certificate of urgency of even date and a further certificate of urgency dated 16th October 2020 evenly filed in Court by the petitioner, Prisca Aluoch Odongo (the applicant herein) and through M/s Omondi Abande and Company Advocates (The Motion herein). It is supported by the affidavit of 56 paragraphs evenly sworn by **the** applicant and grounds 1 to 29 set out on it's face pursuant to Articles, sections and Rules stated thereof.

2. In brief, the Applicant states that she is a resident of Sagama Village in the sub-county of Nyatike, Migori County. She contends that the **National Irrigation Authority**, the 1st Respondent herein, rendered her and sixty five 65 other households homeless when it commenced large scale, state-run rice growing project (hereinafter referred to as the ("**Irrigation project"**) in Sagama area within the Sub County.

3. The applicant laments that the irrigation project has violated and continues to violate her constitutional right to clean and healthy environment. She claims that restoration of the land to its former habitable state is near impossible hence she pleads with the court to resettle or compensate the affected families.

4. Thus, Applicant is seeking orders infra;

1)spent

2) The hearing of this application and the petition be fast tracked and the same be heard and determine on priority, so as to ensure urgent livehood restoration tom those displaced and to preserve the public interest in the continuation and sustainability of the project as designed.

3) The court be pleased to visit Block 3-A, Sagama Village, urgently and on priority, and specifically land parcel no North Kadam Kanyuor/1051 from where the applicant, here household and her neighbours have been forcefully and involuntarily displaced by the activities of the 1st Respondent, National Irrigation Authority without Resettlement Action Plan and or livehood restoration program at all.

4) Spent

5) The Respondent be compelled to forthwith provided funds in the sum of Kshs. 1,100,000/= as an interim measure to the applicant and her household to finance urgent relocation, resettlement and livehood restoration, pending the determination of the petition.

6) Pending hearing and determination of this application and the petition and or further orders of his court, a conservatory order of injunction and prohibition be issued as against the 1st Respondent, National Irrigation Authority, its members, directors and shareholders and or officers from continuing with and or undertaking detrimental rice farming activities in Sagama Area without following the design of Lower Kuja Irrigation Development Project.

7) An order be issued compelling the 1st Respondent to meet the cost of resurvey and marking of the boundaries to land parcel number North Kadem/Kanyuor/1051 by a registered and or licensed surveyor and the costs thereof to be borne out by the 1st Respondent.

8) The 2nd Respondent National Environmental Management Authority be compelled by an Order of mandatory injunction to carry out its duties and functions as by law required and to ensure compliance with the laws relating to the environment.

9) National Land Commission be compelled by an order of mandatory injunction to carry out its constitutional, statutory and regulatory functions and duties to ensure that the applicant and her household are promptly and adequately compensated for the way leaves and public rights of way created on and laid by the 1st Respondent on land parcel No. North Kadem/Kanyuor/1051 forthwith and on priority.

10) The Cabinet Secretary Ministry of Water, Irrigation and Sanitation be compelled by an order of this court to follow the law and to carry out its constitutional, statutory and regulatory functions and duties to ensure that the applicant and her household are promptly and adequately compensated for the way leaves and public rights of way created on and laid by the 1st Respondent on land parcel No. North Kadem/Kanyuor/1051 forthwith and on priority.

11) Such other orders and directions as the court would deem appropriate and necessary, in the circumstances be issued in favour of the applicant, and her household, and to her neighbours if need be, so as to protect eh petitioners fundamental rights and freedoms and to preserve and protect Land Parcel No. North Kadem/ Kanyuor /1051 and other lands in Block 3, Sagama village from further degradation.

12) Costs of this application be provided for.

5. On **7/10/2020,** this Court admitted the motion for inter-partes hearing and gave relevant directions. During inter parties hearing on 28th October 2020, Order No. 4 sought in the motion was granted and with the orders of the court, that counsel for the applicant and counsel for the 1st respondent to argue the motion orally on 9th November, 2020 pursuant to Order 51 Rule 16 of the Civil Procedure Rules,2010.

6. In his oral submissions, Mr. M. Odero, learned Counsel for the Applicant, relied on and adopted in verbatim, the entire motion as well as its supporting affidavit. He submitted that as per the Replying affidavit of Engineer Daniel N Ogwe, the 1st Respondent did not dispute the fact that the applicant had been displaced. He further submitted that it is not in dispute that the Applicant's land number North Kadem/Kanyuor/1051 had been rendered inhabitable by the activities of the 1st Respondent. He referred to paragraphs 3 and 4 of the 1st Respondent's affidavit.

7. Counsel further submitted that the 1st Respondent could not be heard to say that delay in compensation of the affected families was caused by corona virus (Covid-19) pandemic. He stated that the Irrigation project was started in the year 2011.

8. Counsel further stated that since there is no opposition to the prayer for the court to visit the ***locus-quo***, it should be allowed. With respect to the damage occasioned to the Applicant, Counsel submitted that the 1st Respondent has not filed a counter valuation report to controvert the one availed by applicant.

9. In the end, Counsel submitted that it is manifestly a matter of justice that the Respondents be compelled to provide a sum of KShs. 1,100,000/- in the interim, to the applicant to facilitate her relocation, resettlement and livelihood restoration. On that strength, counsel referred to prayer number 5 sought in the motion.

B. <u>THE GIST OF THE 1ST RESPONDENT'S CASE</u>

10. The 1st Respondent, through G & A Advocates LLP, strongly opposed the motion and sought its dismissal with costs to the 1st respondent. The opposition was made by way of the Replying affidavits of Daniel M. Atula and Engineer Nesline Ogwe, both sworn on 27/10/2020 and the annexed documents marked as "No.1 to No 4 to DMA3" herein. The same are noted accordingly.

11. Mr. Ochola learned counsel for 1st Respondent orally submitted that the Applicant misled the Court. That before the start of the project, she was compensated and that if she was not, the process has been commenced to cater for her and others.

12. Counsel further submitted that the Application is meant to circumvent the valuation process for compensation of the affected parties. It was his position that there is no likelihood of irreparable harm to be caused to the applicant. He stated that the project was funded by public funds hence it was being done in the interest of the public.

13. In opposition to the prayer for court to visit the *locus quo*, Counsel submitted that it is the obligation of the applicant to prove her case. That it is the discretion of the court to decide whether or not to visit the site.

14. In rebutting the allegation on environmental impact, counsel stated that environmental impact assessment report had not been presented to the 2nd respondent, the National Environmental Management Authority thus, the alleged environmental impact had no basis. Counsel urged the court to dismiss the motion with costs.

15. The 1st Respondent's counsel also filed 23 paged submissions dated on 9th November,2020 in further opposition to the motion. Counsel largely reiterated the 1st respondent's position as per the oral submissions and stated that the Applicant had not satisfied the requirements as set out in the case of **Giella -vs- Cassman Brown and Co. Ltd (1973**) 358 as emphasized by the Court of Appeal in **Malindi Civil Appeal No. 4 of 2015 Lucy Wangui Gachara -vs- Minundi Okemba Lore (2015) eKLR** where the court observed;

> ***"in an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
>
> ***a. Establish his case only at prima-facie level.***
>
> ***b. Demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***c. Ally any doubts as to (b) by showing that the balance of convenience is on his favour.***
>
> ***These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established principle that all the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."***

16. Counsel went to great detail in delimiting operation of the foregone triple requirements. This court will revisit the arguments in that respect later in its analysis herein.

17. In his rejoinder, Mr. Odero submitted that it is necessary for this court to visit the site for it to make a fair determination. He also stated that the compensation alluded to by Mr. Ochola was not done. He stated that the rights of the applicant cannot be violated in the name of public interest. He reiterated that the applicant is not seeking to stop the project but compliance with its design and the law. He sought that the motion be allowed as prayed herein.

C. <u>THE GIST OF THE 2ND, 3RD AND 4TH RESPONDENTS' CASE</u>

18. The 2nd, 3rd and 4th respondents were duly served herein as disclosed in affidavit of service sworn in 19th October 2020 and filed in court on 21st October 2020 by the deponent, James Otieno Okudo, a licensed process server. Paragraphs 3, 4, and 5 of the affidavit tell it all. However, they failed to respond to the motion.

D. <u>ISSUES FOR DETERMINATION AT THIS STAGE</u>

19. This court has intently considered the motion, the affidavits in reply thereto as well as the oral and written submissions. In that regard, this court is of the considered view that the issues that arise for determination are whether;-

i. The petition should be fast tracked and the same heard and determined on priority

ii. The court should visit the site in dispute herein.

iii. The applicant should be paid kshs. 1.100,000/= in the interim.

iv. The prayers for conservatory order of injunction and prohibition as well as order of cost of resurvey against the 1st Respondent are merited.

v. The prayers against the 2nd,3rd and 4th Respondents are merited.

vi. The court should grant any other appropriate orders and give directions.

E. <u>ANALYSIS & DETERMINATION</u>

20. It is common baseline that the instant motion is brought under, inter-alia, the provisions **of Article 22(1) (2), 23(1)(3)** of the Constitution of Kenya, 2020. Thus, it is not in contest that the Applicant is entitled to seek reliefs including Conservatory Orders in this Constitutional matter before this court as held in **United States International University =vs= Attorney General and 2 others (2012)eKLR.**

21. In respect of the first issue, I approve the obiter in the case of **Mwangi and another =vs= Mwangi (1986) KLR 328** that land is an extremely important aspect of the lives of ordinary people and land cases must be heard as quickly as possible by any forum provided by law or as agreed by parties. That such cases must get a better priority than even accident injury cases.

22. Moreover, the character of the petition is taken into account. The same must be heard in the spirit of **Article 159 (2) (b) of the Constitution of Kenya,2010** which stipulates; **"Justice shall not be delayed."**

23. The issue of visiting the site is within the discretion of the court bearing in mind the expected gathering at the site vis a vis the current Covid -19 restrictions. Parties will be at liberty to submit on it during the main hearing and the court will make appropriate determination on the plea at that time. The order is reserved accordingly.

24. Regarding prayer number 5 for payment of Kshs. 1,100,000/= to the applicant against the 1st,2nd ,3rd and 4th respondents. It is this court's view that as the claim is still under controversy. I am conscious of the condition and situation of the applicant. However, under Article 159 (2) (a) of the Constitution (supra), justice shall be done to all, irrespective of status.

25. So, it is this court's finding that the claim is premature and cannot be addressed at his point in time. The said prayer is an invitation for this court to interfere with the process of the proposed compensation for all and sundry and meant to avoid hearing of the petition on merit.

26. Notably, for a court to grant of conservatory orders, certain minimum requirements must be met. Those requirements have been the subject of consideration in a number of cases including **Giella and Gachara cases (supra).** Therefore, this court will not delve into the factual matrix as presented by the parties herein. Simply put, a party seeking, inter alia, a conservatory order only requires to show that he has a prima facie case with a probability of success and that unless the court grants the same, there is real danger that he or she will suffer prejudice as result of the violation or threatened breach of the **Constitution (supra).**

27. In the case **of Gatirau Peter Munya =vs= Dickson Mwenda Kithinji & 2 others Supreme Court in Application No. 5 of 2014 [2014] eKLR,** the Court had occasion to outline the guiding principles for the grant of injunctions and conservatory orders. It stated as follows;

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

> ***[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders <u>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 supplicant's 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</u>***. *(Emphasis supplied).*

28. In the instant motion, based on the material provided this court is unable to discern the instance in which it will lose its adjudicatory authority should it not issue conservatory orders against the 1st Respondent. As can be gleaned from the Replying Affidavit of Nesline Ogwe, as well as the various annextures thereto, it is evident that the Irrigation activities were obstructed in Block 3, the relevant piece of land that the Applicant resides as a result of failure by the 1st Respondent to compensate residents thereon. There is however, evidence to the effect that correspondence have been exchanged between the 1st Respondent and the 3rd respondent with a view to establishing the market value of the land parcels in question for compensation purposes.

29. From the foregone, the proper functioning of the public bodies involved herein in so far as advancing the compensation program will be enhanced by this Court by non-grant as opposed to grant of conservatory and prohibition orders prayed for. Issuance of orders to prohibit progress of the Irrigation Project will only go towards slowing the process further down thus compounding woes to the appellant and others. Indeed, it is common ground that the applicant is not seeking to stop the irrigation project.

30. I have taken into consideration the inherent merits of the motion as weighed against public interest. It is crucial to point out that the Applicant is entitled to the constitutional right of clean and healthy under Articles 42, 69 and 70 of the Constitution, environment, the Irrigation Project is also aimed at achieving an equally important constitutional obligation, in form of economic and social rights anchored under **Article 43 (1) of the Constitution (supra).**

31. Indeed, Mr. Daniel Atula, the Deputy General manager, operations and Irrigation Management Services of the 1st respondent attests to

the foregone position in his Replying Affidavit. In paragraph 15, he deposed that;

> ***"detailed design report identified food insecurity due to low agricultural production as a major problem facing the area which had been proposed to be irrigated. Thus, according to the report, the implementation of Lower Kuja Irrigation Development Project would thus therefore result in increased agricultural production and assist in addressing the problem of food security in addition to contributing towards regional and national development."*** *(Emphasis added)*

32. The Court of Appeal in **Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR** stated that the granting of conservatory orders based on an applicant's contention that there is threat of violation of his Rights and Fundamental Freedoms and speculation of threat of arrest and prosecution is a question of fact and evidence must be adduced to support the alleged threat; see also **Speedex Logistics Ltd and 2 others =vs= DCI and 3 others position No. 330 of 2018 (2018) eKLR.** The court further observed that :-

> ***"we find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.***
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> ***35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition. This Court, being an appellate court, does not have the benefit of determination by the trial court on merit of existence nor non-existence facts that constitute threat of violation. Whereas it is an arguable ground whether the trial judge erred in fact and law arriving at the decision that there was no threatened violation of the applicants rights and freedoms, we are of the considered view that the intended appeal shall not be rendered nugatory if no conservatory orders are granted because the existence of threat of violation of rights and freedoms shall be determined by the trial court on merits if conservatory orders are not granted in this application. We believe it is in the interest of justice that alleged facts constituting threatened violation of the applicant's rights should be canvassed and a determination made whether or not such facts exist. (****Emphasis laid)*

33. On public interest vis a vis the grant the interlocutory orders, the court further made the following findings;-

> ***"I further find that in determining whether or not to grant conservatory orders, the court is under a duty to balance the interests of the applicants as private citizens to conduct their business unhindered as against the wider public interest to protection from substandard or harmful goods. I note that the subject matter of the impugned proceedings before the trial court is the claim of importation of substandard goods. This court notes that the issue of importation of substandard and/or harmful goods has, in the recent past, been the subject of intense public debate and concern and without passing judgment or blame on any party to these proceedings, I find that it would not be in public interest to stay proceedings relating to the issue of substandard goods.***
>
> ***"…having regard to the findings and observations that I have made in this ruling and without saying much at this interlocutory stage lest I run the risk of determining issues that are ideally the preserve of the court that will eventually hear and determine the main petition, I find that the applicants have not made out a proper case for the grant of the orders sought and the order that commends itself to me is the order to dismiss the instant application with no orders as to costs.***

34. It is abundantly clear from the forgoing that it is only upon interrogation of facts and evidence that a court can competently make a declaration on the violation of a right. It is therefore, premature for the Applicant to assert violation of the Constitution at this point and on that basis pray for substantive orders that define rights and liabilities of parties.

35. The Applicant would have been entitled to conservatory orders if she had demonstrated that the 1st Respondent's current conduct was unlawful, unreasonable, contrary to public interest, the administration of justice or has abused the legal process. That has not been the case. In fact, it is evident that there are other blocks of land which the 1st Respondent has successfully acquired for purposes of irrigation and compensated the affected owners; see **Macharia Mwangi Kagiri and 87 others =vs= Davidson Mwangi Kagiri (2014) eKLR** that equity shall suffer no wrong without a remedy.

36. To that extent, having considered the proportionality test required for the granting conservatory orders, I find that there would be a higher risk of injustice in lieu of the converse, if this Court issued orders in favour of the applicant at this stage ; see the reasoning of **Hoffman J in Films Role International Ltd =vs= Cannon Films Sales (1986) ALL ER 722** hereby endorsed.

37. Therefore, this court is unable find justification to the hold the 1st Respondent in violation of the Constitution at this particular stage.

38. It is common ground that the survey and valuation exercise by the respondent touching on the suit land is ongoing. This is revealed in the applicant's supporting affidavit and the 1st respondent's replying affidavits. It is the respondents' mandate to carry out the exercise. So, the cost of resurvey thereof is to be borne by the 1st respondent who is mounting the irrigation project in the area.

39. In regard to orders 8.9 and 10 sought in the motion, the attention of this court is also drawn to reliefs (a) and (d) sought in the petition. The orders and reliefs are somewhat mandatory and final in nature. The same may be allowed depending on the evidence to be adduced at the hearing of the petition. In the view of the character of the said orders, the parties are rather encouraged to move in the spirit of **Articles 159 (2) (c) of the Constitution (supra**) as the same may dispose of the matter amicably.

40. To that end, some orders in the motion are merited while others are not for grant. The motion is partially merited in the circumstances.

41. Wherefore, the motion be and is hereby determined in the following terms;-

a) Orders 2 and 7 sought therein are allowed accordingly.

b) Orders 3,5,6,8 9 and 10 sought therein are disallowed.

c) The parties are encouraged to embrace Alternative Disputes Resolution mechanisms as noted in paragraph 39 hereinabove to meet the ends of justice in this petition.

It is so ordered.

DELIVERED, DATED and **SIGNED** at **MIGORI** this **20th** day of **JANUARY 2021.**

G.M.A. ONGONDO

JUDGE

In presence of;-

Mr. Odero holding brief for Mr. Omondi Munuango for the Petitioner.

Mr. Mulisa holding brief for Ochola learned counsel for 1st respondent.

Tom Maurice – Court Assistant