



**Mahmud v Al Madaar Trading Company Ltd & another; Nairobi City
County Government & another (Interested Parties) (Environment & Land
Petition E022 of 2023) [2024] KEELC 6742 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6742 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E022 OF 2023
MD MWANGI, J
OCTOBER 7, 2024**

BETWEEN

RAMADHAN ADINAN MAHMUD PETITIONER

AND

AL MADAAR TRADING COMPANY LTD 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

AND

NAIROBI CITY COUNTY GOVERNMENT INTERESTED PARTY

NAIROBI WATER AND SEWERAGE COMPANY LTD ... INTERESTED PARTY

RULING

(In respect of the Petitioner’s application dated 8th November, 2023 amended on 10th November, 2023)

1. This Ruling is in respect of the Petitioner’s application dated 8th November, 2023 amended on 10th November, 2023 seeking for orders;
 - a. That pending the hearing and determination of the main Petition this Honourable Court be pleased to issue a mandatory injunction against the 1st and 2nd Respondents compelling them to repair the drainage lines in their construction site at Toughgone in Makina Ward, in Kibera.
 - b. That an order of temporary injunction do issue restraining the 1st and 2nd Respondents, whether by themselves, their agents, servants, or otherwise, from any further construction or maintenance of the box culvert pending hearing and determination of the main Petition.
 - c. That the costs of the application be provided for.



2. The application is premised on the grounds on the face of it and supported by the Affidavit of the Petitioner deposed on the 8th November, 2023. The Petitioner avers that the 1st Respondent is a contractor hired by the 2nd Respondent to construct a box culvert in Toughgone in Makina Ward, Kibera.
3. In the course of the work, the 1st Respondent ended up destroying the sewer lines. The destruction has caused sewer water to flood into the Petitioner's residence especially when it rains and the sewer water overflows the river at the construction site flowing into the house. This forces the Petitioner to use buckets and tins to manually remove the sewer water from his house. This has caused damage to household items particularly furniture and the carpet. It further leaves behind a foul smell throughout the house. The Petitioner is apprehensive that his family is at the risk of contracting diseases from constant contact with the sewer water.
4. The Petitioner accuses the 1st Respondent of negligence by not following the proper construction standards and guidelines and neglecting to take due diligence in carrying out the construction. It is for this reason that he prays for a mandatory injunction to prevent further harm.
5. The application was opposed by the 1st Respondent and the 2nd Interested Party.

1st Respondent's Replying Affidavit

6. The 1st Respondent opposed the Petitioner's application vide the Replying Affidavit of Abdulbari Issak Ibrahim, one of its Directors sworn on the 8th December, 2023. He confirms that indeed the 1st Respondent was contracted by the 2nd Respondent to construct the box culvert at Touchgone in Makina Ward, Kibera, sometimes in August 2023. The work was projected to be completed in January, 2024. He avers that the 1st Respondent exercised due diligence when constructing the box culvert. He denies the allegations of negligence terming them as baseless.
7. The deponent asserts that they performed their duties to the required standards and as directed and approved by the 2nd Respondent. He insists that they are not to blame for the alleged suffering by the Petitioner as they followed proper construction standards and guidelines. He asserts that the Applicant's house is directly on the river bed and perhaps the reason why they are affected by flooding, if at all.
8. The deponent further avers that the Applicant has not established a prima facie case as he has not directly outlined the elements of breach by the Respondents. He asserts that the 1st Respondent has already started the works and made so much progress in compliance with the contractual terms. Therefore, issuing a mandatory injunction at this point will be detrimental to them.
9. Regarding the issue on breakage of the sewer line, he avers that the same is under the mandate of the 2nd Interested Party and not that of the 1st Respondent. The application is therefore an abuse of the court process and the same ought to be dismissed with costs.

2nd Interested Party's Replying Affidavit

10. The 2nd Interested Party's Replying Affidavit is sworn by Lucas Mkiroma Mwasaru, its Regional Technical Officer, deposed on the 1st July, 2024. He avers that it is the mandate of the 2nd Interested Party to provide and manage water and sewerage services within Nairobi City County.
11. He contends that the 2nd Interested Party has been improperly joined to this suit. He asserts that an Interested Party can only be joined to a suit either by the court or another party. However, in the instant suit, the Petitioner improperly joined the 2nd Interested Party without adherence to the procedure.



That the 2nd Interested Party has no legal interest or stake in this suit; neither will it be affected by the decision of the Court. It has not been demonstrated that a valid decree cannot be made in its absence. The 2nd Interested Party does not therefore qualify for joinder as an Interested Party. It ought to be struck out from the proceedings herein.

12. The deponent further avers that in any event, the Petitioner has not proved his assertions to warrant issuance of the orders sought. The Petitioner has not adduced evidence that he lives in the locality; neither has he adduced evidence proving ownership of the house or that he is a tenant in the house the subject matter of this petition. Further, that no evidence of overflow of water has been shown to this Court as the pictures attached are not accompanied by a certificate of authenticity as required in law.
13. Although the Petitioner alleges that the 1st Respondent was contracted by the 2nd Interested Party to undertake the project, there is no evidence whatsoever to prove the assertion. The 2nd Interested Party denies knowledge of the project or the allegation that it caused damage to the sewer line. As such, the 2nd Interested Party contends that the dispute is between the Petitioner and the Respondents.
14. It is further contended that the Petitioner is not a customer of the 2nd Interested Party and that when the 2nd Interested Party's Technicians visited the site, it was noted that the Petitioner's house was not connected to its sewer system. In fact, the Petitioner is allegedly discharging waste into the river adjacent thereof. Apart from being advised alongside with his Landlord on the measures to be taken and the requirement of having a formal account with the 2nd Interested Party as well as the need to install a proper sewer line, they were also notified of the consequences of non-compliance. However, to date, the Petitioner and his Landlord have not complied with the regulations by the 2nd Interested Party.
15. The deponent avers that unless the Petitioner complies with the requirements for connection to the Sewer System, the 2nd Interested Party is unable to provide any services. As it stands, the sewerage from the premises at which the Petitioner allegedly resides is illegally being discharged. The 2nd Interested Party alleges that it already repaired the leaking sewer line hence there are no more leakages. This is despite the fact that it did not cause any damage on the sewer line. The 2nd Interested Party therefore prays that its name be struck out of these proceedings.

Court's Directions

16. The Court directed parties to file submissions in support of their respective positions on 9th July, 2024 within 14 days respectively. However, up and until the date of delivery of the ruling, none of the parties had complied.

Issues for Determination

17. Having considered the application, the affidavit evidence and the annexures thereto, the issues that arise for consideration are:
 - a. Whether the Petitioner/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.
 - b. Whether the Petitioner/Applicant should be granted orders of temporary injunction.
 - c. Who shall bear the costs of the application?

Analysis and Determination

18. The Applicant seeks for a mandatory injunction against the Respondents compelling them to repair the drainage lines broken in their construction site at Toughgone in Makina Ward, in Kibera.



19. The circumstances under which the Court would grant a Mandatory Injunction at the interlocutory stage were spelt out by the Court of Appeal in the Case of “Malier Unissa Karim –vs- Edward Oluoch Odumbe (2015) eKLR as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –vs - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows: -

A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

20. Further the Court in the case of “Jay Super Power Cash and Carry Ltd –Versus - Nairobi City Council and 20 others CA 111/2002” held that: -

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

21. The reason for this rule on granting of Mandatory Injunction is plain. Megarry. J put it succinctly in the case of “Shepard Homes Case (Supra) as follows: -

“.....if mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

22. The Petitioner avers that the 1st Respondent, who was contracted by the 2nd Respondent to construct a box culvert in Toughgone in Makina Ward, Kibera, was negligent thus destroying and damaging the sewer lines while undertaking the project. It is alleged that the 1st Respondent diverted the course of the river closer to his house. As a result of which, his residence gets flooded with sewer water when it rains making the house inhabitable.

23. Article 42 of *the Constitution* guarantees the Petitioner the right to a clean and healthy environment which includes the right to seek redress where this right is violated, denied or threatened. The Applicant does not have to demonstrate that it has incurred loss or suffered injury.

24. The State is enjoined to eliminate processes that are likely to endanger the environment by Article 69 of *the Constitution*. This Article places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.



25. The function of dealing with county health services including refuse removal, refuse dumps and solid waste disposal was devolved to the Counties under *the Constitution*. The mandate of providing water and sewerage services to the residents of Nairobi is bestowed upon the 2nd Interested Party which is wholly owned by the 2nd Respondent and/or the 1st Interested Party.
26. Section 29 of the Physical Planning Act empowers local authorities, which in this case is the County Government of Nairobi, to prohibit or control the use and development of plots within its area. The section mandates the local authority to consider and grant development permissions.
27. The 2nd Respondent and/or the 1st Interested Party, may serve an enforcement notice on the owner or occupier of land under Section 38 of the Act when it comes to its attention that the development of land was carried out without the required development permission or when the conditions for the grant of the development permission were not complied with. Section 30 prohibits any person from carrying out development within a local authority without being granted development permission.
28. Therefore, there is nothing that stops the 2nd Respondent and/or 1st Respondent from invoking the provisions of the Physical Planning Act. The 2nd Respondent and /or the 1st Interested Party has a role to play in the protection of the environment and affording the people of Nairobi County the opportunity to enjoy the right to a clean and healthy environment guaranteed by *the Constitution*. It is mandated to ensure that sewer lines are properly laid out and put in place on the land adjoining the river and that no raw sewage or effluence is released into any river within its territory.
29. I note that in applying the preventive principle, this court issued an ex parte order on the 10th November, 2023 directing the Interested Parties to immediately take all necessary measures to address the issue and repair the leaking sewer line. They were further directed to submit a report on the measures taken to address the issue on the date for inter parties hearing.
30. Article 70 of *the Constitution* empowers the court to give redress where a person alleges that their right to clean and healthy environment has been or is threatened. The precautionary principle provides that the State has a duty to prevent environmental harm and health risks as well as conduct that may be harmful even where conclusive scientific evidence regarding the harmfulness is not available. The 1st Respondent has an obligation to take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimize significant adverse effects to health and the environment.
31. The Report of the Site Visit conducted on 23rd April, 2024 by the Assistant Deputy Registrar of this Court, and the photographs attached to the report shows sewage overflow in the area as well as the Petitioner's open sewer pipe not connected to the sewerage system. This negates the 2nd Interested Party's assertion that it had repaired the leaking sewer line.
32. Counsel for the 2nd Respondent stated that it is the 1st Respondent who damaged the sewer pipe while constructing the bridge.
33. Based on the foregoing, it is apparent that the repair of the sewer lines in the area is yet to be done as directed by the court. This, I consider a proper case for issuance of an order of mandatory injunction to prevent any further spillage of sewer water into the Petitioner's house and the violation of his right to a clean and healthy environment.



B. Whether the Petitioner/Applicant should be granted orders of temporary injunction

34. The applicant seeks a temporary injunction. The principles to be considered in determining an application for an order of temporary injunction were pronounced in the case of *Giella -vs- Cassman Brown* [1973] EA 358, where it was held that in order to qualify for an injunction: -
- “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 might otherwise 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.”
35. In the case of *Mrao Ltd. -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR the Court of Appeal elaborated the meaning of a prima facie case and stated as follows:
- “a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case 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.”
36. The Court of Appeal in *Nguruman Ltd -vs- Jan Bonde Nielsen & 2 Others* (2014) eKLR, while upholding the 3 conditions pronounced in the *Giella* case stated that,
- the 3 conditions and stages are to be applied as separate distinct and logical hurdles which an applicant is expected to surmount sequentially.’
37. This court in the case of *Nicholas Njeru Muturi -vs- Thome Dynamics Limited & Another* [2022] eKLR stated that the essence of the holding in the *Nguruman* case is that;
- ...if a prima facie case is not established, the court need not go farther to consider if the applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
38. It is evident that there is a damaged sewer line, leakages and an overflow of the sewer. As earlier stated, the Petitioner is entitled to a clean and healthy environment. He therefore has a prima facie case.
39. The Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
40. Having issued a Mandatory Injunction directing the Respondents to repair broken drainage lines in the area, there shall be no more harm that the Applicant shall be exposed to. I therefore find no basis of granting the temporary injunction stopping the construction that is aimed at benefitting the residents of Nairobi in general.



41. I therefore find no merit in granting the order of temporary injunction sought.

Who shall bear the costs of the application?

42. On the issue on costs; section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs.

43. Consequently, I make the following orders:

- a. A mandatory injunction is hereby issued against the 1st and 2nd Respondents and the 2nd Interested Party compelling them jointly and severally to forthwith repair the drainage lines in their construction site at Toughgone in Makina Ward, in Kibera in any event within the next fourteen (14) days from the date of this ruling.
- b. The costs of the application are granted to the Applicant.

It is so ordered

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ramadhan Adinam Mahmud Petitioner/Applicant

N/A by the Respondents and the Interested Parties

Court Assistant: Yvette

M.D. MWANGI

JUDGE

