Kinyanjui & 16 others v National Environment Management Authority & 3 others (Environment and Land Appeal E036 of 2024) [2024] KEELC 7271 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7271 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E036 OF 2024

SM KIBUNJA, J

NOVEMBER 6, 2024

BETWEEN

SIMON KINYANJUI & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS ..... APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

PARKLANE TOWERS LIMITED ..... 2ND RESPONDENT

MARK ODHIAMBO OTIENO ..... 3RD RESPONDENT

SILVER BAY MANAGEMENT LIMITED ..... 4TH RESPONDENT

RULING

Notice of Motion dated 20th September 2024

1. The appellants moved the court through the notice of motion dated the 20th September 2024, brought under section 130(2) of the Environment Management and Coordination Act, Order 51 Rule 1 of the Civil Procedure Rules, and Section 1A, 1B, & 3A of the *Civil Procedure Act*, seeking for:

    1. "Spent.

    2. Spent.

    3. That pending the hearing and determination of this appeal, this honourable court issue an order for temporary injunction against the 2nd respondent nad (sic) its agents/servants, from implementing the construction of Parklane Towers on plot L.R. No. MN/1/5449, under License Number NEMA/EIA/*PSL/2656*4 issued on 27th June 2023.

    4. That the costs of this application be costs in the cause."

The application is based on the sixteen (16) grounds on its face marked (a) to (p), and supported by the affidavit of Simon Kinyanjui, 1st appellant, sworn on the 20th September 2024, inter alia deposing that the 2nd respondent obtained the license No. NEMA/EIA/*PSL/2656*4, issued on 27th June 2023, for construction of Parklane Towers, being two residential blocks with nine floors, having a total of sixty-four (64) 2-bedroom all-ensuite apartments, the project, on plot L. R. No.MN/1/5449, suit property; that the license was issued without adequate and robust public participation of the appellants who are directly negatively affected by the project; that the appellants were not allowed to cross-examine the 2nd respondent's witnesses during the hearing of the appeal before the National Environment Tribunal, where they were interested parties; that unless the temporary injunction order is issued the 2nd respondent, who has since the decision of the tribunal erected a store on the suit property and taken to social media to announce to prospective purchasers that the project was back on full swing, is likely to proceed with the construction, thereby exposing the appellants to serious loss and damages that cannot be compensated by monetary terms, and defeat the appeal.

2. The application is opposed by the 2nd respondent, through the replying affidavit of Adil Salim Awadh, director, sworn on the 2nd October 2024, in which he inter alia deposed that temporary injunction are sufficiently provided for under Order 40 of Civil Procedure Rules that has not been invoked in the instant application, and that section 130(2) of EMCA that has been invoked does not provide for injunctions; that the tribunal decision of 30th August 2023, dismissed the appeal with an order that each party bears their costs, and there was no order and or decision that was capable of being enforced as contemplated under section 130(2) of EMCA, which therefore does not apply here; that under section 130(3) of EMCA, the powers to stop injuries to the environment, pending the appeal or time to appeal has expired, are vested to the Director General; that the appellants approached the court before exhausting the available avenues under the law that bestows the Director General with powers to issue interim protection measures, before invoking the court under section 130(4) of EMCA; that the appeal does not raise any substantive questions, and its only fair the 2nd respondent, who has stopped the development for an year during the appeal before the tribunal, be allowed to continue with its project; that the 2nd respondent had followed the laid down process and obtained all the requisite approvals and permits from the County Government of Mombasa, NEMA and National Construction Authority, to undertake the construction; that the 2nd respondent had earlier applied for and obtained approval for change of use of the suit property from single to multiple residential dwelling; that as much as the appellants have the right to appeal against the tribunal decision, the 2nd respondent has a right to undertake the construction of the project; that the appellants have not demonstrated the damages and losses that they will suffer should the order sought not be granted; that the deponent of the supporting affidavit does not have authority to swear the affidavits on behalf of the other appellants; that the advertisement by Samfrance Properties Mombasa was marketing for Greenwood Nyali, while the project is situated along Mama Ngina Drive, and does not in any case amount to constructing; that the appellants had joined the tribunal matter as interested parties, and this appeal offends the extent interested parties can participate in proceedings as set in the case of Francis Karioki Muruatetu & Another versus Republic & 5 Others Supreme Court Pet. 15 & 16 of 2015 (consolidated): [2016] eKLR; that the tribunal held that the issue concerning the questionnaire survey was not raised by the primary applicants, and the interested parties/appellants were and still are limited to the issues raised by the primary applicants; that the 2nd appellant, who is wife to 1st appellant, was among the people who filled the questionnaire, and is surprising that they are claiming there was no adequate public participation; that the 2nd respondent shall suffer irreparable harm by stalling the project further by being exposed to economic and financial ramifications as well as litigations by purchasers, due to delay that may be occasioned that cannot be compensated by an award of damages; that the appellants have

not met the threshold for grant of injunction set in the case of Giella versus Cassman Brown, but in case the court was to grant the order, it is only fair and just for the appellants to deposit security for costs of Kshs.50 million, being the value of the revenue lost by the 2nd respondent since issuance of the license, and further continued loss pending the outcome of the appeal; that the application is misconceived, an abuse of the court process and should be dismissed with costs.

3. The appellants responded to the depositions in the replying affidavit through the further affidavit of Simon Kinyanjui, 1st appellant, sworn on the 11th October 2024, among others deposing that he has the authority of the other appellants to swear affidavits, execute documents and attend court and annexed a copy of the document dated 21st October 2023 to that effect, that was filed in the tribunal and duly served; that their application has invoked not only section 130(2) of EMCA but also Order 51 of Civil Procedure Rules and sections 1A, 1B & 3A of *Civil Procedure Act* that provides for any necessary application, and that the court can issue any orders for the just and expeditious determination of a matter; that contrary to the 2nd respondent's contention on the import of section 130(2) of EMCA, the tribunal decision dismissing the appeal was automatically stayed until the lapse of 30 days or until an appeal lodged against the decision is heard and determined; that the 2nd appellant was misguided by the 2nd respondent on the actual location of the project as one being along Mt. Kenya Road, which is 4.5 Kilometers away from Mama Ngina Road, where the project is actually situated; that though parties are bound by their pleadings, there is an exception where un-pleaded issue is fully canvassed by the parties, and the court may base its decision on such an issue; that as appellants are households who will directly be affected by the project, they should not be made to pay deposit of Kshs.50 million as security for costs of the appeal, that was occasioned by the 1st and 2nd respondents through issuance of the impugned license without observing the mandatory provisions of the law on public participation, EIA report and environmental degradation among others.

4. The learned counsel for the appellants and 2nd respondent filed their submissions dated the 11th October 2024 and 14th October 2024 respectively, which the court has considered.

5. The following are the issues for the determination by the court in the instant application:

    a. Whether the appellants have met the threshold for the injunctive order sought to issue pending hearing and determination of the appeal.

    b. Who pays the costs?

6. The court has carefully considered the grounds on the application, the affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:

    a. This appeal emanates from the decision of the tribunal of 30th August 2024 in Appeal No. 24 of 2023, which had been filed by Mark Odhiambo Otieno and Silver Bay Management Ltd, as the 1st and 2nd appellants, against the National Environment Management Authority and Parklane Towers Ltd, as the 1st and 2nd respondents. The appellants and respondents in the tribunal matter are now 3rd, 4th, 1st and 2nd respondents respectively. The appellants herein joined the tribunal matter as interested parties, and are shown at paragraph 7 of the copy of the tribunal proceedings annexed to the supporting affidavit, to have supported the appeal. They also filed the witness statement of Dr. Simon Kinyanjui dated 21st February 2024 and list of

documents of even date. As can be seen in paragraphs 7 and 8 of the tribunal judgement, the interested parties' main contention was that;

> 7. "..there was no adequate public participation, and the 2nd respondent failed to comply with the mandatory provisions of Regulation 17 of the Environmental (impact Assessment and Audit) Regulations, 2003, and section 58(2) of EMCA.
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> 8. In addition , the interested parties allege that the questionnaires issued to members of the public were misleading as they made reference to the project being undertaken along Mt. Kenya Road, yet the project is actually being undertaken along Mama Ngina Road. Lastly, it is the interested parties' case that the construction of the project is in violation of the designated plans under the Mombasa Integrated Strategic Development *Plan of 2015* – 2035 (Master Plan), as the project goes upto nine floors, against the height limit of the ground floor and only four additional floors are permitted under the Mombasa masterplan."
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> The proceedings further show that the appeal was heard through viva voce evidence, but the appellants only relied on the evidence of their expert witness.

b. This court is not expected to make any final determinations on any matters of facts and law at this interlocutory stage, as that has to wait until at the stage of judgement after the parties have presented their factual and legal presentations. However, due to the contestations between the parties herein, on what was the import of the tribunal decision of 30th August 2024, it is important to set out here extracts of the relevant tribunal judgement inter alia that:

> " 29. We have carefully reviewed the EIA project report and note that the report has detailed the environmental impacts that the project will have and the mitigation measures that will be put in place to address the said impacts. Some of the negative impacts identified by the report include drainage problems; loss of aesthetic value; stress on the existing resources; traffic jam, dust generation during construction, among other impacts. In equal measure, the report has also provided sufficient mitigation measures."
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> The tribunal went on to find at paragraph 30 that the appellants' concerns had been addressed by the EIA project report and held that;
>
> > " ..therefore they cannot claim that their concerns and views were not taken into account in the issuance of the EIA license. That in the event the EIA license conditions are not adhered to, the relevant agencies will be able to take appropriate action. In that regard, we are guided by the holding of the Environment and Land Court in Makau & 3 Others (Suing in their own name and on behalf of the Syokimau Residents Association) versus Amalia & 2 Others (Environment & Land Petition 14 of 2017) [2023] KEELC

20020 (KLR) (20 September 2023) (Judgement) where the court held as follows:

> "That being the case, it is my view that the concerns of the petitioners are in fact part of the conditions of the EIA license issued to the 1st respondent and therefore, I find that the concerns and views of the petitioners were taken into account in the issuance of the EIA license. I take the view that taking into account objection views does not only mean the application for an EIA license should be rejected. Even including those concerns as conditions on which the license is subject, is sufficient demonstration of considering the views of those affected by the proposed projects".

31. Lastly, the appellants claim that the project violates the zoning policy and regulations of the area. It is our finding that it is not within the jurisdiction of the tribunal to decide as to whether the proposed project is in breach of the zoning regulations. The issue of zoning and development permissions fall within the province of the County Government, and by extension County Physical and Land Use Planning Liaison Committee. Therefore, the issue of the alleged violation of the zoning regulations ought to have been referred to the County Physical and Land Use Planning Liaison Committee being the body clothed with the requisite jurisdiction.

32. In any event, no evidence was placed before the tribunal to show the zoning regulations that are applicable, if at all, in the area in question, and how the 2nd respondent has breached the same.

33. Based on the foregoing, it is our finding that the second issue for determination answers in the affirmative; the Environmental Impact Assessment Project Report is adequate in terms of identifying the potential environmental, social and safely impacts of the proposed project and providing adequate mitigation measures.

Conclusion

26. In view of the above analysis and findings, the conclusion becomes irresistible that the appellant's notice of appeal dated 21st August 2023 is devoid of merit. Accordingly, the same is hereby dismissed with an order that each party bears their own costs."

It is clear from the foregoing paragraphs of the tribunal judgement that the order made by the tribunal was to dismiss the appellants' appeal with an order each party to bear their own costs. That as the interested parties, current appellants, had supported the appellants' appeal, their

claim suffered the same fate. The tribunal decision was a negative order and did not bestow upon any party any positive benefit that was capable of being executed or stayed. The order only took the parties to their legal status before the filing of the appeal.

c. An appeal is just like any other suit, and authority to execute pleadings and or affidavits would be required to be exhibited or proved when filing the appeal, just as it was required in the first instance. The record confirms no such authority empowering Simon Kinyanjui, to swear the supporting affidavit on behalf of the 16 other appellants was filed by the time the memorandum of appeal and or the application dated the 20th September 2024 were filed. The 2nd respondent picked that fact as an objection through paragraph 37 of the replying affidavit to which the appellants responded through the further affidavit by attaching at paragraph *3* a copy of letter of authority dated the 21st October 2023, that was filed with the tribunal. In their submissions, the learned counsel for the 2nd respondent submitted that the authority filed was limited to representation at the tribunal and not in this appeal. The counsel referred the court to the decision in the case of Abdulla Abshir & 38 Others versus Yasmin Farah Mohamed [2015] eKLR, which I agree with, where the court held that:

> " 12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorised to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving authority, must be filed in the proceeding."

It is the contention of the 2nd respondent that the affidavit sworn by the interested party is defective as it fails to comply with requirements of the law and more specifically, Simon Kinyanjui lacks the authority to plead on behalf of the other appellants. That the affidavit sworn by the said deponent is incompetent, fatally defective and the entire application and appeal should be dismissed, with costs. Having found that no written authority by the other 16 appellants was filed authorising Simon Kinyanjui to swear the supporting and further affidavits in respect of the instant application on their behalf, it follows that the deponent is without capacity to represent those other appellants.

d. Applications for temporary injunctions are provided for under Order 40 of the Civil Procedure Rules that is appropriately headed "Temporary Injunctions and Interlocutory Orders". Looking at the appellants notice of motion dated the 20th September 2024, it is apparent it has not invoked the said Order 40. The only Order cited is Order 51 Rule 1 which provides that "All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide." The other provisions cited are section 130(2) of EMCA and sections 1A, 1B & 3A of *Civil Procedure Act*. The counsel for the 2nd respondent has inter alia submitted that the application is not properly before the court, as the provisions of the law and rules cited have nothing to do with the orders sought. The learned counsel referred to the decision in the case of Nakumatt Holding Ltd versus NEMA [2005] eKLR, where the court stated:

> " The applicant herein, and the appeal on which such an application hinges do not at all appear to have been brought under any of the proceedings above. To reiterate, the right of any person or litigant to access the court, and this is a constitutional right for

every person-natural or corporate-in Kenya, does not mean that one is not bound by the procedures through which such a person may move the court.....

The submissions and the attempt to rely on section 3 and 3A of the *Civil Procedure Act* are of no assistance to the applicant. Section 3 applies where there are no specific provisions. Here, the provisions exist. Section 3A deals with the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. This does not mean that the procedures to move the court are thrown out of the window. Section 3A does not permit a litigant to drag his opponent to this court, without summons or notice giving that other party opportunity to defend himself.

All in all, I find that the applicant has not properly moved this court and accordingly under the purported provisions relied upon by the applicant, this court has no jurisdiction to grant the reliefs prayed."

I am in agreement with the position taken by the court in the above decision. In this instant application, in addition to section 3A dealt with herein above, there is reference to sections 1A and 1B, which provides for the objective of the Act and duty of the court respectively. There is also reference to section 130(2) of EMCA, which provides that:

> " No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced, until the appeal has been determined."

Though, the learned counsel for the appellants did not submit on the objection that the provisions cited on the application are not relevant to the issuance of injunctive orders, it is indeed true that none of the provisions of the law and rules cited in the appellants' notice of motion invokes the court's jurisdiction to issue a temporary injunction order.

e. To succeed, an applicant for injunctive orders has to meet the threshold set in the case of Giella versus Cassman Brown Company Ltd [1973] EA 358, of establishing a prima facie case with a probability of success; to show the likelihood of irreparable loss that cannot be compensated by an award of damages if the order is not issued; and that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) the court held as follows:

> " The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles:
>
> 1) whether the applicant has demonstrated a prima facie case with a probability of success.
>
> 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.
>
> 3) Where the balance of convenience tilts if the court is in doubt."

The court proceeded to discuss each of the above points and held as follows;

> " The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a Prima Facie case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed."

The court described irreparable injury as follows: -

> " 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...."

On the last principle, the court stated as follows on the balance of convenience:

> " The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

In this application, there is a serious challenge on the authority of the deponent of the supporting and further affidavits in swearing the said affidavits and executing the pleadings on behalf of the other appellants/applicants. This leads the court to find that the appellants have failed in the first test of establishing a prima facie case with a probability of success. On the issue of suffering irreparable loss, there is no particularization of the nature and extent of the likely loss in the application and they have failed to show that the balance of convenience should tilt towards issuing the order.

f. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where for good cause the court orders otherwise. In this application, I am of the view that the costs of the application should abide the outcome of the appeal.

7. Flowing from the foregoing conclusions, the orders that commend themselves to be issued are as follows:

a. That the appellants' notice of motion dated the 20th September 2024 is without merit.

b. The application is therefore, dismissed.

c. The costs to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellants: M/s Osewe

Respondents: Mr. Salim Khalid for 2nd Respondent and holding brief for Maina for 1st Defendant.

Leakey– Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.