



Sikalieh (Being Chairman of and Suing in Public Interest and on Behalf of Karen Langata District Association) v Kenya Railways Corporation & 5 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition E028 of 2024) [2024] KEELC 7526 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E028 OF 2024**

**AA OMOLLO, J
NOVEMBER 7, 2024**

BETWEEN

**SAMORA SIKALIEH PETITIONER
BEING CHAIRMAN OF AND SUING IN PUBLIC INTEREST AND ON
BEHALF OF KAREN LANGATA DISTRICT ASSOCIATION**

AND

**KENYA RAILWAYS CORPORATION 1ST RESPONDENT
CHINA RAILWAY DESIGN CORPORATION 2ND RESPONDENT
APEC CONSORTIUM COMPANY LIMITED 3RD RESPONDENT
MINISTRY OF ROADS & TRANSPORT 4TH RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF ROADS & TRANSPORT ... 5TH
RESPONDENT
THE ATTORNEY GENERAL 6TH RESPONDENT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED
PARTY
KENYA FOREST SERVICE INTERESTED PARTY**

RULING

1. This determination is with respect to the notice of motion application dated 24th July, 2024 and 23rd September, 2024 under article 23(1) of *the Constitution*, section 3 & 13(7) of the *Environment and*



Land Court Act and section 3(3) of the Environment Management Coordination Act. In the first application, the Petitioners/Applicants moved the court for ORDERS:

1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. That Pending hearing and determination of this Petition, a temporary injunction be and is hereby issued to prevent, stop or restrain the said Respondents and or anyone claiming under them from financing, undertaking, proceedings, mapping, carrying out construction works or any related activities for the said proposed Ngong-Riruta Meter Gauge Railway Commuter Railway Line within Karen area comprising of residential homes, private land and public land comprising of Ngong Forest reserve and environs.
 6. That in the alternative to prayer 5 above and pending hearing and determination of this Petition, a temporary injunction be and is hereby issued to prevent, stop or restrain the said Respondents and or anyone claiming under them from proceeding, carrying out, financing or undertaking the construction of the proposed Ngong-Riruta Meter Gauge Railway Commuter Railway Line passing through Riruta-Karen-Bulbul-Ngong in Kajiado and Nairobi County.
 7. That this Honourable Court do grant such other or further orders or directions as it may deem expedient, fit, just or equitable.
2. The motion is premised on the grounds listed on its face, the supporting affidavit sworn on the same date and a further affidavit sworn on 4th October, 2024. The application is opposed vide various replying affidavit of the Respondents.
 3. The application of 23rd September, 2024 was brought by the 1st Respondent seeking orders;
 1. Spent
 2. That pending the hearing and determination of the Petitioner's application dated 24th July, 2024 and the petition of even date, this Honourable Court be pleased to vary, set aside, and/or vacate the injunctive orders issued on 15th August, 2024 which restrained the 1st Respondent from constructing the Riruta-Ngong meter gauge railway.
 3. That this Honourable Court be pleased to issue such further or orders as it may deem fit in the circumstances.
 4. That the costs of this Application be provided for.
 4. The application was supported by grounds on the face of it and affidavit of Philip Mainga sworn in support thereof. The Petitioners opposed the application relying on their earlier application as well as the further affidavit of 4th October, 2024.
 5. Directions were taken for filing of written submissions which directions all the parties complied with the matter for determination;
 1. Whether the Petitioners Motion of 24th July, 2024 is merited and/or
 2. The injunction application be disallowed by granting the motion dated 23rd September, 2024.



6. The 1st Respondent submitted that the petitioner vide their submissions are digressing from their prayers in the application by submitting on the purpose of conservatory orders while the application sought for orders of temporary injunction. Order 40 rule 2(1) of the Civil Procedure Rules states that;

“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”
7. The principles governing the grant of conservatory orders were discussed in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji, IEBC & Others* (2014) KESC 49 (KLR). The Supreme Court stated thus at paragraph 86;

“Conservatory orders” bear a more decided public-law connotation: for these are orders 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.”
8. Although the case law cited by the 1st Respondent states that Conservatory Orders connotes public interest Order 40 rule 2 is wide and provides for injunction application where there is any injury of a like kind relating to property or a right. In any event, the submissions rendered by the petitioner would not change the facts pleaded in support of the orders sought.
9. In urging the court to grant the orders, the Petitioner argued that they have established a prima facie case with a probability of succeeding in that the Respondents have without public participation and or consultation of the residents of Karen and its environs commenced construction of a proposed Riruta – Ngong Meter Gauge Railway Commuter line at Ngong in violation of article 10, 42, 69, 153, 201 and 232 of *the Constitution*. That the 1st and 3rd Respondents have admitted the absence of procuring an ESIA license.
10. The 2nd and 3rd Respondents through their replying affidavit sworn by Engineer Misheck Waititu responded both to the application and the Petition; Inter alia, Engineer Waititu set out the undertaking of public participation so far done including preparing a study report which they submitted to NEMA in May, 2024 for the application of THE ESIA license. These Respondents denied undertaking any construction activities at the Vet Lab grounds in Ngong, Kajiado County. In the alternative Eng. Waititu avers that the alleged activities undertaken were only ceremonial.
11. It is averred by the 2nd & 3rd Respondents that both the Petition and the application are premature as the construction licence was yet to be issued and the application had been submitted to NEMA who had invited views. They also took issue with the jurisdiction of this court since the project site is in Kajiado County.
12. In the 1st Respondent’s Replying Affidavit, they stated that they engaged the public in 8 locations listed (e.g Ngong Stakeholders on 29th November 2023 and 2nd February 2024; Karen Residents on



- 12th April, 2024). However the Petitioner submits that the purported stakeholder engagement with the Petitioner on 12th April, 2024 was an afterthought, illusory, cosmetic and devoid of quantitative and qualitative components. According to the Petitioner, the purpose of this meeting was to be provided by information regarding the project and from which information they could present their views afterwards.
13. At this inter-locutory stage of the proceedings, this court cannot dig into the quality or quantity of public participation undertaken by the Respondents. The case of British America Tobacco Kenya PLC (formerly BAT Kenya Ltd) Vs. CS Minister of Health & 2 Others (2019) KESC 15 (KLR) is also not distinguishable now as it was a final decision while here we are dealing with an interlocutory application.
 14. The Petitioner asserted that the legislative procedures required to be followed (inter alia section 58 of EMCA) by article 69 of *the Constitution* have not been complied with by the Respondents. In support of this argument, he cited the case of Ken Kasinga vs Daniel Kirui and 5 Others (2015)eKLR. He criticises the process advertised by the 1st Interested Party on 23rd July, 2024 inviting comments from the public by 16th September, 2024 as illusory, cursory and public relations stance. This petition and application were filed before the expiry of the period set out in the newspaper advertisement placed by the 1st Interested Party. Although the Petitioner aver the advertisement was a public stance by NEMA, it is one of the processes in undertaking public participation. This provided them an avenue to give their comments and not ignore it altogether. On this account, and the evidence of dates of stakeholder engagement shown by the 1st Respondent, I am persuaded to find that this application was prematurely filed.
 15. In terms of the need to issue stop orders to the commencement of the project without obtaining the requisite ESIA licenses, the Petitioner annexed several letters exchanged with the 1st Respondent as well as some minutes. There were no photographs annexed to the affidavit in support of this application to show proof of any on-going construction. The Photos were included in the application for contempt and which as I will comment in that application were not sufficient proof that the activities complained of which is said to have taken place at the Vet lab grounds was ongoing. Thus, there were no activities that were going on which were likely to breach the rights of the Petitioner under article 42 and 69 of *the Constitution* to warrant the intervention of this court at this particular point in time.
 16. Having formed the opinion that the application was premature, I will not discuss the application under the heading of irreparable loss and or balance of convenience as the loss cannot be ascertained where the construction has not commenced. Consequently, the application is dismissed.
 17. Given that the application dated 24th July, 2024 has been dismissed, the orders of interim injunction issued on 15th August, 2024 stands vacated. This dispenses with the 1st Respondents application dated 23rd September, 2024 since there exists no orders to be varied and or set aside.
 18. This is a public interest litigation and the Petition is yet to proceed on merits hence it cannot be said that the issues raised in the petition are frivolous. Therefore, I order each party to meet their costs of the application dated 24th July, 2024.

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

A. OMOLLO

JUDGE

