



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. CASE NO. 342 OF 2020

HIRAM MALUKI KASONI

(Suing as Chairman of Committee and

Resident of TWIMUMA AREA OF GAI SUB-LOCATION,

KYUSO SUB-COUNTY).....1ST PLAINTIFF

ANNASTACIA NDUKU KIMEU

(SUING AS CHAIRPERSON KYUSO GIRLS

SECONDARY SCHOOL.....2ND PLAINTIFF

MEUMA JOB MWANGANGI.....3RD PLAINTIFF

JOHN MALUKI MWANGANGI.....4TH PLAINTIFF

JONAH MUTUA MWANGANGI.....5TH PLAINTIFF

JONATHAN MBUTI.....6TH PLAINTIFF

KISINGA MUTHUI.....7TH PLAINTIFF

KITONDO MALUKI.....8TH PLAINTIFF

PHILIP WAMBUA.....9TH PLAINTIFF

MALIA MUSONO.....10TH PLAINTIFF

ROSE KISINGA.....11TH PLAINTIFF

AGNES MUTHAMI.....12TH PLAINTIFF

MWOVA MUTHAKI.....13TH PLAINTIFF

NDUNI MUSANZA.....14TH PLAINTIFF

JOSEPH MUSILI MWANGARI.....15TH PLAINTIFF

PETER MWANGANGI MUSILI.....16TH PLAINTIFF

JUSTUS MWATHE MUSEE.....17TH PLAINTIFF

PETER MUTATI KYALO.....18TH PLAINTIFF

JAMES WAMBUA KYALO.....19TH PLAINTIFF
GRACE KATINDI KYALO.....20TH PLAINTIFF
BENARD M. KITUNDU.....21ST PLAINTIFF
DANIEL MBITI MULONZYA.....22ND PLAINTIFF
DEBORAH MUTUA.....23RD PLAINTIFF
DEBORAH MWANGANGI.....24TH PLAINTIFF
JENETER NZAMBI MWANGANGI.....25TH PLAINTIFF

VERSUS

KARSAN RAMJI & SONS LIMITED.....1ST DEFENDANT
NDOVU CEMENT LIMITED.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 30th October, 2020, the Plaintiffs have sought for the following orders:

a) That an order of temporary injunction restraining the Defendants whether by themselves, their assigns, employees, agents, proxies and/or any other person working under their instructions from engaging in any acts of excavations or digging out hard rocks through blasting on the parcel of land known as Kyuso/ Kyuso B /1066/1067/1068 & 1082 pending the hearing and determination of the suit.

b) That an order of temporary injunction restraining the Defendants whether by themselves, their assigns, employees, agents, proxies and/or any other person working under their instructions from driving any prime movers or trucks on the parcels of land known as Kyuso/ Kyuso B /1066/1067/1068 & 1082 or in any way ferrying or transporting hard rocks or limestone or any type of soil pending he hearing and determination of the suit.

c) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st and 2nd Plaintiffs who deponed that they have the authority of the rest of the Plaintiffs to swear the Affidavit on their behalf. According to the Plaintiffs, they are residents of Twimuma area where the Defendants are engaged in excavation and transportation of limestone materials and other related rocks and that the Defendants were issued with a permit to engage in the said works.

3. The Plaintiffs deponed that on 24th October, 2019, the 1st Defendant, without engaging the residents of Twimuma area, and in particular the 2nd Plaintiff, blasted holes and occasioned cracks on the Plaintiffs' houses, school, demolished graves and other structures; that the said incidence was reported to the police vide OB No. 13/01.02.2020 and that classes and dormitories in the 2nd Plaintiff's school have suffered cracks as a result of the Defendants' blasting and excavation of stones.

4. It was deponed that through an *ad hoc* committee, the Plaintiffs have had meetings with the Defendants to discuss the way forward and how to address the damages occasioned at Kyuso Girls Secondary School and Twimuma area but the Defendants have ignored their pleas and that as a result of the blasting and excavations, the Plaintiffs have been denied a peaceful and quiet enjoyment of their land.

5. The Plaintiffs deponed that the Defendants ought to be guided by the Mining Act, 2016 and the Environmental Management and Coordination (*Noise and Excessive Vibration Pollution*) (*Control*) Regulations, 2009; that the Defendants have an approval to transport limestone issued by the County Government; that the Defendants also have a license and business permits to carry out mining of the natural resources and that the area within which the Defendants are mining limestone is in Mwingi Town.

6. The Plaintiffs finally deponed that unless restrained by this court, the Defendants are likely to continue with the excavation and transportation of limestone which will cause great harm to the Plaintiffs' properties as well as the premises of the residents of Twimuma area.

7. In response, the 1st Defendant's Director deponed that the 1st Defendant is the registered proprietor of the parcel of land known as Kyuso/Kyuso B/1067; that the 1st Defendant is engaged in lawful activities of excavating and crushing stones on the said parcel of land and that the 1st Defendant has been issued with licenses, permits and approvals which remain valid and which have not been challenged.

8. It was deponed that permits were issued to the 1st Defendant after due process as set out in law and as confirmed by the Plaintiffs; that the permits and licenses that were issued to the 1st Defendant included a Single Business Permit issued by the County Government of Kitui in 2019, 2020, and 2021; licenses from the Ministry of Petroleum and Mining issued under the provisions of the Explosives Act; and the

Environmental Impact Assessment License issued by NEMA on 5th March, 2019.

9. The 1st Defendant's Director deponed that the 1st Defendant has at all times complied with all the conditions provided under the licenses and the permits; that the allegation that the Defendants have caused damage to the Plaintiffs' premises is devoid of any evidence and that the photographs produced by the Plaintiffs are not proof that the activities complained of caused damage to the Plaintiffs' premises.

10. It was deponed that the 1st Defendant always notifies the Ministry whenever a blast is to be conducted; that he is not aware of the alleged complaint made to the police by the Plaintiffs; that excavating of stones alone cannot cause any damage to any building and that such a complaint cannot on its own be the basis for seeking an injunction.

11. The 1st Defendant's Director deponed that the Plaintiffs' properties are two kilometers away from the suit property and that the documents produced by the Plaintiffs as Exhibit HK4 are neither signed, nor addressed to the Defendants, and do not bear any evidence of being received by the alleged recipients.

12. It was deponed that whereas there had been various discussions with the community members, the discussions have revolved around the Defendants' corporate social responsibility on the benefits which they can bring to the community including the building of classrooms, improving of road networks, creation of employment and assisting in electricity connection.

13. The 1st Defendant's Director finally deponed that the Defendants' activities have not interfered with the use of any land by the Plaintiffs; that the mining and crushing of stones is in full compliance with the conditions set out in the permits and licenses and that the Plaintiffs have not established a case for the grant of an injunction as prayed.

14. In his submissions, the Plaintiffs' advocate submitted that the Defendants have caused blasting and vibrations while excavating limestone near their property and that the said activities are not only a source of nuisance due to the noise and vibrations emanating therefrom, but also a danger to Plaintiffs' properties.

15. The Plaintiffs' counsel submitted that as a result of the vibrations arising from excavation of limestone by the Defendants, their properties have developed cracks especially on the 2nd Plaintiff's school, the Plaintiffs' homes and other structures, including graves.

16. It was submitted that the activities by the Defendants are illegal in that rock blasting is not supposed to be carried out within a radius of two (2) kilometers from human settlement; that the Defendants have not disputed that they are blasting rocks while excavating limestone near the suit properties and that the Plaintiffs have placed evidence before the court in the form of photographs to show the damage that has been caused by the vibrations arising from the Defendants' activities of excavation of limestone.

17. It was submitted that the damage to the suit properties was caused by vibrations; that the intensity of the vibrations was in excess of the 0.5 centimeters recommended under Regulations 14(3) of the Environmental Management and Co-ordination (*Noise and Excessive vibration pollution control*) Regulations 2009 and that the Defendants ought to have been guided in its activities by the Mining Act, 2016 and the Environmental Management and Co-ordination (*Noise and Excessive Vibration Pollution Control*) Regulations 2009.

18. Counsel submitted that the Plaintiffs have established a *prima facie* case against the Defendants; that the damage to the Plaintiffs' properties, the inconvenience and the discomfort caused by excessive vibrations and the anxiety caused by the cracking of walls cannot be compensated by an award of damages and that the Plaintiffs have met the conditions for granting of a temporary injunction.

19. The Defendants' advocate submitted that the activities complained of are being undertaken on land that belongs to the 1st Defendant and its director; that there is no trespass that has been alleged and that the Defendants have the right to property under Article 40 of the Constitution and the same ought not to be curtailed through allegations which are void of any evidence.

20. Counsel relied on the case of ***Isabella Njoki Pere vs. China Communication Construction Company Ltd; MRG Trading Company Limited (Intended Interested Party) [2020] eKLR*** in which the court dismissed an injunction Application where the Defendant was excavating on its land and in line with the permits and approvals allowed.

21. It was submitted by the Defendants' advocate that contrary to the averments in the Plaintiffs' submissions, the 1st Defendant is not engaging in an unlawful activity since it has been issued with all the permits and licenses, a fact which the Plaintiffs have confirmed; that the Plaintiffs are guilty of laches and that the impugned excavations have been ongoing since the year 2019.

22. Counsel submitted that whereas the Plaintiffs have alleged that the actions of the Defendants have caused damage to their structures, the Plaintiffs have not provided evidence of the structures which have been affected or the excessive levels of vibrations which they allege to have caused the cracks and that the Plaintiffs have only produced photographs which cannot be confirmed to be the houses or structures which have been affected by the impugned excavation.

23. It was submitted that the photographs exhibited by the Plaintiffs do not show the timeframe when they were taken so as to confirm whether indeed the alleged cracks occurred during the activities complained of; that the Plaintiffs have generally claimed that the Defendants' actions have caused damage to their houses without pointing to the court the exact period complained of and that the photographs only show what appears to be walls and it cannot be concluded that these are houses or structures.

24. It was further submitted by the Defendants' advocate that the Plaintiffs have not provided any evidence to link the actions of the Defendants and the alleged damage to the structures; that the Plaintiffs have not provided any report or evidence from an expert such as damage assessment reports, valuation reports *etc* to prove how the Defendants' activities have damaged their properties or whether the

Plaintiffs' alleged structures have been constructed in accordance with the minimum requirements.

25. It was submitted by the Defendants' counsel that the Plaintiffs have not challenged the permits and licenses issued to the 1st Defendant; that they have not demonstrated in any way in which way the 1st Defendant has failed to observe the conditions set out in the permits and licenses and that the Plaintiffs have an alternative prayer for compensation which can be granted once the suit is heard and fully determined.

26. In the Application dated 30th October, 2020, the Plaintiffs are seeking for injunctive orders. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co Ltd (1973) EA 358 and Fellowes and Son v. Fisher [1976] 1 QB 122*).

27. What amounts to a *prima facie* case was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows:

“So what is a prima facie case? I would say that in civil cases it is 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.”

28. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR*, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

29. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

30. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation (*See the Nguruman case*).

31. It is not in dispute that the 1st Defendant is the registered proprietor of the parcel of land known as Kyuso/Kyuso B/1067. On the said land, the 1st Defendant is engaged in activities of excavating and crushing limestones. The Plaintiffs have admitted that the 1st Defendant has been issued with licenses, permits and approvals which remain valid and which have not been challenged.

32. The Plaintiffs' complaint is that on 24th October, 2019, the 1st Defendant, without engaging the residents of Twimuma area, and in particular the 2nd Plaintiff, blasted stones and occasioned cracks on the Plaintiffs' houses, school and demolished graves and other structures; that the said incidence was reported to the police and that classes and dormitories in the 2nd Plaintiff's school have suffered cracks as a result of the Defendants' blasting and excavation.

33. It is the Plaintiffs' case that the Defendants ought to be guided by the Mining Act, 2016 and the Environmental Management and Coordination (*Noise and Excessive Vibration Pollution*) (*Control*) Regulations, 2009 and that unless restrained by this court, the Defendants are likely to continue with the excavation and transportation of limestone which will cause great harm to the Plaintiffs' properties as well as the premises of the residents of Twimuma area.

34. To support the allegations that the activities on the suit property have occasioned cracks on their structures, including the 2nd Plaintiff's school, the Plaintiffs annexed on their Affidavit five undated photographs. The Plaintiffs also annexed on their Affidavit the licenses and permits that were issued to the Defendants by the County Government of Kitui, the Ministry of Mining and NEMA.

35. The 1st Defendant has denied that the excavation of the stones from its land have caused noise pollution or cracks on the Plaintiffs' structures. According to the 1st Defendant's Director, after due process, the 1st Defendant was issued a Single Business Permit by the County Government of Kitui in 2019, 2020, and 2021; licenses by the Ministry of Petroleum and Mining under the provisions of the Explosives Act; and the Environmental Impact Assessment License by NEMA.

36. The evidence before me shows that the 1st Defendant is not engaging in unlawful activities in the excavation of stones from its land since it has been issued with all the permits and licenses, a fact which the Plaintiffs have confirmed. Whereas the Plaintiffs have alleged that the actions of the Defendants have caused damage to their structures, the Plaintiffs have not provided evidence of the structures or houses which have been affected or how the excessive levels of vibrations have caused the cracks on their structures.

37. Although the Plaintiffs have produced photographs showing some walls with cracks, the photographs do not show the houses or structures which have been affected. Indeed, the photographs exhibited on the Plaintiffs' Affidavit do not show houses or classrooms, but rather, portions of what appears to be cracks on unidentified walls.

38. The five photographs exhibited by the Plaintiffs showing what appears to be cracks on unidentified walls. do not show the timeframe when they were taken so as to confirm whether indeed the alleged cracks occurred during the activities complained of. Furthermore, it is not clear to this court the person who took the photographs and the distance between the walls with cracks and where the actual blasting of stones is usual undertaken.

39. The Plaintiffs have generally claimed that the Defendants' actions have caused damage to their houses and classrooms without pointing to the court the exact period complained of. The Plaintiffs have also not provided any evidence to link the actions of the Defendants and the alleged damage to the structures, neither have they provided any report or evidence from an expert to show, *prima facie*, how the Defendants' activities have occasioned or are likely to occasion damage to their properties.

40. The Plaintiffs have not shown, *prima facie*, that the Defendants' activities of excavating stones on its land has occasioned cracks on their structures. Furthermore, the Plaintiffs have not challenged the permits and licenses issued to the 1st Defendant to undertake explosive activities on its land.

41. The Plaintiffs have also failed to demonstrate that the Defendants have failed to observe the conditions set out in the permits and licenses issued to it by NEMA and the other regulatory bodies. That being the case, it is my finding that the Plaintiffs have not established a *prima facie* case with chances of success. Having not established a *prima facie* case, I will not venture into whether the Plaintiffs will suffer irreparable damage that cannot be compensated if the injunction is not given or whether the balance of convenience tilts in their favour.

42. For those reasons, the Plaintiffs' Application dated 30th October, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 23RD DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE