REPUBLIC OF KENYA

IN THE ENVRIONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC NO. 13 OF 2020

GIDEON KOECH

KIPKOECH KIRUI

DAVID CHEPKWONY (Suing as the Chairman,Secretary and treasurer respectively of

CHEMOSIT COMMUNITY.....PLAINTIFF

VERSUS

KTDA POWER COMPANY LIMITED.....1ST DEFENDANT

EPC CONTRACTOR VS HYDRO/PVT LTD.....2ND DEFENDANT

SETTET POWER GENERATION COMPANY LIMITED.....3RD DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 7th April 2020 in which the Applicant seeks the following orders:

i. spent

ii. spent

iii. That an order of injunction to restrain the Defendants by themselves, their agents, employees and/or servants from further excavating, clearing, cultivating, or whatsoever constructing, developing, extracting, conveying or in any way carrying on with a small hydropower project in Chemosit river pending the hearing and determination of this suit.

iv. That the Defendants bear the cost of this application.

2. The application was supported on the grounds on the face of it as well as on the supporting affidavit, supplementary Affidavit and further Affidavits sworn by the Chairman of the Applicant, Gideon Koech on the 7th April 2020, 29th April 2020 and 23rd June 2020 respectively.

3. The said application was opposed by the Respondents' replying and further affidavits dated the 2nd June 2020 and 10th July 2020 respectively to which by consent the court directed that the same be disposed of by way of written submissions.

Plaintiff/Applicants' submission.

4. The Applicant's crux of the application is that the Respondents constructed a small hydropower project in total disregard to recommendations of the NEMA report and the law.

5. In so submitting, the Applicants framed their issue for determination on the on the principles laid down in the **Giella vs. Cassman Brown & Company Ltd (1973) EA 358** case. To this, they submitted that they had made out a prima facie case with a high chance of success in light of the holding in the **Giella vs. Cassman (supra)** for reasons that they were the land owners who stood to be affected by the said project but who had never been compensated by the Respondents.

6. That although the Respondents had compensated some people being a few land owners on the lower far end of the river, they had failed and/or neglected to compensate the Applicants and other land owners who were on the upper side of the river (near the highway) and whose parcel of land was different. That this was irrespective of an Impact Assessment report by NEMA that had directed that all land owners affected by the project be compensated. Reliance was placed on the case in **Solomon Too & Another vs Zipporah Jebichi Seroney & Another [2018] eKLR.**

7. That the owners of land parcel No. Kericho/Kabartegan/1328 where Kipsigis Teachers College stood would be affected as the digging of tunnel, which passed about 20 meters from its wall, would cause the walls to break thus putting the lives of the learners and tutors therein in danger.

8. That pursuant to the Respondents being issued with an approval by NEMA, they had changed the course of the plan initially submitted whilst seeking for the said approval, as evidenced by an annexed Plan marked as 'GK 2', without seeking for a second approval. The construction was therefore based on a new plan that was illegal and more so since the tunnels were now to pass through Chemosit-Kipkerieng road which fell under the County Government and from which no approval had been obtained.

9. That although the Respondents had raised the issue of the Applicants' locus standi yet under the provision of Article 22(2) as read with Article 23 of the Constitution, the Applicants could file suit on behalf of Chemosit community. They submitted that if the court found otherwise, then they sought for leave to amend their pleadings.

10. The Applicants' further submitted that the Respondents' activities were so adverse and if allowed to continue, the Applicants and the entire Chemosit community would suffer greatly. They expounded on the kind of suffering and loss aforementioned to the effect that injustice would be meted on the community as they had not been compensated, secondly that the youth members of the community depended on car wash trade for their livelihood for which the project would interfere and deprive them of the same, third, that the lives of the learners and tutors of Kipsigis Teachers Training college were in danger of the building collapsing on them due to the digging of the dam tunnels that passed a few meters from the walls of the institution.

11. The Applicants lastly submitted that the balance of convenience tilted in favour of granting them the injunction sought since the Respondents had failed to compensate them and had further changed the course of the plan without approval from NEMA.

Respondents' Submission.

12. The Respondents contained that the Applicants' application ought to be dismissed because they had neither made out a prima facie case nor established that they stood to suffer irreparable harm were the orders sought be declined. They framed their issues for determination as follows;

i. Whether the Applicant has established a Prima facie case with chances of success.

ii. Whether the Applicant stands to suffer irreparable harm.

iii. Where does the balance of convenience lie?

iv. Whether the Plaintiff is deserving of an order directing the Defendants to vacate the suit land.

13. On the first issue for determination, the Respondents submitted that the Applicants had not satisfied the conditions for grant of temporary injunction as set out in the case of **Giella vs. Cassman (supra).** That the Applicants purportedly agitated the claim on behalf of Chemosit community, an amorphous entity without any defined legal status which cannot and should not be clothed with authority to sue and/or be sued. That even if section 3(4) of the Environmental Management and Co-ordination Act expanded the locus to sue on account of the environmental infrastructures, such claims ought not to be frivolous or constitute an abuse of the court process and must be instituted by a legal person clothed with authority and capacity to act. That the Applicant did not establish how justifiable their claim was at the very least a proximate cause to warrant intervention of the court. That there was no evidence submitted in support of the allegations of the environmental violations purported to have been committed by the Respondents, the Respondents having sought and procured approvals to pave way for the project and measures having been taken to mitigate any negative impacts of the project in line with the environmental and social impact assessment report. That claims of compensation were personal in nature and ought to be personally canvassed by the affected parties if any.

14. It was their submission that the Applicant had not sought for environmental conservation orders but had instead sought for injunctive relief whose effect was akin to that of an Environmental Conservation order. That the Applicant had further not offered to pay compensation as anticipated under Section 112(5) of the Act as read together with Section 116(3) to warrant the exercise of the court's discretion to issue an Environmental Conservation order.

15. The Respondent also submitted that the Applicant had not provided particulars of the properties and/or parcels of land and sought to be burdened by an environmental easement to enable the court to exercise its discretion. The Respondent concluded therefore that no prima facie case had been established.

16. On the issue as to whether the Applicant stood to suffer irreparable harm, the Respondents' submission was that the Applicants had not submitted any evidence in support of such an assertion so as to assist the court in determining the application. That the said evidence would have been critical in view of the Respondents averments that no member of the public will be denied access to the river and further that the volume of the water to be obstructed would be minimal, and in any event will be discharged back into the river about 800 meters downstream.

17. The Respondents submitted that the balance of convenience lay with allowing the continuance of the project noting that they had procured all approvals necessary to execute it and the fact that they had expended huge sums of money. That were the orders issued as proposed by the Applicants allowed, it would occasion them undue hardship and loss as they would be forced to abandon the project midway occasioning deterioration and wastage of materials already procured. They thus sought for the dismissal of the Applicant's application.

Determination

18. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

19. This suit was instituted by way of plaint by the 3 Plaintiffs who are chairman, secretary and treasurer of Chemosit community respectively. It is pleaded that the Defendants had embarked on the construction of a hydropower project in total disregard of the environmental impact assessment project report and the community interests and as such the Plaintiff members' livelihoods had been put at risk since the community largely depended on the section of the river Chemosit currently within the construction zone to water their animals, to carry out irrigations among other activities. That further, the tunnels of the said project passed along the walls of several buildings, residential houses among them Kipsigis Teachers Training College, which constituted a great threat to the buildings as it made them unstable hence compromising the safety of the occupants.

20. The Defendants have denied the Applicant/Plaintiffs assertion/allegations stating that whereas it was true that they were undertaking a small hydropower project along the Chemosit river to generate power for KTDA affiliated tea factories namely Litein, Kapkatet, Momul and Tegat, they had purchased land and acquired easement from private land owners who were compensated. That they had also acquired all the necessary approvals from the relevant Government bodies which licenses also included a well-researched environmental impact report.

21. That a public participation was also conducted prior to approval by NEMA and questionnaires served during the public participation as per their annexed documents. That measures as highlighted in the environment and management plan /monitoring plan had been put in place to mitigate the negative impact and maximize positive impacts associated with the project activities, as per the annexures on their supplementary replying affidavit.

22. This suit raises fundamental questions on the conservation and management of the environment, and it is not necessary for a person making such an application to demonstrate, that the issues being raised concern her/him personally, or indeed, demonstrate that (s)he stands to suffer individually. Any interference with the environment affects every person in her/his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment. In other words, in an environmental matter, *locus standi* as known and applied under the common law, is not applicable.

23. Article 42 of the constitution provides as follows;

> Every person has the right to a clean and healthy environment, which includes the right—
>
> > (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
> >
> > (b) to have obligations relating to the environment fulfilled under Article 70.

24. Article 70 of the constitution provides as follows;

> (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
>
> 2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate give any directions, it considers appropriate—
>
> > (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
> >
> > (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
> >
> > (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

25. From the above provisions of the Constitution, it is clear that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

26. On the first issue as to whether the Applicants have established a prima facie case, Section 3 of the Environment Coordination and Management Act (EMCA), 1999 provides as follows :-

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) **A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury** provided that such action—

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development;

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intergenerational and intragenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

27. While Section 58 of the EMCA states that

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee

(4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.

(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by

an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

28. Section 59 of EMCA states as follows;

(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—

(a) a summary description of the project;

(b) the place where the project is to be carried out;

(c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and

(d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

(2) The Authority may, on application by any person extend the period stipulated in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

29. And section 60 of the EMCA stipulates as follows;

A lead agency shall, upon the written request of the Director-General, submit written comments on an environmental impact assessment study, evaluation and review report within thirty days from the date of the written request.

30. In the case of **Nguruman Ltd vs Jan Bonde Nielsen & Others C.A civil Appeal No. 77 of 2012,** the Court of Appeal while addressing the issue of a prima facie case stated thus:

"The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed".

The Court then went to state as follows*:*

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. <u>All that the Court is 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</u>".

31. A close look at the Respondents' annexures and in consideration of their submission, and further, in pursuant of the fact that at this juncture the court is not obliged to examine the merits of the case closely but to consider whether the material presented is enough to conclude that there exists a right which has been apparently infringed by the Respondents, I find that there is sufficient evidence herein produced to show that the project herein had been cleared by the relevant authority, including National Environment Management Authority (NEMA), Water Resource Authority (WRMA), County Government of Kericho, Ministry of Energy and Petroleum, and National Construction Authority. There was also an Environmental Impact Assessment done to which there were both positive and negative aspects attributed to the project to which the Respondents having sought and procured approvals to pave way for the project had taken measures to mitigate any negative impacts of the project in line with the environmental and social impact assessment report.

32. Further there was also public participation on the 5th June 2015 wherein it had been resolved that any public views would be submitted to NEMA to enable them make a decision on whether or not to approve the proposed project. The subsequent approvals herein annexed by the Respondents was indicative enough that project had been cleared by the relevant authorities.

33. Having found as above, I find that the Plaintiffs/Applicants have not established a prima facie case and in terms of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR,** the court observed as follows:-

"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

34. Consequently, I dismiss the application dated 7th April 2020, with costs to the Respondents. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF APRIL 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE