



**Kyamue Company Limited & 2 others v Kenya National Highway Authority & another
(Environment & Land Petition E010 of 2022) [2023] KEELC 18598 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E010 OF 2022
A NYUKURI, J
JULY 5, 2023
IN THE MATTER OF ARTICLES 42, 69 & 70 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF ARTICLES 40 & 47 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,
2015**

BETWEEN

**KYAMUE COMPANY LIMITED 1ST PETITIONER
SAMSON MUKEKU MUTUKU 2ND PETITIONER
AGNES MUKEKU MUTUKU 3RD PETITIONER**

AND

**KENYA NATIONAL HIGHWAY AUTHORITY 1ST RESPONDENT
CHINA RAILWAY 21 BUREAU GROUP LIMITED 2ND RESPONDENT**

RULING

1. Before court is a notice of motion dated May 24, 2022 filed by the petitioner seeking the following orders;
 - a. Spent



- b. Spent
 - c. Spent
 - d. Pending interpartes hearing of the Petition, a conservatory order be and is hereby issued restraining the Respondents from diverting/channelling, by way of culverts or such other means, storm water from the ongoing construction of the second carriage way of Athi River – Machakos turn off road (A109) project to the Petitioners’/Applicants’ plots; to wit Title Nos. Mavoko Municipality Block 61 (GIMU) 756, 765, 787, 788 and 789.
 - e. Pending interpartes hearing of this petition; a conservatory order be and is hereby issued halting works with respect to the ongoing construction of the second carriageway of Athi River – Machakos turnoff Road (A109) project, only in so far as they concern the channelling/diversion of storm water by laying drainage culverts/outlets leading to/draining at the Petitioners’/Applicants’ plots; to wit Title Nos. Mavoko Municipality Block 61 (GIMU) 756, 765, 787, 788 and 789.
 - f. Costs be in the cause.
2. The application is supported by the grounds on its face as well as the affidavits of Alexander M. Muthengi and Samson Mukeku Mutuku who are the director of the 1st Petitioner and the 2nd Petitioner respectively. The applicants’ case is that the 1st Petitioner is the registered proprietor of Title Nos. Mavoko Municipality Block 61 (GIMU) 765, 787, 788 and 789, while the 2nd and 3rd Petitioners are registered proprietors of Mavoko Municipality Block 61 (GIMU) 756 (suit properties). They stated that the Petitioners have undertaken developments on their properties while the Respondents were carrying on construction of the second carriage way of Athi River – Machakos turn off road (A109) project where the 2nd Respondent was responsible for the works.
 3. The Petitioners complained that the 1st Respondent had caused diversion of storm water paths into their plots by way of culverts and or drainage channels. They stated that the Respondent’s actions were violating their rights. They asserted that although they have on several occasions written to the Respondents proposing alternatives to address the issue, but the Respondents have neglected to consider their plight. They stated that the storm water has flooded and caused damage to the Petitioners’ perimeter walls and other structures and that they may cave in, which is a danger to their lives and well being. They stated that the diverted storm water threatened their property rights and exposed them to the risk of erosion and pollution. They attached titles of the suit properties, CR 12, letters to the 1st Respondent, and photographs of the impact of water on their buildings.
 4. The application was opposed. Milcah Muendo the Assistant Director Mapping, Survey Department, Directorate of Highway Planning and Design at the Kenya National Highways Authority, the 1st respondent, swore a replying affidavit dated July 13, 2022. It was the 1st respondent’s case that the Petitioners’ claim does not meet the threshold for grant of conservatory orders set out in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR. She stated that if the Petitioners have a claim, then damages would be sufficient compensation.
 5. She stated that granting orders sought would result in a great financial harm to the public interest which would lead to unwarranted shut down of the second carriageway of Athi River – Machakos turnoff project which is for the benefit of the residents of Machakos and Nairobi counties and the country at large. She stated that the 1st respondent had obtained the necessary approvals and adequate mitigation measures had been put in place.



6. It was the 1st respondent's assertion that if the orders sought are granted, the 1st respondent will be condemned to pay huge financial penalties, claims, interest and costs whereas the Petitioners can easily be compensated by damages if they succeed in the petition. She stated that it is common knowledge that the stretch between Nairobi and Machakos counties along Nairobi Mombasa Highway is currently experiencing massive traffic congestion and that therefore granting conservatory orders will greatly inconvenience the general public. Further that public interest lies in allowing construction of the road.
7. She conceded that the applicants' parcels are adjacent and share a common boundary with the road under construction. She stated that before the construction of the road began, an Environmental Impact Assessment Study was undertaken and potential impacts of the project identified, public participation was done, the impact of the project on adjacent properties and proprietary rights of owners identified and mitigation measures taken. She maintained that although members of the public were invited to give their views, the Petitioners never raised any objection and that they are therefore estopped from raising objections at this critical stage of the construction.
8. It was the 2nd respondent's assertion that the 2nd respondent had been granted a right of way by the 1st respondent to carry out construction activities reasonably and lawfully. She maintained that the Petitioners' properties were located within the riparian land (stream) and denied the assertion that the Respondents had diverted storm water to the Petitioners properties. She insisted that the flooding was caused by heavy rains and that therefore the same was an act of God. She maintained that there was no evidence to show that the respondents had diverted storm water to the suit properties. She denied that the petitioners wrote to the Director General of the 1st Respondent in terms of section 67 of the [Kenya Roads Act](#).
9. She deposed that the Respondents have not diverted any storm water to the suit properties but stated that the water has been flowing on its natural water course. She denied allegations that the Respondents had violated the Petitioners' rights to a clean and healthy environment and the right to own property. She stated that the suit did not comply with the mandatory provisions of section 120 of the [Public Health Act](#). She attached a copy of the NEMA licence and a copy of a letter dated 19th April 2022 from the Water Resources Authority addressed to the Resident Engineer of the 1st Respondent annexing an excerpt of the Topographical Survey of Kenya Sheet Numbers 148/4 – Nairobi and 149/3 – Mua Hills and copies of the Topographical Map Sheets for 148/4 – Nairobi and 149/3 – Mua Hills.
10. The 2nd Respondent also opposed the application. Feng Minsheng, the 2nd Respondent's authorized agent swore a replying affidavit dated 19th August 2022 in opposition to the application. It was the 2nd Respondent's case that the 2nd Respondent was an independent contractor working under instructions of the 1st Respondent who is its employer. He stated that the application sought to stop an act which had already happened as the 2nd Respondent had already constructed a culvert and awaiting handing over to the 1st Respondent. That the construction of the culvert was strictly in accordance with the contract with the 1st Respondent and according to the specifications of the 1st Respondent and therefore there is no fault on the part of the 2nd Respondent.
11. He further deposed that the culvert in issue namely the culvert at KM3+300(LHS Carriageway) has been in existence and the instructions from the 1st Respondent to the 2nd respondent was to enlarge it. He averred that the respondents had not trespassed onto the petitioners' land. He maintained that the project has been undertaken with the highest duty of care and the claim by the petitioners is malicious. According to the 2nd respondent, the 1st and 2nd respondents held several meetings with the Petitioners and it was concluded that the Petitioners' parcels were on riparian land and that therefore the damage they allege to have suffered is a result of mother nature taking its course and an act of God and not due



to the actions of the Respondents. He stated that the 2nd Respondent was wrongly sued in this case. He attached a letter of authority to plead, photographs of the culvert in issue, drawings of the said culvert and photographs of the previous culvert.

Analysis and Determination

12. I have carefully considered the application, the supporting affidavit as well as the replying affidavits. The sole issue that arise for determination is whether the Petitioners/Applicants have met the threshold for grant of conservatory orders.

13. Rule 23 (1) of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, provides for the court's jurisdiction to grant conservatory orders in a pending Constitutional Petition as follows;

Despite any provision to the contrary, a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

14. Principles for grant of conservatory orders in Constitutional Petitions are now well settled. It is incumbent on the Applicant to demonstrate a prima facie case with a likelihood of success and also that unless the conservatory orders are granted there is real danger that they will suffer prejudice as a result of violation of threatened violation of *the Constitution*, even in the context of public law and public interest.

15. The threshold for grant of conservatory orders were laid down by the Supreme Court in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR as follows;

(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 applicant’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.

16. Essentially therefore, a party seeking conservatory orders must demonstrate that they have a merited case with a likelihood of success in the context of the public interest attaching to the dispute viewed against Constitutional values and the import of the orders sought. There must be a clear demonstration of a prima facie case that is arguable and not frivolous. In the case of the *Board of Management of Uburu Secondary School v. City County Director of Education & 2 others* [2015] eKLR, the court observed as follows;

26. it is my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

17. In the instant application, the Petitioners contend that in the construction project of the second carriageway of Athi River – Machakos turnoff road (A109) project, the Respondents have constructed a culvert which has channelled storm water to the Applicants’ parcels of land. To demonstrate these allegations, the Petitioners attached their title documents, photographs of their properties and letters of complaint to the 1st Respondent’s officers.



18. On the other hand, the Respondents have rebutted the Petitioners' claim by stating that the Petitioners' properties are on riparian land and the flood waters therein are a result of heavy rains, an act of God and a result of mother nature taking its course. They stated that the culvert in issue has been an existing culvert which was merely enlarged. They stated that the construction was in accordance with NEMA licence with all mitigation measures put in place. They attached a copy of the NEMA licence, a letter from the Water Resources Authority addressed to the Resident Engineer; an excerpt of the topographical Survey of Kenya Sheet Number 148/4 – Nairobi and 149/3 – Mua Hills and copies of those Topographical Map Sheets; and photographs and drawings of the impugned culvert.
19. Therefore in the suit herein, the dispute turns on whether the water in the Petitioners' properties are a result of the Respondents' actions of channelling storm water to their properties; in the course of construction of the road project herein. In so far as the application for conservatory orders is concerned, the question then would be whether the Petitioners have demonstrated a merited prima facie case, one that is not frivolous, but arguable bearing in mind the national values and the public interest involved. And the second issue would be whether denial of conservatory orders sought would prejudice the Petitioners bearing in mind the proportional magnitude of the prejudice.
20. In view of the above, on the question of a prima facie case, it was upon the Petitioners to demonstrate that they have shown at prima facie level that the Respondents' actions have violated or threatened to violate their rights. I have considered the annexures produced by the Petitioners. The photographs produced show water on their property and nothing more. The source of water is not demonstrated although they claim the same was channelled to their properties by the Respondents.
21. I have considered the Topographical Map Sheets 148/4 – Nairobi and 149/3 – Mua Hills and the letter by the Water Resources Authority dated 19th April 2022. The same clearly demonstrate that there is GIMU seasonal stream within the location of the Petitioners' properties, and it is therefore expected that any rain water will get into the natural water course, in this case the GIMU seasonal stream. It was therefore upon the Petitioners to show that the flooding is not as a result of being on riparian land along GIMI seasonal steam. Having considered the evidence on record, I find and hold that the Petitioners have not placed any material before this court to demonstrate the nexus between the culvert constructed on Mombasa Road on the disputed road and the flooding in their properties. In the premises, this court is not satisfied that the Applicants have demonstrated a case with merit to deserve grant of conservatory orders.
22. The upshot is that the application dated May 24, 2022 lacks merit and the same is hereby dismissed with costs to the Respondents.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Njoroge for 2nd Respondent

No appearance for Applicants

No appearance for 1st Respondent

Josephine – Court Assistant

