Sikalieh (Suing as the Chairman of Karen Langata District Association) v Karuna Holdings Limited & 6 others (Environment & Land Petition E060 of 2022) [2023] KEELC 18781 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18781 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E060 OF 2022

EK WABWOTO, J

JULY 6, 2023

BETWEEN

SAMORA SIKALIEH (SUING AS THE CHAIRMAN OF KAREN LANGATA DISTRICT ASSOCIATION) ..... PETITIONER

AND

KARUNA HOLDINGS LIMITED ..... 1ST RESPONDENT

MARULA MANOR LIMITED ..... 2ND RESPONDENT

CHAKULA TAYARI ENTERPRISES ..... 3RD RESPONDENT

THE NAIROBI CITY COUNTY ..... 4TH RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER NAIROBI CITY COUNCIL ..... 5TH RESPONDENT

THE CHAIR, NAIROBI CITY COUNTY ALCOHOLIC DRINKS AND LICENSING BOARD ..... 6TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 7TH RESPONDENT

RULING

1. This ruling is in respect to two applications. The applications dated December 13, 2022 and January 20, 2023. The Petitioner filed a Notice of Motion Application dated December 13, 2022 which was accompanied by Supporting Affidavits sworn by Iain Allan, Ferina Ilyana Keshavjee and Samora Sikaleih. The Petitioner sought the following orders:

   i. ...Spent.

ii. Pending the hearing and determination of this application an injunction be issued against the 3rd Respondent, its servants, agents or employees from continuing to operate the bar selling alcohol or permitting alcohol to be taken in its premise and acting contrary to the First Schedule of the *Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009*.

iii. Pending the hearing and determination of this application an injunction be issued restraining the 1st and 2nd Respondents its servants, agents or employees from permitting any social, corporate or wedding event and trade affairs, permitting the presence of garages or warehouses on the suit properties Land Reference No 1160/30 and Land Reference No 1160/225.

iv. A mandatory injunction be issued against the 4th and 7th Respondents compelling them to: Cancel the liquor license issued to the 3rd Respondent and any other party situated on Land Reference No 1160/225; Bar the issuance of any permits to the 1st and 2nd Respondents and any third parties for any social activities in Marula Manor; Issue and enforce closure notices against the 3rd Respondent, garages and warehouse storing tents and all businesses situated on the 1st Respondents properties.

v. The 7th Respondent be ordered to forthwith: Prevent and order the immediate cessation of the burning of toxic waste and oil spillages in the garages on the 1st Respondent property no Land Reference No 1160/225 and order and compel the persons responsible for the degradation to restore the environment as far as practicable.

vi. The 1st Respondent be ordered to produce under oath copies of its Certificates of Title for Land Reference No 1160/30 and Land Reference No 1160/225 showing change of user of the properties, details of any change of user that may have been obtained converting the land from residential to recreational, commercial or industrial, copies of all approvals obtained from NEMA and County government of Nairobi.

vii. A mandatory injunction be issued against the 4th and 7th Respondents compelling them to issue and enforce closure notices against the 3rd Respondent, garages, and warehouse storing tents and all business situated on the 1st Respondents properties Land Reference No 1160/30 and Land Reference No 1160/225 for being in contravention of the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009.

viii. The 4th Respondent be directed to order its Technical Committee to prepare a report to be filed within 14 days of the order of the court or such lesser time as may be ordered on the following properties of the 1st Respondent.

ix. The 5th Respondent, the county executive committee member, do order the 1st Respondent under Section 57(3) of the *Physical and Land Use Planning Act* to restore Land Reference No 1160/225 by demolishing the assorted developments put up without development permissions and restore the land to its original condition as is possible as prevailing in 2009 and that such restoration be ordered to take place within ninety days at the 1st Respondent's cost.

x. In the event that the 1st Respondent fails to restore Land Reference No 1160/225 to its original condition or as near to its original condition as is possible as prevailing in 2009, the 4th and 5th Respondents be directed and ordered to restore the land and recover the costs of the restoration from the 1st Respondent.

xi. The 7th Respondent's environmental inspector be ordered to investigate the 1st Respondent's Land Reference No 1160/225, examine records and submit a report to court within 14days or such lesser period as may be ordered detailing all the activities taking place on Land Reference No 1160/225 and their impact on the environment as regards noise and smoke pollution and environmental degradation.

xii. The 7th Respondent be ordered to close all businesses and establishments situated on the 1st Respondent's property Land Reference No 1160/225 constructed without any environmental impact license in place.

xiii. All the temporary injunctive orders be granted pending the hearing and determination of the Petition.

xiv. Any other relief that the Court may deem in the interests of justice inclusive of a court sanctioned site visit.

xv. Costs be awarded to the Petitioner.

2. The Application was made on the following five main grounds that:

i. There should be no bars in residential areas.

ii. No planning permission or change of user were obtained and therefore the developments are illegal.

iii. The residents of Mbagathi Ridge Residents Association (MRRA) had signed a petition to seek legal intervention.

iv. The Courts have jurisdiction to grant orders to safeguard environment.

v. There was serious environmental degradation.

3. The 1st and 2nd Respondent also filed an application dated January 20, 2023 which was accompanied by a Supporting Affidavit sworn by Udi Mareka Gecaga. The 1st and 2nd Respondents sought the following orders:

i. .... Spent.

Ii. This Petition be struck out.

iii. In the alternative to prayer (2) above, the petitioner be ordered to furnish security for costs in the sum of Ksh 2,500,000 and revenue in the sum of Ksh 27,000,000.

iv. The costs of the petition and of this application be awarded to the 1st Respondent.

4. The Application was premised on the following grounds:

i. The Petitioner has no authority from Karen Langata District Association (KLDA) to file a suit on their behalf.

ii. The Petition does not raise any constitutional issues for determination.

iii. The Petition is frivolous and an abuse of court process.

iv. The 1st Respondent will suffer significant loss of revenue if the orders sought were granted in the face of ongoing litigation to determine the correct office bearers of Karen Langata District Association (KLDA).

v. The bank account of Karen Langata District Association (KLDA) at I & M bank has been frozen on account of the ongoing litigation and there is a serious risk that the 1st Respondent will not be able to recover costs without undue delay or at all in the circumstances.

5. On December 21, 2022, the Court granted some interim reliefs in the following terms:

   i. The 1st, 2nd and 3rd Respondent were temporarily restrained from undertaking their operations in a manner that contravened the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations 2009 and exceeded permissible noise levels.

   ii. The 1st Respondent is temporarily restrained from burning trash, toxic waste and causing oil spillage on LR No 1160/225 and the adjacent road reserve.

   iii. That the 4th, 5th and 7th Respondents are directed to monitor and ensure compliance with the order.

6. On February 1, 2023, the Court directed that both applications would be heard together and canvassed by way of written submissions. Parties were directed to simultaneously file and exchange written submissions. The interim orders were extended pending the determination of the said applications.

7. The Petitioner filed submissions dated April 20, 2023, in which the main issues were hinged in the argument that both suit properties were residential, change of user and EIA had not been done and therefore all commercial activities carried out were in contravention of the use of their properties. Relying on the case of *Mumara Estate Residents Association vs Nairobi County & 2 Others [2015] eKLR*, it was submitted that no bars should be situated in a residential area. It was further submitted that the 3rd Respondent had perjured himself by stating that he did not run a bar yet he had taken out a license to operate a bar and restaurant business. It is on this premise that the Court was urged to take cognizance of the act of perjury, grant prayer 2 and 4 and direct police to investigate. It was further argued that the deliberate refusal by the 1st and 2nd Respondents to produce copies of title documents draws an adverse inference that the user remains residential.

8. The Petitioner further relied on the case of *Amina Said Abdalla &2 others vs County Government of Kilifi & 2 Others [2017] eKLR* and *Boniface Katana Kalaveri vs Ethics & Anti-corruption commission & another [2015] eKLR* to submit that filing petitions raising constitutional issues can be filed by any person as supported by Articles 22 and 258 of the *Constitution*. It was also submitted that the application for security for costs was meant to stifle the petition which has a high prospect of success.

9. The 1st and 2nd Respondent filed submissions dated March 22, 2023, in which they argued that the Local Physical Development Plan No 42/25/2005/1 was effective for 10 years and had now lapsed. Relying on the case of *Kenya Breweries Limited v Washington Okeyo [2002] eKLR*, it was argued that a mandatory injunction may only be issued in the clearest of cases which was not the case in this petition. Additionally, the petitioner was asking the court to aid his case by seeking production of contracts. It was also submitted that stopping activities on the property would occasion great loss of approximately Kshs 56,000,000 in loss of revenue thus justifying the need for security for costs.

10. The 3rd Respondent filed a replying affidavit dated January 13, 2023 sworn by Christopher Oduor as the proprietor of Chakula Tayari Enterprises. He averred that he run a restaurant where the clients pay to sit and eat meals that are served on the premises or as takeaways. It was submitted that his business operations were upto 8pm on weekdays and 10pm during weekends thus the overnight noises did not emanate from his business. Moreover, the business was subjected to impromptu inspections by the area Chief and Karen police where no alcohol had been recovered at the restaurant.

11. The 7th Respondent filed a replying affidavit dated March 4, 2023 sworn by Antony Saisi as the Country Director of Environment- Nairobi County in which it was averred that the EIA license was issued after assessing the possible impacts of the project and being satisfied that no negative impact would be occasioned to the environment.

12. I have considered the applications, the rival affidavits, submissions and supporting documents. In my view, the main issues for determination are:

    i. Whether the Petitioner has met the threshold to be granted the order of mandatory injunction as prayed?

    ii. Whether the Petitioner has met the threshold to be granted the order of mandamus as prayed?

    iii. Whether the Petitioner has met the threshold to be granted the order of interim injunction as prayed?

    iv. Whether the 1st and 2nd Respondents application dated January 20, 2023 is merited?

13. On the issue of granting a mandatory injunction, the Court must be cognizant of its difference as compared to a temporary injunction. Whereas in an application for temporary injunction the applicant must establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favour (See *Giella vs Cassman Brown & Co Ltd (1973) EA 358*), an applicant in a mandatory injunction must, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a higher standard than the standard in temporary injunctions.

14. The general principles which the court applies when determining applications for interlocutory mandatory injunction were set out in the case of *Locabail International Finance Limited vs Agro-Export (1988) 1 All ER 901*, as follows:

    > ' A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.'

15. The aforementioned position was echoed by the Court of Appeal in the case of *Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR*,

    > ' It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.' [Emphasis Mine].

16. In this instance, the Petitioner represents the residents of Mbagathi Ridge who in their respective affidavits admitted to living and co-existing within the area for many years during which period the 1st and 2nd Respondent carried out their operations. In the circumstances, this court is of the view that that

the Petitioner has not demonstrated any special circumstances to build a strong case for the granting of a mandatory injunction at this stage.

17. On the issue granting of mandamus orders sought by the Petitioner under prayers 6,8,9,10,11 and 12, this Court has primarily considered that the prayers are hinged upon Article 42 of the *Constitution*. I echo the sentiments of Bor J in *Adrian Kamotho Njenga vs Council of Governors & 3 Others [2020]*:

> ' 18. Article 42 of the *Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.
>
> 19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.'

18. This Court must also weigh the impact of granting the said orders which would affect the livelihoods of citizens including workers and business owners trading on the respective suit premises. At this interlocutory stage, Court has made interim orders aimed at quelling further degradation of the environment and therefore reserves that the issue of closure of businesses be determined in trial.

19. With regards to the merits of the application dated January 20, 2023, this Court is called upon to consider two aspects, the first being whether the Petition should be struck out and secondly whether security for costs should be provided.

20. In *Saudi Arabian Airlines Corporation vs Sean Express Services Ltd [2014] eKLR* the court held that;

> ' Yet again, the law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the

Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain.'

21. The spirit of the law with regards to Petition is that any individual should be enabled in their pursuit for justice and protection of their constitutional right. This is outlined in Article 50 of the *Constitution* which provides that;

> ' Every person has the right to have his dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.'

Similarly, the overriding objective of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows:

> ' The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the *Constitution*.'

22. It is in the interest of justice to balance out the positions of the party by refraining any closure of business and provision of security for costs. From the foregoing, the 1st and 2nd Respondents have failed to persuade this court to order for the provision of security for costs. I find that there is no reasonable cause why the court should exercise its discretion in favour of the 1st and 2nd Respondents.

23. In view of the foregoing, the Court makes the follows orders:

    a. The interim orders granted by this Court on December 21, 2022 are hereby extended pending the hearing and final determination of the main Petition.

    b. The Application dated January 20, 2023 is unmerited and hereby dismissed.

    c. Costs will abide the final determination of the main Petition.

24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF JULY 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Allan Kamau S.C for the Petitioner.

Mr. Kiragu Kimani S.C for the 1st and 2nd Respondent.

N/A for the 3rd Respondent.

N/A for the 4th Respondent.

N/A for the 5th Respondent.

N/A for the 6th Respondent.

N/A for the 7th Respondent.

Court Assistant; Caroline Nafuna.

E.K. WABWOTO

JUDGE