



Maru & 5 others v Effective Construction Limited & another; County Government of Nakuru & another (Interested Parties) (Environment & Land Case 20 of 2023) [2023] KEELC 21301 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 20 OF 2023
A OMBWAYO, J
NOVEMBER 3, 2023**

BETWEEN

**SHADRACK KIPKORIR MARU 1ST PLAINTIFF
JANE WANJIKU NJENGA 2ND PLAINTIFF
CHARLES MAGATI MARANGA 3RD PLAINTIFF
MARGARET NYAMBURA WANJA 4TH PLAINTIFF
JANE NYAMBEKI MARANGA 5TH PLAINTIFF
TWAIRU MAUDA JUMA 6TH PLAINTIFF**

AND

**EFFECTIVE CONSTRUCTION LIMITED 1ST DEFENDANT
SMOOTH CONSULT CONSULTING ENGINEERS LIMITED . 2ND DEFENDANT**

AND

**COUNTY GOVERNMENT OF NAKURU INTERESTED PARTY
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY**

RULING

1. Shadrack Kipkorir Maru and 5 others being land owners near the construction site of the 1st and 2nd defendants have come to court vide Notice of Motion dated 13th September 2023 seeking orders that this Honorable Court be pleased to issue an order of temporary injunction barring the Defendants/ Respondents, their agents, employees, contractors, servants and/or whomsoever acting on their behalf



from developing and/or carrying out construction works specifically of the Mbugua Mbugua Road pending the hearing and determination of this application and the main suit.

2. That pending the hearing and determination of this application, this Honorable Court be pleased to issue an order directing the Defendants/Respondents, to immediately unblock and repair the blocked drainage and sewerage systems along the Mbugua Mbugua Road, before carrying out any construction works thereof.
3. That pending the hearing and determination of the main suit and upon compliance with the Orders in Prayers 2 and 3 herein, this Honorable Court be pleased to issue an order of temporary injunction barring the Defendants/Respondents, their agents, employees, contractors, servants and/or whomsoever acting on their behalf from developing and/or carrying out any construction works of the Mbugua Mbugua Road and Drainage until such a time when the Defendants/Respondents will carry out an Environmental Impact Assessment exercise and file a Report of the same in Court. That the costs of this application be provided for.
4. The applicant is based on grounds that the 2nd and 5th Plaintiffs/Applicants are the registered proprietors of the land parcels known as Nakuru Municipality Block 1/1227 and Nakuru Municipality Block 1/1226(hereinafter referred to as "suit properties respectively), while the 1st, 3rd and 6th Plaintiffs/Applicants are tenants on land parcel no. Nakuru Municipality Block 1/1226.
5. The plaintiffs state that on or about 17th August, 2023, while undertaking construction of the Mbugua Road and Drainage, the Defendants/Respondents by themselves, their agents or employees wrongfully and unlawfully caused blockage of the drainage system available on the suit properties, causing rain water mixed with sewage to flood into the residential buildings erected thereon, as a result of which the Plaintiffs/Applicants herein suffered serious sanitary hazards and sustained substantial loss and damage to their properties.
6. THAT whereas the Defendants/Respondents commenced the construction of the Mbugua Mbugua Road and Drainage on or about the 9th of January, 2023, they refused and/or failed and/or neglected to construct a specific drainage system for purposes of draining water flowing from and rain water at the construction site. This, in turn, forced the water flowing from and rain water at the construction site to, on top of the water flowing from and rain water at the residential buildings on the suit properties, also pass through the drainage and sewerage systems available on the suit properties, thereby causing their blockage.
7. That the drainage and sewerage systems available on the suit properties were, particularly, designed to service waste water flowing from and rain water at the residential buildings on the suit properties and no more. Accordingly, the large quantities of water flowing from and rain water at the construction site levied intense pressure on the drainage and sewerage systems available on the suit properties, interfering with their ability to pass water and causing them to block.
8. That had the Defendants/Respondents prioritized the construction of a drainage system through which water flowing from and rain water at the construction site would pass off, the drainage and sewerage systems available on the suit properties would have never experienced blockage and accordingly, rain water would have never flooded into the suit properties, occasioning the Plaintiffs/Applicants great loss and damage to their person and property.
9. That prior to the Defendants/Respondents' construction activities of the Mbugua Mbugua Road and Drainage, neither had rain water flooded the suit properties nor caused blockage of the drainage and sewerage systems available on the suit properties.



10. That accordingly, the blockage of the drainage and sewerage systems available on the suit properties was not occasioned by an Act of God but in fact, by the failure by the Defendants by themselves, their agents and/or employees to take precautionary measures to ensure that water flowing from and rain water at the construction site would not cause damage to the drainage and sewerage systems available on the adjacent properties.
11. That owing to the close proximity of the construction site to the suit properties, the Defendants/ Respondents owed a duty of care, which duty they breached, to take such care, as in all circumstances of the case, is reasonable to ensure that the Plaintiffs/Applicants' properties would be adequately shielded from all evils arising their construction activities.
12. That as a consequence of the Defendants/Respondents' breach of duty of care, the Plaintiffs/Applicants were exposed to grave health risks and sustained substantial loss and damage to their properties.
13. That whereas the Plaintiffs / Applicants are the most affected with the construction works being undertaken by the Defendants / Respondents, they are not aware of any Environmental Impact Assessment exercise carried out before the commencement of the construction works, as their views were never taken into consideration.
14. That contrarily, upon the Plaintiffs/Applicants demanding for compensation for the loss and damage sustained on their person and properties, the Defendants/Respondents gave out food to the residents occupying the apartments located on the suit properties.
15. That the food handouts by the Defendants/Respondents do not adequately and wholly compensate the Plaintiffs/Applicants for the loss and damage occasioned to their person and properties, as a direct consequence of the Defendants/Respondents' actions.
16. That unless the Defendants/Respondents and their agents are compelled to professionally repair the blocked drainage and sewerage system available on the suit properties and barred from carrying out any construction works of the Mbugua Mbugua Road pending the hearing and determination of this application and main suit and until an such a time when an Environmental Impact Assessment exercise will be carried out and a Report filed in Court, the Plaintiffs/Applicants will suffer irreparable injury which cannot be compensated by way of damages. That the balance of inconvenience tilts in favour of the Plaintiff/Applicant.
17. That no prejudice will be occasioned to the Defendants/Respondents if the orders sought in this application are granted.
18. That it is therefore in the interest of justice and fairness that this Honorable Court issues interim measures of protection pending the hearing and determination of this application and the main suit.
19. The application is supported by the affidavit of Shadrack Kipkorir Maru that reiterates the grounds.
20. The respondents filed a replying affidavit stating that the application is devoid of merit. No evidence has been provided that the defendants are the ones constructing the road and that the tenancy agreement are not registered as required by law. That the construction of sewage is not the mandate of the 1st and 2nd defendant. The 1st and 2nd defendants have no authority over the sewerage and there is a water sewerage agency.
21. The defendant have no capacity to control the flow of water. The defendants states that the areas has a history of flooding which is an act of God. The road is being constructed for public good and that



there may be conveniences when will cease once the road is complete. It is stated that Environmental Impact Assessment was done and a report was prepared.

22. The plaintiffs submit that they have established a prima facie case with a probability of success due to the fact that their right to a clean and healthy environment has been violated that call for an explanation from them. The plaintiffs submit that they have produced photographic and video evidence that demonstrate that the respondents are the ones undertaking the construction of the Mbugua Mbugua Road and drainage. The photos and videos show the flooding and sewage spewing on the plaintiffs land. The plaintiffs argue that the defendants have not demonstrated that they did an environmental impact assessment exercise or an environmental feasibility study. They produced tenancy agreements and title deeds belonging to the plaintiffs.
23. The plaintiffs argue that they will suffer irreparable loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed. The plaintiffs contend that if the defendants are allowed to carry on with the construction of the road the plaintiffs will suffer irreparable loss and injury that cannot be compensated with damages because the blockage of the drainage and sewerage system as a result of the defendants acts of negligence have occasioned and will continue to occasion the plaintiffs enormous distress pain and suffering in the form of damage to the property, depreciation in property value and threat of diseases from standing water which cannot be compensated with the award of damages.
24. On the issue of balance of convenience, the plaintiffs argue that the convenience caused by the defendants' action to the plaintiffs will be higher if the temporary injunction is not granted than to the defendants if the injunction is not granted and the suit is dismissed. The plaintiffs argue that they will continue to suffer some health hazards as their right to a clean and healthy environment is threatened.
25. I have considered the application and the reply and do find that the defendants have not produced the National Environmental Management Authority Licence to demonstrate that they were authorised to continue with the project. There is no tangible evidence that they carried on an Environment Impact Assessment as required by the law though there is a report produced. The law on temporary injunction is set in the provision of Order 40 Rule 1 (a) and (b) of the civil procedure rules 2010 that provides as follows:-
 1. Where in any suit it is proved by affidavit or otherwise-
 - a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,
26. The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
27. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown** (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;



in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

28. Consequently, the Plaintiff ought to, first, establish a prima facie case.
29. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

30. In support of their application, the Plaintiffs have attached copies of documents of title to the suit properties and tenancy agreements and video and photographic evidence. The plaintiffs further gave evidence that the there is likely to be a health hazard due to the blocked sewerage that has mixed with the storm water and has affected the plaintiffs property. The constitution of Kenya 2010 guarantees people’s rights to a clean and healthy environment.. This is clear from a reading of Article 42 of the Constitution which provides as follows:-

42. 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.

31. Article 70, referred to in Article 42 above, permits any person to file suit for the enforcement of the right to a clean and healthy environment. It is drawn as follows:-

70.(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—
 - (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.



(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

32. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury and it states;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

33. The Plaintiffs have deposed on how their right to a clean and healthy environment has been violated that call for an explanation from them. They have produced photographic and video evidence that demonstrate that the respondents are the ones undertaking the construction of the Mbugua Mbugua Road and drainage. The photos and videos show the flooding and sewage spewing on the plaintiffs land. The plaintiffs argue that the defendants have not demonstrated that they did an environmental impact assessment exercise or an environmental feasibility study. They produced tenancy agreements.

34. The plaintiffs argue that the right to a clean and health environment is threatened and if a temporary injunction is not granted, there will be an irreparable injury that cannot be compensated with damages. I do agree with the plaintiffs as they have produced enough evidence to demonstrate that the storm water is mixing with the sewerage and making their premises not habitable.

35. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

36. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn



out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

37. In this matter, I do agree with the plaintiffs that the convenience caused by the defendants’ action to the plaintiffs will be higher if the temporary injunction is not granted than to the defendants if the injunction is not granted and the suit is dismissed. The plaintiffs will continue to suffer some health hazards as their right to a clean and healthy environment is threatened.
38. The upshot of the above is that the application is merited and I do grant an order of temporary injunction barring the Defendants/Respondents, their agents, employees, contractors, servants and/or whomsoever acting on their behalf from developing and/or carrying out construction works specifically of the Mbugua Mbugua Road pending the hearing and determination of the main suit. Costs to be in the cause.

RULING DATED SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 3RD NOVEMBER, 2023.

A .O. OMBWAYO

JUDGE

