



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. E011 OF 2021

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 2, 10, 22, 40, 47, 50 (1), 69, 70, 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 3 AND 9 OF THE ENVIRONMENTAL

MANAGEMENT AND CO-ORDINATION ACT CHAPTER 387 LAWS OF KENYA

BETWEEN

M'IMAANA M'ITHILA..... PETITIONER

VERSUS

COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

RULING

1. Before the court is the application dated 16.3.2021, the petitioners seeking for conservatory orders compelling the respondents to close a culvert erected adjacent to his land **L.N No. Igembe/Akirangonde B 1659** pending the hearing and determination of this petition.
2. The second prayer is that the 2nd respondent be compelled to inspect or conduct an environment audit and file a report in court pertaining the illegal erection of the culvert directing water into **L.R. No. Igembe/Kirangonde B/1659** within 30 days. The application is supported by the sworn affidavit of M'Imaana M'Ithilai on 16.3.2021.
3. The grounds upon which the application is made are: the 1st respondent in 2019 constructed a murrum road and erected a culvert adjacent to the applicant's land pouring water into the petitioner's land.
6. It is averred the said water has caused a lot of soil erosion, created gullies, destroyed crops and filled in to his permanent house that was under construction hence making his farm impassible or inaccessible in breach of his constitutional rights and freedoms.
5. The petitioner averred the acts of the 1st respondent were done in total disregard of the petitioner's proprietary rights to utilize his land yet the 2nd respondent is under law mandated to prevent and or safeguard the environmental rights of the applicant. Further, the applicant attached photographs, valuation report and a demand letter as annexure **No. IMM 1 - 3** respectively.
6. The application was opposed through the 1st respondent's replying affidavit sworn by Erick Muriithi Muthomi on 12.5.2021. He stated culverts were typically installed on natural course where flood water crosses the road to prevent flooding of the road and that the subject culvert at Kiwanja area was no exception.
7. He contended prior to the erection of the culvert, the road water used to flood and or run off into the petitioner's land because his land was located in a hilly area where water naturally flowed downwards.

8. Further, he stated the petitioner's land extended on both sides of the road therefore water used to collect on his land on the elevated side and run off into the lower parts of his land across the road and that the only thing which changed upon the installation of the culvert was that water passed beneath the road through the culvert as opposed to on the surface of the road hence making the road passable.

9. Further, the 1st respondent stated due to the murraming and the culvert, the road was now useable and passable by the members of the public and that the only reason flood water run off into the petitioner's land was because it was located in a depression and that a site visit on 12.5.2021 established that the petitioner had dug trenches directing flood water towards his home ostensibly in a clever scheme to extort money from the 1st respondent. The petitioner however has since 2019 continued to live on the same spot, hence the urgency was not genuine.

10. The respondent continued to aver that the petitioner had an obligation to take remedial measures to redirect any flood water that collected on his land from flowing towards his home.

11. The 1st respondent takes the view there was no illegality in constructing the murram road and erecting the culvert and in any event, there were several culverts on that murram road redirecting flood water so as to make the road passable by members of public of Kiwanja area, who were even grateful for use of ease of access to the nearby tarmac road and that to grant the orders sought would make the public suffer immensely.

12. In a rejoinder through an affidavit sworn on 7.7.2021, the petitioner maintained that prior to the construction of the culvert, water stowed on one side of the road and not across the road as alleged, the road used to be passable. It was merely constructed and the culvert made to benefit only the Member of County Assembly and his relatives since the water used to flood their parcels of land, to his detriment and that since no action had been taken by the respondents to remedy the situation, it was only fair the orders sought be issued otherwise his life and that of his family members was put into greater risk incapable of being compensated by way of damages.

13. The 2nd respondent opposed the application through a replying affidavit sworn by Mr. Angwenyi on the basis the petitioner did not notify them over the alleged violation of his rights to clean and healthy environment as occasioned by the construction of the murram access road and the placement of a culvert adjacent to his farm by the 1st respondent.

14. That after being aware of the alleged violation of **Article 42 of the Constitution**, the 2nd respondent conducted an inspection of the project on 4.5.2021 which report was attached as **annexture MA1** hence substantially complying with prayer 3 of the application. It is averred there was no negligence occasioned by the 2nd respondent and in any event, once the suit was lodged, they could not interfere with the subject matter.

15. Further, the 2nd respondent averred the petitioner was duty bound to inform them but he failed to do so which would have been the first port of call. Similarly, the 2nd respondent averred no evidence had been attached to prove that he alerted the 2nd respondent of the alleged violation which if he had acted in good faith, his property would have been preserved as the 1st respondent would have been compelled to conduct a comprehensive project report or summary project report prior to the commencement of the project and that in absence of proof or negligence on its part, any claims of compensation should fail.

16. With leave of court, parties filed written submissions dated 29.11.2021, 7.12.2021 and 18.11.2021 respectively.

17. The petitioner submitted as a beneficial owner of the subject land, his rights under **Article 40 of the Constitution** had been infringed causing grievous damages hence should be entitled to the prayers sought. Reliance was placed on **Loriak Properties Ltd -vs- Susan Wanjiru Gitau & 2 Others [2017] eKLR, Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358, Nguruman Ltd -vs- Jan Bonde Nielson & 2 Others [2014] eKLR, Mrao Ltd -vs- First American Bank Ltd & 2 Others [2003] eKLR, Samuel Kirubi Njenga -vs- Jennifer Ng'endo Waweru [2020] eKLR, Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR.**

18. The 1st respondent submitted the appellant had failed to demonstrate a prima facie case with a probability of success, that he stood to suffer irreparable injury which could not be compensated by way of damages and the balance of convenience tilted in favour of granting the prayers sought as held in **Giella -vs- Cassman Brown Ltd (Supra), Mrao Ltd (Supra and Pius Kipchichir Kogo -vs- Frank Kimeli Tenai [2018] eKLR.**

19. On its part, the 2nd respondent submitted the court under **Section 129 (1) (a) EMCA 1999** demanded the petitioner to file his claim before National Environment Tribunal as the court of first instance hence the court lacked jurisdiction to entertain the petition. Reliance was placed on **Kibos Distillers Ltd & 4 Others -vs- Benson Ambuti Atega & 3 Others [2020] eKLR.**

20. Secondly, it was submitted the 2nd respondent's mandate was judiciously exercised as provided under **Sections 7 and 9 of the Environment Management and Coordination Act** and which mandate the petitioner ought to have invoked prior to the commencement of the construction.

21. Further, it was submitted the 1st respondent violated **Sections 9 and 12 of the Environment Management and Coordination Act** by commencing the construction without consulting them so as to assess its activities with a view of averting environmental degradation since the project qualified as a Medium Risk Project as per the **2nd Schedule of Environment Management and Coordination Act** which required a submission of an Environmental Impact Assessment Standing Report.

22. It was submitted the 2nd respondent would have conducted an Integrated Environmental Impact Assessment as per **Part VII of Environment Management and Coordination Act** and known the impact the land would have had on the petitioner's land.

23. Third, it was submitted that the petitioner had produced no record of complaint or notification in relation to the petitioner's alleged environmental degradation of his property and there being no comprehensive subject report or summary project report in relation to the construction of the above mentioned murrum access road project, the 2nd respondent was not afforded an opportunity to exercise its mandate as per the **Environment Management and Coordination Act** but nevertheless an inspection/investigation was efficiently conducted under **Section 9 (2) of the Environment Management and Coordination Act** which was contained in the Inspection Report dated 4.5.2021.

24. Further, the 2nd respondent submitted a restoration order issued by it would have as per **Section 108 (2) of Environment Management and Coordination Act** required the 1st respondent to restore the environment as near as possible before moving to court and (b) award compensation would have been paid by the person on whom it would have been served to.

25. The 2nd respondent further submitted the petitioner had failed to prove under **Sections 109 (1) and (2) of the Evidence Act** any violation of his rights on the part of the 2nd respondent as opposed to the 1st respondent who failed to comply with the Environment Management and Coordination Act. Reliance is placed on *Elijah Ole Kool –vs- George Ikonya Thuo [2001] eKLR* on the proposition that a defendant could only be held liable for negligence if his act or omission was either the sole effective cause of the plaintiff's injury or the act or omission was so connected with it as to be a cause materially contributing to it.

26. The background of this notice of motion was the petition dated 16.3.2021 in which the petitioner alleged the 1st respondent while constructing a murrum road adjacent to his suit land encroached approximately **0.0792 Ha**, and erected a culvert directing flood water into his land which had caused damages estimated at **Kshs. 3,250,000/=** and which despite the demand to close and or remove the culvert, the respondents have denied liability.

27. He prayed for: an order directing the removal of the culvert in default orders issue to remove it ; declaration that the actions of the construction of the murrum road and the culvert were null, void and unconstitutional; an order directing that approximately 0.792 Ha of his land had been encroached into by the 1st respondent in constructing the murrum road and culvert which should revert back to him and an order directing the 1st respondent to compensate him for **Kshs. 3,250,000/=** and further charges, general damages plus costs and interests.

28. The respondents are yet to file answers to the substantive petition.

29. What concerns this court at this juncture is whether the petitioner is entitled to any conservatory or interim orders as sought, as provided under **Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**.

30. In *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, the Supreme Court of Kenya held that, conservatory orders unlike interlocutory injunctions are granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.

31. In *Center for Rights Education and Awareness (CREAW) & 7 Others –vs- Attorney General [2011] eKLR*, the court held a party seeking conservatory orders is required to demonstrate that he had a prima facie case with a likelihood of success and that unless the court grants the conservatory orders, there was a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.

32. In *Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 Others [2015] eKLR*, the court held it was not enough to merely establish a prima facie case and show it was potentially arguable but there must also be evidence of a likelihood of success, beyond speculative basis for one to be granted conservatory orders.

33. The petitioner averred breach of his **Article 40** occurred in 2019 when the culvert was constructed. He has quantified the damage to his land. He seeks orders for the removal of the culvert to avert more danger and damage to his land and life.

34. On the other hand, the respondents aver the public interest militates against granting conservatory orders.

35. Given the 2nd respondent inspection report in which the 2nd respondent confirmed some irregularity in the project by the 1st respondent, my finding is that the petitioner has a right which is protected by law.

36. The 2nd hurdle is prove that the substratum of the petition shall be rendered nugatory if the orders sought are not granted.

37. The 1st respondent averred there were mitigating factors the petition had not undertaken to avert the danger to his land, whereas the 2nd respondent averred the petitioner had failed to notify them before the construction commenced and or soon thereafter for any intervention.

38. The 2nd respondent has raised the issue of jurisdiction to entertain the petition.

39. In *CORD & Another –vs- Republic of Kenya & Another [2015] eKLR*, the court held that courts must wade with care, prudence and with judicious wisdom in issuing conservatory orders to suspend the operation of statutes, statutory bodies or even regulations except where the national interest demand so and the situation was certain.

40. In my view and given the alleged damage is quantifiable and coupled with the existence of other mitigating factors, I am not persuaded in the circumstances that the petitioner's substratum shall be rendered nugatory by non-issuance of the orders sought. The public interest and stakeholders considerations also outweigh the private interests of the petitioner.

41. In the premises even though the petitioner has established a prima facie case, he has failed in the other pillars for the grant of conservatory orders. Consequently, the notice of motion dated 16.3.2021 is hereby dismissed with no order as to costs.

42. Parties are ordered to fully comply with **Order 11** within 45 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 2ND DAY OF MARCH, 2022

In presence of:

Kabathi for petitioner – present

Miss Amolo holding brief for Lisanza for 2nd respondent

Ikioo for 1st respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE