



**Kiarie & another v Fujian Shixin Investment and Developers (K) Limited & 3 others
(Environment & Land Case E3B of 2022) [2022] KEELC 4765 (KLR) (7 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E3B OF 2022**

JG KEMEI, J

SEPTEMBER 7, 2022

**IN THE MATTER OF CHAPTER 5, ARTICLE 42, 60 (1) (E) 62 (1) (D). (G), (M). (N),
(2), 69(1)(A), (D),(E),(F), (G),(H), 69(2) & 70 OF THE CONSTITUTION OF KENYA**

BETWEEN

ROY KIARIE 1ST APPLICANT

JOSEPH NJUGUNA 2ND APPLICANT

AND

**FUJIAN SHIXIN INVESTMENT AND DEVELOPERS (K)
LIMITED 1ST RESPONDENT**

XINDONG ZHOU 2ND RESPONDENT

CHEN SHUITONG 3RD RESPONDENT

SAMUEL AYUYA GETEMBE 4TH RESPONDENT

RULING

1. The Ruling is with respect to the motion brought by the Petitioners on January 17, 2022 seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this petition a conservatory order be and is hereby issued restraining the Respondents from continuing with the works of the excavation around the Ngubi/Githungucu and Meyers Hills which are protected forested area along the Mai Mahiu Naivasha Road until the petition is heard and determined.
 - c. Spent



- d. Spent
 - e. That the Court do issue a conservatory order restraining the 2nd and 3rd Respondents who are foreigners from leaving the country and have their passports withheld until this petition is heard and determined.
 - f. Any other order or directions from the Court.
2. The application is premised on the grounds annexed thereto and supported by the affidavit of Roy Kiarie, the 1st Respondent sworn on January 17, 2022. He deponed that he has authority to swear the affidavit on his own behalf and that of his co-Petitioner. That they are public spirited individuals in the area of civil and human rights arena who have petitioned the Court in public interest and on behalf of the community living around Ngubi forest , Githungucu and Meyer Hill areas in Kiambu county.
 3. That the Respondents are carrying out activities which are destroying and desecrating a hill which is a natural resource within a government forested land in Ngubi area and Githungucu; excavating rocks and stone cutting; polluting the area with snakes dust rocks and bolders making living conditions unbearable and risky to lives of the communities in the area; the dangerous explosives carried out by the Respondents have made some communities flee the area for safe grounds; and generally violating their right to clean and healthy environment.
 4. They aver that there was no public participation before the activities were sanctioned and allege that the Respondents have concealed their activities through compromising some of the community members.
 5. To further buttress the point that the Respondents' activities in the are contrary the law given that there are no approvals from the National Environment Management Authority (NEMA) or the Cabinet Secretary for the issuance of mining licences to carry out mining. That it is in public interest that the orders be granted.
 6. Joseph Njuguna too swore an affidavit of even date in support of the Motion which is word for word similar to the one of the 1st Applicant.
 7. The application is opposed by the Respondents through the Replying Affidavit of the 3rd Respondent sworn on March 15, 2022. He stated that he is a director and shareholder of the 1st Respondent, a limited liability Company registered in Kenya. The Company is also the registered owner of parcel No Nguirubi/Ndiuni/515'B' and Nguirubi/Ndiuni/516'B' situate along Mai Mahiu Rironi road in Ndeiya Limuru Kiambu County (suit lands). Copies of titles issued on November 16, 2021 were annexed and marked as CS1.
 8. That the lands are not forest or public lands as alleged by the Applicants. On February 16, 2010 the Company obtained a change of user to quarry use and a NEMA licence No NEMA/EIA/PSL/14347 and 14349 to undertake quarry extraction and stone mining activities. It has also been approved by the Ministry of Petroleum and Mining to undertake blasting of the quarry rocks on site. It employs over 50 locals as casuals daily. It has invested in the acquisition of machinery and trucks for the business and its stoppage will occasion it heavy losses.
 9. It denied that the community have raised any complaints against its operations and none specifically on pollution nor that it has polluted the area.
 10. The 4th Respondent also weighed in vide his supplementary affidavit sworn on February 24, 2022 where he deponed that he is a director of the 1st Respondent and therefore competent to swear the affidavit on his own behalf and that of the 1st Respondent and co- directors. He took fault with the competence



- of the Petitioners in bringing the suit on behalf of the community and he stated that the Petitioners are persons residing in Nairobi; have not disclosed the communities they purport to represent.
11. He denied that the Respondents have failed to comply with the law; the land is not forest government land; no complaint has been received from Kenya Forest Service on encroachment of the forest; land is private land; no member of the community has been forced out of their residence as a result of the operations; blasting of rock on site will comply with the laws; the Respondents have invested Kshs 300 million in the project and that his co-directors are not flight risk as they carry on business in Nairobi.
 12. In a rejoinder the 1st Applicant stated that the Respondents have misled the Court in their response for example the Respondents have failed to display their Company name at the campsite; registered office is non-existent in Nairobi and deposed that they are operating clandestinely and hence the opinion that they a flight risk.
 13. That the entrance to the excavation site is a government gazetted forest. Further that they have failed to comply with NEMA conditions since no environmental impact assessment was considered.
 14. The Petitioners submitted that the Respondents have encroached on to a natural hill within the forest that is a natural resource in a government forest and are excavating quarry rocks public participation in the management protection and conservation of the environment. That if any public participation was done it was through a few locals who were dished with handouts in the name of public participation. That no environmental assessment audit and monitoring of the environment was carried out before embarking on the dangerous and unsustainable venture.
 15. It was submitted that the Respondents have failed to put up signage in the area being well aware of heavy machinery turning which are a risk to livestock and humans in the area. The blasting of the hill using explosives are damaging and polluting the environment- with the effect that some residents have been forced to relocate from the area due to noise, snakes falling rocks among other pollutants. The Respondents have also failed to protect genetic resources and biological diversity in an area that is resource rich and is also used as a tourist attraction site (offered a vantage point for watching the great Safari motor rallying, parachuting and excursions along the escarpment).
 16. The Petitioners have based their claim on the following; they are residents of the area and have a right to bring the suit on behalf of the communities residing in the area; the Respondents have not involved NEMA in their activities and if they have then the Respondents have violated the conditions given by NEMA with regards to pollution, noise, excessive vibrations during blasting; their tourist areas are destroyed;
 17. With respect to public participation, they submit that the Respondents failed to carry out public participation. That they are not complying with the licences they hold and the activities they are carrying out on the ground are akin to illegalities.
 18. The Petitioners submitted that they have established a prima facie case and relied on the cases of; *Giella vs Cassman Brown* (1973) EA 358; *East Africa Industries Ltd vs Trufoods Limited* (1972) EA 420; *Pumas Se Vs John Githenduka Macharia Mburu* (2021) eKLR.
 19. The Respondents filed their submissions and denied the Petitioners claims. They submitted that no evidence has been placed before the Court to demonstrate that they are a flight risk. That the 2nd and 3rd Respondents are directors of the 1st Respondent a limited liability Company incorporated in Kenya and carrying out legitimate quarry business under licence from the Government of Kenya with an investment in the region of Kshs 300 Million. No evidence to warrant the confiscation of their passports.



20. The Respondents have contended that the prayer for conservatory orders is not available on the grounds set out as thus; the land upon which they are quarrying belongs to the 1st Respondent and have been issued with titles hence are not government forest; NEMA licenced the activities on the ground; have complied with the conditions under the said licence; have not bribed any local in the name of public participation; no evidence of a tourist site was provided;
21. It was their case that the Petitioners have not demonstrated any prima facie case to warrant the granting of the conservatory orders and urged the Court not to grant. That in any event if the case of the Petitioners is that they should compensate pay and resettle members of the community and restore the environment, then the injury is capable of being compensated with damages in which case a conservatory order will not be awardable in the circumstances.
22. The Respondents stated that the Petitioners have not demonstrated any rights that have been violated and or threatened with contravention.
23. The key issue is whether the application is merited.
24. Having perused the application the following issues have been settled from the affidavit evidence on record;

Public land

25. The land upon which the quarrying activities are taking place prima facie belongs to the 1st Respondent. Section 26 of the [Land Registration Act](#) mandates this Court to take a title issued by the Registrar as prima facie evidence that the person named therein is the owner of the land. In this case the two titles are registered in the name of the 1st Respondent. The Petitioners averment that the quarrying is being carried out in a public land to wit a government forest has therefore not been proved at the prima facie stage.

NEMA Licences

26. Secondly the question of NEMA licenses has been settled. My observation on record is that the Respondents obtained EIA Licences on October 14, 2021 for purposes quarrying activities in the area on the suit lands. The claim that the activities have not been sanctioned by NEMA is without basis.

Locus of the Petitioners

27. On the issue alluded to by the Respondents as to whether or not the Petitioners have locus to bring the suit on their own behalf and that of the local community, given that they are residents of Nairobi as alleged, I draw guidance from the provisions of Article 258 of the [Constitution](#) which states as follows:-

“ Enforcement of this Constitution

- (1) Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;



- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

28. The import of the above provision of the *Constitution* is that every person has a right to institute Court proceedings, claiming that this Constitution has been contravened or is threatened with contravention. Further the provisions permit a person to file suit in his own interest, on behalf of another person who cannot act in their own name; as a member of or in the interest of a group or class of persons; in public interest and in association or in the interest of one or more of its members.
29. The Petitioners have described themselves as individuals working for gain in Nairobi and are champions of civil and human rights. Under para 3 of their supporting affidavits they have averred that they have filed the petition in public interest to halt the activities of the Respondents which activities they aver are destroying the environment.
30. In the preamble of the *Constitution* 2010 Kenyans gave unto themselves a constitution and when it came to environmental matters, they stated as follows;
- “Respectful of the environment which is our heritage and determined to sustain it for the benefit of future generations.”
31. Flowing from the above statement of intent Article 42 of the *Constitution* of Kenya gives every person the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures particularly those under Article 69 and to have the obligations relating to the environment fulfilled under Article 70 which states that if a person alleges that a right to clean and healthy environment recognized and protected under Article 42 has been is being and 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.
32. The crux of the Petition is the alleged violation and or threatened violation of the environment by the activities being carried out by the Respondents in the disclosed area. The Petitioners have claimed that they have filed the suit on their on behalf and that of the residents of the area. The Respondents have challenged the capacity of the Petitioners to mount the suit on the grounds that they live in Nairobi. Going by the wording of the above provisions of the *Constitution*, the Court finds that the Petitioners are within their rights to file the suit. The community living within the area of the quarry is not an amorphous group incapable of identification. These are people who have been said to be affected by the operations of the Respondents given their proximate occupation in the area.
33. On the issue of public participation, the Petitioners have averred that no public participation was carried out before the licensing of the quarry by NEMA. That if there was then the same was obtained through bribery of the community. The Petitioners have raised serious allegations including fraud on the part of the Respondents, an issue that I believe is best left to the hearing so that evidence may be led in proving the same.
34. I will now evaluate whether the Petitioners are deserving of conservatory orders.



35. It is now settled that an Applicant for a conservatory or interim order under Rule 23(1) of the *Constitution of Kenya (protection of the rights and fundamental freedoms) Practice and Procedure Rules, 2013* must demonstrate that:-
- a. He has a *prima facie* case.
 - b. Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the *constitution*.
 - c. It would be in the public interest to grant the order.
36. The Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others*, Supreme Court of Kenya, Petition No 2 of 2014 (unreported), stated that:-
- “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 injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during 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.”
37. In the case of *Kenya Association of Manufacturers & 2 Others vs Cabinet Secretary Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR the Court stated thus:-
- “... In an application for a conservatory order the Court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the Applicant has made a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted the Applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest.”
38. The Petitioners have averred that the activities of the Respondents to wit quarrying of stones, blasting and excavation are violating their clean and healthy environment; failed to put up signages to aid the safety of the residents animals and livelihoods given the deployment of heavy machinery and earthmovers; explosives used in the blasting of the hill are causing damaging the genetic resources and biological biodiversity, natural resources, pollute neighbourhoods; destruction of flora and fauna in the area; causing migration of people from their residents at Kwa Maya to unsuitable area called Githungucu due to disturbance by falling rocks, snakes and dust; destroying the hill used and for tourist attraction – as a watch tower for the safari rally as well as parachuting for camping excursions into Naivasha; works have been set up on a hill running into a cliff overhanging homesteads beneath; no ecologically sound and sustainable plan for the development and extraction of the natural materials have been put in place;



39. The Petitioners have argued that all the above complaints arise from the activities of the Respondents on the ground. That they sought to get answers from the Respondents but were denied access to the site.
40. It is not in dispute that the Respondents have admitted that they are running a quarry on the site under the licence of NEMA. I have perused the general and operational conditions that the Respondents are required to adhere to under the licence. It is common ground that the Respondents have generally denied the complaints of the Petitioners and have not even attempted to present cogent rebuttal on what they have put in place in compliance with the terms and conditions of the licence.
41. Given the state of affairs above, it is my finding that the Petitioners have established a prima facie case. The Court at this stage is not to make hard conclusions on the matter as that is saved for the full hearing where evidence will be adduced.
42. Given the threatened or actual violations cited by the Petitioners this Court is of the view that if the conservatory orders are declined they are likely to suffer injury as a result. The Court has taken public interest as a consideration in the matter.

Joinder of NEMA

43. Having said that I must address the issue of NEMA. The Petitioners complaint are arising from the licence issued by NEMA and in my considered view ought to have been enjoined as a party in this case as it is a necessary party so that they are given the opportunity to address some of the issues raised in the petition. I will make the necessary orders in the end.

Passports

44. The Petitioners have asked this Court to restrain the 2nd and 3rd Respondents from leaving the country and order that their passports be withheld. I must state that this Court's jurisdiction is in the realm of environment and land matters as set out in Article 162(2) (d) of the Constitution of Kenya and Section 13 of the Environment and Land Act and for that reason I decline to entertain the invite to grant the prayer.

Final orders and disposal.

45. In the end I make the following orders;
- a. In the interim I hereby grant a conservatory order restraining the Respondents from continuing with the works of the excavation for a period of 30 days.
 - b. Prayer e is declined for the reason given above.
 - c. The Petitioner to enjoin the NEMA within a period of 7 days from the date of this Ruling.
 - d. Upon service the said NEMA to file and serve their response to the Petition and the Motion within 15 days.
 - e. The matter to be mentioned on the 4/10/2022 for further orders and directions.
 - f. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Gikunda for 1st and 2nd Petitioners

Mukuna for 1st and 2nd Respondents

Ndolo for 3rd Respondent

4th Respondent – Absent

Court Assistant – Mr Dominic

