



**Riunga v Director General, National Environment Management Authority & another
(Appeal E057 of 2022) [2022] KEELC 13274 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13274 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

APPEAL E057 OF 2022

EK WABWOTO, J

OCTOBER 3, 2022

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI – MILIMANI

APPEAL NUMBER E057 OF 2022

-BETWEEN-

SUSAN WANJIKU RIUNGA..... APPELLANT

-VERSUS-

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

SUTTON HOLDINGS LIMITED.....2ND RESPONDENT

**(BEING AN APPEAL FROM THE DECISION MADE ON 25TH JULY 2022 BY THE
NATIONAL ENVIRONMENT TRIBUNAL)**

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

MISC. APP. NUMBER 16 OF 2022

IN THE MATTER OF A DECISION MADE UNDER RULES 10

AND 46 OF THE ENVIRONMENTAL (IMPACT ASSESSMENT

AND AUDIT) REGULATIONS, 2003 APPROVING AN

ENVIRONMENTAL IMPACT ASSESSMENT PROJECT REPORT

OVER ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 1159/323, KAREN

BETWEEN

SUSAN WANJIKU RIUNGA APPELLANT



AND

DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT
SUTTON HOLDINGS LIMITED 2ND RESPONDENT

RULING

(In respect of the Notice of Motion Application dated September 15, 2022 seeking an order of temporary injunction pending the hearing and determination of the Appeal)

1. Susan Wanjiku Riunga the appellant herein being aggrieved by the decision of the National Environment Tribunal made on 25th July 2022 filed an appeal before this court vide an amended memorandum of appeal dated July 25, 2022. Subsequent to the filing of the said amended memorandum of appeal, she filed an application dated September 15, 2022 under certificate of urgency seeking for the following orders:
 1. Spent.
 2. Spent
 3. That pending the hearing and determination of this appeal this honourable court does issue a stop order and/or injunction restraining the 2nd respondent either by itself, its agents and or servants whomsoever from undertaking any construction works on all that property known as Land Reference Number 1159/323 on the basis of the NEMA licence No NEMA/EIA/PSR/22107 on the all that property known as Land Reference Number 1159/323.
 4. Spent
 5. That costs of this application be in the cause.
2. The appellant has enumerated the grounds upon which her application is premised on the face of the application. The appellant has filed an appeal against a ruling of the National Environment Tribunal that upheld the respondent's preliminary objections and dismissed her appeal.
3. The appellant's application is brought under the provisions of articles 49, 50(1), 69(1), (d) and (f) (2), 70 & 159 (2) of the *Constitution* of Kenya, 2010 section 130(2) of the *Environment Management and Coordination Act*, sections 3, 13(2), (7) and 18 (a) (i) of the *Environment and Land Court Act*, ELC Court Practice Directions 2014 Rules. It is supported by her affidavit sworn on September 15, 2022.
4. The application is opposed by the 2nd respondent by way of a replying affidavit sworn by Joyce Wanjiru on September 20, 2022. The 2nd respondent avers that the appellant is not entitled to the orders sought for the following reasons; the appellant filed a similar application before this court dated July 26, 2022, the court declined to grant the interim orders sought and gave directions that the application be served on all parties for inter parties hearing on September 21, 2022, having failed to obtain the said orders before this court, the appellant withdrew the application and proceeded to file an application dated July 26, 2022 before the National Environment Tribunal seeking interpretation of the scope of section 130(2) of the *Environmental Management and Coordination Act* (EMCA) and that the tribunal delivered a ruling to the effect that it was *functus officio* and the appellant has not filed an appeal against that decision therefore there is no basis upon which to grant the orders.



5. The 2nd respondent further averred that the appellant has not fully disclosed to this court the existence of orders with respect to the suit property in parallel proceedings of ELC and Appeal No 53 of 2022 which Justice Mboya Oguttu had granted a status quo order on condition that the appellant provides a bank guarantee of 10 million within 14 days from the date the orders were issued. The same was not complied with by the appellant and neither were those orders extended. The 2nd respondent also disclosed that the said matter is scheduled for judgment of the main appeal on October 5, 2022.
6. According to the 2nd respondent, the appellant has not made the application in good faith but merely seeking to re-litigate the issues which are the basis of the appeal and further she has not demonstrated a *prima facie* case with a probability of success neither has she demonstrated that she has suffered any irreparable injury which cannot be compensated by way of damages.
7. Pursuant to the directions issued on September 21, 2022, the court directed that the application be heard on September 30, 2022 during the hearing of the main appeal. Parties were also at liberty to file and exchange their skeleton submissions and case digest in respect to the application. During the plenary hearing of the appeal on September 30, 2022, learned counsel Mr Luseno appeared for the appellant while learned counsel Ms Ndirangu made submissions on behalf of the 2nd respondent and also held brief for learned counsel Ms Sakami for the 1st respondent. The court also allowed the parties to submit orally in respect to the said application the subject of this ruling.
8. In this ruling, I will be frugal with my words in view of the fact that the court is still expected to deliver its judgment on the main appeal. The singular issue for determination in respect to this ruling is whether the appellant has made a case and deserving injunctive orders pending the delivery of the final judgment of the main appeal.
9. Learned counsel Mr Luseno argued that the appellant had met the test necessary for the grant of the orders sought. Counsel submitted that the appellant had timeously made effort to file, compile her record and prosecute the appeal. Counsel also submitted that as a precautionary approach, this court should issue an interim injunction against the 2nd respondents. Counsel also submitted that the principles enumerated in the case of *Giella v Cassman Brown* (1973) EA 358 on grant of interlocutory injunctions would not strictly apply to this case being one relating to an environmental matter.
10. Learned counsel Ms Ndirangu relied on the affidavit sworn by Joyce Wanjiku on September 20, 2022 on behalf of the 2nd respondent. Counsel argued that the court is not here to interpret section 130 of *EMCA* and further that there is no order capable of being stopped. Counsel further submitted that the prerequisites for the grant of the injunction orders had not been met. It was also argued that Justice Oguttu had previously indulged the appellant when he granted them interim conditional relief which was not complied with and as such nothing has changed to warrant the grant of the temporary injunction sought.
11. The appellant is seeking an injunction pending the determination of the main appeal. While the test for granting of an interlocutory injunction was considered in the *American Cyanamid Co v Ethicon Limited* (1975) AC 396 case in which the court provided that for an injunction to issue, the applicant must satisfy three elements namely: -
 - i. There must be a serious issue to be tried.
 - ii. Damages are not an adequate remedy.
 - iii. The balance of convenience lies in favour of granting or refusing the application.



12. These are the same grounds that had been postulated earlier on in the case of *Giella v Cassman Brown* (1973) EA 358 as follows: The applicant has to show a *prima facie* case with a probability of succeeds, the likelihood of the applicant suffering irreparable damages which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the application will be decided on a balance of convenience.
13. What amounts to a *prima facie* case was explained in *Mrao v First American Bank of Kenya & 2 others* (2003) KLR 12 J as follows-

“So what is a *prima facie* case? I would say that in civil cases it is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
14. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014), the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows;

“..... These are the three pillars on which rests the foundation of any order of injunction, interlocutory, or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co Ltd v Afraha Education Society (2001) Vol EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy the respondent is capable of paying no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
15. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directing threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
16. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.
17. However, it is also worth noting that in the case of *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* (2001) eKLR the court held the conventional principles of an injunction does not have to necessary apply in environmental cases and stated as follows;

“On consideration of these principles in an environmental case it is not advisable exclusively to apply simpliciter the old principles of injunction because whereas activity may be objectionable and ought to be stopped by injunction yet applying the principle in the statute of best practicable means, it would be still a defence under the law of Environment that the defendant has done what he can practically do to prevent and or reduce the nuisance or



pollution and may still continue with the activity in a manner not resulting in cessation of the objectionable activities because of its environmental impact.

In my judgment, I would say that the breaches of environmental statute should be looked at without trappings of equating in applying the law of injunction under Environmental Management and Coordination Act No 8 of 1999 but to apply them with close adherence to what the statute law prescribes. Section 3 prescribes general principles of application by the court in adjudicating over this kind of case. First the court is given wide discretion to make such orders by issuing such writs or give such discretion as it may deem appropriate including an order to restore the degraded environment.

In normal traditional consideration for injunction the *Giella v Cassman Brown & Co Ltd* (1978) EA 358 one has to prove that his legal rights has been unlawfully invaded. Here he does not need to show all that because under the EMCA such provision rights would be prejudicial, under section 3 of Act No 8 of 1999.”

18. The appellant also referred to the provisions of section 130(2) of *EMCA* which provides as follows: -
“No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced, until the appeal has been determined.”
19. Counsel cited the cases of Nairobi ELCA Number 16 of 2015 (*Director General NEMA v Africa Network for Animal Welfare & others* ELC and Nairobi Appeal Number 50 of 2016 (*Isaac Ngotoho & others v Director General NEMA & another* where the court while making reference to section 130(2) of *EMCA* separately held that the said provision provides for an automatic stay of execution of all decisions of the tribunal where an appeal has been filed until the appeal is heard and determined.
20. Being guided by the above authorities and the provisions of section 130(2) of *EMCA*, I am inclined to allow prayer 3 of the appellant’s/applicant’s motion dated September 15, 2022 with an order that costs of the application shall abide the outcome of the main appeal.
21. The judgment of the main appeal shall be delivered on November 24, 2022.
22. Those shall be the orders of the court.

DATED, SIGNED AND DELIVERED AT NAIROBI BY EMAIL THIS 3RD DAY OF OCTOBER 2022

E.K. WABWOTO

JUDGE

