



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. E007 OF 2020

IN THE MATTER OF ARTICLES 19, 20(2), 21, 22, 42, 63, 69, 70, 71 and 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ESTABLISHMENT, MAINTENANCE, SERVICING AND CONSERVATION OF ISIOLO HOLDING GROUND

AND

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999

BETWEEN

ISIOLO HOLDING GROUND USERS ASSOCIATION

(suing through its officials namely

HUSSEIN HAJI ABDULLAHI (chairman)

ABIKAR MOHAMUD OSMAN (Secretary)

DABASO BBORU (Treasurer)PETITIONERS

AND

MARSH CONSTRUCTION COMPANY LTD.....1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....2ND RESPONDENT

RULING

1. Before me is a notice of motion dated 2nd November 2020 brought pursuant to Articles 22, 23(3), 42, 69 and 70 of the Constitution of Kenya. The applicants seek the following orders;

1) That this Honorable court be pleased to grant an order of temporary injunction to restrain the 1st Respondent, its agents, servants, assignees and/or anyone at his behest from entering, trespassing, harvesting sand, excavating murrum or otherwise engaging in any other activities of land and environment degradation of all that area known as Isiolo Holding Ground within Isiolo County within the Republic of Kenya pending the hearing and determination of this application and the main petition.

2) Any other relief this Honorable Court may deem just and fit to grant.

3) That cost of this application be provided for.

2. The application is premised on the grounds on the face of it and on the supporting affidavit of **Hussein Haji Abdullahi**, the chairman of the petitioner, who avers that the association was established to sustainably exploit the resources of Isiolo holding ground, which is the property of the National Government under the state department of livestock. That after establishment, they entered into a Memorandum of Understanding with the ministry of livestock development and marketing which MOU is valid to date. In 2015, they were issued with a licence by NEMA to extract murrum in the said holding area and they have since adhered to the conditions set out in that licence. That they

charge nominal user fee in order to raise revenue for the maintenance and service of the holding grounds and the facilities installed therein.

3. The applicants contend that the holding ground is under the national government and the same has not been devolved to the county government, as such, the 1st respondent cannot purport to get authority from the county government to extract murram and the actions of the 2nd respondent are unconstitutional, ultra vires and illegal.

4. The 1st respondent in total disregard of the need to protect the environment, they sought illegal ways to obtain permits to proceed with the extraction of murram and the illegal harvesting of sand which activities have led to so much degradation of the Isiolo holding grounds without adherence to the prescribed rules and regulations, interfering with the topography and the drainage in the area.

5. The applicants contend that the said illegal activities of the 1st respondent have been sanctioned and/or endorsed by the 2nd respondent. The end result is that the respondents have violated the petitioners' rights to a clean and sustainable environment by degrading their land and environment which has become a health hazard to the animals, herders and small children. Further, the 1st respondent has caused revenue loss to the tune of Kshs. 4,000,000. The applicants therefore urge the court to allow the application in the interest of justice.

6. The Application is unopposed. Nevertheless, the court will proceed to determine if the application is merited.

7. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

"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;

(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, 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."

8. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before and courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set out in the case of **Giella Vs. Cassman Brown [1973] EA 358** to wit:-

(a) Has the Applicant established a prima facie case with high chance of success?

(b) Will the Applicant suffer irreparable damages unless an injunction is issued? and

(c) Where does the balance of convenience lie?

9. In the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** a prima facie case was defined as follows;

"..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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

10. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests, then the court should determine the matter on a balance of convenience.

11. In **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) Eklr** the court stated that;

"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.

.....

The meaning of balance of convenience in favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants".

12. I also place reliance on **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996)eKLR** where the court stated as

follows;

“It is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

13. The petitioners are claiming that their rights to clean and sustainable environment are being violated, their land and environment is being degraded and has become a health hazard to themselves, the animals and herders. In addition, there is loss of revenue. It is therefore apparent that the claim of the petitioners is merited. The application dated 2.11.2020 is allowed, but costs thereof shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Ashaba for applicants

HON. LUCY. N. MBUGUA

ELC JUDGE