



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**CIVIL APPEAL NO. 20 OF 2019**

**ENG.ERASTUS MWONGELA, EZEKIEL ANGWENYI &**

**PROF.ALBERT MUMMA**

*(Suing as Chairman, Treasurer & Secretary of*

**KAREN LANG'ATA DISTRICT ASSOCIATION.....APPELLANT**

**=VERSUS=**

**THE DIRECTOR GENERAL. NEMA.....1<sup>ST</sup> RESPONDENT**

**CYTON INVESTMENT MANAGEMENT LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 25<sup>th</sup> June 2019. The application which is brought by the Appellant/Applicant seeks the following orders:-

**1. Spent**

**2. Spent**

**3. Pending the hearing and determination of this Appeal, this Court be pleased to grant an injunction restraining the 2<sup>nd</sup> Respondent, its agents, servants and/or employees from destroying the forest cover , cutting down indigenous trees, excavating and undertaking any construction on LR No. 5954/2 and LR 5830/7.**

**4. Costs.**

2. The second Respondent had prepared a project plan which was to put up 15 cottages , 50 serviced villas, a shopping centre, a clinic , a nursery school and recreational and conference on a 29.4 acre plot which was formerly known as LR No.5954/2 and LR No. 5830/7 (now amalgamated)within Nairobi County. Before the project could take off, the Appellant filed an Appeal to the National Environment Tribunal (NET) against the Respondents. The Appeal was heard and was dismissed in a Judgement delivered on 8<sup>th</sup> March 2019.

3. The Applicant preferred an Appeal to this Court against the Judgement of NET hence the application before this court. The Applicant contends that the Appeal filed has arguable grounds and that if an injunction is not granted, the Appeal will be rendered nugatory. The Applicant argues that the 2<sup>nd</sup> Respondent had started felling down indigenous trees and that the project is being undertaken on part of the riparian section on Mbagathi River and that if this were to be allowed to continue, it will cause serious environmental damage which may not be reversed.

4. The Applicant further argues that the excavation on the project site has led to drying of underground water points of the area residents and that once the proposed project is completed, it will cause a serious strain on the narrow roads in the area.

5. The 2<sup>nd</sup> Respondent opposed the Applicant's application based on a replying affidavit sworn on 30<sup>th</sup> September 2019. The 2<sup>nd</sup> Respondent contends that what the Applicant is raising in this application was raised before the NET which considered all the grounds and found them without any foundation. The 2<sup>nd</sup> Respondents therefore argues that what the Applicant has raised in the memorandum of Appeal cannot

cause any reversal of the judgement of NET and that this application has raised the same frivolous grounds.

6. The 2<sup>nd</sup> Respondent further argues that the Applicant has not demonstrated that there will be substantial loss if the application is not granted and that the Appeal will be rendered nugatory. The 2<sup>nd</sup> Respondent denies any encroachment onto Mbagathi River and that should there be any encroachment, the Applicant has the option of reporting the encroachment.

7. The 2<sup>nd</sup> Respondent argues that the injunction sought should not be granted as it has already incurred loss in excess of two billion shillings which it is unlikely to recover. The 2<sup>nd</sup> Respondent accuses the Applicant for material non-disclosure and urges the court to dismiss the application.

8. I have considered the Applicant's application as well as the opposition to the same by the 2<sup>nd</sup> Respondent. I have also considered the submissions by the parties herein. This is an application for injunction which has been made based on an appeal which has been preferred to this court. The issue which then emerges for determination is whether the appeal raises arguable grounds to warrant issuance of an injunction.

9. The Appeal herein has been brought mainly for the protection of the environment. There is a complaint that the project is encroaching on River Mbagathi. There is also a complaint that the project is causing flooding and there is felling of indigenous trees. I have looked at the memorandum of appeal. There are serious grounds which have been raised which are arguable. It has been said that an arguable ground is not one which will necessarily succeed on appeal. In the case of **Fred Mtiangi the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government Vs Miguna Miguna & 4 Others (2018)**, the Court emphasised the issue of arguable appeal and cited the case of **Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 Others (2013) eKLR** where it was stated as follows:-

*“ Vi . On whether the appeal is arguable, it is sufficient if a single bonafide ground of appeal is raised. Damji Pragji Mandavia VS Sara Lee Household & Body care (K) Ltd, Civil Application No. Nai 345 of 2004.*

*Vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous Joseph Gitahi Gachau & Another Vs Pioneer Holdings (A) Ltd & 2 Others Civil Application No. 124 of 2008”.*

10. Even on consideration of the principles of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**, the Applicant has demonstrated that there is a prima facie case with probability of success. If the damage to the environment was caused, it will not be easily reversed. This is where the precautionary principle comes in. It is better to avoid rather than coming to remedy what has already been done. In this regard, I agree with the reasoning of Justice Olola in the case of **Amina Said Abdalla & 2 Others Vs County Government of Kilifi & 2 Others (2017)eKLR** where he stated as follows:-

*“The Principle of Prevention decrees that “the protection of the environment is best achieved by preventing environmental harm in the first place rather than relying on remedies or compensation for such harm after it has occurred. The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures. Closely related to the principle of prevention is the precautionary principle. This recognizes the limitations of Science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities”.*

11. It is clear from the above analysis that the Applicant has met the threshold for grant of an injunction. I allow the Applicant's application in terms of prayers 3 and 4. Applicants to file undertaking as to damages within 30 days from the date hereof.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 5<sup>th</sup> day of May 2020.**

**E.O.OBAGA**

**JUDGE**

In the virtual presence of :-

M/s Okuta for Respondent

Mr Ondego for Appellant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**