



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**CONSTITUTIONAL PETITION NO. 13 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEDGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN  
ARTICLES OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS  
AND ENFORCEMENT OF THE CONSTITUTION (PRACTICE AND PROCEDURE RULES)**

**AND**

**IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND COORDINATION ACT**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT**

**AND**

**IN THE MATTER OF THE PUBLIC HEALTH ACT**

**HASSAN ALI KASSIM.....1<sup>ST</sup> PETITIONER**

**FATUMA ABDULLAHI.....2<sup>ND</sup> PETITIONER**

**SAID HASSAN.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**HASSAN ABDI ALI.....1<sup>ST</sup> RESPONDENT**

**AFRO NATURAL DAIRY PRODUCTS.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF ISIOLO.....4<sup>TH</sup> RESPONDENT**

**COUNTY PHYSICAL PLANNING OFFICER, ISIOLO COUNTY.....5<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

## RULING

1. The brief background of this matter is that the 2<sup>nd</sup> respondent operates a milk processing plant on the suit land in Isiolo County, where by 1<sup>st</sup> Respondent is its director. The Petitioners claim to be residents of the area in the vicinity of the milk plant.
2. The petitioners filed the petition dated 14<sup>th</sup> December 2018 seeking a declaration that their Constitutional rights to clean and healthy environment as guaranteed by Article 42 of the Constitution have been violated and/or are threatened to be violated by the respondents their agents, employees and/or servants. Contemporaneously, the petitioners filed an application seeking temporary Orders restraining the Respondents whether by themselves their agents, employees and/or servants from carrying out any activities, wasting, constructing on, alienating or otherwise interfering with the Milk Processing Plant within that area known as **Plot No. 314 Taqwa Residential Area Isiolo County**.
3. On 20.12.2018 the orders of temporary injunction were granted by the court which orders were extended there after until 10.7.2019. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents thereafter filed an application on 28.12.2018 to have the orders of injunction either discharged or stayed. The parties have subsequently filed various affidavits in support of their respective arguments or in opposition to their rival's arguments.
4. I note that the interim orders of 20.12.2019 were not given ex-parte. The initial application had come up before my brother Judge Njoroge on 17.12.2018 who had directed that the same be served. When the matter was mentioned before the Judge on 20.12.2018, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented and therefore, it cannot be said that the orders were given ex-parte. The issue as to whether to discharge the interim orders will ultimately be considered in the earlier application of 14.12.2018.
5. Again on 20.12.2018, the 3<sup>rd</sup> Respondent represented by one M/S Sakami had stated that they would not be opposing Petitioners application. A Mr. Peter Gitonga, the Isiolo County planning officer had also stated that they are not opposing the application. However, grounds of opposition were filed on 7.2.2019 for and on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Respondents (the county government of Isiolo and the county physical planner).
6. The case against the 6<sup>th</sup> Respondent, the Attorney General was withdrawn with no orders as to costs on 7.2.2019.

### **Case for the Petitioners**

7. The case for petitioners has been advanced by one **Hassan Ali Kassim** in his various affidavits as follows; -Supporting affidavit filed on 14.12.2018, Replying affidavit filed on 5.2.2019, further affidavit filed on 5.2.2019 and another further affidavit filed on 8.2.2019.
8. The gist of the petitioner's complaint is that the milk processing plant was constructed in a residential area which is densely populated by the residents and that the said respondents did not obtain the requisite change of user from residential to commercial as required by law. It is further contended that the residents were not given an opportunity to present their views when the milk plant was set up.
9. The petitioners aver that the Milk Processing Plant is causing air and noise pollution to the Residents of Taqwa Area and that the aforementioned respondents have ignored all forms of notices and warnings from the petitioners and relevant government institutions. The petitioners contend they are now falling sick with various deceases including pulmonary infections and there is a high likelihood of them losing lives due to the medical complications caused by pollution emanating from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Milk Processing Plant.
10. In support of their case, the petitioners have availed copies of demand notices from the County Government of Isiolo, Report from Nema, Public Health Department, Enforcement Notices from the County Government of Isiolo, a memo from the county physical planner and hospital treatment notes.

### **Case for 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' arguments are contained in the affidavits sworn by the 1<sup>st</sup> Respondent as follows; -Replying affidavit filed on 28.12.2018 (in response to petitioners application), supporting affidavit filed on 28.12.2019, supplementary affidavit sworn on 7.2.2019. These respondents contend that applicants also conduct the business of selling milk where they sell camel/cow milk to Nairobi hence this is a case of serious business rivalry. They further state that they obtained all the requisite approvals before commencing their business operations. They aver that the allegations made by the petitioners are not true and that a consultative meeting with all stakeholders was held which found that there is no smoke emissions and noise pollution as alleged by the petitioners.
12. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that their material products will go to waste and their customer base will be greatly affected. The shutting down of the plant has completely paralysed the operations and the Respondents who stand to suffer irreparable loss.
13. In the Supplementary affidavit dated 7<sup>th</sup> February 2019, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that they have increased the height of the flue as per the recommendation of the County Public Health Officer. They also aver that the milk plant is on plot no. 310 and not 314.
14. In support of their arguments, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have relied on the following documents; improvement notice from NEMA dated 12.12.2018, the EIA license dated 25.4.2016, the approval from the physical planning officer, PDP for plot no. 310, their own letter to public health officer dated 16.10.2018 and the response there of from the public health officer dated 24.1.2019.

### **Case for the 4<sup>th</sup> and 5<sup>th</sup> respondents**

15. The 4<sup>th</sup> and 5<sup>th</sup> Respondent filed their Grounds of Opposition dated 6<sup>th</sup> February 2019. It is not clear as to whether the grounds are in response to the main petition, the petitioner's application or the 1<sup>st</sup> and 2<sup>nd</sup> respondent's application. What is certainly clear is that these respondents are fence sitting averring that the duel is technically between the petitioners on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand.

**Determination.**

16. I have considered all the arguments raised herein including the submissions of the parties. The issue for determination is **whether the petitioners are entitled to a temporary injunction pending the determination of this suit? Should this court confirm the temporary orders already in force or should those orders be discharged?**

17. The principles for consideration in determining whether a temporary injunction can be granted are well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, where it was stated that:

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

18. The aforementioned principles were restated in the Court of Appeal case of **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, where it was stated that;

**"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

**(a) Establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. 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. 1 EA 86".**

19. One of the serious allegations made by the petitioners is that the plant is located in a residential area, an allegation denied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> respondent avers that the milk plant is in an area designated for industrial use and on this point, he has made reference to annexure HA1 in paragraph 5 of his supporting affidavit of 28.12.2018. However, the document marked as HA1 is an improvement notice from the 3<sup>rd</sup> respondent National Environment Management Authority (NEMA). On the other hand, the petitioners have availed the document from the 5<sup>th</sup> respondent where it is stated that the area is supposed to be residential.

20. I have considered that the dispute herein was triggered by the petitioners letter of complaint to NEMA dated 4.9.2018 which was copied to the county health officer and county building superintendent. In response thereof, the county health officer responded on 21.9.2018 outlining the mitigation measures that 1<sup>st</sup> and 2<sup>nd</sup> respondents should take so as not to disturb the neighbouring residents. In paragraph 2 of the letter from NEMA availed as annexure HA1 (dated 12.12.2018) by the 1<sup>st</sup> and 2<sup>nd</sup> respondents reference has been made to an incident where the neighbours of the milk plant had staged a demonstration at the facility in presence of area MCA. From the foregoing analysis, there is a likelihood that the milk plant is situated in a residential area.

21. On the issue of noise and air pollution, again the complaint is contained in the petitioners letter to NEMA dated 4.9.2018. The contents thereof are as follows:

**"NEMA OFFICE**

**ISIOLO COUNTY**

**AIR NOISE POLLUTION**

**We would like to register our complaint against Milk Processing plant in Taqwa area that has affected the entire community with air and noise pollution. We kindly request your office to make a visit to the plant next to Taqwa Mosque and make necessary recommendations to prevent us from the imminent health hazard.**

**We are looking forward to your positive response.**

**HASSAN ALI KASSIM**

**TAQWA RESIDENT "**

22. Does this letter contain a genuine complaint?.

23. Article 42 of the constitution provides that;

**“Every person has the right to a clean and healthy environment, which includes; the right— (a) to have the environment protected for the benefit of present and future generations....”.**

24. Article 70 of the constitution further provides that;

**“If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or 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”.**

25. Section 3 of the Environmental Management and Co-ordination Act provides that;

**“Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.**

(2).....

**(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to— (a) prevent, stop or discontinue any act or omission deleterious to the environment; (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; (c) require that any on-going activity be subjected to an environmental audit in accordance with the provisions of this Act; (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action— (a) is not frivolous or vexatious; or (b) is not an abuse of the court process.”**

26. The 1<sup>st</sup> and 2<sup>nd</sup> respondents claim that no public institutions concerned have complained about the milk plant. However, from the aforementioned provisions of law, reference is to **EVERY PERSON**, thus the petitioners are properly before this court and their complaint is not frivolous or vexatious, going by the steps under taken by NEMA and public health office.

27. The petitioners were apparently disturbed by the noise and air pollution. Their complaints were found to be valid by both the public health officer and NEMA. For the public health officer, they aver that 1<sup>st</sup> and 2<sup>nd</sup> respondent have rectified the situation save the issue of noise. A report by the department of public health dated 24/1/2019 indicated that the said office could not ascertain the level of sound nuisance. In their letter of 24.1.2019, the public health officer states as follows;

**“We could not ascertain the level of sound nuisance as the office has no functional decibel meter. By a copy of this report, the NEMA Isiolo county department is requested to determine the sound level emitted by the operation....”.**

28. On the other hand NEMA’s letter of 12.12.2018 is an improvement notice setting out 7 conditions to be complied with, **WITHIN 7 days**. This letter was never responded to. That is why the 3<sup>rd</sup> respondent conceded to the petitioner’s application on 20.12.2018.

29. I find it necessary to extract some of the conditions set out in the EIA License dated 25.4.2016;

**“-clause 3.5; the proponent shall ensure that appropriate and functional efficient air pollution control mechanisms are installed to control all air emissions.**

**-clause 2.4; The license shall not be taken as statutory defence against charges of environmental degradation or pollution in respect of any manner of degradation /pollution not specified herein”.**

30. Section 63 of the Environmental Management and Coordination Act stipulate as follows;

**“The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental Management”.**

31. Thus the improvement notice must have been issued on the basis of the aforementioned provisions of law. It follows that even if the 1<sup>st</sup> and 2<sup>nd</sup> respondent had obtained the EIA license for the milk plant, that was not a blank cheque. They were required to comply with all the conditions set out therein of which they have not given the 3<sup>rd</sup> respondent any feedback on the improvement notice. The 1<sup>st</sup> and 2<sup>nd</sup> respondent cannot have a sigh of relieve on the basis of the go ahead report from the public health. The issue raised by the petitioners touches on the right to clean and healthy environment and the 1<sup>st</sup> and 2<sup>nd</sup> defendant have a statutory duty to demonstrate that they have not violated any law. The 3<sup>rd</sup> respondent NEMA is the body which is mandated to ascertain compliance and not the public health officer in respect of the

application of Environmental Management and Coordination Act.

32. The 1<sup>st</sup> and 2<sup>nd</sup> respondent have averred that their plot is not 314, it is 310. However, the petitioner's complaint is in respect of the Milk processing plant, wherever it is situated.

33. From the foregoing analysis, I do find that the petitioners have met the criteria required in the issuance of injunctive orders. As earlier observed by Judge Njoroge, "**The precautionary principle is one of the principle to be observed in environmental matters**". I apply the said principle in favour of the petitioners. The upshot of my findings are as follows;

**1. The Application of 14.12.2018 filed by petitioners is hereby allowed whereby the injunctive orders shall remain in force until the suit is heard and determined or for a period of one year which ever event comes earlier.**

**2. The application dated 27.12.2018 is dismissed with no orders as to costs.**

**3. Meanwhile the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are directed to engage with the 3<sup>rd</sup> respondent with a view to submitting a response to NEMA in respect of NEMA's letter of 12.12.2018.**

**4. Considering that 1<sup>st</sup> and 2<sup>nd</sup> respondent have already incurred losses, then I direct that each party bears their own costs in respect of the two applications.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10<sup>TH</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Ouma for petitioners

Muriuki for 4<sup>th</sup> & 5<sup>th</sup> respondents

1<sup>st</sup> petitioner

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**