



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 2 OF 2019

PATRICK NJENGA MBURU & 98 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....1ST DEFENDANT/RESPONDENT

NGETHE MBURU.....2ND DEFENDANT/RESPONDENT

YETU LIMITED.....3RD DEFENDANT/RESPONDENT

YETU LEATHER COMPANY LIMITED.....4TH DEFENDANT/RESPONDENT

KIAMBU COUNTY GOVERNMENT.....5TH DEFENDANT/RESPONDENT

KENYA POWER & LIGHTNING.....6TH DEFENDANT/RESPONDENT

NAIROBI WATER AND SEWERAGE

COMPANY LIMITED.....7TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated 7th January 2019, brought under **Order 40 Rule 1 ,2,3 and 4 Order 13 Rule 1 and 5 of the Civil Procedure Rules Sec 81 and 63 e of the Civil Procedure Act, Sec 1, 2, 3, 58, 59, 63, 66(2) 67, 68, 69, 87(1), (4) and 5, 90, 129 (1) and 2 of the Environmental Management and Co-ordination Act, Articles 10,23,70 and 162(2)(b) of the Constitution, Section 10 of the Judicature Act and Rule 3(1) of the High Court Practice and Procedure Rules** by the Plaintiffs/ Applicants for orders that;

1. Pending the Hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction to restrain the Defendants and or their agents and or servants and or employees and or representatives from further infringement of the Plaintiffs constitutional rights to clean and healthy environment by operating and or running and or managing a leather Tannery on residential land reference number DAGORETTI/THOGOTO/2312, situated at Dagoretti Kiambu County.

2. Pending the hearing and determination of this suit the Honourable Court be pleased to issue a mandatory injunction to compel the 6th and the 7th Defendants to disconnect and or stop power and water supply to the leather Tannery located on a residential land reference number DAGORETTI/ THOGOTO/ 2312 situated at Dagoretti Kiambu County.

3. Pending the hearing and determination of this suit The Honourable Court be pleased to order the 3rd and 4th Defendants their agents and or servants and or employees to cancel and or revoke the Environmental Impact Assessment license No. number NEMA/EIA/PSL/3754 dated 7th September 2016 or any other licenses, permits, approvals and or certificates issued and or given to operationize the leather Tannery factory business located on land reference DAGORETTI/THOGOTO/2312 situated at Dagoretti kiambu county.

4. That the officer commanding kikuyu police station division be ordered to oversee/ supervise the execution of this order.

5. That costs of this Application be borne by the defendants.

The Application is premised on the grounds and affidavit sworn by **Patrick Njenga Mburu**, with authority from the other **98 Plaintiffs**. That the Plaintiffs/Applicants are the owners and residents of Residential **LR No. Dagoretti/Thogoto/2313,2011,1584,425,1745,1748,744** and immediate neighbors of the 1st Defendant who is the owner of **LR. Dagoretti/Thogoto/2312**. That they have a Constitutional right to a Clean and healthy Environment under **Articles 42 and 70** of the Constitution. That on **4th November, 2015**, the 2nd Defendant/ Respondent leased his land to the 3rd Defendant/Respondent on which the 4th Defendant / Respondent operates a leather Tannery business in the name of **Yetu Leather Company Limited**.

Further that on **19th April 2016**, when they learnt of the signing of the Lease Agreement, they filed an Objection/ Complaint with the 1st Defendant/ Respondent which objection opposed the issuance of the **E.I. A license** on the grounds that the suit property was not environmentally conducive for establishment of a **Tannery Factory**, as it would expose them and their families to eminent health hazard. That on **7th September 2016**, notwithstanding the objection, the 1st Defendant/ Respondent issued the license. That the 2nd Defendant/ Respondent submitted a project report to the 1st Defendant/ Respondent that was not in the prescribed form and contained information that was untruthful and unverifiable. Further that they independently commissioned an expert and found the project had flaws and they filed a fresh objection on **19th April 2016**, which was disregarded and the license was issued to an unregistered and non existent body and they have been forced to relocate.

That contrary to **Section 58 of the National Environmental Management Authority Act**, the 1st Defendant's/ Respondent's proceeded to issue licenses without publishing the same in two Newspapers was illegal. That the report submitted to the 1st Defendant/Respondent on **19th July 2016**, consulted persons who were not neighbours and contained names of people who are Deceased one of them being **Simon Mburu Thiani** who died in the year **1984**, and was purported to have participated in a public participation in the year **2016** which report was issued by the 1st Defendant to issue the said license. Further that the report submitted to the 1st Defendant on **19th July 2016**, was not prepared and submitted by an identifiable Expert who is a member of the panel approved and authorized by the 1st Defendant/Respondent to prepare and submit **Environmental Impact Assessment Project**. That the Tannery being operated by the 4th Defendant/Respondent on an **Environmental Impact Assessment** license issued to the 3rd Defendant/Respondent without affluent discharge, waste disposal and the emission licenses contravened National Environmental Management Authority Act **section 70 to 100 of the Act**.

That according to the **United Nations Report**, setting up of a leather Tannery requires to be done with proper planning, public participation, and Environmental Impact Assessment Report which was not done in this case. Further that the Plaintiffs/Applicants and their families have experienced various health problems such as fevers, skin diseases, respiratory problems and diarrhea, which they fear have been occasioned by the leather Tannery pollution and direct exposure to chemicals used in tanning process.

The Application is opposed and the 5th Defendant filed a Replying Affidavit dated **28 February 2019**, sworn by **Dr. Martin Mbugua** its County Secretary and the head of Public Service, who averred that they have not received any objections or complaints from the Plaintiffs/Applicants regarding the suit property and that he is advised by his Advocates that any person requiring development works, shall make an application to the Clerk of the Local Authority. That the **Physical Planning Act** provide procedures to be followed on the granting of a development approval from the Local Authority for purposes of commercial and industrial use. That he is informed by his Advocates which information he believes to be true that the Plaintiffs/Applicants have not shown how the 5th Defendant's/ Respondent's actions have been tainted by an illegality.

The 3rd and 4th Defendants/Respondents filed their Replying Affidavit dated **4th March 2019**, and a Further Affidavit with leave of the Court dated **2nd October 2019**, Sworn by **Boniface Mwangi Kihia**, its Director who averred that what was required of the 3rd Defendant/Respondent was an Environmental Impact Assessment Project Report and an EIA project report thus, gazettelement and radio announcement were not required. That the 3rd Defendant/Respondent did seek views of persons who may be affected by the project during the process of preparation of the EIA project report by posting posters and holding public meetings with affected parties and communities. Further that the steps and procedures followed in approving the 3rd Defendants/Respondent's application for an EIA license was proper in terms of the provisions of **Regulation 9 and 10(2) of the Environmental Impact Assessment and Audit Regulations 2003**.

That it is not enough for the Plaintiffs/ Applicants to state that they have incurred losses on their businesses that cannot be quantified without any proof or evidence and no sufficient particulars have been provided to warrant an injunction, restraining the 3rd Defendant/ Respondent from operating a tannery on **LR No.Dagoretti/Thogoto/2312**. In his further affidavit, he stated that the 3rd Defendant/ Respondent has conducted and submitted Self Environmental Audit Report to the 1st Defendant/Respondent on an annual basis pursuant to the **EMCA 1999** and **EIA Environmental Audit Regulations 2003** which recommendations have been well accepted over the years, with no rejection from the 1st Defendant/ Respondent.

The 1st Defendant/Respondent filed a Replying Affidavit dated **21st March 2019**, and a Further Affidavit dated **3rd September 2019**, sworn by **Zephania Ouma**, its Acting Director compliance and enforcement of the 1st Defendant/Respondent. He deponed that the 3rd Defendant/ Respondent submitted an EIA report for the proposed leather tannery on plot **LR No. Dagoretti/Thogoto/2312**. Consequently, the 1st Respondent went ahead to issue the 3rd Defendant/Respondent with a license on **7th September 2016**, having complied with all laws and regulations and was issued with license **No. NEMA/EIA/PSL/3754**. That EIA is a consultative process that relies on various actors including technical, institutional agencies as well as policy directions.

In his Further Affidavit, he stated that via their letter dated **19th July 2016**, they forwarded a copy of the **EIA report** to lead agencies seeking their comments on the proposed project within **21 days** and attached and marked the said letter as **"ZO2"**.

The 7th Defendant/Respondent filed a Replying Affidavit dated **8th November 2019** sworn by **Maurice Owuor** its Regional Technical

Coordinator who averred that the Plaintiffs/Applicants have failed to disclose any reasonable cause of action as against the 7th Defendant/Respondent and they have not demonstrated how the 7th Defendant has violated their rights under the Constitution by providing clean water to the 4th Defendant/Respondent either through its acts or omissions to warrant the 7th Defendant/Respondent to be enjoined in the suit and the Plaintiffs/Applicants should not be accorded Mandatory Injunctions as against the 7th Defendant/Respondent as pleaded in their Application.

The Plaintiffs/Applicants further filed a Supplementary Affidavit dated 2nd December 2019, and averred that for one to transform a residential plot to an industrial plot, one has to apply for change of user and the 2nd, 3rd and 4th Defendants/Respondents have not placed any evidence to show change of user before applying for license. They aver that they have established principles for granting of an injunction including that they have a **prima facie** case and they will suffer substantial loss, being the people affected by poisonous chemical emissions from the tannery.

Parties were directed to file written submissions on the Applicants/Plaintiffs Application and the 3rd and 4th Defendants' filed theirs on 30th March 2021 through the Law Firm of COL ADVOCATES LLP. The 1st, 2nd, 5th, 6th and 7th did not file written submissions. Further, the 2nd Defendant/Respondent did not participate in the proceedings.

Having carefully read and considered the Application, the Affidavits by the parties, the written submissions, the authorities relied upon and the provisions of law, It is the Court's considered view that the issues for determination is **whether the Plaintiffs/ Applicants are entitled to the orders Sought**.

The Plaintiffs/ Applicants have sought for both temporary Injunctive orders and Mandatory Injunctive orders. The Applicants having sought for Injunctive Orders are only entitled to either grant or denial of the same. It is not in doubt that at this juncture, the Court is not supposed to deal with the merit of the case or determine disputed facts. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, and **Kibutiri ...Vs... Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

The Plaintiffs/ Applicants need to establish that they have a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“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”.

It is the Plaintiffs/ Applicants contention that their right to a Clean and Healthy Environment have been infringed when the 3rd & 4th Defendants/ Respondents were granted an Environmental Impact Assessment license to operate a Tannery. That the said issuance of the license was in contravention of the Law as the proper procedures were not followed and further despite their Objections to the same, the 1st Defendant/ Respondent still went ahead and granted the License. That the said operations of the Tannery has caused the Plaintiffs/Applicants and their families to experience various health problems as a result of the leather Tannery pollution and direct exposure to chemicals used in tanning process.

It is not in doubt that the Constitution of Kenya under the Bill of Rights provides that every person has the right to a Clean and Healthy Environment. It is further not in doubt that the Leather tannery has been built in the midst of the Plaintiffs/ Applicants properties.

The Plaintiffs/ Applicants contend that the 1st Defendant/ Respondent did not follow the law as there was no public participation. That the name of persons who were Deceased before the Environment **Impact Assessment Report**, had been conducted have been indicated to have participated in the public participation. Further that the views of persons who are not residents of the area are the ones who had been sought. The Plaintiffs/ Applicants have also alleged that their Objections to the issuance of the License were never responded to.

It is not in doubt that the Constitution further provides for the right to **fair Administrative actions** under **Article 47**. The contention by the Plaintiffs/ Applicants that the Defendants/Respondents did not reply to their Objections has not been rebutted by the Defendants/ Respondents. It is thus clear that they were denied a chance to be heard. Further the Law requires that there should be public participation before the granting of the EIA License. The Court has seen the report by an expert dated **19th April 2016**, that states that an **EIA** study ought to have been conducted and not a report. Further the Court has seen the Self Audit Report by the 3rd and 4th Defendants/ Respondents which has indicated that amongst the negative impacts that would be caused by setting up of the said Tannery is air pollution. As already noted above, the Plaintiffs/ Applicants have right to a Clean and Healthy Environment. If the correct procedure was not used in granting the license and the fact that there is **Air pollution** amongst other negative impacts that may be detrimental to their health, the applicants'

rights to a Clean and Healthy Environment may have been violated. The Court therefore finds and holds that the Plaintiffs/ Applicants have established a **Prima facie** case, with probability of success at the trial.

On whether the Plaintiffs/ Applicants will suffer irreparable injury that cannot be compensated by way of damages, the Court will rely on the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** in which the Court held 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.

It is not lost to the Court that the 3rd & 4th Defendants/ Respondents have acquired an Environmental Impact Assessment License . **Regulation 10 (2) of the EIA Regulations 2003** provides that:

“Where the Authority is satisfied that the project will have no significant impact on the environment or that the project report discloses sufficient mitigation measures, the Authority may issue a license in form 3 set out in the First Schedule of these Regulations.”

However, whether or not the granting of the said License was procedural and followed due process, is an issue that cannot be determined at this stage. The Court acknowledges that the 3rd & 4th Defendants/ Respondents have a right to carry on their business upon being granted the License unless the same is proved to have been acquired illegally. However, the Court has carefully gone through the **Environmental Impact Assessment Report** and it provided for Negative Impacts that would pose a great risk and amongst the forceable impacts that may not be completely avoided are amongst others are **air quality** wherein dust particles suspended in the air have a negative impact to ambient air quality and that the same from the leather poses a real danger to the workers and the general public.

It is thus the Court's considered view that if the Plaintiffs/ Applicants are to suffer any health concerns, the same may not be compensated by costs. The Plaintiffs/ Applicants have therefore demonstrated that any injury caused may not be compensated by way of costs and irreparable injury may be caused.

If the Court is in doubt, it is called upon to determine the case on a balance of convenience. The Court is not in doubt. However, the balance of convenience always lies in maintaining the status quo, that which existed before the wrongful act. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (supra) eKLR** which defined the concept of balance of convenience as:-

“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 favour 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 plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer. In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting.”

The Court finds that the inconvenience caused to the Plaintiffs/ Applicants would be greater than that that would be caused to the Defendants/ Respondents and therefore finds and holds that the balance of convenience lies in favour of the Plaintiffs/ Applicants.

Consequently, Court finds and holds that the Plaintiffs/ Applicants are entitled to the temporary Injunctive orders.

On whether the Plaintiffs are entitled to Mandatory Orders of Injunctions and ordering the cancellation and revocation of the **EIA License No.NEMA/EIA/PSL/3754** and that the 1st Defendant be ordered to enter, audit, investigate the impact of chemical contamination, the said orders are Mandatory in nature.

It is evident that Mandatory Orders of Injunction are granted in very special and exceptional circumstances at the Interlocutory stage. These are orders that are sought in the Plaint and if granted at this stage, it would mean that some of the prayers in the Plaint will have been exhausted at the Interlocutory stage without the benefit of hearing evidence of all the parties involved in the suit. Have the Applicants therefore established existence of exceptional circumstances as was stated in the case of **Kenya Breweries Ltd & Ano....Vs....Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

There are issues in dispute as to whether the Defendants/Respondents flouted the provisions of **Article 42 and 70 of the Constitution 2010** and provisions of various Sections of the Environmental Management and Coordination Act of 1999. Further there is no evidence placed by the Plaintiffs/ Applicants of existence of any special or exceptional circumstances to warrant this Court issue the Mandatory Orders of Injunction at this interlocutory stage. Besides, no evidence was brought out to show that the Defendants are trying to steal a match against the Plaintiffs/Applicants herein.

The Court having perused the Plaint and the prayers that have been sought, it is clear that there are multiple issues that are to be determined at full trial not at the interlocutory stage. The Court therefore finds and holds that the Plaintiffs/ Applicants prayers for mandatory injunction are **not merited** at this stage.

For the above reasons, the Court finds the Plaintiffs/ Applicants' **Notice of Motion** application dated 7th January 2019, is partially merited and the same is allowed in terms of prayers No. **4 and 10** of the Application being:-

1. That Pending the Hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction to restrain the Defendants and or their agents and or servants and or employees and or representatives from further infringement of the Plaintiffs constitutional rights to clean and healthy environment by operating and or running and or managing a leather Tannery on residential land reference number DAGORETTI/THOGOTO/2312 situated at Dagoretti Kiambu County.

2. That costs of this Application be borne by the Defendants.

Let the parties herein do comply with **Order 11** within a period of **45** days after the close of the pleadings, then set the suit for full trial expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 4TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

4/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for Plaintiffs/Applicants

No appearance for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent Though Notices

No appearance for the 4th Defendant/Respondent issued

No appearance for the 5th Defendant/Respondent

No appearance for the 6th Defendant/Respondent

No appearance for the 7th Defendant/Respondent

L. GACHERU

JUDGE

4/6/2021