



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC PET CASE NO. E 4 OF 2020

MATHEW OWUOR DIMO

FRED OMONDI WAYARA

CHRISPIN OGUD JAKOGOL

SAMWEL OWADE ODIDA

DOMINICUS OKOTH OKEYO

DR. SABIANS ODHIAMBO MATITE

ENG. JOHN ODHUR OWINO For and on behalf of member residents of

KODUMO WEST REGION AND OF HOMA BAY COUNTY.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL

CABINET SECRETARY, MINISTRY OF WATER, SANITATION AND IRRIGATION

THE CHIEF OFFICER CENTRAL RIFT VALLEY WORKS DEVELOPMENT AGENCY

THE CHIEF OFFICER LAKE VICTORIA WATER WORKS DEVELOPMENT AGENCY

ATKINS CONSULTING ENGINEERS LIMITED

JIANGXI TRANSPORT ENGINEERING GROUP LIMITED

WATER RESOURCE MANAGEMENT AUTHORITY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENTS

RULING

1. By a Notice of motion amended on 18th December 2020 and duly filed in herein on 21st December 2010 (The application herein). The petitioners (The applicants herein) through the firm of S.B. Mbeche and Company Advocates, are seeking the following principal orders:

a. That pending the hearing and determination of the petition filed herein, a conservatory order do issue restraining all the respondents herein by themselves, agents or persons acting on their behalf from digging, excavating, or in any way interfering with the flow of River Awach until issues raised in the petition are heard and determined.

b. An order of temporary injunction do issue restraining the 5th and 6th respondents by themselves, agents, servants, employees or otherwise from further encroaching into constructing thereon and or doing any other act which is prejudicial to the petitioner's

proprietary interest or rights as enshrined in the Constitution till hearing and determination of the petition herein.

2. The application is anchored on the 6th applicant's supporting affidavit of seventeen (17) paragraphs sworn on even date and accompanying documents marked as "SOM 1" to "SOM 5" which include; copies of list of members (SOM1), bundle of title deeds (SOM2) and survey Map (SOM5) as well as grounds (a) to (d) set out on its face. The applicants' lamentation in brief is that the respondents decided and embarked on the construction of Kendu Bay Town Water Project (the project) without participation of the people and determination of the amount payable in compensation to the affected people. That the diversion of River Awach Kibwon on which the project is undertaken by the respondents is likely to cause untold suffering to the members of the public unless the respondents provide serious mitigating solutions thereof.
3. The respondents were duly served with the application by way of email as per a 4-paragraphed affidavit of service sworn on 13th January 2021 by an authorized process server, Benard Obiero. The same was duly filed in court on 21st January 2021.
4. The 1st, 2nd, 5th and 6th respondents failed to reply to the application.
5. The 3rd respondent through learned counsel Caren Lagat, opposed the application by way of eight (8) grounds of opposition dated 5th February 2021 and duly filed in court on 23rd February 2021. The grounds include;-
 - a. That the order granting leave to the applicant to file an amended notice of motion was obtained by deception, misrepresentation and fraud.
 - b. That the affidavit in support of the instant motion does not make reference to the amended notice of motion thereby making the motion incompetent for want of a supporting affidavit.
 - c. That the affidavit in support of the amended application should be struck out as it does not comply with the mandatory provisions of Order 1 Rule 13(1) & (2) and Order 4 Rule 1(2) & 3 of the Civil Procedure Rules 2010.
 - d. That the entire motion should be struck out with costs.
6. The 3rd respondent's replying affidavit of 27 paragraphs sworn on 22nd January 2021 by Engineer Hosea K Wendot, the Chief Executive Officer of the 3rd Respondent and its annexures duly filed in court on 26th January 2021. Essentially, the affidavit targets at fortifying the said grounds of opposition.
7. The 4th respondent is represented by learned counsel, Mr. Pamphil Matsekhe Oundo further to a notice dated 22nd January 2021. The 4th respondent opposed the application by grounds of opposition and replying affidavit of Engineer George Odedeh sworn on 4th February 2021 and filed in court on 15th February 2021.
8. The 7th respondent was initially represented by learned counsel, Hilda Kaberia and now by learned counsel, Tacey Makori further to a notice of change of Advocates dated 14th July 2021.
9. In a fifteen (15) paragraphed replying affidavit sworn on 3rd June 2021 and filed in court on 7th June 2021, the 7th respondent opposed the application. One John Kinyanjui, the manager Water Resources Assessment and Monitoring of the 7th respondent depose, inter alia, that in June 2020, the 7th respondent received from Homabay Water and Sanitation company Ltd, an application for a permit to extract water from Awach Kibwon River intended for public water supply. That the 7th respondent is empowered under section 12 (d) of the Water Act, 2016 to receive permit applications for water abstraction, water use and enforce conditions of those permits, among others. That the permit applied for is undergoing assessment and processing by the 7th respondent before its issuance.
10. The said deponent also stated that in April, 2020, the 7th respondent issued a public notice in the Daily Nation News Paper as per extract copy of 22nd April 2020 annexed thereto and marked as "JNK-1" informing the public of various applications made to the 7th respondent for permits and inviting the public to submit comments and or objections thereto. That therefore, the application is premature and since various documents referred to in the supporting affidavit are not annexed thereto, the same is also defective in form and substance.
11. The 7th respondent also opposed the application by grounds of opposition dated 22nd June 2021 which include; that the petition, the application dated 1st December 2020 and a court order providing for the letter's amendment, if any, have not been served on the 7th respondent. In essence, the grounds reiterate the contents of the 7th respondents' replying affidavit in a summary form.
12. The applicants filed a supplementary affidavit sworn on 23rd March 2021 by the 6th respondent. It is deposed therein, inter alia, that the application for leave to amend the notice of motion dated 1st December 2020, was granted in court with consent of the 3rd respondent and that they are not challenging the report of National Environmental Management Authority (NEMA) but the manner which the project was initiated. Copies of various title deeds and maps are annexed to the supplementary affidavit as a reinforcement to the application.
13. On 26th January 2021, this court did order and direct that the application be canvassed by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**. Accordingly, learned counsel for the applicants filed submissions dated 24th March 2021 whilst 4th respondent and 7th respondent through their respective counsel filed submissions dated 2nd June 2021 and 13th July 2021 respectively.

14. The applicants' counsel framed a single issue for determination namely whether the application meets the threshold of granting a temporary injunction and analysed the same in favour of the applicants. Counsel relied upon the cases of **Mrao Ltd =vs= First American Bank of Kenya Ltd (2003) eKLR** and Pius **Kipchirchir Kogo =vs= Frank Kimeli Kogo (2018) eKLR**, to reinforce the submissions.

15. On his part, learned counsel for the 4th respondent referred to the orders sought in the application, gave a brief history of the case and identified an issue for determination namely whether or not there was public participation before the commencement of the project. Counsel discussed the issue and relied on section 58 of EMCA,1999, section 4 (1) of the Way Leaves Act Cap 282 Laws of Kenya, among others, to buttress the submissions that the application be dismissed.

16. The 7th respondent's counsel framed twin issues for determination; whether the application is properly before this court and whether there exists a cause of action against the 7th respondent. Counsel examined them and urged this court to dismiss the application with costs to the 7th respondent and relied on the case of **Jacinta Mururi =vs= Jane Mwangi and another (2006)** to fortify the submissions.

17. The 1st, 2nd, 5th, and 6th respondents did not file their respective submissions in this application.

18. I have duly taken into account the entire application, the replying affidavits, grounds of opposition, the supplementary affidavit and the rival submissions including the authorities cited therein. In the foregone, the following twin issues flow therefrom for determination;

a. Is the application properly before this court?

b. Depending on the outcome of the first issue, whether the application has met the threshold for the grant of the orders sought therein.

19. As regards the first issue, the application was mounted pursuant to sections 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, among other Constitutional and legal provisions spelt out on it's face. I take into account all the provisions accordingly.

20. Further, I approve the decision in **Oraro =vs= Mbaja (2005) 1 KLR 142 at 149 and 150 that section 3A** (supra) to the effect that the court's discretion be exercised always in it's equitable conscience for the purposes of upholding the law in so far as is possible. That this would require preserving the claims of the parties so that they may be heard and determined according to the law.

21. The genesis of the present matter for determination at this stage, was the applicant's Notice of Motion dated 1st December 2020 seeking a conservatory order and a temporary injunction over the project in relation to the parcels of land, inter alia, LR nos. Kasipul/Kokwonyo/434,3974,1182,447 and LR Nos.Kabondo/Kodumo West/729,860, 275 and 350.The application was simultaneously filed with the instant petition on 7th December 2020. Notably, on 16th December 2020 as discerned in the court proceeding herein, Mr. M. Mbeche, learned Counsel for the applicants informed the court that there was a challenged in e-filing of the application where a crucial document containing four (4) prayers including temporary injunction, was left out in error. He sought that the application be certified as urgent and be granted bearing in mind **Article 159 of the Constitution** of Kenya, 2010 (The Constitution) and the Overriding Objective.

22. Thus, Counsel prayed thus:-

“.....We undertake to serve all the respondents with the Notice of Motion containing all the four (4) prayers on or before 22/12/2020”

23. On her part, Ms. Langat learned Counsel for the 3rd respondent stated;-

“No objection to service of the Notice of Motion containing a temporary injunction. I have been served with Notice of Motion containing three (3) prayers. The one containing temporary injunction has just been served on us. I seek 14 days to file and serve reply to the Notice of Motion to enable court determine the Notice of Motion on merits.....”

24. Having heard learned counsel for the applicants and learned counsel for the 3rd respondent on the application and taking into account Articles 48, 25 (c), 50 (1) and 159 (2) (a) (b) (d) and (e) of the Constitution, the court ordered and directed inter alia:

“(2) The petitioners/applicants may amend and or serve complete application on the respondents bearing in mind Article 159(2)(b), (d) and (e)(supra), within the next seven (7) days from this date.

(3) the respondents may file and serve replying affidavit(s) to the application within 14 days from the date of service of the application as leave is hereby granted accordingly”

25. It is trite law that the court's duty is to balance interests of both parties; See the Court of Appeal decision in **Reliance Bank Ltd -vs- Norlake Investments Ltd (2002) 1EA 227.**

26. In the case of **Kanwal Sarjit Singh Dhiman -vs- Keshavji Jivraj Shah (2015) eKLR** , the Court of Appeal also stated in part:-

“....As court we have to balance the two divergent interests...”

27. The instant application was initiated further to leave of the court given on 16th December 2020. The court took into Article 159 (2) (b) (d) and (e) (supra), among others, in order to attain the best ends of justice thereof. So, the application is properly laid before this court.

28. Concerning the second issue, **Article 22 (1) of the Constitution** provides for the enforcement of Bill of Rights. **Article 23 (3)** of the same Constitution reads:

“In any proceeding brought under Article 22, a court may grant appropriate relief including-

a. a declaration of rights;

b. an injunction;

c. a conservatory order;

d. a declaration of

(Emphasis supplied)”

29. Clearly, a conservatory order and a temporary injunction are the principal orders sought in the application as noted in paragraph 1 hereinabove. This court is conscious of the threshold that such an application must meet before it is allowed as held in the celebrated case of **Giella vs Casman Brown & Company Ltd (1973) EA 358 as restated in Mrao Case (supra) and Nguruman Limited v Jan Bonde Neilsen & 2 others [2014] eKLR**, among other authoritative pronouncements.

30. This court is mandated under **Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)** to grant interim preservation orders. The same include an interim injunction and a conservatory order sought in the application.

31. It is settled law that an application for a temporary injunction has to satisfy the effect of flora and fauna by the construction like in the instant matter ; see **Bob and Ursulla Brenneisen & 7 others v Shanzu Water Front Limited [2016] eKLR**.

32. Indeed, an injunctive relief may be made against Government Officials in a proper case; see **B -VS- Attorney General (2008) 1 KLR (G & F) 535** which is hereby endorsed.

33. In the foregone, the doctrine of lis pendens which is conservatory in nature is drawn into my mind. The principle is meant to maintain the status quo over a property until the suit is determined or terminated; **see the Court of Appeal decision in Ogada v Mollin (2009) KLR 620**.

34. It is not in contest that NEMA carried out an exercise and prepared a report regarding the project as disclosed in paragraph 12 hereinabove. The applicants' lamentations are that the respondents did not embrace public participation over the project as provided for in **Articles 10(2)(a) and 232(2) of the Constitution**.

35. It is noted that the applicants availed a list of members “SOM-1” to “SOM-07” and survey maps “SOM3(a) and (b)” herein. There was public notice as shown in “JNK1” attached to the 7th respondent’s replying affidavit. To that extent, issues including participation of the people as raised in the petition come into picture for determination. Moreover, the permit applied for to undertake the water project is being processed by the 7th respondent before its issuance as noted at paragraph 9 hereinabove. In that scenario, interim preservation orders are merited as the applicants have met the threshold thereof in this application.

36. To that end, it is the considered view of this court that a status quo is merited in the instant petition pending the hearing and determination of the same on merit in lieu of a temporary injunction in the terms sought in the application; see **Ogada case (supra)** and **Musa Angira Angira v ICDC (2015)eKLR**, among other authoritative pronouncements.

37. Wherefore, it is hereby ordered and directed that the parties in this petition to maintain the obtaining status quo over the project in relation to all the parcels of land enumerated at paragraphs 2,3,4,5,6,7 and 8 in the petition and in paragraph 8 of it’s supporting affidavit where the same will be preserved until the petition is heard and disposed of. In particular, the respondents shall not make more steps towards the completion of the water project on the said parcels of land pending the hearing and determination of the petition set to be heard on priority.

38. Pre trial directions on 23rd September 2021 at the newly established Homa Bay Environment and Land Court as this petition is hereby transferred to that court to enhance access to justice.

Orders accordingly.

DELIVERED, DATED AND SIGNED VIA EMAIL AS NOTICE WAS ISSUED TO THE PARTIES, THIS 29TH DAY OF JULY 2021

G.M.A. ONGONDO

JUDGE