



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO E005 OF 2021

DAVID GACHOKI NJOGU & 5 OTHERS.....PLAINTIFF

-VERSUS-

SINO NYDRO CORPORATION LTD.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. By a notice of motion dated 1st February, 2021 and amended on 26th March, 2021 brought under **Section 63 (c) & (e) of the Civil Procedure Act (Cap. 21)**, and all other enabling provisions of the law, the Plaintiff sought the following orders

(a) ...spent

(b) ...spent

(c) *That pending the hearing and determination of this suit or further orders of this court, a temporary injunction be issued against the Defendants by themselves, their servants, employees, agent and or proxies or any other persons acting under or on their authority or claiming through or under them, from entering, remaining, using occupying, possessing, or in any other manner whatsoever interfering with the Plaintiffs parcels of land known and described as LR. Nyandarua/Olkalou Central/3403, 454,6472,5496,5495,5648 and 3321*

(d) *That the costs of this application be paid by the Respondents.*

2. The application was based upon the grounds set out on the face of the application and the contents of the supporting affidavits sworn by the respective Plaintiffs on 1st February, 2021 and the exhibits thereto. The Plaintiffs contended that they were the registered proprietors of the various suit properties set out in the application. They further contended that the Defendants had unlawfully commenced construction of a sewer line through the suit properties without their consent and without undertaking compulsory acquisition thereof in accordance with the law. It was the Plaintiffs' case that the Defendants' actions constituted a violation of their constitutional right to own property hence the application.

3. The 1st Defendant filed a replying affidavit sworn by its project manager **Shan Xiaoyu** on 3rd March, 2021. It was contended that the 1st Defendant was undertaking construction of Ol kalou Town Sewage System on a riparian reserve hence the Plaintiffs had no proprietary interest thereon. The 1st Defendant stated that it was guided by the Water Resources Authority on the riparian reserve within the project area in Ol kalou and that it was the Plaintiffs who had encroached upon the reserve.

4. The 1st Defendant denied that the Plaintiffs shall suffer any loss or irreparable damage as alleged or at all. It was further stated that the project was donor-funded hence it had strict timelines for implementation hence stoppage of works would compromise successful execution thereof to the detriment of the residents of Ol kalou in need of the sewerage system. The court was consequently urged to dismiss the application.

5. The 2nd Defendant filed grounds of opposition dated 18th June, 2021 in opposition to the application. I was contended, *inter alia*, that the project was being undertaken on riparian reserve; that the application was incompetent and an abuse of the court process; that it offended the provisions of **Article 42 of the Constitution of Kenya, 2010, the Water Act , 2016 and the Environmental Management and Coordination Act**. The court was consequently urged to dismiss the application with costs.

6. When the application was listed for hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Plaintiffs filed their submissions on 17th June, 2021, the 1st Defendant on 21st June, 2021 whereas the 2nd Defendant filed theirs on 19th July, 2021.

7. The court has considered the Plaintiffs' said amended application, the Defendants' replying affidavit and grounds of opposition in response thereto as well as the submissions on record. The court is of the opinion that the following key issues arise for determination herein:

(a) Whether a temporary injunction should be issued restraining the Defendants from entering, remaining, using, occupying or in any manner interfering with the suit properties.

(b) Whether a mandatory injunction should be issued against the Defendants ordering them to remove structures constructed or items deposited on the suit property and to restore the properties to their original state.

8. The factors to be considered in an application for interlocutory injunction were summarized in the case of **Giella v Cassman Brown & Co Ltd [1973]EA 358** as follows:

(a) The applicant must demonstrate a *prima facie* case with a probability of success at the trial.

(b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage.

(c) If the court is in doubt on (b), it shall determine the application on a balance of convenience.

9. The court has considered the material and submissions on record against the first principle. There is no doubt that the Plaintiffs are the registered proprietors of the respective suit properties set out in the application. What is in dispute is whether the project is being undertaken on the Plaintiffs' parcels or on what the Defendants claim to be riparian reserve. Whereas the Plaintiffs contended that the Defendants had encroached on their private properties, the Defendants contended that it was the Plaintiffs who had encroached on the riparian reserve.

10. The court is aware that it is not required to determine this issue conclusively since that is the function of the trial court. However, from the material on record, the court is not satisfied that the Plaintiffs have demonstrated on a *prima facie* case that the project is being undertaken on private property. There was no report from a surveyor or other expert indicating the location of the sewer line in relation to the suit properties. The mere fact that the Plaintiffs had planted trees and crops in the contested area is not necessarily evidence of the same being private property. Accordingly, the court finds and holds that the Plaintiffs have failed to demonstrate a *prima facie* case with a probability of success of the trial.

11. The court has further considered the material on record against the second principle. Although the Plaintiffs alleged that they shall suffer irreparable loss or damage unless the orders sought were granted, the Plaintiffs have utterly failed to demonstrate the nature and extent of such irreparable damage.

12. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal described irreparable injury as follows:

“...the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; an injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury is of such nature that monetary compensation, of whatever amount, will never be adequate remedy”.

13. The court is of the opinion that the Plaintiffs have failed to demonstrate that whatever loss they may suffer as a result of construction of the sewer line is incapable of quantification in monetary terms or that damages of whatever amount can never be adequate compensation. It was never contended nor demonstrated that the Defendants are impecunious or incapable of meeting an award of damages should the Plaintiffs ultimately succeed at the trial. Accordingly, the Plaintiffs have failed to satisfy the second principle for the grant of an injunction.

14. Since the Plaintiffs have failed to satisfy the first two principles for the grant of an interim injunction, the court is of the opinion that the Plaintiffs are not entitled to the interim injunction sought. The court is further of the opinion that the Plaintiffs are not entitled to the mandatory injunction sought at the interim stage. A mandatory injunction should only be granted in very clear and exceptional cases where it is evident that the application has a very strong case with a high probability of success at the trial. A mandatory injunction is a major relief which should await the trial of the suit.

15. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' application for interim orders. Accordingly, the Plaintiffs' notice of motion dated 1st February, 2021 and amended on 26th March, 2021 is hereby dismissed with costs to the Defendants.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF SEPTEMBER, 2021.

In the presence of:

Ms Nderitu Komu for the Plaintiff

B.O Akango Advocate for the 1st Defendant

No appearance for the 2nd Defendant

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Y. M. ANGIMA

ELC JUDGE