



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. E001 OF 2021

KAMAU MUCUHA & 35 OTHERS.....APPELLANTS

=VERSUS=

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

LAVINGTON UNITED CHURCH.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Appellants/Applicants have filed the Notice of Motion Application dated **12th April 2021** seeking the following Orders;

a.(spent)

b.(spent)

c. *This Honourable Court be pleased to issue an Injunction restraining the 2nd Respondent either by itself, its contractors, its architects, agents, assigns from constructing, digging, from excavating, further gathering building material or in other way advancing and /or pursuing the ongoing development howsoever on **L.R. No. 3734/991** and/or any sub division emanating from **L.R. No 3734/991** situate along Ndoto Road Lavington within Nairobi County, pending the hearing and determination of the Appeal.*

d. *This Honourable Court be pleased to issue such further and other Order as will meet the ends of justice to ensure the obedience of the Order and directions issued by the Court in furtherance of the rule of law.*

e. *Costs of this application must be provided by the Respondent.*

2. The subject Notice of Motion Application is based on a number of grounds which are contained at the foot thereof and same is also Supported by the Affidavit of one **Billy Aludo**, sworn on the **12th April 2021**, to which the deponent has attached various albeit numerous exhibits.

3. Upon the filing of the Notice of Motion, the 2nd Respondent filed a Replying Affidavit sworn on the **5th May 2021**, whereupon same opposed the Notice of Motion Application and also stated the various Steps that same undertook prior to the commencement of the impugned project.

4. On the other hand, the 1st Respondent herein does not appear to have filed any document in opposition to the subject Notice of Motion. However, the 1st Respondent has variously attended Court and participated in the matter.

5. Nevertheless, upon service of the 2nd Respondent’s Replying Affidavit, namely the one sworn by the **Reverend Naftaly Gitonga Mugiira**, on behalf of the 2nd Respondent, the Appellants herein responded by filing a Supplementary Affidavit sworn by the said Billy Aludo, on the **18th May 2021**, to which again the Deponent has annexed a number of documents most of which relate to email communications (*sic*) pertaining to the construction on the 2nd Respondent’s premises.

6. Suffice it to say, that the email correspondence which are electronically generated have not been accompanied by any Electronic

Certificate in terms of Section 106 A and 106B of the law of Evidence Act, Chapter 80, Laws of Kenya. However, nothing turns on this Issue ,as no objection was raised in this regard by the Respondents.

DEPOSITIONS BY THE PARTIES

APPELLANTS POSITION

7. The Appellants/Applicants case is anchored on the original Affidavit sworn on the **12th April 2021**, and the Supplementary Affidavit sworn on the **18 May 2021**, which are both deponed to by one **Billy Aludo**, for and/or on behalf of the Appellants/Applicants.

8. According to the Appellants/Applicants, the 2nd Respondent, procured and/or obtained NEMA license, on the basis of misrepresentation and without sufficient public participation.

9. It is also the Appellants case that as a result of the impugned license, the 2nd Respondent, thereafter commenced the construction on the suit Property, which is situate in the neighborhood of the Appellants properties , along Ndoto and Margret Kenyatta roads, respectively, within Lavington area, in the city of Nairobi.

10. The Appellants further take the position that as a result of the construction by the 2nd respondent, same proceeded to and lodged a Complaint, with the 1st Respondent, whereupon the 1st Respondent proceeded to and issued a Stoppage Order. However, the Stoppage Order was subsequently vacated without consultation with Appellants.

11. As a result, of the lifting of the Stoppage Order, the Appellants aver that the 2nd Respondent has continued to carry out the development activities and in particular the construction on the suit Property, in a manner that is contrary to and contravenes the interests of the Appellants.

12. It is also the Appellants position that as a result of the project being carried out by the 2nd Respondent, there is a threat to and indeed a violation of the Appellants' rights to clean and healthy environment.

13. On the other hand, the Appellants further aver that owing to the subject project, coupled with the increased human and vehicular traffic, the Appellants have been exposed to *Covid – 19* disease.

14. It is also the Appellant's position, that the impugned project by the 2nd Respondent, which is anchored on the challenged license is bound to occasion the lowering and/or devaluation of the value of the Appellants' property, situate along Ndoto Road, within Lavington Area.

15. Owing to the foregoing, the Appellants aver that same filed and/or lodged an Appeal to the National and Environmental Tribunal, challenging *inter-alia* the discharge of the Stoppage Order and essentially the revocation of the NEMA license, issued to and in favor of the 2nd Respondent.

16. However, the Appellants further aver, that the Appeal lodged at the National Environmental Tribunal, was therefore struck out vide Ruling rendered on the 24th December 2020.

17. Following the rendition of the Ruling under reference, the Appellants filed and/or lodged the subject Appeal as well as the Notice of Motion Application herein, whereby now same seeks orders of Temporary Injunction pending the hearing and determination of the Appeal.

THE 1ST RESPONDENT'S CASE

18. The 1st Respondent herein, has not filed any deposition and/or ground of opposition. However, the 1st Respondent participated in the proceedings before the Tribunal, wherein same filed Submissions in support of the 2nd Respondent's Notice of Preliminary Objection.

19. As pertains to the subject matter, the 1st Respondent has not filed any document and similarly same has not filed any Submissions. Nevertheless, the 1st Respondent has continuously appeared in the Proceedings.

THE 2ND RESPONDENT'S CASE

20. The 2nd Respondent has filed a Replying Affidavit by one **Rev. Naftaly Gitonga Mugira**, whereby same has enumerated the procedure, leading to the grant of the NEMA license.

21. It is also the 2nd Respondent's case that having been issued with the license, same were obliged to commence the authorized development standing on property.

22. However, the 2nd Respondent further states that the Appellant/Applicants herein are merely keen on frustrating the development on the suit Property, and in this regard, the Appellants lodged a complaint firstly, with the 1st Respondent and thereafter vide Appeal to National and Environment Tribunal.

23. According to the 2nd Respondent, the Appeal to the National Environment tribunal was rightly struck out, because same was lodged and/or filed contrary to Provisions of Section 129 (1) of the Environment management and Coordination Act (EMCA) 1999 (2015).

24. On the other hand, they also aver that the filing of the subject Appeal as well as the Notice of Motion Application herein, are a continuation of the Appellants' machinations and concerted efforts to frustrate the development on the part of the 2nd Respondent.

SUBMISSIONS BY THE PARTIES

25. The Notice of Motion Application came up for Hearing on the 6th of May 2021, on which day the Honourable Court ordered and/or directed that same be canvassed and/or disposed of by way of Written Submissions.

26. In this regard, the Appellants proceeded to and filed their Written Submissions on the 24th May 2021, whereas the 2nd Respondent filed her Written submissions on the 3rd June 2021. For clarity, the 1st Respondent has not filed any Written Submissions.

ISSUES FOR DETERMINATION

27. Having reviewed the Notice of Motion Application filed by and/or on behalf of the Appellants, the Supporting Affidavit and the Supplementary Affidavits as well as Written Submissions on one hand and the Replying Affidavit and the Written Submission on the part of the 2nd Respondent, on the other part, the following issues arise for determination; -

i. *Whether the Appeal raises a prima – facie case with overwhelming chances of success.*

ii. *Whether the Appellants are disposed to suffer irreparable loss.*

iii. *The balance of convenience.*

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

Whether the Appeal raises a prima – facie case with overwhelming chances of success.

28. It is common ground that the subject Notice of Motion Application seeks a Temporary Order of Injunction, pending the Hearing and Determination of the Appeal. For clarity, the subject Application is premised on the basis of Order 40 of the Civil Procedure Rules, 2010.

29. Nevertheless, even though the subject Application has been brought under the Provisions of Order 40 of the Civil Procedure Rules, 2010, same should have been brought pursuant to Order 42 Rule 6 (6) of the Civil Procedure Rules, which provides as hereunder;

“(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

30. Notwithstanding the Provision pursuant to which the subject Application has been brought, what matters however are the reliefs that have been sought, which is an Order of Temporary Injunction. In this regard, the determination and/or solutions of the matter is dependent on proof of the various grounds established vide the decision in the case of **giella v cassman brown (1973) e. a.** First and foremost being proof of the existence of a *prima facie case*.

31. What constitutes a prima facie case has been the subject of various court decisions and in this regard it suffices to refer to the Decision of **Nguruman Limited v Jan Bonde Nielsen (2014) eKLR** where the Honourable Court had the following to say on the definition of “*prima facie case*” in civil cases:

Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie* case is 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

32. To determine whether or not the Appellants/Applicants herein have proved a *prima facie* case, it is important to take a glance at the

Reliefs which the Appellants sought before the Tribunal, and which thus form the basis of the Ruling which has been Appealed against. In this regard, the Court has paid attention to **Annexures BA, 2b, page 000027**, same being the Statement of Grounds of appeal, whereby the Applicants sought the following reliefs;

a. The Appeal be allowed with costs to the Appellant.

b. The 1st Respondent's decision to lift the Stop Order issued on or about the 7th May 2020, and permit the proposed project to proceed as set out in the letter of the Director General of the 1st Respondent dated 4th June 2020 (given by the 1st Respondent) to the Appellant vide email on 12th June 2020, be set aside.

c. Environmental Impact Assessment license numbered NEMA/EIA/PSL8582 be set aside.

d. The 2nd Respondent do undertake a full environmental impact assessment study of the proposed project and submits a comprehensive project report to the 1st Respondent.

33. From the foregoing, the central relief that was sought and indeed which was the cornerstone of the Appeal before the National and Environment tribunal, was for setting aside or rather the impeachment of the license. Granted, the Appellants also were aggrieved by the lifting of the Stop Order, but the Stop Order is a side wind, because even same was a process towards challenging the license.

34. Put another way, the bottom-line of the Appellants grievance, is the NEMA license, which was issued in favor of the 2nd Respondent and which therefore is the basis of the development and/or construction and which the Appellant has said is responsible for the violation of the Appellants' right to clean and healthy environment.

35. To the extent that the Appellants were aggrieved by the issuance of the license, coupled with the obvious fact that it is this licence that the Appellants were desirous to impeach, the Appellants Appeal before the Tribunal appears to be one that was premised on Section 129(1) of the Environment Management coordination Act, (1999).

36. For ease of consideration, a reproduction of the said provision becomes imperative and same is reproduced as hereunder;

129. Appeals to the Tribunal.....

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder; the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder,

37. Taking into consideration the Provision alluded to herein before, it is apparent that an Appeal challenging the Decision of the 1st Respondent to grant a license, (like the one herein), must be filed and/or lodged within sixty (60) days from the date thereof. For clarity, the time when the Appellants or the intended Appellants established the existence of the decision is irrelevant and/or immaterial.

38. To fortify the foregoing position, I rely on the decision in the case of **DAVID AWUORI & 2 OTHERS on behalf of gigiri village association v Director general (NEMA) (2018) eKLR**, where the Court held as follows

“since the Appeal is one brought under Section 129(1) of EMCA, rule 4 of the National Environment Tribunal Procedure Rules, 2003 is in applicable as it covers Appeals under Section 129(2) and the question when the Appellant became aware and/or knowledge of the decision is immaterial in determining whether Appeal is competent or not”

39. The Tribunal found and held that the Appeal by the Appellants, was predicated upon Section 129(1) of EMCA 1999. In this regard, the Tribunal proceeded to find and held that being an Appeal anchored on the said Sections, same ought to have been filed within the sixty days of the impugned license.

40. For clarity, the license in question was issued on the 24th October 2019, whereas the Appeal was filed on the 3rd July 2020.

41. From the foregoing, it is apparent that by the time the Appeal was lodged before the tribunal, the Statutory sixty days stipulated pursuant to Section 129(1) of the EMCA, had long lapsed. In the premises, the decision by the Tribunal appears to be in consonance, not only with the Statute Law but also a plethora of precedents emanating from this Honourable Court.

42. On my own account, I have reviewed the contents of the Notice of Appeal as well as the Memorandum of Appeal, both dated the 3rd of

July 2020, and taken into account the crux thereof and I have arrived at the inescapable conclusion that the Appeal to the Tribunal, was one that appears to be leaning towards Section 129(1) of EMCA and not otherwise.

43. Having reached and/or arrived at the foregoing conclusion and juxtaposing same against the definition of a *prima facie* case, in line with the Decision in **NGURUMAN LIMITED (Supra)**, I am not convinced that a *prima facie* Case/Appeal has not been established.

44. In view of the foregoing and on this ground alone, I would be obliged to dismiss the Notice of Motion Application dated 12th April 2021. However, there are two other issues that have been enumerated in the issues for determination and thus require to be addressed.

ISSUE NUMBER 2

Whether the Appellants are disposed to suffer irreparable loss.

45. As pertains to Irreparable loss, it suffices to take cognizance of the contents of **paragraphs 16, 17, 18 and 20 of the Supporting Affidavit** sworn on the 12th April 2021, whereby the deponent has articulated the aspects or the nature of injuries that are likely to be suffered.

46. Without reproducing the contents of the said paragraphs, the deposed to aspects are as hereunder;

a. The development being undertaken by the 2nd Respondent has caused increased/additional human and vehicular traffic which has exposed the Appellants to the risk of contracting Covid – 19 disease.

b. That the impugned development has occasioned air and noise pollution and thus creating nuisance to the Appellants.

c. The offensive construction is bound to occasion a lowering of the value or otherwise a devaluation of the Appellants properties which are situate in the neighborhood of the subject Property.

47. In respect of the 1st Complaint, despite the alarmist statement that there has been increased human and vehicular traffic, no evidence was tendered to the Honourable Court to show the number of vehicles which ordinarily used to ply Ndoto/Margaret Wambui Kenyatta Roads, before the commencement of the impugned projects and how many vehicles have increased as a result of the impugned project and not otherwise.

48. On the other hand, no evidence was also tendered to the number of human traffic that was ordinarily using the two roads and/or otherwise undertaking assorted activities in the neighborhood thereof. Simply put, the Appellants, have just made statements and thrown them on the face of the Court for the Court to speculate thereon.

49. Secondly, there is also the allegation that the increased human and vehicular traffic in and around the two roads, whereby the Property of the Appellants are situated, has exposed the Appellants to Covid - 19 disease. Suffice it to say, that Covid – 19 pandemic is still with us and the whole world.

50. However, we must not lose sight of the fact that the site where the project is being undertaken, is ordinarily required to be hoarded. Indeed, that is part of the condition stipulated in the NEMA Licence and there is no complaint by the Appellants that the site is not hoarded.

51. Owing to the foregoing, the human personnel, usually comprised of the casual labourers and such other technical Staff, would ordinarily be confined within the construction site. Consequently, there would be absolutely no contact between the Appellants and the human personnel, engaged in the construction of the impugned development.

52. Nevertheless, the only time if any that there would be contact between the Appellants and the human personnel at the construction site, would be if the Appellants chose to visit and/or invade the construction site. Consequently, this would be a conscious and deliberate act at the instance of the Appellants and for which the Appellants shall therefore be the authors of their misfortune.

53. Despite the foregoing, it must also be recalled that it was incumbent upon the Appellants to tender scientific and empirical evidence and/or data, obviously from the public health, showing how the alleged increased and/or additional human and vehicular traffic has indeed increased the Covid – 19 situation, in the area and/or around Ndoto/Margaret Wambui Kenyatta Roads, respectively.

54. Better still, it was incumbent upon the Appellants to tender and/or avail Medical evidence that following the commencement of the impugned development, some of them, their families and/or domestic servants, have been exposed to and/or contracted Covid – 19. However, no such evidence was tendered before the Court.

55. In similar vein, the Appellants have also complained about the emission of noise, caused by the 2nd Respondent/Contractor's Vehicles transporting materials into the site but yet again no scientific and/or empirical evidence was tendered in Court.

56. In respect of air pollution, it is also worthy to note that there was no evidence, tendered by an air pollution expert, to determine the amount of dust emitted into the air and how much of that dust, gas and related particles, arise from the subject impugned development.

57. The foregoing aside, there is also the allegation that the impeached development is likely and/or bound to occasion a lowering in value of the Appellants properties in the neighborhood. How and by what extent, the values of the neighboring properties would be affected, has

not been explained.

58. To my mind, if the impugned development was to occasion devaluing of the properties belonging to the Appellants, one would have expected the Appellants to file a report by a registered/licensed Valuer, showing the impacts or effects of the impugned development on the neighboring Parcels of Lands.

59. Having looked at the Supporting Affidavit and further Affidavit by one Billy Aludo, I have not seen any paragraph where he describes himself as a registered Valuer to authenticate the averments that the construction by the 2nd Respondent shall devalue (Appellants) properties. In this regard, I must state that the said averments have been made without any sound backing and same are therefore devoid of probative value.

60. To fortify the foregoing, I take refuge in the Decision in the case of **KIBOS DISTILERS LIMITED & OTHERS V BENSON AMBUTI & OTHERS (2020) eKLR**, where the Court held as hereunder;

*“My re-examination of the record reveals that there is no scientific evidence on record to prove that there was air pollution and that aquatic life in the water bodies in the neighborhood was affected through the activities of the three appellants. There is no chemical analysis conducted by the respondents (more particularly the 4th respondent) to prove that the waters of the rivers had been polluted. Other than the observations made by the 4th respondents Inspectors, no scientific causal link between the activities of the three appellants and the alleged pollution of the rivers was proven. The **sources of river or water pollution can be considered to be Non-Point and Point. Point indicates the existence of pollutants coming from one source.** River pollution comes from a variety of different sources, including agricultural operations, industrial discharge, wastewater treatment plants and storm water runoff, that carry pollutants into waterways. All these are non-point sources of pollution.*

In the instant matter, there is no scientific empirical evidence on record to prove point pollution and its causal link to the activities of the three appellants. No sampling technique to prove river pollution was tendered in evidence. Above all, the alleged deleterious effect of the vinasse to the environment was not scientifically proven and no expert report on the effect of vinasse to the environment was produced in evidence”.

61. Having reproduced the findings by the Honourable Court of Appeal in **KIBOS DISTILERS LIMITED (Supra)** and taking into account the Depositions contained in the Supporting Affidavit, as well as the Supplementary Affidavit, on behalf of the Appellants, I am afraid that there is no empirical evidence that have been availed to support the allegations touching on the Irreparable loss.

62. In any event, Irreparable loss must be actual, conceivable, realistic and substantial but not remote and/or un realistic. Suffice it to say, that what amounts to Irreparable loss, was well amplified by the Court of Appeal in the decision in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court thus stated as hereunder;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; 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 or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy”.

63. I must now say, that as pertains to the issue of Irreparable loss, the Appellants Notice of Motion Application, must similarly fail.

ISSUE NUMBER 3

The balance of convenience.

64. The 2nd Respondent herein is undoubtedly the Registered Proprietor and/or Beneficial Owner of the suit Property where the impugned development is being carried out and/or undertaken and it is on this ground that same was able to procure the License to commence the impugned project. In this regard, the 2nd Respondent herein is entitled to partake of and/or benefit from the rights attendant to Ownership of Property. **See Section 24 and 25 of the Land Registration Act 2012.**

65. By virtue of being the Registered and/or Beneficial Owner of the suit Property, the 2nd Respondent must be allowed to develop same, save only to the limitations and/or restrictions stipulated and known to the Law.

66. At any rate, it is common ground and there is no dispute that prior to the commencement of the impugned development, there was an Application for change of use, which was duly gazetted and upon there being no Objection, the City County Government of Nairobi, proceeded to and approved same.

67. It also appropriate to mention, that in a bid to commence and undertake the impugned development, the 2nd Respondent also engaged an EIA lead expert, who carried out the requisite EIA study, leading to the preparation of an EIA study report, the latter which was submitted to the 1st Respondent, culminating into the issuance of the license.

68. In fact, the development by the 2nd Respondent, is predicated on the NEMA license, which so far, appears to have been procedurally

issued and in any event, which has not been suspended, revoked and/or rescinded.

69. Suffice it to say, that up-to and including to date and in as much as the license has not been suspended or revoked, it can evidently and conveniently be stated that the development that is being undertaken by the 2nd Respondent in the suit property, is within the parameters of the Law.

70. In short, the Balance of Convenience tilts in favor of the 2nd Respondent, who has endeavored to and indeed procured the requisite licenses and/or approvals, from the relevant authorities before commencing the subject development.

71. On the contrary, the Appellant herein do not have a stake in the suit Property and it appears that their Complaint, which includes the allegations of risk/exposure to Covid-19, which I have examined elsewhere herein above, are not supported by any sufficient basis or credible Evidence.

72. In the premises, I find and hold, that the Balance of Convenience tilts in favor of the 2nd Respondent.

COSTS

73. Costs are ordinarily at the discretion of the Court. Nevertheless, in deciding whether to award or not to award cost, the Honourable Court is to take into account or consideration, the circumstance of the case and the conducts of parties, both prior to and/or during the Commencement of the Proceedings.

74. Taking into account the observations contained in the foregoing paragraphs, I am constrained to award the Costs of the subject Application to the 2nd Respondent.

75. As concerns the 1st Respondent, though same has been represented by Counsel, no Pleadings and/or Submissions were filed, and on this account same is not entitled to Costs.

FINAL DISPOSITION

76. The inescapable conclusion is that the Notice of Motion application dated 12th April 2021, is devoid of merits and/or misconceived and same is hereby Dismissed with Costs to the 2nd Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI

In the presence of;