



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC PETITION NO. 03 OF 2021**

**DAVID NGOGE MALACK.....1<sup>ST</sup> PETITIONER/APPLICANT**

**SAMSON ONGERI MAENDA..... 2<sup>ND</sup> PETITIONER/APPLICANT**

**SAMWEL OGACHI NYATWANGA.....3<sup>RD</sup> PETITIONER/APPLICANT**

**THADEUS MOMANYI NYARONGE.....4<sup>TH</sup> PETITIONER/APPLICANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**NYABONGO PRIMARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**HON. SAMWEL ONUKO**

**MCA BOOCHI BORABU WARD..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF NATIONAL ENVIRONMENT**

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

**RULING**

**INTRODUCTION**

1. The Applicants filed a Notice of Motion application under Certificate of Urgency dated 7<sup>th</sup> April, 2021 seeking the following orders against the Respondents,

a) That this Honorable Court be pleased to issue a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves, their agents, or any person acting on their behalf from harvesting, collecting and interfering in any way with the murrum which belongs to Nyabongo P.A.G Primary School (hereinafter referred to as **the school**).

b) That the Honorable Court be pleased to issue a restoration order against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to restore the degraded environment of the school as far as practicable to its immediate condition prior to the damage.

c) That costs of the application be provided for.

2. In support of the application the 1<sup>st</sup> Applicant swore an affidavit on 7<sup>th</sup> April 2021 in which he averred that the 1<sup>st</sup> Respondent authorized the 2<sup>nd</sup> Respondent and an unknown private contractor to harvest and collect murrum from the school, purportedly to repair roads which are within Boochi Borabu Ward.

3. Further the Applicants averred that the harvesting begun abruptly without the community's knowledge.

4. It was his averment that an Environment Audit was not conducted on the field before the 1<sup>st</sup> and 2<sup>nd</sup> Respondent commenced the harvesting and therefore no Environment Impact Assessment report was available to support their actions.

5. He deponed that the harvesting was done by the excavators notwithstanding the fact that pupils were still learning.
6. He criticized the private contractor who was contracted to repair the roads for colluding with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to excavate the murrum from the school instead of procuring the same from another place. He deponed that the intentions of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent was to harvest the murrum to the detriment of the school and the surrounding community.
7. He averred that the Applicants together with other community members raised concerns with the head teacher of the school but their concerns were not heard because the harvesting continued. He deponed that they then resolved to write a demand letter through their advocate to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and copied the same to 3<sup>rd</sup> Respondent among many institutions demanding that the harvesting be stopped.
8. It was their deposition that the 3<sup>rd</sup> Respondent ordered the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to stop the harvesting as they had not obtained a license and had not complied with other requirements.
9. He averred that even though the excavation process stopped, deep holes were left as a result of the digging posing a great risk to the children. It is his further contention that the 3<sup>rd</sup> Respondent has refused to issue a restoration order which the Applicants now request this court to issue.
10. In response the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on 21<sup>st</sup> April, 2021. The Respondent averred that in 2020 there arose the need to evacuate, back-fill, grade and compact soft soil and to plant grass over the grounds of the school. He avers that the 1<sup>st</sup> Respondent resolved to request the 2<sup>nd</sup> Respondent to help the school. The 2<sup>nd</sup> Respondent accepted to fund the project and a memorandum of understanding was drawn.
11. It is his further averment that after the memorandum of understanding was entered between them, a public participation was carried out through questionnaires that were supplied to members of the public. After the public participation, the 3<sup>rd</sup> Respondent issued them with a license to proceed with their excavation.
12. He averred that it was after the commencement of the process that they received a demand letter from the Petitioner to which they responded on 1<sup>st</sup> March, 2021.
13. He averred that the process excavation was over and therefore the application has been overtaken by events. He added that they are in the process of back-filling the playground to give it a face-lift.
14. In response to the averments by the 2<sup>nd</sup> Respondent, the Applicant filed a Supplementary Affidavit sworn on 26<sup>th</sup> April 2021. In the said Affidavit he vehemently opposed the averments made by the Respondents as dishonest and accused him of material non-disclosure. It was his contention that the activities by the Respondents had nothing to do with the improvement of the school but rather to harvest murrum there from.
15. He averred that there was no public participation carried out as the documents annexed by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents prove that the same were only hurriedly generated after the Applicants had written to them a demand letter on 24<sup>th</sup> February, 2020 demanding that they stop excavation.
16. He averred that the license they claim to have acquired was issued to them on 13<sup>th</sup> April, 2021 long after the excavation had been carried out and 4 days after the filing of this case meaning that they did not get the license before commencing the process.
17. It was his contention that the license was issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by the 3<sup>rd</sup> Respondents on the date when all of them were served with the court documents, which was a clear indication that they were colluding so as to defeat justice.
18. The Applicants pointed out that the title of the Approval letter clearly showed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were only interested in quarrying the murrum and not improving the school ground as they claimed.
19. In response to the Supplementary Affidavit by the Applicants, the Respondent filed a further affidavit sworn by the head teacher of the school one Momanyi Magare who literally repeated the averments by the 1<sup>st</sup> and Respondents highlighted above.
20. The court directed that this application be canvassed by way of written submissions. The Applicant filed their written submissions on 10<sup>th</sup> June 2021 while the Respondent filed her submissions on 21<sup>st</sup> June, 2021.

#### **ISSUES FOR DETERMINATION**

21. Having considered the application, rival affidavits and the documents attached thereto as well as the written submissions filed by both parties, the issues for determination are:

- a) **Whether the application meets the threshold for grant of a temporary injunction.**
- b) **Whether a restoration order should be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

## ANALYSIS AND DETERMINATION

### Whether application meets the threshold for grant of a temporary injunction.

22. The principles for granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows:

**"Firstly, 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."**

23. The first hurdle for an Applicant is to establish that he/she has a prima facie case before an order of injunction can be issued.

24. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

*"With reference to the establishment of a prima facie case, Lord Diplock in the case of **American Cyanamid vs Ethicon Limited [1975] AC 396** stated thus,*

*"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."*

25. Further in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the court further expounded and stated that:

*"In **HABIB BANK AG ZURICH V. EUGENE MARION YAKUB, CA NO. 43 OF 1982** this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:*

*"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."*

26. In this instant application, the Applicants have given an elaborate background in their Supporting and Supplementary Affidavits and all documents annexed thereto elaborating the murrum excavation by the 2<sup>nd</sup> Respondent with the collusion of the 1<sup>st</sup> Respondent on the school grounds.

27. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not denied the facts set out by the Applicant save that they claim that the said excavation of murrum from the school ground was carried out with the approval of members of the school Board and the community with a view to giving the school grounds a face-lift. They also claim that they obtained an approval from the 3<sup>rd</sup> Respondent to carry out the activities which activities have since ended. However, the Applicants have demonstrated clearly that the public participation process and the approval by the 3<sup>rd</sup> Respondents were processes that were carried out after the excavation process.

28. Given the elaborate and uncontroverted averments by the Respondents, it goes without saying that the Applicants have established a *prima facie* case against with a probability of success.

29. The second hurdle is whether the Applicants established that they will suffer irreparable loss if an order of injunction is not issued. The Respondents have submitted that there will be no irreparable damage suffered by the Applicants because the quarrying process has since ended. Clearly from the facts given by both parties, it can easily be said that the application has been overtaken by events given that the quarrying activities has ended.

30. However, the fact that the Respondent obtained a license for quarrying from the 3<sup>rd</sup> Respondent on 13<sup>th</sup> April, 2021 on the very date they were served with the pleadings of this case goes to show that the Applicants have all reasons to fear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will proceed with quarrying activities if an injunction is not granted by this Court.

31. It is rather absurd that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decided to carry out public participation and seek approval from the 3<sup>rd</sup> Respondent long after the quarrying activities were complete.

32. Further, it is logical to conclude the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have intentions to carry out the quarrying process during the pendency of this case, an exercise that would render this suit nugatory and cause irreparable damage to the Petitioners.

33. I have considered the application, the submissions and relevant authorities and find that the Applicant has met the threshold for grant of temporary injunction.

### Whether a restoration order should be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

34. The restoration order that the Petitioners would like the court to issue against the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners is a final order that can only be issued as final order and not at this interlocutory stage and thus the same is denied.

35. In view of the foregoing, I allow the application and order as follows;

i. A temporary order of injunction is hereby issued against the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents either by themselves, their agents, or any person acting on their behalf restraining them from harvesting, collecting and interfering in any way with the murram which belongs to Nyabongo P.A.G Primary School pending the hearing and determination of the Petition.

ii. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF SEPTEMBER, 2021.**

.....

**J.M ONYANGO**

**JUDGE**