



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. PETITION NO. E004 OF 2021

IN THE MATTER OF ARTICLES 2, 42, 69 & 70 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF SECTION 3 OF THE ENVIRONMENTAL MANAGEMENT & COORDINATION ACT, CAP 387 LAWS
OF KENYA**

AND

ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

NGONG SANITARY LANDFILL ENTERPRISES

(Acting in the interest of the Residents of Ngong Slums, Ngong Ward,

Kajiado Sub County)PETITIONER/ APPLICANT

AND

KAJIADO COUNTY GOVERNMENT.....1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA).....2ND RESPONDENT

RULING

What is before Court for determination is the Petitioner’s Notice of Motion application dated the 16th March, 2021 brought pursuant to Section 1A, 3A and 63 (c) & (e) of the Civil Procedure Act, Order 40 Rule 2(1), Rule 4(1) & (2), Rule 8 and Order 51 Rules 1 & 3 of the Civil Procedure Rules. The Petitioner seeks the following orders:

1. Spent
2. This Court issue an order of temporary injunction preventing and stopping the 1st Respondent from continuing of excavation and any other activities relating to Ngong dumpsite pending the hearing and determination of this Petition.
3. This Court issue an order for permanent injunction preventing and stopping the 1st Respondent from continuing of excavation and any other activities relating to Ngong Dumpsite pending the hearing and determination of this Petition, here fore prioritizing the relocation and recommissioning of the proposed landfill to the designated location.

4. This Court issue an order compelling the 1st Respondent to provide to the Petitioners a comprehensive audited accountability report for the funds allocated in this mega project.

The application is premised on the grounds on the face of it and the supporting affidavit of FELIX KARIUKI GITHAIGA who is a Chairman of the Petitioner where he deposes that the Ngong Dumpsite which covers a total area of 6.71 acres with an overall waste volume estimated to be around 300,000m³, has been active since late 90s and its main source of waste is from Ngong, Rongai, Kiserian including Nairobi (Langata). He explains that the dumpsite was established in the 1970s but formally adopted by the Local Government via motion made by the Community through a letter dated July 28, 2005. Further, that the then Ministry of Environment and Natural Resources granted authority to dig a landfill that was to act as a remedy for managing waste through a letter dated October 7, 2005. He contends that the Petitioner organized themselves into groups to manage the dumpsite but in 2010 it was filling up necessitating an alternative site which was granted by the Government through a letter from the Office of the President to the then Minister for Livestock Development dated August 31, 2010 instructing him to allocate land for the dumping site for Ngong Residents. He avers that the 1st Respondent proposed decommissioning of Ngong dumpsite and commissioning of an Integrated Waste Management System at Kerarapon and an Environmental and Social Impact Assessment (ESIA) Study was conducted with a Report developed in 2018. He avers that there were several stakeholder consultations conducted with an aim of the dumpsite decommissioning including rehabilitation and relocating refuse disposal management in the allocated landfill at Ngong Veterinary Farm. Further, that the Ngong Dumpsite has over the years become a fundamental threat to the health of locals with residents' houses barely 10 meters from it. He insists more than a decade ago the Government of Kenya allocated 20 acres of land with Plan No. DD/ 164/ IV(27) at Ngong Veterinary Farm for purposes of relocation of the Ngong dumpsite. Further, there have been several attempts to close the current Ngong dumpsite but it has remained operational todate and only made the situation worse for the residents. He states that the Petitioner had earlier petitioned the County Government of Kajiado through a Petition dated December 9, 2019 seeking for the dumpsite to be moved from its current position to the landfill allocated by the Government for waste disposal. He reiterates that the Petitioner's problems got worse when excavation works of a dumping pit about 20 feet deep began adjacent to the current dumping site and was then abandoned. Further, the excavation works did not involve inclusivity and accountability reporting by the County Government of Kajiado to the public. He further states that the procedures of rehabilitation of the current site by the 1st Respondent that are currently underway contradict the recommendations of the ESIA and the Feasibility Study Reports about the strategic mechanisms and measures for the current dumping site rehabilitation final relief formation provided for. Further, that the project risks being a scam just by considering the aforesaid activities by the 1st Respondent including the now proceeding activities of excavating the current refuse dumps and bulldozing the same adjacent pit. He reaffirms that the threat to the community and environment is so severe that immediate relocation of the dumpsite is of imperative importance. Further, the County Government of Kajiado has contravened the rights of the Petitioners from enjoying a clean including safe environment, and the Petitioners have experienced negative effects from the current dumpsite. He further contends that he rehabilitation of the dumpsite is for the direct benefit of the people of Ngong.

The 1st Respondent opposed the application and filed a replying affidavit sworn by Francis Sakuda, where he deposes that there is a place marked as Ngong Dumpsite used by various residents as named in paragraph 2 of the Petitioner's affidavit. Further, that there is excavation going on in the dumpsite to improve it as well as manage the waste being dumped. He insists the Petitioner is not being candid as while seeking for orders to stop excavation, it also admits that together with other affected parties they took an initiative to manage the said dumpsite. He contends that there is nowhere in the letter addressed to the then Minister of Livestock Development confirming that land had been allocated to the Ngong residents as a dumpsite as in the said letter, it only requested the said Ministry to allocate 20 acres of land to be used for dumping waste. He explains that the Ngong dumpsite is being excavated because an alternative land has not been availed to serve as a dumpsite hence the only option is to improve it. Further, the excavation is for the good of the Ngong Residents and the surrounding area as it is part of the management strategy to manage the waste at the dumpsite. He avers that the Petitioner has not provided proof of a proposal by the 1st Respondent to decommission the Ngong dumpsite and commission the integrated waste management system. Further, the Ngong dumpsite has been in existence since 1970 and acted as waste management site for a long time which means the residents around, bought land as well as settled thereon with full knowledge of its existence. He reiterates that the public outcry from the residents of the area if any is controversial, yet the 1st Respondent has done its best in management of the waste at the dumpsite. He states that the orders being sought are vague and not capable of being executed. Further, that the Petitioner has not identified itself to warrant the mandatory orders sought. He insists the prayers sought will work against the best interest of the majority of the residents who stay around Ngong dumpsite as the main agenda of waste management shall be lost focus of. Further, the Petitioner has not attached any document to the Application to show that the residents it represents, own some property around the Ngong dumpsite hence no proof of any legal right to be protected. He further insists that there is no expert report to show the devastating effect and proof of residency of the affected persons. He contends that over the years the government has been working to improve the dumpsite and the Petitioner has not come out clearly on why they want it moved from the current location to Kerarapon. Further, the Petitioner is opposed to excavation of the dumpsite to make more space to accommodate more waste but have given no alternative site for dumping.

The Petitioner filed a further affidavit where it reiterated its claim and insisted the 1st Respondent budgeted for rehabilitation of the dump site including relocation of the landfill to the designated area. It averred that the waste sources have increased from when the dumpsite was established hence taking up more space than had been anticipated. He explained that the excavation works on the dumpsite has made the situation worse and increased hazards. Further, that allegation of proof of land ownership is baseless.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 16th March, 2021 including the respective affidavits and rivalling submissions, the following are the issues for determination:

- Whether the Petitioner is entitled to orders of temporary injunction in respect to the Ngong dump site, pending the determination of this Petition.
- Whether a mandatory injunction should issue compelling the 1st Respondent to provide the Petitioner with a comprehensive audited accountability report for the funds allocated for the mega project.

The Petitioner in its submissions reiterated its claim, contended that they had established a prima facie case and will suffer irreparable harm if the orders sought are not granted. Further, that the balance of convenience tilted in its favour. It further submitted that it had made out a case where the court can grant a mandatory injunction or order of mandamus to compel the 1st Respondent to provide it with an audited accountability report for the funds allocated in this mega project. To buttress its averments, it relied on the following decisions: **Giella Vs Cassman Brown & Company (1973) EA 358; Gitonga Wanjau V Gathuthi Tea Factory Company Limited & 2 Others (2016) eKLR; American Cyanamid Co Vs Ethicom Limited (1975) A AER 504; Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125; Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another (1990) eKLR; Charles Mugane Mbugua (Suing as the Administrator/ Legal Representative of the Estate of Charles Mugane Njubi (Deceased) V China Road & Bridges Corporation & 3 Others (2020) eKLR; and Moses C Muhia Njoroge & 2 Others V Jane W Lesaloi and 5 Others (2014) eKLR.**

The 1st Respondent submitted that the Petitioner does not have a right threatened with violation as the act alleged has already been committed and there is no prevention of violation. Further, the residents who claim to be part of the Petitioner bought land adjacent to a dumpsite which has been in use over a long period of time and it would be easier to have an excavation in order to make more space for dumping. It insists it will suffer irreparable harm if the dumpsite is suddenly decommissioned to an unknown place. Further, that it has already put measures in place to manage the dumpsite until it gets an alternative. It reiterates that the balance of convenience tilts towards not issuing those orders. On the issue of a mandatory order, it contends that there is no evidence provided that there were monies allocated towards the project. To support its arguments, it relied on the following decisions: **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR; Amir Suleiman V Amboseli Resort Limited (2004) eKLR; Shepherd Homes Limited Vs Sandahm (1971) 1CH 34 and HCCC Case NO. 255 of 2012 – Machakos Coral Land Limited Vs Mastermind Tobacco & 3 Others.**

As to whether the Petitioner has established a prima facie case with probability of success at the trial, I will rely on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. It is not in dispute that the Ngong Dumpsite has been in place from the 1970's. It is further not in dispute that the Dumpsite is owned by the 1st Respondent that is currently undertaking excavation to enable it accommodate more waste. What is in dispute is the Petitioner's contention that there was an alternative land allocated for the dump site. Further, that the dumpsite is a health hazard and excavation should be stopped and the said dump site relocated to the new site. The 1st Respondent on the other hand insists there is no alternative land for the dumpsite and it has been excavating it for purposes of enabling it receive more waste. From the annexures in the supporting affidavit, I note the Petitioner's annexed various documents to prove the said dumpsite had been relocated. From a perusal of the aforementioned Letter to the then Minister for Livestock, it does not indicate if it allocated the requested 20 acres for relocation of the dumpsite. Further, the Environmental and Social Impact Assessment (ESIA) Study Report for the said dumpsite November, 2018 which the Petitioner has heavily relied upon was undertaken by consultants and its main objective was to evaluate the current state of the dumpsite so as to warrant the developing including operating of a new Integrated Waste Management System by the 1st Respondent. I note the Petitioner did not dispute the 1st Respondent's averments that they acquired their portions of land when the dumpsite was in place. Further, that they have all been using this dumpsite including public drawn from Ngong, Kiserian, Ongata Rongai including certain areas of Nairobi which dumpsite is still being managed by the 1st Respondent. To my mind, I find from the documents presented that there is no proof there is alternative land for the dumpsite. Further, since excavation has already been undertaken to make the dumpsite receive more waste which will be to the benefit of the larger public using the dumpsite as enumerated by the 1st Respondent, it will be detrimental to issue an injunction at this juncture without the Petitioner indicating where the dumpsite should be relocated to. I further note that the alleged violations have already taken place.

In the circumstances while associating myself with the decisions cited above, I find that the Petitioner has not established a prima facie case to warrant the orders of injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that in instances when a party fails to establish the first limb on injunctions, the court need not proceed to make a determination of the other two and I will hence decline to do so.

On the issue of a mandatory injunction sought by the Petitioner, I wish to make reference to the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** where the Court of Appeal 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 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.'**

In the current scenario, the Petitioner seeks a mandatory injunction as against the 1st Respondent to provide a comprehensive audited accountability report for the funds allocated in this mega project. However, it has not provided proof of when these funds were allocated. I opine that this is a report which can be produced during the viva voce hearing of this Petition and does not warrant an order of a mandatory injunction to that effect. Further, from the evidence before court, I note the dump site which serves the public drawn from Ngong, Kiserian, Ongata Rongai including certain areas of Nairobi is still being managed by the 1st Respondent. It is my considered view that it would be pertinent for viva voce evidence to be adduced of all the issues in contention, to enable the Court arrive at a proper determination of the dispute at hand. It is my considered view that there are no special circumstances to warrant the orders sought. Further, from the facts as presented by the Petitioner, this is not a clear case to meet the threshold set in granting a mandatory injunction. Based on the facts as presented while relying on the above cited judicial authority, I decline to grant the mandatory injunction at this juncture.

It is against the foregoing that I find the Notice of Motion application dated the 16th March, 2021 unmerited and will proceed to dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE