REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 96 OF 2019

MARY CHRISTINE WANJA KARANJA.....1ST PLAINTIFF

GRACE WANJIRU KIBUE.....2ND PLAINTIFF

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

AND

RUNDA EVERGREEN ASSOCIATION LIMITED.....1ST INTERESTED PARTY

OUR LADY OF THE ROSARY CATHOLIC CHURCH RIDGEWAYS.....2ND INTERESTED PARTY

RULING

What is before the court is the Plaintiffs' Notice of Motion dated 11th March, 2019. In the application, the Plaintiffs (hereinafter referred to as "the Applicants") are seeking the following orders;

1. THAT an Order of a temporary injunction be issued restraining the Defendants (hereinafter referred to as "the Respondents"), their employees, servants, representatives and agents or whomsoever acting on their behalf from interfering, demolishing, destroying, altering or from otherwise interfering with the structures and or buildings erected on the parcels of land known as L.R. No. 5989/122 and L.R. No. 5989/124 at Ridgeways Area, along Kiambu Road (hereinafter referred to as "the suit properties") pending the hearing and determination of the suit herein.

2. THAT pending the hearing and determination of the suit herein, the Respondents be compelled to control the storm water draining from Runda Evergreen Estate so that it does not flow into the suit properties.

3. THAT the Applicants be awarded the costs of the application.

The Applicants' case:

The Applicants' case as set out in the body of the application and the supporting affidavit sworn by the 1st Applicant on 11th March, 2019 is as follows: The Applicants are the registered proprietors of the suit properties. The 1st Respondent has threatened to demolish some culverts and structures on the suit properties which amounts to blatant harassment of the Applicants. The 1st Respondent has claimed that the Applicants have interfered with the natural water course which is not true. There is no natural water course on the suit properties. The only natural water course in the vicinity is Ruaka River which does not pass through the suit properties. The storm water started flowing into the suit properties after new large scale developments were put up in Runda Evergreen Estate. This made it necessary for the Applicants to take measures to divert the said storm water from the suit properties to prevent the destruction and wasting away of the properties.

The Applicants have averred that the legal obligation to control storm water falls on the Respondents. The Applicants have averred that the 1st Respondent is aware of the drainage problem in the Applicants' locality but rather than engaging the Applicants in finding a lasting solution, it has resorted to issuing threats. The Applicants have averred that unless the orders sought are granted, they will suffer irreparable loss and mental anguish.

In their written submissions filed on 29th June, 2020, the Applicants cited Article 40 of the Constitution and Section 3 of the Environmental Management and Co-ordination Act, 1990 (hereinafter referred to as "EMCA") and submitted that they have a right to acquire and own property and to have a healthy environment. The Applicants submitted that in furtherance of those rights, they constructed culverts and other structures on the suit properties to stop the destruction and wasting of the same by storm water. The Applicants cited sections 7 and 9 of EMCA and the cases of Mahmood Shariff Ali & 10 Others *v* Safaricom Limited [2018] eKLR and Hosea Kiplagat & 6 Others *v* National Environment Management Authority (NEMA) & 2 Others [2018]eKLR and submitted that the 1st Respondent had a duty to monitor and assess developments and constructions that were being undertaken in Runda Evergreen Estate to ensure that the same were not degrading the environment or if they were, that the necessary mitigation measures had been put in place. The Applicants submitted that the 1st Respondent erroneously issued them with an Improvement Notice. The Applicants submitted that they were only taking measures to protect the suit properties from damage and destruction occasioned by the 1st Respondent's failure to perform its duties.

The Applicants cited Part 2, section 11 of the 4th Schedule of the Constitution and submitted that by failing to construct storm water management systems in the locality of Ridgeways and by extension causing the flow of storm water onto the suit properties, the 2nd Respondent neglected its constitutional and statutory duties.

The Applicants cited section 4 of the Kenya Roads Act and submitted that the 3rd Respondent had been carrying out expansion of Kiambu Road as part of its mandate. The Applicants submitted that contrary to the averments in the 3rd Respondent's Replying Affidavit, the 3rd Respondent had jurisdiction over Kiambu Road through whose road reserve storm water flowed from Runda Evergreen Estate into the suit properties. The Applicants submitted that the 3rd Respondent was properly joined in the suit.

In conclusion, the Applicants submitted that they had satisfied the conditions set out in Giella *v* Cassman Brown & Co. Ltd [1973] E.A 358 for grant of a temporary injunction. The Applicants submitted that they had shown that the Respondents had failed to perform their duties leaving the Applicants with no alternative but to take measures to divert the flow of artificial storm water from the suit properties. The Applicants submitted that the Respondents should be restrained from interfering with the culverts and other structures that the Applicants had put up to divert the artificial storm water from the suit properties.

The 3rd Respondent's case:

The 3rd Respondent opposed the application through grounds of opposition dated 18th April, 2019 and a replying affidavit sworn by Kennedy Ndugire on the same date. The 3rd Respondent's case is as follows: There is a stream known as Water of Life which flows down the 2nd Interested Party's premises into the suit properties. Further down, the stream is known as Whiskey River. The suit properties are located on a wetland which the Applicants have tried to reclaim by dumping foreign materials thereon.

With regard to its legal obligations towards the Applicants, the 3rd Respondent averred that its mandate is limited to the management, development, rehabilitation and maintenance of national roads in Kenya. Consequently, the management of the drainage system within Runda Evergreen Estate is not under its authority but that of the 2nd Respondent. The 3rd Respondent contended further that between the suit properties and Kiambu road reserve, there is a parcel of land with a basketball court belonging to the 2nd Interested Party and that in between the said basketball court and the suit properties lies the stream mentioned earlier. The 3rd Respondent averred that the stream in question is not within its jurisdiction. The 3rd Respondent averred that the Applicants never sought any approval or supervisory assistance from the 3rd Respondent while carrying out the drainage works in dispute.

In its submissions filed on 10th December, 2020, the 3rd Respondent submitted that the Applicants had not established a prima facie case which is one of the conditions to be met before a temporary injunction can be granted. The 3rd Respondent cited Giella *v* Cassman Brown (supra) and Mrao Limited *v* First American Bank of Kenya Limited & 2 Others [2003] KLR 125 in support of this submission. The 3rd Respondent argued that the Applicants were riding on an illegality by blatantly interfering with a natural water course (that of Water of Life stream also known as Whiskey River downstream) by constructing culverts and other structures without the requisite approvals required under section 41 of EMCA. The 3rd Respondent relied on Kyangaro *v* Kenya Commercial Bank Limited & Another [2004] 1 KLR 126 cited in Patrick Waweru Mwangi & Another *v* Housing Finance Co. of Kenya Limited [2013] eKLR and argued that the Applicants who were seeking equity needed to have come to court with clean hands. The 3rd Respondent submitted that the Applicants had not demonstrated that they had an arguable and a genuine case and by extension a prima facie case. The 3rd Respondent submitted that in the absence of a prima facie case, it is not necessary for the court to venture into the other conditions for grant of a temporary injunction.

The 3rd Respondent submitted further that it is not a proper and a necessary party in this suit. The 3rd Respondent cited Technomatic Limited t/a Promopack Company *v* Kenya Wine Agencies Limited & another [2014] eKLR and Section 4 of the Kenya Roads Act, and submitted that its mandate was limited to national roads and that the suit properties fell outside its road reserves. The 3rd Respondent submitted further that under the 4th Schedule of the Constitution, drainage and storm water management in Runda Evergreen Estate lies with the 2nd Respondent. The 3rd Respondent submitted that there is no relief flowing from the 3rd Respondent to the Applicants and that the Court is able to adjudicate and settle all questions arising in the suit in the absence of the 3rd Respondent.

The 3rd Respondent urged the court to dismiss the Applicants' application or in the alternative to strike out the suit as against the 3rd Respondent with costs.

Determination:

I have considered the Applicants' application together with the supporting affidavits. I have also considered the replying affidavit filed by the 3rd Respondent in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support hereof. The Applicants have sought a temporary prohibitory and mandatory injunction. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella *v* Cassman Brown & Co. Ltd.(supra), it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited *v* First American Bank of Kenya Limited & 2 Others(supra) and went further to state as follows:

> **"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. …All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."**

For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited *v* Agro-Export (1988) 1 All ER 901, where the court stated that:

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction."**

In Shepherd Homes Ltd. *v* Shandahu [1971] 1 Ch.304, Meggary J. stated as follows:

> **"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation".**

From the material before me, I am satisfied that the Applicants have established a prima facie case with a probability of success against the 1st Respondent. The Applicants brought this suit after the 1st Respondent served them with Improvement Notice Order under section 117(3)(g) of EMCA. In the said notice, the 1st Respondent accused the Applicants of; carrying out development/construction of a culvert on a water course without approval from the 1st Respondent and interfering with the natural flow of the water course and failing to comply with the previous orders by the 1st Respondent. The 1st Respondent demanded that the Applicants stop forthwith all developments and construction of culverts on the water course until they obtained approval from the 1st Respondent. The 1st Respondent also demanded that the Applicants remove forthwith the culverts that they had laid on the water course and the debris resulting from the said removal. The 1st Respondent did not respond to the application. The Applicants contention that there is no natural water course passing through the suit properties was not controverted by the 1st Respondent. The Applicants contention that the exercise that they were involved engaged in was intended to divert artificial storm water flowing into the suit properties and damaging it was not controverted by the 1st Respondent. The burden was upon the 1st Respondent to justify its Improvement Notice Order to the Applicants. In the absence of a response by the 1st Respondent, the only conclusion the court can arrive at is that the said Improvement Notice Order was without any legal basis.

It was only the 3rd Respondent that responded to the application. I found the position taken by the 3rd Respondent contradictory. On one hand, the 3rd Respondent claimed that it has no jurisdiction over the subject matter of this suit since the suit properties are not near a road reserve. The 3rd Respondent claimed that it has been wrongly joined in the suit and urged the court to strike out the suit as against it for misjoinder. On the other hand, the 3rd Respondent has contended that there is a stream flowing from the 2nd Interested Party's premises through the suit properties and that the suit properties are on a wetland. The Applicants have denied the existence of any such stream and the evidence placed before the court by the 3rd Respondent has not established the existence of the stream. I believe that if indeed the Applicants were interfering with the flow of water from the 2nd Interested Party's premises, the 2nd Interested Party would have responded to the application. The 3rd Respondent has not persuaded me that the Applicant's suit baseless. I am satisfied from the foregoing that a prima facie case with a probability of success has been established against the 1st Respondent with regard to the legality of the Improvement Notice Order that was served upon the Applicants. I am however not convinced that a case for a mandatory injunction has been established. The Applicants have not persuaded me that the 1st Respondent has a statutory duty to control storm water. A case for an order compelling it to control storm water has therefore not been made out.

The Applicants have not established a prima facie case against the 2nd, 3rd and 4th Respondents. There is no evidence before the court showing that any of these Respondents interfered with the construction or development activities that the Applicants were carrying out on the suit properties. There is also no evidence that any of these Respondents attempted to demolish the structures that had been put up by the Applicants on the suit properties. Although I am satisfied that the 2nd Respondent has legal mandate to manage storm water drainage, the Applicants have not satisfied me at this stage that the 2nd Respondent had an obligation to intervene in this particular case. In any event, the Applicants seem to have dealt with the problem at their end; it is not clear how the 2nd Respondent's intervention at this stage would benefit the Applicants. There is no evidence however that the 3rd and 4th Respondents have constitutional or statutory duty to control storm water. Due to the foregoing, a case for prohibitory and mandatory injunction has not been established against the 2nd, 3rd and 4th Respondents.

Since a prima facie case has not been established against the 2nd, 3rd and 4th defendants, it is not necessary to consider whether, the Applicants will suffer irreparable harm unless the orders sought are granted against them.

With regard to the 1st Respondent, I am satisfied that the Applicants will suffer irreparable harm unless the prohibitory injunction sought is granted. The Applicants risk having the structures that they have constructed to control the storm water demolished by the 1st Respondent if the injunction sought is not granted.

Due to the foregoing, I will allow the Applicants' application dated 11th March, 2019 in terms of prayer 3 thereof but as against the 1st Respondent only. The costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2021.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A by all the parties

Ms. C. Sagina-Court Assistant