



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC E70 OF 2021

MWAKAKI INVESTMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DAVID GIKARIA.....1ST DEFENDANT/RESPONDENT

JAMES HUMPHREY MWANIKI.....2ND DEFENDANT/RESPONDENT

NICODEMUS AKIMBA.....3RD DEFENDANT/RESPONDENT

GEORGE MWAURA.....4TH DEFENDANT/RESPONDENT

RULING

Application

1. The applicant moved the court through notice of motion dated 15/9/2021 brought under **Rule 3(1) & (2)** of the **High Court Practice and Procedure (Vacation) Rules, Article 159** of the **Constitution of Kenya 2010, Section 1, 3A and 3B** of the **Civil Procedure Act, Order 40, Rules 1,2,3 and 4** of the **Civil Procedure Rules, Order 51** of the **Civil Procedure Rules, Cap 21** seeking the following orders:

(1) ...spent

(2) That pending the hearing and determination of this application, the honourable court be pleased to grant and order of temporary injunction restraining the respondents whether by themselves, agents, employees or anyone claiming under them from dispossessing, trespassing on, wasting, constructing on, alienating or otherwise dealing in any way or interfering with the plaintiff's possession and ownership of Plot L.R No. Kiambogo/Kiambogo Block 2/1209.

(3) That pending the hearing and determination of this suit, the honourable court be pleased to grant and order of temporary injunction restraining the respondents whether by themselves, agents, employees or anyone claiming under them from dispossessing, trespassing on, wasting, constructing on, alienating or otherwise dealing in any way or interfering with the plaintiff's possession and ownership of Plot L.R No. Kiambogo/Kiambogo Block 2/1209.

(4) The Officer Commanding Nakuru Police Station do

Enforce compliance of the orders above.

(5) Costs of this application.

2. The application is supported by the affidavit sworn on 15/9/2021 by Peter Mugane where he deposed that he is the director of the plaintiff/applicant's company; that together with other shareholders, they have been in continuous, open, exclusive, undisturbed possession and have enjoyed the use and enjoyment of the suit property since **2001**; that the parcels on the Eastern and Western boundaries were excavated leaving the suit property in soil slides and cracks and architects advised that the whole parcel would have to be excavated and levelled with the adjoining parcel to enable future construction of permanent buildings.

3. He went on to depose that the defendants/respondents upon discovering that the plaintiff/applicant was in the process of conducting sand excavation, sent goons to the plaintiffs/applicants land who attacked the workers and paralyzed ongoing operations and destroyed all temporary structures forcing the plaintiff/applicant to withdraw all machinery and equipment in the suit land; that the said goons expressed

orally that the applicant had to negotiate with the local 'wazee' which the plaintiff/applicant refused to comply with the said directions; that the plaintiff/applicant then engaged National Environment Management Act (NEMA) which did a feasibility study and a report submitted; that a series of public *barazas* and consultation for a were conducted to ensure compliance with the law.

4. He finally deposed that the County Government of Nakuru issued the plaintiff/applicant with a permit to proceed on with the excavation process and urged the court to grant it the said orders otherwise they stand to suffer irreparable harm.

Response

5. The defendants/respondents filed a replying affidavit dated **14/10/2021** sworn by David Gikaria on behalf of his co-defendants/respondents where he deposed that the defendants/respondents and the residents of Mzee Wanyama do not have any proprietary claim over the suit land; he went on to explain the events leading to the conflict between the parties herein where he deposed that the plaintiff/applicant went to Mzee Wanyama in August **2021** intending to harvest sand from their parcel of land; that when this became known to the residents of Imperial Game area, they held a meeting with the chief and village elders to collect views from the **85** members regarding the commercial activities by the plaintiff/applicant who expressed their dissatisfaction to the sand harvesting activities by the plaintiff/applicant as the area had already been extensively excavated causing a serious environmental hazard which was communicated to NEMA; that despite the plaintiff/applicant having been informed of the disapproval by the members of the community the plaintiff/applicant moved to the parcel of land and harvested sand.

6. He further deposed that on **17/8/2021**, a public participation forum was held where the attendees included the A.C.C Lanet Division, the area MCA, himself and a NEMA representative and at that meeting more than **40** residents objected to the commercial activities of sand harvesting; that the true intention of the plaintiff/applicant is to harvest sand from the said property without any regard to the objections of the residents of the surrounding property; that the plaintiff/applicant claims that the project is for leveling sand and thereafter construction of building contrary to the main components of the project as provided for in the executive summary of the report at **paragraph 6**; that the project is simply a sand harvesting project of which the report acknowledges the environmental hazards involved which the residents of Imperial Game are worried about, key of which is soil erosion and change in land flow pattern increasing risk of landslides; that it is evident that the plaintiff/applicant's planned activities are mainly sand harvesting and there is no reclamation of land project to be undertaken by the plaintiff/applicant; that the report **PM5** and the purported minutes which do not represent the views of the residents of Imperial Game prevalent during the public participation forum; that the quarrying activities have adversely eroded the land including the roads, paths and road reserves within the estate rendering most roads impassable and many plots owned by residents inaccessible and that other miners have dug through roads and paths and through residents plots posing great threat of landslides, strata collapse and flooding.

7. He further deposed that the plaintiff/applicant has blocked one of the access roads which has resulted to one of the residents being seriously injured when he collided with the illegal barrier while riding his motor cycle on his way home; that the plaintiff/applicant is relying on misrepresentations and intends to block the will of the residents and that by virtue of the plaintiff/applicant's actions of alleged forgery of minutes, acquisition of NEMA license through corrupt means and collusion with corrupt NEMA officials to acquire illegal license, it does not deserve the orders sought.

8. He finally deposed that it would be proper for the NEMA expert Angela Warui be included in the present proceedings so as to fully resolve the issues in the instant case and urged the court to dismiss the plaintiff/applicant's application.

Submissions

9. The defendants/respondents filed their written submissions on **5/11/2021**. The plaintiff filed its submissions on **17th November 2021**.

Determination

10. The issue that arises for determination is whether the reliefs sought by plaintiff/applicant should issue. **Sections 4** of the **Environment and Land Court Act, 2011** establishes this court and **Section 13 thereof** clothes it with specialised jurisdiction to hear and determine disputes relating *inter alia* to environmental planning and protection, climate issues and land use planning.

11. It is a fact that the defendants/respondents have no proprietary interest in the suit land as their concern is majorly on the safety of the neighbors' and the negative environmental impact the actions of the plaintiff/applicant has on them.

12. **Order 40** of the **Civil Procedure Rules** provides as follows:

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

13. The conditions for the grant of interlocutory injunctions have already been set out in the *locus classicus* case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** as follows:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, 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."

14. Further in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held that:-

"... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."

15. In the instant case, the plaintiff/applicant stated in their supporting affidavit that they have been in continuous possession of the suit land. However, they failed to annex a copy of the title deed to the suit property. It further stated that the defendants/respondents have since interfered with their construction activities, destroying all temporary structures despite the plaintiff having been issued with the relevant license by the Nakuru Government and NEMA to carry out their sand harvesting on the suit property. It is urged that the court should grant them an order of temporary injunction against the defendants/respondents. The defendants/respondents on the other hand contend that they have no proprietary interest in the suit land and therefore granting the said orders against them would be in vain.

16. As the Supreme Court stated in the case of **Bernard Murage - v - Fineserve Africa Limited & 3 others [2015] eKLR**:

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

17. The plaintiff/applicant was issued with a NEMA license which the defendant/respondent in their replying affidavit stated that the same license was issued illegally and proposed that the NEMA expert be included in the instant suit. that may well be the future course the litigation herein may have to take but we are for now dealing with the issue of whether or not a temporary injunction ought to issue against the defendants.

18. I am in agreement with the defendant/respondent the plaintiff/applicant has failed to establish a *prima facie* case as it has failed to prove that it is the registered proprietor of the suit land hence an injunction cannot issue in the instance.

19. The plaintiff/applicant stated that the defendant/respondent has demolished the temporary structures built in the suit property as evidenced by the photographs marked as **PM4** in its supporting affidavit dated **15/9/2021**. It is therefore my opinion that under the prevailing circumstances, an injunction in the form sought by the plaintiff/applicant under **prayers 2, 3 and 4** cannot issue as they have since been overtaken by events.

20. In the case of **HABIBA ALI MURSAL & 4 OTHERS V MARIAM NOOR ABDI [2018] eKLR**, the Court held as follows:

"On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the walls of the building have already been demolished and all windows removed. The entire building has been fenced and sealed using iron sheets. The applicants are not in the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one's right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders. I will therefore decline to grant any orders in the notice of motion dated 11th October, 2018 save for an order that the respondent shall meet the costs of this application. It is so ordered."

21. Further, in the case of **MOSES M WAIRIMU & 24 OTHERS V KENYA POWER & LIGHTING CO LTD & ANOTHER [2020] eKLR**, the Court held as follows:

"On whether they will suffer injury which will not be compensated, there is no doubt that the structures which they were seeking to protect have already been demolished. If the Applicants will succeed to show that their buildings were unlawfully brought down, they will always be compensated in monetary terms. An injunction cannot therefore be granted and in any case an injunction cannot issue to prevent what has already happened."

22. In the present case, and as stated above, it is a fact that the said temporary structures have already been demolished thus it is my view that an injunction cannot issue in such circumstance where demolition has already taken place. Consequently, the instant application dated **15/9/2021** fails and it is hereby dismissed with costs to the defendants/respondents.

23. The parties shall comply with the rules, the plaintiff within **21 days** and the defendants within **42 days** from today, with the time frames running concurrently from the date hereof, and the matter shall be mentioned on **3/2/2022** for the fixing of a hearing date.

Dated, Signed and Delivered at Nakuru via electronic mail on this 24th day of November, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.