



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 16 OF 2020

LYDIA KAGUNA JAPETH.....1ST PETITIONER/APPLICANT

LUCY ADHIAMBO NYALWANGA.....2ND PETITIONER/APPLICANT

HAMDAN OQBAL BAYUSUF.....3RD PETITIONER/APPLICANT

VERSUS

MBESA INVESTMENT LIMITED.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

THE NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....3RD RESPONDENT

RULING

1. Before this Honorable Court for determination is the Notice of Motion application dated 9th July 2020 by the 1st 2nd and 3rd Petitioners/Applicants herein. It was filed in court on 9th July 2020 and brought to court under the provisions of Articles 70 and 162 of the Constitution of Kenya, Section 3 of the Environment and Management and Coordination Act 1999, Section 13 (2) (a) and 7 (a) of the Environment and Land Court Act 2011, and Rules 13, 19, 23 (1) and (2) and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and procedure Rules, 2013). The 1st, 2nd and 3rd Petitioners/Applicants filed a petition on 9.7.2020 and the Amended Petition dated 13th July, 2020.

2. The 1st 2nd and 3rd Petitioners/Applicants Case

Through the aforesaid notice of motion application the 1st 2nd and 3rd Petitioners/Applicants have sought for the following orders:-

(a) Spend

(b) Spend

(c) Pending the hearing and determination of the Petition filed herewith there be is hereby issued a conservation order to restrain the 1st Respondent whether by itself, its Director Shareholders, Contractor, agents, assigns, employees and servants and/or whomsoever is acting under its authorities or instructions from proceeding with the construction of 3 towers known as Towers A, B, and C comprising of 126 units, swimming pools underground water tanks, sea wall and associated facilitates and amenities on properties Land Registration MN/1/5503, Land Registration No. MN/1/5504 and Land Registration No. MN/1/3412.

(d) Costs of this application be provided for.

3. The Notice of Motion application is founded on the grounds and testimony of the jointly signed and sworn the 31 paragraphed Supporting Affidavit of LYDIA KAGUNA JAPETH, LUCY ADHIAMBO NYALWANGA and HAMDAN IQBAL BAYUSUF dated 9.7.2020 and all the 15 annexures marked as "LKJ – 1- 15" annexed thereto.

The Deponents deposed that the 1st Respondent had on 20th June, 2020 commenced construction of a 3 storey tower structure comprising of 126 units, swimming pools, underground water tanks, sea wall, associated facilities and amenities three properties owned by the 1st Respondent being all that parcels of land known as Land Reference MN/1/5503, Land Reference No. MN/1/5504 and Land Reference No. MN/1/3412 respectively. It was held that the said construction was at the inception and preliminary stages.

4. The Deponents deposed that the construction was being undertaken in a reckless manner and utter disregard of the Petitioners/Applicants' health, well-being, right to clean and health environment. There were no protective and/or safety measures and gears against dust, soot, debris and particles escaping from the 1st Respondents site to the Petitioners/Applicant's plots which are adjacent to it. They noted that the 1st Petitioner/Applicant had an underlying medical and health conditions including recurrent cough and cold which requires her to be in a clean and healthy environment at all times yet the pollution emitted from there is affecting her. They deposed that the 2nd Petitioner/Applicant operated a restaurant and hotel business on the plot – where clean and health environment is required for such business.

5. They deposed that the 2nd and 3rd Respondents being statutory regulators of construction projects had abandoned and abdicated their regulatory role and left the Petitioners/Applicants on their own and in the hands of the 1st Respondent. The Purported and alleged approvals and licenses ostensibly obtained from the 2nd and 3rd Respondent to the 1st Respondent were done illegally, irregularly and procedurally.

6. The Deponents deposed that the 1st Respondent development project was in violation of the Constitution statute and legal regulation in that.

(a) Article 10 of the Constitution of Kenya mandated 2nd and 3rd Respondents to ensure public participation including the Petitioners before granting their respective approval and license for the 1st Respondent development. No such process took place.

(b) Under Regulation 17(1) of the Environment (Impact and Audit) Regulations, 2003, the 1st and 3rd Respondents were under the obligation to have conducted the Environment impact assessment study for the 1st Respondent development seeking the Petitioners/Applicants view being the ones to be directly affected by the said project. Yet this never took place.

(c) Under Sections 59 of the EMCA the 3rd Respondent ought to have caused to be published in the Kenya Gazette, in at least two (2) newspapers and over the radio a notice of the 1st Respondent's project. This never happened.

(d) Under Regulations 21 of the Environmental (Impact and Audit) Regulations, 2003, the 3rd Respondent ought to have within 14 days of receiving the Environment Impact Assessment study report invited the public including the Petitioners/Applicants to make oral or written comments on the report but this never happened.

(e) Under Regulations 17(2) of the Environmental (Impact and Audit) Regulations, 2003, the 1st Respondent was under the obligations to publish the project after its approval had been given by the 3rd Respondent and held meetings with persons likely to be affected by the project but clearly this never happened.

7. Therefore, the Deponents deposed that the ostensible Environmental Impact Assessment License No. NEMA/EIA/ PSL/9181 dated 14th April, 2020 allegedly issued to the 1st Respondent by the 3rd Respondent was issued irregularly and in a manner that was in breach of the Regulations and hence null and void for having failed to adhere with and followed the above stated procedures.

8. The Deponents deposed that on 14th May, 2020 the 3rd Respondent purported to amend the said license through a certificate of variation of Environmental Impact Assessment Licenses No. NEMA/EIA/ VC/1387 by introducing/adding the 1st Respondent third plot No. Land Reference No. MN/1/3412 on it which had not been in the ESIA study and for which no environmental impact assessment study had been conducted. Clearly, the 3rd Respondent violated the provision of Section 58 of EMCA which makes it mandatory to conduct EIA study before granting a licence for development on a given property. They held that the certificate of variation of Environmental Impact Assessment License No. NEMA/EIA/VC/1387 was irregular in that:-

(i) While it had been issued on 14th May, 2020, its effective date was backdated to 13th May, 2020.

(ii) It was not signed by the Director General of the 3rd Respondent but by a different person.

9. They further deposed that the 1st Respondent project was being undertaken in a manner that was in breach and violation of the provisions of the Physical and Land Use Planning Act 2019 in that:-

(a) No development permission had been given by the 2nd Respondent's County Executive Committee member as was required under the Provisions of Sections 57 (1) and 58 (1) of the Physical Planning Land Use Planning Act.

(b) The 1st Respondent never notified the Public of the development project as required under the Provisions Section 58 (7) of the Physical Planning Act.

(c) No change of user of the 1st Respondent's properties from low density residential area/Single dwelling to high density residential area/multiple dwelling had been applied for by the 1st Respondent nor obtained.

(d) The 1st Respondent applied for the change of use and consolidation of its three properties at a time when the 1st Respondent had not been the registered owner. The change of user was advertised in the newspaper on 27th April 2015 and 28th April 2015 and approved on 21st August 2015 before the 1st Respondent had been registered as the properties of its properties on 7th September, 2015. Hence, the purported approval was therefore irregular, null and void for having been issued to the 1st Respondent who had not been the owner of the subject properties at the time the approval was given.

(e) The approval of the change of user and consolidation dated 25th September, 2015 had been issued by the 2nd Respondent regularly, the approval had not been effect and could not be applied to support and justify the ongoing development as the approval had been subject to the condition outlined therein which the 1st Respondent had not complied with.

(f) The Approval of the change of user and consolidation dated 25th September 2015 never took place as the 1st Respondent's three (3) plots had never been consolidated to date and each plot exists independently on individual titles.

(g) Under the Provisions of Sections 41(3) and 52 of the repealed Physical Planning Act (applicable then) it was required that the 1st Respondent application for change of user and consolidation to have been published in the Kenya Gazette, one English Newspaper and another Kiswahili newspaper. This never happened and as per the provision of section 41(3) of the Physical Planning Act (Repealed) were never served with the application.

(h) The published notices in the newspapers only gave the notices of change of user and not notice of the application for consolidation of the 1st Respondents properties.

10. The Deponents deposed that the 1st Respondent's development was in violation of the condition imposed on the Certificate of title deeds which provided that the buildings to be erected on the land should not exceed 50% of the area of the land. From the ESIA study Report, the 1st floor up area of Towers A & B is 2663 M². The titles shows that the area/site of Plot No. MN/1/5503 and MN/1/5504 where Towers A & B are to be erected is 0.02076 hectares (2076M²) and 0.2077 hectares (2077 M²) making a total of 4153M² for the two plots combined the total area of the two Towers of 2663M² is way beyond 2076M² which was the 50 % of the total area of the two plots.

11. In summary, the 1st Respondent development was in violation of the integrated National Land use Guidelines published by NEMA, the 3rd Respondent in particular its Regulations 3.2.1; for Coastal Zone area that no storey building should be allowed in the front row (Sea Front) and only two storey in the second row. The 1st Respondents are on the front row and sea walls along the shoreline are prohibited.

12. The upshot of all these, the deponents deposed that they were entitled to the conservatory orders and if not granted the 1st Respondent would continue with the construction and advanced the same to more substantial stages without observing the environment regulations and in manner that was injurious to the Petitioners rights to a healthy and clean environment the wellbeing of the Coastal/Oceanic zone and would render the Petition nugatory. Further the 1st Petitioner health condition would deteriorate to a fatal point and the 2nd Respondents would suffer loss of business and income while the 1st Respondent would suffer no prejudice as the construction was still in the infancy and early stage.

13. They held that pursuant to the provisions of Article 70(2) of the Constitution of Kenya, the court has jurisdiction to grant the conservatory orders so as to prevent, stop or discontinue the 1st Respondent's Construction from taking place as the same was harmful to the people and the environment.

II. THE 1ST RESPONDENT'S CASE

14. On 23rd July 2020, the 1st Respondent filed a 21 paragraphed Replying Affidavit dated 22nd July 2020 sworn and signed by HUSSEIN SHARRIFF ALWY and 7 annexures marked as "HS 1 to 7 annexed thereto. He deposed that he was the Managing Director of the 1st Respondent and duly authorized to swear the said affidavit. He held that the entire suit and application were defective and non-starter for offending the provisions of EMCA No. 8 of 1999 particularly Sections 129 and 130 of the Act. He informed court that the 1st Respondent was established on 16th February 1994 so as to acquire beach front land and develop apartments for sale to the general public and hence acquired the parcels of land known as - Land Reference MN/1/5503, Land Reference No. MN/1/5504 and Land Reference No. MN/1/3412 respectively.

15. He held that after the acquisition of the parcels of land the 1st Respondent begun the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies – including the 2nd and 3rd Respondents. On 29th April 2015 the 1st Respondent applied for the change of user. It sought comments from the District Physical Planning District Surveyor and District Land Officer and none of them raised any objection to the application for the change of user. Indeed the 1st complied with all the necessary procedural and the requirements with respect to its application for change of user. It placed an advertisements in the two of the local dailies with wide national circulation being "Saturday Nation" and "The Standard" newspapers both appearing on 28th and 27th April 2020 respectively.

16. He averred that the said application for the change of user was made on 25.9.2015 were approved after all the relevant agencies which were consulted endorsed it. He held that the 1st Respondent was aware that the correspondences and/or notifications from the relevant agencies with the respect to that application were submitted to the Director County Planning and Architecture. He held that on 25.9.2015 the 2nd Respondent granted approval for the change of user subject to certain conditions being met and the Ministry of Lands also forwarded the revised rent valuation which the Petitioner paid up. It applied to the NEMA for the license for the project and on 14th April 2020 it was granted a license for the construction of the said building comprising of two ten (10) storey complex and swimming pools among other structures.

17. He stated that the 1st Respondent also submitted the Project Building Plans to the 2nd Respondent for approval by the Project Architect and on 25.9.2015 they were notified that the plans had been approved. They therefore embarked on the financial/resource mobilization, project promotion and securing customers and to commence the construction and they were issued with a Certificate of Approval. He held that although the construction commenced in earnest but on 24th July, 2020 they were served with a notice to stop and/or suspend construction works pending resolution of outstanding issues. He averred that they have incurred substantial loss and which continues to incur each day the project was delayed further. They referred to the 1st Respondent's Advocates letter dated 25th June, 2020 to the 2nd Respondent that unless it revoked the suspension of the construction works appropriate proceedings would follow.

He held that the application and suit by the Petitioners/Applicants should be dismissed as the 1st Defendant had filed another constitutional Petition No. 43 of 2020 at the Judicial Review Mombasa against the 2nd Respondent challenging the notice to suspend the construction dated 24th June, 2020 and the court had granted the 1st Respondent with conservatory orders effectively allowing the 1st Respondent to proceed on with the construction works. He urged court to disallow the orders sought here as unless construction commenced and/or proceeded on forthwith there would be real danger that the project would collapse with various strategic investors pulling out with even greater losses.

18. At the same time, I have noted that on 2nd July, 2020 the 1st Respondent raised a preliminary objection dated 23rd July, 2020. They stated that the objection was on matters of law to the effect that this court has no jurisdiction as the matter raised in the Plaintiff (sic) were issues to be determined before the National Environment Tribunal. To them the suit violated the provisions of sections 129 and 130 of the Environmental Management and Coordination Act 1999 (EMCA). Pursuant to this and upon all parties articulately submitting on the Preliminary Objection, on 19th October, 2020 this court dismissed the preliminary objection with no orders to costs. Court ruled that the provisions of Article 162 (2) (b) of the Constitution of Kenya and Sections 4 and 13(1) of the ELC Act No. 19 of 2011 this Court had the legal mandate to hear any matter related to the environmental and Land, including Constitutional Petition such as the instant one. In so doing, it heavily relied on the Supreme Court decision of "*Benson Ambuti Adega & 2 Others –VS- Kibos Distillers Limited & 5 Others [2020] eKLR*

III. THE 2ND AND 3RD RESPONDENTS CASE

While the 2nd Respondent despite being served with pleadings has never participated in this proceedings. On 22nd July, 2021 and 6th October, 2021 the 3rd Respondent indicated that they could not be participating in this interlocutory application where the Petitioners are seeking conservatory orders as set out above.

IV. SUBMISSIONS

19. On 22nd July 2021 when all the parties were present in court, direction were given to the effect that the Notice of Motion application dated 19th July 2020 be disposed off by way of written submissions. The Petitioners/Applicants and the 1st Respondents obliged accordingly by filing their written submissions. A ruling date was reserved for 7th December, 2021

IV. THE PETITIONERS/APPLICANTS SUBMISSIONS

20. On 4th October, 2021 the Advocates for the 1st, 2nd and 3rd Petitioners/Applicants the law firm of Messrs. Oluga & Co. Advocates filed their written submissions dated 29th July 2021. The Advocates submitted that despite of the ruling on the preliminary objection delivered on 19th October, 2020 the issue touching on the EIA License was now still pending determination before the NET. In NET Appeal No. 30 of 2020 – "*Mbesa Investments Limited –VS- NEMA*" and hence they would leave this issue out of this matter. The Learned Counsel submitted that the 1st Respondent was in breach and violation of the Provisions of the Physical and Land Use Planning Act 2019 as follows:-

- (a) It did not obtain development permission as required by Law – under the Provisions of Sections 57 (1) & 58 (1) and (2) of the said Act.
- (b) It did not obtain approval for the Project development.
- (c) It merely stated that it submitted building plans from the 2nd Respondent but did not exhibit any copy of the alleged plans.

They summed up that the fact that the 1st Respondent failed to attach and/or exhibit copies of the building plans, application for approval and the alleged Certificate of Approval only confirmed the Petitioners' case to the effect that the 1st Respondent had not applied for and/or obtained the development permission.

21. The Learned Counsels averred that even assuming that the allegations made out under three (3) paragraphs being numbers No. 13, 14 and 15 of the 1st Respondents' Replying Affidavit to the effect that they applied for and obtained development permission/approval were true, these assertions clearly demonstrated that the development commenced without following the laid down procedures for seeking approval – in that the 1st Respondent only submitted provisional building plans which were used to obtain approval and it was only after the approval were allegedly obtained that the consultants finalized the building plans .. to ensure timely completion of the project. Further, the 1st Respondent only submitted the detailed Plans after the alleged approval had been given but commenced the construction works before a certificate of Approval had been given.

- a) It did not notify the Public of the development – contrary to the Provisions of Section 58 (7) of the Physical and Land used planning Act 2019, an issue the Advocates stressed was never responded to by the 1st Respondents.

b) The change of user by the 1st Respondent was irregular, un-procedural and hence illegal – the Learned Counsels contended that there was no proper change of user on the 1st Respondent’s properties from low density residential area/single dwelling to high density residential area/multiple was applied for by the 1st Respondent and procedurally processed by the 2nd Respondent in that:-

(i) it applied for the change of user and consolidation of its 3 properties at a time when the 1st Respondent was not the registered owner – it advertised for the same on 27th April, 2015 and 28th April, 2015 and approved on 21st August, 2015 yet it only became registered proprietors to the properties on 7th September, 2015 – 5 months after the advertisement and 17 days after the approval.) – hence irregularly, null and void

(ii) Even if the Approval of the change of user and consolidation dated 25th September 2015 had been issued by the 2nd Respondent regularly, the approval did not take effect and could not be applied to support and justify the ongoing development because the approval was subject to the condition outlined therein which the 1st Respondent did not comply with.

(iii) Approval of the change of user and consolidation dated 25.9.2015 never took effect as the 1st Respondent’s three plots had never been consolidated – each plot existed independently. There was no change of user from single dwelling to Multi – dwelling been endorsed on the title deeds.

(iv) Under the Provisions of Section 41(3) and 52 of the Physical Planning Act, the application for change of user and consolidation ought to have been advertised on the Kenya Gazette, an English and Kiswahili printed local newspapers. Unfortunately, It only happened in the English newspapers. The owners or occupants of the adjacent plots which included the 1st, 2nd and 3rd Petitioners were never served with the application. Further, the advertisement in the English local dialy was incomplete as it only published notices of change of user and not for the applications for consolidations of the 3 properties.

22. The Learned Advocates reiterated that the 1st Respondent’s development was in violation of several provisions of the Constitution of Kenya and statues which included the Integrated National Land use Guidelines published by NEMA particularly Regulations 3.2.1, Articles 2 (1) & (3), 27 (1) & (2) 10, 42 & 70 of the Constitution of Kenya and Section 3(1) of the EMCA.

In the long run, they averred that the application and the submissions in the given circumstances warranted the Honorable Court’s intervention by granting the Conservatory order sought. In that event they argued that the 1st Respondent would not suffer any prejudice if the project was stopped pending the hearing and determination of the Petition as if the Petition failed the 1st Respondent would simply continue with the development. However, they urged court if the development was to continue with the alleged glaring irregularities then the 1st, 2nd and 3rd Petitioners would suffer immense damage which would even result to death of the 1st Petitioner who had demonstrated suffering from serious health condition.

In any event, it was in the interest of the 1st Respondent to stop the project temporary so that it did not go on with the development only to be demolished after having spend a substantial sum of financial resources if this Petition ultimately was to success and the court found that the development was under taken against the law and had to be demolished. They urged the court to grant the Conservatory order sought and costs as prayed.

IV. THE 1ST RESPONDENTS SUBMISSIONS

23. On 25th October, 2021, the Advocates for the 1st Respondent the law firm of Messrs. Balala & Abed Advocates filed their written submissions dated 22nd October, 2021. They submitted that by the decision of this court made on 19th October, 2020 onto an preliminary objection earlier on raised by the 1st Respondent regarding the jurisdiction powers of this court to hear and determination the Petition was in essence stayed the hearing of this Petition and/or any application pending the outcome of the decision of NET and hearing of any appeal preferred alongside the rest of the issues reserved for the determination by this Court. In any case, they held that the dispute touching on the EIA license was already before NET being NET Appeal No. 30 of 2020 MBESA INVESTMENTS LTD. –VS- NEMA for hearing and determination on the said subject matter.

They held that in the event that the court was not persuaded by the 1st Respondent’s position and as observed by the Petitioner/Applicant in their submission under Paragraph 7, the 1st Respondent would restrict itself on the matters reserved which were the constitutional issues raised in the Petition – being the right to clean and healthy environment, the right to fair administrative action the right to equal protection and benefit of the law and the right to public participation vis a vis the grant of Conservatory orders.

24. On whether the Petitioners/Applicants had met the criteria for the grant of the Conservatory orders sought, the Advocates for the 1st Respondent relied on several decisions of:-

“Patrick Pomanus Omuto Odundo & Another –VS- Agro Chemicals & Food Company Limited & 2 others [2020] eKLR, Patrick Musimba –VS- National Land Commission and 4 Others [2015] eKLR, Micro & Small Enterprises Associations of Kenya (Mombasa Branch) –VS- Mombasa County Government [2014] eKLR. The Supreme Court – “Gatiran Peter Munya –VS- Dickson Mwenda Kithinji and 2 Others [2014] eKLR.

Where in summary the Courts held “Conservatory Orders bore more decided public law connotation. For these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court. In the public interest, Conservatory orders, therefore, are not unlike interlocutory injunctions linked to such private party issues as **“the prospects of irreparable harm” occurring**

during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and is priority levels attributable to the relevant causes”

25. The Learned Advocate in a rebuttal to the allegations laid out by the Petitioners held that on 13th July, 2020 the 1st Respondent obtained approval and license and the application for the development. Indeed, the development permission was approved on 25th September, 2015 and proceeded to annex a copy of Form PPA – 2.

On 24th June, 2020, the 2nd Respondent vide an Enforcement Notice suspended the approval upon which the 1st Respondent filed a Civil Suit – Constitutional Petition (Mombasa) No. 43 of 2020 – hence they had obtained development permission from the 2nd Respondent and on the strength of this commenced the construction on the suit properties.

With regard to the notifying the public of the development, the Learned Counsels held that, the 1st Petitioner acquired her title on 9th June, 2017 which was way after the building approval had been granted by the 2nd Respondent in the year 2015. Additionally, the 2nd Petitioner was a tenant on LR. MN/I/5502 neighboring the suit property with a tenancy agreement for 5 years 3 months commencing from 18th March, 2014 which by calculation the tenancy agreement had lapsed and hence she had no *locus standi* in this proceedings. On the 3rd Respondents who was the owner of the property from 7th April, 2017 which was obtained way later after the building approval had been granted by the 2nd Respondent in the year 2015 and still held that public participation had been held.

26. On the issues raised with regard to the change user being irregular, un-procedural and hence illegal. The learned Advocates submitted that, the 1st Respondent fully complied with all the necessary procedures and requirements with respect to its application for change of user and further stressed it placed advertisements on the daily newspapers.

They argued that the 1st Respondent fully adhered with the procedure on applying and obtaining the change of user accordingly. With regard to the allegations made by the Petitioner on the violation and breach of the provisions of the Constitution of Kenya by the 1st Respondent’s development project had failed as the Petitioner failed to demonstrate how these violation took place.

In the final analysis they urged this court to dismiss the application with costs as the 1st Respondent had already commenced the construction. Furthermore, they argued that the issue of the EIA License was already before the NET and the approvals by the 1st Respondent had been obtained from the 2nd and 3rd Respondent in a proper manner.

IV. ANALYSIS AND DETERMINATION

27. I have considered all the pleadings, the well-articulated submissions and the relevant provisions of law by the Advocates for the 1st, 2nd and 3rd Petitioners/Applicants and the 1st Respondent with regards to the Conservatory orders sought in the Notice of Motion application dated 19th July 2020 pending the hearing and determination of the main Petition.

In order to arrive at an informed and fair decision hereof I have framed the following four (4) salient issues:-

(a) Whether the 1st 2nd and 3rd Petitioners/Applicants have met the prudent and/or made a case on the laid down threshold set out to be granted the Conservatory Orders?

(b) What was the legal import and/or Connotation of the Ruling by this Honorable Court delivered on 19th November, 2020 arising from the Preliminary Objection raised by the 1st Respondent.

(c) Whether the 1st, 2nd and 3rd Petitioners/Applicants were entitled to the reliefs sought from the Application.

(d) And who bears the costs.

Issue No. 1 Whether the 1st 2nd and 3rd Petitioners/Applicants have met the prudent and/or made a case on the laid down threshold set out to be granted the Conservatory Orders?

28. Prior to embarking on the analysis of issues raised from this application, I need to expound on the brief facts of the case here. The 1st, 2nd and 3rd Petitioners/Applicants are the legal owners to some parcels of land which are directly adjacent to the three parcels of land known as Land Registration Nos. MN/I/5503, MN/I/5504 and MN/I/3412 respectively registered in the names of the 1st Respondent. From the Pleadings the 1st and 3rd Petitioner live on a flat next there while the 2nd Petitioner is a businessman who runs and operates a hotel and restaurant from the vicinity.

In the year 2015, the 1st Respondent commenced construction of a three (3) towers known as Tower A, B, and C comprising 126 units, swimming pools underground what tanks, sea wall and assorted facilities and amenities on to the above 3 properties. This Construction did not sit well with the 1st, 2nd and 3rd Petitioners/Applicants for failure to adhere with the required Constitution of Kenya requirements on clean and healthy environment, approvals and licenses from NEMA; Physical Planning and change of user from a low density to much high density residential area which prompted them to file a Petition and an application seeking for the appropriate orders to stop the commencing of the construction as the project. They alleged that the project had caused them substantial loss and suffering which may lead to fatal

consequences. They further argued that the orders sought would not prejudice the 1st Respondent in any way as the Construction had not yet commenced. On the other hand, the Respondents stressed having fully complied with all the Environment, Physical Planning and Building requirements as they had all the approvals and consents. They pleaded on having adhered with all the procedures and requirements for buildings. They urged court to dismiss the application and the filed Petition as they had incurred a lot of substantial financial resources and that there was the issue of E.A. Licenses still pending at NET.

29. It is trite law that in an application for Conservatory Orders, Under Article 23 of the Constitution the Court is not invited to make any definite or conclusive findings of fact or Laws on the dispute before it because that duty falls within the jurisdiction of court which will ultimately hear and determine the substantive dispute in the main Petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it to determine whether the Applicant has made out a *Prima facie* case to warrant grant of a Conservatory Order. Secondly the court has the duty to determine if the Conservatory order is not granted, the Applicant will suffer prejudice and Thirdly, it is to be borne in mind that Conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest ***In the case of Platinum Distillers Limited –versus- Kenya Revenue Authority (2019) eKLR it held :- “The guiding principles upon which Kenya courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for Conservatory Orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the Petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the Applicant has made out a Prima Facie case to warrant grant of Conservatory Orders. the court is also required to evaluate the pleadings and determine whether denial of the Conservatory orders will prejudice the Applicant”*** The Law on Conservatory orders is now well settled in this jurisdiction and is backed up by myriad of authorities. For instance in the case of ***Centre for Rights Education and Awareness (CREAW) and Another –VS- Speaker of the National Assembly and 2 Others [2017]eKLR*** the Court was emphatic that:-

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition”

30. The instant Notice of Motion application by the Petitioner is brought under Articles 70, 162 (2) of the Constitution of Kenya section 3 of EMCA 1999, section 13(1) (2) (a) & 7 (a) of the ELC Act 2012 and Rules 13, 19, 23 (1) & (2) & 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms Practice and Procedure Rules 2013). This court holds that the provisions of Article 23 (3) of the Laws of Kenya are explicit in that they clearly indicate that ***“In any proceedings brought Under Article 22 “a Court may grant appropriate relief; including (c) a conservatory Order.***

And that Article 22(1) of Laws of Kenya equally explicit provides that ***“Every Person has a right to institutes Court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened”***

Further to the above, I have cited the matter of ***“Simeon Kioko Kitheka & 18 Others –VS- County Government of Machakos & 2 others [2018] (eKLR) where County Government of Machakos & 2 Others [2018]eKLR where Hon. Justice Odunga held:-“Article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the Constitutionality of legislation. The only rider is that the case must be one of which falls under Article 22 of Laws of Kenya. This however does not mean that court ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the court is satisfied that it ought to be exercised. However, it can be exercised. Therefore whereas I agree that there is presumption of Constitutionality of statute that is a rebuttable principle. This was clearly appreciated in Ndanabo –VS- The Attorney General [2001] 2EA 485 where it was held inter alia that in interpreting the Constitution, the court would be guided by the general principles that there is a rebuttable presumption that legislation is Constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restrictionhaving passed the first hurdle, the second issue is whether the Petition has satisfied the provisions of Article 23 (3) (c) of Laws of Kenya Article 23 (3) (c) – provides that in any proceedings brought under Articles 22, a court may grant appropriate relief including a conservatory order”***

31. The Proceedings under Article 22 of Laws of Kenya deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23 (3) (c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of right has been denied, violated or infringed or is threatened. Therefore an Applicant for conservatory orders ought to bring himself or herself within the provisions of Article 22 of the Constitution of Kenya by pleading and establishing on a *“prima facie”* basis that his or her right or fundamental freedom in the Bill of Rights or those or of other persons have been denied, infringed or is threatened.

32. Article 165 and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental freedom) Practice and procedure Rules 2013, (otherwise referred to *“The Mutunga Rules”*) clearly grants this Honorable Court powers to hear and determine application for Conservatory orders or interim orders. In order to preserve and/or secure the subject matter Rule 23 of ***“the Mutunga Rules”*** Provide:-

“Despite any provision to the contrary, a Judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory order or interim order”

While still on this point, I fully concur with the submissions by the Advocates for the 1st Respondent to the effect that, the Principles in regard to granting of interim orders or conservatory orders were clearly outlined by the Supreme Court in the case of ***“Gatirau Peter Munya –Versus- Dickson Mwenda Kithinji & 2 Others “Supreme Court Appel. No. 5 of 2014 [2014] eKLR, Nubian Rights Forum & 2 Others – Versus- Attorney General & 6 Others Nos. 56 of 2019 [eKLR] and Board of Management of Uhuru Secondary School –Versus- City County Director of Education & 2 Others [2015] eKLR.***

Where in summary the principles were laid down as:-

“That the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific rights or freedom in the Bill of Rights and whether if an interim conservatory order is is not granted, the Petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercise its discretion whether to grant or to deny a conservatory order”

33. In the instant application and applying the above principles, I find that the 1st, 2nd and 3rd Petitioners have fully satisfied the aforesaid standards in regard to granting the Conservatory orders. They have demonstrated an arguable prima facie case with a likelihood of success and shown in the absence of the Conservatory orders they are likely to suffer prejudice by the commencement and/or continued of the construction and development of the 1st Respondent’s project if the conservatory orders sought are denied and/or not granted hereof.

The 1st, 2nd and 3rd Petitioners/Applicants have further met the second principles that granting or denial of the Conservatory orders would enhance the Constitutional values and objectives of a specific right or freedom, in the Bill of Rights.

Thirdly the 1st, 2nd and 3rd Petitioners/Applicants have demonstrated, if the interim orders or Conservatory orders are not granted the Petition or its substratum will be rendered nugatory and finally have demonstrated that public interest will be prejudiced by a decision not to grant the Conservatory orders sought.

On the 2nd Issue What was the legal import and/or Connotation of the Ruling by this Honorable Court delivered on 19th November, 2020 arising from the Preliminary Objection raised by the 1st Respondent.

34. From the ruling by Court, delivered on 19th November, 2020 I fully concur that impliedly there was stay of the proceedings in this matter awaiting the outcome of the decision of NET in the NET Appeal No. 30 of 2020 –MBESA INVESTMENT LIMITED –versus NEMA, it’s imperative that the decision of NET is allowed to fate effect before the matters herein

On the 3rd Issue Whether the 1st, 2nd and 3rd Petitioners/Applicants were entitled to the reliefs sought from the Application.

The 1st, 2nd and 3rd Petitioner ought to be granted the Conservatory Orders as sought from the application as already elaborately stated herein

35. The orders are granted to allow the Notice of Motion application dated 19th July, 2020 which is meritorious.

DETERMINATION

In view of the foregoing and for avoidance of any doubt these are the orders of this court:-

1. THAT Conservatory order restraining the 1st Respondent whether by itself, its Directors, Shareholders, Contractors, agents, assigns, employee and servants and/or whosoever is acting under the authority or instruction from proceedings with the construction of 3 towers known as Towers A, B, and Comprising of 126 units, swimming pools underground water tanks, sea wall and associated facilities and amenities on properties Land Registration MN/1/5503, Land Registration No. MN/1/5504 and Land Registration No. MN/1/3412 pending the hearing and determination of the Petition.
2. THAT pursuant to and in consonance to the decision by this court on 19th November, 2020 in the meantime, there be a stay to the hearing and determination of the filed Petition by the 1st, 2nd and 3rd Petitioners hereof awaiting the final outcome of NET – in Net Appeal No. 30 of 2020 = Mbesa Investment Limited, on the legality of the EIA license over the subject matter hereof.
3. THAT thereafter depending on the outcome and/or decision of the NET aforesated, this Court to proceed to hear the issues raised in the Petition hereof.
4. THAT for expediency sale and in order to keep close track of the Petition hereof the matter to be mentioned on 3rd March, 2022 to ascertain progress and the outcome of Order No. 2 above.
5. THAT the Petition shall be heard by both viva voce evidence and reliance on the pleadings written submissions.
6. THAT costs to be in the cause.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Kinuva holding brief for Mr. Oluga for the Petitioners

M/s. Mwangi for Mr. Ngara for the 3rd Respondent

Mr. Mohamed for the 1st Respondent