



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

PETITION NO. E033 OF 2021

KIPSIRGOI INVESTMENTS LIMITED.....PETITIONER

VERSUS

LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES.....RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....INTERESTED PARTY

RULING (1)

1. In the Notice of Motion dated 13th September, 2021, the Petitioner has sought for the following orders;

a. That pending hearing and determination of this Petition, a temporary conservatory order or injunction to forthwith prevent, stop, discontinue or restrain the Respondent, whether by itself, servant, agents, officers, contractors and or anyone claiming under her from proceeding with or carrying out deleterious and destructive activities particularly cutting down, wasting away and destroying trees or any property, excavating or carrying out construction or road works including but not limited to purported upgrading or constructing a 10 meter wide road on the Petitioners property known as L. R. No. 13065 (original No. 6939/1 and 5830/9) situated in Ololua Ridge-Karen in Nairobi without prior compliance with Article 40, 42, and 69 of the Constitution of Kenya.

b. That the petitioner filed herewith be certified urgent and be heard on priority basis.

c. That costs of the application herein be borne by the Respondent.

2. The Application is supported by the affidavit of the Petitioner's director who deponed that the Respondent is the registered owner and proprietor of land known as L.R No. 13065 (original number 6939/1 and 5830/9) measuring about 8.4 Ha (the suit property) that the Respondent is the owner of land known as L. R. No. 6930/2 measuring about 20 acres and neighbouring the suit property and that in 1975, the original owner of the suit property granted an easement of a 3.5 km long and three (3) meters wide marram access road.

3. It is the Petitioner's Director's deposition that the marram access road was for passage or access by two single family private house dwellers of the property L. R. No 6930/2 (the dominant property) onto public roads known as Ololua Ridge road and thereafter Ngong Road.

4. It is the Petitioner's case that the developments in Ololua Ridge area in Karen are regulated by the Nairobi City County Government Guide of Nairobi City Development Ordinances and Zones which has zoned the area as low density residential dwelling house and that the said easement was granted to exclusively serve the two dwelling single family houses.

5. According to the Petitioner's Director, the Respondent obtained approvals on or about 2017 to construct over 30 single dwelling residential units known as Naiserian homes on the dominant land; that the said houses are serviced by a 10-meter-wide public tarmacked road known as forest lane road and that the Respondent has never sought the Petitioner's authority to vary the easement on the suit property.

6. It is the Petitioner's case that despite the recent changes in the dominant land, the Respondent has never acquiesced to the change of the user of the marram access road or an upgrade thereof to serve more than two single family private resident on the dominant land thereof and that the Petitioner has at all material times maintained indigenous tress along the private marram access road on the suit property.

7. The Petitioner's Director deponed that on 8th September, 2021, the Respondent forcefully and violently in breach of the easement on the suit property started cutting down the indigenous tress along the marram road and commenced excavations of the said road and that the Respondent's actions are not only *ultra vires* the easement and user thereof, but also a violation of the Petitioner's right to property.

8. It was deponed that the Respondent has not obtained any legal approvals and permits from the 1st Interested Party in compliance with the legislative measures under **Article 42** of the **Constitution** and/or any approvals from the relevant state organ to fell the Petitioner's indigenous tress.

9. The Petitioner's Director lastly deponed that the Respondent's proposed development will have adverse environmental and land use impacts on the suit property and that the proposed road on the suit property will adversely increase the user population of the access road from the intended two single family dwellers to over 90 vehicles for over 30 residential units on the dominant land thereby straining the suit property.

10. In reply, the Respondent's Director deponed that both the Petitioner's and the Respondents' properties originated from one large parcel of land measuring 60 acres on L. R. No. 6939 situated in Ololua Ridge-Karen; that on 16th October, 1970, the property was presented for sub-division, which sub-division produced three separate and independent portions measuring 20 acres each and that the sub-divisions were L. R. No. 6939/2 (the Respondent's land); L. R. No. 13065 (formerly 6939/1 – the Petitioner's land) and L. R. No. 6939/3.

11. It is the Respondent's case that the sub-division was approved by the Commissioner of Lands on condition that a right of way be registered against the title of Plot B (L.R. No. 6939/1) in favour of L. R. No. 6939/2 and 6939/3).

12. It is the deposition of the Respondent's Director that a survey plan was processed on survey plan FR No. 122/9 dated 5th July, 1971 which shows the right of way (easement) to plots L. R. No. 6939/2 and 6939/3 and that in consideration that the provision of the wayleave of 38 M long by 12 M wide (approximately 1 acre) would encroach into sub-plot L.R. No. 6939/1, the original owner offered to compensate the owner of L.R. No. 6939/1 by purchasing land known as L. R. No. 5830/9 measuring one (1) acre and consolidated it with the suit property (L. R. No. 6939/1) to form one parcel measuring 20 acres.

13. According to the Respondent's Director, after the amalgamation of L. R. Nos. 5830/9 and 6939/1, the land became L. R. No. 13065; that in April, 2012, the Respondent bought L. R. No. 6939/2 and that prior to the commencement of the project on L.R. No. 6939/1, the Respondent carried out an Environmental Impact Assessment (EIA).

14. It was deponed by the Respondent's Director that as the developer of the 30 single dwelling residential units on L. R. No. 6930/2, the Respondent complied with all the necessary approvals and that due to the many interferences by the Petitioner, the parties agreed at the beginning of September, 2021 to have their respective surveyors survey the land for purposes of confirming the easement, which report confirmed that the easement is 12 meters in width.

15. The Respondent's Director deponed that the initial approvals from National Environmental Management Authority (NEMA) were sufficient; that the projects that are required to undergo Environmental Impact Assessment are listed under the **second Schedule** of the **Environmental Management and Co-ordination Act** (EMCA) and that an easement does not form part of the project to be subjected to Environmental Impact Assessment.

16. It is the Respondent's case that the **Environmental Management and Co-ordination Act** establishes the National Environmental Tribunal (NET) with power to hear appeals on matters of issuance of licenses; that the easement in issue is for the benefit of the Respondent and not the Petitioner and that the said easement existed as at the time the Respondent purchased the suit property.

17. The Respondent's Director finally deponed that the power to cancel and extinguish easements and analogues rights lies with the Registrar of Lands and is limited to the person occupying the dominant land and that having completed its project, the Respondent had commenced the process of upgrading the easement to cabro standard, to match the stature of the project as well as the expected tarmacking of the public road for use.

18. In his supplementary affidavit, the Petitioner's Director deponed that the Respondent has admitted that the upgrading of the access road on the Petitioner's land, L. R. 13065, was being undertaken without complying with **Articles 42** and **69** of the **Constitution**.

19. According to the Petitioner, the purported EIA licences by the Respondent did not extent to the purported upgrading or improvement of the easement on the Petitioner's property at all and that no permission was sought or has been sought from the Interested Party for such operational changes on the Petitioner's land.

20. It was deponed by the Petitioner's Director that the works on the Respondent's property done after 26th August, 2021, or even the easement on the Petitioner's property, is in breach of the renovation permit in so far as there is no extension of time thereof, *ultra vires* the authorized area of work and contrary to **Section 57** of the **Physical and Land Use Planning Act**.

21. The Petitioner's Director finally deponed that the change of user of the Respondent's property support the fact that the Petitioner's property was analogues to the user of the dominant land; that the easement was and is always a country earth road and that the requisite change of user of the easement should have been procured from the City County of Nairobi, KURA as well as NEMA. The Petitioner and the Respondent's advocates filed submissions and authorities which I have considered.

Analysis and findings

22. The Petitioner is seeking for a conservatory order, which is in the nature of an injunction pending the hearing and determination of the Petition. The test for granting of an interlocutory injunction was considered in the ***American Cyanamid Co. vs Ethicon Limited (1975) AC 396*** case in which the court provided that for an injunction to issue, the Applicant must satisfy three elements, namely:

- i. **There must be a serious issue to be tried;**

ii. Damages are not an adequate remedy;

iii. The balance of convenience lies in favour of granting or refusing the application.

23. These are the same grounds that had been postulated earlier on in the case of *Giella vs Cassman Brown (1973) EA 358* as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

24. What amounts to a *prima facie* case was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

25. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR*, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86*. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

26. In the same case, the Court of Appeal stated that 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.

27. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation (See *the Nguruman case*).

28. It is not in dispute that both the Petitioner's and the Respondents' properties originated from one large parcel of land measuring 60 acres being L.R. No. 6939 situated in Ololua Ridge-Karen. The documents annexed on the Respondent's affidavit shows that on 16th October, 1970, L.R. No. 6939 was sub-divided, which sub-division produced three separate and independent portions of land measuring 20 acres each: The sub-divisions were L.R. No. 69392/2 (the Respondent's land); L. R. No. 13065 (formerly 6939/1 – the Petitioner's land) and L. R. No. 6939/3.

29. The sub-division of L.R. No. 6939 was approved by the Commissioner of Lands on condition that a right of way be registered against the Petitioner's title (L.R. No. 6939/1) in favour of L. R. No. 6939/2 and 6939/3. In addition to the right of way being registered against L.R. No. 6939/1, the Commissioner of Lands also approved 3 metres drainage wayleave to be provided along the eastern and western boundaries of L.R. No. 6939/2 as indicated in the plan.

30. To abide by the directions of the Commissioner of Lands, a survey plan was processed on survey plan FR No. 122/9 dated 5th July, 1971 which shows the right of way (easement) to plots L. R. No. 6939/2 and 6939/3. It is the Petitioner's Director's deposition that the marram access road was for passage or access by two single family private house dwellers of the property known as L. R. No 6930/2 (the dominant property) onto Ololua Ridge Road and thereafter Ngong Road.

31. According to the Petitioner's Director, the Respondent obtained approvals on or about 2017 to construct over 30 single dwelling residential units known as Naiserian homes on the dominant land; that the said houses are serviced by a 10-meter-wide public tarmacked road known as Forest Lane Road and that the Respondent has never sought the Petitioner's authority, or the Interested Party's authority, to vary the easement on the suit property.

32. The Respondent has not denied that it has cut down indigenous tress along the access marram road and commenced excavations of the said road. According to the Petitioner, the Respondent has not obtained any legal approvals and permits from the 1st Interested Party in compliance with the legislative measures under **Article 42** of the **Constitution** and/or any approvals from the relevant state organ to cut the indigenous tress for expansion of the road of access.

33. In his affidavit, the Respondent's Director stated as follows:

“27...we did not require to apply for any additional approvals for the upgrading of the easement to the Respondent land. As a matter of fact, the projects that are required to undergo Environmental Impact Assessment are listed under the 2nd

Schedule Section 58 (1) of the Environmental Management and Coordination Act, 1999 particularly section 3 thereof...It is therefore evident from the above that small access roads and easements doo not form part of the projects to be subjected to Environmental Impact Assessment.”

34. Although the Respondent did not seek for the approval of NEMA to upgrade the access road, it obtained a renovation/repair permit from the Nairobi Metropolitan Services on 27th July, 2020. The authority that was granted to the Respondent was to allow it to “*carry out cabro works on plot number 6939/2 along Ololua Ridge, Karen, Lang’ata sub-county.*”

35. It is the Petitioner’s case that the failure by the Respondent to engage it and conduct an EIA before upgrading the access road on its land is a violation of its rights under **Article 42 and 69** of the **Constitution**.

36. Article 42 of the **Constitution** provides that every person has the right and is entitled to a clean and healthy environment, which right includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated in **Article 69**.

37. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind.

38. In Adrian Kamotho Njenga vs. Council of Governors & 3 others [2020] eKLR, it was held as follows:

“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”

39. The **Constitution** under **Article 69** obligates all persons to protect and ensure a clean and healthy environment, which includes but is not limited to elimination of processes and activities that are likely to endanger the environment as well as establish systems of Environmental Impact Assessment and Environmental Audit and Monitoring of the environment.

40. Indeed, according to the *Second Schedule, Rule 1 (h)*, of the **Environmental Management and Co-ordination Act**, an Environmental Impact Assessment Study Report is supposed to be submitted to NEMA for all activities involving *local roads and facility access road*, whereafter a license is issued. **Section 58 (2)** of the **Environmental Management and Co-ordination Act** provides as follows:

“The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.”

41. **Regulation 10 (2)** of the **EIA Regulations 2003** provides that:

“Where the Authority is satisfied that the project will have no significant impact on the environment or that the project report discloses sufficient mitigation measures, the Authority may issue a license in form 3 set out in the First Schedule of these Regulations.”

42. Under **Regulation 4(1)** of the **Environmental (Impact Assessment and Audit) Regulations, 2003**, no proponent shall implement a project likely to have a negative environmental impact or for which an environmental impact assessment is required under the Act or the Regulations, unless an environmental impact assessment has been concluded and approved in accordance with the Regulations.

43. In the surveyor’s joint report annexed on the Respondent’s affidavit, the surveyors have stated that with the easement of 9 metres, a few trees will have to be felled within the existing corridor. However, if the 12 meter easement corridor is fully implemented, then the entire fence line defining the undeveloped portion will be demolished and all the mature tress fully affected since they fall within the 3 meter extension of the easement measurement.

44. The upgrading of the access road passing through the Petitioner’s land to serve more than 30 single dwelling residential units on LR. No. 6930/2 required, *prima facie*, not only an EIA Study Report and a licence by NEMA, but also public participation. In the case of **Ken Kasing’a –v- Daniel Kiplagat & 5 Others (2015)eKLR** Munyao J stated as follows:

“Public participation for purposes of EIA ought to be real and actual. It is a critical role, for the persons to be affected, may offer alternatives to the project or propose important mitigation measures. It is not a window dressing exercise, and neither should it be looked at as a mere formality aimed at ticking the boxes.”

45. In the case of John Kabukuru Kibicho & Another –v- County Government of Nakuru & Others (2016) eKLR Munyao, J reiterated the need of public participation during the preparation of EIA's as follows:

“Public participation especially when it comes to EIA's is extremely critical and cannot be treated as a formality or inconvenience. It is the core of any EIA exercise.”

46. The evidence before me shows that the Respondent did not comply with the provisions of **Article 69** of the **Constitution** and **section 58** of the EMCA before commencing the upgrading of the impugned 12-meter road. As was held in Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others [2016]eKLR, where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. *That being the case, it is my finding that the Petitioner has established a prima facie case with chances of success.*

47. Indeed, the implementation of any project like a 3.5 Km road is likely to have a negative environmental impact, thus the need for an EIA study report. Consequently, the continued construction of the road of access through the Petitioner's land without an EIA study report is likely to occasion the Petitioner irreparable injury that may not be compensated by damages.

48. For those reasons, I allow the Petitioner's application dated 13th September, 2021 as follows:

a. That pending the hearing and determination of the Petition, a temporary conservatory order is hereby granted to forthwith prevent, stop, discontinue or restrain the Respondent, whether by itself , servants, agents, officers, contractors and or anyone claiming under it from proceeding with or carrying out deleterious and destructive activities particularly cutting down, wasting away and destroying trees or any property, excavating or carrying out construction or road works including but not limited to the upgrading or constructing a 10 meter wide road on the Petitioner's property known as L. R. No. 13065 (original No. 6939/1 and 5830/9) situated in Ololua Ridge-Karen in Nairobi.

b. The Respondent to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF DECEMBER, 2021

O. A. ANGOTE

JUDGE

In the presence of;

Ms Sekami for Mr. Litoro the Petitioner

Mr. Lusweti for Ms Wekesa for the Respondent

Court Assistant: John Okumu