



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 16 OF 2019

IN THE MATTER OF ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA

MICHAEL L. GATUMA & 19 OTHERS.....PETITIONERS

VERSUS

VICTOR KARITHI.....1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT

RULING

1. The petitioners filed the application dated 18/06/2019 seeking an order of temporary and permanent injunction restraining the Respondents and/or their servants and/or agents from carrying out the intended construction of the Proposed Athwana Market in Karamene Residential Area within Athwana Ward pending the hearing and determination of this application.

2. The application was supported by an affidavit jointly sworn by the 1st, 3rd, 4th, 6th and Rose Mwakiuna who act as representatives of the Petitioners. They aver that the market is being put up on a residential area contrary to the physical planning act for being carried out without obtaining the change of user from residential to commercial, that the strip of public land No.215 Athwana/Akithi Section measuring 13 metres by 148 metres, has been sub-divided to fourteen plots and allocated to individuals some of whom are not from Athwana/Akithi Adjudication Area despite the fact that the land was sourced from land owners within the adjudication area for their benefit, that the market is being put up without public participation, and that the residents of the area were never consulted nor notified of the construction of the market.

3. The applicants further contend that the market is being put up without the necessary National Environmental Management Authority licenses/approval. Owing to the size of the land there will be no adequate provisions of sanitation facilities or an access road for the petitioners. That the market also borders Waso Mara river which due to the constant flooding the same would occasion pollution to the river hence posing a great danger to residents of Karamene as they will be affected by contamination on the said stream.

4. Lastly, the applicants aver that there are two major markets i.e. Ngundune Market and Muriri Market within 1km and 2km respectively hence the market is not of priority or benefit to the public.

5. The Respondents filed a Preliminary Objection on 9/07/2019 on the grounds that;

I. The application and petition are supported by an incompetent and incurably defective affidavit.

II. That the affidavit in support of the application and the petition offends the mandatory provisions of Order 19 Rule 5 of the Civil Procedure Rules and Section 16 of the Oaths and Statutory Declaration Act Cap 15 and the same should be struck out.

6. Both Respondents have opposed the application via the Replying affidavits of one Victor Karithi dated 1.10.2019, and the one of Catherine Kithinji dated 20.8. 2019. The respondents aver that only a public toilet is being constructed on the parcel of land No. 215 in Athwana Akithi Section, which construction is being undertaken through the Ward Development Fund. They also state that the construction of a market is not amongst the projects within Athwana ward in the 2019/2020 budgetary allocations, that the allegations that the land has been subdivided and allocated to people is neither here or there as the same is a prerogative of the county government and there is a clear procedure to be followed in allocation and leasing of public land to interested members of the public.

7. On 31/7/2019 this Court directed the parties to simultaneously canvass the both application and the preliminary objection through written

submissions. Both parties have filed their written submissions which I have dully considered.

ANALYSIS AND DETERMINATION

The preliminary Objection

8. The issue to determine in so far as the Preliminary Objection is concerned is **Whether the petitioner’s affidavits are defective in both the application and the Petition.**

9. The Respondents have relied on the provisions of Order 19 Rule 5 which provides for the manner of drawing affidavits as follows;

“Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”

10. They also relied on the provisions of Section 16 of the Oaths and Statutory Declarations Act which provides;

“Every affirmation shall be as follows:” I, AB..., do solemnly, sincerely and truly declare and affirm”, and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.”

11. In support of their submissions, the respondents relied on the cited authorities of; **Patrick Ochieng Abachi & 6 Others v Kenya Anti-Corruption Commission [2010] eKLR**, where the court was categorical that a petition not supported by a sworn affidavit ought to be struck out. They also relied on the cited case of **Duncan Gakuna Kionga & 2 others v Timboroa Hotels limited (2008)eKLR** where the court observed that the Civil Procedure Act and Rules made there under does not envisage a situation where two deponents can swear to one affidavit. Other authorities relied on by respondent are:

- **Francis Kariu Gakumbi & Another vs Piliska Njoki Maina (2008) eKLR.**
- **Peter Kimonye and Others vs Barclays Bank of Kenya Limited and 2 others, HCC No. 403 of 2004.**
- **Nyayo Embakasi residents association suing through its registered officials George Ochola & 3 others vs National Social Security fund & another (2015) eKLR.**

12. In response to the Preliminary Objection the Petitioners relied on the cited authority of **Moses G. Mukuria (t/a Modana Pharmaceuticals & 4 others) v Madatali Chatur (t/a Chatur Radio Service) [2007] eKLR** where H.P.G. Waweru (J) was of the opinion that the provisions of order 19 rule 5 permits the affidavit to be drawn in the first person Plural since the plaintiffs have taken responsibility for the affidavit, should that become necessary. This position was exemplified in **Re estate of Mwangi Nganga (deceased) (2005) eKLR**. The petitioners also urged this court to rely on the provisions of **Order 19 Rule 7 of the Civil Procedure Rules and Articles 23 (3) and Article 159 of the Constitution.**

13. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013** provide that a petition filed under these rules may be supported by an affidavit.

14. The petitioners herein did not provide a supporting affidavit but instead attached a verifying affidavit. The decision to strike pleadings on the basis that the same do not comply with Rules has been perceived to be a draconian action. The **2010 Kenya constitution at Article 159** mandates this Honourable Court **to administer justice without undue regard to technicalities**. Whereas there is lack of a supporting affidavit in the petition, I find that the none compliance with the that rule of procedure does not render the petition incurably defective as the same may be corrected by the parties.

15. I also agree with the determination in **Moses G, Mukuria (supra)** where **H.P Waweru J** stated that the provisions of order 19 rule 5 permits the affidavit to be drawn in the first person Plural since the plaintiffs have taken responsibility for the affidavit, should that become necessary.

16. Whereas the Respondents had sought to distinguish the case of **Francis Kariu Gakumbi & Another vrs Piliska Njoki Maina [2008] eKLR**, the Court of appeal was clear that an affidavit may be sworn by two persons. The court of appeal even noted that though the Judge in the High Court (Juma J), had ruled that the affidavit in support of the application was defective, he did not expunge the same from the records and he relied on the same in arriving at a decision. The court of appeal had further relied on the provisions found in **O. 19 Rule 7 of the Indian Code of Civil Procedure (Allahabad)**, and the **Supreme Court Practice 1997 O. 41 Rule 2**. The latter provides that;

“Where an affidavit is made by two or more deponents the names of the persons making the affidavit must be inserted in the jurat except that if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that I both (or all) of the “above named deponents.”

17. What resonates from this analysis is that the affidavit in support of the petition and the application are properly on record. I Therefore find no merits in the Preliminary Objection.

The Application dated 18.6.2019

18. The issue for determination is whether this court should or should not grant the injunctive orders in so far as the application is concerned.

19. The petitioners herein have presented the application as residents of Karamene area, a residential suburb within Athwana Ward that borders Land No. 215 Athwana/Akithi Section. They have made adverse allegations that the proposed construction of the market did not undergo public participation and that NEMA did not undertake an Environmental Impact Assessment. There is also allegations of the land being issued to persons who are not from the locality and that the said development will occasion pollution of Waso Mara river. The Respondents have averred that the only construction which was to be undertaken was the one of a public toilet as opposed to a market.

20. The main purpose of an injunction is to ensure that the substratum of the subject matter is preserved during an intervening period. He who alleges bears the burden of prove. It was therefore incumbent upon the applicants to demonstrate to the satisfaction of this court that they have met the criteria set out in the **Giella vs Cassman** brown case. I have found it necessary to analyse the documents availed by the applicants in support of their case;

1) **MG2**; Applicants have availed this document averring that the public land no. 215 Athwana/Akithi section is 13 metres by 148 meters. The document is a map which requires interpretation.

2) **MG3**; This is an extract of the budget estimates and development projects. In the document, there is the mention of construction of one livestock market at Athwana ward. However, I am not able to find anything touching on the construction of Karamene market.

3) **MG4**; These are photographs. Applicants aver that a dairy store, a toilet and fencing has been carried out. I have scrutinized the photographs. All that is visible is a small iron sheet structure and fencing. There is nothing wrong in fencing of public land especially in this era where open spaces attract land grabbers. The court notes that a go ahead of the construction of the public toilet has already been given vide my ruling of 31.7.2019.

4) **MG5**; This is a report from Environmental Impact Assessment advisers availed by the applicants. It remains an advisory report since as the matter stands, there is no evidence to indicate that there exists a project proponent for the construction of the alleged Karamene market.

21. In **Mrao Limited vs First American Bank of Kenya [2003] KLR 125** it was held that:

“...a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case.” It is a case 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...”

22. The test for any order of an injunction is laid down in the landmark case of **Giella v Cassman Brown & Company Ltd [1973] EA 358** where the three conditions were stipulated as follows:

“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 “

23. The application of these conditions was elaborately explained by the Court of Appeal in the case of **Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR** where it was stated as follows:

“All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted however strong the applicant’s claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there. Only where there is doubt as to whether a prima facie case is made out or as to the adequacy of the remedies in damages that the question of balance of convenience would arise. It must follow from this that the existence of a prima facie case does not permit the applicant to “leap-frog” to an injunction directly without crossing the other second, and probably the third hurdles in between.”

24. In the present case, the applicants have not managed to demonstrate that they have a prima facie case. The court cannot therefore proceed to determine the other criterias set out in the **Giella vs. Cassman Brown case**.

25. At this juncture, I find it necessary to distinguish this case with the cases cited by the petitioners. In the case of **Daniel Ngumba Karanja versus Beatrice Wambui Mbogo [2006] eklr** the respondent was already carrying out quarry blasting operations, where the National Environmental Management Authority had even issued a stop order. In the case of **Hosea Kiplagat & 6 Others v National Environment Management Authority (Nema) & 2 others [2015] eklr**, the respondents had admitted that there was a project which had been duly approved by the relevant authorities especially from NEMA and the county government of Baringo.

26. In the final analysis, I find that an applicant seeking interlocutory orders for an injunction must not only show that he has an arguable case, but must also prove that a legal right is being infringed or is about to be infringed of which the applicants have failed to prove. There is no evidence that there is a project proponent or that there is an up coming Karamene market. In the circumstances, I find that the application filed by the Petitioners is not merited.

27. FINAL ORDERS;

- (1) The Preliminary Objection is hereby dismissed.**
- (2) The Application dated 18.6.2019 is hereby dismissed.**
- (3) Each party to bear their own costs of the application and the preliminary objection.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020

IN THE PRESENCE OF:-

C/A: Kananu

Maranya for petitioners- present

Ashaba holding brief for Laishena for Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE