



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 804 OF 2013

JUSTUS IRUNGU GITHAH & 12 OTHERS.....PETITIONERS

VERSUS

HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE GOVERNOR, KIRINYAGA COUNTY.....2ND RESPONDENT

THE MINISTER OF ENVIRONMENT, KIRINYAGA.....3RD RESPONDENT

THE COUNTY CORDINATOR, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....4TH RESPONDENT

THE COUNTY PUBLIC HEALTH OFFICER, KIRINYAGA.....5TH RESPONDENT

RULING

It is unfortunate that an application filed under certificate of urgency on 21st November 2013 is being canvassed almost three (3) years later. I have however looked at the record and it seems to me that counsels are to blame for this state of affairs. Perhaps the application was not urgent after all. But that is obiter!

The suit as against the 1st respondent having been withdrawn, the dispute herein now only relates to the 2nd to 5th respondents.

The 2nd respondent is the registered proprietor of the land parcel No. MWERUA/KAGIO/4130 (the suit land) which they use as a dump-site. The said dump-site emits bad odour and has attracted rodents and other scavengers which is a nuisance to the petitioners who have moved to this Court vide a Constitutional Petition seeking various orders including the closure of that site.

Simultaneously with the filing of that petition, the petitioners filed an application under certificate of urgency seeking the following substantive orders:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *That this Honourable Court be pleased to order that the 2nd respondent herein by themselves, their agents, servants and/or anybody claiming through them be restrained from further disposal of waste material on land parcel No. MWERUA/KAGIO/4130 until this suit is heard*

and determined.

5. *That this Honourable Court be pleased to grant costs.*

The application is based on the grounds set out therein and supported by the affidavit of the 1st petitioner herein **JUSTUS IRUNGU GITHAE** sworn on behalf of the other petitioners. Briefly, the applicant's case is that they are the registered proprietors of land parcels No. MWERUA/KAGIO/3370, 4001, 2918, 3234, 3756, 4593, 4594, 5237, 2916, 4129, 3441 and 4576 which neighbours the suit land belonging to the 2nd respondent and which is used as a site for disposal of waste material that is a cause of nuisance to the petitioners' homes by emitting smell that makes it difficult for the applicants to enjoy a clean and healthy environment. The site is also situated next to the petitioners' water catchment area which they have had to abandon for fear that the water is contaminated. This is a contravention of the petitioner's rights protected under **Articles 42 and 69 of the Constitution** and despite their pleas to have the respondents relocate the site, they have refused, failed and/or ignored the same hence this application.

JOSEPH MUTHIKE the County Executive Committee member of the 3rd respondent filed a replying affidavit on behalf of the 2nd, 3rd and 5th respondents in opposition to the application. He confirmed that the disposal site on the suit land which is registered in the names of the 2nd respondent was established in 2005 long before most or all of the petitioners had obtained the change of user of their properties from agricultural to residential who therefore constructed their homes well aware of the risk. In any event, the manner of disposal of the waste material has been in conformity with waste disposal management regulation. That the 2nd respondent is carrying out an environmental impact assessment with a view to establishing the status of dump-sites in the county which will now be fast-tracked and funds have already been allocated for an alternative land for a dump-site. Meanwhile plans are underway to fence off the site and the petitioners can wait for the process to be complete whereupon their grievances will be addressed. For now, the orders sought should not be granted but should await the hearing of the substantive petition.

However, in a further affidavit **JUSTUS IRUNGU GITHAE** the 1st petitioner deponed that the suit land was only made a disposal site in 2010 long after the petitioners had settled in their respective land parcels and the respondents should not continue to use it as it infringes on their ***Fundamental Human Rights Enshrined in the Constitution*** and the fact that an ***Environmental Impact Assessment*** is underway is immaterial and there is no proof that the respondents will indeed purchase alternative land for use as a dump-site. That from the replying affidavit, the petitioners' grievances have not been denied and it is in the interest of justice that the orders sought be granted as prayed.

Submissions have been filed both by Fatuma Wanjiku advocate for the petitioners and Njue Muriithi advocate for the 2nd, 3rd and 5th respondents.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

The following are not really in dispute:-

1. ***That the suit land is registered in the names of the 2nd respondent and is used as a dump-site.***
2. ***That the petitioners' homes are in the neighbourhood of the said dump-site.***
3. ***It is conceded in paragraph 10 of the replying affidavit of JOSEPH MUTHIKE the 3rd respondent's County Executive Committee member that no Environmental Impact Assessment Report was obtained though one is underway.***
4. ***The photographs of the dump-site are not disputed and there is no doubt that it is indeed a nuisance with all manner of garbage including carcasses of animal dumped thereon.***

What this Court has to determine at this stage is whether the petitioners have established, as set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358**, that they have a prima facie case with a probability of success at the trial and that the injury they are likely to suffer if the prayer sought is not granted cannot be compensated in damages. If the above are not established, then the Court will determine the application on the balance of convenience. What is sought, as indicated above, is an order restraining the 2nd respondent, its agents, servants or anybody claiming through them from further

disposal of waste material on the suit land until this petition is determined.

From the submissions of the petitioners, their case is that by the time the dump-site was being created on the suit land, they had already obtained change of user of their respective parcels of land from Agricultural to Residential and therefore the dump-site was created by the 2nd respondent without taking into account the Environmental rights of the petitioners.

The submissions of the 2nd, 3rd and 5th respondents however is that the dump-site was created on the suit land in the year 2005 before the petitioners had obtained their change of user from Agricultural to Residential and in any event, the petitioners have not met the test set out in the ***GIELLA*** case (supra).

While the respondents alleged that the dump-site was established in 2005 before the petitioners obtained change of user of the land parcels from Agricultural to Residential, the copy of the title deed to the suit land shows that it was registered in the names of the Kirinyaga County Council the predecessor to the 2nd respondent on 29th August 2013. It is therefore un-likely that the 2nd respondent created a dump-site long before it acquired the suit land and if that was the case, no such evidence was availed before this Court to that effect.

Even assuming that the 2nd respondent acquired the suit land and has been using it as a dump-site since 2005, it is conceded that no Environmental Impact Assessment was done prior to the establishment of the project as required by law. In paragraph 10 of the replying affidavit of **JOSEPH MUTHIKE**, it is deponed as follows:-

“That the newly created Kirinyaga County Government under the leadership of the 2nd respondent is underway in carrying out an Environmental Impact Assessment with a view to establishing the status of among others, dump-sites within the county”

In paragraph 11 of the same affidavit, it is also deponed as follows:-

“That this will now be fast tracked given the existence of an Environment portfolio within the County Executive Committee which I head”

It is therefore conceded that no ***Environmental Impact Assessment Report*** was prepared prior to the establishment of a dump-site on the suit land. That was in contravention of the law. The ***Environment Management and Co-ordination Act (Chapter 387 Laws of Kenya)*** provides for elaborate provisions that any development has to comply with. ***Section 58 (1) of the Act*** provides as follows:-

“Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by any person any undertaking specified in the second schedule to this Act, submit a project report to the Authority in the prescribed form giving the prescribed information and which shall be accompanied by the prescribed fee”

Under ***Schedule two of the Environment Management and Co-ordination Act (the Act)*** Waste disposal projects including:-

- ***sites for solid waste disposal***
- ***sites for hazardous waste disposal***
- ***sewage disposal works***
- ***works involving major atmospheric emissions and***
- ***works emitting offensive odours***

are among the projects whose developments require an Environment Impact Assessment to be done. ***Sections 58 and 63 of the Act*** sets out in detail the procedure for obtaining an ***Environment Impact Assessment Report***. That was, it is conceded, not done before a dump-site was created on the suit land.

That is a clear violation of the law for which the petitioners are entitled to the order sought herein. It is clear from the material before me that the petitioners have established a prima facie case which was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS (2003) K.L.R 125** as one 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 of the latter.

The averment that the dump-site created on the suit land is emitting pungent stench making it unbearable for the petitioners to enjoy a healthy Environment as pleaded in paragraph 7 of the supporting affidavit of **JUSTUS IRUNGU GITHAE** the 1st petitioner herein has also not been rebutted. **Section 3 (1) of the Act** provides as follows:-

“Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment”

On the other hand, **Article 42 (a) of the Constitution** provides as follows:-

“Every person has the right to a clean and healthy environment, which includes the right –

- a. ***to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69”.***

Therefore, apart from the violation of the Act, there is also an un-controverted violation of the provisions of the Constitution. The respondents argue, as per paragraph 11 of the replying affidavit of **JOSEPH MUTHIKE** that the issue of an ***Environmental Impact Assessment Report*** will now be ***“fast-tracked”***. It is further pleaded in paragraph 14 of the same affidavit as follows:-

“That in the circumstances, all is not lost for the petitioners as they can wait for the completion of the process and their grievances will stand addressed”

Among the principles that guide this Court is the precautionary principle under **Section 18 (vi) of the Environment and Land Court Act** and in determining this application, I must consider that it is important to prevent any serious irreversible Environmental damage or injury to the health of the petitioners and others in the neighbourhood of the dump-site pending the determination of this suit. The petitioners have clearly surmounted the first principle of the **GIELLA** case (supra).

I must also consider if the damage or injury that the petitioners are likely to suffer if the order sought is not granted is capable of being compensated in damages. My answer is that such injury cannot be quantified or assessed in terms of damages firstly because it is of a continuing nature and secondly, it involves not only harm to the environment but also to the petitioners’ physical well-being. How, for example, can any Court possibly quantify the amount of damages to atone the petitioners for the stench and nausea caused to the petitioners and their families not to forget the risks of them contracting diseases? In my view such injury cannot adequately be compensated by an award of damages more so considering that it is continuing in nature. I am therefore also satisfied that the petitioners have met the second test in the **GIELLA** case (supra).

As I am not in doubt that the petitioners have met the first and second test in the **GIELLA** case (supra), I need not consider the application on the balance of convenience. But even if I did so, the balance would tilt in the petitioners favour because, taking the route suggested in the English case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 3 ALL, E.R 772**, I should take the course that appears to carry the lower risk of injustice should it turn out that I was wrong in granting the order sought herein and in my view, the lower risk of injustice is to restrain the 2nd respondent from further disposing of waste material on the suit land.

Ultimately therefore and upon considering all the evidence herein, this Court makes the following orders:-

1. *The 2nd respondent by itself, its agents, servants or anybody claiming through them are hereby restrained from further disposal of waste material on land parcel No. MWERUA/KAGIO/4130 until this suit is heard and determined or until further orders of this Court.*
2. *Costs shall be in the cause.*
3. *It is directed that the parties expedite the taking of pre-trial directions so that this petition is heard and determined within the next 12 months.*

B.N. OLAO

JUDGE

12TH MAY, 2016

Ruling dated, delivered and signed this 12th May, 2016 in open Court

Mr. Macharia for Ms Fatuma for the Plaintiff/Applicant present

Mr. Muriithi for 2nd, 3rd & 5th Defendants/Respondents absent

Attorney General for 1st Defendant/Respondent absent.

B.N. OLAO

JUDGE

12TH MAY, 2016