REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION NO. 5 OF 2020

ROBERT NJENGA .....1ST PETITIONER

DANIEL IRUNGU MAINA .....2ND PETITIONER

VERSUS

SYLVESTER NJIHIA WANYOIKE.....1ST RESPONDENT

BAHATI AFRICA LTD ..... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..INTERESTED PARTY

RULING

1. The petitioners herein commenced proceedings in this matter through petition dated 9th April 2020. Alongside the petition, they also filed Notice of Motion dated 9th April 2020, which is the subject of this ruling. They seek the following orders in the application:

a. Spent.

b. Spent.

c. That the Officer Commanding Kirengero Police Station within Subukia Sub County be ordered to enforce and ensure compliance to NEMA orders; issued in accordance with Section 108 of Environment Management Act, 1999 (EMCA) and dated 17th February 2020 restraining the respondents from any installation activities and served to him in a letter dated 25th March 2020.

d. That pending the hearing and determination of this application and the petition, this honourable court be pleased to issue orders restraining the respondents, staff, agents, servants and or any other person acting on the instructions of the respondents however or any of the respondents from continuing with any other workmanship, installations, operations, construction works, of the wood/pole treatment and concrete post plants in their Kabazi Plot Nos. Kabazi/Kabazi block (Kihoto)/940/939/804/938.

e. Spent.

f. Or that such other orders as this honourable court shall deem just

g. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by the first petitioner. He deposed that the respondents operate a concrete and wood pole treatment plant which is adjacent to the petitioners' residential homes and which produces a lot of noise, vibration, waste, contaminated water, dust, fumes and general pollution that adversely affects the petitioners and the entire neighbourhood. That on 2nd March 2018, the 2nd petitioner wrote a complaint to the interested party (NEMA) on behalf the neighbouring community over the plant. He annexed a copy of the complaint and an acknowledgement thereof by NEMA. He added that the respondents disregarded the complaint and continued with their operations with resultant adverse effects both on the environment and the neighbouring community. Subsequently on 6th March 2020, over 50 members of the neighbouring community wrote to NEMA objecting to the plant and seeking information inter alia on public participation during environmental impact assessment leading to the establishment of the wood treatment plant and copies of environmental impact assessment licences. NEMA acknowledged the complaint through its letter dated 12th March 2020. He further stated that NEMA issued a restoration order dated 17th February 2020 which indicated that the respondents were indeed installing a plant without evidence of an

environmental impact assessment licence. The order directed the respondents to stop all the installation activities on the site. He added that the respondents continued with installation activities and works despite the order and as a result, he wrote to NEMA on 24th March 2020 on his own behalf and that of the over 50 neighbours informing it that the wood treatment plant was 90% complete. He further stated that the concrete plant has been discharging waste contaminated and running water to the adjacent neighbouring properties and producing a lot of noise and high vibrations resulting in damage to buildings and tanks. That the wood pole treatment plant uses heavy chemicals such as Ammonium Copper Zinc Arsenate (ACZA), Ammonium Copper Arsenate (ACA) Chromate Copper Arsenate (CCA) and Copper Naphthenale which produce fumes and seep to adjacent water sources such as rivers and households water wells thus polluting both water and soil and posing threat of respiratory problems and damage to the stomach.

3. The respondents opposed the application through grounds of opposition and a replying affidavit sworn by Janet Wanjiru Kimani, a director of the second respondent. She deposed that she was not aware of any complaint lodged by the petitioners in regard to the second respondent's operations. She added that the second respondent has been operating pursuant to a trade licence issued by the County Government of Nakuru which allowed the expansion. She denied that there has been any vibration, water, noise or air pollution from the second respondent's operations and that any chemicals have been used by the second respondent. She further stated that the second respondent's activities were approved by NEMA after a report was prepared indicating that those activities have no negative impact on the environment. She also stated that the second respondent has not disobeyed the conservatory orders issued by this court, that the present application has been brought out of malice and that there will be irreparable damage to the second respondent if the orders are granted. In support of her statements, she annexed a copy of a trade licence dated 14th January 2020, an environmental impact assessment licence dated 30th January 2015 and a copy of a certificate of incorporation dated 25th February 2009. In the grounds of opposition the respondents took the position that the first respondent is not a director of the second respondent and that the claim against him should therefore be struck out.

4. NEMA responded to the petition through a replying affidavit sworn by Zephaniah Ouma, its Acting Director in charge of Compliance and Enforcement. He deposed that NEMA bears the statutory responsibility of ensuring that all Kenyans enjoy the right to a clean and healthy environment and in that regard it has put in place mechanisms such as the Environmental Impact Assessment (EIA) process as a means to achieve the right to a clean and healthy environment. He added that the EIA process seeks to analyse the potential positive and negative impacts of a proposed project with a view of either allowing the project or rejecting it and where approved, with a view of enhancing the positive impacts and mitigating the negative impacts. That without the EIA mechanism, it is impossible for NEMA to appreciate the impacts of a proposed project and for it to intervene.

5. He further stated that NEMA received complaints from the petitioners alleging that the respondents were undertaking a timber treatment plant in their neighbourhood using hazardous chemicals and exposing them to the risks of underground water/aquifer contamination through seepage of the chemicals used in the timber treatment. That protection of the environment requires deployment of the preventive and precautionary principles which require that interventions be taken before actual harm occurs. He added that having received the complaint from the petitioners, NEMA's Nakuru office visited the site for a field inspection and verified that indeed there was an ongoing timber treatment plant run by the respondents. That during the inspection NEMA's officers requested the manager of the 2nd respondent to produce proof of an EIA licence but none was availed. Consequently, NEMA issued an Environmental Cessation and Restoration Order directing the respondents to stop all installation activities and to report to the NEMA Nakuru office with a copy of the EIA licence. He added that the nature of timber treatment carried out by the respondents is prescribed by the law as chemical works and uses chemicals such as copper chrome acetate and other copper compounds which generate hazardous waste requiring pre-treatment before disposal and that the process requires the EIA mechanism to guide and inform the disposal.

6. Mr Ouma further deposed that regulation 16 of the Environmental Management and Coordination (Waste Management) Regulations, 2006 read with Schedule 4 paragraphs Y5, Y12 and Y22 thereof define and describe formulation of inks, formulation of wood preserving chemicals and wastes containing copper compounds respectively as generating hazardous waste. According to him, it is therefore illegal and dangerous for a project that employs use of chemicals that result in hazardous waste to be undertaken without being subjected to the EIA process. He stated that the respondents were instructed by NEMA in February 2020 to immediately submit an EIA report for processing but they have not done so yet they are carrying on with the project works. In the circumstances, the respondents' project has no support or participation of the public since no EIA process has been carried out. He added that for those reasons NEMA supports the petition and notice of motion herein and that NEMA reserves the right to take up ancillary enforcement actions on the respondents such as prosecution for environmental offences. NEMA also filed a supplementary affidavit sworn by Mr Ouma, whose contents I have noted.

7. The application was canvassed through written submissions. The petitioners argued that the respondents' operations in its concrete and wood pole treatment plant are contrary to the **Environmental Management and Co-ordination Act, 1999** (EMCA) thus presenting real and present danger to the right to a clean and healthy environment as provided for under **Article 42** of the **constitution**. Citing *inter alia* the cases of **Benson Ambuti Adega & 2 others v Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR** and **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR**, the petitioners urged the court to grant the orders sought.

8. The respondents argued in their submissions that the petitioners lack *locus standi* to bring the petition on behalf of their neighbours since no authority to do so has been annexed, that the first respondent is not a director of the second respondent and that he has therefore been wrongly joined, that no prima facie case has been established, that the respondents' operations are lawful in view of the trade licence dated 14th January 2020 and the environmental impact assessment licence dated 30th January 2015 and that they have not violated any law, be it constitutional or statutory. The cases of **Athi Paper Mills Limited v Dakawou Transport Limited [2017] eKLR** and **Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR** are cited in support of the submissions.

9. NEMA did not file any submissions. It relied entirely on the affidavits which it filed and also associated itself with the petitioners' submissions.

10. I have considered the application, the affidavits, the grounds of opposition and submissions of parties. Although the parties in some instances tended to submit on the petition itself, what is before the court for determination is an application for conservatory orders. To succeed in such an application, the applicant must demonstrate a *prima facie* case with a likelihood of success and that unless the order is granted he will suffer prejudice as a result of the violation or threatened violation of the Constitution. See **Centre for Rights Education and**

Awareness (CREAW) & 7 others v Attorney General [2011] eKLR.

11. Conservatory orders are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR**, Odunga J stated as follows:

> **Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.**

12. The Supreme Court emphasized the public law nature of conservatory orders in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

> **[86] "Conservatory orders" bear a 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 priority levels attributable to the relevant causes.**

13. The petitioners herein maintain that the respondents operate a concrete and wood pole treatment plant on plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938 which is adjacent to their homes and which produces noise, vibration, contaminated water, dust, fumes and general pollution that adversely affects the petitioners and the entire neighbourhood. They claim that there is a threat to the right to a clean and healthy environment as guaranteed by **Article 42** of the **Constitution** which 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; and**
> >
> > **b. to have obligations relating to the environment fulfilled under Article 70**.

14. It is also important to note that **Article 70** of the constitution provides that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury. Additionally, **Section 3 (4)** of EMCA empowers any person to commence an action such as the present one notwithstanding that he cannot show that the respondent's actions or omissions have caused him or may cause him any personal loss or injury. In view of the provisions at **Article 70** of the constitution, **Section 3 (4)** of EMCA as well as **Article 258** of the constitution which grants every person the right to institute proceedings alleging contravention or threatened contravention of the constitution whether acting for himself or in the public interest, the respondents' arguments that the petitioners lack *locus standi* to file this petition do not hold.

15. In exercising the jurisdiction on matters to do with the right to a clean and healthy environment, this court is required by **Section 3 (5)** of EMCA to be guided by principles of sustainable development which include public participation and the pre-cautionary principle. The pre-cautionary principle is defined by **Section 2** of EMCA as:

> **the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.**

16. The respondents do not deny that they operate a concrete and wood pole treatment plant on plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938. Their argument that the first respondent is not a director of the second respondent is not supported by any evidence from the companies' registry as to who the actual directors of the second respondent are. The first respondent has himself not sworn any affidavit disowning any association with the concrete and wood pole treatment plant. I note that NEMA confirmed that it visited the site and verified that indeed there was an ongoing wood treatment plant run by the respondents and that it issued an Environmental Cessation and Restoration Order dated 17th February 2020. It is thus apparent that the respondents were obligated under **Section 58** of EMCA to submit a project report to NEMA, giving the prescribed information in regard to the plant so as to set off the Environmental Impact Assessment (EIA) process. As correctly pointed out by NEMA, the EIA process makes it possible to analyse the potential positive and negative impacts of a project and to incorporate public participation in the analysis.

17. To answer the petitioners' contention that their activities on the plant pose a threat to the right to a clean and healthy environment all that the respondents needed to do was to demonstrate that they have successfully submitted the plant to (EIA) process and obtained an EIA licence in respect thereof. Unfortunately, no such evidence has been availed by the respondents at this stage. A perusal of the EIA licence dated 30th January 2015 which they have exhibited shows that the project in respect of which it was issued was an "Assorted Concrete Workshop" located on plot number 643 Kihoto Farm, Kabazi. It expired after 24 months from date of issue. A concrete workshop is very different from a wood pole treatment plant. Further the location of the project in respect of which the licence was issued is plot number 643 Kihoto Farm which is very different from plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938 where the petitioners maintain that the wood pole treatment plant is located. In the absence of a current and valid EIA licence, the petitioners' and NEMA's contention that the plant poses a threat to the right to a clean and healthy environment appears valid.

18. In view of the foregoing discussion, I am persuaded that the petitioners have a *prima facie* case. Considering that the wood treatment or preservation operations are said to be carried out using chemicals and compounds that generate hazardous waste, there is real danger to the environment, the petitioners and the public at large. The pre-cautionary principle requires the court in the circumstances to deploy measures to prevent environmental degradation. In that regard, the conservatory orders sought are merited.

19. In the end, I make the following orders:

> **a. A conservatory order is hereby issued restraining the respondents, their staff, agents, servants and or any other person acting on their instructions from continuing with any other workmanship, installations, operations or construction works of the wood/pole treatment and concrete post plants in their Kabazi plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938 pending the hearing and determination of the petition herein.**
>
> **b. The Officer Commanding Kirengero Police Station within Subukia Sub County is hereby ordered to enforce and ensure compliance with the Environmental Cessation and Restoration Order dated 17th February 2020 issued by the National Environment Management Authority (NEMA).**
>
> **c. Costs of the application shall be in the cause.**

20. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 1st day of July 2020.

D. O. OHUNGO

JUDGE