



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 4 OF 2020

IN THE MATTER OF

ARTICLES 1(1), 2(1), 3, 10, 27, 28, 31, 35, 40(2), 47(1), 48, 50(1) AND 66 OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLES 1, 2, 3(1), 10(1) & (2)(A) & (C), 19, 20, 27, 28, 31, 35, 40(2), 47(1), 48 AND 50(1) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

THE ALLEGED CONTRAVENTION AND VIOLATION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 31, 35, 40(2), 47(1) 48 AND 50(1) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

ARBITRARY DEPRIVATION OF THE RIGHT TO ENJOY PROPERTY KNOWN AS TITLE NUMBER AGUTHI/GATITU/5642 BY THE COUNTY GOVERNMENT OF NYERI

IN THE MATTER OF

THE CONSTITUTION AND LEGAL VALIDITY OF THE ENFORCEMENT NOTICE WITH RESPECT TO TITLE NUMBER AGUTHI/GATITU/5642 DATED 21ST MAY, 2020 ISSUED UNDER SECTION 72 OF THE PHYSICAL AND LAND USE PLANNING ACT, ACT NO. 13 OF 2019

BETWEEN

DEPAR LIMITEDAPPLICANT

-VERSUS-

COUNTY EXECUTIVE COMMITTEE

MEMBER FOR LANDS, PHYSICAL

PLANNING, HOUSING AND URBANIZATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

RULING

1. The Petitioner/Applicant herein vide his application dated the 29th May, 2020 seeks for the following orders;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Pending the hearing and determination of Petition herein the honorable Court do grant the Petitioners a conservative order staying the execution of the Enforcement Notice dated 21st May 2020 issued by the Respondents.
 - v. Pending the hearing and determination of Petition herein the honorable Court do grant the Petitioners a conservative order restraining the Respondents by themselves, their officers, and agents or otherwise howsoever from any further arbitrary search or entry or interference with the development of the Petitioners' premises otherwise than on the strength and authority of a lawful warrant issued by a Court of competent jurisdiction upon a reasonable and justifiable grounds.
 - vi. The Respondents do, within such period as may be specified by the honorable Court, produce the alleged Public Petition before this Court and do provide a full and complete copy of such alleged Public Petition.
 - vii. The honorable Court do issue directions regarding how such items are to be dealt with.
 - viii. The honorable Court do issue such further orders, directions and writs as may be necessary to safeguard and prevent the further violation of the Petitioners' fundamental rights and freedoms under the Constitution of the Republic of Kenya.
 - ix. The costs of this application in any event be provided for.
 - x. The Petitioners be at liberty to apply for further orders and/or directions as the honorable Court may deem fit to grant.
2. The said Application was supported on the grounds on the face of it as well as on the Supporting Affidavit of Eng. Linus Gitonga, the Chief Executive Officer of the Petitioner/Applicant sworn on the 29th May 2020.
3. Interim orders were granted to the effect that the Respondents shall cease by themselves, their officers, agents or otherwise from arbitrary search entry or interference with the development of the Petitioner/Applicant's premises other than on the strength and authority of a lawful warrant issued by a Court of competent jurisdiction on justifiable grounds pending the hearing and determination of the Application inter-parties.
4. Subsequently and owing to the Covid -19 pandemic, on the 15th July 2020, directions were thereafter taken in the presence of counsel to both parties to the effect that;
 - i. The application shall be disposed of by way of written submissions.
 - ii. That the Respondents to file their response to the application dated the 29th May, 2020 within 7 days and thereafter file their submissions within 14 days.
 - iii. The Petitioner's submissions to the main Petition shall remain in abeyance for which they shall file their written submissions to the application within the 14 days upon service of the Respondent's response.
5. Despite the application being served upon Respondents in this suit, no response was filed to the application and neither were there any written submissions filed by either the Petitioner/Applicant in support of his application, or the Respondent. Nonetheless, I need to be satisfied that the orders sought are justiciable to grant before I can allow the application.
6. I have carefully considered the procedural issue arising from the interpretation of Order 51 Rule 14(4) of the Civil Procedure Rules which Rules are made to help establish orderliness in the management and control of suits and every party in a suit is bound to follow those rules. Order 51 Rule 14(4) of the Civil Procedure Rules provide as follows:-

'If a Respondent fails to file to comply with sub rule (1) and (2), the application may be heard ex parte.'
7. The Petitioner/Applicant herein contends that it is a Limited Liability Company licensed by the Energy and Petroleum Regulatory Authority wherein it operates a liquefied petroleum gas distribution business.
8. That sometime in July 2019, the Petitioner/Applicant entered into a sale agreement with Wicos Investment Co-operative Society Limited for the purchase of the LR Aguthi/ Gatitu/5642 which was an agricultural land. Thereafter the parties to the agreement proceeded to apply and obtain from the Respondents permission to alter the use of the property to light industrial and specifically as liquefied petroleum gas storage and filling plant.
9. Wicos Investment Co-operative Society Limited then applied for a development permission from the Respondents and paid the requisite

fees wherein in September 2019, the 1st Respondent and the parties to the sale agreement herein afore stated, caused to be advertised the intention to change use of the suit property and Wicos Investment Co-operative Society Limited then prepared a planning brief for the proposed change of user wherein on the 3rd October 2019, the Respondents, through their County Planning technical Committee approved the change of user of the property and the sale agreement was concluded wherein the property was finally transferred to the Petitioner/Applicant.

10. The Petitioner/Applicant then applied for and obtained from the Respondents approvals to construct upon the property, and from the Kenya National Highway Authority, approval for the construction of an access culvert linking the property to the adjacent Nyeri-Marua (B21) road.

11. Thereafter, there was held a stake holders meeting and/or consultation and as well as public participation from members of the community where the Petitioner/Applicant applied for and was issued with an Environmental Impact Assessment License.

12. The Petitioner/Applicant then applied for and was issued with a construction permit for a liquefied Petroleum Gas (LPG) storage and Filing Facility by the Energy and Petroleum Regulatory Authority which permit is due to expire on the 16th April 2021.

13. The Petitioner/Applicant's grievances are based on the fact that pursuant to obtaining all the relevant licenses and adhering to all the conditions imposed on them, on the 21st May 2020, the 1st Respondent without any scintilla of legal justification or right and in breach of the Petitioner/Applicant's right and freedoms, issued an Enforcement Notice upon the Petitioner/Applicant ordering it to stop further construction of the Liquefied Petroleum Gas (LPG) storage and filling plant on the property in contravention of Article 10 of the Constitution.

14. That pursuant to the issuance of the Enforcement Notice, the Petitioner/Applicant was now incurring delay penalty of Ksh 500,000/- per week, from the contracted contractor. That the Respondents have failed, neglected, refused or otherwise failed to constitute the Nyeri County Physical and Land use Planning Liaison Committee as required by Sections 76 and 77 of the Physical and Land Use Planning Act.

15. The Petitioner/Applicant's application in seeking interim injunctive orders against the Respondents is based on the fact that by issuing the Enforcement Notice and ordering the stoppage of the construction project, this action amounted to arbitrary searches, seizure of property and deprivation of property in a manner that was inconsistent with the Petitioner/Applicant's fundamental rights and freedoms as well as the provisions of Article 10, 27, 28, 31, 35, 40(2) 47, 48 and 50 of the Constitution because such notice could only be issued where the Petitioner/Applicant had breached a condition of the development permission so granted.

16. The Petitioner/Applicant thus sought for the above captioned interim orders so as to stop the continued violation of their fundamental rights and freedoms as they continue to suffer irreparable harm where its interest is negatively and adversely affected hence the Respondents ought to be restrained by an order of injunction pending the hearing and determination of the Petition

Determination.

17. The issue for determination by this Court is whether the Petitioner/Applicant has established a prima facie case to enable the Court grant the interlocutory injunction sought. The principles to be considered by this Court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the Court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

18. Has the Petitioner/Applicant made out a prima facie case with a probability of success? In the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described as follows:

"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."

19. Looking at the facts of this case, the Court has been moved under a certificate of urgency, by the Petitioner/Applicant, to issue temporary injunctive orders against the Respondents. The Court is aware that at this juncture it is not required to make any definitive or conclusive findings on the factual matters for that is the sole function of the trial Court.

20. The Court has, however, considered the totality of the material on record. The first issue that I need to consider for determination is whether the Petitioner/Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

21. I have considered all the material facts and documents placed before me. The Applicants' main complaint as I understand is that despite the Petitioner/applicant having obtained all necessary consents and approvals from the Respondent to commence developments on its said properties, by turning around and issuing it with an Enforcement notice ordering it to stop the construction project it had embarked on, the Respondent was interfering with the developments being carried out on the properties thus infringing on the Petitioner/Applicant's rights which were guaranteed by Articles 10, 27, 28, 31, 35, 40(2) 47, 48 and 50 of the Constitution and subjecting it to suffer irreparable loss and damage.

22. The Respondents did not file a replying affidavit to controvert the averments in the supporting affidavit, the result is that the evidence contained in the supporting affidavit was not controverted

23. It is not in dispute that the issuance of the Enforcement Notice was an administrative action by the Respondent. It is also not in dispute that the Respondent has a duty to ensure that its action is expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be effected by the decision be afforded an opportunity of being heard before the decision is taken.

24. In this case the notice dated 21st May 2020 to stop a construction that had already been approved without giving the Petitioner an opportunity to be heard and to address any issue arising therein before issuing an enforcement in my view violated the Petitioner's right to fair administrative action.

25. Upon obtaining approvals from both the Respondent and relevant authorities, including consultation and public participation, where "the project was unanimously accepted by all attendees", I find that it was therefore *prima facie* illegal for the Respondents to issue the Enforcement Notice stopping 'further construction arising from a public Petition until the matter was resolved.'

26. I find that subject to such approval, and public participation, the Petitioner/Applicant had the right to develop and use its property without interference which right, based on the available evidence, was infringed.

27. The provision of section 72(3) of the Physical and Land Use Planning Act, provide as follows:

Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

28. The Applicant has averred that since the Respondents have failed, neglected, refused or otherwise failed to constitute the Nyeri County Physical and Land use Planning Liaison Committee as required by Sections 76 and 77 of the Physical and Land Use Planning Act, this suit became the only feasible remedy.

29. Pursuant to the notorious authority in **Giella vs Cassman Brown** (supra) I find that the applicant has established a *prima facie* case with a probability of success and is entitled to an order of injunction in terms of prayer (iv) and (v) of the motion.

30. Costs shall follow the event.

Dated and delivered at Nyeri this 30th day of September 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE_x