REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO.3 OF 2020

IN THE MATTER OF ARTICLES 1(1), (3), (2) (1), 10(1), 20, 21(1) 23(1), 13(a)(F), 24 (1), 26(1), 35(1), (3), 40, 47(1) 48, 60(1), 159(1) (2) (a), (d), (e), 165(3) (b) 258(1), (2) (a) (d), (e) 165 (3) (b) 258 (b) 258(1) and 259 (1) (3)

AND

IN THE MATTER OF VIOLATION OF ARTICLES 26(1), 40,47,60(1) & 67(1) OF THE CONSTITUITION OF KENYA2010

BETWEEN

SUSAN WANGARI MBURU.....1ST PETITIONER

TERESIA WANJIRU KAMAU.....2ND PETITIONER

NJOROGE NJUGUNA.....3RD PETITIONER

JAMES MUGO MBOGO.....4TH PETITIONER

NG'ANG'A GACIGWA WANDITU.....5TH PETITIONER

JANE WANJIKU WARARI.....6TH PETITIONER

VERSUS

ELDORET WATER AND SANITATION ..

COMPANY LIMITED.....1ST RESPONDENT

UASIN-GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

This ruling is in respect of an application by the petitioners dated 5th February 2020 seeking for the following orders:

a) Spent.

b) Pending the hearing and determination of this Application inter-parties theRespondents be barred by orders 0f temporary injunction from demolishing houses, removing, entering and/or trespassing into the Petitioner's parcels of lands known as **ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/306, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/ 204, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/267, ELDORET MUNICIPALITY BLOCKS 15 (HURUMA)/400, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/463 AND ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O) 3291** and thereafter pending the hearing and determination of the petition.

(c) costs of the Application be provided for.;

This application was brought under certificate of urgency by the petitioners where the court ordered them to serve the application but granted orders of maintenance of status quo pending the hearing and determination of the application inter partes.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel for the applicants cited the case of Giella v Cassman Brown & Company Ltd (1973) EA 358 on the principles for grant of injunctions. Counsel further submitted that the petitioners are the registered owners of the parcels of land known as **ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/306, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/204, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/267, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/463, and ELDORET MUNICIPALITY BLOCK 15 (KING'ONG'O)/3291** and pursuant to section 24(a) of the Land Registration Act No. 3 of 2012 they are vested with absolute ownership of the land together with the rights and privileges appurtenant thereto.

Counsel relied on Section 143 2 (a) of the Land Act no.6 of 2012 which defines a right of way as follows

> *"a right of way created for the benefit of the national or County Government a local authority, a public authority or any corporate body to enable as such institutions, organizations, authorities and bodies to carry out their functions, referred to in this Act as a way leave".*

Mr. Mathai submitted that in order for such wayleave to be created an application for the creation of a wayleave has to be made unless the commission is making suo moto pursuant to **Section 144 of the Land Act No. 6 of 2012**. The Applicant is therefore required to a serve a notice on

(a) All persons occupying land over which the proposed wayleave is to be created including persons occupying land in accordance with customary pastoral rights.

(b)The County Government in whose area of jurisdiction land over which the proposed wayleave is to be created is located.

(c) All persons in actual occupation of land in an urban and per-urban area over which the proposed wayleave is to be created; and

d)Any other interested person.

Counsel further cited the provisions of Section **148 of the Land Act No.6 of 2012** that states that;

> *"subject to the provisions of this Section compensation shall be payable to any person For the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave in addition to any compensation for the use of land for any damage suffered In respect of trees crops and buildings as shall in cases of private land, be based on the value of the land and determination by a qualified valuer therefore compensation is must where wayleave has been created and the same has to be determined by a qualified valuer.*

Mr Mathai submitted that the Respondents never served any notice to the petitioners and they have not adduced any evidence that the said notices were served and relied on the case of **NYANGILO OCHIENG AND ANO. VS- KENYA COMMERCIAL BANK, COURT OF APPEAL AT KISUMU CIVIL APPEAL NO 148 OF 1995 (1996) eKLR** where the Court of Appeal stated as follows:-

> " *It is for the chargee to make sure that there is COMPLIANCE WITH the requirements* ***of Section 71 (1) of the Registered Land Act****. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of statutory notice is for the chargee to prove that such notice was infact sent*"

On the issue whether damages would be adequate compensation, Counsel cited the case of **Waithaka v Industrial & Commercial Development Corporation (2001) eKLR** where the court held that:

> *"As regard damages, I must say that in my understanding of the law, it is not inexorable rule that, where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue of damages would be an adequate remedy. By using the word "****normally*** *the Court was recognizing that, there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted."*

Counsel therefore submitted that the applicants have shown in their affidavits the houses that the respondents intend to demolish which the applicants use for shelter and economic activities. That the loss cannot be compensated by way of damages.

Mr Mathai also submitted that the respondents have not complied with the mandatory statutory provisions of giving notice to the occupants of the land for the creation of the wayleave hence the balance of convenience lies in favour of the petitioners being granted the orders of injunction pending the hearing of the petition. He urged the court to grant the orders as prayed.

RESPONDENT'S CASE

Counsel for the respondent opposed the application and submitted that during the construction of the sewer line in 2005 all constitutional and statutory requirements were complied with and that the petitioner is guilty of non-disclosure of material facts.

Counsel further submitted that the petitioners admitted to the existence of the sewer lines and their encroachment on the wayleave, further that they admitted receiving oral notices from a village elder of an impending compulsory acquisition by the 1st respondent.

Counsel cited the case of **Edward Saya Malovi Juma v Kenya Electricity Transmission Co. Ltd (2015) eKLR** on the issue of notices where the court held that:

> *" I am also satisfied that the Applicant was notified and that the requirement for public participation under Article 10 of the Constitution does not mean that everybody including those not affected should participate in the process of acquisition of way leaves. As long as the owner of the land is informed, that suffices."*

Mr Maina further submitted that the applicants having encroached on the sewer line are not entitled to orders of injunction and relied on the case of **Everline Sande Ngulamu & 2 others v Kenya Urban Roads Authority & 9 others (2018) eKLR** where the court while declining to issue injunctive orders held that the petitioners have no right to remain on a road reserve.

Counsel therefore urged the court to dismiss the applicant's application as they have not established a prim facie with a probability of success as the sewer line has been in existence since 2005 and that any injunctive order will cause untold suffering to the populace and public facilities along the line. Further that any loss that may be suffered by the applicants is capable of being compensated by way of damages as was held in the case of **Edward Saya Malovi Juma v Kenya Electricity Transmission Co. Ltd (2015) eKLR.**

The 1st respondent cited the case of **Kenya Power & Lighting Company Limited v Mosiara Trading Co. Ltd (2016)** where the court held that the balance of convenience tilted in favour of the plaintiff as it was in favour of public interest.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicants have met the threshold for grant of temporary injunction. The principles were set in the case of Giella Casman Brown. Apart from the three principles set out in the Giella case, the court should also look at the circumstances of each case as was held in the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where Mabeya J remarked as follows:-

> *'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In* ***Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J*** *(as he then was) at page 607 delivered himself thus:-*
>
> *'……..counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago. In Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been "wrong"…."*
>
> *Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.*
>
> i. *Is there a prima facie case….*
>
> ii. *Does the applicant stand to suffer irreparable harm…*
>
> iii. *On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.…..…*

When dealing an application for injunction you must consider which option has a lower risk of injustice for a party. Would it be in the interest of justice to grant an order of injunction or decline to do so. Looking at the surrounding circumstances of the case would it be in the interest of justice to stop a sewer line being used by the greater or larger public to stem breakout of disease? The answer would be that the public interest would take a center stage as opposed to the individuals in the name of the applicants herein.

The respondent's position is that the wayleave has been in existence since 2005. Further, the petitioners' admission to having known that the wayleave existed as they had been informed of the same jeopardises their claim to rights over property that contains a sewer line that is used by the public.

The 1st petitioner admitted at paragraph 3 of her affidavit that they have encroached on the sewer line with illegal structures. In the case of **Veronica Njeri Waweru & 4 others vs The City Council of Nairobi & Others [2012] Eklr,** Mumbi J held:

> *"The petitioners have readily conceded that they have been occupying public property, a road reserve for the last ten years. They have licences to operate businesses but have not proprietary interest on the land. Clearly, therefore their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over".*

I find that the applicants have not established a prima facie case with a probability of success.

Further in the case of **Edward Saya Malovi v Kenya Electricity Transmission Co. Ltd. (2015) eKLR** the court held;

> *The applicant has also not shown that even if the amount for compensation were to be determined at Kenya shillings Four Million Five Hundred thousand, (Kshs.4, 500,000/=) the Respondent would not be able to pay that amount. The law allows compensation for damaged crops, trees or buildings. The Applicant has not therefore satisfied the second point for consideration in an application for grant of an injunction that he would suffer irreparable loss that cannot be adequately compensated by an award of damages.*

On the limb of balance of convenience in this matter, it is between public interest and the petitioners' interests. In **Kenya Power & Lighting Co.Ltd v Mosiara Trading Company Ltd [2016] eKLR** the court held;

> *"However, even if the Court was in doubt, the balance of convenience would tilt in favour of the Plaintiff who has a right to enjoy its public right of way as the wayleave serves the public interest."*

In conclusion having considered the application together with the rival submissions I find that the balance of convenience lies in not granting the injunctive orders sought as the same will greatly prejudice the public interest. The application is therefore dismissed with costs to the respondents.

DATED and **DELIVERED** at **ELDORET** this **30th DAY** OF **September, 2020**

DR. M. A. ODENY

JUDGE