



Board of Management, Ngara Girls High School & another v Erdemann Property Limited & another; Ministry of Education (Interested Party) (Constitutional Petition E066 of 2024) [2025] KEELC 95 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEELC 95 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CONSTITUTIONAL PETITION E066 OF 2024**

**MD MWANGI, J
JANUARY 21, 2025**

BETWEEN

**BOARD OF MANAGEMENT, NGARA GIRLS HIGH SCHOOL 1ST
PETITIONER**

LOISE NDOTU MWATHE 2ND PETITIONER

AND

ERDEMANN PROPERTY LIMITED 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

THE MINISTRY OF EDUCATION INTERESTED PARTY

(In respect to the Petitioners’ notice of motion dated 8th August 2024 brought pursuant to Section 3 of the High Court (Practice and Procedure) Rules, Articles 22, 48 and 258 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure) Rules, 2013)

RULING

Background.

1. The Petitioners’ application is dated 8th August 2024. The Petitioners pray for a conservatory order suspending the operations by Erdemann Property Limited (the 1st Respondent) on L.R No. LR 209/136/239/R (hereinafter referred to as ‘the suit property’) pending the hearing and determination of the petition herein.



2. The application is premised on the grounds on the face of it and on the supporting affidavits of Dr. Beatrice Achieng Ndiga and Loise Ndotu Mwathe sworn on 8th August 2024. The Petitioners explain that on 10th June 2020, Ngara Girls High School entered into a lease agreement with the 1st Respondent in respect to a part of the parcel of land L.R. No. LR 209/136/239/R (the suit property) for purposes of temporary stocking of material during the construction stage of the River Estate Project on LR. No. 209/22016 and for incidental purposes related to such construction during the period running from the date of the execution of the agreement until the date of termination of the agreement.
3. The Petitioners assert that the lease was to terminate after 3 years. It terminated on 10th June 2023 and was not renewed. Despite the termination and non-renewal of the lease, the 1st Respondent has and continues to illegally occupy and trespass on the Petitioners' property while undertaking construction activities namely concrete processing which has and continues to wreak havoc in form of noise and emission of dust thereby disrupting the learning activities at the school and affecting the rights of the minors and staff at the school.
4. The Petitioners aver that the continued activities of the 1st Respondent pose a great health hazard for the minors and school staff and constitute a continuing violation of Articles 10, 12, 27, 28, 29, 40, 42, 43, 53, 69 and 70 of *the Constitution* of Kenya as read with Section 23 of the *Climate Change Act*, 2016.
5. The Petitioners further allege that the 1st Respondent has deliberately forcibly taken over and detained the playground space of Ngara Girls High School thereby denying the students their rights to play contrary to Article 31 of the Convention on the Rights of the Child.
6. In spite of efforts by the Petitioners to have the 1st Respondent halt the aforesaid activities, the 1st Respondent has adamantly persisted necessitating the filing of the petition and the application for conservatory orders.

Response by the Respondents.

7. The 1st Respondent replied to the Petitioners' application by way of a replying affidavit sworn by one Otieno John Kenneth Rajwayi at Nairobi on the 4th October 2024. The deponent describes himself as the planning manager of the 1st Respondent company well versed with the facts and issues in contention and duly authorized and competent to swear the affidavit.
8. The deponent deposes that the Petitioners' petition and application have been made in a bid to evict the 1st Respondent from the suit property without complying with Section 152E of the *Land Act* disguised as a Constitutional Petition. Consequently, it is the 1st Respondent's position that the application before the court is anchored on gross misapprehension of the law and misrepresentation of the nature, manner and instance of the obtaining dispute undeserving of the reliefs sought.
9. The deponent asserts that the 1st Respondent company is a leading and reputable property developer in Kenya and the region. It has allegedly undertaken various pristine residential and commercial developments with a deliberate focus and conscientious business model designed to timeously deliver affordable and cost effective projects across Kenya. The model carries with it huge financial outlay which is leveraged for financing with banks and other financial institutions informed by the company's reputation for integrity, credibility and critical project competition within reputedly very short periods of time.
10. The deponent asserts that the 1st Respondent company has successfully constructed well over 10,000 units in various places. The company is, according to the deponent, a leading investor and the market leader in the manufacture and sale of gypsum related products. The company contributes to the



development and progress of the country through creating employment for thousands of Kenyans, revenue generation for the government through payment of taxes and provision of the much needed quality affordable real estate projects and related products.

11. The company, being the registered owner of L.R. 209/22016 (original number L.R. 209/20567) at Ngara within Nairobi resolved to execute a mega residential development comprising River Estate Housing Development and the rehabilitation of Jadongo Road. It has undertaken and received all lawfully required statutory and regulatory approvals in respect of its development including undertaking an elaborate environmental and social impact assessment study report and upon review of which, NEMA issued an Environmental Impact Assessment license No. NEMA/EIA/PSL/6420. It was also issued with a building permit by the Nairobi City County Government.
12. In issuing the Environmental Impact Assessment license, NEMA imposed various general construction, operational, notification and decommission conditions which would mitigate against any and all the issues being raised by the Applicant.
13. Prior to the commencement of the works, the 1st Respondent sought and obtained regulatory approvals from the National Construction Authority (NCA, the Water Resources Authority (WRA) and the Kenya Civil Aviation Authority (KCAA) in respect of the subject project. The 1st Respondent also reached out to the petitioners who neighbor their site and entered into a lease agreement over a portion of L.R. 209/136/239/R for a duration of 3 years which had been projected as the project completion period. The lease was entered into with the approval of the Ministry of Education. The deponent asserts that the subject portion of the lease was not in use at all by the Petitioners at the time of the lease.
14. Minded to mitigate against potential negative environmental impact from the project, the 1st Respondent states that it has erected dust-proof nets and installed a recycling plant and regularly water the surroundings. The allegations on pollution are therefore unmerited. It asserts that the Jadongo Road Residents' Association had expressed satisfaction for the measures taken to ensure that the school, business premises, and residents live in a clean, conducive and habitable environment.
15. The 1st Respondent termed the petition and the application filed by the Petitioners an abuse of the process of the court. In any event, the lower risk of injustice and balance of convenience vis-à-vis advancement of constitutionalism and public interest tilts in favour of disallowing the application but nonetheless fixing it for expeditious determination.
16. The 1st Respondent prays for the dismissal of the application.
17. The Ministry of Education, through the replying affidavit sworn by Dr. Belio R. Kipsang, the Principal Secretary, State Department for Basic Education, supports the Petitioners' application. The Principal Secretary deposes that the Ministry had been informed about the activities of the 1st Respondent on the school land which include concrete processing.
18. The said activities had affected teaching and learning at the school owing to the noise pollution and the concerns for the health of the learners and workers of the school from the dust production. The Ministry therefore supports the issuance of the conservatory orders sought by the Petitioners.

Court's directions.

19. The court's directions were that the application be canvassed by way of written submissions with occasion to highlight the same before the court. Parties complied with the directions and highlighted their submissions on 4th November 2024. The proceedings of the day form part of the record of this court and I need not replicate them verbatim in this ruling.



Issues for determination.

20. Undoubtedly, the application before me is an interlocutory application. The court's jurisdiction in determining an application of this nature is limited in the sense that the court is not called upon to make any conclusive or definite findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.
21. Considering the issues raised by the Petitioners in the application under consideration, the response by the Respondents and the interested party, the court's view is that the issue at this point in time is whether the Petitioners are entitled to conservatory orders and if so, whether the reliefs sought in their application are the appropriate reliefs in the circumstances of this case pending the hearing and determination of the main petition.

Analysis and determination.

22. The late Onguto J in the case of Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 others (2015) eKLR, summarized the principles to be considered for purposes of the grant of conservatory orders as follows;-
 - a. The Applicant sought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b. The court should decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects.
 - c. Whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. If the grant of the conservatory order is in the public interest.
 - e. The court in exercising its discretion whether to grant or deny a conservatory order must consider all relevant material facts and avoid immaterial facts.
23. This is the same position taken by the Supreme Court in the case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others (2014) eKLR, where the court stated that,

“Conservatory orders, consequently should be granted on the inherent merits of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”
24. The Petitioners' application is two pronged. It is premised first and foremost on allegations of trespass against the 1st Respondent. The Petitioners allege that the 1st Respondent has continued to occupy their portion of land even after the expiry of the 3 years lease. Secondly, the Petitioners accuse the Petitioners of undertaking activities that wreak havoc in form of noise and emission of dust disrupting learning activities in the school.
25. The issue whether the 1st Respondent is trespassing on the Petitioners' land is best determined after consideration of substantive evidence at the hearing where both sides will have occasion to table their evidence and interrogate the other side's evidence through cross-examination or rebuttal by contra-evidence.
26. The 2nd ground touches on the right to a clean and healthy environment of the students and staff of Ngara Girls High School. As I highlighted earlier on, the Petitioners allege that the activities of the 1st



Respondent are causing noise pollution and emission of dust thereby disrupting learning activities of the students and violating their rights.

27. The 1st Respondent in its submissions avers that its operations are duly licensed in accordance with Section 58 of Environmental Management and Coordination Act (EMCA). They have an Environmental Impact Assessment License and if there are any contraventions recourse lies in enforcing the alleged contraventions. In any event, the 1st Respondent argues that its occupation of school land was with the mutual consent of all the parties including the Ministry of Education, ‘for the benefits the school was going to reap from the project’ as per the Ministry’s letter dated 1st January 2020 marked as exhibit OJKR-7 in the 1st Respondent’s replying affidavit dated 4th October 2024.
28. The 1st Respondent further submitted that it had taken appropriate mitigation measures against potential negative environment impact from the project by erecting dust proof nets, installing a recycling plant and regularly watering the surroundings.
29. Amongst the guiding principles that this court is required under Section 18 (a)(vi) of the *Environment and Land Court Act* and Section 3(5)(f) of the Environmental Management and Coordination Act is the precautionary principle.
30. Considering the principles espoused in the Gatirau Munya’s case (supra), the precautionary principle, the particular circumstances of this case, the potential risk to the health of the students and staff of Ngara Girls High School and on the basis of the material placed before the court, public interest will best be served by issuance of conservatory orders.
31. Accordingly, a conservatory order is hereby issued in terms of prayer 3 of the Petitioners’ application dated 8th August 2024, suspending the operations of Erdemann Property Limited on L.R. No. LR 209/136/239/R, pending the hearing and determination of the petition.
32. The costs of the application shall be in the cause.
33. As this matter touches on environmental rights, it shall be heard on a priority basis.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ochieng’ Odinga for the Petitioners/Applicants

Mr. Lusi for the 1st Respondent

N/A by the Attorney General

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

