



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CONSTITUTIONAL PETITION NO. 4 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION AND/OR

THE ALLEGED CONTRAVENTION OF THE RIGHTS AND FREEDOMS

UNDER ARTICLES 10,35,40,42,69(1)(a) (d) (f) (g) (h) & 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 3, 4 & 10 OF THE

CONSTITUTION OF KENYA(PROTECTION OF RIGHT

AND FUNDAMENNTAL FREEDOMS)PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE PHYISCAL AND

LAND USE PLANNING ACT NO. 13 OF 2019

AND

IN THE MATTER OF THE ENVIRONMNETAL MANAGEMENT

AND COORDINATION ACT NO. 8 OF 1999

AND

IN THE MATTER OF THE MINING ACT NO. 12 OF 2016

BETWEEN

CHARLES MUGANE MBUGUA (*Suing as the Administrator /*

Legal Representative of the Estate of

CHARLES MUGANE NJUBI)(Deceased).....PETITIONER/APPLICANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....3RD RESPONDENT

THE MINISTRY OF PETROLEUM AND MINING.....4TH RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated 22nd July 2020 by the Petitioner/ Applicant seeking for orders that;

1. That the Honourable Court be pleased to issue orders of injunction restraining the 1st Respondent , its agents, servants and/or employees or whomsoever acting on its behalf or instructions from engaging in quarrying activities or in any other manner whatsoever from dealing with L.R No. Kabete/Lower Kabete/523, pending the hearing and determination of the Petition herein.

2. That this Honourable Court be pleased to issue orders of injunction restraining the 1st Respondents , its agents, servants and or employees or whomsoever acting on his behalf or instructions from engaging in blasting activity or in any other manner whatsoever from employing other methods or rock mining with respect to L.R No.Kabete/Lower Kabete / 523, pending the hearing and determination of the Petition herein.

3. THAT this Honourable Court be pleased to issue a mandatory injunction against the 1st Respondent to erect a secure fence and mount safety warning signage around the quarry site located on L.R No. Kabete/Lower Kabete/523 pending the determination of the Petition herein.

4. The Respondents shall bear the costs of this Application.

The Application is premised on the grounds that the 1st Respondent bought and/or leased the suit property and is engaging in destructive quarrying activities thereby causing deep excavation therein which poses great danger to the Environment, the interests of the beneficiaries of the Estate of the Late **Charles Njubi in L.R No. Kabete/Lower Kabete/503**, the safety and security of the said beneficiaries , their invitees and other third parties and the future gain in the value of **L.R 503** which borders the suit property.

It was contended that the 1st Respondent did not follow due process prior to the commencement of the said quarrying activities in the suit property and therefore does not possess the requisite approvals and licenses obtainable from the 2nd, 3rd and 4th Respondents and should it be in possession of the requisite approvals, the same were irregularly obtained and therefore illegal. That the Respondents did not invite the participation of the interested parties including the Petitioner/Applicant before the commencement of the activities. That despite the Petitioner/Applicant cautioning the 1st Respondent, the 1st Respondent continually engages in the said destructive quarrying activities in the suit property.

Further that the illegal activities on the suit property is carried out openly without any form of warning signage and fencing which exposes the general public and the beneficiaries of the Estate to the risk of bodily harm. Further that there exists a legitimate apprehension that the uncontrolled quarrying activities on the suit property by the 1st Respondent will cause the sinking and/or erosion of **L.R 503**, especially due to the ongoing heavy rains causing the loss of ownership guaranteed by the Constitution. Further that the suit premises has begun retaining underground as well, as rainwater as a result of the deep excavations raising legitimate apprehension on the part of the Petitioner/Applicant of the formation of a dangerous pool that cannot be contained by the 1st Respondent.

Further that the continuing acts of the 1st Respondent and the inaction by the 2nd, 3rd and 4th Respondents are destructive to the environment, prejudicial to the interests of the beneficiaries of **L.R 503**. That the State has a duty under law to ensure sustainable exploitation, utilization, management and conservation of the Environment which it as failed to do with respect to the activities of the 1st Respondent.

In his Supporting Affidavit, **Charles Mugane Mbugua** averred that he is the Legal Representative of the Estate of **Charles Mugane Njubi** and that the deceased is the registered proprietor of **L.R 503**. He further averred that sometimes in **July 2019**, he learnt through third parties that 1st Respondent had bought and / or leased the suit property and was engaging in quarrying activities to support the construction of the **Nairobi-Western Bypass**. It was his contention that **L.R 503**, borders **L.R 523** on the right hand side and are therefore immediate neighbours.

That the quarrying activities on the suit property is in itself illegal having been commenced in residential area without following the due process. Further that as a result of the illegal activities by the 1st Respondent, the value of the Petitioner's/Applicant's land faces imminent devaluation, as it neighbors an open quarry which devaluation robs them the right of enjoyment of the land. Further that the activities are prone to periodic soil erosion, which erosion is inimical to the value and security of the land. Further that the illegal activities has limited usage of the Petitioner's/Applicant's property as it has weakened its foundation and therefore limiting the kind of structures that can be erected, and has made the road impassable and are a nuisances to the beneficiaries.

He further alleged that the activities by the 1st Respondent are intended to maliciously deprive the Petitioner/Applicant and other beneficiaries of their Constitutional right to a **clean** and **healthy** environment and right to quiet possession.

The Application is opposed and **Ivan Wang**, swore a Replying Affidavit on 25th September 2020 and averred that she is the **Human resource and Public Relations Manager** of the 1st Respondent. That on 22nd May 2019, the 1st Respondent leased 2 acres out of the 5

acres of the suit property for use as a borrow pit for excavation of marram/gravel. Sub grade materials to be used in the construction of the Nairobi Western Bypass. Further that on **19th June 2019**, the 1st Respondent leased the remaining 3 acres for the same purpose. She contended that the borrow pit excavation activities were approved by **NEMA**, vide letter dated **24th May 2019** and NEMA license valid for 24 months issued on **11th July 2019**. She further averred that all approvals were obtained and procedures followed.

She contended that sometime in June **2020**, the 1st Respondent encountered rock on the leased land which it deemed suitable for road construction and ceased activities on the land. That on **21st July 2020**, the 1st Respondent signed a new lease for use of the leased land as a borrow pit excavation of both marram and rock and that since the execution of the lease dated **21st July 2020** and that for a few months preceding execution, the 1st Respondent has not carried out any activities on the leased land even though it continues to pay rent.

That all other procedures for obtaining the requisite license such as a license for the use of the explosives by the 1st Respondent are already underway. It was her contention that the 1st Respondent having leased the suit property, is entitled to utilize the land in accordance with the licenses granted as all activities carried in the leased land are duly licensed. That any damage that may result to the leased land and its environs as a result of the Western By-Pass will be fully rehabilitated prior to completion of the construction project in accordance with the rehabilitation plan submitted by the 3rd Respondent. She further contended that the suit property is properly secured and that the 1st Respondent extensively consulted the local community prior to the commencement of the Western By-Pass and continues to hold consultative forums with the local community to mitigate any effects of construction of the Western By pass on the local community.

Further that she has been advised by her Advocate that the Petitioner/ Applicant has not established a **prima facie** case for the grant of the injunctive orders. That no evidence of sinking, erosion or retention of underground water on the Petitioner's property has been led and that his claim can sufficiently be compensated by an award of damages if the Court ultimately finds the Respondents culpable. That the balance of convenience tilts in favour of the 1st Respondent as the construction of the Western By-Pass is for the greater good of the public and forms part of the National Government Agenda to deliver reliable infrastructure for economic development and will ease congestion along its corridor. Further that the underlying rock on the leased land is highly suitable for construction and would tremendously lower the cost of the construction of the Western By-Pass, as the 1st Respondent has been obtaining rock for the project from Kajiado County thus incurring heavy transportation costs. That she has been advised by her Advocate that the matter does not fall within the ambit of a Constitutional Petition, the Petitioner/Applicant claim being for compensation and restoration of the property.

The Petitioner/ Applicant filed a further Affidavit sworn on **5th October 2020**, and averred that it is clear that the executed leases dated **22nd May 2020** and **21st July 2019**, are null and void ab initio in law as the lessors **Wairimu Elizabeth Njonjo** and **Beni Josiah Njonjo** had no capacity to execute the same as the suit property has not been transferred to them and that such capacity vests in the personal representative of the Estate of **Emma Wambui Njonjo** and **Mr. Charles Mugane Njonjo** and that the said execution amounts to intermeddling which is a criminal offence. That the license issued by the **NEMA** and letter were issued irregularly and that there is a dispute as to their legality. Further that **Condition 4.1** of the NEMA license, mandates the 1st Respondent to erect and maintain a signboard approved by the 2ND Respondent including the reference number on the said approved board, which signboard has not been erected and which approval by the 2nd Respondent is yet to be provided in evidence. Further that condition 4.3 mandates the 1st Respondent to install warning signs of appropriate size and language in the quarry site, Condition 4.8 mandates it to only conduct its operations between **00800hrs and 1700hrs** week days and **00800hrs to 1300hrs** on Saturdays which conditions have not been complied with. He further averred that condition 4.10 of the license mandates it to adhere to zoning specifications issued for development of such projects within the jurisdiction of the **Kabete Sub County** and the Ministry of lands and Settlement with emphasis on approved land use but that the project does not comply with the said condition as the suit property falls under agricultural use and no change of user has been undertaken by the 1st Respondent.

Further that the 1st Respondent is not in possession of a mining license and therefore it ought to be restrained from conducting further operations as the quarrying site is not properly secured and that the 1st Respondent did not consult the community as there is no evidence of notices of invitation, advertisements and minutes as prescribed by law has been adduced.

He averred that he has established a prima facie evidence and that evidence has been adduced in form of pictorials on the extensive damages on the Petitioner's/Applicant's land. That the construction of the Western By-Pass is a private commercial contract and that his inherent rights cannot be sacrificed at the expense of commercial interests. That the 1st Respondent has admitted of an alternative source of rock and the issuance of injunctive orders will not prejudice it as compared to the destruction occasioned to the Petitioner.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The issue for determination is whether the Petitioner/Applicant is entitled to the orders sought.

The Petitioner/ Applicant has sought for injunctive orders. This being an interlocutory stage, the Court ought not to look at the merits of the case, but what the Court should determine is whether the Applicant has met the conditions as set out in the case of ***Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358***. See also the case of ***Kibitiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR***, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might 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. See also *E.A Industries ..Vs...Trufoods (1972) EA 420.*”

Has the Applicant therefore established a prima facie case with probability of success? A *prima-facie* case was described in the case of ***Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR***, to mean:-

“A case in 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.”

In this case the Petitioner/Applicant he is the Legal Representative of the Estate of the Late **Charles Mugane Njubi**, who is the registered owner of **L.R 503**, that borders the suit property. It is the Applicant’s contention that the activities that are being carried out are detrimental to the beneficiaries of the Estate of **Charles Mugane Njubi** as the said activities may cause damage to their property and that since the 1st Respondent has not properly secured the area, then it may also occasion injury to them.

The Court has seen the license granted to the 1st Respondent and it is thus not in doubt that the license requires them to fulfil certain conditions including signage’s that will warn the public against any potential dangers. Further the Court has seen the Addendum to the Rehabilitation Plan for the Excavation and Material Borrow Pit Site on the suit property and the report states that the quarrying and mining activities usually destroy the original landscape of the affected area leaving behind water pods that have a potential to be hazardous and pose a threat to the public health. Since the Applicant has apprehended that there is potential of devaluing his property and further there is a likely hood of their peaceful enjoyment of the suit property being interfered with, it then follows that there is a likely hood of the Applicants rights being breached.

The Court thus finds and holds that the Applicant has established that he has a **prima facie** case, with probability of success at the trial.

It is not in doubt that on determining whether a party is deserving of the rights of interlocutory injunction, the Applicant must establish all the three conditions and that the conditions are sequential. So then the Court must further determine whether the Applicant has established that he will suffer irreparable harm that cannot be compensated by way of damages.

‘Irreparable loss’ was described in the case of ***Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015***, as ***simply injury or harm that cannot be compensated by damages and would be continuous.***

It is very clear that before the 1st Respondent undertook the project, it did conduct an Environmental Impact Assessment. Further that the 1st Respondent did get the necessary licensees to conduct the project peaceful and it even has a rehabilitation plan to be able to get the land back and will be able to compensate any person who will have been affected by the quarrying and mining activities.

However, it is not in doubt as per their Rehabilitation Plan that there will be carious negative impacts includes habitat degradation , pollution of Environmental media , health and noise concerns. As already stated above, irreparable injury is injury that may not be compensated by damages. It is not in doubt that if the land is degraded the Petitioner/Applicant can be compensated, However in the Court’s considered view , the issues involved here concern health concerns, and pollution of the Environment and it is clear that these are injuries if suffered cannot be compensated by way of damages.

Therefore, the Court holds and finds that the Petitioner/Applicant has demonstrated that he will suffer irreparable harm that will not be compensated by way of damages.

The third limb is that of, if the Court is in doubt then it ought to decide the case on the balance of convenience. The Court is not in doubt but the balance of convenience always tilts in favour of maintaining the status quo.

From the available evidence, the Court finds and holds that the Petitioner/ Applicant is deserving of the orders of interlocutory injunction.

The Petitioner/ Applicant has also sought for mandatory injunction to compel the 1st Respondent to erect a secure fence and mount safety warning signage. It is evident that mandatory orders of injunction are granted in very special and exceptional circumstances at the interlocutory stage. Have the Applicants herein established existence of exceptional circumstances as was stated in the case of ***Kenya Breweries Ltd & Ano....Vs....Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109***, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See ***Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.***

From the available evidence, it is clear that the License granted to the 1st Respondent requires it to put up warning signage. In its Replying Affidavit in response to the allegations by the Petitioner/ Applicant, the 1st Respondent **only** stated that the site is properly secured. The Court having carefully looked at the photographs produced in evidence is not convinced that the suit is properly secured. Further the 1st Respondent has not produced, any evidence that it has put up the said signage. It is thus the Court’s considered view that as the issues of warning signage concerns the safety of the public, there these are special circumstances that indeed requires that the orders be granted at the interlocutory stage. Therefore, the Court also finds the orders of mandatory injunction sought are merited.

Having now carefully read and considered the Application, the Affidavits thereto, the annexures and the written submissions, the Court finds and holds that the Petitioner/Applicant has established the threshold for grants of both the **Interlocutory and Mandatory orders of injunction** as sought in his application dated 22nd July 2020.

For the above reason, the Court finds and holds that the said application dated **22nd July 2020** is **merited** and the same is allowed entirely in terms of **prayers no. c, e, f and g.**

It is so ordered

Dated, signed and Delivered at Thika this 5th day of November 2020

L. GACHERU

JUDGE

5/11/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mitto holding brief for Mr. Mugane for the Petitioner/Applicant

M/s Mungai for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

L. GACHERU

JUDGE

5/11/2020