



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.405 OF 2017**

**JANE WAGATHUITU GITHINJI.....1<sup>ST</sup> PLAINTIFF**

**ISAAC KAMAU KABIRA .....2<sup>ND</sup> PLAINTIFF**

**JACKSON GICHUKI KABIRA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SOJANMI SPRINGFIELDS LIMITED.....1<sup>ST</sup> DEFENDANT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAKURU.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. Judgment in this suit was rendered by Hon. Justice Sila Munyao on 19<sup>th</sup> June 2019 in favour of the plaintiffs. The plaintiffs subsequently filed a Notice of Motion dated 23<sup>rd</sup> July 2019 seeking to have the 1<sup>st</sup> and 2<sup>nd</sup> defendants held to be in contempt for breaching the terms of the judgment. The 1<sup>st</sup> defendant for its part filed a Notice of Motion dated 7<sup>th</sup> October 2019 seeking stay of execution of the judgment and decree herein pending the hearing and determination of an appeal that it had filed in the Court of Appeal. Hon Justice D.O Ohungo who took over the conduct of the matter following the transfer of Hon. Justice Munyao from the station directed the parties to file responses and submissions in respect of both applications. When the matter came up for mention on 20<sup>th</sup> November 2019, the Court scheduled the delivery of ruling in respect of the two applications on 5<sup>th</sup> February 2020 and in the meantime granted stay of the judgment pending the delivery of the ruling.

2. Before the ruling on the two applications was delivered the plaintiffs' filed a Notice of Motion dated 25<sup>th</sup> November 2019 which *inter alia* sought that the Court Vacates, reviews and/or varies the stay of execution orders granted on 20<sup>th</sup> November 2019 pending the ruling of the earlier applications scheduled on 5<sup>th</sup> February 2020. The plaintiffs application dated 25<sup>th</sup> November 2019 was ostensibly provoked by what the plaintiffs described as intervening events/factors since the delivery of judgment that had not been brought to the notice of the Court at the time the stay orders were granted and which were of grave nature and threatened not only the environment but also peoples' lives in the community where the acts occurred.

3. After Hon. Justice Ohungo heard the plaintiff's application dated 25<sup>th</sup> November 2019 he on 19<sup>th</sup> December 2019 rendered a ruling and made the following orders:-

(i) *This Court's order of 20<sup>th</sup> November 2019 granting stay of execution of the judgment herein pending delivery of the ruling scheduled for 5<sup>th</sup> February 2020 is hereby reviewed.*

(ii) *Temporary stay of execution of Orders number 11, 12 and 13 of the judgment herein is hereby granted. As regards order number 11, ONLY the portion of the said order that requires the 1<sup>st</sup> defendant to pay the plaintiffs the full value of the land that has been wasted is stayed.*

(iii) *The rest of the orders on the judgment remain in force and are not stayed.*

(iv) *The order in (ii) above shall remain in force for only six months from the date of delivery of this ruling or until the Court of Appeal makes orders on the application for stay that is pending before it, whichever occurs first.*

(v) *In view of this outcome, the ruling scheduled for delivery by this Court on 5<sup>th</sup> February 2020 shall only be in respect of Notice of Motion dated 23<sup>rd</sup> July 2019.*

(vi) *The plaintiffs shall have costs of Notice of Motion dated 25<sup>th</sup> November 2019 as against the 1<sup>st</sup> defendant.*

4. As is evident from the Orders Ohungo, J gave; he fully disposed of the application for stay of execution of the judgment and decree filed by the 1<sup>st</sup> defendant. He was mindful that the 1<sup>st</sup> defendant had filed an appeal in the Court of Appeal and had further filed an application for stay in the Court of Appeal. The conditional stay that Ohungo, J granted relating to the orders in the judgment with financial implications being orders number 11,12 and 13 were time bound and were subject to the Court of Appeal making orders on the stay application within a period of six months from the date of the ruling he gave on 19<sup>th</sup> December, 2019. In the event there were no orders from the Court of Appeal on the application for stay before it, the stay granted by this Court were to lapse. In regard to the application for stay of execution by the 1<sup>st</sup> defendant this Court is *functus officio* as the same was disposed by the court ruling of 19<sup>th</sup> December 2019. Indeed Ohungo, J was clear on this point as under order number (V) he was categorical that the ruling scheduled to be delivered on 5<sup>th</sup> February 2020 was to be only in respect of the Notice of Motion dated 23<sup>rd</sup> July 2019.

5. On 5<sup>th</sup> February 2020 Ohungo, J did not deliver a ruling on the Notice of Motion dated 23<sup>rd</sup> July 2019. As per the record of the proceedings on that day the judge, stated as follows:-

*“On reflection and in view of the fact that there is an application for stay pending before the Court of Appeal and considering that the Notice of Motion dated 23<sup>rd</sup> July 2019 is in essence flowing from the decree, I have decided not to consider the application until such time as the court of appeal will have dealt with the application for stay”.*

6. In my view that constituted an order dispensing with and/or suspending the hearing and determination of the Notice of Motion dated 23<sup>rd</sup> July 2019 until the Court of Appeal had disposed of the application for stay pending before it. This order has not been varied, vacated or set aside. Although Ohungo, J on 5<sup>th</sup> February 2020 fixed the matter for mention on 2<sup>nd</sup> April 2020 in order to get an update in regard to the application for stay before the Court of Appeal, the record does not show any mention took place on the date scheduled. It is however instructive to note that the mention fell within the period when the Courts countrywide had drastically down scaled their operations owing to Covid-19 pandemic outbreak. The next activity on the file is on 30<sup>th</sup> June 2020 when the plaintiff's Notice of Motion dated 23<sup>rd</sup> July 2020 seeking to have Ohungo, J recuse himself from further handling the matter came up for hearing *ex parte*.

7. On 8<sup>th</sup> October 2020 the application dated 23<sup>rd</sup> July 2020 was compromised with the trial court directing that the matter henceforth be handled before ELC 1 where I presently preside.

8. I have set out the background of this matter to contextualise the orders and/or directions that I will shortly be issuing. There is no doubt that this was a matter that raised far reaching environmental concerns. The judgment by Munyao, J aptly dealt with the environmental concerns and found expression in the final orders that he issued. The specific orders in the judgment being orders 1 to 9 clearly required NEMA to be directly involved in their implementation being the National Agency that is charged with the obligation of Management and Co-ordination of all environment issues or matters that have the potential of negatively affecting or impacting the environment. Indeed there are appropriate provisions in the Environment Management and Co-ordination Act, 1999 (EMCA) which enables NEMA to exercise authority and supervision over all matters environmental with a view of conserving and protecting the environment.

9. Having regard to the judgment rendered by Munyao, J in this matter it is clear that the conservation and protection of the environment was a key aspect and the specific orders 1 to 9 left no doubt that NEMA was to play a key role in the implementation of the judgment. NEMA was to play specific roles in ensuring that the activities the 1<sup>st</sup> defendant was carrying out including whether or not their dam(s) had the appropriate EIA licences and whether their effluent discharge satisfied the NEMA requirements as provided under the Act and the Regulations.

10. The Court is of the view that while the plaintiffs application for contempt dated 23<sup>rd</sup> July 2019 may have been opportune in highlighting the challenges that were being experienced in implementing the terms of the judgment, the court is of the considered opinion that perhaps an audit of the measures taken by all the parties to implement orders 1 to 9 which related to restoration and compliance with environmental dictates would have enabled the court and the parties to identify any gaps in the implementation of the judgment and the measures that may be necessary to fill those gaps. The judgment specifically placed upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants participatory obligations in the implementation of the judgment which did not require a one-off action but rather continuous actions.

11. Acknowledging that the nature of the judgment to the extent that it placed on the parties obligations that had to be performed and executed post judgment, the Court equally had a residue role without being rendered *functus officio* to exercise post judgment implementation oversight to ensure the judgment was not merely of academic interest but served to enhance environmental conservation and protection. In the premises I issue the following directions which are aimed at obtaining an audit report on the implementation of the judgment:-

**1. The Director General – NEMA is hereby directed to undertake an assessment and audit of the activities of the 1<sup>st</sup> defendant on its farm in relation to the plaintiffs parcel of land in the context of the judgment delivered on 19<sup>th</sup> June, 2019 with a view of ascertaining whether the specific orders 1 to 9 have been complied with.**

2. The Director General NEMA is directed to prepare a report highlighting the specific actions undertaken by NEMA and the 1<sup>st</sup> Defendant to comply and implement the judgment.
3. The report by the Director General (NEMA) to identify any specific areas, if any, where there has been no compliance and recommend what actions need to be taken and by who to achieve compliance.
4. The report to be prepared and filed in Court within the next sixty (60) days from today.
5. The Director General and/or a duly authorised officer (other than counsel) to attend Court on 25<sup>th</sup> January 2021 when the matter will be heard to present the report and to respond to any issues that the Court and parties may raise on the report.

Dated signed and delivered at Nakuru Virtually this 4<sup>th</sup> of November 2020.

J M MUTUNGI

JUDGE