

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELCPET NO. E003 OF 2025

GARDEN PARK HOTEL LTD.....1ST
PETITIONER
GERALD KIRUIRU ELIUD.....2ND
PETITIONER

-VERSUS-

JIANGXI TRANSPORTATION
ENGINEERING GROUP LTD.....1ST
RESPONDENT
VICTORIA ENGINEERING CO. LTD.....2ND
RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD
RESPONDENT

RULING

A. Petitioners' Application

1. By a notice of motion dated 03.03.2025 filed pursuant to *Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act (the Act), Article 47 of the Constitution of Kenya and all other enabling provisions of the law*, the petitioners sought the following orders:

- a. *Spent.*
- b. *Spent.*
- c. *THAT pending the hearing and determination of the Petitioners' application inter partes an order be issued against the Respondents compelling them to construct supportive pillars and/or shoring and bracing the excavated boundary to the Applicants' property known as L.R No. MN/III/2971, Garden Park Hotel, situated at Mtwapa Creek and abutting the Respondents' Road and bridge construction site at Mtwapa Bridge.*
- d. *THAT pending the hearing and determination of the Petitioners' application inter partes an order be issued to the respondents compelling them to remove the steel structure obstructing access to the suit properties known as plot numbers MN/III/2439 & 2440.*
- e. *THAT the Honourable Court do make any other order that it deems just and fit in the circumstances.*
- f. *THAT the costs of and incidental to this application be in the suit.*

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Gerald Kiruiru Eliud on 03.03.2025. It was contended that the 1st and 2nd respondents were expanding the Mombasa-Malindi Highway on the instructions of the 3rd respondent. It was further

contended that while undertaking the said expansion at Mtwapa Bridge, the 1st and 2nd respondents dug deep excavations along the petitioners' properties and on the access roads to the suit property. It was the petitioners' case that the said construction activities had not only blocked access to the hotel but also rendered the whole property dangerous and unusable. The petitioners further claimed that the 3rd respondent neither gave adequate notice to the petitioners of the construction nor provided an alternative access road to the suit property. It was contended that the hotel which the petitioners operated on the suit property has since been shut down due to its inaccessibility. The court was urged to allow the application as prayed as the petitioners pleaded to have suffered economic disruptions and irreparable loss and damage.

B. 1st and 2nd respondents' response

3. The 1st and 2nd respondents responded to the application vide a replying affidavit sworn by Danied Kigada on 15.05.2025. It was contended that the 1st and 2nd respondents were contracted by the 3rd respondent to upgrade the Mombasa-Mtwapa-Kwa Kadzengo-Kilifi (A1) section of the East Africa Coastal

(Multinational Malindi-Lungalunga/Tanga-Bagamoyo) Road Corridor Development. The said project was subjected to an Environmental and Social Impact Assessment between 2012 and 2013, approved and licensed by the National Environment Management Authority under Environmental Impact Assessment Licence No. NEMA/EIA/PSL/1198. The deponent contended that the concerns of the affected communities were addressed during the process of acquiring the licence and any emerging issue such as compensation for land acquisition and property damage lay with the 3rd respondent.

4. Further, it was argued that the petitioners being aggrieved by the scope of the licence granted by NEMA, ought to seek redress before the National Environmental Tribunal as stipulated by Section 129 of the Environment Management and Coordination Act; and that this court has no jurisdiction to hear and determine the application. It was argued that as agents of the 3rd respondents they had been wrongly sued hence the suit ought to be struck out. Further, it was contended that as agents of the 3rd respondent, the 1st and 2nd respondent they could only be liable for breaches emanating from the license.

5. The court was urged to dismiss the application which was said to be seeking final orders in the interim stage which orders could only be issued after a full hearing of the case on merit. Further, it was argued that the petitioners do not stand to suffer any irreparable damage since there is a government fund run by the 3rd respondent to mitigate the environmental impact arising from such projects. It was also contended that the balance of convenience lay in favour of completing the project funded by public funds.
6. In addition to the replying affidavit, the 1st and 2nd respondents opposed the petition vide a Notice of Preliminary Objection dated 24.04.2025 whereby it was contended that this court lacked jurisdiction to hear and determine the petition under Section 129 of the Environmental Management and Coordination Act (EMCA). Further, it was contended that the 1st and 2nd respondents had been wrongly used as they were agents of a disclosed principal, the 3rd respondent.

C. Directions on submissions

7. When the application was listed for *inter partes* hearing it was directed that the same shall be canvassed through written

submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The petitioners filed submissions in support of their application on 25.04.2025 whereas the 1st and 2nd respondents filed submissions together with their bundle of authorities on 16.06.2025.

D. Issues for determination

8. The court has perused the application, the response thereto, the notice of preliminary objection on record as well as the submissions made by all counsel. The court is of the view that the following key issues arise for determination herein:

- a. Whether the 1st and 2nd respondents' notice of preliminary objection is merited.*
- b. Whether the petitioners have made out a case for the prayers sought in the application.*
- c. Who shall bear the costs of the application.*

E. Analysis and determination

a) Whether the 1st and 2nd respondents' notice of preliminary objection is merited.

9. What constitutes a preliminary objection was well established in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited (1969) EA. 696* that;

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. The 1st and 2nd respondents claimed that under Section 129 (1) (2) (3) (4) of the Environmental Management and Coordination Act, it's the National Environmental Tribunal that has the jurisdiction to hear and determine a petition of this nature. The National Environment Tribunal was established by Section 125 of EMCA to hear and determine appeals by any person aggrieved by:

- (a) *the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;*
- (b) *the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;*
- (c) *the revocation, suspension or variation of the person's licence under this Act or its regulations;*
- (d) *the amount of money required to paid as a fee under this Act or its regulations;*

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

11. The petition herein seeks, *inter alia*, declarations that the respondents have violated the petitioners' constitutional rights under *Articles 24, 28, 40, 42, 47, and 69 of the Constitution*. The enforcement of environmental rights and freedoms can only be determined by this court as enshrined in *Section 13 (3) of the ELC Act*, which provides that:

Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

12. The National Environmental Tribunal's limited jurisdiction does not include the enforcement of constitutional rights such as the right to a clean and healthy environment and the

award of compensation or damages for loss of business or property. As such, the 1st and 2nd respondents' objection on jurisdiction is overruled.

b. Whether the petitioners have made out a case for the grant of the prayers sought in the application

13. It would appear that the prayers sought in the application are all spent the reason being they were sought “*pending the hearing and determination of the petitioners' application inter partes*”. However, in the interest of justice, the court shall still consider the said prayers as if they had been sought pending the hearing and determination of the petition. That is undoubtedly what the petitioners intended to seek. The petitioners are seeking to compel the respondents to provide access to the suit properties which they claim have been blocked at the entrance and exit by the respondents' construction activities at the Mtwapa bridge.

14. The principles for the grant of an injunction were set out in the case of *Giella vs Cassman Brown & Co Ltd (1973) EA 358* as follows:

- a. *First, the applicant must demonstrate a prima facie case with a probability of success at the trial.*
- b. *Second, an injunction will not be normally be grated unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.*
- c. *Third, if the court is in doubt on the second principle it shall determine the matter on a balance of convenience.*

15. The material before the court includes an assessment report dated 30.01.2025 which appears to show that there are deep excavations near the suit properties and the entrance to the suit property has been blocked or partially blocked. Prima facie, it appears that the petitioners' right to access, utilize and enjoy the suit properties has been interfered with. However, the establishment of a prima facie case alone cannot be sufficient to justify the grant of an interlocutory injunction. The court must be satisfied that the injury the applicant stands to suffer in the event the injunction is not granted will be irreparable. *The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) held, inter alia, that;*

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

16. The petitioners have provided the court with the Annual report and financial statements for the year ending 31.12.2023 and for the year ending 31.12.2024. It is clear to the court that damages are quantifiable; the petitioners can claim compensation for the loss of business and depreciation of assets at the hearing of the petition. The petitioners were in the

business of making revenue and as such every damage they claim to have suffered can be quantified and given a monetary value that can be awarded as damages by the court. As such, the court cannot consider the petitioner's alleged loss as irreparable loss since there is a way the damage can be remedied.

c. Who shall bear the costs of the application

17. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. In this case, the court is of the view that the appropriate order to make is for both the application and the notice of preliminary objection to be dismissed with no order as to costs.

F. Conclusion and Disposal Order

18. The upshot of the foregoing is that the court finds both the petitioners' application and the 1st and 2nd respondents' notice of preliminary objection devoid of merit. As a consequence, the

court makes the following orders for disposal thereof:

a. The 1st and 2nd respondents' notice of preliminary objection dated 24.04.2025 is hereby disallowed with no order as to costs.

b. The notice of motion dated 03.03.2025 is hereby dismissed with no order as to costs.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this 16th **day** of October **2025**.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Joel Nyamumbo for the petitioners

Ms. Githinji for the 1st and 2nd respondents'

Mr. Ragot for the 3rd respondent