



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 306 OF 2018

KAROLYNE MWATHA MBURU.....1ST PLAINTIFF

MARAGERT WAIRIMU MUCHAU.....2ND PLAINTIFF

SIMON MBUGUA.....3RD PLAINTIFF

(Being the Officials of LORESHO SOUTH RESIDENTS ASSOCIATION)

VERSUS

ATHI WATER SERVICES BOARD.....1ST DEFENDANT

WATER RESOURCES AUTHORITY.....2ND DEFENDANT

RULING

1. The plaintiffs brought this suit on 3/7/2018 through a plaint of even date. They averred that they were officials of Loresho South Residents Association. They contended that the 1st defendant was intent on constructing a water transmission pipeline through various parcels of land within Loresho South Estate without following due process of compensating the owners of the affected parcels of land. They further averred that the 2nd defendant had descended on their properties and had erected beacons and demarcated boundary lines in a purported exercise to ascertain the riparian reserve. Aggrieved by the intention and actions of the defendants, they sought the following orders:

a) Order of permanent injunction restraining the defendants from trespassing , entering, remaining, digging, beaconing, pegging, breaking fences, and or harassing, or interfering with the peaceful occupation, enjoyment, usage and access by the plaintiffs, their workers, servants and agents in respect of House Numbers 1 to 22 comprised in Certificates of Leases for titles Numbers Nairobi/Block 90/560, Nairobi/block 90/2 all the way to Nairobi/Block 90/22 (22 houses).

b) General damages for the inconveniences, suffering and losses occasioned by the said interferences by the defendants.

c) That the OCS Spring Valley Police Station to ensure compliance of any orders issued herein

d) Costs and interest of this suit.

e) Any other relief that this court may deem fit and just to grant

2. Together with the plaint, the plaintiffs brought a notice of motion dated 3/7/2018 seeking the following interim orders:

a) That the application be certified urgent and this honourable court be pleased to hear the same ex parte in the first instance.

b) That pending the hearing and determination of this application interpartes, this honourable court be pleased to issue an order of injunction restraining the defendants from trespassing , entering remaining, digging, beaconing, pegging, breaking fences, and or harassing, or interfering with the peaceful occupation, enjoyment, usage and access by the plaintiffs, their workers, servants and agents in respect of House Numbers 1 to 22 comprised in Certificates of Leases for titles Numbers Nairobi/Block 90/560, Nairobi/block 90/2 all the way to Nairobi/Block 90/22 (22 houses).

c) That pending the hearing and determination of this suit, this honourable court be pleased to issue an Order of injunction restraining the defendants from trespassing, entering, remaining, digging, beaconing, pegging, breaking fences, and or harassing, or interfering with the peaceful occupation, enjoyment, usage and access by the plaintiffs, their workers, servants and agents in respect of House Numbers 1 to 22 comprised in Certificates of Leases for titles Numbers Nairobi/Block 90/560,

Nairobi/block 90/2 all the way to Nairobi/Block 90/22 (22 houses).

- d) That the Officer Commanding Station (OCS) Spring Valley Police station does assist in the enforcement of any orders issued herein.*
- e) That this honourable court be pleased to grant such further orders as may deem just and fit in the circumstances of this case.*
- f) That the costs of this application be borne by the defendants.*

The said notice of motion is the subject of this ruling.

3. The application was supported by an affidavit sworn on 3/7/2018 by Lilian Renee Omondi. She deposed that Loresho South Residents Association is a registered association of all persons residing or owning houses in Loresho South Estate along Mukabi Road. She added that she is a resident of House No 5 erected on Land Title Number Nairobi/block 90/5. She further deposed that in February 2018, the 1st defendant held a meeting at Loresho PCEA Community Church and disclosed that they intended to construct a water transmission pipeline and the pipeline was to pass through properties in the estate. She stated that it was agreed that the pipeline would be laid along the boundary to minimize loss of land and that compensation had to be agreed on before commencement of the project.

4. Ms Omondi further deposed that on 31/5/2018, the 1st defendant wrote to the Association indicating that it intended to ascertain whether the pipeline alignment was within the riparian reserve and to this extent they intended to establish the extent of the riparian reserve along Kibagare River. She further deposed that, similarly, the 2nd defendant wrote to the Association on 6/6/2018 stating that it intended to ascertain the riparian reserve along Kibagare River. She stated that on 14/6/2018, agents of the 2nd defendant proceeded to erect and peg beacons and demarcate boundary lines in a purported exercise to ascertain the riparian reserve along Kibagare river. She contended that the relevant maps and titles which the residents hold did not contain any riparian reserve hence the defendants were illegally, forcefully, and compulsorily acquiring the properties without compensating the owners. She urged the court to stop the activities of the defendants by granting the restraining orders.

1st Defendant's Case

5. The 1st defendant opposed the application through a replying affidavit sworn by Martha Wanjiku. The case of the 1st defendant was that it is a state corporation created by statute. Its statutory mandate includes planning and developing national public water works for bulk water supply in Nairobi City County, Kiambu County and parts of Muranga County. She added that the Government of Kenya, through the 1st defendant, is implementing a project by the name "**The Western Transmission (Kabete – Uthiru – Karen) Pipeline – Lot 2**" which is jointly financed by the Government of Kenya (GOK), German Dar Bank and European Union through a grant. The project is aimed at improving water supply to under-supplied areas of Nairobi and its environs and is one of Kenya's Vision 2030 projects. To save on costs, the project was designed to pass along road reserves, existing water pipeline way-leaves, Kenya Power way-leaves and river riparian resources, where possible. The GOK has set aside funds to compensate any private land owner adversely affected by the pipeline.

6. It was also the 1st defendant's case that in February 2018 the 1st defendant engaged the Association and informed it about the project and assured the residents that it was the Government's intention to avoid affecting private parcels of land but where there was no alternative than to pass through private land, the 1st defendant had a proper strategy for compensation. She added that the 1st defendant duly notified the residents about a survey exercise aimed at marking out the pipeline way-leave route and pegging out the final pipeline route, and the Association duly granted it consent. The Association was further notified by the 2nd defendant that the defendants were to carry out a survey exercise to determine the riparian reserve along Kibagare River in order to peg out the final way-leave route. This exercise was done although the Association resisted it despite its earlier consent.

7. The 1st defendant further contended that the plaintiffs were officially notified through a letter dated 6/6/2018 that the defendants were going to conduct a survey exercise to mark the riparian reserve along Kibagare River. On 14/6/2018, the defendants' officials visited Mukabi Road to mark the riparian reserve but were denied entry by the plaintiffs' security team. She deposed that after pegging the extent of the river's riparian reserve, the 1st defendant instructed a contractor to survey the 8 metre riparian reserve between each bank of the river but they were chased away by the plaintiffs' security guards. She added that government pipelines and way-leaves were overriding interests under the legal framework in Section 28 of the Land Registration Act. She stated that the project was meant to fulfil the constitutional right to water under Article 43 of the Constitution of Kenya and therefore, an injunction should not be issued. She further deposed that government would suffer additional costs if the project is not started immediately. Lastly, she deposed that the proposed pipeline route is mainly through a riparian land which is public land and as such, the 1st defendant obtained consent from the 2nd defendant to use the riparian land.

2nd Defendant's Case

8. The 2nd respondent filed a replying affidavit sworn on 26/11/2018 by John Munyao who stated that he was the sub-regional manager of the 2nd defendant in Nairobi. He deposed that one of the mandates of the 2nd defendant is to determine and demarcate riparian boundaries of any watercourse or body on any land. It was the 2nd defendant's case that the authority is mandated to manage and regulate the use of water resources as stipulated under Sections 6 and 12 of the Water Act, 2016. He further deposed that the authority was requested by the 1st respondent to enter estate and mark the riparian reserve along Kibagare River. He stated that there were no destructions on properties in the estate and that demarcation was undertaken under the guidelines set out under Rule 116 of the Water Resources Management Rules 2017. He further deposed that the demarcation process was not meant to take away private land.

Plaintiff's Submissions

9. The Plaintiffs filed their submissions on 24/1/2019. They submitted that the respondents forcefully trespassed into the estate without

following the procedure laid down in Section 89 of the Water Act. The plaintiffs relied on **Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125**. They further argued that they would suffer irreparable damage if the injunction is not issued. It was their argument that the respondents destroyed developments on the plaintiffs' land and they will continue to suffer loss if the defendants are not stopped from causing more damage. Reliance was placed on **Joseph Mbugua Gichanga v Co-operative Bank of Kenya Ltd (2005)** where Maraga J held that a party should not take advantage by breaking the laws because he is able to pay for it. The plaintiffs further submitted that the balance of convenience tilts in their favour because they had demonstrated to the court that the inconvenience caused to them was greater than the inconvenience caused to the defendants. Reliance was placed on **Nawaz Abdul Manji & 4 others v Vandeeep Sagoo & 8 others [2017] eKLR**.

10. The 1st defendant filed its submissions on 14/2/2019. It submitted that the plaintiffs had not established a prima facie case. The 1st defendant argued that the plaintiffs did not have *locus standi* to institute these proceedings. It was further submitted that this suit is a representative suit and the procedure for instituting such suits is laid down under Order 1 rule 8 of the Civil Procedure Rules, 2010 and the plaintiffs had failed to comply with the mandatory requirements of the law. It was further argued that Order 1 rule 13 strictly obligates the person instituting the suit to obtain a written authority from the person he or she is representing before instituting a representative suit. It further submitted that none of the plaintiffs attached a certificate of lease or title to prove ownership of property in the Estate. Reliance was placed on **Andrew Ileri Njeru –Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR, HC at Embu Civil Case No. 4 of 2013**.

11. The 1st defendant further submitted that the plaintiffs had not demonstrated any damages suffered and the alleged acts of destruction had not been proved. The 1st defendant argued that the relevant leases contain a special condition permitting the state to enter the land and lay service pipes. The 1st defendant argued that the plaintiffs will not suffer irreparable injury if pipes were laid through the properties. They further argued that the plaintiffs had not demonstrated that any injury suffered cannot be quantified in monetary terms or cannot be remedied through an award of damages. The 1st defendant submitted that the riparian reserve is undeveloped and no damage will be suffered because the pipes will be laid far from existing buildings. On a balance of convenience, the 1st defendant argued that the construction of the water pipeline is a government project which is meant to improve water supply to Nairobi and Kiambu areas and therefore, it is in the public interest that the project is implemented. Lastly, it was submitted that granting an injunction would mean denying the public the right to clean and safe water in adequate quantities as required under Article 43(d) of the Constitution of Kenya 2010.

12. The 2nd defendant filed its submissions on 14/2/2019. It was submitted that the 2nd defendant was not involved in the meeting held on 16/2/2018 on compensation of the plaintiffs and that its involvement was only limited to determination and demarcation of the riparian reserve. It was further submitted that the project is being implemented for the benefit of the public and the public interest overrides private interests. It was argued that the plaintiffs had not established a prima facie case to warrant an injunction. Reliance was placed on **Edith Wangari Gitata v Athi Water Service Board [2012]eKLR** where it was held that the public's rights will be upheld over the rights of an individual. The 2nd defendant further submitted that the plaintiffs had failed to establish that they will suffer irreparable harm. On the question of balance of convenience, it was submitted that a temporary injunction will not be issued where there will be harm to the public interest. Reliance was placed on the of **Symon Gatuu Kimamo & 587 others v East African Portland Cement Co. Ltd [2011]eKLR**.

Determination

13. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal frameworks and jurisprudence. The single issue falling for determination in this application is whether the plaintiffs have satisfied the criteria for grant of an interim injunction. The criteria was spelt out in the case of **Giella v Cassman Brown (1973) EA 358**.

14. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant demonstrates that he stands to suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. It is to be noted that at this point of determining the application for interim injunction, the court does not make definitive or conclusive findings on contested issues. The forum for making definitive or conclusive findings is the judgment which follows trial.

15. The applicant in this suit is a residents association suing through its representatives. The tenor and import of the application under consideration is that the property rights of unnamed property owners are alleged to be under threat of encroachment by the defendants. No evidence of written authorization by property owners has been presented to the court. Secondly, the deponent in the supporting affidavit does not depose that she owns property which is under threat of encroachment. In my view, if indeed there is threat of illegal encroachment onto or unprocedural acquisition of private property, the proper parties to be ventilating the grievances herein are the registered proprietors, not the residents association or the deponent herein.

16. The Court of Appeal in the case of **Mrao Limited v First American Bank of Kenya Limited (2003) eKLR** spelt out what constitutes a prima facie case. It defined a prima facie case thus:

“ a case in which on the material available to a court, it can be concluded that the applicant’s right appears to have been infringed by the respondent as to require the latter to explain or rebut the allegation. The evidence tendered must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”

17. Looking at the materials presented by the association, there is no evidence presented to demonstrate that the association is the registered proprietor of any property which is under threat of encroachment, trespass or illegal acquisition. There is also no evidence that any specific registered proprietor has authorized the plaintiffs herein to bring this suit on his behalf. It cannot therefore be said that the association has established a *prima facie* case with a probability of success.

18. The present application was triggered by exercises carried out by the 2nd defendant to peg out the riparian reserve along Kibagare River, with a view to facilitating the laying out of water transmission pipes along the riparian reserve. The relevant constitutional and statutory

frameworks appear to indicate that the plaintiffs may not have a proper basis for the objection. Under Article 62(1) (i) of the Constitution, rivers are public land. Under Section 2 of the Water Act 2016, streams are water resources. By dint of Section 5 of the Act, streams are vested in the National Government. Under Section 7 of the Water Act, no instrument of conveyance or title vests in any person any property, right, interest or privilege in respect of water resources. The 2nd defendant is an agency of the National Government mandated to manage water resources.

19. Similarly, under Section 28 of the Land Registration Act, all registered land is subject to overriding interests set out under the Act. These overriding interests include water supply pipelines laid in pursuance or by virtue of any power conferred by any written law.

20. Significantly, the lease relied on by the plaintiffs, which is at page 72 of their bundle, contains various special conditions. Special Condition 10 contains the following special condition:

“The president of Kenya or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains, telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the lessees shall not erect any buildings in such a way as to cover or interfere with any existing alignments of main or service pipes or telephone or telegraph wires and electric mains.”

21. The totality of the foregoing is that under the existing constitutional and statutory frameworks and instruments of title, the defendants have every right to access the suit properties and demarcate the riparian reserves and lay water transmission pipelines. Where the pipelines encroach onto private land, the defendants are obligated to make provision for compensation of the affected land owners. It is therefore my finding that the plaintiffs have not satisfied the first two limbs of **Giella v Cassman Brown (1973) EA 358**.

22. The balance of convenience similarly tilts in allowing the government project to proceed as planned. The subject project is a Vision 2030 Project. The water supply pipeline will serve many residents of Nairobi and its environs. The balance of convenience therefore tilts in allowing the public project to go on.

Disposal Orders

23. In light of the foregoing, the court’s finding is that the plaintiffs have not satisfied the criteria for grant of interlocutory injunction. Consequently, the plaintiffs’ notice of motion dated 3/7/2018 is dismissed. The defendants shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Chacha holding brief for Mr Lakicha for 2nd defendant

Ms Mwinzi holding brief for Mr Mulekyo for the 1st Defendant

June Nafula - Court Clerk