



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 19 OF 2017

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER

ARTICLES 22(1) AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 19, 20, 21, 25

(C), 27, 42, 43, 45, 47, 64, 69 OF THE CONSTITUTION OF KENYA AND SECTIONS 4(2), (3), (4), (5),

AND (6) OF THE FAIR ADMINISTRATIVE ACTION ACT AND SECTION 10 OF THE PETROLEUM

(EXPLORATION AND PRODUCTION) ACT

BETWEEN

DANIEL NGOTIEK NCHUI

NGOTIEK OLE MESHOLOLO

DAVID RAKUA

JULIUS MATILONG KAREI(suing as representatives of

OLDONYO – NYOKIE GROUP RANCH.....PETITIONER

AND

NATIONAL OIL CORPORATION OF KENYA.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

What is before Court for determination is the Petitioners' Notice of Motion application dated 21st June, 2017 brought pursuant to Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. In the said application, the Petitioners seek injunctive orders against the Respondents. The Application is based on the grounds that the Petitioners are duly registered representatives of OL DONYO NYOKIE GROUP RANCH pursuant to the Land (Group Representatives Act. The Petitioners have never been furnished with any notice concerning the 1st Respondent's intention to carry out any prospecting for petroleum products on the land. The 1st Respondent's actions amount to contravention of section 4 of the Fair Administrative Action Act. The Petitioners were not afforded the opportunity to see the information, materials and evidence to be relied upon in making the decision or taking the administrative action by the 1st Respondent.

The application is supported by the affidavit of DANIEL NGOTIEK NCHUI the Chairman of the OL DONYO NYOKIE GROUP RANCH where he avers that the Group Ranch is the proprietor of land parcel number Kajiado/ Oldonyo – Nyokie/3 measuring 68627.974 hectares . He claims sometime in the month of May 2017, the 1st Respondent entered into their property specifically in the Ol Kirimatian area, set up camp and started to prospect for petroleum. He avers the 1st Respondent trespassed on their land without adhering to due process. He states

that after they sent out a demand notice through their lawyer, the Deputy County Commissioner convened a meeting on 10th May, 2017 between the Respondents' representatives and Group Ranch officials but the matter was not resolved. Further, vide their letter dated the 29th May, 2017, the 1st Respondent contended that its activities are sanctioned by the Ministry of Energy in line with the Petroleum Act. He reiterates that they were never given a chance to air their views as representatives of the Group Ranch and the recruiting of additional staff who are non-group ranch members is discriminatory. He reaffirms that due process was not adhered to by the 1st Respondent and it has not provided security to compensate Petitioners for activities arising as a result of the damage to their land, crops, buildings as well as stock.

The 1st Respondent opposed the application and filed a replying affidavit sworn by PAULINE KIMOTHO their Company Secretary, where she confirmed that on 17th August, 2016 the National Environmental Management Authority (NEMA) issued an Environmental Impact Assessment (EIA) to the 1st Respondent for purposes of conducting seismic survey for oil and gas exploratory activities at Block 14T in Magadi area. She contends that the Petitioners have not stated that they are aggrieved with the EIA license, which was issued by NEMA, nor have they appealed against the said license to the National Environment Tribunal. Further, the Petitioners have not complained that the 1st Respondent has breached any of the EIA license conditions to warrant intervention by NEMA or the Court. She has denied that the 1st Respondent has violated any of the Petitioners rights nor trespassed on the suit land and contends that they have no interest on the said land. She insists that the Petitioners have not availed proof of ownership to demonstrate locus for the rights and that in a letter dated the 29th May, 2017 in response to the Petitioners' advocate's demand letter of 8th May, 2017, the 1st Respondent requested the Petitioners' to provide it with GPS coordinates of their property to establish that the survey lines did not encroach on their property, but they failed to respond to the letter. She reiterates that the Petitioners have not provided a copy of the title deed, nor survey maps or photos to prove the encroachment. Further, that all staff recruited by the corporation are from the local community.

Both the Petitioners and the 1st Respondents filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 21st June, 2017 including the supporting as well as the replying affidavits; and on considering submissions filed herein, the only issue for determination is whether the Petitioners are entitled to orders of temporary injunction pending the outcome of the Petition.

The fulcrum of the suit revolves around the 1st Respondent's alleged violation of the Petitioners' agents constitutional rights by undertaking oil exploration on land parcel number Kajiado/ Oldonyo – Nyokie/3 measuring 68627.974 hectares owned by the OL DONYO NYOKIE GROUP RANCH, which fact is disputed by the Respondents.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an 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 would 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."

In line with this principle, the Court will proceed to interrogate whether the Petitioners have made out a prima facie case with a probability of success at the trial.

The Petitioners' have furnished a copy of the title deed to confirm ownership of the suit land which has not been disputed by the Respondents. I note from the materials presented, the Petitioners' confirm the measurement of the suit land but have not indicated the exact acreage where the alleged exploration is being undertaken. They have further not furnished court with any documentary proof of the alleged activities being undertaken by the 1st Respondent. It is the Petitioners' contention that the 1st Respondent has failed to hire personnel from the local community which fact is controverted. What is not clear from the instant application is whether the Petitioners' ever challenged the EIA license at NET as it is the expected procedure. The Court takes judicial notice of the fact that since there is already an existing EIA license allowing the 1st Respondent to undertake exploration which is not challenged. Further, that this is an exploratory stage and the Petitioners have not indicated how far the work has been undertaken. Insofar as the Petitioners have an issue with the said project, I opine that at this juncture they have not demonstrated a prima facie case to warrant the grant of an injunction. If they are aggrieved with the EIA license, as they were not consulted, they should proceed and lodge an appeal at NET as provided under Environmental Management and Coordination Act (EMCA).

On the second principle as to whether the Petitioner will suffer irreparable loss which cannot be compensated by way of damages. I wish to refer to the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, 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.'**

As I have alluded to earlier, the Petitioners have not demonstrated the portion of the land that had been trespassed upon. Further, they have not provided the list of the non community members being hired by the project. The 1st Respondent insists they are not undertaking the project on the suit land and that the Petitioners failed to give it the coordinates of the area it had trespassed upon. From these averments, I find that the Petitioners' alleged injuries are hence speculative and not demonstrable as to warrant the grant of an injunction.

On the question of balance of convenience, from the evidence presented by the parties, and being persuaded by the case of **Simon Otworu & 7 v Lake Victoria South Weather Service Board & 6 others [2018] eKLR** where the Court declined to grant an injunction because a disputed project was for the public benefit, I am not in doubt that at this juncture the balance does not tilt in favour of the Petitioners as the project in dispute herein is also for the greater public benefit.

It is against the foregoing that I find the application dated the 21st June, 2017 unmerited and dismiss it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 6th day of March, 2019.

CHRISTINE OCHIENG

JUDGE