REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ELCA NO. 28 0F 2021

EVANCE OTIENO GOR……1ST APPELLANT

MICHAEL KOJO OTIENO……2ND APPELLANT

WALTER OKELO OPIYO……3RD APPELLANT

VERSUS

FUND MANAGER NGAAF HOMABAY COUNTY .....1ST RESPONDENT

HOMABAY COUNTY WOMEN REPRESENTATIVE…2ND RESPONDENT

M/S PACIFIC CENTRAL WORKS LTD……3RD RESPONDENT

JUDGMENT

(*Being an appeal from the decision and Ruling of the Honourable A. T. Obutu SPM delivered in the Chief Magistrate's Court in Homabay No. 40 of 2020, on 26th August 2020*).

Brief facts

1. The appellants filed a Plaint dated 3rd August 2020 in the Homabay Chief Magistrate's Court. They headed it as Homabay CM ELC Case No. 40 of 2020. In it they sought the following reliefs:

a) An order to declaration (*sic*) that the Defendants are obligated in law to assume responsibility for use of public funds and accord all persons to full benefit of services offered by them.

b) An order of injunction to restrain the defendants, its (*sic*) employees, servants, agents or any persons deriving authority from the defendants or any of its officers from entering into, opening the said market.

c) An environmental restoration order issued 16th June 2020 by the 1st Interested Party be enforced by this Honourable Court.

d) An order be issued against the 1st, 2nd and 3rd defendants for committing offences as stipulated in Sections 138(a), (b) and (c) of Environmental Management and Coordination Act.

2. Accompanying the suit was a Notice of Motion dated the same date, brought under Certificate of Urgency. In it the appellants sought an interim injunction restraining the 3rd Defendant/ respondent either by itself, agents, servants and or employees from continuing with construction of shades in Rangwe Market (sic). It also sought, pending the hearing and determination of

the suit, an interim order of injunction restraining the 1st and 2nd defendants/ respondents either by itself (sic), agents, servants and or employees from continuing to make any further payments on the construction of the Rangwe market shades to the 3rd Defendant, and the costs of the application.

3. Upon the trial court hearing the application ex parte on 3rd August 2020, it granted prayer 2 of the application. The prayer granted was to the effect that an interim injunction be issued restraining the 3rd Defendant from the 3rd Defendant/ respondent either by itself, agents, servants and or employees from continuing with construction of shades in Rangwe Market. The application came for *inter partes* hearing on 13th August 2020 it did not proceed since the Respondents sought time to respond. The record bears that when the court adjourned the application to 2nd September, 2020 it did not extend the interim orders of injunction.

4. Following the issuance of the order above and the *inter partes* hearing which was adjourned as indicated above, the 1st, 2nd and 3rd Defendants filed a Notice of Motion dated 17th August 2020. They brought it under Certificate of Urgency, served it

as ordered on the material date, and appeared for inter partes hearing on 20th August 2020. They sought prayers, among others that the court orders the plaintiffs to deposit security in the sum of KShs 2,000,000/= for the due maintenance of the interim injunction since stopping the project which was three quarter way complete would occasion the 3rd Defendants to incur expenses under the contract with the 3rd contractor.

5. Although the Plaintiffs/ Respondents had not filed any response to the application, the Court granted them chance to oppose the application orally. They stated that they had not filed a response because they did not have time to file one. They termed the application as frivolous, vexatious and an abuse of the process of the court. Further, that under Section 7 of the Attorney General Act, the Attorney General cannot provide services to a particular entity. They added that the court did not have jurisdiction to give the orders sought. They urged the court to dismiss the application.

6. The court reserved the Ruling for 26th August 2020. On the said date, it delivered the ruling impugned. By it, the court ordered that the Appellants do deposit the sum of KShs 1,000,000/=

(one million) only in in 15 days in court as security for costs failure of which the orders issued on 3rd August 2020 would lapse automatically.

7. It was based on the said Ruling that the appellants filed the instant appeal. They raised the following grounds of appeal.

1. The learned trial magistrate erred in fact and in law by granting orders in favour of the 3rd Defendant who did not even enter appearance as required by the law regardless of the balance of probabilities.
2. The learned trial magistrate erred in fact and law by failing to consider our oral arguments (*sic*) made in court by the counsel purporting to act on behalf of the 3rd respondent who is a private entity being represented by the Attorney General contrary to Section 7(3) of the Attorney general' Act hence arriving at a wrong decision.
3. The learned trial magistrate erred in fact and law by compelling us the appellants to be compelled (*sic*) to deposit KShs 1,000,000/ as security yet the matter is of public interest when it comes to enforcement of Restoration Orders issued by the national environment authority.

4. The learned trial magistrate erred in fact and law by failing to analyze the evidences (sic) brought before him hence arriving at a wrong decision.
5. That matters of public interest litigation orders issued cannot be vacated if the persons who have brought them in the interest of justice cannot afford money.

8. They thus prayed that the appeal be allowed, the ruling of the trial court be set aside with costs being in the cause.

9. The appeal was disposed of by way of written submissions. The appellants filed their written submissions dated 11th August 2025. In then they argued that this court determines whether the trial court erred both in fact and law by failing to consider **Section 7** of the Attorney General Act.

10. They argued that the provision does not permit the Attorney-General, in matters of public interest, to representation private persons. They reproduced that provision and argued that by virtue of it the Attorney General to was not supposed to represent a private entity and the Homa-bay County Women Representative. They added that the 2nd and 3rd Defendants

were private persons who could can represent themselves or through advocates hired by them and not the Attorney General.

11. Further, they argued that no contractual engagement was placed before the court that it could attract interest or that the construction was 75% as alluded to by the defendants/ Respondents herein to warrant dismissal of the appeal (*sic*) filed herein.

12. Furthermore, it was their argument that the independent employer was the contractor was employed by the NGAAF which had its own development committee established in various counties, and the court acknowledged the appellant's presence when they indicated that they could proceed orally hence it ought to have considered their oral evidence placed on the application of **Section 7** of the **Attorney General Act**.

13. They added that oral arguments or submissions by parties are part of legal proceedings and courts always considers them in making any decisions.

14. Regarding the matter being of public interest, they argued that it was hence the court ought not to have compelled them to pay security of costs yet they were ensuring compliance with

the directives which were issued by the president on procurement of government goods. They added that there was no EIA issued to undertake the project yet public funds were being spent. Therefore, as vigilant public spirited persons that was what they intended to protect. They relied on the case of **Brian Asin & 2 others vs Wafula W. Chebukati & 9 others [2017] eKLR** on the issue whether public interest litigation should attract costs. They cited an excerpt from therein, and this court has considered it at length.

15. The excerpt added that;

"***The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations***."

16. They also relied on the ruling in **Raila Odinga and Others vs The Independent Electoral and Boundaries Commission and Others Supreme Court Petition No. 5 of**

2013, and **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR**.

17. Their final argument was that Counsel for the defendants tried to use his own omission to slum shut the doors of justice for the appellants yet they had the right to access this court. They added that the authority relied on by Counsel for the respondents on payment of security of costs related an incorporated private entity or registered business entity but not members of the public. They prayed the appeal be allowed as prayed.

18. On their part, the Respondents began their arguments in their submissions, by reminding the court of the holding by Hancox JA in **Mwanasokoni vs Kenya Bus Services Limited CA No. 35 Of 1985 CA No. 35 of 1985** where he stated that an appellate court would disturb a finding of fact "Only when the finding of fact that is challenged on appeal is based on no evidence, or on misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

19. They then summed up the application which gave rise to the ruling and that there was no response to it.

20. In answer to the claim by the Appellants that the 3rd defendant did not enter appearance as required by law and that it was wrong for a private contractor to be represented by the Attorney General, they argued that the 3rd Defendant, an independent contractor, was lawfully contracted by the Government and was therefore at all material times acting as an agent of the State. They relied on the definition of an 'agent' under the Government Proceedings Act including an independent contractor employed by the Government. Further, that under **Section 12** of the Act, in "…civil proceedings by or against the Government shall be instituted by or against the Office of the Attorney-General…". They added that the Office of the Attorney General is mandated to represent the government, including its agents, in all civil matters therefore rightful in representing the 3rd Defendant. They summed it that the trial court rightly found that the Office of the Attorney General was acting within the statutory and constitutional

mandate hence found no fault in the representation of the 3rd Defendant.

21. Regarding the prayer for security for costs, they argued that the trial court rightly found that the appellants did not demonstrate to the court in any way that should they lose the case they will be able to pay the costs of the suit. In any event, the appellants did not file any affidavit on grounds of opposition to oppose the application, as required by common jurisprudence.

22. They contended that Order 26 Rule 1 of the Civil Procedure Rules grants the court jurisdiction to order security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party. They stated that when the trial court found that the construction of the market was more than 75% complete and the construction project would incur extra costs because of the orders of stay given by it, it was only prudent that such costs be provided for to protect the parties hence it properly invoked its discretion. They relied on the case of **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021)**

[2023] KESC 11 (KLR) (Civ) (Judgment). In it the court stated that the purpose of security for costs order was to alleviate the concerns of potential difficulties in seeking to recover costs. It was their submission that the trial court noted the potential loss to the contractor and government in the event of delays due to litigation but was still lenient enough to reduce the security for costs requested by the applicants/defendants by half.

23. About the matter being of public interest litigation orders issued not being capable of being vacated if the persons who brought them cannot afford money they argued that the learned trial magistrate rightly found that the Respondents did not file any affidavit on grounds of opposition to oppose the application for security of costs when it was filed. Thus, the court could not be expected to exercise discretion in favour of a party who deliberately failed to respond to an application and then seeks to invoke the shield of public interest to avoid the legal consequences of that inaction. They relied on the case of **Kenya Magistrates & Judges Association v Turinga & 2 others (Civil Appeal (Application) E051 of 2021) [2022]**

where the court, in noting that there was neither affidavit in response to an application nor grounds of opposition, found that the motion as unopposed.

24. They submitted that the appeal was misconceived, lacks merit, and it should be dismissed.

ISSUE, ANALYSIS AND DETERMINATION

25. This Court has carefully considered the appeal, starting with the Memorandum of Appeal and going to the law, and then the facts as per the contents of the Record of Appeal. It has also given due regard to the submissions of the parties herein. It is of the humble opinion that the following issues arise for determination:

a) Whether the appeal is merited

b) Who to bear the costs of the appeal

26. I will analyze the two issues sequentially, beginning with the merits or otherwise of the appeal.in so doing I beg to stated that being a first appeal, this court must be guided by the principles as set out in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** wherein the Court of Appeal held:

"...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

27. One thing that parties should not forget is that the appeal herein arises from an order made at the interlocutory stage of the suit before the trial court. The suit has not been heard and determined on merits.

28. In addition, this is an appeal challenging the exercise of discretion by the trial court. It must be clear that this court would he cautious and slow to interfere with the discretion of the trial court but as it is in respect of the exercise of all discretions, the same must be exercised judiciously. Further,

the nature of the decision made on 26th August 2020 is that which foregrounds this appeal hence I am obligated to consider whether the trial court proceeded judiciously.

29. To be clear, in order for an appellate court to interfere with the decision arrived at by a trial court the appellate judge must take care as not to substitute his decision with the that of the trial court. But a successful appellant must show that while exercising discretion the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively. In arriving at such a view, this court is guided decisions of various courts, some which are binding and others persuasive. For instance, in ***Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)*** the Court stated:-

> ***"… Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles.***

Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

30. This legal principle was also emphasized by the Court of Appeal in ***Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR*** where it held that

"…the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference."

31. Again, in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63**, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

32. The seminal case of **Mbogo and Another v Shah [1968] EA 93,** at **96** illustrates this point thus:

> ***"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."***

33. Also, in **Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment),** this court stated;

> ***"As for the instant appeal, it is clear that it arose from the low court's exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the***

discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong."

34. In the instant case, the decision appealed from was the Ruling delivered on 26th August 2020 by which the trial court found that the appellants were obligated to pay to the court or deposit the sum of KShs 1,000,000/= (one Million) only as security for costs as a condition to keep in place the orders issued on 3rd August 2021. It is clear from the Court record as demonstrated from the Record of Appeal herein that the trial court proceeded with the application before it based on the facts as were before it, which were the depositions of the applicants/ now Respondents. The depositions were clear that there was ongoing construction of the market which was three quarter way complete. The appellants think otherwise. They gave their reasons in the Grounds in the Memorandum of Appeal and explained them in their written submissions. This court must then reexamine the law, the facts and the

submissions of the parties herein in order to find whether indeed the trial court erred in law and fact as alleged.

35. Having examined the facts before the trial court, this court is of the considered view that the trial court proceeded on the correct principles, did it arrive at the right decision. This is because, in the first place, the appellants moved the court to stop a construction what was substantially complete. As to why they did not move the court at the very initial stages before a lot of public funds could be expended to lay down the infrastructure, enter into ongoing and timed contracts which attract penalties if breached or slowed down, and not having filed the petition immediately after the conclusion of the public participation stage, this is a matter well known to the appellants. Thus, to stop the project at this stage where the appellants moved the court would not be in the best interest of the public which is likely to incur greater costs through breach of contracts than the intended purpose of the Petition.

36. Again, was the application opposed? I am of the view that under Order 51 Rule 14 (1) of the Civil Procedure Rules, 2010, a party wishing to oppose an application ought to file one or two

or all of the documents listed in the subRule. The provision is to the effect that,

> "*Any respondent who wishes to oppose any application may file any one or a combination of the following documents —*
>
> *(a) a notice preliminary objection: and/or;*
>
> *(b) replying affidavit; and/or*
>
> *(c) a statement of grounds of opposition*;"

37. The Appellants admitted that they did not file any of the documents stated above. But they were permitted to argue their 'opposition' to the application orally. They did. None of their arguments met the threshold of the requirements the law has in mind, much as the court still was bound to examine the merits of the application, which it did.

38. Lastly, the other ground of appeal was that the court did not consider the appellant's submissions. I have carefully examined the ruling of the court. I find no record to support the argument by the appellants. The court considered the submissions of the parties. In any event it was no bound to rely on the submissions. Submissions are only a marketing language of

parties as they try to convince the court to agree to their side of the case. Actually, in real life, there are many cases that are decided by courts without relying or considering parties' submissions, and that does not make the decisions any less merited than if they considered them. In Moi v Muriithi & another (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR) (9 May 2014) (Judgment), the Court of Appeal held as follows:

> "***Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."***

39. The totality of mu analysis, in my humble view, is that all the issues the trial court ought to have considered it did and then ordered that the petitioners do deposit security as ordered, for the due perfomance of the orders of injunction. This court has no reason to interfere with discretion of the court as was exercised and found.

40. There shall be no order as to costs.

Judgment dated, signed and delivered virtually via the Teams Platform this 15th day of December 2025.

Hon. Dr. iur Nyagaka
Judge

In the presence of,

Evance Oloo the1st Appellant

M. Kojo the 2nd Appellant

3rd Appellant, absent,

No appearance for State Counsel for the Defendants.