



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 11 OF 2018

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED VIOLATION AND/OR THREATENED VIOLATION OF

ARTICLES 25, 26, 40 AND 43(1) (A) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 26, 40, 48,

159,165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

THE LITTLE SISTERS OF ST. THERESE OF THE CHILD

JESUS – REGISTERED TRUSTEES.....PETITIONER

VERSUS

CHINA NATIONAL AERO – TECHNOLOGY INTERNATIONAL

ENGINEERING CORPORATION LIMITED.....1ST RESPONDENT

ENG. KABAT Z.N.....2ND RESPONDENT

KENYA RURAL ROADS AUTHORITY.....3RD RESPONDENT

JUDGMENT

1. This petition was lodged in this court on 13.11.2018 and is supported by the affidavit of Sister Mary Agnes Nkatha. The petitioner seeks the following prayers:

a) A declaration that the 1st, 2nd and/or 3rd respondents' actions of, inter alia, blocking the petitioner's drainage system violates, and/or threatens to violate Articles 25, 26, 40 and 43 (1) (a) of the Constitution of Kenya 2010.

b) A declaration that the 1st, 2nd and/or 3rd respondents' actions of, inter alia, blocking the petitioner's drainage system are unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.

c) An order of mandatory injunction compelling the 1st, 2nd and/or the 3rd respondents to immediately reinstate the hospital's drainage channel as it then was; or in the alternative, this honorable court be pleased to issue an order compelling the respondents

to execute the recommendations in the letter dated 28th March 2018.

d) Any other order or further orders as the court may deem just and expedient to grant

e) Costs of this petition and interests at court rates.

2. The petitioner stated that it is an institution which serves a large number of patients both within and outside Meru County. The institution is built on a relatively low ground area that receives high rainfall hence prone to flooding. To curb this problem it constructed a drainage channel inside the hospital to drain water towards Kiirua Ruiru Road.

3. The 3rd respondent began developments of upgrading the Kisima-Kibirichia-Kiirua-Ruiru road which serves as the main access to the hospital by engaging the 1st respondent. The 2nd respondent was the resident engineer in charge of the aforementioned road construction.

4. In March 2018 the petitioner noticed that the 1st respondent had interfered with the drainage system. They approached the 1st and 2nd respondent, with a view of getting a mutually agreeable way on how the 1st respondent would continue with its works while taking care of the safety of the petitioner's property and lives of patients, workers and residents.

5. On 28th March 2018, the 2nd respondent came up with a proposal on how the 1st respondent would address the drainage problem of which the petitioner agreed to it. However, the 2nd respondent has taken no action whatsoever to actualizing the recommendations. Currently, the main drainage of the road has been completed and stone pitching done closing the possible drainage of the hospital. This could result in the hospital being pre-disposed to flooding, disruption of services, destruction of hospital property which would consequently lead to closure of parts of the hospital and denying crucial services to the people as well as safety of patients.

6. Despite being served with the suit papers, the respondents failed to enter an appearance.

7. The right to be heard is crucial. The Supreme Court of India underlined this importance as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

8. The petitioner has demonstrated that the medical services they offer to their patients would be affected as a result of the affected drainage of the hospital. The letter dated 28th March 2018 by the 3rd respondent written by the 2nd respondent provided a solution of which the petitioner agreed to. From then on, the respondents have not communicated with the petitioner. I hold the view that the petitioner has indeed proven its case on a balance of probability.

9. Vide a ruling dated 17.12.2018, the court had already granted the mandatory injunction compelling the respondents to restore the drainage to the hospital. The orders were to last until the determination of the suit.

10. I now grant final orders as follows:

a) This honorable court declares that the 1st, 2nd and/or 3rd respondents' actions of, inter alia, blocking the petitioner's drainage system are unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.

b) The order of mandatory injunction issued on 17.12.2018 compelling the 1st, 2nd and/or the 3rd respondents to immediately reinstate the hospital's drainage channel as it then was; or in the alternative, execute the recommendations in the letter dated 28th March 2018 is hereby confirmed.

c) Each party to cater for their own costs of this suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Gikonyo for petitioner

HON. LUCY. N. MBUGUA

ELC JUDGE