



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 405 OF 2017

JANE WAGATHUITU GITHINJI1ST PLAINTIFF

ISSAC KAMAU KABIRA2ND PLAINTIFF

JACKSON GICHUKI KABIRA3RD PLAINTIFF

VERSUS

SOJANMI SPRINGFIEDS LIMITED1ST DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

1. This ruling is in respect of plaintiffs' Notice of Motion dated 25th November 2019. The following orders are sought in the application:

1. Spent

2. That this Honourable Court be pleased to issue orders granting the applicants the earliest hearing date possible for hearing inter partes orally for them to explain the emerging, very compelling and recent developments on the ground which pose an imminent and immediate danger to the applicants, their properties, livestock, environment and the decimation of the lives of the Michorui Community, part of Rurii villages and the public at large (albeit with skeleton submissions).

3. That this Honourable Court, in the alternative, do issue Directions to protect and preserve the subject matter from current destruction, imminent danger, impending massive destruction and even possible annihilation pending the ruling of this Court scheduled to be delivered on 5th February 2020.

4. That the alternative to the above, that this Honourable Court do visit the site again to verify for itself the magnitude of the looming danger, the veracity of these facts and make a holistic finding based on its such visit.

5. That in the further alternative this Honourable Court summons and/or interviews NEMA, WRA, The Kenya National Disaster Operation Centre and all relevant agencies to confirm the extent of the looming disaster.

6. That this Honourable Court is vested with the powers to protect the impending decimation of the Michorui populace.

7. That in the further alternative this Honourable Court do vacate, review and/or vary the stay of execution orders issued pending the ruling in February 2020 in that hundreds of people's lives are at stake.

8. That in the even further alternative, this Honourable Court sets an earlier date for its ruling.

9. That this Honourable Court do issue any other order(s) that it may deem just and expedient to grant in the circumstances.

2. The application is supported by an affidavit sworn by the 1st plaintiff. She deposed that other than the orders of damages and costs, all

other orders made in the judgment delivered herein on 19th June 2019 were intended to have a holistic approach while striking a balance between the 1st defendant's investment in its farm as against the interests of the general public. She further stated that on 21st November 2019 at 3am, she was awakened by roaring sounds of water released from the 1st defendant's farm and on going out she confirmed that indeed waters had been released as used to happen prior to the intervention of the various organs mandated by the court to execute the orders made in the judgment. That in a letter dated 11th October 2019, NEMA had raised the issue of impending disaster in the area and that NEMA, Water Resources Authority as well as other agencies had started taking steps to implement the orders made in the judgment. She added that the 1st defendant had filed an application for stay of execution in the Court of Appeal being **Civil Application No. 78 of 2019** but no orders were issued by the said court. A further supporting affidavit was sworn by the 2nd plaintiff.

3. When the application came up for ex parte hearing under certificate of urgency on 25th November 2019, this court gave directions for filing of responses and written submissions within stated timelines. The matter was then set for mention on 16th December 2019 for further directions and to take date of ruling. Come that date, the court was satisfied that the respondents had been duly served with both the application and the orders of 25th November 2019. None of the respondents had filed any response or written submissions. Counsels for the 1st and 2nd respondents did not attend court. Counsel for the 3rd defendant who was present indicated that his client did not intend to file a response or submissions since the application did not affect it. The applicants filed written submissions.

4. I have carefully considered the application, the supporting affidavits and the submissions. Although the application has a multiplicity of prayers, I will consider prayer 7 first since it has the potential of resolving the other prayers.

5. So as to better appreciate the application, a little background information is necessary. Judgment was delivered herein by my brother Munyao J on 19th June 2019. The judge proceeded on transfer with effect from September 2019. The orders made in the judgment were as follows:

- 1. That NEMA is hereby directed to liaise with the relevant agencies/institutions to ensure that the water quality discharged within and without the 1st defendant's farm is not contaminated and is safe to be discharged to the environment.*
- 2. That NEMA is hereby directed to liaise with the relevant agencies/institutions to assess the quality, capacity, and effectiveness of the soak pits used by the 1st defendant, and if need be, provide requisite guidance and/or changes in the manner of discharge and treatment of chemicals from the 1st defendant's property.*
- 3. That it is hereby declared that it was improper and contrary to the provisions of Sections 58 of the Environment Management and Coordination Act, Act No. 8 of 1999, and the second schedule thereof, for NEMA to issue an EIA licence to the 1st defendant for construction of a dam based only on a project report when the law required a full environmental impact assessment study report.*
- 4. That the EIA licence issued for the construction of the dam was issued contrary to law and is hereby revoked. The 1st defendant is directed to undertake a fresh EIA as required by law within 60 days from today if it intends to continue with the operations of the dam within its premises or else it decommissions the dam.*
- 5. That NEMA is hereby barred from issuing an EIA licence for the construction of a second dam before a full environmental impact assessment study is conducted in accordance with the law.*
- 6. That NEMA in consultation with other relevant agencies/institutions is hereby directed to undertake a dam integrity test and provide the requisite guidance depending on the results of such assessment.*
- 7. That NEMA is hereby directed to investigate whether the 1st defendant applied for an EIA licence to expand its operations by a further 13 greenhouses, and if it is found that no EIA was ever conducted, direct that one be conducted forthwith and no later than 60 days from today, and if none is conducted, prepare to decommission the 13 additional greenhouses.*
- 8. The subject to the above orders, the 1st defendant is hereby ordered to ensure full compliance with the restoration orders issued by NEMA and any further orders that NEMA may issue.*
- 9. That NEMA in consultation with all relevant agencies/ institutions, is hereby directed to undertake a study on the changed topography and hydrology of the Mwihoti area, and direct mitigation measures and a master plan on how to manage the same to avoid loss to the population of the locality.*
- 10. That the 3rd defendant is hereby directed to undertake an assessment of the damage to the infrastructure of the area and consider taking measures to rehabilitate the said infrastructure.*
- 11. That the 1st defendant is hereby directed to undertake a rehabilitation programme of the land of the plaintiffs within the next 3 months, and if it is unable to do so, or if rehabilitation is not possible, to pay the plaintiffs the full value of the land that has been wasted, as noted and directed in this judgment.*
- 12. That the 1st defendant is hereby ordered to pay the plaintiffs the loss of user in the sums noted in this judgment.*
- 13. That the plaintiffs shall have the costs of this suit as against the 1st and 2nd defendants.*

14. That no orders as to costs are made in favour of or against the 3rd defendant.

6. After delivery of the judgment, the plaintiffs filed Notice of Motion dated 23rd July 2019, seeking to punish the Director General of the 2nd defendant and the Managing Director of the 1st defendant for disobeying orders made in the judgment. The 1st defendant later filed Notice of Motion dated 7th October 2019, seeking stay of execution of the judgment and decree herein pending hearing and determination of an appeal that it had filed in the Court of Appeal. This court gave directions for filing of responses and written submissions in respect of both applications. Parties duly filed responses and submissions save for the 3rd defendant whose counsel once again indicated that his client did not intend to file a response or submissions in respect of the two applications. When the matter came up for mention on 20th November 2019, this court scheduled delivery of ruling in respect of the two applications for 5th February 2020 and granted stay of execution of the judgment pending the ruling. It is that order which provoked the present application.

7. The applicants seek review of the orders made on 20th November 2019. Review is provided for under **Section 80** of the **Civil Procedure Act**, which states:

Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

8. Further **Order 45, rule 1** of the **Civil Procedure Rules** provides as follows:

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

9. The application is made mainly on the ground of discovery of new and important matter or evidence: that at the time the court made the order of stay on 20th November 2019, it was not brought to the attention of the court that in a letter dated 11th October 2019, NEMA had raised the issue of impending disaster in the area and that NEMA, Water Resources Authority as well as other agencies had started taking steps to implement the orders made in the judgment.

10. In **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR**, the Court of Appeal stated as follows:

The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.

11. As previously noted, the application is not opposed. The facts put before the court by the applicants remain unchallenged. A perusal of NEMA's letter dated 11th October 2019 addressed to the Kenya National Disaster Operation Centre indeed shows that NEMA had expressed concerns regarding the looming "danger the dams on the farm pose to the immediate neighbourhood especially with the onset of the rains ..." NEMA enclosed a report prepared following a multi-agency inspection. Thus, the threat involved is real and serious. The court was not aware of this. A wholesale stay of the judgment would, needless to state, hamper efforts to safeguard not only the environment in the area but even the safety of the people in the affected areas. I am therefore persuaded that a case has been made for granting an order of review. Once that is done, there will be no need to consider prayers 2 to 6 and 8 to 9 of the application. The review will be with a view to ensuring that efforts to safeguard the environment as ordered in the judgment and to avert any disaster are not frustrated. The new orders of stay will only deal with execution of any monetary decree arising from the said judgment.

12. There is no dispute that an application for stay of the judgment herein pending hearing and determination of an appeal is currently pending before the Court of Appeal. In view of the provisions of **Section 6** of the **Civil Procedure Act** and out of deference to the said court, I cannot consider the merits of whether or not an order of stay pending appeal should issue. That will in the circumstances remain the province of the Court of Appeal. So as to encourage the 1st defendant to actively prosecute its application in the Court of Appeal, I will limit the life of temporary stay orders.

13. In the end, I make the following orders:

i) This court's order of 20th November 2019 granting stay of execution of the judgment herein pending delivery of the ruling scheduled for 5th February 2020 is hereby reviewed.

ii) Temporary stay of execution of orders number 11, 12 and 13 of the judgment herein is hereby granted. As regards order number 11, ONLY the portion of the said order that requires the 1st defendant to pay the plaintiffs the full value of the land that has been wasted is stayed.

iii) The rest of the orders in the judgment remain in force and are not stayed.

v) The orders in (ii) above shall remain in force for only six months from the date of delivery of this ruling or until the Court of Appeal makes orders on the application for stay that is pending before it, whichever occurs first.

vi) In view of this outcome, the ruling scheduled for delivery by this court on 5th February 2020 shall only be in respect of Notice of Motion dated 23rd July 2019.

vii) The plaintiffs shall have costs of Notice of Motion dated 25th November 2019 as against the 1st defendant.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Jaoko for the plaintiffs/applicants

Mr Situma holding brief for Mr Opondo for the 1st defendant/respondent

Mr Situma holding brief for Mr Ngaira for the 2nd defendant/respondent

No appearance for the 3rd defendant/respondent

Court Assistants: Beatrice & Lotkomoi