



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO 4 OF 2019

PETER THUITA KARIUKI.....1st PETITIONER

JACINTA NJERI SARONI.....2nd PETITIONER

ELIJAH WAINAINA NJIHIA.....3rd PETITIONER

HANNAH WAIRIMU GITHINJI.....4th PETITIONER

VERSUS

KENYA RURAL ROADS AUTHORITY.....RESPONDENT

RULING

1. Vide an Application by way of Notice of Motion dated the 25th September 2019, the Applicant/Petitioners sought for an injunction restraining the Respondent either by itself, its servants, employees, agents officers or any other person or body or authority from beginning the construction and upgrading to Bitumen standards, the roads as described under tender number RWC 567 advertised by the Respondents, pending the hearing and determination of the suit
2. The Petitioners also sought for mandatory injunction compelling the Respondents to furnish them with all information and documentation relating to the upgrading to Bitumen standards of the roads as described under tender number RWC 567 advertised by the Respondents.
3. The said Application was supported on the grounds on the face of it as well as on the Supporting Affidavit and a further Affidavit of Elijah Wainaina Njihia the 3rd Petitioner sworn on the 25th September 2019 and 29th October 2019 respectively.
4. Interim orders were granted to the effect that since the said construction / or grading of the road had not commenced and in order to preserve the suit property pending the hearing of the Application, that parties maintain the status quo to the effect that the subject suit remains as it is at the moment pending the hearing and determination of the Application inter-parties.
5. Directions were thereafter taken that the Application be heard orally wherein on the 5th November 2019 the Petitioners submitted on their Application to the effect that sometime in June 2019 the Respondents herein invited tenders for upgrading of the road described in the tender as RWC 567, the road in Maili Kumi -Subukia -Sipala -Shamata -Kaka -Kariamu.
6. That the Petitioners are aggrieved by this tender of upgrading of the road which is a diversion from the road D388 which transverses Maili 4 all the way to Kariamu.
7. That the Petitioners were aggrieved because the said diversion was made without public participation and was a violation of their legitimate expectation to have the road D388 which passes through their locality from being upgraded.
8. That the Petitioners only heard about the diversion from the media when the tender was advertised and despite numerous requests to them for information regarding the said upgrading of the road, the Respondents have failed to furnish them with the same, prior to filing of the suit. That the Respondents' and/or agents were currently in the process of preparation of the upgrading of the said road which would be prejudicial to the Petitioners if the upgrading was done before the petition was heard as it would render the same nugatory.
9. That the Respondents' replying affidavits in opposition to the Petition were full of contradictory averments for example at paragraph 6 and 7 of the replying affidavit dated 23rd October 2019, the Respondent had admitted that the upgrading of the road D388 was terminated and switched with the upgrading road D1322.

10. That at paragraph 9 of the same affidavit, the deponent had averred that the cancellation of the upgrading of the road D388 was because the lake Olborossat area was declared a wet land area via a Gazette Notice attached thereto. That this was not the true position as the area that was demarcated as a wet area within the lake was an area adjacent to that lake. That vide a Map attached to their affidavit the same demonstrated that the road classified as D388 was not within the area that had been classified as a wet land.
11. That paragraph 11 and 12 of the Respondent's Affidavit was to the effect that since Lake Olborossat had been declared as a wet area, the Respondent required more funds to upgrade the road D388 as they did not have funds at the time. That the environment issues raised for not upgrading D388 was extinguished by the averment that they required more funds.
12. At paragraph 14 of their Affidavit, the Respondent had averred that after consulting the area Member of Parliament-Ndaragwa, it had been decided that the upgrading of route D388 would be switched with the upgrading of route D1322.
13. That it was apparent that the issue of wet land had now ceased and the switching had now been at the request of the Member of Parliament. That it was clear that the switching of the upgrading of D388 to D1322 was neither an environmental issue nor an issue based on financial constraints, but was politically instigated without the public participation of the residents of Kirima and the larger Olborossat area, which was their main grievance.
14. That in relation to the environmental issue raised, route D1322, specifically the route between Shamada and Kaka, was constructed by the Government in the years between 2013 and 2014 and traverses through the Abadere Ranges and that the forest was quickly disappearing, a fact which the Respondent was not keen on the impact of the said road.
15. That it was necessary and important that the Respondents provide information to the Petitioners because for example they had just learned that the route D1322 was a classified road and that it had been their Member of Parliament who had requested for the switching of the development, which was enough ground that there was more information on issues surrounding the upgrading of the development being withheld by the Respondent, which information the Petitioner had a right to know.
16. The petitioner submitted that the Respondent had made a unilateral decision to switch and upgrading of the route without any public participation thus violating their constitutional requirement of legitimate expectation. The Petitioners relied on the decided case of **County Assembly of Machakos vs. the Governor, Machakos County & 4 others [2018] eKLR** and **Boniface Ambani vs AFC Leopards Sports club, Ben Musundi (Interested Party) [2019] eKLR** to submit that, these authorities laid the rules that guide a court when considering interim injunctions and conservative orders.
17. That the suit before court connoted issues on public interest and the same would be rendered nugatory if the orders prayed were not granted. That the Petitioners had established a Prima facie case wherein the Respondents had admitted to switching the upgrading of the roads without involving the Petitioners and the residents of Kirima and the larger Lake Olborossat region.
18. The Application was opposed by the Respondents relied on their replying affidavit I filed on 23rd October 2019 as well as on the further replying affidavit filed on the 4th November 2019 and the Respondent's written submissions (which were filed without leave) which were inclusive of their authorities.
19. The Respondent submitted that the alleged site and or diversion of the roads in question was that the procurement process which was the subject of the road preferred to as Maili Kumi- Gekoye -Olborossat to Kaka to Kariamu junction was terminated as per the contents of paragraph 6-7 of their replying affidavit. That the tender that had been packaged as RWC 567 was distinct from RWC 479 which had been pointed out well in annexure 2 of the Petitioners' pleadings.
20. That upon termination of the procurement process in respect to RWC 567, a fresh process was started which is the subject of the RWC 485. That they had detailed the circumstance for tarmacking D1322 and not D388 now 485 at paragraph 9-20 of their replying affidavit to wit that there had been a declaration of Lake Olborossat as protected area measuring 147 Km² vide a gazette Notice.
21. Secondly, that the tarmacking of the road D388 needed extensive mitigation measures that would be undertaken to protect the environment which was made a protected area during the construction of the road.
22. And third, that there had been the aspect of budget requirements to undertake the mitigation measures noting the time when the procurement process was started and the time of the declaration of the protected area.
23. The Respondent sought that the court considers these factors conjunctively and not in isolation.
24. That whole issue as to whether there was consultation with the member of Parliament for the area who was a representative of the people of the area was discussed in paragraph 9-20 of their replying affidavit to the effect that the discussion was in respect of another road within the same area so that the residents of this particular area did not lose out on development. The reason why D1322 was chosen to be tarmacked leaving out D588 was for environmental reasons.
25. That it was not true that the road earmarked for tarmacking was not a classified road and that a classified road had been left out.
26. That on the issue that the Petitioners had been denied access to information, it was the Respondent's submission that the Petitioners had not sought for and had been denied the information. That further they had not specified what kind of information they required before they filed the matter in court. To sum it all up, it was the Respondent's submission that the Petitioners had not demonstrated that they had a Prima facie case to enable them be granted the orders sought in their Application.

27. That the Applicants had not demonstrated that they were likely to suffer any irreparable injury if the orders so sought were denied. And on a balance of convenience it was the Respondent's submission that the same tilted against the grant of the orders sought.

28. That the Petitioners had sought for orders of mandatory injunction or compelling orders for documents or information to wit the Respondent submitted that the standard in this kind of Application was higher and that the Petitioners had not met the threshold.

Determination.

29. The issue for determination by this court is whether the Applicant has established a prima facie case to enable the court grant the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

30. Has the Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

31. Looking at the facts of this case, the court has been moved under a certificate of urgency, by the Applicant, to issue temporary injunctive orders against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

32. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

33. I have considered all the material facts placed before me. The Applicants' main complaint as I understand is that the Petitioners are unhappy about the advertising for eligible contractors for road works tenders of RWC 567 which was earmarked for upgrading to Bitumen standards and performance based routine maintenance of the roads described as Maili Kumi- Subuku –sipala –shamata –Kaka –Kariamu /Warukurra- Shamata/ Shamata town roads/access to shamata Girls Secondary School roads.

34. Their concern was that this road was not a classified road and was a diversion from the classified road D388 Maili 4-C69 Kariamu which ought to have been upgraded to bitumen Standard before any other road.

35. That the decision by the Respondent to upgrade RWC 567 was undertaken without public participation and without disseminating information, documentation or data regarding the tender No RWC 567, thus violating their Constitutional right and legitimate expectation.

36. I note from the Respondents submissions and replying affidavit that procurement process for the construction of Maili Kumi- Olborossat Kariamu Junction D388 (C 485) was terminated and that the two projects that is D388 (C485) and D1322 were two different projects under two different contracts that were subjects to two deferent procurement processes.

37. That it was public knowledge that on 14th July 2018, Lake Olborossat was declared and Gazetted as a protected wetland by the Cabinet Minister for Environment and Natural Resources which then affected D388 (C485) for reasons that tarmacking of that road would have required additional resources in order to undertake specialized measures to protect the wet land.

38. I further note that it was after consultation with the leadership through the area Member of Parliament that it had been agreed that it was viable to tarmac RWC 567 instead of D388. That other issues were taken into consideration including issues affecting the ecosystem surrounding Lake Olborossat before a decision was made to tarmac RWC 567 instead, which issues included;

- i. That it would reduce the water quantity to the residents within the area.
- ii. That it would reduce the water quality thus affecting utilization for example herding, fishing.
- iii. That it would lead to a reduction of flora and fauna in the area which has the possibility of occasioning long-term negative effects on the environment
- iv. It will lead to soil erosion which would reduce the wetland ability to control floods during rainy seasons thus making the area prone to flooding.

39. That the tarmacking of RWC 567 was in the interest of the public good and for the benefits of the Public within Muruli and Kirima Locations.

40. That the decision on tarmacking a road was not based on the fact that a road was classified or not but rather on the immediate and

pertinent strategic importance of the road, the economic importance of the road, the mobility and accessibility of the road and finally on the population to be served by the road amongst many others.

41. A close look at the Respondent's annexures and in consideration of their submission, in comparison to the applicants submission and further, in pursuant of the fact that at this juncture the court is not obliged to examine the merits of the case closely but to consider whether the material presented is enough to conclude that there exists a right which has been apparently infringed by the Respondents.

42. **Order 40, rule 1** of the Civil Procedure Rules is very clear on the cases in which temporary injunction may be granted hence:

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

43. In the present case, there has been no evidence adduced by the Applicant to the effect the property in dispute is in danger of being wasted, damaged, alienated or that the defendant threatens or intends to remove or dispose of this property. In short, the Applicant has not established a *prima facie* case with probability of success.

44. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

45. The Petitioners also sought for mandatory injunction compelling the Respondents to furnish them with all information and documentation relating to the upgrading to Bitumen standards of the roads as described under tender number RWC 567 that was advertised by the Respondents.

46. In the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal held that:-

“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

47. The principles of law arising from the above decisions is that a court considering an Application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.

48. I find that there was no evidence placed before the court that indeed the Petitioners had sought/requested for and had been denied information pertaining the tarmacking of the said road.

49. Consequently, I dismiss the Application dated the 25th September 2019 with costs to the Respondents.

50. Parties to comply with the provisions of order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main Petition herein.

Dated and delivered at Nyahururu this 17th day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE