



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 122 OF 2017

SAMMY NGUGI GIKONYO.....1ST PLAINTIFF

GEOFFREY MWANZIA KIIKU.....2ND PLAINTIFF

ELIAS MAUNDU MAKAU.....3RD PLAINTIFF

KHADIJA MUMAWI.....4TH PLAINTIFF

ANGELINA MBEKE.....5TH PLAINTIFF

EDWARD SILA MASAKU.....6TH PLAINTIFF

STEPHEN MUETI MASALA.....7TH PLAINTIFF

CEASER MWANGI GATIMU.....8TH PLAINTIFF

VERSUS

DANIEL MUNYAO MULE.....1ST DEFENDANT

RUTH MUTILE MUNYAO.....2ND DEFENDANT

HISH COMPANY LIMITED.....3RD DEFENDANT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY (NEMA).....4TH DEFENDANT

RULING

1. In the Application dated 17th March, 2017, the Plaintiffs are seeking for the following orders:

a. That pending the hearing and determination of the main suit, this Honourable Court be pleased to stop, prevent and/or restrain the 1st, 2nd and 3rd Defendants/Respondents by themselves, their servants, agents and/or whomsoever from using all that parcel of land being Title No. Mavoko Town Block 3/4444 as a mining ground for ballast and building stones and/or from continuing with acts and omissions therein that constitute noise pollution within the meaning of The Environmental Management and Co-ordination (Noise and Excessive Vibration

Pollution) (Control) Regulations, 2009.

b. That pending the hearing and determination of the main suit, this Honourable Court be pleased to grant a temporary injunction to stop, prevent and/or restrain the 4th Defendant/Respondent by itself, its servants, agents and/or whomsoever from issuing the 1st, 2nd and 3rd Defendants/Respondents an Environmental Impact Assessment (EIA) license for carrying out mining activities on all that parcel of land being Title No. Mavoko Town Block 3/4444 as a mining ground for ballast and building stones and/or from continuing with acts and omissions therein that constitute noise pollution within the meaning of The Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.

c. That the County Commander Machakos County do oversee the enforcement of court orders issued.

d. That cost of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that the suit has been instituted by the Plaintiffs on behalf of the residents and interested persons within all that parcel of land known as Machakos Town Block 3, Lukenya; that the said parties are owners of various parcels of land within Mavoko Town Block 3 and that they neighbour the 1st and 2nd Defendant's parcels of land being Mavoko Town Block 3/4444 leased by the 3rd Defendant.

3. It is the Plaintiffs' case that they reside on their respective parcels of land and that it has come to their attention that there was heavy vibrating noise coming from the 1st and 2nd Defendant's property causing them lack of sleep and scaring their cows.

4. According to the Plaintiffs, the 1st and 2nd Defendants have assembled heavy machinery and commenced the mining of the ballast and that no change of user of the Defendants' land was advertised in the daily local dailies.

5. The 1st Plaintiff has deponed that the 1st and 2nd Defendants lack the necessary approvals from the 4th Defendant to carry on mining activities on the suit land; that there was no Environmental Impact Assessment conducted prior to the mining activities that are being undertaken and that if there is evidence showing that an Environmental Impact Assessment (EIA) license was issued, then the same ought to be revoked.

6. The 1st Plaintiff has deponed that the mining activities by the 1st and 2nd Defendants are infringing on their rights to peacefully enjoy their properties; and that the injunctive orders should be granted.

7. The 1st, 2nd and 3rd Defendants filed a joint Replying Affidavit in which the 1st Defendant deponed that they are the proprietors of land known as Mavoko Town Block 3/4444 which they have leased to the 3rd Defendant; that the suit land was leased for purposes of quarrying stones and that in January, 2017 they applied for the change of user of the land from agricultural to quarrying (*machine cutting*) and that the Physical Planner prepared a Local Physical Development Advisory Plan Report in the proposed change of user of the suit land.

8. It is the Defendants' case that in January, 2016, they published in two dailies of nationwide circulation notices regarding the proposed change of user of the suit land inviting objections from the public; that the Plaintiffs did not raise any objection to the proposed change of user of the land and that the Machakos County's Department of Lands and Urban Development issued a Notification of Approval of Development Permission on 6th February, 2017.

9. The 1st Defendant has deponed that the 3rd Defendant is now in the process of seeking for a licence

from the 4th Respondent having commissioned an expert to prepare the Environmental Impact Assessment Report which has since being prepared and that the Plaintiffs were interviewed before the Environmental Impact Assessment (EIA) Report was prepared and following numerous meetings, the process of issuing the relevant licences is ongoing.

10. It is the Defendants' case that the suit herein was filed prematurely and that any challenge to the issuance of a licence to the Defendants should be filed at the National Environment Tribunal.

11. In addition to the Replying Affidavit, the 1st, 2nd, and 3rd Defendants filed a Notice of Preliminary Objection in which they averred that under Sections 125 and 129 (1) (a) of the Environmental Management and Co-ordination Act, the complain herein should be referred to the National Environment Tribunal and that this court does not have the requisite jurisdiction to deal with the issues raised in the current suit.

12. In the Supplementary Affidavit, the 1st Plaintiff deponed that the 1st, 2nd and 3rd Defendants have already commenced the mining of ballast and stones before being issued with a licence by the 4th Defendant and that the said mining activities should be stopped.

13. The Plaintiffs' advocate submitted that under Sections 126(2) and 129 of the Environmental Management and Co-ordination Act (EMCA) the National Environment Tribunal deals with appeals referred to it; that the Tribunal can only deal with an appeal where a licence has already been issued and that the 4th Defendant has not issued a licence to the Plaintiff.

14. Counsel submitted that the Defendants did not specify what the change of user of the land was for; that annexure PMM4 states that change of user was for the proposed development of a petrol station and that the use of the land for quarrying activities will have an adverse effect on the environment.

15. The Defendants' advocate submitted that by law, it is the Tribunal that is vested with the original jurisdiction to determine any dispute relating to the issuance of an Environmental Impact Assessment licence and that this court does not have jurisdiction to hear the dispute herein.

16. The Defendants' advocate submitted that in any event, the 1st, 2nd and 3rd Defendants followed the laid down procedure in acquiring the change of user and applying to the 4th Defendant for a licence and that the Plaintiffs have not established a prima facie case with chances of success.

17. The Defendants' counsel further submitted that the Applicants have not adduced evidence to substantiate the allegation that they might suffer irreparable harm if an injunction is not granted.

18. The first issue that this court will deal with is whether in view of the provisions of Section 129 of the Environmental Management and Co-ordination Act (EMCA), this court has jurisdiction to entertain the suit herein.

19. In the Plaint and the Plaintiffs' Affidavit in support of the Application, the Plaintiffs have averred that although the 1st, 2nd and 3rd Defendants (*the Defendants*) have commenced mining activities on parcel of land known as Mavoko Town Block 3/4444, there has been no change of user of the suit land and that the Defendants lack the necessary approvals from the 4th Defendant for carrying on mining activities on the land.

20. In the Plaint, the Plaintiffs have sought for a declaration that the mining of ballast on the suit land is illegal and unlawful; a permanent injunction to issue restraining the 4th Defendant to issue to the 1st, 2nd and 3rd Defendants an Environmental Impact Assessment (EIA) licence for carrying out mining activities on the suit land and an order that the 4th Defendant cancels the licence issued to the 1st, 2nd and 3rd Defendants.

21. The 1st, 2nd and 3rd Defendants have averred that indeed they have obtained the approval for the change of user of the suit land from agricultural purpose to quarry (*machine cutting*), and that they followed due process in obtaining the said change of user.

22. On the issue of whether they have acquired a licence from the 4th Defendant to commence the said quarrying activities, the Defendants have deponed that they are yet to acquire it. However, the Environmental Impact Assessment (EIA) Report has been prepared and forwarded to the 4th Defendant and that having not commenced the quarrying activities as alleged, the suit was filed prematurely.

23. The suit before this court is therefore challenging the change of user of the suit land and the issuance of a licence by the Defendants for the proposed quarrying activities on the suit land.

24. The Application before me is only seeking for two prayers-to stop the Defendants from carrying on mining activities on the suit land pending the hearing of the suit and to restrain the 4th Defendant from issuing to the 1st, 2nd and 3rd Defendants an Environmental Impact Assessment (EIA) licence for carrying out mining activities on the suit land pending the hearing and determination of the suit.

25. Section 125 of the Environmental Management and Co-ordination Act, 1999 (EMCA) establishes a Tribunal known as the National Environment Tribunal (*the Tribunal*) whose jurisdiction is set out under Section 129 of the Environmental Management and Co-ordination Act, 1999 (EMCA). The said section provides as follows:

“(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.”

26. The jurisdiction of the Tribunal is therefore limited to determining any dispute relating to issuance or refusal to issue an Environmental Impact Assessment licence to a developer, or the imposition of restrictions on a licence, or the revocation of the licence or any decision made by the Director-General of NEMA.

27. If any party is dissatisfied with the orders of the Tribunal, such a party may appeal to this court.

28. Although an Environmental Impact Assessment (EIA) Report has been prepared by the 3rd Defendant's experts for the “*proposed quarrying on Plot No. Mavoko Town Block 3/4444*”, the said report has not been considered by the 4th Defendant for the issuance of a licence.

29. Indeed, the Plaintiffs have not annexed on their Affidavit any decision of the 4th Defendant in respect to the said Environmental Impact Assessment (EIA) Report.

30. Considering that the 4th Defendant has the statutory mandate to issue licences pursuant to the provisions of Environmental Management and Co-ordination Act, 1999 (EMCA), and in view of the fact the issuance of such licences is subject to appeals to be heard and determined by the Tribunal, this court is divested of original jurisdiction to hear and determine disputes relating to issuance or denial of issuance of Environmental Impact Assessment licence.

31. Indeed, as was held by the Court of Appeal in the case of ***R vs. National Environment Management Authority (2011) eKLR***, where the Constitution or statute has established a dispute resolution mechanism or procedure for the resolution of a dispute, that process must be followed.

32. Indeed, I agree with the Plaintiffs' advocates submissions that they could not have moved the Tribunal because the 4th Defendant has not made a decision yet on the matter. If that is so, then in the same breath, they cannot ask this court to restrain the 4th Defendant from issuing a licence to the 3rd Defendant in these proceedings.

33. What the Plaintiffs should do is to raise the issues they have raised in the current Application with the 4th Defendant and await the 4th Defendant's decision. If dissatisfied, they should file an appeal with the Tribunal.

34. If indeed the 1st, 2nd and 3rd Defendants have commenced quarrying activities on the suit land before obtaining a licence from the 4th Defendant, then this court would have the jurisdiction to issue an injunctive order. However, no evidence has been shown to me indicating that quarrying activities are ongoing on the land. The few photographs annexed on the Plaintiffs' Affidavit do not show that the alleged activities are ongoing.

35. Considering that the Defendants have already obtained the change of user of the suit land, the issue of whether the said change of user was done procedurally or not can only be determined at trial.

36. In the circumstances, and in the absence of evidence to show that the 3rd Defendant is carrying on the suit land quarrying activities without a licence, I find that the current Application was prematurely filed and the same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE