



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 4 OF 2018

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY (NEMA) PLAINTIFF

VERSUS

ADAM RASHID RESPONDENT

RULING

1. This is the Notice of Motion dated 17th January, 2018. It is brought under Section 111, 109, 42 of the Environmental Management And Coordination Act, Sections 13 and 18 of the Environment and Land Court Act, and all other relevant provisions of the law.

2. It seeks orders;

a) Spent.

b) Spent.

c) That pending the hearing and determination of this suit, this court be pleased to issue an Environmental Restoration Order stopping the Defendant through himself, agents, employees and servants from undertaking any motor vehicle garage works activities in Mtopanga Estate, within Mombasa County pending the submission by the Defendant to the Plaintiff of an Environmental Impact Assessment Report and an approval by the Plaintiff issuing.

d) That costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1-7. I do not need to reproduce them here.

4. The application is supported by the affidavit of Stephen Wambua, the county director incharge of Compliance and Enforcement at Mombasa county sworn on the 17th January, 2018.

5. The application is opposed. There is a replying affidavit sworn by Adam, Badi Rashid, the Defendant/Respondent sworn on the 9th February, 2018.

6. It is the Plaintiff/Applicant's case that the Defendant/Respondent is undertaking a motor vehicle garage business within Mtopanga Estate. This has interfered with the residents' rights to a clean and healthy environment.

Further that the business is out of character with its surroundings. The disposal of used motor vehicle oil is hazardous to the residents. That the Defendant/Respondent was served with a notice requiring him to apply for an Environmental Impact assessment licence but he has declined to comply.

That the Defendant/Respondent is facing criminal proceedings in Shanzu Law Courts and that the environmental injury continues unabated.

7. It is the Defendant/Respondent's case that the orders sought by the Plaintiff/Applicant can only be granted after the parties have been heard and not at an interlocutory stage. That the Defendant/Respondents business is legal. Further that there is no affidavit of any resident of Mtopanga Estate complaining or showing how they have been affected by the Defendants/Respondents business.

He prays that the application be dismissed.

8. I have considered the Notice of Motion, the supporting affidavit and the annexures. I have also considered the replying affidavit and the annexures. I have considered the oral submissions of counsels and the relevant provisions of the law. The issues for determination are;

i) Whether the orders sought in this application are premature.

ii) Whether the Plaintiff's application case has satisfied the conditions for grant of temporary injunctions.

9. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

10. In the celebrated case of *Giella –versus- Cassman Brown And Company Limited (1973) E.A 385* the court set out the principles for grant of temporary injunctions.

In the case of *Mrao Limited –versus- First American Bank of Kenya And 2 Others (2003) KLR 125* the Court of Appeal on determining what amounts to a prima facie case stated;

“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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I am guided by the above authorities.

11. Section 111 of Environmental Management and Coordination Act provides;

1. “Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.

2. For the avoidance doubt, it shall not be necessary for a Plaintiff. Under this section to show that he has a right or interest in the property, environment or land alleged to have been likely to be harmed.”

12. I have also gone through Section 108 for the Environmental Management and Coordination Act specifically subsection (4) which requires the Authority to serve a restoration order on any person to do certain things.

I have gone through the Plaintiffs/Applicant's documents and I find that there is no evidence that this was done.

13. Section 109 of the Environmental Management and Coordination Act show that contents of the Environmental restoration order. Section 110 provides that the party or person who has been served with an environmental restoration order may in writing ask the National environmental Management Authority to reconsider the order.

14. I have gone through the Plaintiff/Applicant' application. There is nothing to show that the Authority followed these steps.

There is annexed to the application on record annexure “DO2”. The same is an improvement notice issued under Section 117(3) (g) dated 21st September, 2017. I find that the same does not qualify as an Environmental Restoration order as described on Section 108 of the Act.

The upshot of the matter is that the Plaintiff/Applicant rushed to court to file this application without going through the laid down procedures as per the Act.

15. It is the Defendant/Respondent' contention that his business is legal. He has attached the necessary documents to confirm this.

I agree with the Plaintiff/Applicant's counsel that the court ought to apply preventive/precautionary principles but I am also alive to the fact that the Defendant/Respondent ought to be afforded an opportunity to be heard before his business is closed down.

16. This does not mean that he will not comply with the requirements by the Act, infact I encourage him to move with speed and ensure that environmental audit is done.

17. All in all I find that these are not orders that can be granted at an interlocutory stage. In the case of *Charter House Investment Limited –versus- Simon K. Sang and 3 Others Eldoret Civil Appeal No. 315 of 2004 (2010) eKLR*, the Court of Appeal stated as follows;

“An injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter or right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the inconveniences of the parties and possible injuries to them

and their properties.

18. I am not satisfied that the application herein has merit. The same is dismissed. The costs do be in the cause.

It is so ordered.

Dated, Signed and Delivered at *Mombasa* on the 25th day of *April* 2018.

L. KOMINGOI

JUDGE

25/4/2018.