



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC CASE NO. 466 OF 2017**

**PATRICK M. MAKAU .....1<sup>ST</sup> PLAINTIFF**

**FLORENCE M. MWANGANGI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**THE MINISTRY OF MINING .....2<sup>ND</sup> DEFENDANT**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**SINOHYDRO TIANJEN**

**ENGINEERING COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before me is the Application dated 27<sup>th</sup> November, 2017 in which the Plaintiffs are seeking for the following orders:

*a. That a temporary order of injunction do issue restraining the 2<sup>nd</sup> Respondent by themselves, their agents or servants from licensing stone quarrying activities and issuing blasting material/explosives to the 4<sup>th</sup> Defendant and others whatsoever for stone quarrying in Katani, Athi River, Mavoko Sub-County in Machakos County or permitting the use of rock blasting material/explosives or any other blasting materials whatsoever for quarrying activities in the said Katani area pending the hearing and determination of the suit herein to ensure that no further damage is occasioned by the quarrying activities to the Applicants' premises on land Title Number Mavoko Town Block 3/1182 and to ensure that the safety of the Applicants, members of their family and their servants is not endangered.*

*b. That a temporary order of injunction do issue restraining the 3<sup>rd</sup> Respondent by themselves, their agents or servants from licensing stone quarrying activities by the 4<sup>th</sup> Defendant and others whatsoever in Katani, Athi River, Mavoko Sub-County in Machakos County pending the hearing and determination of the suit herein to ensure that the health of the Applicants and of members of their family and servants is not endangered by the negative impact on the environment caused by the quarrying activities.*

*c. That a temporary order of injunction do issue restraining the 4<sup>th</sup> Respondent by themselves and or their agents from carrying out rock blasting in quarrying activities in Katani, Athi River, Mavoko Sub-County in Machakos County and all activities related and incidental thereto and/or from using rock blasting material/explosives in their quarries or elsewhere whatsoever in the said Katani area pending the hearing and determination of the suit herein to ensure that no further damage is occasioned by the quarrying activities to the Applicants' premises on land Title Number Mavoko Town Block 3/1182 and to ensure that the safety of the Applicants, members of their family and servants is not endangered.*

*d. That the suit herein be fast-tracked and heard on priority basis owing to its circumstances.*

*e. That the court do issue such other/further orders as it may deem fit to grant to serve the ends of justice in the circumstances herein.*

***f. That the costs hereof be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the 2<sup>nd</sup> Plaintiff is his wife; that their home stands on land known as Mavoko Town Block 3/1182 and that the same is in imminent danger of collapsing due to the conduct of the Respondents.
3. The 1<sup>st</sup> Plaintiff deponed that it is the responsibility of the 3<sup>rd</sup> Respondent to license mining activities in quarries for the extraction of building materials through the issuance of Environmental Impact Assessment (EIA) licenses; to ensure that annual environmental audits for the relevant quarrying projects are carried out and to monitor the activities to ensure compliance with the terms and conditions of each license and to punish any breach thereof.
4. According to the 1<sup>st</sup> Plaintiff, they constructed their home on the suit land between the year 2005-2013 and have lived in the said home since then; that due to the violent vibrations caused by rock blasting being undertaken by the 4<sup>th</sup> Respondent and others in the Katani area, their home is in real danger of collapsing and that furthermore, the blasting is causing clouds, dust, smoke and loud noise in the area.
5. The 1<sup>st</sup> Plaintiff deponed that the licensing of the quarrying activities by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the supply of the blasting materials by the 2<sup>nd</sup> Respondent and the actual blasting by the 4<sup>th</sup> Respondent and others in the Katani area is in flagrant breach of their right to a clean and healthy environment; that they have suffered great torment, anxiety and mental torture as they watch the gradual destruction of the premises forming their home and that unless the injunctive orders are granted, their home, together with other homes in the neighbourhood will collapse.
6. In response, the 2<sup>nd</sup> Respondent's Head of Explosive Unit deponed that the 4<sup>th</sup> Defendant was contracted by the Ministry of Infrastructure to construct Nairobi-Outer Ring Road; that the 4<sup>th</sup> Defendant leased land in Katani Athi River for quarrying of ballast for use in the project and that the 4<sup>th</sup> Respondent applied for and obtained from the 2<sup>nd</sup> Respondent authority to manufacture and store explosives for extraction of rocks on 13<sup>th</sup> September, 2016.
7. According to the 2<sup>nd</sup> Respondent, after their experts conducted interviews with the home owners in the Katani area, they concluded that the blasting explosives used by Mr. Edward Njeru and Mr. Thomas, the licensed blasters, could not produce huge vibrations levels that could adversely affect structures which were beyond 5 kilometres away.
8. The 2<sup>nd</sup> Respondent's Head of Explosive Unit deponed that the two parallel cracks that traversed the Plaintiffs' compound, avoiding the swimming pool, raised doubts into the nature of the underneath rock; that the Plaintiffs' perimeter wall did not have any crack; that the neighbouring houses did not also have any cracks and that the 4<sup>th</sup> Respondent had not undertaken any recent blasting in the area.
9. The 3<sup>rd</sup> Respondent's County Director of Environment, Machakos County, deponed that an Environmental Impact Assessment (EIA) licence was issued to Lanyavu Garden Limited in accordance with the Environmental Impact Assessment regulations, guidelines and procedures, and that no license was issued to the 4<sup>th</sup> Respondent although Lanyavu Gardens Limited was to conduct quarrying activities in conjunction with the 4<sup>th</sup> Respondent.
10. According to the 3<sup>rd</sup> Respondent, the Plaintiffs have not met the required standards for the issuance of an injunctive order.
11. The 4<sup>th</sup> Respondent's Deputy Project Manager deponed that the alleged quarry is fully licensed by the 3<sup>rd</sup> Respondent; that there are many homes which are adjacent to the quarry whose owners have not complained about the blasting and that their quarrying activities are done within the stipulated laws and regulations.
12. The 4<sup>th</sup> Respondent finally deponed that the activities of quarrying are essential for the supply of raw materials for the construction industry and that it would be prejudicial if the operation is stopped.
13. A neighbour of the Plaintiffs, Andrew Manthi Muthoka, swore an Affidavit and stated that he is the owner of parcel of land known as Mavoko Town Block 3/1140 and 6876 situated in Kinanie village; that he has a commercial building on parcel number 6876 while his home is on parcel number 1149 and that due to the blasts for quarrying construction materials in the Katani area, his building standing on parcel number 6876 has developed cracks.
14. According to Mr. Muthoka, his home which is situated on parcel number 1149 also has cracks due to the ongoing blasting from the quarries and that they have also suffered from air and noise pollution caused by the quarrying activities of the 4<sup>th</sup> Respondent and others.
15. The Attorney of the owner of parcel of land known as Mavoko Town Block 3/1180 situate in Kinanie village raised the same complaints that have been raised by the Plaintiffs in respect to the house constructed on the said land.
16. The 2<sup>nd</sup> Plaintiff swore a Further Affidavit in which she deponed that it is dishonest of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to allege that her neighbour's houses had no cracks caused by the blasting; that the 2<sup>nd</sup> Respondent's representatives did not visit the homes of her immediate neighbours and that the injunctive orders should issue.
17. In his submissions, the Plaintiffs' advocate submitted that the 1<sup>st</sup> Respondent has failed to ensure protection of the public interest in so far as it relates to the Applicants with regard to the quarrying activities and that the 4<sup>th</sup> Respondent has undertaken activities on the land under its control which activities have caused damage to the Plaintiffs' premises.

18. Counsel submitted that the quarrying activities by the 4<sup>th</sup> Respondent have been done without participation of the stakeholders and in breach of the law.

19. The 4<sup>th</sup> Respondent's advocate submitted that the Plaintiffs have not provided the court with any pre-construction and post construction structural or architectural plans for the premises to demonstrate its soundness; that they have not provided any scientific measurements of seismograph to determine whether the strength of the explosives could cause vibrations that can cause damage to their homes and that the 4<sup>th</sup> Defendant has not fallen foul of any law or regulation.

20. Counsel submitted that in any event, the Plaintiffs should have filed their complaint with the National Environment Tribunal and not in this court and that the 4<sup>th</sup> Defendant's activities are geared towards public good.

21. According to the 4<sup>th</sup> Respondent's advocate, the Plaintiffs have already quantified the alleged loss in monetary terms and can therefore be compensated monetarily.

#### **Analysis and findings:**

22. The Plaintiffs, together with two other Interested Parties, are seeking for an order of injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from licensing stone quarrying activities and issuing blasting materials to the 4<sup>th</sup> Defendant and others for quarrying in Katani area, Athi River, Machakos County pending the hearing and determination of the suit. According to the Plaintiffs, the licensing of the quarrying activities by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the actual blasting by the 4<sup>th</sup> Respondent and others in the area are contrary to the relevant laws and the rights of, among others, to a clean and healthy environment.

23. It is the Plaintiffs' case that the quarrying activities by the 4<sup>th</sup> Defendant and others within the proximity of their home is causing gradual destruction of their premises and that unless those activities are stopped, their homes may collapse which will result in irreparable loss and damage.

24. The Plaintiffs and the two Interested Parties annexed several photographs showing the cracks that have formed on the walls of their homes. Other than the cracks on the walls, the Plaintiffs also exhibited on their Affidavits the photographs showing the cracks that have formed on the granite tiled floors, steps, kerbs and pillars.

25. According to the Report of Shomax Consulting Engineers Limited of April, 2017, the quarry blasting by the 4<sup>th</sup> Respondent and others is happening approximately 2.5km from the Plaintiffs' residence and the same has created "*vibrations which travel below the ground surface and causes damage to stationary structures along the path of the vibrations*". According to the said Report, the vibrations that are caused by the blasting mainly affect the load bearing walls; partition walls; joints between Beams and walls; joints between slabs and walls; bonding between tiles and the slab; joints between windows and doors to masonry wall and joints between skirting and walls. This, according to the said report, is what had happened to the Plaintiffs' palatial home on which they spent in excess of Kshs. 100,000,000 to construct.

26. In their conclusion, Shomax Consulting Engineers Limited stated that the structural integrity of the Plaintiffs' Main House and other building structures in the compound and the security walling have been compromised and require urgent remedial measures and that the damages are on an increasing basis as the blasting is continuing thus weakening the Plaintiffs' house further.

27. Other than an order of permanent injunction, the Plaintiffs have sought in the Plaintiff for a sum of Kshs. 10,912,528 for the repair of the damage caused to the suit premises due to the said blasting.

28. The 3<sup>rd</sup> Defendant exhibited a copy of the Environmental Impact Assessment (EIA) license dated 24<sup>th</sup> November, 2015 issued to Lanyavu Gardens Limited for the purpose of conducting quarrying activities in conjunction with the 4<sup>th</sup> Defendant.

29. The licence dated 24<sup>th</sup> November, 2015 that was issued by the 3<sup>rd</sup> Defendant shows that it was for the proposed quarrying activities to provide raw materials for the construction industry located at sub plot No. 12610/4 Kinanie area, Athi River Sub-County, Machakos County. The license was to remain valid for a period of 24 months from the date of issue. Under condition number 1.8 of the license, the proponent was required to submit an Environmental Audit Report in the first year of operation to confirm the efficacy and adequacy of the Environmental Management Plan.

30. Although the court was shown the Environmental Impact Assessment license that was issued to Lanyavu Gardens Limited, it is not clear to this court the relationship between the 4<sup>th</sup> Respondent and the said Lanyavu Gardens Limited. It would however appear that the said licence was transferred by the 3<sup>rd</sup> Respondent from Lanyavu Gardens Limited to the 4<sup>th</sup> Respondent vide a certificate of transfer dated 9<sup>th</sup> March, 2016. Other than the fact that the license was transferred to the 4<sup>th</sup> Respondent to conduct quarrying activities on L.R. No. 12610/4 in Kinanie area, the 4<sup>th</sup> Defendant was also granted a license by the 2<sup>nd</sup> Respondent to manufacture explosives pursuant to the Explosives Act.

31. It is not clear to this court if indeed Lanyavu Gardens Limited or the 4<sup>th</sup> Defendant conducted an Environmental Impact Assessment study before the two licenses were issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Neither the 3<sup>rd</sup> Respondent nor the 4<sup>th</sup> Respondent alluded to the fact that an Environmental Impact Assessment (EIA) report was ever prepared.

32. Section 58 of the Environmental Management and Coordination Act (EMCA) provides that the proponent of any project specified in the Second Schedule shall undertake a full Environmental Impact Assessment study and submit an Environmental Impact study report to the Authority prior to being issued with any licence by the Authority- provided that the Authority may direct that the proponent forego the submission of the Environmental Impact Assessment (EIA) study report in certain cases.

33. Section 59 of the Act requires that upon receipt of an Environmental Impact Assessment (EIA) study report from a proponent, the authority shall publish it in the gazette, in at least two newspapers circulating in the area or proposed area of the project.

34. The Second Schedule of the Act, at paragraph 6(g) shows that any project involving mining, including quarrying and open cast extraction of large scale commercial stones and slate requires submissions of an Environmental Impact Assessment (EIA) study report which should be published.

35. The requirement of preparing an Environmental Impact Assessment (EIA) study report, and publication of the same, is meant to allow people who are likely to be affected by the project to participate in its preparation. Indeed, the principle of public participation in activities that are likely to affect the right to a clean and healthy environment is provided for under Article 69(1) (d) of the Constitution which provides that the State shall encourage public participation of the management, protection and conservation of the environment.

36. Section 3(5) of the Environmental Management and Coordination Act on the other hand provides that in exercising the jurisdiction conferred upon it under Sub-Section (3), the Environment and Land Court shall be guided by the principle of public participation in the development of policies, plans and processes for the management of the environment. The guiding principle of public participation has also been repeated in Section 18 (a) (i) of the Environment and Land Court Act.

37. If the licence to Lanyavu Gardens Limited for quarrying activities, which licence was transferred to the 4<sup>th</sup> Defendant, was issued without an Environmental Impact Assessment (EIA) study report, then the action would be an affront to the law and the principle of public participation which is not only a statutory requirement, but also a constitutional imperative.

38. The Plaintiffs have stated that they were not involved in the granting of the licences to the 4<sup>th</sup> Defendant, or any other entity, to quarry raw materials for the construction industry in the Kinanie area, Athi River Sub-County. In the absence of evidence that indeed there was public participation in the preparation of an Environmental Impact Assessment (EIA) study report, I find that the Plaintiffs have established a prima facie case with chances of success.

39. The Plaintiffs have further directed this court to photographs showing the extensive damage that has been purportedly caused by the quarrying and blasting activities in the Kinanie area, Athi River Sub-County. A report by Shomax Consulting Engineers Limited shows that the numerous cracks found on the Plaintiffs' house were caused by the ongoing blasting of stones in the Kinanie area.

40. Although the Report of Shomax Consulting Engineers Limited is subject to prove at the hearing of the suit, this court, while dealing with the threat that an activity may cause to the environment is supposed to be guided by the precautionary principles (See Section 3(5) (f) of the Environmental Management and Coordination Act and Section 18(a) (vi) of the Environment and Land Court Act.

41. The Environmental Management and Coordination Act has defined the "*precautionary principle*" as follows:

***"is the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."***

42. The Plaintiffs and the Interested Parties have shown the photographs of cracks on the walls of their houses purportedly caused by the blasting that is going on in the Kinanie area. The Plaintiffs and the Interested Parties have further alleged that the dust and the noise caused by the said blasting is having an adverse effect on the environment, and by extension infringing on their right to a clean and healthy environment.

43. Although the 2<sup>nd</sup> Respondent's Head of Explosives Unit deponed that the blasts in the area could not produce huge vibration levels that could adversely affect the structures which are beyond five (5) kilometers, and that the Plaintiffs have not produced the measurements of vibrations of the said blasting using seismographs, the precautionary principle, taken together with the report of Shomax Consulting Engineers Limited dictates that the injunctive orders should issue. The lack of the measurements of the vibrations generated by the blasting using seismographs cannot be a reason to allow the blasting of stones to go on. In any event, the burden of showing the generated vibrations caused by the blasting is on the Respondents.

44. It is for the reasons that I have given above that I find that the Plaintiffs have not only established a prima facie case with chances of success, but are also likely to suffer irreparable damage that cannot be compensated in damages unless the injunctive orders are granted.

45. In the circumstances, I allow the Application dated 27<sup>th</sup> November, 2017 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**