



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 568 OF 2017

(Formerly Nairobi ELC 1312 of 2014)

SARAH PITORIA OLE SEIN.....1ST PLAINTIFF
RIMPA ESTATES LIMITED.....2ND PLAINTIFF
ALBANUS RUMOI LESEYA.....3RD PLAINTIFF
BERNARD NAUMU LESEYA.....4TH PLAINTIFF
ESTATE OF KAPOYA MOSIRO.....5TH PLAINTIFF

VERSUS

ATHI WATER SERVICES BOARD.....1ST DEFENDANT
STANSHA LIMITED.....2ND DEFENDANT
THE NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' application dated the 11th December, 2017 that seeks injunctive orders to restrain the Defendants from commencing construction, constructing or continuing with the construction of the Kiserian Sewerage and Treatment Works on any part of the Plaintiffs' land parcels numbers Kajiado/ Kitengela/ 77815; Ngong/ Ngong/ 8392; Ngong/ Ngong/ 58075; and Ngong/ Ngong/ 54733. The Plaintiffs' further seek orders that the Defendants be compelled to erect a bill – board at the alleged construction site so as to inform the public of the project and disclose the total acreage required for the project

The application is supported by the affidavit of CONSTANCE KONE OLE SEIN who is an attorney to the 1st Plaintiff who confirms the Plaintiffs' and their families reside in the Rimpa/ Lemelepo community on their parcels of land. She explains that about two weeks prior to filing this application, the Plaintiffs noticed large number of workers clearing a section of the land within the community and later a great deal of excavation was taking place. Further, the Plaintiffs' saw masonry works taking place on the said land and is aware the 1st Defendant was granted a license by NEMA to construct the Kiserian Sewerage Project but mandatory consultations with the people affected had not been conducted. She contends that the 1st Defendant has appointed the 2nd Defendant as the contractor and given it Engineer Notice to Commence Works dated the 25th November, 2015 while there is no Billboard constructed thereon. She reiterates that the Plaintiffs' have been unable to get information from the workers/ personnel on the site. Further, the said project is close to their properties and threatens their constitutional right to property including right to clean and healthy environment as it will affect their borehole where they draw water for human consumption. She contends that during the NEMA public hearing that took place on 5th August, 2015, the 1st Defendant had not identified to the Plaintiffs and the public at large the extent of the project and on 21st August, 2015 they came up with an Aerial map of the site of the proposed project. Further, that the 1st Defendant's meeting on 21st August, 2015 was an ambush, designed to deny the people affected by the project to present as well as participate in a public decision. She avers that at the said meeting, it emerged that the project has a design projection to the year 2020 and 2030 and they need to know if the 1st Defendant has enough land to cater for it. 1st defendant has denied it is targeting the Plaintiffs' land. She insists that in all the Environment Social Impact Assessment Studies/ Project Reports on the Kiserian Sewerage Project in the year 2008, January, 2015, April , 2015 and August, 2015, it all focused on the Plaintiffs' land.

The application is opposed by the 1st Defendant whose Legal and Compliance Officer MARTHA WANJIKU filed a replying affidavit where

she deposes that the application is misconceived, bad in law, defective, merely anticipatory and the same is premised on unfounded apprehensions. She confirms that the 1st Defendant has been conducting feasibility studies since 2009 on various parcels of land within the larger Kiserian Area with a view to identifying the most suitable location for its intended Sewerage Treatment plant, a position that the Plaintiffs' have been aware of. She insists the 1st Defendant has acted within the law at all times and in strict adherence to the Court Order. She explains that the 1st Defendant has acted in liaison, advise, recommendations, consultations and approval of various government agencies including NEMA; and have conducted public participation forums where the Plaintiffs' were represented. She confirms that upon conducting the feasibility studies, the experts identified the ideal location that is apart from the Plaintiffs' parcels of land and highlighted the parcels of land affected. Further, that this information was communicated to the community including the Plaintiffs, which position their lawyers informed the Plaintiffs' advocates. She insists the 1st Defendant's project has approvals from relevant agencies in compliance with statutory and Constitutional stipulations. She reiterates that the Plaintiffs' had prior notice as well as sufficient knowledge of the issues herein including the fact that their parcels of land are not affected and the application is merely filed to forestall commencement of the project as well as not disclosing a cause of action. She reaffirms that the Plaintiffs' have failed to demonstrate the locus standi or any basis to maintain the suit against the 1st Defendant and the prejudice they will suffer.

Both the Plaintiffs and 1st Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 11th December, 2017 including the supporting as well as the replying affidavits; and on considering submissions filed herein, the only issue for determination is whether the Plaintiffs' are entitled to orders of temporary injunction pending the determination of the suit.

The fulcrum of the suit revolves around the alleged violation of the Plaintiffs' rights by the 1st Defendant that intends to commence a Sewerage project in Kiserian Area. It is the Plaintiffs' contention that their parcels of land are affected by the project and the 1st Defendant has been secretly proceeding with preparation of the same without their knowledge, a fact denied by the 1st Defendant that contends that feasibility studies have been conducted since 2009 and the affected landowners were informed. Further, that they have all the necessary approvals from the relevant government agencies to commence the project. In their submissions the Plaintiffs' have reiterated their claim and contended that the 1st Defendant is geared towards diverting the attention of the Court and insists they have established a prima facie case with probability of success. The 1st Defendant on the other hand has submitted that the Plaintiffs have not demonstrated a prima facie case as their parcels of land are not affected and they have relevant approvals as well as authorities to commence the project.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant 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."

In line with this principle, the Court will proceed to interrogate whether the Plaintiffs' have made out a prima facie case with a probability of success at the trial. I note the Plaintiffs parcels of land have not been affected by the Kiserian Sewerage project. From the evidence presented, it emerges that 1st Defendant has obtained the necessary approvals from the relevant government agencies including NEMA to implement the project. It was the 1st Defendant's submission that the Plaintiffs' challenged the License before the National Environment Tribunal vide NET Appeal No. 180 of 2016 which was unsuccessful, which averment has not been controverted by them. I note that the Plaintiff participated in various meetings regarding the project and even intimated that in August 2015, the 1st Defendant presented to them the Aerial Map of the same, I hence do not foresee any prejudice the plaintiffs' will suffer if the Bill board is not erected as they were already of the said project. The issues raised on violations they will suffer cannot be dealt with at this interlocutory stage but once the suit is set down for hearing. It is against the foregoing that I find the Plaintiffs have not demonstrated a prima facie case to warrant the injunctive orders they are seeking.

On the second principle as to whether the Plaintiffs' will suffer irreparable loss, which cannot be compensated by way of damages. I note the Plaintiffs' initially thought their parcels of land were affected by the project which fact is denied by the 1st Defendant. The Plaintiffs' claim that the project will interfere with their right to clean and healthy environment as well as their borehole. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'

I note there is already an Aerial view of the project and feasibility studies conducted that culminated in the omissions of the Plaintiffs' parcel of land from it. From the Plaintiffs' averments I find that their alleged injuries on interference with the right to healthy environment is speculative at this juncture and should not warrant the grant of an injunction but can only be determined once viva voce evidence is adduced. .

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that at this juncture the balance does not tilt in favour of the Plaintiffs' as their parcels of land are not affected by the Kiserian sewerage project.

It is against the foregoing that I find the application dated 11th December, 2017 is unmerited and dismiss it with costs.

I urge the parties to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Ngong this 18th day of October, 2018.

CHRISTINE OCHIENG

JUDGE