



**REPUBLIC OF KENYA**

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

**PETITION 11 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION AND/OR THREATENED VIOLATION OF ARTICLES 25, 26, 40 AND 43 (1) (A) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES, 10, 19, 20, 21, 22, 23, 26, 40, 48, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**THE LITTLE SISTERS OF ST. THERESE OF THE CHILD**

**JESUS - REGISTERED TRUSTEES.....PETITIONER**

**VERSUS**

**CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL**

**ENGINEERING CORPORATION LIMITED.....1<sup>ST</sup> RESPONDENT**

**ENG. KABATA Z.N.....2<sup>ND</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. In the notice of motion dated 13.11.2018, applicant pray for the following orders:

- i. That this application be certified as extremely urgent and the same be heard exparte in the first instance.
- ii. That this honourable court be pleased to issue and order of mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> and or the 3<sup>rd</sup> respondents, by themselves, their employees, juniors, officers, agents, servants, representative and/or anybody else whomsoever acting for and/or on their behalf to immediately reinstate St. THERESA’S MISSION HOSPITAL – KIIRUA’S water drainage as it them was before the construction of the KISIMA-KIBIRICHIA-KIIRUA-RUIRI road pending the hearing of this petition.
- iii. In the ALTERNATIVE AND WITHOUT PREJUDICE TO PRAYER 2 HEREIN ABOVE, this honourable court be pleased to issue and order of mandatory injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> respondents, by themselves their employees, juniors, officers, agents, servants, representative and/or anybody else whomsoever acting for/or on their behalf to make the relevant constructions connecting the petitioner’s drainage system to the KISIMA-KIBIRICHIA-KIIRUA-RUIRI ROAD’S drainage system pending the hearing and determination of this petition.
- iv. That the costs of this application be provided for.

2. The grounds in support of the application are:

- i. That St. Theresa's Mission Hospital has been built on a relatively low ground in an area that receives comparatively high rainfall; hence it is prone to flooding during the rains.
- ii. That to curb the said problem, the hospital management came up with an intervention to control storm water by constructing drainage channel inside the hospital to drain the water towards the Kiirua-Ruiri road.
- iii. That Kisima-Kibirichia-Kiirua-Ruiri road serves as the main access to St. Theresa's Kiirua Mission Hospital.
- iv. That recently, the Kenya Rural Roads Authority-Meru County, began developments tailored towards upgrading of the said Kisima-Kibirichia-Kiirua-Ruiri road standard to bitumen.
- v. That in or about the month of March, 2018, the petitioner noticed that the 1<sup>st</sup> respondent had interfered with its above stated drainage system and as such it approached the 1<sup>st</sup> and the 2<sup>nd</sup> respondents with a view of getting a mutually agreeable way on how the 1<sup>st</sup> respondent would continue with its works while taking care of the safety of the petitioner's property and the lives of patients and workers and residents therein.
- vi. That vide a letter dated 28<sup>th</sup> March 2018, the 2<sup>nd</sup> respondent came up with a proposal on how the 1<sup>st</sup> respondent would address the petitioner's concerns and he attached a drawing (sketch) showing the proposed drainage outline and levels.
- vii. That vide a letter dated 27<sup>th</sup> April 2018, the petitioner agreed to the 2<sup>nd</sup> respondent's proposal and they implored upon the respondents not to compromise the levels thereby compromising the free flow of storm waters to the drainage system and the respondents agreed to carry out the said works as agreed.
- viii. That despite the said confirmation, the 1<sup>st</sup> and the 2<sup>nd</sup> respondents have not taken any action whatsoever; and they have not made any effort towards actualizing their recommendations in the said letter dated 28<sup>th</sup> March 2018 which had already been approved by the petitioner.
- ix. That currently, the main drainage on the Kisima-Kibirichia-Kiirua-Ruiri road has been completed and the stone pitching already done; closing the possible drain of the hospital.
- x. That as a result, the hospital has been left pre-disposed to flooding due to the expected heavy rains.
- xi. That this could result in disruption of services offered by the Hospital and destruction of hospital property; which would consequently lead to the closure of parts of the hospital and hence denying crucial medical services to the people that the upgraded road is meant to serve.
- xii. That the hospital's safety and the health of the patients therein is at stake.
- xiii. That the petitioner's right to property and its patients' right to medical care and health and/or right to life is being violated.
- xiv. That it is in the interest of justice and fairness that this application is allowed.

3. One sister Mary Agnes Nkatha has filed a supporting affidavit where she has reiterated the grounds in support of the application.

4. The respondents were served but they did not file any response to the application.

5. The test on whether to grant a mandatory injunction or not was correctly stated in Court of Appeal case, **Kenya Breweries Ltd vs Okeyo (2002) 1 EA 109** as follows: *"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which reads:*

*'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a match on the plaintiff .... a mandatory injunction will be granted on an interlocutory application'.*

6. It follows that an applicant must demonstrate the special circumstances that warrant the granting of the mandatory injunction.

7. In the instant case, applicant has demonstrated that it provides crucial medical services which services may be disrupted if the orders are not granted.

**Article 43 (1)** of the constitution provides that *"Every person has the right to highest attainable standard of health which includes the right to health care....."*

8. I therefore find that the application is merited and the same is allowed in terms of prayer 3 of the application. Costs to the applicant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17<sup>TH</sup> DECEMBER, 2018 IN THE PRESENCE OF:-**

C/A: Kinoti

Ngunjiri for applicants

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**