



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.169 OF 2013
MICHEAL OTIENO NYAGUTI.....PLAINTIFF
VERSUS
JACK RANGUMA1ST DEFENDANT
EVANS KIDERO.....2ND DEFENDANT
ALICE KAUDIA.....3RD DEFENDANT
DIRECTOR, NEMA.....4TH DEFENDANT
PERMANENT SECRETARY MINISTRY
OF WATER AND NATIONAL RESOUSES...5TH DEFENDANT

RULING

1. **Michael Otieno Nyaguti**, the plaintiff, commenced this suit against **Jack Ranguma, Evans Kidero, Alice Kaudia, Director NEMA**, and **Permanent Secretary Ministry of Water and Natural Resoues**, herein refered to as the 1st to 5th Defendant respectively, vide the plaint dated the 27th June 2013 and amended on the 4th July 2013 seeking for eight (8) reliefs under paragraph 15 marked (a) to (h). Also filed contemporaneously with the plaint is the notice of motion of even date also and amended on 4th July 2013 seeking for the following prayers:

“ 3. That pending the hearing and determination of this suit the 4th Defendant to unconditionally release to the Plaintiff all information in regard to the environmental impact assessment and any other restriction orders if any previously directed at the 1st, 2nd and 3rd defendants.

4. That a temporary injunction do issue directed at the Defendants, their employees workers, agents and/or whomsoever in disputed wetlands areas, pending the hearing and determination of this suit”.

The prayers 1, 2 and 5 are already spent. The notice of motion is based on the six (6) grounds on its face marked (a) to f) summarized as follows;

i) That the Plaintiff has been unable to get information from the 4th Defendant on the E.I.A reports relating to the projects being undertaken by 1st to 3rd Defendants.

ii) That the projects being undertaken by the 1st to 3rd Defendants are encroaching on and around the Wetland thereby endangering biodiversity and exposing the Plaintiff and other members of the community to waterborne health hazards.

iii) That the ongoing encroachment and constructions if not stopped, will cause irreparable harm to the riparian wetlands' ecosystem.

iv) That the Plaintiffs and other riparian communities members rights and fundamental freedoms enshrined in the Bill of Rights has been denied, violated, or infringed or is being threatened through the actions of the Defendants.

The application is supported by the affidavit sworn by the Plaintiff on 4th July 2013.

2. The application is opposed by the 1st and 2nd Defendants through on four (4) grounds contained in their grounds of opposition dated 29th August 2013. The 4th and 3rd Defendants also opposed the application through the replying affidavits sworn by Anthony Sausi, the County Director of Environment, and Alice Kaudia on the 31st December 2016 and 20th January 2017 respectively.

3. The notice of motion came up for hearing on the 6th April 2017 when the Plaintiff, Mr. Onyango for the 1st and 2nd Defendants, Mr. Wasuna for the 3rd Defendant and Mr. Gitonga for the 4th Defendants gave their oral submissions.

4. The following are the issues for the determination by the court;

a) Whether the 1st to 3rd Defendants are carrying out developments on parcels of land touching on Lake Victoria, and if so, whether Environmental Impact Assessment (EIA) reports are required for the projects.

b) Whether the 1st to 3rd Defendants have submitted E.I.A reports of their respective projects to the 4th Defendant.

c) Whether the 4th Defendant has declined to avail details of E.I.A Reports provided by the 1st to 3rd Defendants to the Plaintiff.

d) Whether the Plaintiff has established a reasonable case for the issue of temporary and mandatory injunction orders at this interlocutory state.

5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by Defendants counsel and the Plaintiff and come to the following determinations:

A) That among the grounds of opposition raised by the 1st and 2nd Defendants to the application is that the Plaintiff has no legal authority to pursue the suit; that the application is defective, incompetent, frivolous and an abuse of the courts process.

That the court record shows that the 4th Defendant had filed a notice to raise a preliminary objection dated 28th August 2013 raising the ground of the jurisdiction of the court and the suit being defective among others. The preliminary objection was heard and dismissed with costs vide the court's ruling dated 10th December 2013. The 1st and 2nd Defendant had filed their notice to raise a preliminary objection dated 24th September 2013 raising the grounds that the suit was incompetent and abuse of courts process and the law. The 3rd Defendant had also filed a notice to raise a preliminary objection dated 24th September 2013 setting out five (5) grounds among them questioning how the Plaintiff was allowed to sue as a pauper without the Defendants participation and the suit being defective as it is not brought through a petition. The 3rd Defendant's preliminary

objection was heard on 3rd April 2014 and dismissed with costs vide the ruling of 28th October 2015. The counsel for the 1st and 2nd Defendant has not to date taken any steps to prosecute their notice of preliminary objection whose grounds are more or less the same in the grounds of opposition to the notice of motion. That even though the court's ruling of 10th December 2013 and 28th October 2015 were on the preliminary objections raised by counsel for the 4th and 3rd Defendants respectively, they settled all the questions raised in the grounds of opposition except that of the Plaintiff's locus which must be determined now.

B) That to address the issue of whether or not the Plaintiff has capacity to prosecute the notice of motion and by extension the main suit, the provisions of **Articles 22, 42, 70 and 159 (2) (d) and (e)** of the Constitution are relevant. The Articles provides as follows:

“ 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

(a) a person acting on behalf of another person who can act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the proceedings referred to in this Article, which shall satisfy the criteria that –

(a) the rights of standing provided for in clause (2) are facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis informal documentation;

(c) no fee may be charged for commencing proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under the Article, and to have the matter heard and determined by a court.

42. Every person has the right to a clean and healthy environment, which includes the right-

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate –

(a) To prevent, stop or discontinue any act or omission that is harmful to the environment.

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) To provide compensation for any victim of a violation, of the right to a clean and healthy environment.

(3) for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this constitution shall be protected and promoted.”

The counsel for the 1st and 2nd Defendant submitted that the Plaintiff claim to be the Chairman of Magnam Environmental Network (C.B.O) but has failed to avail documentary evidence to confirm that the CBO lawfully exists and that he is the bona fide Chairman. The counsel further submitted that if the Plaintiff's suit is meant to be representative one, then he has failed to abide by the provisions of the Civil Procedure Rules on representative suits.

C) That the Plaintiff has in his pleadings in the plaint dated 27th June 2013 made reference to **Articles 3, 22, 42, 69, 70, 73 and 74** of the constitution. The Plaintiff has in the heading of the Amended notice of motion referred to **Articles 19 to 23, 27 to 28, 42 to 43, 46, 48, 50, 60, 62, 63, 69, 70 and 165** of the constitution. The court has already through the rulings of 10th December 2013 and 28th October 2015 dismissed the attack on the suit on the basis of being defective and an abuse of the courts process and the court do not intend to address those issues in this ruling as to do so would be a waste of judicial time. That a plain reading of **Article 22 and 70** of the Constitution as set out above clearly shows that any person, with or without personal interest to gain with the outcome, has a right to move the court where **“a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”** That such a person could be acting for self, another, as a member of, or in the interest of a group, in a public interest or an association acting in the interest of one or more of its members. That when such a person moves the court under **Articles 70 (1)** of the Constitution the court has jurisdiction to make an order or give directions to prevent, stop or discontinue any act or omission that is harmful to the environment, to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment or to provide compensation for any victim of a

violation of the right to a clean and healthy environment. That the person moving the court does not need to demonstrate that any person has incurred loss or suffered injury.

D) That in view of the findings in (C) above, and noting that this suit and the Amended notice of motion are clearly indicated to be filed by Michael Otieno Nyaguti, the Plaintiff, who is described at paragraph 1 of the plaint and Amended notice of motion as a Kenya of sound mind, member and Chairman of Magnam Environmental Network (CBO), the court finds and hold that he has the locus to initiate and prosecute this suit and Amended notice of motion for and on behalf of himself and as a member of the C.B.O.

E) That the 4th Defendant has disclosed that only the 1st Defendant had provided the E.I.A Report for the project on his **Plot No.Kisumu/korando/3755 and 3756** on the 18th December 2012 that was acknowledged on the same day and assigned reference **NEMA/PR/KIM/5/2/0062**. The Plaintiff has availed a copy of a letter dated 4th October 2012 addressed to the District Environment Officer Kisumu and another dated 12th February 2013 addressed to the Permanent Secretary Ministry of Environment and Mineral (sic) Resources. The court has perused the two letters and none of them has asked for the E.I.A reports in respect of the developments being under taken by the 1st to 3rd Defendants. That the foregoing notwithstanding, it is important to emphasize that every citizen has a right to access information held by the state in accordance **with Article 35** of the Constitution which states as follows:

“ 35. (1) **Every citizen has a right of access to.....**

(a) Information held by the state, and

(b) Information held by another person and required for the exercise or protection of any right of fundamental freedom.

(2) Every person has the right to correction or deletion or untrue or misleading information that affects the person.

(3) The state shall publish and publicise any important information affecting the nation.”

That Section 3A of environmental Management and cordination Act also provides for access to information.

That the Plaintiff is therefore entitled to get the information contained in the E.I.A Report provided by the 1st Defendant to the 4th Defendant in accordance with the laid down procedures.

F) That the main basis of the Plaintiff application for temporary injunction in respects of the projects being carried out by the 1st to 3rd Defendants is that there has been encroachment to the riparian areas hence hindering the community members and other residents free access to the wetland. The Plaintiff has availed photographs with evidence of fencing and iron sheet structures on the areas he claim forms part of the wetland. The Plaintiff further claim that no EIA Reports have been done in respect of those projects and no licenses have been obtained as required by **Section 58 of Environment Management and Coordination Act No.8 of 1999** and the 2nd schedule thereof. The Defendants have responded that the projects being carried out by the 1st to 3rd Defendants do not require EIA Reports or Lisences to be obtained. That the fencing that has been undertaken is to secure the investments carried out on the land and do not hinder the residents access to the Lake. That the provision of **Section 58(2) of EMCA** reads as follows:

“58 (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority.”

That Second Schedule that is referred to in the above subsection is headed “**PROJECTS REQUIRING SUBMISSION OF AN ENVIRONMENTAL IMPACT ASSESSMENT STUDY REPORT**” and at **Section 2** on Urban Developments the projects listed includes:

“(a) **Designation of new townships.**

(b) Establishment of industrial estates.

(c) Establishment of new housing development exceeding 30 housing units.

(d) Establishment or expansion of recreational areas in National Parks, National reserves, Forests and nature reserves and any area designated as environmentally sensitive.

(e) Shopping centres and complexes”

And at Section 4 on Dams, rivers and water resources, the following projects are among those included;

“(a) Any project located within a distance prescribed by a written law from a wetland, ocean, sea, lake, river, dam, stream, spring or other water body.”

G) That whereas single dwelling projects may appear on a reading of **Section 58** of EMCA, and paragraph 2 of the Second Schedule not to require EIA Report and licensing, the projects being carried out by the 1st to 3rd Defendants are on land that touches on the Lake and the Plaintiff complaint is that they have led to encroachment onto the wetlands. That though the 1st to 3rd Defendants have disputed the Plaintiff’s claim, the court is of the views that any encroachment or threat to encroach the wetland should be stopped as the suit is heard and determined. That under **Section 4** of the second schedule, projects that are located within distance prescribed by a written law from a wetland, lake and other water bodies listed are subject to EIA Reports and licensing. The court may not at this stage determine conclusively whether the projects being carried out by 1st to 3rd Defendants are such projects and as the suit goes to hearing, there should be no fencing, or construction that extends to the wetland in a manner that hinder access of the surrounding communities to the lake.

H) That as the Plaintiff has not availed any experts report on whether the fencing and structures he has noted on the suit Lands, subject matter of this suit and which he alleges are on the wetland are actually on the riparian areas, it is only fair that the Land Registrar and Surveyor, in conjunction with the NEMA, Kisumu County do visit land parcels **Kisumu/Korando 3755, 3756, 3833, 3834, 3835, 3836, 3839 and 4458, 3831 and KisumuKogony/3582**, and confirm their extent to the lake and make a report whether any of the developments, including fencing done on each of them, has encroached onto the Riparian areas.

6. That in view of the foregoing the final determination on the amended Notice of motion dated 4th July 2013 will wait for the exercise directed herein below to be completed.

a) That the County land Registrar and Surveyor Kisumu county in conjunction with the County Director of Environment, Kisumu do visit the land parcels listed in the Amended plaint dated 4th July 2013 i.e. **Kisumu/Korando/3755 and 3756** belonging to the 1st Defendant; **Kisumu Korando/3831, 3833 to 3836, 2839, and 4458** belonging to 2nd Defendant and **Kisumu/Kogony/3582 and 3583** belonging to the 3rd Defendant and do the following;

i) Confirm their boundaries with the neighbouring lake.

ii) Report on any structural developments, including fencing, encroaching onto the riparian areas and the extent of the encroachment, if any.

iii) Report on any development that hinders the residents of the neighbouring areas from accessing the lake.

b) That the reports be filed with the court within the next ninety (90) days.

c) That the matter be fixed for mention when further directions in respect of the amended notice of motion will be issued.

Orders according.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2017

In presence of;

Plaintiff Present

Defendants Absent

Counsel M/S Alieta for 1st and 2nd Defendants and h/B for Wasuna and Gitonga for 3rd & 4th Defendants respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2017

22/6/2017

S.M. Kibunja Judge

Oyugi court Assistant

Plaintiff present

M/S Alieta for 1st & 2nd Defendant also held brief for Mr. Wasuna and Gitonga for 3rd and 4th Defendant.

Order: Ruling dated and delivered in open court in presence of the Plaintiff and M/S Alieta for 1st and 2nd Defendant and holding brief for Mr Wasuna and Gitonga for 3rd and 4th Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2017