REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 37 OF 2017

EDGAR KIPSASE CHOGE, HARRY JUMBATI MBITI,

FRED OMBIRI, COLLETA INZAYI(Suing on behalf

of KAMOBON VILLAGE RESIDENTS**):::::::::::::::::::::::::::PLAINTIFFS**

VERSUS

CHINA OVERSEAS ENGINEERING

GROUP CO. LTD:::1ST DEFENDANT

COUNTY GOVERNMENT OF NANDI:::::::::::::::::::::::2ND DEFENDANT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY NANDI COUNTY:::::::::::::::::::::::::::::::::3RD DEFENDANT

ELIJAH KIPLAGAT:::4TH DEFENDANT

RULING

This is a ruling in respect of an application brought by way of Notice of Motion dated 31st February 2017 where the plaintiff/applicants are seeking for the following orders:

a) That this application be certified as urgent and the same be heard ex-parte in the first instance.

b) That pending the hearing and determination of this application inter-parties the court be pleased to issue temporary order of injunction restraining the 1st Defendant/Respondent by themselves, their agents, servants, employees and/or any other person acting on its instructions from entering, digging holes, crushing stones, erecting, constructing over land parcel number NANDI/KAPSENGERE/1085 and or in any way interfering with the Plaintiffs/Respondents occupation, access to, use or quiet enjoyment of land parcel number NANDI/KAPSENGERE/1085 which is a public land designated for grazing.

c) That pending the hearing and determination of this suit the court be pleased to issue temporary order of injunction restraining the 1st Defendant/Respondent by themselves, their agents, servants employees and/or any other person acting on its instructions from entering, digging holes, crushing stones, erecting, constructing over land parcel number NANDI/KAPSENGERE/1085 and or in any

way interfering with the Plaintiffs/Respondents occupation. Access to, use or quiet enjoyment of land parcel number NANDI/KAPSENGERE/1085 which is a public land designated for grazing.

d) That pending the hearing and determination of this suit the court do issue an order directing and/or compelling the 1st Defendant/Respondent to remove all material placed on land parcel number NANDI/KAPSENGERE/1085 and to restore the parcel of land to its original state.

e) That the Defendants/Respondents do bear the costs of this application.

This matter was brought under certificate of urgency on 6th February 2017 when the court directed that the application be served for inter parte hearing on 21st February 2017. On 28th March 2017 Counsels for the parties agreed to canvass the application by way of written submissions. The same were filed and a ruling date given.

This suit was instituted by way of plaint by the 4 plaintiffs who are suing on behalf of 73 Kamobon Village residents. The plaintiffs also contemporaneously filed the current application for injunction against the defendants. The plaintiffs signed an authority to sue and sign documents dated 1st February 2017. The defendants were served with the plaint together with the application and they subsequently filed defenses and replying affidavits in opposition to the application.

Plaintiff's Counsel's Submissions

The plaintiffs' Counsel Mrs. Khayo relied on the supporting affidavit together with the grounds on the face of the application. She submitted that the suit land, NANDI/KAPSENGERE/1085 is community land reserved as a grazing area.

It was Counsel's submission that vide a lease agreement dated 30th October, 2012 the 1st defendant and the 2nd defendant agreed to lease the suit land for a period of four years. It was the plaintiff's case that the 2nd defendant leased the land to the 1st defendant without following any legal procedures therefore denying the Plaintiffs access to the land. It was further submitted that the emission from the work that the 1st Defendant was undertaking on the suit land of crushing stones affected the health and distracted the community at large.

Counsel listed four issues for determination by the court as follows:

a) Whether the land parcel No. NANDI/KAPSENGEREE/1085 is a community land.

b) Whether the Respondents have any authority to allocate a community land.

c) Whether the Respondents are in anyway interfering with the land parcel NO. NANDI/KAPSENGEREE/1085

d) Whether the Applicant has a prima facie case.

It was Counsel's submission that the suit land is community land reserved for grazing as confirmed by the certificate of official search hence the Plaintiffs who are from Iribo community have a right to pursue and ensure they effectively utilize the land for that purpose. Counsel cited Article 63(2) (i) of the Constitution of Kenya 2010 which describes community land as "land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines…".

On the issue as to whether the Respondents have any authority to allocate a community land, Counsel submitted that the 2nd Defendant did not have the power or authority to allocate community land to the 1st Defendant. She also stated that the subject land is a wetland and Section 12 (2) b and c of the **Land Act, 2012** does not allow allocation of wetlands.

The section stipulates that:

> ***The commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories:-***
>
> ***a) public land that is subject to erosion, floods earth slips or water logging;***
>
> ***b) public land that fall within the forest and wildlife reserves, mangroves and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;***
>
> ***c) public land that is along watersheds, river and stream catchments, public water reservoirs lakes, beaches, fish landing areas, riparian and the territorial sea as may be prescribed.***

Mrs. Khayo Counsel for the plaintiff argued that the Respondents are interfering with the suit property. She stated that the 1st Defendant has resolved in using the suit land as a stone crushing site which process has caused a lot of havoc to the plaintiffs. It was her submission that the plaintiffs can no longer access the land for grazing and that the smoke and dust from the crushed stones is irritating both to the animals and human beings.

Counsel cited section 3 of the Environmental Management and Coordination Act, Cap 387 which states that every person in Kenya is entitled to a clean and healthy environment and has a duty to safeguard and enhance the environment, and that the court has wide powers under section 3(5) of the Act to deal with such issues. It was Counsel's submission that the respondents had admitted in their replying affidavit and annexures that the suit land is for community use and that the 1st defendant's use of the same for stone crushing generates dust and noise. Counsel further alluded to the principles enunciated in the Giella case and urged the court to grant a temporary injunction as the applicants had established a prima facie case with a probability of success.

It was also submitted by Counsel for the plaintiffs that the balance of convenience tilts in favour of the Plaintiffs as they are environmentally protected both under the Environment Management Act and the Constitution of Kenya 2010 Chapter 5, Article 69 to 72.

1st Defendant's Counsel's Submission

Counsel relied on the replying affidavit and responded to the plaintiffs Counsel's submissions. He submitted that Article 61 of the Constitution of Kenya classifies land as public, community and private and further that Article 63 (1) provides that Community Land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Counsel brought to the attention of the court that the suit land is registered in the name of the Nandi County Government and it holds it in trust of the use of the public good. This was evident from the copy of the search certificate attached to the plaintiff's supporting affidavit. He submitted that nobody including the individual citizens, the church and the school can claim private ownership and use of the said land.

In response to the issue raised by counsel for the plaintiff that the suit land is community land, counsel submitted that the court lacks jurisdiction to hear and determine this matter. He submitted that the matter should be dealt with in the Constitutional and Judicial Review Division of the High Court. Counsel cited the case of **The Owners of Motor Vessel ": Lilian S" Vs Caltex Oil Kenya Ltd (1989) KLR 1** where the Court of Appeal held *inter alia* that it is reasonably plain that a question of jurisdiction ought to be raised at the earlier opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Mr. Kouko Counsel for the 1st defendant submitted further that the Applicants had raised several issues in respect of the suit land and subsequently a meeting was held whereby it was agreed that the 2nd Respondent was to provide the Applicants with an alternative parcel for grazing and that the 1st Respondents to drill a borehole in an alternative spot. On the issue of noise pollution and dust emitted

from the crusher, Counsel submitted that the 3rd Respondent examined the site and later gave out an approval to continue with the activities as per the annexed letter to the replying affidavit.

It was further submitted by counsel that stalling the project will be detrimental to the public good**.** He cited Article 10 1(a) of the Constitution of Kenya which provides that the national values and principles of governance in this Article bind all state organs, State officers, Public officers and all persons whenever any of them applies or interprets this Constitution.

Counsel stated that the interpretation of on who has the authority to allocate community land must take into consideration that this allocation did not enrich or help any of the Respondents personally but that the 2nd Respondent only did the said allocation for the benefit of the public at large. He submitted that use of the land by the 1st Defendant is limited to a time when the REHABILITATION OF THE KISUMU-KAKAMEGA SECTION OF THE KISUMU-KITALE ROAD is completed. He stated that the project by the 1st Respondent is in the public interest and shall benefit the residents of Kisumu, Vihiga, Kakamega, Nandi, Trans-Nzioa and Uasin Gishu Counties among other several citizens of this Republic.

Counsel also submitted that the 1st Defendant had promised to drill boreholes, employ locals and build houses for the surrounding community which has already been done partially.

It was counsel's submission that the case of Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272 settled the principle that a person alleging contravention of a constitutional right must set out the right infringed and the manner in which the right is alleged to have been infringed. He therefore stated that the deprivation of a right is distinct and inherent and cannot be exercised together and that the Plaintiffs have not demonstrated that each of them is entitled to a part of the land or as a community right. Further, there was no indication whether the Plaintiffs were seeking a community or group right or whether they were registered as a society. Also, there is no indication that Edgar Kipsase Choge, Harry Jumba Mbiti, Fred Ombiri and Colletta Inzayi were given authority to represent a community or the basis on which Edgar Kipsase Choge swore the affidavits in support of the Application.

Counsel further submitted that for a group of people to claim community land they must at least share an ancestral or cultural background, but the Applicants share nothing in common and most are former employees of the 1st Respondent who were relieved of their duties due to under performance. Mr. Kouko further submitted that this is a funded project for the benefit of the public and stalling the project shall be detrimental to the general public good. He therefore urged the court to disallow the application.

The 3rd defendant filed a replying affidavit and grounds opposition to the application and to the main suit. Counsel for the 3rd defendant urged the court to strike out the 3rd defendant's name from the pleadings or have the plaintiffs' case be dismissed against the 3rd defendant on the grounds that the suit raise no cause of action against them. He relied on two authorities namely **G.B.M KARIUKI V NATION MEDIA GROUP LIMITED & 3 OTHERS[2012]eKLR** and **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR** to support his grounds.

Analysis and Determination

I have considered the application, the material in support and in opposition, and the submissions of counsels. This is purely an application for injunction and the principles of granting temporary injunctions are as per enunciated in the case of Giella vs Cassman Brown (1973) EA 358, The court of appeal stated as follows: -

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.

Before I deal with the issue as to whether the plaintiffs have a prima facie case or not, I wish to deal with the issues of jurisdiction and whether the plaintiffs have *locus standi* to bring the suit on behalf of the residents of Kamobon village. This is a matter involving the environment and the plaintiffs claim to be affected by the activities or actions of the defendants.

Articles 42 and 70 of the Constitution provide as follows :-

Article 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.

Article 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 is 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. 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.

These provisions give any person a right to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate that the issues concern him personally or that he stands to suffer individually. The challenge on the issue of locus standi of individuals who had to demonstrate that they had suffered over and above the other individuals from the actions complained of was cured by the Constitution. The plaintiffs also signed an authority to sue and sign documents on behalf of the 73 Kamobon Village residents. What more was required?

On the issue of the jurisdiction of the court it was argued by the 1st Defendant that this matter concerns interpretation of the law and should be dealt with in the Constitutional and Judicial Review Division of the High court. Counsel therefore submitted that the court does not have jurisdiction to handle this matter.

Article 162(2)(b) of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

(*1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments

granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

The dispute herein involves public land registered in the 1st defendant's name in trust for the community which land has been reserved for grazing to the plaintiffs as evidenced by the official search. It is also not in dispute that the suit land is community land which the county government holds in trust for the community. The plaintiffs also pray for restitution and an injunction restraining the defendants from certain activities and vacant possession. In the 1st defendants defense dated 7th march 2017 under paragraph 9, the jurisdiction of this court is not disputed. It is therefore clear that this court is clothed with jurisdiction to hear and determine this matter.

The other issue that was raised by the 3rd defendant was that the plaintiffs case be dismissed against the 3rd defendant or that its name be struck out of the pleadings. The authorities cited do not in any way support that assertion. They actually reinforce the position that a case should be heard on merit not striking out at a preliminary stage. I will therefore not deal with that as this is an application for temporary injunction and not for striking out of a suit.

I shall now deal with the substantive issue of temporary injunction. I had earlier mentioned the principles of granting a temporary injunction. The plaintiffs stated their case which was reinforced by the replying affidavit of the 1st defendant together with annexures which confirmed that actually there is stone crushing on the suit land, emissions and noise pollution as per the letter dated 6th December 2016 by National Environment Management Authority. This was further confirmed by the 1st defendant's annexure of inspection report from NEMA dated 1st December 2016 which sated that noise is generated from the small crusher and a little dust is generated if wet crushing is done.

The 1st defendant further confirmed this position by the annexed minutes of a meeting held on 17th January 2017 between the plaintiffs, the defendants and other stakeholders to deliberate on the issue affecting the plaintiffs. All the issues that the plaintiffs have complained about were discussed and resolutions promised to rectify the situation but the plaintiffs averred that the same have not been addressed. I further note that the lease agreement annexed by the 1st defendant was for a period of 4 years which has since expired and no evidence of renewal has been tendered. The renewal of the lease was one of the issues discussed in the above meeting but I have not seen any renewed lease. Having said that I find that the plaintiffs have established a prima facie case with a probability of success.

As to irreparable loss which cannot be adequately compensated by an award of damages, I find the damage to the environment has far reaching effects which are not only confined to the current generation but to intrageneration. Even if individuals are compensated it can never be the same once the damage has been done.

On the issue of public interest and public good I dare to say that as much as the project is for the benefit of the community we should weigh the attendant benefit verses the degradation of the environment and to the individuals' health. There are usually mitigation measures which are supposed to be put in place to ensure that the surrounding communities do not suffer from the harsh impacts of the activities undertaken by the project. This is why Environmental Impact assessments are done and mitigation measures suggested for alleviating the impacts. I still find that the balance of convenience tilts in favour of the plaintiff. If the defendants had implemented the measures that they had suggested to alleviate the impact of their activities then we would be talking of different reliefs.

Having considered the application, the supporting documentation and the submissions of Counsels for the parties, I therefore find that the application for injunction is merited and make the following orders:

a) That pending the hearing and determination of this suit the 1st Defendant/Respondent by themselves, their agents, servants employees and/or any other person acting on its instructions are

restrained from entering, digging holes, crushing stones, erecting, constructing over land parcel number NANDI/KAPSENGERE/1085.

b) The parties to comply with order 11 within 30 days.

c) The costs of the application shall be costs in the cause.

It is so ordered

Dated and delivered at Eldoret on this 27th day of July, 2017.

M.A ODENY

JUDGE

Read in Open Court in Presence of:

Miss Adhiambo holding brief for Kouko for 1st defendant.

Mr.Koech - Court Assistant.