



**REPUBLIC OF KENYA**

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

**ELC NO. 57 OF 2017**

**ISAAC CHEBON :::1<sup>ST</sup> PLAINTIFF**

**STEFFANO KIPYEGEN::2<sup>ND</sup> PLAINTIFF**

**DANIEL CHESAINA::3<sup>RD</sup> PLAINTIFF**

**THE TRUSTEES BOROWONIN**

**FULL GOSPEL CHURCH OF KENYA::::::::::::::::::::::::::::::::::4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF BARINGO::::::::::::::::::::::::::DEFENDANT**

**RULING**

**INTRODUCTION**

This ruling is in respect of an application brought by way of Notice of Motion dated 14<sup>th</sup> February, 2017 by the Plaintiff/applicants who sought for the following orders:

1. That this application be certified urgent and its service be dispensed with in the first instance.
2. That pending the hearing and determination of this application a temporary order of injunction do issue restraining the defendant whether by itself or by its employees, servants and/or agents from constructing a cattle dip on plot No. **BARINGO/KEWAMOI ‘B’/856**, until an Environmental Impact Assessment is given.
3. That pending the hearing and determination of this suit a temporary order of injunction do issue restraining the defendant whether by itself or by its employees, servants and/or agents from constructing a cattle dip on plot No. **BARINGO/KEWAMOI ‘B’/856**, until an Environmental Impact Assessment is given.
4. That the costs of this application be provided for.

This application was brought to court under certificate of urgency on 16/2/17 when the court certified that matter as urgent and ordered that the same be served for inter parte hearing. The same was served and heard inter partes on 17/7/17.

**Plaintiff’s Counsel’s Submissions**

Mr. Chebii Counsel for the applicant argued the application and urged the court to issue temporary injunction against the defendant restraining them from constructing a cattle dip on the suit land. He relied on the provisions of the law, the supporting and supplementary affidavits sworn by Isaac Chebon the applicant herein.

Counsel submitted that the plaintiff/applicants are owners of neighboring plots where they have constructed their houses. The plaintiff averred in the affidavit that the defendant has decided to construct a cattle dip on the suit land in the midst of human settlement without consulting the plaintiffs and the community. Counsel further submitted that the defendant has not carried out an Environmental impact assessment as required by law. He also stated that the construction of the cattle dip will affect the plaintiffs' health. The church which is used by the plaintiffs and the community is five meters from the proposed construction.

It was Counsel's submission that the defendant purported to do a report in March 2017 after this suit was filed. He submitted that the report entirely supports the plaintiff's averments and that the report indicates that the defendant should not proceed with any construction until they receive communication from NEMA. Counsel urged the court to look at pages 35 – 37 of the report which talks of the negative impacts of the project and page 60 which provides for the mitigation measures of planting trees to act as a barrier to reduce pollution. The report also envisages high risk of displacement and counsel submits that the mitigation measures offered cannot help the situation. Mr. Chebii Submitted that the project will cause untold suffering to the plaintiffs, further the area is a water catchment area and also a shrine. He submitted that the seepage will pollute the water spring to the detriment to the applicants and the community. He urged the court to grant the injunction as prayed.

### **Defendant/Respondent's Submissions**

The application was opposed. Counsel for the defendant Mr. Kibii relied on the replying affidavit and annexures filed herein. He submitted that the application lacks merit and that the applicants are not in occupation of the suit land. It was submitted that the suit property is a public utility which is reserved for construction of a cattle dip. Counsel urged the court to look at the EIA report at page 62 which he states that was approved by NEMA. He submitted that there are mitigation measures and that the negative impacts are minimal.

Counsel further submitted that the applicant cannot discredit an expert report by way of an affidavit, it would be prudent to counter such report with another expert report. He submits that the same was not done and therefore the assertion should be ignored. It was also submitted that the applicants are in the wrong forum as they should have moved the court by way of a Judicial review or a Constitutional petition.

Mr. Kibii also submitted that the power to set aside land for public utility purely rests with the National Land Commission and the County Government which is the defendant herein. It is submitted that this is registered land and not community land as stated by the plaintiff that it is land meant for a shrine. Counsel submitted that the plaintiffs have not established a prima facie case and hence the application should be dismissed.

In response counsel for the plaintiff reiterated his earlier submissions and submitted that the project has not been approved by NEMA as alleged by the defendant. He urged the court to allow the application.

### **Analysis and Determination**

I have considered the application, the supporting documentation and the submissions of the both counsels for the plaintiff and the defendant and state that this is an application for temporary injunction. The principles of granting injunctions are well settled. The question to ask is whether the plaintiff has fulfilled these principles. Has a prima facie case been established with a probability of success, Will the plaintiff suffer irreparable injury which cannot be adequately compensated by an award of damages? If the court is in doubt, will it decide on a balance of convenience.

The cases of **Giella -v- Cassman Brown & Co. Ltd [1973] E.A 358**, **Ibrahim -v- Sheik Bros Investments Ltd [1973] EA 118**, **Mrao Ltd -v- First American Bank Ltd & 2 others [2002] LLR 3801**, **Bonde -v- Steyn [2013]2 EA 8**, **The Despina Pontikos [1975] EA 38** and **Locabail Intern Finance -v- Agro Export & others [1986]1 All ER 901** are all relevant, to mention but a few. The grant of temporary injunction is discretionary and the court should look at the circumstances of the case.

Certain issues were raised regarding the forum that this matter was brought to. Counsel for the defendant submitted that the plaintiff should have filed a judicial review or a constitutional petition. This is an issue that the court has to deal with before it determines whether to grant a temporary injunction. It would seem to me like a halfhearted preliminary objection which counsel is not sure whether to pursue or not. I must deal with this issue first to clear the air. Would the court uphold a preliminary objection due to lack of form? My answer would be in the negative. This can only happen if the form is very gross and goes to the root cause of the suit making it impossible for the court to come to a just decision. The court is also guided by Article 159 of the Constitution which obliges it to administer justice without undue regard to procedural technicalities. On that note, I reject Counsel's assertion that the matter should have been brought by way of a judicial review or a constitutional petition.

On the issue whether the plaintiff has established a prima facie case with a probability of success, it was the plaintiff's case that the construction of a cattle dip within the human settlement would greatly affect their health. They took issue with the fact that no EIA had been conducted to give it a clean bill of health and further that the purported report which was done after the filling of the case does not help in anyway. I notice from a letter dated dated 21/3/17 marked as 'JK1' that it is an acknowledgement of the report by NEMA. The report was done by a private entity known as Lead Securities Ltd. The letter states that

***'the report will be reviewed in accordance with Environmental Impact Assessment and Audit Regulations 2003 and NEMA – Baringo will communicate its assessment and findings to you in due course'***. The report finally states:

**NB:** *'In the interim please do not commence or proceed with any development of the project until you receive communication from this office on the same'*.

This was an annexure by the defendant in support of their case. I have not seen any letter

giving a go ahead to proceed with the project. This shows that the report has not yet been reviewed in accordance with the EIA & Audit Regulations 2003 as required by law. The report was just a proposal for approval which has not yet been done. On that I find that the plaintiff has established a prima facie case with a probability of success. They have a real concern and the same has been reinforced by the defendant who has filed a report and a letter from NEMA. Further looking at the purported report in the interim, there are risks that are enumerated which include displacement. Although it mentions certain mitigation measures, the same look long term like planting trees to reduce the pollution.

On the issue of damages having found that the plaintiffs have established a prima facie case with a probability of success and considering the nature of the case involving the pollution of the environment, I would be inclined to find that damages would not be adequate compensation for the plaintiffs. Supposing your health is affected in any way through acts of pollution to the environment, would money to take you to the medical facilities be adequate compensation? You might go for medical help but there is no guarantee that your ailment will be addressed or cured.

I have considered the submissions from both counsels, the supporting documentation and the relevant judicial authorities and I have come to the conclusion that this is a proper case where the I must use my discretion to grant a temporary injunction.

The upshot is that the plaintiff's application dated 14/2/17 succeeds. Costs of this application are awarded to the plaintiff.

Dated and delivered at Eldoret on this 25<sup>th</sup> day of September, 2017.

**M. A ODENY**

**JUDGE**

**In the presence of:**

Mr. Chepkibut holding brief for Mr. Chebii for Plaintiff/Applicant

Mr. Kapere for Kiboi for Defendant/Respondent.

C/A: Koech