



REPUBLIC OF KENYA

LAND AND ENVIRONMENT DIVISION

AT MALINDI

ELC MIS APP NO 41 OF 2016

DIMA OMAR HASSAN.....APPLICANT

=VERSUS=

GRAVITY CANAL1ST RESPONDENT

INVRCL LIMITED.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. This is a Ruling on a Notice of Motion dated 19th October 2016. The application brought pursuant to Section 1A, 1B, 3 and 3A of the Civil Procedure Act is seeking the following:-

1. Spent

2. Spent

3. THAT the Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves, their employees and/or their agents from further excavation and/or developing the canal situate at Sala Location within Tana River County, pending the final determination of the petition herein.

4. THAT the costs of this application be provided.

2. The application is supported by the annexed affidavit of the Applicant Dimar Omar Hassan sworn on 19th October 2016. The application is further premised on the grounds:-

(a) That the 1st and 2nd Respondents have commenced the construction of a Canal in Bili, Sala Location Tana River County.

(b) That the said construction involves excavation of a huge canal that has been left open thus

posing a danger to the community.

(c) That there are no barriers erected along the canal by the 1st and 2nd Respondents to protect livestock and humans from falling into the canal.

(d) That the residents of the surrounding areas have lost livestock to the said canal especially during the rainy seasons as the same usually floods.

(e) That from the inception of the construction of the said canal there has been reported one death of one A H H (12 years old), and

(f) That it therefore goes without saying that the continued construction of the said canal without undertaking the necessary precautions to protect the residents and their livestock is gravely negligent and ought to be stopped with immediate effect.

3. In a Replying Affidavit sworn on 10th April 2017, by one Dinesh Degwekar, a director of the 2nd Respondent, the Respondent avers that the application is incomplete, bad in law, misconceived and is an abuse of the Court Process. The 2nd Respondent states that on 27th February 2013, they signed an agreement with the National Irrigation Board for construction of works at Bura Irrigation and Settlement Scheme. The scope of the agreement included construction of a new gravity canal of 26 kilometres meant to increase the irrigation potential of the scheme with concomitant benefits to the local community.

4. The 2nd Respondent further avers that the project cost is Kshs 7.35 Billion and is funded by both donors (29.38%) and the Government of Kenya (70.627%). It is further their case that contrary to the allegations made in the petition, an Environmental and Social Impact Assessment of the project was carried out by the National Irrigation Board as a result of which a final report (annexed to the Replying Affidavit as Exhibit "D G 2") was prepared. It is further their case that as a result of the said Impact Assessment the Applicant's community came forward and discussed the project wherein they raised the possible risk of people and animals falling into the canal and getting injured.

5. The 2nd Respondent further avers that they agreed within the communities involved that in order to avoid those risks, designated crossing areas would be kept for people and livestock to use. It is therefore their position that contrary to the Applicant's contentions, the 2nd Respondent has left out designated crossings for human and livestock safety in the course of the project and adhered to all safety measures and standards in the construction of the canal.

6. In addition, the 2nd Respondents contend that 24 kilometres of the expected 26 km that the canal shall cover is already completed and an injunction at this stage would be catastrophic to both the project and its financiers as the project is almost complete. Accordingly, they urge this Court to dismiss the application.

7. I have considered both the application and the Affidavit in reply. I have similarly considered the submissions and authorities placed before me by the Learned Advocates representing the Petitioner and the 2nd Respondent respectively.

8. The facts constituting the Petitioner's case are listed at paragraphs 7 to 12 of the petition filed herein on 24th October 2016. The Petitioner states therein that Messrs Gravity Canal listed as the 1st Respondent herein undertook the construction and/or evacuation of a canal in Bali Area, Sala Location of Tana River County. The 1st Respondent then contracted the 2nd Respondent to undertake the construction. The Petitioner avers that since the beginning of the construction, residents of the said Bali area have suffered immeasurable losses as they have lost their livestock and at one point in the year 2014, a young school going boy named Abdkadir Hassan Hussein drowned in the canal.

9. At paragraph 11 of the Petition, the Petitioner avers that there is no evidence that an Environmental Impact Assessment was conducted by the National Environmental Management Authority-the 3rd

Respondent, before the commencement of the construction project and that the 1st Respondent was therefore illegally granted a licence by the 3rd Respondent to commence the project. Further, the Petitioner states that the residents of the area were never consulted and their participation was therefore never solicited and/or obtained prior to the commencement of the project which he describes as “deadly”. The Applicant/Petitioner then proceeds to accuse the Respondents herein of breaching Articles 3, 42 and 69 of the Constitution in regard to his rights as an individual and the other residents of Bali Area, Sala Location of Tana River County.

10. The Petitioner then proceeds to seek the following reliefs against the Respondents jointly and severally:-

(i) *A permanent mandatory injunction compelling the 1st and 2nd Respondents to construct protective barriers along the canal.*

(ii) *A declaration that the correct procedure was not followed by the 1st, 2nd and 3rd Respondents before the inception of the project.*

(iii) *Compensation and*

(iv) *Any other relief deemed expedient in the circumstances.*

11. It is against that background that the Petitioner filed the present application now before me. In the Petitioner’s affidavit sworn on 19th October 2016, he states that the canal being built poses a danger to the residents of the area and their animals. He cites the incident where a 12 year old boy is said to have drowned in the canal in 2014. I note however while minutes of a meeting held on 25th November 2014 to condole the family of the deceased attached to the Supporting Affidavit as Exhibit ‘DOH 2’ make mention of contribution received from the 2nd Respondent, no particulars are given as to the circumstances under which the boy lost his life. It is therefore not possible for this Court to conclude that the same resulted from the manner in which the dam was constructed.

12. Similarly, while paragraph 6 of the Supporting Affidavit indicates that the Community of Bali lost three camels and twenty one goats, no details are given of the owners thereof and the circumstances under which they were lost.

13. From the Replying Affidavit of Dinesh Degwekar sworn on 10th April 2017, it is apparent that the local community from which the Petitioner hails was fully involved in the Environmental and Social Impact Assessment carried out by the National Irrigation Board prior to the commencement of the project. The Report annexed as Exhibit DG2 shows at page 45 thereof the Community Sensitization Meetings that took place between 15th February 2014 and 13th March 2014 in various venues. The Petitioner did not contradict these averments and this Court can therefore only assume that the residents of the listed areas were consulted.

14. In the submissions filed by Mr. Gicharu, Learned Counsel for the Petitioner, the Petitioner contends that they have met the applicable conditions for the grant of a temporary injunction as spelt out in the celebrated case of ***Giella - vs- Cassman Brown & Co Ltd (1973) EA 358***. This being a Constitutional Petition however, I think the Petitioner ought to have met the conditions for the grant of conservatory orders instead.

15. In ***Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (Application No. 5 of 2014) (2014) eKLR***, the Supreme Court observed at paragraph 85 and 86 of its Ruling as follows:-

“.....Injunctions, in a proper sense, belongs to the sphere of civil claims, and are issued on the basis of convenience as between the parties and the balance of probabilities.... Conservatory Orders (on the other hand) bear a more decided Public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory

authority of the Court, in the public interest. Conservatory Orders, therefore, are not, unlike interlocutory injunctions, linked to such private-Party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory Orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

16. The issue before me, therefore is whether this is a proper case where the interlocutory reliefs sought by the Applicant should be granted. As we have seen herein above, the Petition alleges infringements or violation of the Petitioner’s rights under the Constitution. Article 22(1) of the Constitution provides as follows:-

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated, or infringed, or is threatened.”

17. Under Article 22 (3) of the Constitution, the Chief Justice is mandated to make rules providing for proceedings for the enforcement of the Bill of Rights. Pursuant to this provision, the Honourable the Chief Justice came up with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. Accordingly, it follows that an application arising out of an alleged infringement or violation of any right provided for under the Constitution should be made via the said Practice and Procedure Rules and not the Civil Procedure Rules as it the case herein. An application for conservatory or interim orders ought to be made under Rule 23 of the said Practice and Procedure Rules. That has not been done in the case before me.

18. Be that as it may, I have looked at paragraphs 13, 14 and 15 of the Petition wherein the Petitioner alleges various breaches of Articles 3, 42 and 69 of the Constitution. No particulars or evidence have been provided in this application to demonstrate how the Respondents breached the rights claimed by the Petitioner. Arising from the foregoing, I am not convinced that the Petitioner has established a case with inherent merit or a prima facie case.

19. Accordingly, I find and hold that the application dated 19th October 2016 lacks merit. I dismiss the same.

20. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE