



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NUMBER 235 OF 2017

(formerly NAIROBI ELC CASE NO. 1305 OF 2016)

CHARITY MPANO NTIYIONE.....PLAINTIFF

VERSUS

CHINA COMMUNICATIONS CONSTRUCTION COMPANY LIMITED.....1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND DEFENDANT

BETWEEN

CHARITY MPANO NTIYIOINE.....APPLICANT

VERSUS

CHINA COMMUNICATIONS CONSTRUCTION COMPANY LIMITED..1ST RESPONDENT

LIU QITAO.....2ND RESPONDENT

FU JINYUAN3RD RESPONDENT

LIU WENSHENG.....4TH RESPONDENT

LI QIANG.....5TH RESPONDENT

RULING

What is before Court is the application dated 1st February, 2017 and Notice of Preliminary Objection by the 1st Defendant dated 13th September, 2017. The application dated 1st February, 2017 is brought pursuant to Articles 10 and 42 of the Constitution, Section 63(c) of the Civil Procedure Act, Order 40 rule 3 (1) and (3) of the Civil Procedure Rules, Section 4 (1) (a) , 5 and 23 (a) of the Contempt of Court Act and all enabling provisions of the law.

The Notice of Preliminary Objection by the 1st Defendant is based on the following points:

1. Section 129 (1) of the Environment Management and Coordination Act vests jurisdiction on the National Environment Tribunal to hear and determine matters challenging the issuance of Environmental Impact Assessment Licence.

2. Section 32 of the Environment Management and Coordination Act vests jurisdiction on the Public Complaints Committee established under Section 31 of the Act to hear and determine the Plaintiff's allegations of the alleged threat to a clean and healthy environment.

3. Proceedings filed in a judicial forum without jurisdiction are null and void.

The Plaintiff filed Grounds of Opposition in respect to the 1st Defendant's Notice of Preliminary Objection dated 13th September, 2017 on the following grounds:

- a) The application is frivolous, vexatious and a complete waste of precious judicial time;
- b) The orders sought in this application are incapable of being granted in the circumstances of this case;
- c) The application is only aimed at trifling expeditious hearing and disposal of this suit; and
- d) The application is only fit for dismissal with costs to the Plaintiff/Respondent.

The application dated 1st February, 2017 is based on the following grounds which in summary is that Liu Qitao, Fu Jinyuan, Liu Wensheng and Li Qiang, being directors of the 1st Respondent, have been served with the orders made by the court on 24th October, 2016 together with the requisite Penal Notices, and have disobeyed the said Court Order as their servants have continued to carry out quarrying and crushing activities on LR No. KAJIADO/LOODARIAK /908 hereinafter referred to as the 'suit land'. The actions of the 1st Respondent through its agents, servants or employees are in contravention of the court orders made on 24th October, 2016 restraining the 1st Respondent from engaging in any further quarrying and crushing activities on the suit land pending the hearing and determination of the application dated 24th October, 2016. The 1st Respondent's activities on the suit land are raising copious amounts of dust which settles on the Plaintiff's property thereby causing adverse effects on the Plaintiff and her family's health which is contrary to the Applicant's right to a clean and healthy environment under article 42 of the Constitution.

The application is supported by the Statutory Statement and affidavit of CHARITY MPANO NTIYIOINE who is the Plaintiff herein where she deposes that she is the registered proprietor of land parcel number KAJIADO/LOODARIAK/ 909 and is currently resident on the suit land together with her co – wives. She avers that the 2nd, 3rd, 4th and 5th Respondents are directors of the 1st Respondent. She confirms that she filed the instant suit together with an application dated 24th October, 2016 which application is seeking among other orders a temporary injunction restraining the 1st Respondent either by itself, its agents, servants, officers and/or any other body or entity from engaging in any further quarrying and crushing activities on the suit land pending the hearing and determination of the application and suit. She states that the Court granted an ex parte order in the first instance and granted a temporary injunction on 24th October, 2016 for a period of 14 days restraining the 1st Respondent either by itself, its agents, servants, officers and/or any other body or entity from engaging in any further quarrying and crushing activities on the suit land pending the hearing and determination of the application.

She reiterates that the said order was served upon the Respondents on 26th October 2016, with the interim orders granted on 24th October, 2016 extended on 7th November, 2016 and a copy of the order extending the said interim orders being served upon the Respondents on 8th November, 2016 together with a Penal Notice of the even date. Further that the Court made an order on 21st November, 2016 extending the interim orders which order was served upon the 1st Respondent on 13th December, 2016. The Court further extended the interim orders on 14th December, 2016 which orders were served upon the Respondents on 19th December, 2016. She claims the 1st Respondent's advocates wrote to it a letter dated 23rd November, 2016 and copied her advocates, advising it to cease and desist from carrying out the quarrying activities on site in obedience to the court order made on 24th December, 2016. Further, on 24th

November, 2016 an advocate from the firm of Wambugu & Muriuki Advocates representing the 1st Respondent and two advocates from Kariuki Muigua & Company Advocates went for a site visit to ascertain the genuineness of the complaints the Plaintiff had raised about the 1st Respondent's activities.

She reiterates that despite service of the Court's order dated 24th October, 2016, the 1st Respondent has continued its quarrying activities in wanton disregard to the said order. She further avers that her advocates wrote to the 1st Respondent's advocates vide a letter dated 15th December, 2016 urging them to prevail upon their client to obey the Court's order but to no avail. Further that the 1st Respondent's activities were also subject of a newspaper article captured in the Sunday Standard dated the 15th January, 2017. She contends that the 1st Respondent's actions are in direct and flagrant contravention of the orders of the Court given on 24th October, 2016 and this amounts to breach of the rule of law and sound juridical doctrine. She reaffirms that this Court should preserve and safeguard the rule of law by punishing for contempt to those found disobeying the Court Order. Further that she stands to suffer irreparable loss and damage if the orders sought herein are not granted and the Respondents do not stand to suffer any prejudice.

The application is opposed by the 1st Respondent who filed a replying affidavit sworn by LIU QITAO who is its Managing Director where he deposes at paragraphs 10 to 17 that the application dated 1st February, 2017 for contempt amounts to harassment. He avers that the applicant approached the Court for interim orders and further filed an application for contempt without even establishing with certainty the current status of the activities on the suit land. He insists the Applicant's approach to Court was done in haste and prematurely without establishing the facts as they stand at present. He claims that the Respondent's operations have been greatly inconvenienced by the Orders of the Court which it has obeyed despite constraints they are facing in their construction activities. He contends that the alleged claims of contempt by the Applicant are only aimed at casting the Respondents in very negative light and to portray them as belligerent, non – compliant and contemptuous to the Court. He avers that the alleged claims of contempt against the Respondents are aimed at diverting the Court's attention from the actual issues between the parties, getting the Court to sympathize with the Plaintiff and extending the orders of the Court granted on 24th October, 2016 which the Respondent continues to abide with under great difficulty. He reiterates that it would be unjust, unfair and against the interests of justice to sustain the claims of contempt against the Respondents considering they have been operating under the instructions from the Ministry of Transport, Infrastructure, Housing and Urban Development.

The 1st Respondent further filed a supplementary affidavit dated 13th September, 2017 sworn by LIANG YAMIN who is a Director therein where he deposes that the 1st Respondent is involved in many infrastructural projects in Kenya including the construction of the Standard Gauge railway, Nairobi Northern Bypass Project, Nairobi Southern Bypass Project and the expansion of the Inland Container Depot in Nairobi. He states that the offices, officers and operations of the 1st Respondent are located at Jacaranda Estate off Kamiti Road in Kiambu County and at Lavington Estate along Hatheru Road in Nairobi County. He avers that each project is usually assigned to independent contractors who are distinct and housed in different geographical location with offices, officers and their own personnel but work under the name of the 1st Respondent. He claims that the independent contractors often receive Court papers without the knowledge or authority of the 1st Respondent. Further that in the event that the said Mr. David Sewe was served or became aware of the ex parte interim order, he did not bring to the attention of the Respondents its existence to enable it advise the independent contractor to stop quarrying activities immediately. He contends that when the Respondents became aware of the ex parte interim order, they directed the independent contractor to cease all activities immediately and the Applicant can confirm that all activities on the suit land have ceased. He reiterates that the 1st Respondent is an international company with impeccable reputation and has been undertaking massive infrastructure projects on behalf of the Government of Kenya and as such would not deliberately fail to obey this Court.

Both the Plaintiff and the 1st Respondent filed their respective submissions in relation to the Notice of Preliminary Objection and Application dated 1st February, 2017, which were highlighted on 11th October,

2017 that I have considered.

Analysis and Determination

Upon perusing the application dated 1st February, 2017 including the supporting/replying affidavits as well as the annexures thereon and the Notice of Preliminary Objection dated 13th September, 2017 plus all the parties submissions, the following are the issues for determination:

- Whether this Court has jurisdiction to entertain this suit.
- Whether the 1st Respondent is in contempt of the Court Order dated the 24th October, 2016.

As to whether the Court has jurisdiction to entertain this suit. I note the Plaintiff seeks the following prayers in the Plaint:

- a) A declaration that the Plaintiff's right to a clean and healthy environment has been infringed upon;
- b) An environment restoration order under Section 111(1) of the Environment Management and Coordination Act;
- c) Cancellation of the Environmental Impact Assessment License dated 13th October, 2016 issued to the 1st Defendant, China Communications Construction Company Limited;
- d) A permanent injunction against the Defendants, restraining them either by themselves, their agents, servants, tenants, licensees, visitors, and/or any other body or entity infringing on the Plaintiff's right to a clean and healthy environment by causing or allowing to be caused any form of pollution by way of generating dust, noise and any other form of environmental degradation;
- e) An order that the 2nd Defendant, National Environment Management Authority, directs the 1st Defendant, China Communications Construction Company Limited to submit a fresh Environmental Impact Assessment Study;
- f) General damages for breach of the Plaintiff's constitutional right to a clean and healthy environment, quiet possession of her property and injury to health;
- g) Aggravated damages;
- h) Cost of future medical expenses;
- i) Costs of relocation;
- j) Costs of the suit;
- k) Interest on f), g), h), i) and j) above at court rates from the date of entry of judgement until payment in full; and
- l) Any other order (s) this Honourable Court may deem fit to grant

Section 129 (2) of Environmental Management Coordination Act (EMCA) provides as follows: ***Any person who is aggrieved:- Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions as may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.***

Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the ELC and stipulates 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.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (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'

The above provisions are distinct in terms of jurisdiction of the Environment and Land Court.

The 1st Defendant's Counsel submitted that there is a Case pending within National Environmental Management Authority (NEMA) that had been filed by Okiya Omtata on behalf of the Plaintiff, which information was not controverted by the Plaintiff's counsel. However, he insisted that 50% of the Plaintiff's case is challenging decision by NEMA to grant the Environmental Impact Assessment Report and give license to the 1st Respondent. He reiterated that the Court has jurisdiction to entertain the suit herein.

It is the Plaintiff's contention that they did not rely on section 3A of the Civil Procedure Act and that the application for injunction does not seek to challenge Environment Impact Assessment License but relied on Articles 10, 42, 48 and 70 of the Constitution, Order 40 of Civil Procedure Rules, Section 13, 18, 19, 29 of the ELC Act and Section 3 of EMCA. Plaintiff insists Preliminary Objection is based on law that was amended in 2015. Complaints before Court ought to have been filed before Public Complaints Committee on National Environmental Tribunal (EMCA Amendment Act No. 5 of 2015). Section 32 amended so that Public Complaints Committee was replaced by a body called the National Environmental Complaints Committee. On the issue of section 129 (1) of EMCA Act deals with application for grant and refusal of license. Provision is not mandatory and even if the Plaintiff was aggrieved it may take its appeal to the tribunal or before the Court. The Plaintiff has not come to court to challenge issuance EIA License to the 1st Defendant.

In the case of **The Owners of the Motor Vessel Lilian 'S' Vs. Caltex Kenya Limited (1989) KLR 1** the Court of Appeal held that: **'..... it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.....'**

In relying on the facts above and the authority, I find that in so far as the ELC Act gives original and appellate jurisdiction on environment and land matters to the ELC, prayers (c) and (e) of the Plaint as coined, have to be referred to the National Environment Tribunal first before an appeal can lie to the Environment and Land Court (ELC).

In the case of **Matanga Tea & Coffee Company Limited Vs. Shikara Limited & Anor (2015) eKLR** it was held that: **'The reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 to supervise bodies such as the 2nd Respondent, such supervision is limited in various respects, which I need, not go into here, Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.'**

However in accordance with Section 129 (2) of EMCA, Section 13 (1) of the ELC Act and in relying on the above authority, I find that except for prayers (c) and (e) in the Plaintiff, this Court has jurisdiction to handle the remaining prayers. The Preliminary Objection will hence partially fail.

In terms of the prayers sought for contempt, the Counsel for the Applicant admitted that the prayers granted on 24th October, 2016 were obtained ex parte. I note to date the application for injunction that was filed on 24th October, 2016 has not been heard inter partes and the Plaintiff has not made effort to fix the same for hearing. The Plaintiff contends that the 1st Respondent was indeed served with the Order of the Court dated 24th October, 2016 but continue to perform acts which are contrary to the said order and have persisted to do so. The 1st Defendant on the other hand contends that the burden of proof is squarely on the Plaintiff to prove the order was served personally upon the Respondents and was accompanied by the Penal Notice. Further, that the specific acts prohibited have been committed and order wilfully disobeyed. The 1st Defendant's Counsel submitted that no Penal Notice was served with the Court Orders and this is evident even in the Affidavits of Service. He relied on the Case of **Josephine Mutisya Vs Lillian Muthama (2014) eKLR** where the Court held that the Notice should be served personally. He further relied on the **case of Direct Assurance Co. Ltd vs Jamii Bora (2015) eKLR** where the court held that contempt proceedings are criminal in nature and if the contempt is stopped, the court should not punish for contempt.

It is the 1st Defendant's contention that in the first instance there was no order to be disobeyed because the order was given on 26th October, 2016 for 14 days only. In accordance with Order 40 rule 4 (2) of the Civil Procedure Rules that provides as follows: **'(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.'**

The 1st Defendant contends that the extension of the interim orders was a nullity as the Court did not have jurisdiction to do so. Further that discretion of court only applies where there are no express provisions. In the current scenario, the order for injunction is not in force as it lapsed. He contended that there is no admissible evidence of crushing and quarrying. The 1st Defendant reiterated that paragraph 13 of the supporting affidavit is not admissible as the Plaintiff did not say the source of knowledge. The 1st Defendant further states that there was no order preventing the 1st Respondent from constructing houses.

In the case of **Maisha Nishike Ltd vs. Commissioner of Lands & 3 others (2011) eKLR** the court while citing the holding in **Kalyaso Farmers Cooperative Society & others Vs County Council of Narok** the court held that: **'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.'**

Further in the case of **Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR** where the court held as follows: **'the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.'**

The relevant provisions in the Contempt of Court Act concerning the current scenario are highlighted here below:

Section 27(b) of the Contempt of Court Act provides that a person who wilfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;'

Section 28(1) of the Contempt of Court Act provides that save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'

Section 29 (1) of the **Contempt of Court Act** provides that:

Where a company is guilty of contempt of court in respect of any undertaking given to a court by the company, every person who, at the time the contempt was committed, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail:

Provided that nothing in this subsection shall render any such person liable to punishment if the person proves to the satisfaction of the court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent its commission.'

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice **Matavo** stated that: ' **writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:-**

'there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'

I note there are three elements that must be proved in contempt proceedings:

- a) Applicant must demonstrate terms of orders
- b) Applicant must demonstrate knowledge of terms by respondent
- c) Applicant must demonstrate failure of respondent to comply with court order

In the instant case, I note that the Order that was purportedly disobeyed was granted *ex parte* hence with the officials of the 1st Respondent not participating when the same was granted. Further, the application dated the 24th October, 2016 has never been heard *inter partes* and determined. The 1st Defendant disputes that penal notices accompanied the Court Order which resulted in their being cited for contempt. The 1st Respondents directors were never served directly and have even admitted that they use contractors on their various sites, which fact has not been controverted by the Plaintiff. Further, they have indicated they have head offices in Lavington and Jacaranda and denied that even if Mr. David Sawe was served, they never brought it to their attention. The 1st Respondent insists they have complied with the Court Order and stopped the quarrying and crushing but Plaintiff contends this is still ongoing. I note Contempt proceedings are criminal in nature and hence the burden of proof should be on the Plaintiff to prove that the same is ongoing. I note from the various affidavit of service, there is no indication whether the Court Order was accompanied with the mandatory Penal Notice.

In the relying on the authorities above, and Section 29 of the Contempt of Court Act, I find that in the current circumstances and with the facts presented, I decline to allow the application dated the 1st February, 2017 at this juncture.

I further direct that the Plaintiff's application dated the 24th October, 2016 be set down for hearing within the next within the next seven (7) days from the date hereof for hearing and final determination.

Parties are further urged to comply with Order 11 to enable the suit be set down for hearing and final determination

Dated, Signed and Delivered in Kajiado this 11th day of December 2017

CHRISTINE OCHIENG

JUDGE

Present:

Tuinoti Gatobu holding brief for Kariuki Mugwe for Applicant

Ondego holding brief for Ndegwa for 1st Respondent

CC Mpoye