REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 973 OF 2015

CHARLES AWITI……..……..……..…1ST PLAINTIFF

KEVIN KAHIRO MUNENE…….....…….……..2ND PLAINTIFF

LAVENE ARIKO ESIABA…….....…….3RD PLAINTIFF

ERIC OMONDI ANGULA…….…….....….4TH PLAINTIFF

INNOCENT KELVIN OWINO…….....……5TH PLAINTIFF

JAMES MUOKI WAMBUA…….....……..…..6TH PLAINTIFF

LUCY WANJIKU NDIKO……..…….....…….7TH PLAINTIFF

ERIC KIHORO GITERE…….…….....……..8TH PLAINTIFF

JAME MOGO…….…….....…..……9TH PLAINTIFF

JAMES NGUNJE KARIUKI…….....….10TH PLAINTIFF

SAMUEL KIBOR CHEMISTO…….....……..11TH PLAINTIFF

ISAACK MARTIN…….…….....…….12TH PLAINTIFF

VICTORIA ROTICH…….....……..…13TH PLAINTIFF

STANLEY MICHIEKA…….....…..…..14TH PLAINTIFF

EDWARD NYAANGA…….…….……..….15TH PLAINTIFF

RICHARD MICHIEKA…….……..……...…….16TH PLAINTIFF

SOLOMON NYAANGA……...…….....……..….17TH PLAINTIFF

JOEL MICHIEKA…….....…….18TH PLAINTIFF

JAN TEYA…….…….....……..19TH PLAINTIFF

FRANCIS MACHARIA…….…….……20TH PLAINTIFF

CATHERINE MASILA……..…….21ST PLAINTIFF

VERSUS

CHINA ROAD AND BRIDGES

CORPORATION KENYA LIMITED…….……...……...DEFENDANT

RULINGS

I have two (2) applications before me, one by the plaintiffs and the other by the defendant. The plaintiffs brought this suit on 6th October 2015 seeking among others, a declaration that the defendant's method of excavating rocks by way blasting within a radius of two (2) kilometers from the plaintiffs' residential houses situated on a parcel of land known as L.R No. 27253/14,Mavoko Municipality, Machakos County(hereinafter "the suit properties") is illegal, in breach of the law and an infringement of the plaintiffs' right to a safe and clean environment, a permanent injunction restraining the defendant from excavating or digging out hard rocks through blasting within a radius of two (2) kilometers from the suit properties, a mandatory injunction against the defendants to compensate the plaintiffs for the damage caused to the suit properties and, damages for nuisance.

In their plaint dated 5th October 2015, the plaintiffs stated as follows; they are proprietors of the suit properties which are located on Makumbi road, Mlolongo in Syokimau area approximately 150 meters from Mombasa-Nairobi Railway line. The suit properties comprise of 48 apartments. The defendant is engaged in the construction of Standard Gauge Railway ("SGR") from Mombasa to Nairobi along the old railway line which construction has now reached the neighbourhood of the suit properties. In the process of carrying out the construction of the said SGR, the defendant has employed the method of excavating rocks by way of blasting which exercise is being undertaken approximately 150 meters from the suit property. The rock blasting exercise has subjected the plaintiffs to excessive noise and vibration thereby resulting in annoyance and nuisance. The defendant was called upon to reduce the intensity of blasting of rocks in the area and/or to stop the blasting altogether but it refused to comply with the request. On 17th August 2015, the rock blasting was so intense that it caused massive vibrations and tremor that resulted in damage to the suit properties which damage was confirmed by the defendant. The defendant refused to stop the blasting exercise even after the said damage to the suit properties. The plaintiffs averred that the blasting activities being carried out by the defendant is illegal in that the same is being undertaken in breach of the law.

Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 5th October 2015 seeking an injunction to restrain the defendant from excavating or digging out hard rocks through blasting within a radius of two (2) kilometers from the suit properties pending the hearing and determination of this suit. The plaintiffs sought a further order that, the injunction sought if issued, be served upon the National Environmental Management Authority(NEMA), Ministry of Mining and Kenya Railways Corporation for implementation. The application was brought on the same grounds set out in the plaintiff's plaint the contents of which I have highlighted hereinabove at length. The plaintiffs have contended that the blasting of rocks near the suit properties by the defendant has caused extensive damage to the suit properties. The plaintiffs have contended that the defendant is carrying out the said rock blasting exercise within a radius of two (2) kilometers from human settlement contrary to Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) Control Regulations 2009. The plaintiffs have contended that the said activity is being carried out by the defendant without the necessary permits and licenses from the Ministry of Mining and NEMA. The plaintiffs have contended that their right to have quiet possession of the suit properties and safe and clean environment has been infringed by the defendant.

The application was supported by the affidavit of the 1stplaintiff, Charles Awiti sworn on 5th October

2015 in which he reiterated the contents of the plaint which I have set out above. The plaintiff's application came up for hearing exparte under certificate of urgency before Gacheru J. on 7th October 2015 when the same was certified as urgent and interim injunction granted on a temporary basis pending the hearing of the application inter partes on 21st October 2015.

The defendant entered appearance and filed a statement of defence on 16th October 2015 in which it denied the plaintiff's claim. The defendant admitted that it is constructing the Mombasa – Nairobi SGR and that it is engaged in rock blasting in the neighbourhood of the suit properties. The defendant averred that the blasting exercise was necessitated by the existence of a very hard bottom rock in the area which defied all other available method of excavation. The defendant averred that the blasting exercise has been carried out cautiously under close supervision of professionals so as to minimize possible adverse effects to the neighbouring properties and the environment in general. The defendant averred that prior to commencing the said blasting exercise, it obtained all relevant licenses and permits from NEMA and the Ministry of Mining. The defendant averred that it also engaged the services of certified professionals to undertake the exercise. The defendant denied that the blasting exercise caused excessive noise, vibration and damage to the suit properties. The defendant contended that some of the cracks on the walls of the suit properties existed even before the rock blasting exercise commenced. The defendant contended that it had committed itself to repairing any damage caused to any premises as a result of the said rock blasting exercise. The defendant maintained that the blasting exercise is being carried out in a controlled, tolerable and reasonable manner and that the issue could have been resolved amicably without resorting to court. The defendant contended that the construction of the SGR is divided into sections which are interdependent and that any delay in one section would impact on the other sections negatively. In its replying affidavit in opposition to the plaintiff's application which was sworn by Wang Ming Jun on 16th October 2015, the defendant reiterated the contents of its defence.

Together with its statement of defence and replying affidavit to the plaintiff's application, the defendant brought a Notice of Motion application dated 18th November 2015 seeking orders that the exparte injunction that was granted to the plaintiffs **"restraining the defendant from continuing with construction works – Nairobi Standard Gauge Railway(SGR) otherwise identified as DK 463 + 000 to DK 464 + 640 which is in the neighbourhood of Lynwood Apartments be discharged, vacated, varied or set aside."** The defendant sought a further order that an independent structural engineer be appointed by the Institution of Engineers of Kenya to expeditiously carry out structural audit of all the flats in Lynwood Apartments where the suit properties are situated to ascertain if any structural damage has been caused to the premises by the defendants previous rock blasting activities.

The defendant's application was brought on the grounds that were set out on the face thereof and on the supporting affidavit sworn by one Benson Masavo on 18th November 2015. The application was brought on the grounds that the plaintiffs herein moved the court and obtained exparte orders on 7th October 2015 stopping the blasting of stones which is necessary in the area where the construction of Mombasa – Nairobi SGR is taking place on the ground that the said blasting of rocks is causing damage to their properties. That defendant contended that the plaintiffs stand to suffer no irreparable damage because the damage to the suit properties if any is quantifiable and can be compensated. The defendant contended that the injunction granted to the plaintiffs has completely stalled the works which were being undertaken by the defendant and in respect to which time is of essence. The defendant contended that the plaintiffs have declined to pursue an out of court settlement of the matter because of the said interim injunction which they are enjoying. The defendant contended that the plaintiffs had earlier agreed that an independent structural engineer be appointed at the cost of the defendant to carryout structural audit of the suit properties to ascertain if there has been any structural damage caused to the same by the defendant's rock blasting activities after which the modalities for the repairs of any damage detected could be discussed and agreed upon. The defendant averred that the plaintiff's changed their minds on this agreement upon obtaining the injunction order sought to be set aside. The defendant contended that it is incurring a loss of Kshs.1,000,000/= daily on account of idle labour and penalties due to the existence of the injunction aforesaid. The defendant contended that the SGR is a national project and that the benefit of the project to the country should outweigh private interests of the plaintiffs.The 1st plaintiff swore a further affidavit on 21st October 2015 in response to Wang Ming Jun's replying affidavit sworn on 16th

October 2015.

The defendant's application dated 18th November 2015 was opposed by the plaintiffs through a replying affidavit sworn by the 8th Plaintiff, Eric KihoroGitere on 25th November 2015. In his affidavit, the 8th Plaintiff stated that the interim exparte injunction that was granted in favour of the plaintiffs herein on 7thOctober 2015 was validly issued. The 8th Plaintiff admitted that the plaintiffs had agreed to an out of court negotiations to resolve the dispute herein amicably. He contended however that the negotiations were on a without prejudice basis and that no settlement was reached. The 8th Plaintiff disowned the minutes of the meeting that was held on 27th October 2015 by the parties annexed to the affidavit in support of the defendant's application as not reflecting the true deliberations by the parties. The 8thplaintiff contended that the plaintiffs did not agree that the Institution of Engineers shall appoint an independent structural engineer to carry out structural audit of the plaintiffs buildings since the plaintiffs had already engaged their own engineer to do the audit. The 8thplaintiff contended that nothing had changed since the order sought to be set aside was made and as such the defendant's application has no basis. The 8thplaintiff added in conclusion that the orders issued by the court on 7th November 2015 did not stop the defendant from carrying out construction of the SGR. He contended that the order sought to be set aside is nonexistent.

On 30th November 2015, the Court ordered that the plaintiff's and the defendant's applications be heard together by way of written submissions. The parties filed their respective submissions and the same are on record. When the matter came up for mention on 20th January 2016, the plaintiff's advocate Mr. Chenge was allowed at his request to highlight the plaintiffs submissions. Mr. Gisemba who appeared for the defendant informed the court that the defendant did not wish to highlight its submissions.

I have considered the two applications before me, the submissions by the advocates for the parties and the authorities which were cited in support thereof. I will consider the two application one after the other starting with the plaintiffs' application which was first in time and also due to the fact that the determination of that application will have a bearing on the outcome of the defendant's application. The plaintiff's Notice of Motion dated 5th October 2015 seeks principally a temporary injunction against the defendant pending the hearing and determination of this suit. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was held in the case of **Giellavs. Cassman Brown and Co. Ltd (1973) E.A 358,** an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and the 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. If the court is in doubt as to the above, it will decide the application on a balance of convenience. In the case of, **Mraovs. First American Bank of Kenya Ltd. & 2 Others [2005] KLR 123,**a prima facie case was defined as follows:-

> **"a prima facie case in civil application includes but is not confined to "a genuine and arguable case". It is a case which on the material presented the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

In the,**East African Court of Justice at Arusha First Instance Division, application No. 5 of 2013, Venant Masenge vs. The Attorney General Burundi,**which concerned interlocutory injunction, the court cited with approval,**Halsbury's laws of England, Volume II (2009), 5th Edition paragraph 385** at which the authors have stated as follows:

> **"On an application for an interlocutory injunction the court must be satisfied that there is a serious question to be tried. The material available to court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial. The former requirement that the claimant should establish a strong prima facie case for a permanent injunction before the court would grant an interim injunction has been removed."**

The plaintiffs' complaint in this suit is that the defendant is blasting rocks near the suit properties and that the activity is not only a source of nuisance due to the noise and vibrations emanating therefrom but is also a danger to the suit properties. The plaintiffs have contended that as a result of the vibrations arising from rock blasting by the defendant, the suit properties have started developing cracks thereby compromising their structural integrity. The plaintiffs have contended that the activities by the defendant complained of are illegal in that rock blasting is not supposed to be carried out within a radius of two (2) kilometers from human settlement. The plaintiffs have also contended that the defendant has not obtained the requisite licenses from the relevant authorities to engage in rock blasting in the area.

In response to the plaintiffs' application, the defendant has contended that its activities complained of are legal and that it has obtained all requisite consents and permits to carry out the same. The defendant has contended that the noise and vibrations emanating from the said rock blasting exercise is within reasonable and permissible levels. While not denying that some damage may have been caused to the suit properties, the defendant has contended that some damage presented by the plaintiffs existed prior to the commencement of the rock blasting exercise and that for any damage caused by it, it is ready and willing to make good the same by paying damages or carrying out repairs to the satisfaction of the plaintiffs. The defendant has contended further that public interest to be served in the expeditious completion of the SGR should supersede the plaintiffs' private interest.

It is not disputed that the defendant is blasting rocks near the suit properties. What is disputed is whether the rock blasting exercise has caused damage to the suit properties and whether the same is being carried out legally. The plaintiffs have placed evidence in the form of photographs before court to show the damage that is said to have been caused by the vibrations arising from the defendant's rock blasting activities. The photographs show cracks at various points on the walls of the suit properties. The defendant has not completely denied that these cracks have been caused by the vibrations from rock blasting. In paragraph 13 of the replying affidavit sworn by Wang Ming Jun on 16th October 2015, the defendant contended that "**some of the cracks in the premises complained of existed even before the blasting started…..**" This shows that there is an admission that at least some of the cracks may have been caused by the vibrations arising from the defendant's rock blasting activities. This to me is not surprising. From the material on record, there is no doubt that the defendant had expected some damage to occur to the properties neighbouring the blasting area. The defendant has annexed to its replying affidavit what it has claimed to be assessments of the condition of the buildings near the blasting area before the blasting commenced. There was in my view no need to carry out this assessment if no damage was expected to arise from the blasting exercise. In the observations and recommendations made in their report following the said assessment, the defendant's consultants stated among others that:-

> **"There shall be need to engage a structural engineer to assess and/or ascertain the damage to the houses structurally (at post blasting stage) and recommend the best approach for repairs which shall complement our quantity surveying compensation approach."**

There is also a high likelihood that the damage to the suit properties were caused by vibrations because, from the vibration reports annexed to the defendant's replying affidavit, in some occasions, the intensity of the vibrations were in excess of the 0.5 centimeters recommended under Regulations 14 (3) of the Environmental Management and Co-ordination (Noise and Excessive vibration pollution control) Regulations 2009. It appears also that the defendant did not obtain license to carry out excessive vibrations. I am in agreement with the defendant that it did obtain most of the licenses and permits necessary to carry out the blasting of rocks. I do not think however that the said licenses or permits authorized it to cause damage to properties belonging to third parties. I am also not in doubt that the defendant is capable of making good any damage that it has or may cause to the suit properties either by carrying out repairs or paying damages. The question that I have to ask is whether the defendant should be allowed to damage the plaintiffs' properties because it can pay for the damage? I don't think so. The defendant also brought in the issue of public interest. In its submissions, the defendant has contended that the injunction sought if granted would violate the interests of the people of Kenya who are to benefit from the SGR. I have perused the case of **Symon Gatutu Kimamo and 587 others vs. East African Portland Cement Co. Ltd (2011) eKLR** which was cited by the defendant in support of its public interest submission. I am unable to see how this case supports the defendant's position herein. The

plaintiffs have a right to clean and healthy environment. The plaintiffs also have a right to own property. These are constitutional rights enshrined in the bill of rights. These rights can only be limited by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. See Article 24 of the Constitution. The defendant has not indicated under what law the plaintiffs' rights to clean and healthy environment provided for under Article 42 of the constitution and right to acquire and own property under Article 40 of the Constitution can be limited in the public interest in the circumstances of this case. In any event, I do not think that it is in the public interest for the defendant to make excessive noise, cause illegal vibrations and damage private property.

I am satisfied from what I have stated above that the plaintiffs have established a prima facie case against the defendant. I am also satisfied that the damage to the Plaintiffs cannot be compensated in damages. I don't think that the inconvenience and discomfort caused by excessive vibrations and the anxiety caused by the cracking of walls can be compensated by an award of damages. That being my view of the matters at hand, I am satisfied that the plaintiffs have met the conditions for granting temporary injunction.

The disposal of that application takes me to the defendant's application dated 18th November 2015. In view of what I have stated above with regard to the plaintiffs' application for injunction, I find no merit in the defendant's application. Having found that the plaintiffs are entitled to a temporary injunction and should have the ex parte injunction granted herein on 7th October 2015 confirmed, there is no basis upon which I can again order the said ex parte injunction to be discharged. In addition to the prayer for injunction, the defendant had also sought an order that an independent structural engineer be appointed to carry out structural audit of the suit properties to ascertain if any structural damage has been caused to the premises as a result of its blasting activities. Again, I find no merit in this prayer. I don't see why this court should force the plaintiffs to accept an independent structural engineer to carry out structural audit of the suit properties if they are satisfied with the audit which has been carried out by their own structural engineer.

In the final analysis and for the reasons given above, I would allow which I hereby do, the plaintiffs' application dated 5th October 2015 in terms of prayer 3 thereof. The defendant's applications dated 18th November 2015 is found to be without merit and the same is accordingly dismissed. The plaintiffs shall have the costs of both applications.

Dated and Delivered at Nairobi this 20th day of May, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Chenge for the Plaintiffs

N/A for the Defendant

Kajuju Court Assistant