



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 228 OF 2016

PATRICK KAMOTHO GITHINJI

GEORGE BRAUN MURGEN

ESTHER WANJIRU GICHUKI

SOLOMON KIPKEMBOI LIMO

MUREITHI MAINA GACHANGI

(suing for and on behalf of aggrieved residents of Muthurwa

**Estate within Nairobi County.....PETITIONERS/APPLICANTS
VERSUS**

RESJOS ENTERPRISES LTD.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....3RD RESPONDENT

MINISTRY OF TRANSPORT & INFRASTRUCTURE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

What is before me is the petitioners' application brought by way of Notice of Motion dated 4th March 2016 seeking an order of injunction to restrain the respondents from continuing with any further construction, excavation or any related works on Muthurwa Jogoo Road pending the hearing and determination of this petition. The petitioners have also sought orders that the Officer Commanding Kamukunji Police Station do ensure compliance with the order sought if granted.

The application is supported by an affidavit sworn by the 1st Petitioner, Patrick Kamotho Githinji sworn on 4th March 2016 wherein he has contended that the other petitioners and he are residents of Muthurwa Estate situated within Nairobi City County while the 1st respondent has been contracted by the 2nd, 3rd, 4th and 5th respondents to undertake the rehabilitation of access road to Muthurwa Market. The 1st respondent has stated that the construction of the said road commenced on or about 12th February 2016 and on 23rd February 2016, the respondents excavated the construction site in the process of which trees

which had been in existence in the area for more than 85 years and which provided shade and fresh air to Muthurwa residents were cut down. The 1st respondent has stated that on 29th February 2016, a pupil of St. Peters Cleaver Primary School was fatally hit by a speeding vehicle on a road diversion that has been put in place by the respondents for the purposes of the said project. The 1st respondent has stated that the construction works on the said road are being undertaken irregularly since no environmental impact assessment licence has been issued by the National Environment Management Authority (“NEMA”) in respect thereof and that provisions of the Environmental Management and Co-ordination Act, 1999 (“EMCA”) relating to public participation in a project of that nature have not been complied with. The 1st respondent has stated that the construction of the said road has adversely affected the area residents owing to the noise and air pollution caused by speeding vehicles. The 1st respondent has stated that the residents of Muthurwa Estate have had to contend with cases of asthma, cough and, ear, nose and throat ailments arising from the respondents’ said project.

The application was opposed by the 2nd, 4th and 5th respondents through a replying affidavit sworn on 11th April 2016 by Engineer Andrew Amayi Sirkoi, the regional manager of the 2nd respondent, Kenya Urban Roads Authority. In his affidavit, Mr. Sirkoi has set out the history of the Muthurwa road project and how it had progressed as at the time the present petition was filed. He has stated that the project was intended to rehabilitate the access road to Muthurwa Market and the bus terminus in the area following constant complaints by Muthurwa residents over the deterioration of the said road and that the project was estimated to cost Kshs 107,554,140/-.

He has stated that the project is at an advanced stage with 50% of the physical works already completed. He has stated that the respondents are not constructing a new road but are rehabilitating an already existing road and as such tree cutting complained of by the petitioners has been minimized. He has stated that the only trees which are being cut are those which have encroached on the road area. He has stated that the respondents intend to plant more trees after the completion of the project as part of the environmental beautification.

Mr.Sirkoi has stated further that in the course of undertaking the project, it became necessary to create a road diversion to control the traffic flow and that safety measures were put in place to prevent accidents on the diversion. These included designation of staff to regulate traffic, provision of traffic safety cones as well as provision of adequate and visible diversion signs. He has stated that the death of the minor mentioned in the petitioners’ affidavit in support of the application herein has been wrongly attributed to the road construction works. He has stated that there is no connection between the said road diversion and the speeding vehicles. He has stated that contrary to the petitioners’ claim that the respondents have not undertaken an environmental impact assessment study on the project, the study had been done and the residents of Muthurwa were involved in the process. He has stated that there were a number of public awareness meetings at which the area residents were informed of the nature of the project, the project timelines, likely positive and adverse effects of the project and mitigating factors that were to be employed to address the adverse impacts of the project. He has annexed a copy of the Environmental and Social Impact Assessment Project Study Report which he has stated has already submitted to NEMA. He has stated that the respondents have developed an environmental management plan for the project and that the same is being implemented by the 1st respondent. He has stated that there is no evidence that the alleged ailments being suffered by the residents of Muthurwa Estate are as a result of the road project in question.

Mr.Sirkoi has stated that the rehabilitation works on the Muthurwa road is for public good and as such the same should take precedence over petitioner’s private interests. He has stated that stopping the project which is 50% complete would have far reaching negative effects on the movement of people and goods in the area. It will also lead to the delay in the execution of the project which would result in unnecessary costs and penalties beyond the project’s budget allocation. He has stated that the additional costs would have to be met by the tax payers.

The application came up for hearing on 12th April 2016 when the 1st petitioner who appeared in person and Mr. Githinji Counsel for the respondents made oral submissions. The 1st petitioner submitted that the

respondents had created a road diversion through Muthurwa Estate which was a danger to the residents and that several people had been hit by vehicles on the said diversion. He submitted further that the said road diversion has made the area very dusty and this has affected the health of the residents.

The 1st petitioner submitted that those who were consulted over the road project were from Muthurwa Market. He denied that the residents of Muthurwa Estate who are directly affected by the project were consulted during the Environmental and Social Impact Assessment Study. The 1st petitioner submitted further that the questionnaires through which the respondents claim to have sought the views of the public in relation to the project were sent out after the filing of this petition. The 1st petitioner submitted that there are no speed bumps to slow down vehicles on the road diversion and that water is not being sprinkled every two hours to arrest the dust emanating from the project area. The 1st respondent submitted further that the road project is being undertaken without Environmental Impact Assessment Licence from NEMA.

In response to the submission by the 1st petitioner, Mr. Githinji advocate for the 2nd, 4th and 5th respondents submitted that environmental impact assessment had been done in respect of the road project in question and that the respondents had duly complied with the provisions of the Environmental Management and Co-ordination Act, 1999 (EMCA). He submitted that the said road project which would cost the tax payer over Kshs 100 million would benefit the area residents in several ways. Mr. Githinji submitted that most of the issues raised by the petitioners have been adequately addressed. Counsel submitted that the location of the project is 30m away from the nearest occupied buildings and as such the noise and vibrations complained of are within acceptable limits.

Mr. Githinji submitted that the project was supposed to take 4 months and that the respondents had engaged a contractor who was on site and that 50% of the project had been completed. Counsel contended that the orders sought if granted would result in adverse cost consequences to be borne by the government and the public at large. He submitted that it is in the public interest for the project to be allowed to proceed to completion. Counsel submitted that the petitioners had not shown that they were tenants or residents of Muthurwa and as such, they had failed to establish a prima facie case.

On the issue of public participation, Mr. Githinji referred the court to the minutes of the meetings which are said to have been held between the 2nd and 4th respondents and the residents of Muthurwa which are annexed to the replying affidavit sworn by Sirkoi in opposition to the application herein. Counsel submitted that the public also expressed their views with regard to the project through questionnaires. Mr. Githinji submitted that the balance of convenience tilts in favour of the respondents since the project is for the benefit of the public.

I have considered the petitioner's application together with affidavit filed in support thereof. I have also considered the replying affidavit by the 2nd, 4th and 5th respondents in opposition to the application. Finally, I have considered the submissions that were made before me by the 1st petitioner and the counsel for the 2nd, 4th and 5th respondents. The petitioners have brought this petition pursuant to the provisions of Articles 10, 22, 23, 42 and 70 of the Constitution for the enforcement of their right to clean and healthy environment. The present application has been brought under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter "the rules"). Rule 23 of the said rules gives the court power to issue conservatory or interim orders pending the hearing and determination of the petition. The application before me is seeking conservatory orders. What I need to determine is whether the petitioners have satisfied the conditions for granting such orders. As I stated in the case of **George Odera vs. Lake Victoria Environment Management Programme & others [2015] eKLR**, it is now fairly settled that, an applicant for a conservatory or interim order under rule 23 of the rules must demonstrate that:-

(i) he has a prima facie case.

(ii) unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution.

(iii) it would be in the public interest to grant the order.

In the Supreme Court case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Petition No. 2 of 2014[2014] eKLR**, the court stated that:-

“Conservatory orders” 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 injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during pendency of a case; or “high probability of success” in the applicant’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.”

The petitioners’ complaint is that their right to clean and healthy environment has been violated by the respondents. The petitioners have contended that the respondents have commenced the construction of a road next to their residential premises and in the process created a road diversion which passes through the said premises. The petitioners have contended that they were not consulted before the commencement of the said project and that the project is being carried out without environmental impact assessment (EIA) having been done and EIA licence issued for the same. The petitioners have contended that the project has subjected them to air and noise pollution. The petitioners have claimed that as a result of the said pollution, they have developed, respiratory diseases, eye, nose and ear ailments. The petitioners have also claimed that the said project has exposed them to danger more particularly the road diversion. The petitioners have given an instance where a school pupil was knocked down by a speeding motor vehicle on the said road diversion. The petitioners have contended that the respondents have not erected speed bumps on the said road diversion and that the contractor is not pouring water on the said road to control dust. The petitioners have also accused the respondents of destroying the environment by cutting down trees which have existed in the area for several years. The petitioners have annexed photographs showing the respondents activities complained of.

As I have stated earlier in this ruling, the 1st and 3rd respondents did not respond to the application. The 2nd, 4th and 5th respondents in their response to the application cited public benefits that will accrue to the residents of Muthurwa once the project was completed. The respondents have contended that there was full public participation before the commencement of the project and that environmental impact assessment was done in respect of the project. The respondents annexed to their affidavit in opposition to the application, copies of the environmental impact assessment study report and the minutes of the meetings which are said to have been held between the respondents and the residents of Muthurwa to discuss the project. The respondents have also exhibited the questionnaires which they claim to have used to get the views of the area residents on the project. They have denied any responsibility for the accidents which have occurred on the road diversion which has been created as part of the project and the ailments said to have afflicted the respondents as a result of the said project.

Article 42 of the Constitution of Kenya guarantees every person a right to a clean and healthy environment. Article 70 (1) of the Constitution gives a person who alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution has been or is likely to be denied, violated, infringed or threatened a right to apply to court for redress. The petitioners have contended as I have stated above that their right to clean and healthy environment has been violated by the respondents. There is no dispute that the 1st, 2nd, 4th and 5th respondents are engaged in a project for the rehabilitation of access road to Muthurwa Market and bus terminus. There is no dispute that the scale of the project is such that the implementation thereof was bound to have an impact both positive and negative on the surrounding areas. The petitioners have contended that they have been affected adversely by the said project. The petitioners are not opposed to the project as it no doubt will benefit the local community and the public at large. The petitioners’ complaint is about the manner in which the project is being undertaken. The petitioners’ have contended that the project is being undertaken illegally without proper environmental impact assessment having been undertaken for the purposes of assessing the negative impact the project would have on its surroundings and possible interventions that can be put in

place to mitigate those effects. The petitioners' have accused the respondents of creating a road diversion through their residences thereby subjecting them to noise and air pollution leave a lone endangering their lives. The respondents have been accused of failing to erect speed bumps to slow down vehicles on the said road diversion. They have also been accused of failing to take any action to control the dust from the project area.

Under Section 58 and Second Schedule of EMCA and Environmental (Impact Assessment and Audit) Regulations, 2013, the road project herein was required to undergo environmental impact assessment and should not have commenced until an Environmental Impact Assessment Licence was issued by NEMA. From the material before me, there is no doubt that the respondents were aware of this legal requirement. There is also no doubt that the respondents commenced the implementation of the project before obtaining the necessary licence from NEMA. The petitioners brought the petition herein on 8th March 2016 complaining about violation of their right to clean and healthy environment. The petitioners placed before the court material showing that the implementation of the project was ongoing. The Environmental and Social Impact Assessment Project Report which has been submitted to court by the respondents is dated 31st March 2016 and was submitted to NEMA on the same day. I have noted from the said report that much of what is said to have been part of the public participation process in the preparation of the said report was conducted after the filing of this suit and while the execution of the project was going on. There is no evidence that the respondents obtained Environmental Impact Assessment Licence from NEMA following the submission of the said report. No such licence has been exhibited by the respondents. In the circumstances, I am in agreement with the submission by the petitioners that the respondents' road project is being undertaken in breach of the law and regulations which have been developed to protect and safeguard the environment. I am of the view that the Environmental Impact Assessment Study Report (hereafter "the study report") which has been placed before this court is of no significance until the same has been approved by NEMA. It is the duty of NEMA to satisfy itself that the mitigation measures put in place by a developer is adequate to deal with the possible adverse impacts of the project. It is also the duty of NEMA to ensure through post licensing audit that the mitigation measures are being undertaken by the developer. The study report has highlighted a number of negative impacts of the project such as, noise and air pollution, occupational and health risks, accident risks, destruction of vegetation and soil erosion. Several measures have been proposed in the report to mitigate against the said adverse impacts. In the absence of approval of the said study report by NEMA, the court is not in apposition to say whether the interventions which have been proposed by the respondents to deal with the negative impacts of the project in question are satisfactory.

The petitioners have complained of noise and air pollution. They have also complained of destruction of vegetation and accidents. All these have been acknowledged in the study report as likely impacts of the project. In the absence of any evidence that the mitigation measures proposed by the respondents have been approved by NEMA and that the project has been licensed, I am inclined to accept the petitioners' contention that the respondents are violating their right to clean and healthy environment. I am in agreement with the respondents that there is no scientific proof that the ailments allegedly being suffered by the Petitioners are as a direct consequence of the project. I am of the view however that in the circumstances of this case, it would be appropriate to apply the precautionary principle. The principle is also referred to as "*In dubio pro natura*" which means, if in doubt, favour nature. It provides that, in cases of doubt, matters should be resolved in a way most likely to favour the protection and conservation of the environment.

Due to the foregoing, I am satisfied that the petitioners have established a prima facie case against the respondents. The respondents have submitted that the public interest in the project far outweighs the petitioners' private interest in clean and healthy environment. I am unable to accept this submission. It is the duty of everyone to protect the environment. Clean and healthy environment is for the benefit of all humanity. It cannot therefore be termed as a private right. I am not satisfied that there is any public interest in the circumstances of this case that would justify limitation of the petitioners' right to clean and healthy environment.

For the foregoing reasons, it is my finding that the petitioners' application dated 4th March, 2016 has merit. The same is allowed on the following terms;

