



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.964 OF 2014

DR. J.S MUIRU..... 1ST PLAINTIFF
MR. GEORGE RURIA..... 2ND PLAINTIFF
MR. JOHN KAMAU MWANGI3RD PLAINTIFF

**(As Chairman, Secretary and Treasurer respectively of
TIGONI RESIDENTS ASSOCIATION)**

VERSUS

TIGONI TREASURERS LIMITED.....1ST DEFENDANT
MR. ARTHUR NAMU2ND DEFENDANT
MRS. GETRUDE M. NAMU3RD DEFENDANT

RULING

The plaintiff's Notice of Motion application dated 23rd July 2014 brought under Order 40 Rules 1 and 2 of the civil Procedure Rules, Articles 42, 62 and 69 of the constitution and section 111 of the Environment Management and Co-ordination Act 2003 is before the court for determination. The application inter alia seeks an order of injunction in the terms that:-

“the Defendants by themselves, their agents and/or servants be restrained from constructing and/or developing multi-dwelling houses and/or Maisonettes on land parcel.R.NO.7660/72 Ithanji Road Tigoni pending the hearing and determination of this suit”.

The application is premised on the grounds that appear on the face of the application and the supporting and supplementary affidavits sworn by **Dr. J.S. Muriu**, Chairman of Tigoni Residents Association on 23rd July 2014, 22nd August 2014 and 25th September 2014 respectively.

The plaintiffs set out in the application the following grounds in support of the application.

1. That the proposed development is contrary to the grant that set out the tenure under which the land is held.
2. That the proposed development is contrary to development legal regime upon which such development must be approved namely:-
 - i. The Physical Planning Act Cap 286.
 - ii. The Environment Management and Co-ordination Act NO. 8 of 1999.
3. That the proposed development is contrary to the development regulations of Tigoni Residents Association to which the proprietors of land parcel **L.R. 7660/72** subscribe to.
4. That the proposed developments will have far reaching and fundamental adverse irreparable Environmental and societal effects.
5. That the proposed development lacked stakeholder participation and consultation and is objected to by the majority of the membership of Tigoni Residents Association.
6. That in the recent past the 2nd and 3rd Respondents have enjoined themselves in opposition to similar developments on neighbouring land parcels.

The supporting affidavit and the further affidavits sworn by **Dr. J.S. Muriu** the 1st Plaintiff on behalf of the plaintiffs sets out and outlines the facts and annexes the various exhibits the plaintiffs rely on in support of the application for injunction against the Defendants. In brief the plaintiffs state they are residents of Ithanji Road, Tigoni Area in Kiambu County and are members of Tigoni Residents Association before they transferred the suit property to the 1st Defendant. The 2nd and 3rd Defendants who are also directors of the 1st Defendant are as well members of Tigoni Residents Association. The plaintiffs complainant as per the facts contained in the filed affidavits are that the Defendants have conceived and plan to commence a housing development project on plot NO.7660/72 which is within the Tigoni Resident's Association area where they intend to build 27 maisonettes on the 6 acre property. The plaintiffs aver that the proposed housing development is in contravention of the user permitted under the mother title out of which plot NO. 7660/72 was excised. The plaintiffs state that the permitted user was **"Not more than one dwelling house... shall be erected on any sub-division"**. **Plot NO. 7660/72** was one such subdivision and the plaintiffs contend that the Defendants could not properly obtain change of user from single dwelling to multiple dwelling from the Limuru sub-county without involving the Tigoni Resident's Association.

The plaintiffs aver that the Limuru sub-county did not comply with the provisions of the Physical Planning Act Cap 286 Laws of Kenya in making any approvals for change of user as there was no publication of the application for change of user and specifically the plaintiffs state there was no public participation and/or consultations before the approval for change of user was given. The Tigoni Residents Association, the plaintiffs argue, are key stakeholders as they stand to be directly impacted upon and affected by the implementation of the housing development. The plaintiff's aver that in case the project is allowed to proceed as conceived by the Defendants there will be adverse effects as outlined under paragraph 9 of the plaintiffs supporting affidavit.

The Plaintiffs further aver that National Environment Management Authority (NEMA) gave its approval to the project without ensuring the members of the public had participated in the process during the preparation of the Environmental Impact Assessment (EIA) Report and failed to carry out any public hearings as required under the Environment Management Co-ordination Act (EMCA) and the Regulations made thereunder. The members of the Tigoni Residents Association held a meeting with the Defendant and a representative of NEMA on 27th June 2014 at the Limuru Golf Club at which meeting the plaintiffs voiced their grievances and objections to the project and consequent thereto formally wrote to NEMA outlining their objections but rather than afford the defendants a hearing on their objections **NEMA** went ahead to issue their license to the Defendants on 15th July 2014.

The plaintiffs contend that the Defendants and in particular the 2nd & 3rd Defendants being members of Tigoni Resident's Association and the 2nd Defendant having previously (2013) served as chairman of the Association's Environment Committee were well aware of the constitution whose objectives included

conservation and preservation of the Environment and control of developments within the area. The objectives of the Tigoni Residents Association are set out under clause 4 of its constitution which provides as follows:-

4. objectives of the Association

To enhance the quality of life of the community by taking or influencing such actions to improve the environment within the boundaries set out above. To this end, the Association shall devote itself towards the following, in co-operation with Local Authorities, or responsible Government bodies, or private enterprise, or all together as the committee may see fit.

- 1. To liaise with responsible Authorities and/or private enterprise to ensure the preservation, cleaning and restoration of the environment.**
- 2. To liaise with responsible Authorities and/or private enterprise to ensure that all roads within the area defined above are maintained in good and proper condition.**
- 3. To liaise with responsible Authorities and/or private enterprise to ensure that adequate and proper security is maintained within the community.**
- 4. To liaise with Authorities and/or private enterprise to ensure that development within the community is done with all due regard for the welfare of the community, that the community is fully consulted prior to any new developments, that land usage is not changed without due process of consultation and law being followed, and that the essential nature and character of the area is not disrupted or altered to the detriment of the community.**

It is the plaintiffs contention that the Defendants were obligated to abide by the constitution of the Tigoni Residents Association in seeking and processing any approvals for change of user and/or development permission which they did not do and consequently any approvals and/or consents they may have procured and/or obtained would be ineffectual. The plaintiffs further contend the Defendants acts ran counter to **Article 69** of the Constitution which among other things imposes duties and obligations in respect of the environment on the state which includes:-

- i. Ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources,
- ii. Endeavouring to achieve and maintain a tree cover of at least ten percent of the land area of Kenya.
- iii. Encouragement of public participation in the management, protection and conservation of the environment,
- iv. Establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment,
- v. Elimination of process and activities that are likely to endanger the environment and natural resources for the benefit of the people of Kenya.

Article 69 (2) of the constitution provides thus:-

Every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

The plaintiffs aver that their right to a clean and healthy environment as guaranteed under Article 42 of the Constitution has been infringed by the acts of the Defendants and under Article 70 of the Constitution are entitled to seek redress from the court.

Article 42 of the Constitution provides:-

42. Every person has the right to a clean and healthy environment, which includes the right-

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and

(b) to have obligations relating to the environment fulfilled under Article 70.

The Defendants in response to the plaintiffs application filed three replying affidavits through one **Robert Masinde**, a director of the 1st Defendant, **Mr. Arthur Namu** the 2nd Defendant and **Mrs. Getrude M. Namu** the 3rd Defendant. All the replying affidavits were sworn on 14th August 2014 and filed in court on the same date. The Defendants state that the 1st Defendant is the registered proprietor of the suit property and aver that the application by the plaintiffs is premature, misconceived and bad in law in view of the fact that the Applicants have not complied with the procedural requirements necessary before the lodgment of the application. The 1st Defendant avers that it has obtained the appropriate consent to erect multi dwelling units on the suit property contrary to the averments by the plaintiffs.

The 1st Defendant asserts that it has pursuant to the provisions of the Physical Planning Act, Cap 286 of the Laws of Kenya obtained change of user from single dwelling unit to multi dwelling units from the relevant planning authorities permitting the implementation of the intended project. Letter of approval of change of user from Agricultural to Residential dated 10th April 2014 from District Lands Office, Kiambu to Limuru Sub county and marked “**Rm4**” and notification to approval for the project dated 28th April 2014 is annexed and marked “**Rm5**”. The Defendants thus contend they have complied with the conditions of the grant and they have obtained all the appropriate planning permission and consents and intend to abide and comply with the conditions attaching to the planning permission, change of user and consents/approvals given by the sub – county of Limuru.

The Defendants state that there was adequate stakeholder engagement and consultations and therefore denies the plaintiffs assertion that there was no public participation. The Defendants aver that an Environmental Impact Assessment study was conducted in accordance with the Environment Management and Co-ordination Act NO. **8 of 1999(EMCA)** by **Peman Consultants Limited** and that **NEMA** granted its approval after it was satisfied the Defendants project would have no adverse impact on the environment. It is the Defendants contention that the intended project is infact similar to other projects that have been done within the neighbourhood and is not out of character with other developments within the area. The Defendants argue that they have demonstrated compliance with all the necessary legal requirements and have obtained change of user and the development permission as required and as such the plaintiffs have no basis to object to the project at this stage and that in case they had any objections they ought to have raised their objections to the approving authorities before the approvals were given and that at any rate the plaintiffs ought to have followed the laid down process and procedure of appealing the determinations of the various authorities and not to come to court.

The Defendants position is that the plaintiffs are not properly before the court and that in case they had issues with the approval for change of user and development condition the plaintiffs should have pursued the appeal Procedure under the Physical Planning Act Cap 286 of the Laws of Kenya. As regards the environmental issues that the plaintiffs raise in the suit the Defendants aver these ought to have been referred to the **NEMA** Tribunal established under the EMCA Act for determination. The Defendants therefore contend to the extent that the plaintiffs did not exhaust the procedural requirements under the Physical Planning Act and the Environmental Management and Co-ordination Act (EMCA) the plaintiffs instant application and the suit are incompetent and that the High Court lacks the jurisdiction to deal with the matter as the plaintiffs have invoked the court’s original jurisdiction which it lacks in matters such as the plaintiffs have raised before it.

The Defendants have further argued that **Article 60** of the constitution accords every proprietor of land the right to lawfully exercise full right of ownership and the right to own property is guaranteed and thus the plaintiffs intervention is but an attempt to fetter and restrict the Defendants right of ownership and use of the subject land contrary to the security rights of ownership entrenched in the constitution. The Defendants contend that the plaintiffs have no basis to object to the project and that they merely wish to impose their own views on land planning and use which is unacceptable since there are the duly constituted institutions that are charged with those responsibilities and the Defendants have satisfied their requirements and obtained their sanction for the project. The Defendants in the premises aver that the plaintiffs cannot demonstrate they have a prima facie case with any probability of success and urge the

court to dismiss the plaintiffs application.

The parties have filed written submissions ventilating their respective positions. The plaintiffs filed their submission dated 27th August 2014 on the same date. The 1st Respondent filed its submissions on 29th August 2014. Having perused the plaintiffs application together with the affidavits sworn in support and in opposition and the parties written submissions the following issues stand out for determination:-

- i. Whether this court has jurisdiction to entertain the application.**
- ii. Whether the change of user and development permission granted to the 1st Defendant was in compliance with the law,**
- iii. Whether the plaintiffs have satisfied the conditions for grant of a temporary injunction to entitle them to the grant of an injunction.**

Jurisdiction of the Court.

The Defendants contend that the court lacks the jurisdiction to deal with the matter. The 1st Respondent submits that the Physical Planning Act, Cap 286 of the laws of Kenya lays down an elaborate process and procedure of handling and determining issues relating to approvals for developments and change of user. It is the 1st Defendants submission that the Physical Planning Act under sections 7 and 8 provides for the establishment of Physical Planning Liaison Committees with the National Physical Planning Liaison committee being at the apex and to which appeals from the Nairobi Physical Planning Liaison Committee, the District Physical Liaison Committees, and the Municipal Planning Liaison Committees lie. **Section 10(1) of the Physical Planning Act provides for the functions of National Physical Planning Liaison Committee which inter alia includes:-**

- a. Hearing and determining appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee,**
- b. Determining and resolving physical planning matters referred to it by any of the other liaison committees**

Section 10(2) of the Act provides for the functions of the other liaison committees and include:-

- i. To inquire into and determine complaints made against the Director in the exercise of his functions under the Act or local authorities in the exercise of local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act.**
- ii. To inquire into and determine conflicting claims made in respect of application for development permission.**
- iii. To determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land.**
- iv. To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act.**

The 1st Defendant submits that part V of the Physical Planning Act under sections 29 to 40 makes provisions for control of development by local authorities. Under the provisions it is a requirement that every person who wishes to carry out any development in any land within a local authority must seek and obtain the appropriate development, permission/approval before undertaking any development. It is the 1st defendant's submission that it sought and obtained the necessary approval as provided under the Physical Planning Act and the plaintiff lacks any basis to object and/or interfere with its proposed project. The 1st Defendant contends that the plaintiffs failed to challenge the approvals granted to the 1st Defendant as envisaged under the Physical Planning Act and would in the premises not be entitled to challenge the approvals given before this court without having exhausted the process and procedure of appeals under the Act.

The 1st Defendant in support of its position referred the court to this court's decision in the case of **Sanjay Solanki & 8 others –vs- Hirji Kanji Patel & 5 others (2013) eKLR** where the court held that where a party failed to exhaust the procedure set out under the Physical Planning Act to have any grievances arising from any approval or consent given for any development permission addressed/resolved as provided under the Act it would be premature for such a party to resort to court to challenge such approvals and that the court would lack the jurisdiction to entertain the suit as to do so would be to usurp the function roles of the organs set up under the provisions of the Act. The 1st Defendant also referred the court to **Lady Justice Nyamweya's** decision in the case of **Jeremiah Nyandusi Abuga & 17 others –vs- City Council of Nairobi (2013) eKLR** where the Judge observed that though section 38 of the Physical Planning Act requires appeals to be made to the liaison committee in the first instance that would not oust the original jurisdiction of the High Court granted by the Constitution under Article 165(3). **Nyamweya, J** however made reference to the court of Appeal decision in **Speaker of National Assembly –vs- Njenga Karume (2008) IKLR** where the court held that where there is clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed. The Judge having held that the plaintiffs in the case had not exhausted the available procedural mechanisms for the resolution of the dispute before moving the court proceeded to stay the application by the plaintiff and directed the status quo to be observed pending compliance with the procedures of appeal provided for under the Physical Planning Act.

The plaintiffs submission in regard to the issue of jurisdiction of the court is that under section 3 of the Environmental Management and Co-ordination Act (EMCA) they would be entitled to seek redress from the court where their right to a clean and healthy environment is under threat. The plaintiffs further rely on Article 42, 69 and 70 of the constitution to argue that they are properly entitled to seek redress from the court.

Section 3 EMCA provides in part:-

3(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to_

(a) prevent, stop or discontinue any act or omission deleterious to the environment.

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to environment,

(c) require that any ongoing activity be subjected to an environment audit in accordance with the provisions of this Act,

(d)-----

(e)-----

(5) in exercising the jurisdiction conferred upon it under subsection(3) the High Court shall be guided by the following principles of sustainable development-

(a) the principle of public participation in the development of policies, plans and process for the Management of the environment,

(b) -----

(c) -----

(d) the principles of intergenerational equity,

(e) the polluter-pays principle and

(f) the precautionary principle.

It is thus abundantly clear from the foregoing provisions that the jurisdiction of the High Court may be invoked in matters relating to the environment where there is a threat to the environment and under section 3(3) (4) a party seeking the protection of the environment need not show or establish that he has suffered loss or injury and only needs to demonstrate is that the action is not frivolous or abuse of the court process.

The plaintiffs in the present suit are members of a Resident's Association of the area the proposed project is located and their complaint is that the project as conceived will harm the environment as the Defendants want to do a multidensity housing project in an area which is exclusively low density. The plaintiffs/Residents complain that there was no or any adequate public participation before the project was given a green light. There being a registered Residents Association it would reasonably have been expected that the Association would have been actively involved before the project was approved. The members of the Association state that they only became aware of the project at the tail end when apparently the approvals that they now challenge had been given or were in the process of being issued without any input on the plaintiffs part.

The plaintiffs in particular fault the Environmental Impact Assessment study carried out by the Defendants and contend that the same was not conducted in accordance with Section 58 of EMCA and the regulations, guidelines and procedures issued under the Act.

Under section 2 of the Environmental (Impact Assessment and Audit) Regulations 2003 "**Environmental Impact Assessment study report**" means the report produced at the end of the environmental impact assessment study process under section 58 of the Act and regulation 11. Under the regulations public participation is pivotal in the approval of the project and during the conduct of the environmental impact assessment the public are expected to play a central and key role as their input ultimately informs the decision to be taken. Regulations 17, 21 and 22 highlight the role and participation of the public during the Environmentals Impact Assessment Study.

Regulation 17(1) provides-

17(1) during the process of conducting an environmental impact assessment study under these regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) in seeking the views of the public, after the approval of the project report by the Authority, the proponent shall_

(a) Publicise the project and its anticipated effects and benefits by-

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project,

(ii) publishing a notice of the proposed project for two consecutive weeks in a Newspaper that has a

nation wide circulation and,

(iii)-----

(b) Hold at least three public meetings with the affected parties and communities to explain the project and its effects and to receive their oral or written comments.

(c) Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meeting are convenient for the affected communities and the other concerned parties, and

(d)-----

From the material presented before the court there is no evidence to show that any public participation in the manner contemplated under Regulation 17 ever took place before the Environmental impact Assessment study was finalized. Equally there is no evidence that NEMA complied with the provisions of Regulation 21(1) that provides thus:-

21(1) The Authority shall within fourteen days of receiving the environmental impact assessment study report, invite the public to make oral or written comments on the report.

Under Regulation 21(2) **NEMA** is required to publish for two successive weeks in the Gazette and in a Newspaper with nation wide circulation a public notice once a week inviting the public to submit oral or written comments on the environmental impact assessment study on the project. Upon receipt of the comments **NEMA** as specified under sections 59 and 60 of the EMCA may hold public hearings in the manner set out under Regulation 22. In the instant case it does appear **NEMA** was virtually hands off as there is no evidence of what they did if at all they did anything after they received the Environmental Impact Assessment report. The only formal consultation that appears to have been held was on 27/6/2014 and which apparently was at the instigation of the plaintiffs after they got wind that the project had been approved. Although there is record that the plaintiffs raised their protestations to the proposed project at the said meeting there is no indication that their concerns were considered by **NEMA** who on 15th July 2014 proceeded to issue to the Defendants a **NEMA** license giving the proposed project a go ahead. Having regard to all the facts and circumstances and considering the submissions by the parties I am not able to hold that the **NEMA** licence in regard to the proposed project was indeed issued in compliance with the EMCA Act and the Regulations made thereunder. The complaint by the plaintiffs that there was no public participation before the **NEMA** licence was issued in my view is not without merit.

In the case of **Sanjay Solanki & 8 others –vs- Hirji Kanja Patel & 5 others (Supra)** where this court held that the High Court lacked the original jurisdiction to deal with grievances arising from approvals granted for development under the provisions of the Physical Planning Act the provisions of the Act had not been exhausted relating to appeals to the relevant liaison committees. The principal issue in that suit was the question of the grant of the development permission which the applicant's were challenging and the issue relating to environmental concerns was peripheral. Likewise in the case of **Jeremiah Nyanduse Abuga & 17 others –vs- City Council of Nairobi (supra) Nyamweya J**, was dealing with the question of development permission under the Physical Planning Act Cap 286 of Laws of Kenya. I hold the same view that where the issue is whether or not the development permission has been appropriately issued, it would be premature for a party to approach the court for redress if the process and procedure of appeals under the Physical Planning Act has not been exhausted.

However my view is different where the principal issue touches and relates to environment as in the present application. I have understood the applicants to say that they would have no problem and/or objection to the Defendants obtaining change of user and obtaining development permission as long as their environmental concerns are addressed. The plaintiffs state the magnitude of the project was not disclosed to them before the change of user and development permission was given and while they state they would not have had any objection to the Defendants developing single dwelling units in portions equivalent to one half acre they object to the proposed multidwelling units stated to be 27 (although only

24 have been approved) on the basis that such a project would compromise the environment in an adverse manner.

The constitution under articles 42, 69 and 70 has given special prominence to environmental matters and article 70 specifically allows any aggrieved party to apply to a court for redress. Under article 162 (2) (b) parliament was mandated to establish a court with the status of the High Court to hear and determine disputes relating to:-

“the environment and land use and occupation of and title to land”.

Parliament duly established the Environment and Land Court vide Act NO. 19 of 2011 and under section 13(a) the Environment and Land Court has jurisdiction to hear and determine disputes **“relating to environmental Planning and Protection, climate issues, land use planning-----“** The Constitution and the Environment Land Court Act make no mention of the National Environmental Tribunal established under section 125 of the Environmental Management and Co-ordination Act and in my view that means the court that has jurisdiction to deal with any environmental matters is the Environment and Land Court established pursuant to article 162 (2) (b) of the constitution notwithstanding that the NEMA Tribunal has jurisdiction to hear any matters referred to it under section 129 of EMCA.

Having regard to section 3 of the Environmental Management and Co-ordination Act, Article 162(2) (b) of the Constitution and Section 13 (a) of the Environment and Land Court Act, it is my view that this court has the jurisdiction to hear and determine matters touching on the environment such as the present one.

ii. **Change of user and development permission.**

The approval for change of user granted by the Limuru Sub-county on 28/4/2014 was from single dwelling to (Multifamily maisonnetts – comprehensive development) and the same was subject to among other conditions:

-undertaking a full Environment Impact Assessment study report and approval of the same before commencement of development.

The court in the consideration of the issue of jurisdiction above has reviewed the process through which an Environmental Impact Assessment study is subjected under EMCA and the Regulations made thereunder. My view is that the process through which the 1st Defendant obtained the NEMA Approval/License was flawed. I am not satisfied there was any or any adequate public participation as envisaged under the Act and the Regulations. Public participation is the single most critical requirement in an Environmental Impact Assessment study and without it the approval/license cannot stand. Thus it is my holding and finding that the **NEMA** license issued for the proposed project on 15th July 2014 was not in compliance with the law and I hereby set the same aside. The plaintiffs had a right to be heard and the public hearing forums would have provided an opportunity for them to be heard. It cannot be assumed that whatever they would have had to say at the public hearings could not have affected the decision by **NEMA**. The fact is that they were not accorded a hearing or an adequate opportunity to be heard and that vitiated the process. There was no publication of the project in the manner set out under the Regulations governing the conduct of the Environmental Impact Assessment Study and thus the Applicants never got the opportunity to lodge their objections. The plaintiffs being an organized group who specifically had a Residents Association with even a constitution which among other objectives provided for the preservation, cleaning and restoration of the environment and for consultation before any new developments were undertaken or land use changed, it should have been quite easy to consult and engage with the Association but on the material and information made available the Defendants do not appear to have been keen to engage with the Association directly. The exhibited responses to the questionnaire during the EIA study were completed by individuals of the public who upon getting to understand the full scope of the project have filed affidavits withdrawing and/or recanting their no objection comments.

iii. **Conditions for grant of temporary injunction.**

Having come to the conclusion that this court has jurisdiction to entertain the plaintiffs suit and having found that the plaintiffs were not accorded the appropriate opportunity to participate at any public hearings during the Environmental Impact Assessment Study, I am satisfied that the plaintiffs have established they have a prima facie case with a probability of success. The process of conducting the Environmental Impact Assessment study was flawed and therefore the **NEMA** License issued on 15th July 2014 approving the proposed project cannot be justified. The conditions and principles for the grant of interlocutory injunction are as enunciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** and an applicant is required to establish that:-

- i. He has a prima facie case with a probability of success.
- ii. That unless an injunction is granted damages would not be an adequate remedy and the applicant would suffer irreparable harm,
- iii. In case of doubt as regards the above two conditions the application is to be determined on a balance of convenience.

Although the said conditions/principles may not be applicable in environmental matters in a strict sense as they are applied in ordinary suits, an applicant must nonetheless demonstrate an arguable case that is not frivolous in environmental matters it may be difficult to determine the question of damages as the damage may not be easily ascertainable or even foreseeable. The fact being once there is damage to the environment, the damage is irreversible and thus the precautionary principle would be applicable where there are any threats to the environment to prevent environmental degradation. In environmental matters where development is concerned such as in the instant matter the court will be concerned with whether or not it is a “**sustainable development**” and whether or not it is a “**sustainable use**” as defined under section 2 of EMCA. These principles and concepts can only be adequately established if a credible Environmental Impact Assessment Study is undertaken in respect of the project. In the present matter, it is that Environmental Impact Assessment Study that the plaintiffs have a quarrel with owing to their non involvement in the study. The credibility of the Environmental Impact Assessment Study is put to question.

In the premises and having considered all the facts and circumstances of this matter I am persuaded the plaintiffs have made out a case for the grant of a conservatory order against the Defendants pending the carrying out of an Environmental Impact Assessment Study in which they are duly involved as interested parties. I accordingly grant and make the following orders:-

1. That the Defendants by themselves, their agents and/or servants be and/are hereby restrained from constructing and/or developing multi-dwelling houses and/or maisonettes on land parcel **L.R NO. 7660/72** Ithanji Road, Tigoni pending the hearing and determination of this suit and/or further orders of the court.
2. That the Environmental Impact Assessment (EIA) study report on the proposed Tigoni Treasures Development on plot 7660/72 Ithanji Road, Tigoni Kiambu County prepared by **Peman Consultants Ltd** and the **NEMA** Environmental Impact Assessment License issued on 15th July 2014 pursuant to the Environment Impact Assessment Study report is hereby set aside and a fresh Environmental Impact Assessment Study report on the proposed project is hereby ordered to be conducted involving the plaintiffs as interested parties.
3. The costs of the application shall be in the cause.

Ruling dated, signed and delivered at Nairobi this...**14th**day of...**November**.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

Mr. R.M. Mutiso.....For the Plaintiffs

Mr. Shimenga for Dr. Njiru..... For the Defendants