M'Rinjiru v National Land Commission & 3 others; Peter (Interested Party) (Environment & Land Petition E005 of 2024) [2024] KEELC 4833 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4833 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND PETITION E005 OF 2024

CK NZILI, J

JUNE 12, 2024

IN THE MATTER OF THE PROVISIONS OF THE CONSTITUTION OF KENYA 2010 ARTICLES 21, 22, 23, 42, 60, 69, 70 AND 71

AND

IN THE MATTER OF PROTECTION OF IMENTI FOREST IN THE COUNTY OF MERU AND ENFORCEMENT OF ENVIRONMENTAL RIGHTS

AND

IN THE MATTER OF SECTION 58 OF THE FOREST ACT 2005

BETWEEN

BETWEEN

AMOS THURANIRA M'RINJIRU ..... PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

HOSEA MUTEMBEI PETER ..... INTERESTED PARTY

RULING

1. Before the court are two applications dated 6.5.2024 and 21.5.2024. In the first application, the court is asked by the petitioner to grant a temporary order suspending any license or authorization by the respondents to establish a quarry and excavator of stones within Imenti forest in the county of Meru, pending the hearing and determination of this petition.

2. The grounds are contained on the face of the application and in a supporting affidavit of Amos Thuranira M'Rinjiru sworn on 6.5.2024. The petitioner avers that he is a resident of Meru County who discovered that there is an unlawful and illegal quarry established in the Imenti forest contrary to the law on environmental management of a forest and, in particular, violating Section 58 of the Forest Act 2005, Article 70 of *the Constitution* and the international conventions on the conservation of the environment, to which Kenya is a party.

3. The petitioner avers that they visited the forest and found the excavation taking place as per annexed photographs as A.T.M. "1". It is averred that upon investigation, the petitioner discovered that there was neither public participation for any authority under the law and *the Constitution* to issue a license for the quarrying in the forest, nor was there an approval from parliament by dint of Article 71 of *the Constitution*.

4. Similarly, the petitioner averred that Imenti forest is a government facility that required protection, and unless the orders sought were granted, his right to a clean and healthy environment under Article 42 of *the Constitution* of Kenya should be denied, violated, infringed, and threatened.

5. In addition, the petitioner averred that the respondent, despite the mandate to conserve, manage, and protect the forest, has illegally allowed such a quarry to be established contrary to Section 42 of the Forest Act 2005, yet the forest contains rare threatened, and endangered species, which include sacred trees. Further, he said there was no environmental impact assessment report done, yet the said forest was an important water catchment area, being a source of springs and rivers, and the continuous establishment of the said quarrying had damaged not only humans but also wildlife.

6. In the second application dated 21.5.2024, the court is asked to discharge, vary, or set aside the conservatory orders made on 9.5.2024. The reasons are contained on the face of the application and in the supporting affidavit of Hosea Mutembei Peter and Dorothy Naitore, sworn on 21.5.2024, and a supplementary affidavit by Hosea Mutembei Peter, sworn on 24.5.2024.

7. The interested party who was joined to this petition by an order dated 22.5.2024 avers that he is a lawful holder of a special use license with effect from May 2019, for a period of ten years given by the board of directors of the 2nd respondent. He has annexed their letters dated 8.8.2019, 23.9.2019, the license dated 22.9.2019, the invoice for a license fee and annual land rent dated 23.8.2019, payment receipts as annexure H.M.P. "1", - "4", respectively.

8. Moreso, he interested party avers that before the issuance of a license, the suit premises had been leased to H-Young Co. E.A Ltd from 2014 to August 2019, and he only took over upon the lapse of their lease. He attached copies of letters dated 17.9.2019, 26.9.2019, 14.11.2019, and 20.5.2020 as annexures H.M.P. “5 (a) – (d)”.

9. The interested party averred that after acquiring the license, he undertook an environmental impact assessment, and on 8.10.2019, he was granted an Environment Impact Assessment license to operate the quarry as per an attached license marked H.M.P. "6".

10. Similarly, the interested party avers that he embarked on his operations while making annual levy payments for crushed stone materials at the rate of Kshs.200/= per tone as per attached receipts marked H.M.P. "7". The interested party averred that he was surprised when the county forest conservator served him with a letter dated 14.5.2024 suspending the quarrying within Meru forests station and an attached court. Annexed are the letters marked H.M.P. 8 (a) & (b).

11. Therefore, the interested party avers that the allegations in paragraphs *2* & 3 in the supporting affidavit of the petitioner were misleading, untrue, and full of non-material disclosures, given the preceding facts that the quarry was initially licensed in 2014 and operated by H-Young Co. E.A Ltd up to August 2019, before he took it over.

12. Again, the interested party avers that the area where the quarry is situated is a zone best for quarrying as per the 2nd respondent since it was rock and barren where trees could not grow unless the rocks as excavated and after rehabilitation, then trees can be planted shown by a geological report. Further, it was averred that the area cannot grow trees unless the excavation and hydrological risk assessment survey report dated 20.5.2024 marked as H.M.P. "10" and the suitability studies carried by both National Environment Management Authority (NEMA) Kenya Forest Service and every other government body tasked with such tasks under Section 46 of the *forest Conservation and Management Act* as per the annexed environment audit report for the quarry marked H.M.P. "11".

13. The interested party averred that he had no problem with any of his neighbors, most of whom were happy with his activities, as he had made roads for them just like H-Young had constructed most feeders roads in Meru town.

14. Additionally, the interested party averred that the petitioner had provided an expert opinion to show any harm oden to the forest by his activities and that to mitigate the effects of quarrying or excavation was a condition with the 2nd respondent to restore and rehabilitate the quarry area upon completion of the period which was yet to lapse.

15. The interested party averred that the has invested in machinery worth millions of money through bank loans being serviced by the same quarry and hence would suffer irreparable and monumental damages and loss which cannot be quantified unless the order granted were varied otherwise, the area has been operated as a quarry for the last ten years and therefore the orders should be vacated to hear the petition on merits.

16. The interested party further avers that the petitioner had not disclosed his capacity or locus which of his rights have been violated, for the business has been running for over ten years and has not shown how a dry area only designated as a quarry for lack of vegetation could be a water catchment area. Further, the interested party avers that before the 2nd respondent granted him a lease, it had undertaken vigorous exercises and tasks and that many other activities were going on in the forest, including a workshop and a hotel. It was, therefore, interesting that only in an area he was quarrying, which has no vegetation, was targeted when such other activities are allowed by law. He attached copies of photographs for the other activities marked as H.M.P. "12".

17. In the 2nd affidavit in support sworn by Dorothy Naitore, a secretary of the Meru Forest Environmental Conservation and Protection Association, it was averred that the association which is duly registered as per a certificate attached as D.N. "1" under part v of Forest Conservation Management Act (FCMA) the communities around the forest co-manage and conserve it alongside the 2nd respondent through management agreement under Sections 48 – 52 of FMCA attached as D.N. "2" within Kithirune area.

18. The deponed averred that the association was aware of the activities within the forest by the 2nd respondent including quarrying area, harvesting building of water intake, among others, and had prepared a Participatory Forest Management Plan (PFMP) annexed as D.N. "3" to run for a period of 5 years. The deposed averred that they were aware of the license given to H. Young in 2014 for Gitoro forest following public participation after which the license was approved. Therefore, the community was involved, aware, consulted, and consented to the quarry alongside other stakeholders.

19. After the initial lease expired, the deponent says that they were also consulted when the interested party applied to take over the quarry, and since there was no change of user of the quarry, there was no need for public participation. She denied that there were rare and endangered tree species in the area and that a cypress plantation was in existence in the neighbors since the site was rocky, zoned by Kenya Forest Service (KFS) for quarrying activities, and until the rocks were removed, backfilling done, no trees could be planted there. Therefore, the deponent denied that the area was a water catchment area, as alleged; otherwise, her organization would not have allowed the quarrying to take place.

20. The deponent averred that the activities of the interested party were beneficial to the forest and not vice versa, since, until the rocks were removed, no rehabilitation could take place so that forest cover would be enhanced.

21. The 2nd application is opposed through the petitioner's replying affidavit sworn by Amos Thuranira M'Rinjiru on 23.5.2024 and the 2nd – 4th respondent affidavit in reply sworn by Wellington Ndaka on 23.5.2024. The petitioners termed the application as lacking merits, brought to scuttle the due process and procrastinate the matter more so since the interested party had put up a billboard that the quarry is now open. Therefore, his allegations in paragraphs 15 – 17 of the affidavit in support were untrue, for the area was purely a forest full of trees and other vegetation, a fact the court can take judicial notice of.

22. The petitioner avers that the petition had raised weighty environmental matters for much damage had been done so far through irregular and unlawful issuance of the license by breaching the law. The petitioner averred that excavation since 2014 destroying the water catchment and the environment cannot be a justification for varying or setting aside the orders granted; otherwise, more destruction of the forest and environment will be allowed, which could not be reversed, for two wrongs cannot make a right for anything done in contravention of Articles 70 and 71 of *the Constitution*, and to vary the orders for personal gain or benefit shall have environmental severely damaged to the public at large.

23. The petitioner avers that there were no settlements within the forest where the quarry was situated and that under FMCA, such a special license requires approval and ratification by parliament; otherwise, there was no basis to vary the orders for the court must save the water catchment and the environment as an intergeneration equity which interests override the personal benefits of the interested party.

24. Further, the petitioner avers that the Ministry must have been compromised through its officials in 2014 to illegally license the quarrying contrary to his right to a clean and healthy environment which would seriously be compromised if the order sought were granted. The petitioner averred that there was a need to preserve the status quo pending the hearing and determination of the petition.

25. The 2nd – 4th respondents, on their part, admitted that though the 2nd respondent indeed issued a special use license to the interested party dated 22.8.2019, the government policy toward environmental conservation has changed, inclining toward environmental conservation to achieve the 10% forest cover. It was averred that the interested party had breached clause No. 11 (a) (x) (iii) as regards pollution, for he was manufacturing asphaltic concrete on the site that was causing smoke pollution as per the attached photographs and that condition under 1.5 of the license stated that a license shouldn't

be taken as a statutory defense against charges of environmental degradation or pollution in respect of any manner of degradation or pollution.

26. The 2nd – 4th respondents on the other hand, avers that manufacturing asphaltic concrete causes respiratory and genetic mutations as complications in the long term. It averred further that the interested party had not adhered to the restoration plan by rehabilitating the site simultaneously as she continued quarrying; hence, the 2nd respondent should continue to evaluate the impact as the attached photographs as W.N. "2" show that no restoration had occurred and that there was stagnant water during the rain season thus a breeding place for mosquitoes which was a health threat.

27. As per clause number 11 (a) xx of the license, the 2nd – 4th respondents averred that the interested party was to carry out a natural environment audit, yet the recommended mitigation measures and not been undertaken.

28. With leave of court, parties on 24.5.2024 agreed to canvass the two applications by way of written submissions. Oral highlights were also made by the respective counsels on record in open court on 24.5.2024. Further, pending the ruling, parties by consent varied the orders made on 9.5.2024 to the extent that the interested party is granted limited access to the quarry to remove ready ballast already crushed by 5.00 pm on 25.5.2024, under the supervision of the 2nd respondent and to maintain a night and day security guarding services over the quarry.

29. The petitioner relied on written submissions filed on 23.5.2024. It was submitted that Article 70 of *the Constitution* grants a right to a clan and healthy environment, which the acts of the interested party and those of the respondent have denied him, violated, infringed, or threatened.

30. Further, the petitioner submitted that under Article 70 (3) thereof, he was not required to demonstrate any loss, and, therefore, the Article superseded any statute or regulation.

31. The petitioner urged this court to be guided by the Article since the framers of our Constitution propose to avoid any mischief by government officials who collude with private individuals for personal gain or abuse administrative law to go wrong or become rogue.

32. The petitioner submitted that everyone relies on the environment for survival; hence, he had approached the proper forum to ventilate his environmental concerns, given that the respondents have conceded its and interested parties that some activities are going on in the subject forest by the interested party whose personal benefit has to be weighed against the public and intergenerational equity since as the late Laurate Prof. Mathai observed that nature has no mercy, and if you destroy it will revenge. The petitioner submitted that he was in court seeking the protection of the environment.

33. Learned counsel Mr. Gikunda Anampiu, submitting before the court, expressed his happiness to be associated with the petitioner to protect the lower Imenti forest, which is so dear to the community of Imenti North and its environs. Learned counsel submitted that the special use license could not be extended beyond quarrying or any other activities injurious or likely to destroy the environment, and therefore, the court must step in to stop the destruction by confirming the conservatory orders.

34. As to the 2nd application seeking to lift the conservatory orders, learned counsel submitted that temporary personal losses cannot justify variation of the order for such rights are inferior to the right to a clean and healthy environment. Reliance was placed on Thomas Edison Ltd vs Bathok (1912) 15 CLR 679 as quoted with approval in Communist Party of Kenya vs Nairobi Metropolitan services and others (N.R.B.) E.L.C. Petition No. 8 of 2021 and The Bloggers Association of Kenya (Bake) vs Hon. AG & others (2018) eKLR.

35. The 2nd – 4th respondents relied on written submissions dated 24.5.2024. It was submitted that the special user license was issued upon approval of the requisite procedures by the 2nd respondent and that though the quarrying has been going on, the question was whether the interested party has fulfilled all the conditions set in the special license.

36. The 2nd – 4th respondents invited the court to find that clauses 11 (a) xiii had been breached by manufacturing asphaltic concrete, which was polluting the environment, and that was different from what was licensed to the interested party. Further, it was submitted that the restoration plan and rehabilitation had not been done alongside the quarrying. It was also submitted that the general conditions of the environmental impact assessment license under condition number 1.5 had been breached contrary to Articles 42 & 70 of *the Constitution* as read together with Section 2 of the EMCA, hence posing a danger to a clean and healthy environment. Reliance was placed on Adrian Kamotho Njenga vs Council of Governors & others (2020) eKLR.

37. Learned state counsel Mr. Mugambi, on behalf of the 2nd – 4th respondents, emphasized that the 2nd – 4th respondents were not opposed to the application by the petitioner. He submitted that NEMA and KENHA had confirmed that there was some manufacturing taking place at the forest contrary to the license and that the interested party has undertaken no restoration; hence, all these were posing a hazard to the environment.

38. Similarly, Learned counsel submitted that though the 2nd respondent was a semi-autonomous agency with the 3rd respondent, it was apparent that there was an internal dispute mechanism to do with licensing and that the petition had triggered some of the discoveries; otherwise, such mechanism would not have been invoked earlier.

39. Further, Learned counsel, on behalf of his clients, admitted that there appears to have been some breakdown between the 2nd respondent and the 3rd respondent since the former was supposed to supervise the interested party since it enjoys some degree of independence from the 3rd respondent.

40. Learned counsel submitted that after the petition was filed, the issues were taken over by the 3rd respondent's national office after discovery of the shortcomings in the sufficient of the conditions on the license, given the admission by the interested party in the supplementary affidavit paragraph *2* that there is a machine capable of manufacturing bitumen yet the license was for quarrying.

41. The interested party relied on written submissions dated 23.5.2024. It was submitted that under Rule 25 of *the Constitution* of Kenya (Protection of Fundamental (Rights & Freedoms) Practice & Procedure Rules, 2013 (Mutunga Rules), an order issued under rule 22 thereof could be discharged, varied, or set aside suo moto or upon an application by an aggrieved party. Relying on the Communist Party of Kenya vs Nairobi Metropolitan (supra) it was submitted that one of the grounds of the review was no important matters or evidence. In this instance, the interested party submitted that since the petitioner had averred on oath in his supporting affidavit that the quarry was illegal, unlicensed, and was polluting or destroying both a water catchment area and the environment and evidence of licensing with effect from 2014 to present, coupled with lack of material of legality or unlicensed activities by the petitioner save for his photos, the petitioner's application fails on non-compliance with under Section 46 of FCMA.

42. The interested party submitted his official licenses, and documents were clear that the interested his activities were lawfully sanctioned by the 2nd – 4th respondent, as per section 46 of FCMA. Reliance was placed on Luka vs Narok Bursaries Management Board and others Narok County Assembly (interested party) Constitution Petition No. E016 of 2023 (2024) KEHC 104 (K.L.R.) (11th January (2024) Ruling.

43. The interested party submitted that he stands to suffer irreparable injury for he has invested in machinery and paid all the requisite license fees and rates his investments may be vandalized, stolen, or suffer irreparable harm and that it was only fair to set aside the conservatory orders and hear he petition on a priority basis.

44. Further, the interested party submitted that the 2nd – 4th respondent shaving conceded the issuance of a special user license; any issue regarding its breach under paragraph 12 of the user license and Section 7 of the FCMA did not lie before this court and the doctrine of avoidance steps in for the 2nd – 4th respondents have not exhibited any notices of breach issued to him.

45. The interested party submitted that the Fair Administrative Actions Act forbids any whimsical and arbitrary administrative action such as that of the 2nd respondent when it argues about the alleged breach of a license but has not followed the laid down procedures.

46. The interested party submitted that in view of the admissions by the 2nd respondent on the existence and the legality of both the special use license and the E.I.A license by NEMA and without any expert report of environmental damage, the petitioner has failed to meet the test for a grant of a conservatory order.

47. As to the allegations that quarrying was a transaction requiring parliamentary approval, the interested party disagreed with the interpretation of Article 71 of *the Constitution* which specifies that a law shall be passed by parliament to give effect to the Article. In this case, parliament passed Natural Resources Classes of Transactions subject it to rectification (Cap 381) with effect from 4.10.2016 and under Section 4 (2) thereof, quarrying was among those transactions outside the list of ratification by parliament and therefore the issue of public participation was not backed by any law.

48. Learned counsel Mr. Kaburu, rising to highlight for the interested party, submitted that a forest was a natural resource available to all Kenyans for use. That purpose is emphasized by FCMA 2016 and Article 69 of *the Constitution*, covering the development, sustainable management, conservation, and rational utilization of all forest resources for social, economic, and connected purposes.

49. The interested party submitted that under Sections 46 and 57 of FMCA, the qualification and eligibility for licenses to quarry cover technical and financial capacity.

50. In this case, the interested party obtained a license on 22.8.2019 as a public and private partnership, and under the sections, no public participation was required before licensing. To that extent, the interested party submitted that the petitioner was confusing issues or facts. The interested party submitted that courts do not rewrite contracts, and in this case, Schedule 1 of the license did not outlaw any asphalt preparation; in any event, asphalt is prepared by mixing equally ballast and tar; hence was a by-product of quarrying and cannot be synonymous with mining as per Clause 11 B of the license.

51. The interested party submitted that the 2nd – 4th respondents tendered no evidence of mining, which, if it were, would have been captured in the E.I.A. audit. Further, it was submitted that had there been pollution, nothing was stopping the 2nd – 4th respondents from sending experts and invoking the provisions of EMCA to close down the premises.

52. Additionally, it was submitted that the respondent would have also gone to N.E.T. as the first port of law and or invoked Section 66 of FMCA on offenses relating to quarrying, as well as to revoke the license.

53. In the absence of adverse reports from NEMA, Kenya National Highway Authority (KENHA) or under EMCA or the alleged change of policy on the environment, the court was urged by the interested

party to submit that the petition was targeted or sponsored one, as alluded to in the supplementary affidavit which is also discriminatory, lacking any evidential material to warrant conservatory orders. According to the NEMA report the interested party urged the court to find the quarry activities as legal and eco-friendly geared towards improving the forest.

54. In a rejoinder, learned counsel Mr. Anampiu for the petitioner, urged the court to read EMCA (Cap 387) Laws of Kenya) under Section 4 (2) (e) as requiring ratification by parliament under Article 71 of *the Constitution* of Kenya, for what was before the court was a long-term concession, which also requires public participation.

55. The petitioner submitted that there was no other alternative dispute resolution mechanism where the claim would have been filed save this court, for he was not privy to the license contract. The petitioner submitted that the activities by the interested party were injurious to environmental rights, and the photos he brought were enough evidence. Regarding other activities in the forest, the petitioner submitted that none had caused environmental pollution like those of the interested party to warrant the invocation of environmental administrative law remedies by doing the right thing. He urged the court to sustain the conservatory orders by allowing the 1st application.

56. What the petitioner has sought before this court is a temporary order suspending any license or authorization made by the respondent for the establishment of a quarry and excavation of stones within Imenti forest pending the hearing and determination of this suit. The basis of the prayer is that an unlawful and illegal quarry is in place at the Imenti forest in violation of Section 58 of the Forest Act 2005 and Articles 42 & 70 of *the Constitution* and was a breach of the respondents' statutory duty and responsibilities to conserve and protect the forest.

57. The petitioner avers that unless interim orders are granted, there will be irreversible damage not only to humans but also the wildlife. The petitioner, in his affidavit in support, says that the quarry has been established despite the forest harboring rare and endangered species as well as being a water catchment area. The petitioner averred that his right to a clean and healthy environment had been infringed, threatened, and or violated and that the quarry was established without an EIA. report, public participation and or ratification by parliament.

58. A party who moves to court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation are being violated or threatened violation is likely to continue unless a conservatory order is granted. In CREAW and another vs. Speaker of the National Assembly and others (2017) eKLR, the court said that the purpose of granting a conservatory order was to prevent Violation of rights and fundamental freedoms and to preserve the subject matter pending the hearing and determination of a pending case or petition.

59. Article 23 (3) of *the Constitution* provides that a court may grant an appropriate relief, including a conservatory order. An applicant must, therefore, establish on a prima facie basis that their right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated, infringed, or threatened. Rule 23 of the Mutunga rules provides that a judge before whom a petition under Rule 4 is brought shall hear and determine an application for a conservatory or interim order.

60. In Gatirau Peter Munya vs Dickson Mwenda Kithinji & others (2014) eKLR, the Supreme Court of Kenya said that conservatory orders bear a public law connotation for they facilitate orders functioning within public agencies as well as to uphold the adjudicatory authority of the court in the public interest, for unlike interlocutory injunctions they shall 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.

61. In Nubian Rights Forum & others vs A.G. and others (2019) eKLR, the court cited B.O.M. Uhuru Secondary School vs City County Director of Education (2015) eKLR, that an applicant ought to demonstrate an arguable prima facie case with a probability of success and that in the absence of the conservatory orders, he is likely to suffer prejudice and further that, he court should decide where a grant or a denial of the conservatory order will enhance the constitutional values and objects of the specific right or freedoms and whether if an interim conservatory order is not granted the petition or its substratum will be rendered nugatory. Further, the court said it would also look into the public interest and the relevant material facts in exercising its discretion by entering a detailed analysis of the said facts and the law.

62. In Muslim for Human Rights & others vs. A.G. & others (2011) eKLR, the court held that in an application or conservatory order, it must be careful to maintain the delicate balance, ensuring that it does not delve into issues that are in the realm of the main petition for it not to reach ad to make final findings; otherwise, it may operate adversely. See *Makumi & 4 others vs Speaker of county assembly of Kitui & another Constitutional Petition E001 of 2024* KEHC 2812 (K.L.R.) (19th March 2024) Ruling). See also *Cabinet Secretary Ministry of Health vs Aura and 13 others (Civil Application No. E583 of 2023*) (2024) KECA (Ruling).

63. In *Bia Tosha Distributors Ltd vs Kenya Breweries Ltd & others Petition 15 of 2020* (20203) KESC 14 (K.L.R.) Constitutional and Judicial Review (17th February 2023) (Judgment), the court observed that conservatory orders were not ordinary civil law remedies. The court said that courts should be careful when issuing conservatory orders and other interim relief to parties since while it was well intended to preserve the substratum of the case by way of status quo orders, sight should never be lost of the facts that parties appearing before court for such urgent relief are always at the height of their contest.

64. In Invesco Assurance Co. Ltd vs M.W. (Minor), suing thro' the next friend and mother H.W. (2016) eKLR, a conservatory order was defined as a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

65. In J.S.C. vs Speaker of the National Assembly & another (2013) eKLR, the court observed that conservatory orders were not remedies between one individual as against another but were meant to keep the subject matter of the dispute in situ and, therefore, are remedies in rem as opposed to remedies in personam.

66. Applying the preceding case law, and alive to the fact that the court should walk on the tight line not to prejudice the hearing of the main petition, has the petitioner disclosed a prima facie case to be entitled to a conservatory order?

67. A prima facie case was described in Mrao Ltd vs First American Bank of Kenya Ltd (2013) eKLR, as established if, based on the material presented before a court there exists a right that has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

68. It is not a case that must succeed at the main hearing to disclose arguable issues. In Kevin K Mwiti and others vs Kenya School of Law & others (2015) eKLR, the court held that in considering an application for conservatory orders, the court is not called upon to make any definite findings either of fact or law as that is the province of the court ultimately to hear the petition.

69. What the petition has prayed for is a suspension of the license and the extraction of the quarry stones, pending the hearing and determination of the petition. The 2nd – 4th respondents have conceded that there is a special use license issued pursuant to Section 46 of the FCMA with effect from 2019. The

interested party has brought before the court the licenses E.I.A report, E.I.A audit geological and hydrological report, and an E.I.A license. All these documents have been conceded as legal, procedural, regular, and lawful by the 2nd -4 respondents.

70. The issues as to whether or not the license and the quarrying that is also conceded to have been going on since 2014 to present, are eco-friendly, to create space conducive for the planting of more trees in a potentially rocky place within the forest, and whether such activities pass the constitutional test under Articles 10,61,69,70 and 71 of *the Constitution*, parties shall have occasion to address the court at length at the main hearing.

71. At the time the conservatory orders were issued exparte 6.5.2024, what the petition presented before the court was that the activities of the interested party lacked legal, statutory, and constitutional backing. Further, the court had been told by the petitioner that there was no valid license, environmental impact assessment, environmental audit, regulatory mechanisms as well as a permit by the relevant government agencies. The exparte applicant had also not sued the proponent of the project, the interested party.

72. The rebuttal by the interested party, coupled with admission by the 2nd – 4th respondents that the interested party is in the forest legally and pursuant to a license issued under Section 46 of FCMA, leaves no doubt in my mind that the conservatory orders are untenable at this stage. The real danger or prejudice likely to be suffered by the petitioner pending the hearing of the main petition appears remote at this stage. See Wilson Kaberia Nkunja vs the Magistrates and Judges Vetting Board (2016) eKLR.

73. The petition will not be rendered nugatory if the orders are not granted. See Martin Nyaga Wambora vs County Assembly of Embu and others (Petition No. 7 of 2014).

74. In this instance, Section 46 of FMCA allows for licensed quarrying in forests. A special use license was issued in 2019 by the 2nd -4th respondents to the interested party, who has been on the site with the full knowledge and approval of the respondents. No documented adverse reports or formal complaints have been brought before this court at this stage, or a show cause letter issued recalling the license by the issuing authority, out of a complaint by the petitioner to the respondents or any other agency. The petitioner has submitted that I maintain the interim orders by allowing his application. Unfortunately, no scientific material has been placed before me by the petitioner or the respondents, contrary to what has been filed from NEMA under Section 58 of EMCA and its licenses, including a recent environmental audit report by the interested party. A court of law acts on tangible and cogent evidence to show a prima facie case of breach of a right to a clean and healthy environment. The applicant has failed to discharge the burden of proof of the immediate and apparent irreparable harm by way of pollution or otherwise to the environment or the forest posed by the quarrying on a rocky place in Imenti forest. The applicant has not demonstrated a single complaint letter or protest note that he made to the forester in charge of the respondents challenging the alleged illegal and or injurious quarrying activities going on from 2014 to present.

75. In the circumstances I find the application for conservatory orders lacking merits, the same is dismissed with no order as to costs. The said interim orders are a result of this vacated or set aside. Meantime, the respondents are directed to file their substantive responses to the petition within 30 days from the date hereof. The petition shall be listed for hearing on a priority basis. Mention for directions on 18.7.2024.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 12TH DAY OF JUNE, 2024.

In presence of

C.A Kananu

Anampiu for the applicant

Mr. Mwirigi Kaburu for interested party

Mr. Mugambi for 2nd – 4th respondents

HON. C K NZILI

JUDGE