



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. E069 OF 2021

MAVOKO WATER AND SEWERAGE

COMPANY LIMITED PLAINTIFF

-VERSUS-

SAFARICOM STAFF PENSION

SCHEME REGISTERED TRUSTEES.....1ST DEFENDANT

PRISTINE CONTRACTORS LIMITED.....2ND DEFENDANT

RULING

What are before Court for determination are two Notice of Motion Applications dated 14th July, 2021 and 19th October, 2021 respectively. In the Notice of Motion application dated 14th July, 2021, which is brought under Order 40, Rule 1 & 4 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act, the Plaintiff seeks the following orders:

- a) That a temporary injunction be issued restraining the Defendants either by itself, agents, servants, employees and/or proxies from excavating, laying foundation, constructing, cementing, culverting, building any structure atop the Plaintiff sewer line and using the said structure or dealing in any way whatsoever with the Plaintiff's sewer line at Crystal River Project along Quarry Road and the old Mombasa Road pending the hearing and determination of this application.*
- b) That a temporary injunction be issued restraining the Defendants either by itself, agents, servants, employees and/or proxies from excavating, laying foundation, constructing, cementing, culverting, building any structure atop the Plaintiff sewer line at Crystal River Project along Quarry Road and the old Mombasa Road pending the hearing and determination of this suit.*
- c) That the O.C.S Athi River do ensure compliance with the orders of this court as issued thereto.*
- d) That the cost of this application be provided for.*

The application is premised on the grounds on the face of it and supported by the affidavit of Michael Yumbya Mangeli, the Plaintiff's Managing Director who explains that the company is tasked with sewage disposal within Mavoko Area and due to the growth in population the company had to reconsider the sewerage system in 2019 to ensure proper disposal of sewage without blockages. He deposes that on 1st July, 2021, their personnel on maintenance patrol reported that the Defendant Company was constructing a building structure/access road to their Crystal River Project located along Mombasa road which structure was being laid atop their sewer line thus endangering the same. He contends that the construction works were endangering the lives of more than 139,000 residents should their pipelines be damaged by exposing them to raw sewage and that unless the Defendant's are

restrained from construction works, the Plaintiff Company would be unable to render its services.

In response, the 1st Defendant filed Grounds of Opposition dated 19th July, 2021 and averred that the application was fatally incompetent and incurably defective having been brought with no provisions of the law. They stated that there was no construction ongoing along Quarry 39 road by the 1st Defendant as alleged by the Plaintiff. Further, that the Plaintiff had misrepresented several facts in their application first being that their sewer line was one (1) meter away from the 1st Defendant culvert box and that the Plaintiff's sewer line rested at least 4.5 meters below the ground on which the access road to the 1st Defendant's Crystal River Project had been constructed more than the recommended 1.2 meters for sewer lines laid underneath roads therefore no risk of damage posed. They averred that the Plaintiff's application did not meet the legal threshold for grant of interim injunctive orders and that a confirmation of the orders would cause grave and irreparable loss, harm including damage to innocent members of the 1st Defendant's scheme.

The 1st Defendant further filed their Notice of Motion application dated the 19th October, 2021, brought pursuant to Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Sections 18 and 19 of the Environment and Land Court Act, Order 40, Rule 7 and Order 51 rules 1 & 15 of the Civil Procedure Rules, 2010 wherein it sought the following orders:

a) Prior to the hearing and determination of this application and/or the application filed by the Plaintiff dated 14th of July, 2021, the court does conduct a site visit in the presence of the representatives of the Plaintiff and the Defendants.

b) The ex parte orders discharged, varied and/or set aside.

c) In the alternative to issue by the Honourable Court (Hon. Justice O. Angote in favour of the Plaintiff on 14th of July, 2021 (hereinafter "the expunged orders")) be and are hereby prayer (3) above, the Plaintiff be and is hereby directed to deposit security in a sum to be determined by the court on account of the subsistence of the Impugned Order.

d) The OCS Athi River Police station is hereby directed to ensure compliance with any orders issued by the court as sought for by the 1st Defendant/Applicant.

e) Such other further and/or supplemental order (s) as the Honourable Court may deem fit.

The application is premised on the grounds on the face of it and supported by the affidavits of Richard Gitahi and Eng. Josphat Muthumbi where they depose that it was imperative that the court makes a physical visit to the site to enable it appreciate the factual and material issues that were present on the ground which the parties might not be able to bring out by way of affidavits, documents including oral arguments in court. They contend that the 1st Defendant had in place an approval issued by the Kenya National Highways Authority (KENHA) with respect to the access road along Mombasa Road and the irregular ex parte orders which should not have been issued in the first place have occasioned extreme hardship on the 1st Defendant, its members and the general public. They urged the court to allow the prayers as sought with costs.

In opposition, the Plaintiff through its Managing Director filed a replying affidavit dated 24th January, 2022 and averred that considering the 1st Defendant did not adhere to the necessary structural engineering requirements and ignored concerns by the Plaintiff through its letters; this court would be left with no option but to order the demolition of the constructed structure as recommended by the Plaintiff's Engineers. He urged the court to allow their application.

The 1st Defendant through its Trustee filed a further affidavit dated 1st February, 2022 and urged the court to note that the Plaintiff had failed to present any evidence to controvert the mathematical findings of the 1st Defendant's Engineer to the effect that the sewer line is not at risk of damage by road pressure as contended by the Plaintiff in its pleadings.

The two applications were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the two Notice of Motion applications dated the 14th July, 2021 and 19th October, 2021 respectively including

the respective affidavits, annexures, Grounds of Opposition as well as the rivalling submissions, the following are the issues for determination:

- *Whether the Plaintiff is entitled to orders of interlocutory injunction pending the outcome of this suit.*
- *Whether the ex parte orders of injunctions issued on 14th July, 2021 should be set aside.*

I will proceed to deal with the issues jointly.

The Plaintiff in its submissions reiterated its averments and contended that there was a probable risk of occasioning environmental harm by the 1st Defendant. It submitted that the Defendants' actions singly and in totality will expose its sewer system to probable bursting of pipes, spilling sewage and owing to the permanent nature of the impugned structure. Further, in the event the sewer pipes were to be damaged at that point, it will be tedious and time consuming as well as hinder its operations, therefore damages cannot be adequate to remedy such a situation. It insisted that the Defendants have not furnished court with documents to confirm that their structure met the necessary construction standards. Further, that the structure being constructed atop the sewer line was done without accompanying engineers design report. It reiterated that it will suffer the effects of the sewer line bursting. Further, that the court should weigh the wide public good vis-à-vis the narrow economic interest of the Defendants and find that public good is paramount. To buttress its averments, it relied on the following decisions: **Giella v Cassman Brown (1973) EA 358; Brookside Studios Ltd & Anor v A.A Kawir Transporters Ltd & 4 Others CA 346 of 2013 at Pg 10; Nguruman Ltd v Jan Bonde Nielsen & 2 Others CA No. 77 of 2012; Adrian Kamotho Njenga V Council of Governors & 3 others (2020) eKLR; Trusted Society of Human Rights Alliance v James Kinuthia & 2 Others (2019); Luo Council of Elders V County Government of Bomet & 24 Others (2018) eKLR; Peter K. Waweru V Republic (2006) eKLR; Rwanyange Resident Self Help Group V Tana Water Service Board & 2 Others (2019) eKLR; and Save Lamu & 5 Others V National Environmental Management Authority (NEMA) & Another, Appeal No. 3 of 2018 (2019) eKLR.**

The 1st Defendant submitted that the Plaintiff had not demonstrated a prima facie case as required in **Giella Vs Cassman Brown**. It argued that the Plaintiff had not shown any irreparable damage that would result in the event the court declined to grant the injunctive orders. It further submitted that it is capable of paying for the repairs of the sewer line in the unlikely event it gets damaged due to pressure caused by the access road as they had invested approximately Kshs. 6 Billion in the Project and the Plaintiff would be at liberty to gain access to the sewer line for regular maintenance as usual. It reiterated that the balance of convenience did not favor a grant of the injunctive order for the reason inter alia that it would be more prudent to allow the completion of the access road and monitor the pressure load on the sewer line to determine the risk of damage as opposed to jeopardizing public interest and billions of pensioners' investments on pure speculation.

Further, that interim orders were not meant to be punitive of a party to a proceeding. It sought for the interim orders earlier issued to be set aside as the Plaintiff concealed and misrepresented material facts to obtain them. Further, that the Plaintiff's sewer line also runs under Quarry 39 road with more foot and vehicle traffic than the proposed access road. To support its arguments, it relied on the following decisions: **Giella Vs Cassman Brown & Company Limited (1973) EA 358; Mrao Limited V First American Bank of Kenya Limited & 2 Others (2003) KLR; Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR; Uhuru Highway Development Limited V Central Bank of Kenya & 2 others; St Patricks Hill School Ltd V Bank of Africa Kenya Ltd (2018) eKLR; Tate Access Floors Inc v Boswell (1990) 3 All ER 303; Brink's Mat Limited V Elcombe (1988) 3 All ER 188; Uhuru Highway Development Limited V Central Bank of Kenya & 2 others and Ochola Kamili Holdings Ltd v Guardian Bank Limited [2018] eKLR.**

In line with the principles established in the case of **Giella Vs Cassman Brown & Company Limited (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Limited V First American Bank of Kenya Limited & 2 Others (2003) KLR**, at this juncture I will only proceed to determine whether the Plaintiff has demonstrated a prima facie case to warrant the orders of injunction sought. It is the Plaintiff's contention that the 1st Defendant is constructing an access road into its Crystal River Estate which will interfere with its sewer line and cause it irreparable harm as it will create undue pressure culminating in the busting of the said sewer line. The 1st Defendant on the other hand insists the Plaintiff obtained the interim orders of injunction by misrepresenting material facts. Further, that the access road is one metre away from the pumping sewer line location. It insisted the sewer line is 4.5 metres below the ground and it obtained approval from KENHA and Machakos County Government before commencing construction of access road.

From perusal of the Plaint and respective affidavits, I note the Plaintiff has not denied that their sewer line runs under Quarry 39 Road which also has human and motor traffic. Further, that the pumping sewer line location is more than one (1) metre away from the 1st Defendant's box culvert whose construction its impugns. The Plaintiff has not disputed the 1st Defendant's averments that its sewer line rests at least 4.5 meters below the ground on which the access road to the 1st Defendant's project has been constructed. In the replying affidavits the 1st Defendant confirmed it obtained approval from KENHA and the County Government of Machakos before undertaking the construction of the access road into its Crystal River Project, which approvals are annexed to the said affidavit. I note in the approval from KENHA, it actually provided specification on the access road. It is my considered view that except for the Plaintiff claiming the sewer will be in danger of future destruction due to traffic, and presented designs and opinion from its Engineer, it failed to tender any evidence on whether they challenged the approval granted to the 1st Defendant by KENHA and County Government of Machakos. Further, whether, the 1st Defendant interfered with its wayleave while undertaking the impugned construction. From the photographs that were presented on the respective affidavits relating to the construction of the said access road, I have not seen any evidence on how the box culvert which is being constructed is indeed interfering with the sewer line. In the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR** the Court of Appeal held as follows:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

At this juncture, to my mind, I find that the Plaintiff's alleged injuries are speculative. I opine that this matter should be set down for hearing and all the parties present their respective expert evidence to enable the court make a proper determination of this suit on merit.

Based on the facts as presented while associating myself with the decisions cited above, I find that the Plaintiff has not established a prima facie case to warrant the orders of injunction as sought.

In further associating myself with the decision of **Nguruman Limited V Jan Bonde Nielsen & 2 Others (supra)**, where the Court of Appeal held that where a party has failed to prove the first limb on injunction, the court need not proceed to deal with the remaining two limbs, and will decline to do so. In the circumstance, I will proceed to set aside the ex parte orders of injunction that had been issued on 14th July, 2021 and have been in place to date.

On the prayer for site visit, I direct that the parties to organize the same with the Deputy Registrar of this court.

It is against the foregoing that I find the Notice of Motion dated the 14th July, 2021 unmerited and will disallow it. I find the Notice of Motion dated 19th October, 2021 merited and will allow it.

Costs of the two applications will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE



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