REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND CASE AT ELDORET

E & L C CASE NO. 52 OF 2015

HOSEA KIPLAGAT.....1ST PLAINTIFF/APPLICANT

ISAAC CHEBON.....2ND PLAINTIFF/APPLICANT

CAROLINE J. KOMEN.....3RD PLAINTIFF/APPLICANT

PAUL T. KANGOGO.....4TH PLAINTIFF/APPLICANT

ELIMA P. ARGUT.....5TH PLAINTIFF/APPLICANT

SARA J. KIPCHUMBA.....6TH PLAINTIFF/APPLICANT

JUSTINE K. BEIMOK.....7TH PLAINITFF/APPLICANT

VS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA).....1ST DEFENDANT/RESPONDENT

MUSA MULWA T/A TIONYBEI NURSING HOME AND DOCTORS PLAZA.....2ND DEFENDANT/RESPONDENT

PHILIP CHESANG.....3RD DEFENDANT/RESPONDENT

RULING

Introduction

By plaint dated 26th day of February 2015 ***Hosea Kiplagat*** and Six others ***(hereinafter referred to as the plaintiffs)*** brought a claim against **National Environment Management Authority (NEMA), Musa Mulwa T/A Tionybei Nursing Home And Doctors Plaza And Philip Chesang.(Hereinafter referred to as** the defendants) seeking the following substantive orders;

1. ***An order for an injunction restraining the 2nd defendant from constructing a health facility, gathering building material, digging foundation or in any other way interfering with plot No. 183 Kabarnet.***
2. ***An order of an injunction restraining the 1st defendant from authorizing or licensing or approving further construction of a health facility on plot No. 183 Kabarnet.***

3. ***An order for an injunction restraining the 3rd defendant from giving professional advise to the 2nd defendant for the building of a hospital on plot No. 183 Kabarnet or within the suit plots on the ground that the location is not suitable.***
4. ***An order that the professional advise of the 3rd defendant and the 1st defendant is compromised and cannot meet the threshold set in the Act.***
5. ***A cancellation of the Environment Impact Assessment License.***
6. ***An order that the project is unsuitable on plot No. 183***

They also sought for costs of the suit and any other relief that this Honourable Court may deem fit to Grant. The foregoing plaint was filed together with the Notice of Motion dated 26th day of February 2015 brought under Order 40 rule 2(1) of the Civil Procedure Rules seeking the following substantive orders.

a) That the 2nd defendant/respondent be restrained by himself, his servants,agents and/or employees from constructing, gathering building materials,digging foundation or in any other way interfering with plot No. 183 Kabarnet until this suit has been heard and determined.

b) That pending the hearing of this application inter-partes the 2nd defendant/respondent be restrained by himself, his servants, agents, and/or employees from constructing, gathering building materials, digging foundation or in any other way interfering with plot No. 183 Kabarnet.

c) That the 1st and 3rd respondent be restrained from authorizing or licensing or presenting for approval any environment audit on behalf of the 2nd respondent or in any other way interfering with all that parcel of land known as Plot No. 183 Kabarnet.

On the other hand the defendants are opposed to the instant suit and the foregoing application. In this regard the 1st defendant subsequently filed a ***Notice of Preliminary Objection dated 3rd Day of March 2015,*** the Replying Affidavit dated 14th Day April 2015 and the defendant's statement of defence dated 17th day of April 2015. Whereas the 2nd defendant filed a replying affidavit dated 3rd March 2015 and further the 2nd and 3rd Defendants jointly filed Statement of Defence dated 14th March 2016 and ***a Preliminary Objection dated 16th day of March 2015.*** The first Preliminary Objections dated 3rd March 2015 raised by the first respondent was to the effect that the honorable court lacked jurisdiction to entertain this matter in light of the provisions of section 129 of the Environmental Management and Coordination Act (EMCA), 1999 and section 13 of the Environment and Land Court Act and that the 1st defendant was served with the instant proceedings within less than the statutory 7 clear days rule provided in the Civil Procedure Rules. The second Preliminary Objection raised jointly by the 2nd and 3rd defendants was to the effect that the instant suits offends the provisions of section 22 of Environment & Land Court Act 2011 and Order 1 Rule 13(1) & (2) of the Civil Procedure Rules 2010 and that the honorable court is not vested with the jurisdiction to hear and determines this suit since it touches on issue of physical planning, change of user and issuance of license which National Environment Tribunal has the mandate to hear and decision on the same.

However it is important to note that the two foregoing preliminary objections raised by the 1st and the 2nd & 3rd Defendants were deliberated upon by the the honourable court. In its ruling dated 9th Day of April 2015, the honorable Court dismissed all the issues raised in the preliminary objections and directed that this matter proceeds for hearing. It follows therefore that the instant application before the honorable court for determination is subject to grant or denial of injunctive orders. It is also important to note that apart from the instant application for injunction brought by the applicants now before the honourable court for determination, there are other two application on record. The first one is dated 19th March 2015 filed by the 2nd defendant seeking that the plaintiff be ordered to furnish security of costs or make undertaking. This application was also deliberated upon by the Honourable court. Similarly the

Court dismissed the said application dated 19th March 2015. The 2nd Application is dated 30th day of April 2015 filed by the 2nd and 3rd defendants seeking that pending the hearing and determination of the intended appeal this Honourable Court be pleased to stay the entire proceedings and the hearing of this suit. Apparently the honourable court on 5th of May 2015, directed that the applications one dated 26th February 2015 and the one dated 30th April 2015 be heard simultaneously. However the application dated 30th April 2015, has not been prosecuted and therefore the same is left in abeyance. It follows therefore that the application before the honourable court for determination is the application dated 26th February 2015.

Plaintiff's/Applicant's Case

As noted above the instant application dated 26th February 2015 seeks injunctive orders against the Respondents. The applicants application dated 26th March February 2015 brought pursuant to order 40 rule 2(1) is premised on the three major grounds. ***One*** that the 2nd respondent has started gathering materials on site and has started to dig foundation for the construction of health facility on residential area. ***Two,*** that the 2nd Respondent is a close neighbor of the applicants and the size of the plot cannot accommodate the nature of project being put up and ***three,*** that the respondents have forcefully and unilaterally invited the construction of the project despite protest by the applicants. In his Supporting affidavit sworn on 26th February 2015, the 3rd applicant **Caroline J. Komen** on behalf of other applicants has expounded on the foregoing grounds and deponed that the respondents intent to put up a health facility project which is hazardous and that the applicant together with their families being the immediate neighbours to the 2nd Respondent are likely to suffer irreparably due to hazards associated with the said health facility such as exposure to members of the public, frightening noises such as wailing and groaning, smell, waste disposal, conflict and general trauma. It is deposed further that the applicants intent to put up rental houses which cannot in any way be compatible with the nature of project of the 2nd respondent and that the area is generally rocky and water deficit and very congested hence waste management is not achievable. It is deposed further that despite their opposition to the concerned authorities such as NEMA, the respondents have continued to gather materials for the construction of the said health facility and hence unless the respondents are restrained by an order of this honourable court, the applicants shall be exposed to irreparable loss and damage and in any event the balance of convenience tilts in favour of the applicant.

Defendant's/Respondent's Case

Defendants are opposed to the instant application dated 26th February 2015. The 1st Defendant *vide* the Replying Affidavit sworn by **Zephania Ouma** on 17th Day of April 2015 and filed in court on 27th April 2015, has deponed that it is fallacy and not correct to fault a project before it starts off where the grounds of faulting it is perceived environmental impact and that ***Environmental Impact Assessment*** is a tool for mitigation of environmental impact and this is done through monitoring and issuing improvement orders throughout the project. It is deponed that the perceived impact or dangers cited by Carol J. Komen in her supporting affidavits are all addressed in the ***Environmental Impact Assessment*** Report, the ***Environmental Impact Assessment*** license conditions and the County planning approvals. It is deposed that the plaintiffs/applicants are not expert on the matters deponed in their affidavit and that the same cannot be relied upon especially where experts have said the contrary. It is deposed further that the plaintiffs seem lost to the fact that the land use was changed and certified as commercial by the relevant County authorities and that the concern by the applicants are therefore without merit.

While the 2nd Defendant, **Musa Kiptai Mulwa** is opposed to the instant application dated 26th February 2015 *vide* the Replying Affidavit dated 3rd day of March 2015. He swears that he followed all

the procedure while applying for the project herein which was duly approved by the relevant authorities including NEMA. He deposes that the Environment Impact Assessment Study Report was done by an expert and all the fears of the plaintiff's as stated in the supporting affidavit sworn by Caroline J. Komen are taken care of since all the precautions stated in the report shall be followed to the letter. It is deponed that the ***Environmental Impact Assessment*** Report has the provisions of Septic Tank hence the issue of sewage is taken care of and that in Kabarnet Township there are several big institutions near where the construction is being undertaken such as the Kenya School of Government, (KSG), the Catholic Church, The Seventh Day Adventist Church and School, Warwa Academy and the G.K Prison which are all within the surrounding that are not using septic tank to collect water and the plaintiffs have not raised any complaints about them.

The 2nd Respondent has deposed further that the plaintiff's are out to frustrate the noble concern to raise a modern Doctors Plaza to help the community and the application is not brought in good faith and it is full of mischief and jealousy and that the plaintiff's application is devoid of merit and the same ought to be dismissed with costs. It appears that the 3rd Respondent did not file any reply to the foregoing application dated 26th February 2015.

Submissions

Plaintiff's/Applicants Submissions

The applicants through Kipkenei & Co. Advocates have submitted that threshold and the conditions for the grant of an injunction were set in the celebrated case of *Giella vs. Cassman Brown & Co. Ltd.* The applicants counsel has submitted that the aforesaid conditions include; one, *prima facie* case with a probability of success, two, where the applicant might suffer irreparably injury incapable of being compensated by damages and three, balance of convenience. On *A prima facie case with high probability of success* the applicants counsel has submitted that the grant of license herein was unprocedural, fraudulent and lacked transparency. It is submitted that part 2 of the Environment Management and Co-ordination Act Cap 387 guarantees the applicants entitlement to a clean healthy environment. Counsel has argued that sections 58-67 of the Act deliberately provides comprehensive guidelines on how to obtain Environmental Impact Assessment License and that the 1st Respondent recklessly flouted the provisions of section 59 of the Environment Management and Co-ordination Act Cap 387 Laws of Kenya. It is submitted that the 3rd Respondent misrepresented the size of the plot to obtain license and that there is no evidence of request for a lead expert report by the first respondent to the third respondent as required by the law and that it is not clear at whose interest the 3rd respondent made a report. It is submitted that the 1st Respondent has a habit of flouting rules to the detriment of neighbors and that a live example is the ***Lead Factory at Owino Uhuru Estate in Kwale County.***

On ***Inadequacy of Damages in a Polluted Environment,*** the applicants counsel has submitted that the 2nd respondent wishes to put up a hospital and the scope of the project include various health services such as theater/surgery, mortuary, laboratory, X-ray, Orthopedics, pediatrics, ENT, Dermatology, Obstetrics/Gynecology, Dentist, Family Planing and Antenatal and Out Patient Services. It is submitted that the negative impacts outweigh the positive impacts which are mainly commercial. It is argued that impacts expected due to project operation are Biomedical waste, solid waste, air pollution, noise, sewerage, waste water and environment, traffic environment. It is submitted that the 3rd Respondent in his conclusion strongly recommended the construction of the facility despite the devastating negative impacts. It is argued by counsel, that he deliberately omitted to factor in future development of respective plots by the applicants and that the applicants fear that in the event of disease outbreak such as cholera, Rift Valley fever, Ebola among others they will be exposed. It is also submitted that Emergency siren of ambulances, wailing of bereaved relatives from mortuary etc is

traumatizing and frightening.

And lastly on *Balance of Convenience,* it is submitted that the same is in favour of the applicants. It is submitted further that the area is zoned as a residential area and that the applicants are more in number as opposed to the proponent and that the 2nd Respondent has alternative such as to construct residential premises or any other friendly projects.

Defendants/Respondents' Submissions

1st Defendant/Respondent's Submissions

The first Defendant filed its submissions through its counsel Erustus K. Gitonga who has submitted that contested project herein was given a clean bill of health by **National Environment Management Authority (NEMA)** through Environmental Impact Assessment. He submitted that the **National Environment Management Authority** is a creature of statute and its duties and functions are well set out in the very statute thus the Environment Management and Co-ordination Act Cap 387 and that the courts of law should be reluctant to interfere in the duties of a statutory corporation save for where abuse of power are manifest. To this end counsel relied on the case of *Peter Bongoko vs National Environment Management Authority (NEMA) (2006) eKLR, H.C at Nairobi Misc. Application No. 1535 of 2005*, where it was held that the court cannot curb NEMA's power given by statute. Counsel for the 1st Defendant/Respondent submitted further on the 3 ingredients set out in the case of *Giella vs. Cassman Brow*, supra, and disagreed with the plaintiffs/applicants arguments.

On *prima facie case with a probability of success,* it is submitted that the plaintiff's/applicants have not established a *prima facie* case and there is no probability of success. Counsel has argued that the project has been approved by the relevant authorities, that is NEMA and that County Government of Baringo who granted him a go ahead after approving change of user of the said plot that is owned by the 2nd defendant. It is submitted that the proponent has also complied with section **58 of EMCA** and obtained an Environmental Impact Assessment license from NEMA to undertake the project. Counsel submitted that NEMA has county environmental inspectors with skills and competencies to detect violation of license conditions and that this suit is undoubtedly premature. It is argued that publication is not a requirement for Environmental Impact Assessment project reports and that NEMA (1st defendant/Respondent) did not flout section 59 of the EMCA as alleged by the Plaintiffs/Applicants.

On *Irreparable injury incapable of being compensated with damages,* it is submitted that all the concerns raised by the plaintiffs/applicants were addressed by Environmental Impact Assessment license and that the issues raised are subject to environmental auditing and cannot be raised to deter a project from taking off but perhaps only to improve a running project.

On *Balance of Convenience*, Counsel submitted that the foregoing has no bearing on the 1st Defendant/Respondent (NEMA) and 3rd defendant/respondent but between the plaintiff's and the 2nd Defendant. However counsel argued that the 2nd defendant has made an investment that is currently not making any returns and that he is obviously suffering loss. It is lastly submitted that it is not true that the area is zoned as a residential since the 2nd defendant had obtained change of user.

Submissions by the 2nd and 3rd Defendants/Respondents

The 2nd and 3rd respondents submit that the applicants have not satisfied the test in Giella -vs- Cassman Brown& Co Ltd as the 2nd defendant is digging and depositing the materials in his plot and that he will take all reasonable care from the start to the finish to ensure that the concerns of the

applicants are addressed.

Determination

The applicants have filed the instant application pursuant to Order 40 Rule 2(1). Order 40 Rules 1 & 2 states as follows;

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

The principles governing the grant or denial of the injunctive orders were laid down in the celebrated case of ***Giella vs. Cassman Brown (1973) E.A 358.*** In this case the court held as follows;

"An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience."

It follows therefore that the main issue for determination is **Whether the plaintiff has established the threshold for injunction as set out in the land mark case of** *Giella vs. Cassman Brown*, ibid. In the foregoing case the court observed that the plaintiff is required to demonstrate that;

a) One, has a prima facie case with a probability of success against the defendant.

b)Two, stands to suffer irreparable loss and harm unless orders sought are granted.

c)Three, in the event of doubt, the court is to decide the matter on a balance of convenience.

***Prima facie* Case with a Probability of Success**

Section 3 of the Environmental Management and Co-ordination Act, (EMCA), Cap 387 Laws of Kenya stipulates as follows;

3. Entitlement to a clean and healthy environment

(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 the 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 the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(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 processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intergenerational and intragenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

While section 58 of the EMCA states that

58. Application for an Environmental Impact Assessment Licence

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee

(4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazete.

(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement

and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

8. **The Director-General shall respond to the applications for environmentalimpact**

assessment license within three months.

9. **Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.**

Whereas section 59 of EMCA states as follows;

59. Publication of Environmental Impact Assessment

(1) Upon receipt of an environmental impact assessment study report from any

proponent under section 58(2), the Authority shall cause to be published for two

successive weeks in the Gazette and in a newspaper circulating in the area or

proposed area of the project a notice which shall state—

(a) a summary description of the project;

(b) the place where the project is to be carried out;

(c) the place where the environmental impact assessment study,evaluation or review report may be inspected; and

d. **a time limit of not exceeding sixty days for the submission oforal or written comments environmental impact assessment study,evaluation or review report.**

(2) The Authority may, on application by any person extend the period stipulated

in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

And section 60 of the EMCA stipulates as follows;

60. Comments on Environmental Impact Assessment report by Lead

Agencies

A lead agency shall, upon the written request of the Director-General, submit written comments on an environmental impact assessment study, evaluation and review report within thirty days from the date of the written request.

In the instant case, by the plaint dated 26th February 2015, at paragraphs 5 and 10 the plaintiff have averred that they are the owners of Kabarnet Plots No. 182, 189 184, 187, 188, 185 and 186 respectively and are the most immediate neighbors of the 2nd defendant who is the owner of the plot No. 183. It is their further contention therefore that the defendants are intending to set up a hospital in a residential area after the 2nd defendant purportedly obtained change of user of the plot from residential to commercial without consulting the plaintiff. It is the contention of the plaintiff that the project cannot meet the conditions set out in the License and the Environment Management and Co-ordination Act due

to the following particulars; that waste management is incapable of being controlled by the 2nd defendant because the place is rocky and there is no open sewer in Kabarnet to empty waste; that the plot is very small about a quarter (¼) of an acre and incapable of accommodating a project of such a magnitude without creating conflict; that there is no exit road hence parking and turning of motor vehicles shall be big problem and source of conflict with neighbors; that air pollution is inevitable; that the plaintiff's privacy shall be compromised as the Nursing home shall be open to the public; that the project will devalue the area; that the project shall expose the plaintiff's and their children with risk of contracting diseases and unfamiliar and scaring noise wailing and groans associated with a healthy facility and that the location is totally unsuitable for the kind of project.

In his replying affidavit sworn on 3rd March 2015, the 2nd Respondent at paragraph 7 and 8 has deponed as follows;

“That the only person who has done construction and resides in his plot is Caroline J. Komen and Justine K. Beimok is living in a distance of about 100 meters away from my plot. ...that the rest of the plaintiffs have never done any construction and the plots are vacant and some are far from my plot.”

On the other hand, in her supporting affidavit sworn on 26th February 2015 on behalf of other plaintiff's, the 3rd Plaintiff Caroline J. Komen, at paras 2, 3 and 4 has deposed as follows;

“That I am the owner of Plot No. 184 Kabarnet (See letter of allotment and particulars of payment marked CJK 1(a), (b), (c), (d), (e), (f) and (g)...That the 1st, 2nd, 4th, 5th, 6th, and 7th applicants are owners of Plots No. 182, 189, 187, 188, 185 and 186 respectively (See statement of each of them and attached documents of proof of ownership marked CJK 2(a), (b), (c), (d),(e), (f) and (g). ...That the 2nd respondent s' plot is sandwiched between my plot No. 184 and the 1st applicant's Plot No. 183 (See approved sketch map marked CJK 3)”

A close look at the annextures marked CJK 1 and CJK 2 and the sketch map marked CJK 3 reveal that the 2nd Defendants Plot No. 183 and the plaintiffs aforestated plots are in the same neighborhood as they boarder each other. The defendants have defended the project herein and argued that the same was cleared by the relevant authority, including National Environment Management Authority (NEMA). On the other hand the plaintiff's are contesting the said clearance and argued that the same was compromised. This leads us to the following question; ***What is prima facie case with probability of success?***

In *Mrao Limited –vs- First American Bank Limited (2003) KLR **125*** where learned judge the Bosire JA while considering what constitutes a prima facie case in Civil cases observed thus:-

“So what is prima facie case? I would say that in civil case it is a cases in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

The learned judge observed further that;

“……..it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”.

In ***Shimmers Plaza Ltd v National Bank of Kenya, Cape Suppliers Ltd & another [2014]***

eKLR, E&LC at Nairobi ELC Suit No. 1401 Of 2013 the learned judge Nyameya J. while relying on the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR , also cited as Mrao Limited –vs- First American Bank Limited (2003) KLR 125, ibid, reiterated that; **a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case and that it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.**

In the case of ***Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982,*** Unreported, Madan, Law and Potter JJA. held that **Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."** *(See GV Odunga "Digest on Civil Case Law & Procedure" at pg 393)*

And **i**n the case of ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)*** Ringera J. (as he then was) reiterated that **The settled principles for grant of an injunction are, first that the applicant must show a prima facie case with probability of success at the trial and if the court is in doubt it should decide the application on a balance of convenience.** *(See GV Odunga, ibid at pg 402-403 at pg 402)*

The applicants are apprehensive that construction of a hospital in their neighborhood would compromise their right to a clean and health environment. By dint of the provisions of section 3(1), (3) and (4) of EMCA, cited above, every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment and that if a person alleges that the entitlement conferred under subsection (1) of the EMCA 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; prevent, stop or discontinue any act or omission deleterious to the environment; compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act; compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. and that a person proceeding under the provisions of section 1(3) of the EMCA shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action is not frivolous or vexatious; or is not an abuse of the court process.

It is submitted that section 58-59 of EMCA provides a clear guidelines on how to obtain EIA License and that the 1st respondent recklessly flouted the provisions of section 59 of EMCA given the fact that there is no evidence for publication and the lead expert. On the other hand counsel for the 1st defendant/respondent has argued that the instant project does not require public participation as it is perceived to occasion less environmental impact. The submissions by counsel for the 1st defendant/respondent may be true. However counsel has not submitted on the provisions of section 60 of the EMCA which requires that a lead agency expert to be involved in an EIA. There is no report filed herein by the lead agency. It follows therefore that the applicants have raised genuine concerns in so far as the negative impacts and or environmental hazardous associated with the said project. It is my considered view that the plaintiffs/applicants have raised genuine concerns that requires the courts

intervention and hence they have established a *prima facie* case with a probability of success by dint of the provisions of sections 3, 58, 59 and 60 of the EMCA.

Irreparable Harm

In the case of ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported),*** supra., the learned judge Ringera J. (as he then was) noted that **an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages.** In the instant case it is submitted that the negative impacts by the project herein outweighs the positive impacts. According to the applicants the said project may expose them and their children to the risk of contracting disease. In my view, unless the project is injuncted, the applicants may suffer irreparably.

A Balance of Convenience

As stated by Ringera J. in ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)*** *supra*, Ringera J. **"The golden Rule in applications for injunctions is to maintain status quo*".*** It is not disputed that initially the disputed location of the project herein (construction of a hospital) was zoned as a residential area. However it is apparently clear that the 2nd defendant was clear by the County Government of Baring to construct the said hospital after his application for change of user from residential to commercial was granted. Be that as it may the said change of user is being challenged by the applicants who are apparently in the neighborhood of the 2nd defendant. It follows therefore that the balance of convenient tilts in favour of the plaintiffs/applicants.

Conclusion

In the case of ***Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi High Court Civil Case Number 1128 of 2001(Unreported)*** *supra*, the learned judge Ringera J. (as he then was) noted that the settled principles for grant of injunction are, first that the applicant must show a *prima facie* case with probability of success at the trial and if the court is in doubt it should decide the application on a balance of convenience; secondly , an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages; thirdly at the interlocutory stage the Court should not venture into making definitive findings of fact or law and particularly where the affidavits filed are contradictory as the Court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case, on affidavits contrary to the one of the fundamental postulates of the law that causes are to be ordinarily tried on *viva voce* evidence. The judge observed further that the golden rule in an application for injunction is to maintain the *status quo.* In view of the foregoing holding by Ringera J. in the instant case, there is no doubt that the plaintiff has established a *prima facie* case and hence injunction ought to be granted and the same is granted in terms that the 2nd defendant/respondent is hereby restrained by himself, his servants, agents and/or employees from constructing, gathering building materials, digging foundation or in any other way interfering with plot No. 183 Kabarnet until this suit has been heard and determined.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JULY 2015

ANTONY OMBWAYO

JUDGE.

Mr Kemboi h/b for Kipkenei for applicants

Mr Tarus for 2nd and 3rd Respondents and h/b for Gitonga for 1st Respondent.