



REPUBLIC OF KENYA

High Court at Mombasa

Environmental & Land Case 5 of 2012

FADHILA S. ALI ..... 1<sup>ST</sup> PLAINTIFF

DOMINIC MIGUNA ..... 2<sup>ND</sup> PLAINTIFF

CHARLES PETER IKUTWA (as officials of National

Housing Corporation Tenant Welfare Association) ..... 3<sup>RD</sup> PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION ..... 1<sup>ST</sup> DEFENDANT

DICKSON GITHAIGA T/A

DICKWAY CONSTRUCTION COMPANY ..... 2<sup>ND</sup> DEFENDANT

RULING

(1) The 1<sup>st</sup> defendant's counsel on 27<sup>th</sup> November 2012 with leave of court urged an informal application, in the presence and with response of the plaintiff's counsel, for an order that the plaintiff be required to give an undertaking in damages in respect of the ex parte injunction granted in the matter restraining, until hearing interpartes, the construction which has been commenced by 1<sup>st</sup> defendant which the plaintiffs contend offends their right to a clean and healthy environment. In view of the ex parte order already in place, the 1<sup>st</sup> Defendant's application ought to have been made under Order 51 rules 1 and 15 as a Notice of Motion pursuant to Order 40 Rule (2) of the Civil Procedure Rules. However, in compliance with the Article 159 principle of substantial justice without regard to technicalities of procedure and with no objection, rightly, from the Plaintiffs' counsel, the court took arguments on the informal application from counsel of the 1<sup>st</sup> Defendant and the Plaintiffs before hearing of the application interpartes, which by consent of the parties is set for the 6<sup>th</sup> December 2012.

(2) With the aid of two Court of Appeal decisions **Chatur Radio Service v. Phonogram Ltd (1994) KLR 114** and **Rockland Kenya Ltd. v. Miller (1994) KLR 63**, counsel for the 1<sup>st</sup> Defendant, Mr. Sitonik, urged that it is usual for the court to impose a condition for the giving of an undertaking in damages by a Plaintiff who seeks an injunction to stop the Defendant from doing of any act which could result in loss to the Defendant and that the object of the undertaking is to protect the Defendant from such loss should the court finally determine upon trial that the injunction was wrongly granted. Counsel submitted, relying

on the Replying Affidavits filed herein that the 1<sup>st</sup> Defendant had a construction contract with a contractor who had already commenced construction and the stoppage of the works was occasioning substantial losses to the 1<sup>st</sup> Defendant on account of the contractor charges incurred daily. Counsel stated that the 1<sup>st</sup> Defendant agreed to be bound by the injunction and only sought its protection by way of an undertaking in damages should the injunction turn out to have been unjustified.

(3) For the Plaintiffs, Mr. Hayanga agreed with the general proposition of law with regard to undertaking in damages in cases of injunction restraining acts of the Defendant and which result in pecuniary loss to the Defendant. Counsel however sought to distinguish situations where the complaint relates to acts affecting the environment in which, counsel argued, there was public interest in the enforcement of the law. Counsel relied on the House of Lords decision in **F. Hoffmann-La Roche & Co. AG and Others v. Secretary of State for Trade and Industry (1974) 2 ALL ER 1128** in which it was held by a majority (Lord Wilberforce dissenting) that:

***“Where the Crown was engaged in litigation for the purpose of asserting a proprietary or contractual right the overriding rule applied and on a motion by the Crown the court would not grant an interlocutory injunction unless the Crown chose to give the usual undertaking as to damages. Where the Crown had commenced the proceedings for an injunction for the purpose of enforcing the law in the manner prescribed by statute, it was for the person against whom an interlocutory injunction was sought to show special reason why justice requires that it should not be granted or should only be granted on terms.”***

Counsel contended that the Plaintiffs in this suit as tenants of the 1<sup>st</sup> Defendant were in the position of the Crown (Attorney General) in seeking to enforce the environmental law to healthy environment under the Environmental Management and Coordination Act. Relying on **Nzioka & 2 Others v. Tiomin Kenya Ltd, KLR (E & L) 1 at p. 423**, counsel submitted that it were the principles of the Environmental Management and Coordination Act which applied to the matter in granting relief to any person who approached the High Court under section 3 of the Environmental Management and Coordination Act and not the strict compliance with common law principles. Counsel also cited the English Court of Appeal decision on nuisance in **Kennaway v. Thompson & Another (1981) Q.B. 88** in which an injunction was granted to restrain motor-boat racing, water skiing and the use of boats creating a nuisance by noise to a neighboring home of the plaintiff.

(4) The court has power to grant interlocutory injunction under section 63 of the Civil Procedure Act. Considering the English position in similar terms in the **H.L. Hoffmann-La-Roche case, Lord Morris of Borth-Y-Gest at p. 111-2** said:

***“The High Court has power to grant an injunction (see s.45 of the Supreme Court of Judicature (Consolidation) Act 1925) by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so. An injunction may, of course, be granted either unconditionally or on such terms and conditions as the court think just. In cases where a Plaintiff considers that a Defendant is doing or threatening to do something that he ought not to do, a Plaintiff may be able to persuade a court that it is just or convenient to compel the Defendant to desist pending a decision whether the Plaintiff has the law on his side. But if the Plaintiff proves to have been wrong the Defendant may have suffered loss by having been ordered to desist. In disputes between private parties a Plaintiff in ordinary circumstances would only secure the order he sought if in suitable form he gave an undertaking to the court that he would abide by any order as to damages that the court might make in case the court should afterwards be of opinion that the Defendant had sustained damage by reason of the order and which damage was damage for which the Plaintiff ought to pay. Matters would be left on that footing until the rights***

***of the parties were determined.”***

The Plaintiff and the 1st Defendant herein are agreed on the general proposition set out above and the only dispute relates as to whether the general proposition applies or, because of the nature of the Plaintiffs' suit as an enforcement of statutory provisions for environmental protection under Environmental Management and Coordination Act, the exception would apply to place the Plaintiff in the same position as the Attorney General or the Crown in the **Hoffmann-La-Roche** decision where the injunction would be granted without undertaking in damages.

(5) I have considered the matter and I find that the Plaintiff as tenants of the 1<sup>st</sup> Defendant who complain against the proposed construction commenced by the 1st Defendant in too close proximity to their houses in which they reside so as to affect their right to clean and healthy environment under the Constitution and the Environmental Management and Coordination Act, have sufficient private interest to justify their seeking to enforce the environmental law provisions and should not be prevented from so doing by a condition for provision of undertaking in damages. Besides section 3 of the Environmental Management and Coordination Act which gives a right to any person who alleges contravention of the right to healthy environment in relation to him, Articles 42, 69 and 70 of the Constitution of Kenya, 2010 entrench the right to a clean and healthy environment and the right of access to court for the enforcement thereof in terms as set out below:

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

***(a) to have the environment protected for the benefit of present and future generations through legislative and other means, partially those articulated in Article 69; and***

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

Article 70 of the Constitution is in these terms:

***“70 (1) If a person alleges a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.***

***(2) On application under clause (1), the court may make any order or give any directions it considers appropriate -***

***(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;***

***(b) to compel any public officer to take measures to prevent or discontinue any environment;***  
***or***

***(c) to provide compensation for any victim of a violation of the right to clean and healthy environment.***

***(3) For the purpose of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”***

(6) Having found that the right pursued or sought to be enforced by the Plaintiffs is a constitutional

right under the Bill of Rights (Article 42) for a clean and healthy environment for which access is guaranteed under both Article 48 on the general access to justice and specifically under Article 70 of the Constitution on enforcement of environmental law matters, I find that to require the provision of undertaking in damages or other security contemplated under Order 40 rule 2 (2) of the civil Procedure Rules would unduly hamper the right of access to justice in that if the injunction is refused because the Plaintiffs cannot undertake in damages they will be compelled to undergo what may turn out to be an unclean and unhealthy environment for the period of trial before their right can be enforced by a final order. Such a scenario would render the constitutional protection under the Bill of Rights illusory and of no meaningful effect: a complainant would be required to suffer a violation until a declaration after hearing of the suit outlaws the offending act by which time the injury may be complete irreversible and irreparable.

(7) As the body statutorily charged with the management and coordination of environmental matters in the courts, the National Environmental Management Authority is a necessary party in this suit to enable the effectual determination of the suit. I accordingly direct pursuant to Order 1 rule 10 of the Civil Procedure Rules that the National Environmental Management Authority (NEMA) be joined as a necessary party.

(8) For the reasons set out above, I decline the request by the 1<sup>st</sup> Defendant for an order requiring the Plaintiffs to give an undertaking in damages under Order 40 rule (2) of the Civil Procedure Rules. Costs in the cause.

**Dated and delivered this 4<sup>th</sup> day of December 2012.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of:

No appearance for the Plaintiffs

Mr. Sitonik for the Defendants

Mr. Buoro - Court Clerk



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