



**Patel Coffee Estate v Water Resources Authority (Tribunal Appeal
E001 of 2023) [2023] WAT 1390 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] WAT 1390 (KLR)

**REPUBLIC OF KENYA
IN THE WATER APPEALS TRIBUNAL
TRIBUNAL APPEAL E001 OF 2023
B OCHOI, CHAIR
DECEMBER 8, 2023**

BETWEEN

PATEL COFFEE ESTATE APPELLANT

AND

WATER RESOURCES AUTHORITY RESPONDENT

RULING

Background

1. The application before the tribunal is a Notice of Motion application dated 11TH October 2023 brought under the provisions of Rule 12 of the water Tribunal Rules and the enabling provisions of the Law. 1 Rules 2007, order 40, rule 3 of the civil procedure rules (2010) and all enabling provisions of the Law.
2. The applicant seeks the following orders;
 - a) dispensed with
 - b. dispensed with
 - c. that pending the hearing and determination of this appeal, this Honourable court be pleased to issue temporary injunction restraining the respondent, its employees, servants and or agents from decommissioning the Tindress Dam.
 - d. That the costs of this application be provided for.
3. The Application is supported by 25 grounds set out on the face of the application and an affidavit sworn by Vinoj Jaya Kumar sworn on 11th October 2023
4. This application was filed by way of certificate of urgency and heard Ex parte in the first instance, and upon hearing the applicant, the tribunal granted the tribunal interim orders of injunction in term



of prayer (c) of the application. Upon service, the respondent filed a replying affidavit sworn on 18th October 2023 by John N. Kinyanjui a Manager in charge of Water resources Assessment and Monitoring of the defendant company.

5. When the application was ready for hearing the parties agreed that the same could be canvassed by way of written submissions. On 10/11/23 2023 parties confirmed that their submissions were filed and the application was reserved for ruling on 1/12/23 however on the said date the ruling was not ready as the tribunal had noted that some of the annexures attached to the replying affidavit were not clear and requested the respondent to provide a clearer copy which counsel graciously agreed to do. The tribunal therefore reserved another date for the ruling.

The Applicant's Contention.

6. The applicant contends that it took over the operations of the Tindress Dam situated in Solai area which had been constructed during the colonial period and that upon taking over the running of the dam, the applicant engaged the services of structural engineers who redesigned the entire dam and ensured that it complied with all the safety and security measures.
7. It contends that upon the completion of the renovations and redesigning, an integrity test for the dam was conducted in September 2022 by Engineer Bernard Imbambi Kasabuli and that the structural Engineer issued the appellant with a final dam integrity report which confirmed the integrity and suitability of the dam. In addition, a geotechnical site investigation at Tindress was conducted in August 2022 and geologists approved the dam while recommending continuous monitoring during its life.
8. It contends that the Nakuru county commissioner wrote to the respondent in December 2022 detailing the benefits the dam would have on the community and that public participation had earlier been conducted and all relevant stakeholders were in favour of the dam being operationalized.
9. The applicant further contends that following the above reports, the same were submitted to the project management unit which held a meeting on 16th November 2022 wherein the following recommendations were made;
 - a. NEMA recommended that once permits are acquired and the dam made operational, an annual environment audit will be mandatory and a report submitted accordingly.
 - b. The county recommended that a PMU be immediately convened to review the progress and the professional reports with a view to advising on the next steps in operationalizing the dam.
 - c. The community emphasized the importance of the dam to the livelihoods and recommended its operationalization without any further delays to alleviate water problems in the area.
 - d. The community also emphasized the need for all other community projects (boreholes and pans) rehabilitation to augment the water support from the Tindress dam.
10. It contends that it got a greenlight from the PMU to undertake steps to operationalize the dam the first one being to conduct an Environmental Impact Assessment which was done and report forwarded to NEMA which upon consideration of the report issued a license to operationalize the dam on the 29th September 2022.
11. The applicant contends that after the above processes, the remaining step was the application of the water permit from the respondent which they did and were advised by the respondent to pay fees of Ksh.40,0000 which they paid but on 31st May 2023, the applicant received a letter informing them that the permit application had been rejected without an explanation on how this decision had been



arrived at and they were further informed that the full decommissioning of the dam still stood. 12) The applicant contends that on 26th September 2023 and 3rd October 2023, the respondent wrote to the appellant demanding full decommissioning of the Tindress dam citing reasons that the dam may pose a significant danger to the community considering the imminent threat of El-Nino rains making the applicant wonder what threat was faced when the dam has been in place from 2018.

13. It's the contention of the applicant that the actions of the respondent are discriminatory as no other dam was issued with the order of decommissioning and contrary to fair Administration action the respondent has refused to issue the applicant with a permit and is adamant that the same should be decommissioned. That a Notice for decommissioning was issued vide a letter dated 3rd October 2023.
14. The applicant finally contends that the actions of the respondent are ultravires as they do not have not complied with the provisions of section 75 and 76(1) of the Water Resources Regulations 2021 and the applicant is apprehensive that the respondent will at anytime decommission the entire dam to their detriment as well as the detriment of the entire community.

Respondent's Response.

15. John N. Kinyanjui a Manager Water Resources Assessment and Monitoring filed a replying affidavit on behalf of the respondent, he deposes that the respondent was an agent of the Government responsible for regulating the use and management of the use of water resources in the country and opposed the application on several grounds.
16. The respondent deposes that on 9th May 2018 an earth embankment dam owned by the applicant located in the upper reaches of Milmet river in Solai location Nakuru county and the Patel coffee Estate breached leading to uncontrolled water flows downstream resulting to death of 48 people, displaced several households, caused extensive destruction to properties and livelihoods. 17) The respondent deposes that following the inspection of the Tindress dam several directives were given to the applicant by the respondent namely;
 - a. Establish a performance monitoring and data collection unit (PMU) to enumerate and evaluate the effective and environmental impact associated with the dam removal and to act as a liaison office to help document the decommissioning process.
 - b. Prepare and submit to WRA a dam decommission report
 - c. Submit a notification on the starting date of decommissioning
 - d. Follow procedures stipulated in the [water Act](#) and water resource Management Rules.
17. The respondent further deposes that following inspection and audit of the Tindress Dam NEMA directed the applicant to undertake decommissioning of the dam in order to allow flow of the natural river course and to implement the decommissioning orders issued by the respondent collect stakeholders' views on the project.
18. That by a letter dated 27/10/2021 the applicant wrote a letter to the respondent submitting its dam decommissioning and removal plan signifying compliance with the respondent's order and on 14th January 2022 the respondent communicated its approval of the applicant's dam decommissioning and removal plan and the applicant in return also communicated the composition of the (PMU) and the respondent's work plan towards decommissioning.
19. The respondent deposes that the applicant in a letter dated 25th July 2022 sought to deviate from the decommissioning by applying for a permit while stating that they had partially complied with the decommissioning and were not proceeding to full compliance due to some unexplained difficulties but



the respondent wrote back and informed the applicant that the original order for decommissioning was mandatory before a permit could be issued.

20. The respondent contends that in addition to requiring adherence with the law, the respondent has legitimate concerns for the welfare and safety of the public should the Tindress dam breach and this in consideration of the fact that it is bigger than the Milmet dam that occasioned the death of 48 people and is located at an elevation with the potential to cause serious damage to property and lives downstream should it fail.
21. It is the contention of the respondent that a grant of the orders sought in the application will occasion extensive safety repercussions prejudicial to the statutory mandate of the respondent and the management and use of water resources in the country.
22. The respondent submits that the obligation of the dam owner could only take effect upon the complete decommissioning in place and a fresh application for permit being made under face II of the dam decommissioning plan.

Issues For Determination

23. In its submissions, the appellant identified two issues first whether the appellant /applicant is entitled to an order of temporary injunction pending the hearing and determination of the appeal and second whether costs should issue. The respondent identified the same issues for determination albeit in different words “whether the applicant has established a prima facie case to warrant issuance of the injunction orders sought”
24. I join issues with both parties and find the issues for determination as Whether the plaintiff/ Applicant has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.
25. Who shall bear the costs of the application”

Analysis And Determination

26. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and the appellant cited *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to,

- a) establishes his case only at a prima facie level,
- b) demonstrates irreparable injury if a temporary injunction is not granted and
- c) allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

27. The applicant herein therefore ought to first, establish a prima facie case.



In *Mrao Limited v First American Bank of Kenya Ltd and others* [2003] KLR 125, which was cited by the respondent, the Court of Appeal stated that a prima facie case is one 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.

28. In this application the arguments by the applicant is that they have established a prima facie case with probability of success as the respondent was seeking to enforce an order against the applicant which order was never issued by the respondent as alleged. The applicant states that though an order was issued by the respondent on 14th May 2018, the said order did not provide for the decommissioning of Tindress Dam as alleged by the respondent but directed the applicant to perform certain thing in relation to the dam. The respondent on the other hand insists that they issued the order for decommissioning and the that the applicant took steps to comply. The respondent attached the said order in its replying affidavit at paragraph 13 and marked it JNK1. I have taken time to peruse the said order and observed that the particulars of the of full names of the person served with the order was Salt Manufacturers Kenya Ltd and not Patel Coffee Estate, the applicants herein, none of the parties attempted to explain whether there was any connection between the two in their pleadings and therefore my take is that the same was not addressed to the Applicant. Further it is noted in the same order that that the name of the body of water or Aquifer related to the order was Kings stream and Bailey's stream not Patel Coffee Estate and therefore raising issues of who was the order in relation to.
29. Going to the order itself it is indicated that the action required to be taken was to comply with the following;
1. "To ensure that you empty the water stored in two dams namely Tindress dam and the dam located along the road from Nakuru to Solai market center.
 2. Stop any impoundment, storage, conveyance of water in (1) above mentioned dams.
 3. Submit initial designs and relevant licenses/permits, approving the construction of the dams 4) Before reconstruction is carried out all necessary dams detailed design reports shall be submitted to the Authority
- Items 1,2, and 3 takes effect immediately, item 4 on or before 21 days starting 15.5.2018" 31) From my reading of the said order there appears to be no clause providing for the decommissioning of the Tindress dam. Perhaps for clarity it is important to understand what decommissioning of a dam means or implies. I did not find the definition in the regulations or the Act but in the oxford English dictionary decommissioning is defined as "to take out of service, to dismantle and make safe". I have not seen anywhere in the order where directions were given for the dismantle the dam, the clear direction in regard to Tindress dam was empty water stored therein and stop impoundment or storage or conveyance of water. The applicants stated in their submissions that water was emptied from the dam and there was no imminent danger as alleged by the respondent. There was no corresponding evidence to show that the dam had water as at the time of the filing the application in court.
- 32) At paragraph 13 of the replying affidavit, the respondent states that following inspections of the Tindress dam by the Applicant, the following directives were issued to the applicant by the respondent in respect of the dam
- a. Establish a performance monitoring data collection unit (PMU) at its cost. The PMU was to enumerate and evaluate the effective and environmental impact associate to the dam removal. Also, to act as a liaison office to help document the decommission process.



- b. Prepare and submit to WRA a dam decommission report.
 - c. Submit a notification of the starting date of decommissioning and a work plan (Schedule) for supporting the monitoring process by the regulator.
 - d. Follow the procedures stipulated by the Water Act 2016 and Water Resources Management Rules 2007.
30. The respondent submitted that annexure “JNK1” supported the above but when I looked at the said annexure, I do not find the above directives. The respondent states that the directives were given following the inspections of the Tindress dam by the Applicant but they did not state when the said inspection was done and they did not attach in the replying affidavit any report of their findings which may have led to the action taken. It is my finding from the above therefore that indeed the applicant has demonstrated that he has a prima facie case with chances of success.
31. Secondly, the applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
32. The question then is what injury will the applicant suffer if the application is not granted? According to the applicant if the orders are not granted then the respondent will proceed with the threatened decommissioning which is a discriminatory and contrary to fair administrative action considering that the respondent had not inspected the project, had ignored the NEMA report and license and Dam integrity reports presented. The respondent argued that after the decommissioning order was issued the applicant started complying and even wrote a letter signifying acceptance to comply, the respondent also submits that NEMA actually issued a certificate to the applicant approving the decommissioning plans by the applicant and attached the said certificate from NEMA. I note that the license attached by the respondent from NEMA is dated 28/10/21 and is titled proposed decommissioning of Tindress Dam, the applicant on his part attached a license from the same NEMA dated 29th September 2022 for repair and improvement of Tindress Dam. There seems to exist clear contradictions on the import of the directions given by the respondent and the licenses issued by NEMA as pointed above. There appears to be a dispute as to whether the licenses issued were for the decommissioning of the Tindress dam or repairs as shown by the two sets of licenses attached and I believe that these are triable issues that will be determined during the full hearing of this matter.
33. To demonstrate the seriousness of the matter, the respondent submits that on the night of 9th May 2018, an earth embankment dam owned by the applicant located in the upper reaches of Milmet river in Solai Location of Nakuru county and the Patel Coffee Estate breached leading to uncontrolled water flows downstream thereby resulting in the death of 48 people and displaced several households. The respondent states that the meteorological department issued an El Nino alert between October and December 2023 and therefore apart from requiring adherence to the law the respondent has legitimate concerns over the safety of the general public should the Tindress Dam breach in light of the fact that the Tindress dam is bigger than the Milmet dam that occasioned the loss of 48 people.



34. The concern by the respondent in my view is genuine and legitimate and inline with the mandate of the respondent, the question is whether the threat is real if there is no water in the dam as alleged. The applicant states that had the respondent bothered to inspect the dam they would have confirmed that there was no water that would then have posed the danger and safety issues raised. The respondent did not present the inspection report in court or provide anything to show that the dam had water and the status.
- 35 From the above, I am satisfied therefore that irreparable injury is likely to be suffered if the orders are not granted at this stage. And the balance of convenience tilts in the applicants favour.
- 36) I will therefore allow the application in terms of prayer number (C) of the application. Having noted that the respondent did not have an inspection report of the Tindress Dam, it will help this court and the parties for the respondent to carry out and file a report before proceeding with the full hearing of the matter. The same can be filed within 45 days.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DECEMBER 2023 SIGNED BY:
HON. BERNARD OCHOI**

THE JUDICIARY OF KENYA.

WATER TRIBUNAL

TRIBUNAL

DATE: 2023-12-11 16:28:07+03

The Judiciary of Kenya

