



**Maikara & 5 others v Chico Company Limited & 2 others (Environment & Land Petition 8 of 2021) [2023] KEELC 17843 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17843 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND PETITION 8 OF 2021**

**M SILA, J**

**MAY 31, 2023**

**BETWEEN**

**AMON MARUCHA MAIKARA ..... 1<sup>ST</sup> PETITIONER  
CHARLES KEBARI MAGE ..... 2<sup>ND</sup> PETITIONER  
SALOME K. OBONYO ..... 3<sup>RD</sup> PETITIONER  
DENIS MOGERE KEUYA ..... 4<sup>TH</sup> PETITIONER  
TERESA JOMO ..... 5<sup>TH</sup> PETITIONER  
HENRY OMIKO MAUTI ..... 6<sup>TH</sup> PETITIONER**

**AND**

**CHICO COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF KISII ..... 2<sup>ND</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. The suit herein was commenced by way of a constitutional petition filed on 10 May 2021. The petitioners averred that they have filed the petition owing to activities of a ballast factory owned by the 1<sup>st</sup> respondent which was contended to be causing environmental harm in Bonyawangwa village, Kisii County, where the petitioners reside. The factory is also in the same village and it is said that two residents of the village leased their land to the 1<sup>st</sup> respondent who then put up the factory. The petitioners claim that the said factory has caused death of livestock and poultry, poor farm yields, poor eyesight and chest pains to the petitioners, dust and noise that has made their houses inhabitable causing others to relocate. In the petition, the petitioners claim general and special



damages, a permanent injunction to restrain the respondents from channeling storm water from the factory into their land, an order to compel the respondents to erect an impenetrable fence between her property and the petitioner's property, costs and any other relief the court may deem fit to grant. Together with the petition, the petitioners filed an application seeking to have the activities of the 1<sup>st</sup> respondent stopped pending hearing and determination of the petition and also for an environmental restoration order.

2. The 1<sup>st</sup> respondent opposed the motion through a replying affidavit filed by Oscar Obonyo who is her Environment Health and Safety Officer. He deposed that the 1<sup>st</sup> respondent owns two stone crushers, one at Bonyawangwa and another at Bombure, and they are separated by a stream. He deposed that they were only operating one crusher and that they use wet crushing. He displayed an EIA licence for their activities. He averred that none of the petitioners have ever complained to them, or to the National Environment Management Authority (NEMA), about their activities. He added that stopping their activities will cause them massive losses. The 1<sup>st</sup> respondent also raised issue that the court is devoid of jurisdiction and that the suit does not raise any constitutional issue and does not meet the threshold of a constitutional petition.
3. The application was heard by my predecessor, Onyango J, who delivered ruling on 6 July 2022. That ruling framed three issues being :-
  - i. Whether the court has jurisdiction to hear and determine this matter.
  - ii. Whether this suit meets the threshold of a constitutional petition.
  - iii. Whether the orders sought in the application should be granted.
4. On the first issue, the Honourable Judge reviewed various authorities and held as follows :-

“In light of the above authorities the suit herein was instituted in the wrong forum as the petitioners have not exhausted the administrative remedies provided under Article 159 (1) and (2) of *the Constitution* and Section 129 (2) of the *Environmental Management and Co-ordination Act*, 1999.”
5. On the second issue, the judge held as follows :-

“In the instant suit the matter complained of relates to the interpretation of the *Environmental Management and Co-ordination Act*, 1999 and the alleged failure by the 1<sup>st</sup> respondent to observe the same. The petitioners have not set out with precision the Articles of *the Constitution* that are alleged to have been infringed and how they have been infringed and the court cannot not (sic) speculate. As correctly submitted by counsel for the 1<sup>st</sup> Respondent, the Petitioners have at paragraph 9 of the Petition alleged that the 1<sup>st</sup> Respondent is negligent in its activities and that those activities amount to trespass and nuisance. I am therefore of the considered view that a claim of negligence, nuisance or trespass can be ventilated through a normal suit without the need for a Constitutional Petition.”
6. On the third issue the court was not persuaded to grant the interlocutory orders sought and dismissed the application. The Honourable Judge, did not, however, dismiss the petition.



7. On 5 October 2022, the 1<sup>st</sup> respondent filed a notice of preliminary objection seeking to have the petition struck out on the following grounds (paraphrased for brevity) :-
1. The petition is defective
  2. No single constitutional issue is presented by the petition.
  3. The 2<sup>nd</sup> – 6<sup>th</sup> petitioners have not demonstrated how they are interested in the subject matter of litigation.
  4. The petition contravenes the doctrine of exhaustion of remedies as they should have presented their case before the National Environment Tribunal (NET)
  5. That this court lacks the requisite jurisdiction to hear the issues herein which should have been presented to Standards and Enforcement Review Committee of NEMA under Section 70 (1) and 71 (1) of EMCA.
8. I directed that the preliminary objection be canvassed by way of written submissions. Only counsel for the 1<sup>st</sup> respondent filed written submissions which I have taken into account. The petitioners' counsel did not present any submissions as to why the petition should remain. He also did not attend court when the matter came up for hearing of the preliminary objection. I therefore do not have the benefit of any arguments that the petition should be allowed to proceed as presented.
9. Much of what the 1<sup>st</sup> respondent raises was canvassed by the learned Judge when hearing the application for injunction which I have already set out above and see no need of repeating. However, I am not bound by that decision which was made in the context of an application for injunction and I need to make my own determination as to whether or not this petition ought to be struck out for the reasons raised by the 1<sup>st</sup> respondent.
10. I have gone through the petition. Its title suggests that it is brought inter alia under Articles 27, 28, 32, 40, 42, 43, 47 and 70 of the Constitution. The body of the petition however does not expound on any of the Articles of the Constitution provided but the gist of it is that the factory of the 1<sup>st</sup> respondent has caused them environmental harm. There is no linkage of any fact pleaded to any of the articles in the constitution. It is pleaded that the respondents are guilty of negligence, trespass and nuisance, and there are indeed particulars of negligence pleaded being as follows: -
- i. Channeling storm water and/or rain water into the plaintiff's (sic) land.
  - ii. Dumping heaps of murrum/stones knowing very well that they are hazardous in the process of crushing the same.
  - iii. Failing and/or refusing to channel storm water away from the petitioner's land while knowing that it would cause damage to the petitioners' property.
  - iv. Allowing smoke, dust and ashes to escape onto the petitioners' property and exposing their families to pollution knowing it would be detrimental to the health of the petitioners and their families.
  - v. Leaving soak pits near the petitioners' property open thus exposing the petitioners to harm and water borne diseases.



11. It is pleaded that as a result of the above negligence, nuisance and trespass, the petitioner has suffered loss and incurred expenses including:
  - (a) Cracks to the petitioners' permanent houses rendering them inhabitable.
  - (b) Loss of the petitioners' source of income as they have been compelled to stop farming, rearing cattle, and chicken from which they earn their daily bread.
  - (c) Dust, smoke and ash rendered the petitioners' houses inhabitable.
12. The petitioners plead particulars of special damages being some money for reports and car hire. The prayers in the petition are as follows :-
  - (a) General and special damages.
  - (b) A permanent injunction to restrain the respondents either by themselves, agent, servant, assign or any person whatsoever from channeling storm water from the factory into the petitioners' land parcels South Mugirango/Bosinange/3208 and South Mugirango/Bosinange/..... (no title number provided).
  - (c) An order compelling the respondents to erect an impenetrable fence between the respondents' property and the petitioners' property.
  - (d) Costs.
  - (e) Any other relief this Honourable Court may deem fit to grant.
13. It will be seen that there is no prayer for any declaration for violation of any constitutional right. I will agree that this is a common law suit asserting the torts of negligence and nuisance and nothing more. It will indeed be observed that particulars of negligence have been pleaded. Although the Kisii County Government and NEMA were sued as the 2nd and 3rd respondents, from what I can see, the prayers are actually against the 1st respondent only. There is nothing pleaded in the petition indicating any dereliction of duty on the part of the 2nd and 3rd respondents or any breach on their part of any provision of *the Constitution*.
14. One may argue that the petition asserts the right to a clean and healthy environment, which is true, and a court may have discretion to proceed with a petition, even where there are issues of negligence and nuisance presented, but I think the issues herein are best addressed through an ordinary suit by way of plaint.
15. I don't think however, that this is a suit for filing before the National Environment Tribunal. The mandate of NET is set out in Section 129 (1) of *EMCA* which provides that:

129 (1) Any person who is aggrieved by—

  - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
  - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
  - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;



- (d) the amount of money required to be paid as a fee under this Act or its regulations;
- (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

16. I don't think the grievance of the petitioners, as drawn, is contesting the grant of the EIA licence, or conditions of the licence, or revocation, or imposition of an environmental restoration order. In fact there are no such prayers in the petition. What the petitioners appear to be complaining about is nuisance and negligence. I wouldn't, in those circumstances, say that their case is for presentation to NET. The petitioners could of course complain to NEMA, as urged by the 1<sup>st</sup> respondent, but that, again, does not mean that they have no recourse to the ordinary courts for damages for the common law torts of nuisance and/or negligence.
17. As I have stated, a court presented with such petition, may opt to proceed with it as drawn, for there is in fact a question relating to a clean and healthy environment, though very inelegantly presented in our case. The petitioners have not come to challenge the contention of the 1<sup>st</sup> respondent that the suit is best heard by way of plaint and the 1<sup>st</sup> respondent has persuaded me that the issues herein are best addressed through an ordinary suit.
18. I will therefore proceed to strike out the petition. I am however not persuaded to condemn the petitioners to pay the costs of this petition. I think they brought the petition in good faith and in public interest. In those circumstances, each party to bear his/her own costs of the petition.
19. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 31 DAY OF MAY 2023

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

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