



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**PETITION NO. E009 OF 2021**

**HOKO AND SHALETE SHALLOW WELLS COOPERATIVE SOCIETY LIMITED.....1<sup>ST</sup> PETITIONER**

**LAN BIB SOUTH SUB-LOCATION COMMITTEE.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**WAJIR WATER, SEWERAGE &**

**SANITATION CO. LTD.....1<sup>ST</sup> RESPONDENT**

**WORLD BANK – KENYA OFFICE.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**WATER RESOURCES MANAGEMENT**

**AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Petition dated 18<sup>th</sup> October 2021, the Petitioners, **Hoko and Shalete Shallow Wells Cooperative Society Limited & Lan Bib South Sub-Location Committee** sued **Wajir Water, Sewerage and Sanitation Co. Ltd** as 1<sup>st</sup> Respondent, **World Bank – Kenya Office** as the 2<sup>nd</sup> Respondent, **National Environment Management Authority** as 3<sup>rd</sup> Respondent & **Water Resources Management Authority** as 4<sup>th</sup> Respondent.

2. The Petitioners complain that the 1<sup>st</sup> Respondent through funding of the 2<sup>nd</sup> Respondent has started drilling of boreholes in Lan Bib South and the wider Wajir South area without carrying out public participation and consent in violation of the rights of the residents of the affected areas. Further that the 1<sup>st</sup> Respondent has not carried out proper hydrological survey and environmental impact assessment and is drilling or about to commence drilling next to the traditional shallow wells which action may dry the shallow wells thus violating the rights of the residents. They also alleged contravention of Article 42, 43 and 70 of the Constitution.

3. The Petitioners seek for;

(a) **A declaration that the Respondents have jointly, and severally, breached the rights and fundamental freedoms of the residents of Lan Bib South, Umbi, Rifed and Shalete in Wajir South within Wajir County.**

(b) **A permanent injunction restraining the 1<sup>st</sup> Respondent from drilling, proceeding to drill, and or operating the boreholes in Lan Bib South, Umbi, Rifed and Shalete in Wajir South within Wajir County.**

(c) **A mandatory injunction directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to stop the 1<sup>st</sup> Respondent from drilling, proceeding to drill and/or operating the boreholes in Lan Bib South, Umbi, Rifed and Shalete in Wajir South within Wajir county without the requisite licences from the two State organs.**

4. Accompanying the Petition is a Notice of Motion of even date brought pursuant to Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013, and Rule 3(2) of the High Court (Practice and Procedure) Rules.

5. Prayers 1 and 2 are spent and/or overtaken by events. Relevant to this ruling are; -

**3. Pending hearing and determination of this Petition there be a conservatory order restraining the 1<sup>st</sup> Respondent from drilling, proceeding to drill, and or operating the boreholes in Lan Bib South, Umbi, Rifed and Shalete in Wajir South.**

**4. Costs.**

6. The application is based on grounds that the 1<sup>st</sup> Respondent has proceeded to drill boreholes in total disregard of a demand note sent by the Petitioners' counsel; secondly, the petition shall be rendered nugatory unless conservatory orders are issued, thirdly order to be issued will be in the interest of the rule of law.

7. The application further is supported by the affidavit of **Abdirahman Mohamed Abdille**, the Chairperson of the 1<sup>st</sup> Petitioner, who reiterates the grounds on the face of the application.

8. Affidavits of service have been filed as prove of service of the court processes and hearing notices upon all the Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents neither entered appearance nor responded to the application within the stipulated time despite several adjournments. The 3<sup>rd</sup> Respondent entered appearance. The 4<sup>th</sup> Respondent entered appearance and filed a replying affidavit.

9. While writing this ruling it was brought to the attention of the court that the 1<sup>st</sup> Respondent has entire appearance, filed a response to the Petition, a replying affidavit and a preliminary objection.

10. The above documents filed by the 1<sup>st</sup> respondent and more so the replying affidavit to the application subject matter was filed out of time and without leave of court. Indeed, the same was filed too late after canvassing by other counsel on record such that other counsels will be denied an opportunity to react to the same should the court make reference to it. As for the other documents they do not relate to the application and can be canvassed at the appropriate time. The affidavit is therefore irregularly before court and will be ignored.

11. In the replying affidavit of the 4<sup>th</sup> Respondent sworn by **Joseph K. Langat** the Sub-Basin Area Coordinator, Mandera Sub-Basin Area he depones that the 4<sup>th</sup> Respondent is designated by the Water Act, 2016 (the Act) as an agent of the National Government responsible for regulating the management and use of water resources in the country and pursuant to the said mandate bestowed on it the 4<sup>th</sup> Respondent is empowered under Section 12(d) of the Act to receive, permit applications for water abstraction, water use and enforce conditions of the permits etc.

12. That the 1<sup>st</sup> and 4<sup>th</sup> Respondents have been in communication over the exercise subject matter over time. However, the 1<sup>st</sup> Respondent is yet to comply with all the requisite conditions and had indicated to the 4<sup>th</sup> Respondent that it is in the process of obtaining the relevant documents before it could apply for a permit. It is yet to permit the 1<sup>st</sup> respondent's project subject matter.

13. When to issue a conservatory order is now moot. In **Centre for Rights Education and Awareness (Creaw) & Anor vs Speaker of the National Assembly & 2 Others [2017] eKLR** the court stated as follows;

**“A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.”**

14. The Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others** stated;

***“[86] Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

**“Public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributed to the relevant cause.”**

17. It behooves every government agency or institution to uphold the rule of law, adhere to set down legal process and comply with rules and procedures. There is a purpose why agencies are set to regulate the use and exploitation of resources and clearly requisite processes on the face of it in the absence of proof to the contrary so far were not adhered to.

18. Consequently, for public good and in order to uphold the tenets of Good Governance, Constitutional values, Law & Order and to preserve a public resource a conservatory order do issue restraining the 1<sup>st</sup> Respondent from drilling, proceeding with drilling and/or operating boreholes in Lan Bib South, Umbi, Rifed and Shalete areas of Wajir South within Wajir County until further orders of this court.

19. Costs to abide the outcome of the petition.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021.**

.....

**ALI-ARONI**

**JUDGE**