



Opondo & 441 others v Chinese Overseas Engineering Group Company Limited (COVEC) & 3 others (Environment & Land Petition 2 of 2021) [2023] KEELC 18956 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18956 (KLR)

FORMERLY KISUMU ELC PETITION NO. E002 OF 2020

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ENVIRONMENT & LAND PETITION 2 OF 2021

E ASATI, J

JULY 13, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 43(1) & 28 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 40, 42, 43 OF THE CONSTITUTION AND RULE 11(C) & 12 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES AND ALL OTHER RELEVANT ENABLING POWERS AND PROVISIONS OF THE LAW IN KENYA

AND

IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

BON OPONDO & 441 OTHERS PETITIONER

AND

CHINESE OVERSEAS ENGINEERING GROUP COMPANY LIMITED (COVEC) 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA) ... 2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 3RD RESPONDENT



**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
RESPONDENT**

JUDGMENT

Introduction

1. *Vide* the Petition dated 2nd November, 2020, Bon Opondo & 441 Others (the Petitioners) sought for the following relief against the Respondents: -
 - a. a declaration that the acts and omissions of the 1st Respondent's excavation works and blasting of rocks thereby causing damage to the houses and structures belonging to the Petitioners amounted to a violation of the rights and freedom of the Petitioners, the person they represent and their families.
 - b. a declaration that the Petitioners are entitled to damages as compensation to damaged properties including buildings and other improvements on their parcels of land with interest thereon at commercial rates.
 - c. a declaration that the requisite valuation accounts regarding (b) above is undertaken by M/s Jamu Real Limited to be the amount payable in respect of the damages caused by the 1st Respondent's activities.
 - d. an order compelling the Respondents jointly and severally to compensate the Petitioners for losses suffered due to the activities at Mwoki village quarry.
 - e. general damages as just compensation for loss and suffering by each petitioner due to the activities of the 1st Respondent.
 - f. exemplary and aggravated damages.
 - g. costs and interest from the date of payment in full at court rates.
 - h. any other or any other alternative remedy that the Honourable court may deem fit to grant.
2. The Petition was supported by the averments in the Supporting Affidavit sworn by Bon Opondo on 2nd November 2020 and the annexures thereto.
3. The 1st Respondent opposed the Petition *vide* the Replying Affidavit to the Petition sworn by Li Jiabing on 6th September, 2021 and the annexures thereto.
4. The 2nd Respondent opposed the Petition *vide* the 2nd Respondents Reply to Petition dated 25th February, 2021, the Replying Affidavit sworn by Richard Mogesi on 25th February, 2021 and the annexures thereto.
5. The 3rd Respondent filed a Memorandum of Appearance on 4th December, 2020 and no further pleadings or documents.
6. The 4th Respondent did not respond to the petition.
7. The Petition was heard by way of *viva voce* evidence and although Counsel appearing in the matter agreed and directions were given that parties file written submissions on the petition within given timelines, none of the parties filed written submissions.



The Petitioners' Case

8. The Petitioners' case is that the 1st Respondent, Chinese Overseas Engineering Company Limited (COVEC) is a road construction company contracted by the 2nd Respondent, Kenya National Highway Authority (KENHA) under contract noKENHA for the rehabilitation of Kisumu - Kakamega Road. That the 1st Respondent has executed and performed the said contract up to 99% completion as per the KENHA On-going Roads Projects Physical Progress Report of 13th January, 2020. That in constructing the road, the 1st Respondent identified the Mwoki area where it established a quarry and started blasting operations around the year 2012. That the 1st Respondent has been extracting raw material from Mwoki village which extraction involved blasting and excavation works at the quarry. That the 1st Respondent blasted and excavated rocks on the said quarry at Mwoki at least once a week until the year 2018. That the Petitioners who live within a close proximity of the quarry were affected by the loud noise emanating from the quarry and the vigorous shaking of the ground and houses. That as a result, the Petitioners have suffered damages including cracks on the walls and floors of their houses, churches, toilets, collapsed houses, sunken toilets and collapsed perimeter wall. That the 1st Respondent has failed to compensate the Petitioners who were never forewarned that the blasting actions could endanger their lives.
9. The Petitioners contend that the 2nd and 3rd Respondents abdicated their responsibilities and have not acted with a view to protect the Environment and have not observed the provisions of Articles 42 and 43 of *Constitution* of Kenya and Section 58 and 59 of the *Environment Management and Coordination Act* which dictate that Physical development projects be undertaken only after an Environmental Impact Assessment (EIA) feasibility study has been undertaken and the report given to any affected person. That the Petitioners' did not participate in the process of undertaking the Environmental Impact Assessment (EIA). That the 1st Respondent carried out the excavation and blasting works carelessly, negligently and disproportionately and without due regard to the environment and the right and welfare of the surrounding communities. The Petitioners prayed that their prayers be granted.

The Case of the 1st Respondent

10. The case of the 1st Respondent as can be gathered from the Replying Affidavit is that it is a construction company involved in the construction and repair of roads. That it was hired by the 2nd Respondent under Contract no KENHA/RD/SP/171/2010 to construct Kisumu – Kakamega road. That the 1st Respondent has at all times conducted itself in accordance with all the laws and regulation governing the implementation of its projects.

That it undertook and carried out all appropriate environmental and social impact research and complied with all laws and environmental standards before obtaining the clearance and sanctions of the 3rd Respondent herein.

11. That the 1st Respondent identified a spot around Mwoki area where it established a quarry for blasting operations for excavation of rocks for construction of the road. That the identification of the spot and the blasting process was fully sanctioned by the 3rd Respondent who inspected the area and approved of the activities of the 1st Respondent. That the said identified spot or area is public land and situated far from the resident area of the Petitioners herein and hence it is unlikely that any of the activities undertaken at Mwoki area could have affected the Petitioners in any way whatsoever. That before identifying the Mwoki spot, the 1st Respondent conducted investigations to ensure that the area was fit and safe for the purpose and that the activities to be undertaken could not affect the public negatively.



12. That after complaints from the residents claiming that the blasting had affected their houses and sunk their latrines, an investigation was conducted by the National Construction Authority, which is mandated to oversee the construction industry and coordinate its development, to determine the extent of the effects of blasting activities. That the investigation did confirm vide a report made that there were indeed some cracks on the walls on some of the mud houses and semi-permanent structures of the houses although far away from the quarry. That the report noted that the cause of the cracks could not be ascertained and that it could not be ascertained that the same were indeed as a result of the blasting at the quarry by the 1st Respondent. That the owners of the houses closest to the quarry who claimed for damages were promptly compensated for the same by the 1st Respondent without any discrimination.

That the Petitioners then saw an opportunity to attempt to illegally benefit from the 1st Respondent by falsely claiming that they were also affected by the blasting despite the report from the investigations of the National Construction Authority (NCA).

13. That the Petitioners' claim is brought too late in the day and is an afterthought. That the same is unfounded, baseless and time barred and that the Petitioners are only peddling falsehoods before the court in an attempt to mischievously obtain compensation.
14. That no other houses have been destroyed as a result of the 1st Respondent's activities on Mwoki area or its surrounding other than the few whose owners have already been compensated.

That the Petitioners have not provided any proof of destruction of their houses and/or any demonstration that the alleged losses were as a result of the blasting by the 1st Respondent.

That the 1st Respondent conducted all due diligence before embarking on the blasting activities and has since compensated all losses that were allegedly linked to the blasting.

The 2nd Respondent's Case

15. The case of the 2nd Respondent as contained in the 2nd Respondent's Reply to Petition is that the petition is fatally defective as it is time and statute barred by dint of Section 67(b) of the [Kenya Roads Act](#) no2 of 2007 and incurably defective for want of written and express authority from all the Petitioners in terms of Order 1 Rule 13(1) and (2) of the [Civil Procedure Rules 2010](#).

That the 2nd Respondent is a state corporation discharging its responsibilities as set out in Section 4(2) of the [Kenya Road Act](#), 2007 on behalf of the Kenya Government for the rehabilitation of the roads. That it is mandated to manage, develop, rehabilitate and maintain national roads as provided under Section 4(1) of the [Kenya Road Act](#) 2007.

16. That the Petitioners have failed to demonstrate how the Respondents have infringed their constitutional rights.
17. That the 2nd Respondent awarded a contract to the 1st Respondent on behalf of the Government of Kenya for the rehabilitation of Kisumu – Kakamega road (A1(A109)). That in the contract noKeNHA/RD/SP/171/2010, the 2nd Respondent's mandate was limited to rehabilitation of the Kisumu – Kakamega road (A1)(A109).

That the contract works were commenced on 5th January, 2013 and were completed on 30th October, 2018. That Taking Over Certificate in respect of the same was issued indicating the date of substantial completion as 30th October, 2018.



That the Petitioners had all the time to raise the allegations but did not do so since the project begun in the year 2013. That the petition was brought 2 years after completion of the project. That by the year 2017, the quarrying activities had stopped and the 1st Respondent was in the process of rehabilitating the quarry site.

18. That any damage that resulted to the quarry land and its environs as a result of rehabilitation of Kisumu – Kakamega (A1)(A109) were fully rehabilitated prior to completion of the construction projects. That the Mwoki/Masana quarry is located within Mwoki Primary School compound on plot no kakamega/masana/1155 about 9km off the main road. That the 2nd Respondent obtained an Environmental Impact Assessment License from NEMA on 21st October, 2011. That the license was subsequently varied on 29th October, 2013 and extended for 24 months.

That the 2nd Respondent is aware that the 1st Respondent consulted the members of Mwoki community before the quarry was established and before the commenced of the rehabilitation of Kisumu – Kakamega Road (A1)(A109) and that all requirements of the law were fulfilled. That the 2nd Respondent also did consultation with regard to the Mwoki/Masana quarry after complaint were registered sometime in the year 2015. That Valuers from the Directorate of valuation, Ministry of Land and Physical Planning did a valuation of damaged property and prepared a report ref no VAL/1457 dated 24th March 2017. That those residents affected were compensated on various dates between May, 2017 and October 2017 in a total of ksh 29,209,250/-.

That the Petitioners are not entitled to the relief sought.

The Evidence

19. The parties chose, and directions were taken that the matter proceeds by way of *viva voce* evidence. The Petitioners called two (2) witnesses namely PW.1 Bon Opondo and PW.2 Francis Okoth Asuna.

PW.1 adopted the contents of his Affidavit sworn on 2nd November, 2020 as his evidence. He had deposed in the Affidavit that he is a resident of Magonya and Got-Kabindi villages in South Maragoli Ward, Vihiga County. That the Petitioners live within a close proximity to Mwoki village where the quarry is located and at a radius ranging from 200 metres to 2 kilometers from the quarry where the blasting operations were taking place. That as a result of the blasting acts of the 1st Respondent, the Petitioners have suffered severe damage on their properties including cracks on the walls and floors of their houses, churches, toilets and collapsed houses, sunken toilets and collapsed perimeter walls. That the petitioners reported the damages but the Respondents refused to compensate them. That the Petitioners were never warned that the activities of the 1st Respondent would endanger their lives and property. That the government did not notify them that the 1st Respondent would take that course of action. That the 2nd and 3rd Respondents have not observed the provisions of Article 42 and 43 of the Constitution as well as Section 58 and 59 of the Environment Management and Coordination Act (EMCA) which dictate that physical development projects be undertaken only after an Environment Impact Assessment (EIA) testify study has been undertaken and reports given to any affected person.

That due to the actions of the 1st Respondent, the Petitioners have been forced to live and sleep in dilapidated structures, in dangerous home, houses and toilets exposing them to health risks, poor sanitation and other elements and vagaries of nature.

That the 1st Respondent has directly discriminated against the Petitioners by compensating some of their neighbouring village home owners and families. That the Petitioners' homesteads lie on the same bedrock with other claimants whom the 1st Respondent has since compensated for losses caused by



the blasting. He produced exhibits in support of the petition inclusive of list of petitioners, valuation report by Jamu Real Limited Minutes, letters and Memorandum to the Governor.

20. On cross-examination he stated that the effect of the blasting began in the year 2012 but the complainant letter was done in the year 2018. That his house which was damaged was built in the year 1992.
21. PW2 was Francis Okoth Asunah who introduced himself as a registered Geologist. He testified that he did extensive survey and was able to attribute the fracturing to the explosions from the quarry site. That the blasts and the damages were related. That the effect was detected in the whole of the area.
22. The 1st Respondent called 1 witness DW2 who adopted his witness statement dated 6th June, 2022 as his evidence. He repeated the content of the Replying Affidavit in the witness statements. He produced exhibits inclusive of National Construction Authority report for 12th to 26th October 2021, NEMA letter dated 29th April, 2021, status report for material site rehabilitation and decommissioning, NEMA, EIA license no0013267, handing over letter dated 12/11/2019, clearance certificate for Mwoki dated 12/11/2019 and list of participants. He testified that the quarrying work begun in the year 2013 and ended in 2017. That all people who were affected were compensated.

That the complainants' homes were over about 6 km from the quarry. That they visited the complainants' homes and did a report. That they never received any complainants from the residents of Magonya and Got-Kabindi villages before the case was filed.

That KENHA's role in identifying the quarry was nil and that it is the contractor who paid the compensation.

23. The evidence of 2nd Respondent was adduced by DW1 who testified that the project the subject of the Petition namely the construction of Kisumu – Kakamega road begun in the year 2012. That all requisite approvals and license were obtained from NEMA.

That in the year 2017, there was a valuation conducted by Ministry of lands because there was a complaint that the blasting at Mwoki had damaged property. That payments were done in accordance with the valuation report. That the total compensation paid was ksh 29,209,250/=.

That there was stakeholder's engagement. That the valuation by the Petitioners was done after the certificate of handling over had been done.

That KENHA does not play any role in material sourcing. He also produced the documents annexed to his Replying Affidavit as annexure 1 to 7.

24. The 3rd and 4th Respondents adduced no evidence.

Issues for Determination

25. From the pleadings filed and evidence adduced, this court identifies the following as the issues for determination herein: -
 - a. whether or not the Respondents infringed on the Petitioners' constitutional rights as provided for under articles 42 and 43 of the constitution.
 - b. whether or not the Respondents discriminated against the Petitioners thereby contravening the provisions of article 27 of the constitution.
 - c. Whether or not by reason of the Respondents activities the petitioners suffered damage for which they are entitled to compensation.



d. who payments the costs of the petition.

The preliminary issues on whether or not the petition is time barred by dint the provisions of section 67 of the Roads Act no 2 of 2007 or any other statute and whether or not the petition was fatally defective for non- compliance with Order 1 Rule 13(1) and (2) were determined *vide* the Ruling dated 15th November, 2021.

Analysis and determination

26. The Petitioners' complainant is that the Respondents never notified or forewarned the Petitioners or anyone else that the blasting exercise would endanger their lives and property, that the actions of the 1st Respondent contravened the provisions of Articles 42 and 43 of the Constitution on the right to housing and Article 25 of the 1948 Universal Declaration of Human Rights and Article 11 of the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR).

Secondly, that by compensating some people and leaving the Petitioners, the 1st Respondent has directly discriminated against the Petitioners. That this is in contravention of Article 27(5) of the Constitution.

Thirdly, that the 1st Respondent violated their right to property by damaging the walls of the Petitioners' houses and causing the cracking and peeling off of walls, breaking windows panes, cracking of floors, collapsing of houses, sinking of toilets thereby exposing the Petitioners to unsanitary and unhygienic conditions.

27. Article 42 provides for the right to a clean and healthy environment that "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 the present and future generations through legislative and other measures particularly those contemplated under article 69
- b. To have obligations relating- to the environment fulfilled under article 70."

28. Article 43 of the constitution provides for economic and social rights as follows

- (1) Every person has the right
 - a. To the highest standard of health which includes the right to healthcare services including reproductive healthcare;
 - b. To accessible and adequate housing, and to reasonable standards of sanitation;
 - c. To be free from hunger and to have adequate food of acceptable quality
 - d. To clean and safe water in adequate quantities
 - e. To social security
 - f. To education
- (2) a person shall not be denied emergency treatment.
- (3) the state shall provide appropriate social security to persons who are unable to support themselves and their dependants .

29. Section 58 and 59 of the EMCA provides for the procedure for application for Environmental Impact Assessment License (EIA) for projects specified in the Second Schedule of the Act.



30. Issuance of the Environmental impact Assessment license by NEMA is the culmination of compliance with the EMCA and the Environmental Impact Assessment and Audit Regulations for the project to be undertaken. Evidence placed before the court shows that the 1st Respondent obtained the EIA for the extraction of construction stones (rough stones) from Masana South Maragoli location Vihiga District Vihiga County for the construction of Kisumu-Kakamega Road. The EIA document acknowledged receipt of Project Report/ Environmental Impact Assessment study report from the 1st Respondent in respect of the undertaking in accordance with the law.
31. There is evidence of meetings between the residents of the area where the quarry was located, the local administration, the County government and representatives of the Respondents on the issues of damage emanating from the activities at the quarry and compensation therefor. There is evidence that this culminated in a valuation and assessment of the damage by officials from the Ministry of Lands. There is further evidence that people whose property were found to have been affected were paid compensation.
32. The Petitioners' claim for compensation was premised on the report by PW2. PW2 testified that the cracks to the buildings were caused by the blasting activities.
33. There is no evidence that the petitioners presented their claim with the other claimants who were paid and that they were left out. The Respondents submitted that the Petitioners' claim was an afterthought brought well after the project was complete and long after those found to have been affected were paid compensation. There no explanation as to why they did not present their claim then if indeed they were affected and if their homes/property are within the proximity of the quarry.
34. The petitioners produced a list of the claimants (petitioners) and the amounts of money each of them claims. There is no evidence of ownership of the property they claim to have been damaged. There is no evidence that the plots quoted in the list belong to the petitioners. There is no evidence of the particulars of the property and the damage for each petitioner. Moreover, there is no evidence of how the amount of compensation for each claimant was arrived at.
35. The *evidence Act* cap 80 of the Laws of Kenya is applicable to the conduct of constitutional matters. Section 2 provides that the Act is applicable to all judicial proceedings except proceedings before the Kadhi and before an arbitrator. Sections 107, 108 and 109 of the *Evidence Act* places the burden of proof on the Petitioners to prove their claim on a balance of probabilities. In my view, the petitioners have not discharged the burden.
36. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v royal Media Services Limited and 5 Others* [2014]eKLR although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened a party invoking this article has to show the rights said to be infringed as well as the basis of his or her grievances. This principle emerges clearly from the high Court decision in *Anarita Karimi Njeru v Republic* (1979)KLR 154: the necessity of a link between the aggrieved party, the provisions of the constitution alleged to have been contravened and the manifestation of contravention or infringement. Such principle plays a positive role as a foundation of conviction and good faith in engaging the constitutional process of dispute settlement.”
37. My finding is that the petitioners have failed to prove the manifestation of the alleged infringement. As at the time of filing suit the 1st Respondent had already completed the project handed over the project to the 2nd Respondent and the quarry to the local community.



38. For the foregoing reasons I find that the Petitioners' claim contained in the petition has not been proved. I dismiss the petition. Each party to bear own costs

39. Orders accordingly

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI,

JUDGE.

In the presence of:

Neville: Court Assistant.

No appearance for the Petitioners.

Indimuli for the 1st Respondent.

Mudavadi for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

