



REPUBLIC OF KENYA



**KENYA LAW**  
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**Guyo v Kenya Electricity Generating Company PLC (Kengen);  
National Assembly (Interested Party) (Environment & Land Petition  
4 of 2022) [2023] KEELC 19335 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 4 OF 2022  
MAO ODENY, J  
AUGUST 30, 2023**

**BETWEEN**

**ALI WARIO GUYO ..... PETITIONER**

**AND**

**KENYA ELECTRICITY GENERATING COMPANY PLC  
(KENGEN) ..... RESPONDENT**

**AND**

**NATIONAL ASSEMBLY ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of a notice of motion dated October 24, 2022 by the Respondent/ Applicant seeking the following orders;
  - a. That the Trial Judge be and is hereby pleased to pay a site visit to Masinga and Kiambere dams operated by the Respondent along the River Tana for the purposes of observing in person the functioning of the spillway which constitutes part of the said dam and establishing whether or not the Respondent was at any times material to the Petition in a position to deliberately or otherwise release or discharge any excess water from the said dams back into the river as has been alleged by the Petitioner;
  - b. That in the alternative, that the Trial Court be and is hereby pleased to direct that the Deputy Registrar of the Court pay a site visit to Masinga and Kiambere dams for the purposes of observing in person the functioning of the dam's spillway and establishing whether or not the Respondent was at any times material to the Petition in a position to deliberately or otherwise release or discharge any excess water from the said dam back into the river as has been alleged



by the Petitioner and to thereafter furnish the Court with a report on his or her observations and findings.

- c. That the Court be pleased to grant any other or further orders as it may deem just and expedient in the peculiar circumstances of this matter.
- d. That the costs of the Application be in the main Cause.

### **Respondent/Applicant's Case/Submissions**

2. The Applicants gave the background to the Petition and stated that the Petitioner alleged that the Applicants released and discharged excess water from the dams which are located in the upper stream part of River Tana, back into the river thereby resulting into subsequent massive flooding at the downstream parts of the said river.
3. The Applicants in response to the allegation maintained that due to the design and operation of the said dams, it is not possible for her to deliberately or even negligently discharge or release any excess water from the said dams to flow back into the river and onwards to the downstream parts of the river as has been alleged by the Petitioner in the Petition or at all.
4. Further, that the reason why it is not possible for the Applicant to intentionally or deliberately discharge or release excess water from the dams is the dam's spillway.
5. The Applicants stated that proposed site/scene visit shall allow the Trial Court to better appreciate the fact that the said dams are all structurally designed to hold a certain volume of water and that once the dams have taken in the maximum volume of water they are structurally designed to hold, they are as a matter of structural design unable to take in any additional water from the river.
6. Counsel submitted that it is therefore critical that the Trial Court, either by itself or through the Deputy Registrar, makes a site visit to any one or both of the said dams so as to see and observe in person the operation of a dam spillway as this shall enable the Court to better appreciate and understand the technical response pleaded by the Applicant in her response to the Petition on the question of whether or not the Applicant can intentionally, deliberately or even negligently "discharge" or "release" excess water from the dams as alleged by the Petitioner.
7. In support of the application counsel relied on the case of *Showcase Properties Limited v Bamburi Speida Products Limited* [2013] eKLR where the court held that since a court is not an expert in this matter the courts lay observation of the site would help to better understand the expert evidence.
8. Counsel further relied on the cases of *Tramex Limited v Nairobi City County* [2017] eKLR and *Juma Juma Kanga & 299 others v Abdulkadir Ahmed Rahmkhan & 9 others* [2021] eKLR and urged the court to allow the application.

### **Petitioner's Submissions**

9. Counsel submitted that the petitioner filed a replying affidavit in opposition to the application by the applicant or the court to visit Masinga and Kiambere Dams to observe the functioning of spillway to establish whether the Respondent was in breach.
10. It was counsel's submission that the Petitioner's Replying Affidavit stated that there is a comprehensive report, which has been filed after several site visits were made to the said dams by the Departmental Committee of the Interested Party herein. Counsel further submitted that the report is sufficient to enable this Honorable Court arrive at a just determination of the matter thus conducting another site visit to the said dams would amount to duplication and a waste of judicial resources.



11. Counsel also submitted that the Application is spent as the excess spillage complained of occurred on or around April, 2018 thus conducting a site visit almost 5 years later will not enable this Honorable Court further the course of justice.
12. Counsel further submitted that the Honorable Court lacks the technical expertise or equipment to examine the structural or functioning of the dams thus the site visit will be a distraction from timely, expeditious and just determination of the suit and relied on the case of *Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 others* [2017] Eklr.
13. Counsel similarly relied on the case of *Njiru Micheni Nthiga v Governor, Tharaka Nithi County Government & 5 others* [2020] eKLR, where the judge declined an application for a site visit as it would not yield meaningful results and the Court would benefit more from the expert report filed.
14. Counsel therefore urged the court to dismiss the application with costs.

### **Analysis and determination**

15. The issue for determination is whether the Applicant has made a case for a site visit by the court to Masinga and Kiambere dams.
16. The Applicant urges the court to visit the site to see and observe in person the operation of a dam spillway as this shall enable the Court to better appreciate and understand the technical response by the Applicant whether or not the Applicant can intentionally, deliberately or even negligently “discharge” or “release” excess water from the dams as alleged by the Petitioner.
17. The Purpose of a site visit is to receive evidence that will assist the court to come to a just decision as was held in the case of *Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 others* [2017] eKLR (Supra) where the court held as follows:
 

“If the court visits a site, it can only be for purposes of receiving evidence which will assist it make a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence then the judge will be no better than a tourist satisfying curiosities and taking photographs during the site visit. A court in session must perform judicial functions and must resist distractions that take it away from its mission.”
18. The question is whether a site visit to the Masinga and Kiambere dams would yield any evidence that would assist the court in coming to a just decision? It is not in dispute that there have been previous site visits by the Departmental Committee of the Interested Party and reports filed in respect of the said visits. This does not mean that the court cannot visit the site due to the previous site visits.
19. It is further on record that issues complained of what happened in April 2018 and even if the court were to visit the site, it might not have the eye to observe and understand what transpired as the court has not expertise in that field and that is why the court involves experts to give reports which they have to explain in a lay man’s language in court.
20. I therefore find the application lacks merit and is therefore dismissed with costs to the Petitioner.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF AUGUST, 2023.**

**M.A. ODENY**

**JUDGE**

