



Emwatsi Welfare Society v County Government of Vihiga & another (Environment & Land Petition E011 of 2024) [2025] KEELC 1213 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND PETITION E011 OF 2024**

**E ASATI, J
MARCH 13, 2025**

BETWEEN

EMWATSI WELFARE SOCIETY APPELLANT

AND

THE COUNTY GOVERNMENT OF VIHIGA 1ST RESPONDENT

VIHIGA COUNTY ENVIRONMENT COMMITTEE 2ND RESPONDENT

JUDGMENT

1. The Petitioner approached the court vide the Petition dated 16th September, 2024 seeking for the following relief: -
 - a. declaring that alienation of part or whole of community land at Emwatsi village of Emuhaya sub-county of Vihiga County and acquisition of registered ownership thereof by the Respondents or by their servants, agents, or nominees or whichever names registered after unlawful alienation thereof was in breach of due process for alienation of community land and null and void for unconstitutionality thereof
 - b. an order to give effect to the foregoing declaration by cancellation of the title deed thereof
 - c. declaring that the 1st Respondent's plan to construct a granite factory at Emwatsi village without strategic environmental impact assessment report and harvesting of granite from the fragile hilltops, hillsides, mountain tops, mountain sides water catchment areas, wetlands, rivers and rivulets will deny the residents of Emwatsi village and elsewhere in Emuhaya sub-county their fundamental rights and freedoms to a clean and healthy environment
 - d. a writ of prohibition to give effect to the foregoing declaration, prohibiting, restraining harvesting of granite from fragile hilltops, hillsides, mountain sides, water catchment areas, wetlands, rivers and rivulets at Emwatsi village and elsewhere in Emuhaya sub-county



- e. a writ of prohibition to give effect to the foregoing declaration prohibiting, restraining construction of a granite factory at Emwatsi village or elsewhere in Emuhaya sub-county
- f. the honourable court be pleased to make any further or other orders for the ends of justice
- g. the Petitioner to be awarded the costs of this petition.

Petitioner's case

2. The Petitioner's complaint is that the residents of Emuhaya sub-county were not invited by the Respondents to participate in the decision to establish a granite factory at Emwatsi and that they fear that the implementation of the project without their participation is unlawful and unconstitutional as violating their rights and fundamental freedoms to a clean and healthy environment guaranteed to them by the provisions of articles 42 and 70 of *the Constitution*.
3. That the activities planned by the Respondents will result in serious downturn on the health and lives and livelihoods of the residents and occupants of Emuhaya sub-county, Vihiga County.
4. That the Respondents failed to conduct an environmental impact assessment of the projected activities, excavation, mining and removal of granite stones as well as the activities of the projected granite factory thus contravening the provisions of *the Constitution* and the Environment Management and Coordination Act.
5. That the parcel of land selected by the Respondent as the site for the projected granite factory is part of community land at Emwatsi village that has been hived off for acquisition by the Respondents without following due process for alienation thereof. That this was in violation of the provision of articles 62 and 63(4) of *the Constitution* and the *Community Land Act*.
6. The Petitioner contended that the Respondents were under statutory obligation under the provisions of the Environment Management and Coordination Act and under the provisions of *the Constitution* to protect the fragile environment of hilltops, hillsides, mountain tops, mountain sides, water catchment areas and wetlands, rivers and rivulets and the health and livelihoods of the residents of Emwatsi village but acted recklessly and in total disregard of the statutory obligation.
7. On the constitutionality of the petition, the petitioner relied on the provisions of articles 2(1), 2(5), 19(2), 19(3), 20(1), 22(1), 42, 69 and 70 of *the Constitution*.

Respondents' response

8. The Respondent's reply to the Petition is contained in the Replying Affidavit sworn by Ezekiel Ayiego, the County Secretary to the 1st Respondent. He stated that the land where the granite factory is to be situate namely; No. West Bunyore/Embali/1057 was identified for marram mining and set aside for that purpose during land adjudication in the 1960s and registered in the name of the defunct Kakamega County in 1964. That the land has never been community land.
9. That the national government published the tender for feasibility study in the year 2018 requesting for expression of interest from those interested in undertaking the feasibility study. That the terms of reference in the said advert were wide and included among others, the impact of the proposed plant on the local community and the environment.
10. That the feasibility study report was finalized in October, 2019 and submitted to the Ministry of Petroleum and Mining. That all issues including the extraction methods, the equipment to be employed, the environmental impact assessment and the community views on the granite processing



plant were addressed before the final recommendation for the establishment of the plant in the area after its economic potential had been proved.

11. That the contract with the investor was signed with the national government and that the role of the County Government was to avail the required land for the project and prepare the lease which it did after following due process.
12. That the suit land is no longer in the name of the Respondent that hence there is no cause of action against the Respondents. That although the project was initiated in the year 2014, it was not until August 2024 when the project was due for commencement that the petition was filed. That this confirm that the petition lacks good faith and is meant to derail development.

That the residents of Emuhaya wholly support the project.

Submissions

13. The petition was disposed of, pursuant to directions taken by consent on 8th October, 2024, by Affidavit evidence and written submissions.

Petitioner's Submissions

14. Written submissions dated 29th October, 2024 were filed on behalf of the Petitioner.
15. It was submitted that the petition was brought on behalf of the Residents of Emuhaya sub-county to vindicate violation or threatened violation of fundamental rights of the residents and future generations of Emwatsi village in Emuhaya sub-county to a clean and healthy environment guaranteed by article 42 and 70 of *the Constitution*.
16. Relying on the provisions of section 40(1) of the Environment Management and Coordination Act, it was submitted that the Respondents were under statutory duty to prepare Vihiga County Environment Plan for adoption by Vihiga County Assembly and that the 2nd Respondent was mandated to submit the Vihiga County Environment Plan to the Cabinet Secretary for incorporation in the National Action Plan.
17. That section 58 of the Environment Management Coordination Act mandated the Respondents to apply for an environmental impact assessment license before construction of a granite processing plant in Vihiga County. That the feasibility study annexed to Affidavit of Ezekiel Ayieko alleging that an Environment and Social Impact Assessment (ESIA) was conducted was without evidence. That there is no evidence that such Environment and Social Impact Assessment (ESIA) was conducted or received approval by NEMA before construction of the granite factory at Emwatsi village was undertaken.
18. Relying on the case of Charles Ndegwa Kiragu deceased [2016]eKLR and Twiga Chemicals Industries Ltd v Alan Stephen Reynolds [2014]eKLR, Counsel submitted that the references in the Affidavit sworn by Ezekiel Oyieko vouching for an Environmental and Social Impact Assessment are inadmissible hearsay evidence about the contents of the Environment and Social Impact Assessment which was not produced.
19. That the Respondents have failed to produce evidence of an Environmental and Social Impact Assessment (ESIA) report of the projected granite processing plant.
20. Relying on the provisions of article 63(1) and (4) of *the Constitution*, Counsel submitted that the subject land selected by the Respondents as the site of the projected granite factory namely; No. West Bunyore/Embali/1057 belonged to the community and the title in respect thereof was held by the 1st Respondent as a Trustee for the community of Emwatsi village and that the transfer thereof to



the Cabinet Secretary to the Treasury of Kenya contravened the provisions of article 63(4) of *the Constitution* and section 5 of the *Community Land Act*.

21. That compulsory acquisition of the community land without due process is null and void ab initio.

Respondents' submissions

22. Written submissions dated 2nd December, 2024 were filed on behalf of the Respondents. It was submitted that the petitioner's claim to the suit land on the basis of community interest is misplaced and baseless. That the land does not fit in the description of community land as provided for in article 63(2) of *the Constitution* and the *Community Land Act*.

23. That land registered under County Council are public lands within the meaning of article 62(2) of *the Constitution* and not Community land. That it was the National Land Commission which processed and granted consent for transfer of title from Kakamega County Council to the National Government because the land is public land.

24. Counsel relied on the case of James Maosa Okeno v County Government of Kisii [2019]eKLR where it was held that the suit property registered in the name of County Council was public land as defined in section 62 of *the Constitution*.

25. It was submitted further that it was the National Government through Ministry of Petroleum and Mining, State Department of Mining that procured the company that undertook the Feasibility study and submitted a report that recommended the project.

26. That the doctrine of public interest consideration must be brought into operation. That the proposed granite plant shall be of great economic benefit to the whole County and Country. That public interest must override the dishonest sectional and individual interest being advanced.

27. On non-joinder of parties, Counsel submitted that the County Government cannot be competently sued in connection with functions which fall under National Government. That mining as a function involving protection of environment and natural resources for sustainable development is a function of the National Government under Part 1 paragraph 22 of the Fourth Schedule. That equally, public investment under which the proposed granite factory falls is a function of national government under paragraph 33 of the same schedule.

28. Counsel submitted that the petition was pre-mature because it was not the responsibility of the Respondent as county government to undertake environmental impact assessment as it is not the developer of the granite plant.

29. That even in constitutional petitions, the Petitioner has a duty to present evidence to the required standard in order to be entitled to the sought remedies. That the Petitioner has failed to establish a cause of action against the Respondent through evidence.

Issues for Determination

30. From the petition, the evidence placed before court and the submissions made the following emerge as the issues for determination herein: -

31.

a. whether or not the Petitioner as a society registered under the *Societies Act* has capacity to file the petition herein in its name;

b. whether or not the suit land is community land belonging to Emwatsi village community;



- c. whether or not the Petitioner has demonstrated a cause of action against the Respondents;
- d. whether or not the Petitioner is entitled to the relief sought;
- e. what orders to make regarding the costs of the petition.

Analysis and Determination

- 32. The first issue for determination is whether or not the Petitioner as a society registered under the *Societies Act* has capacity to file the petition herein in its name;
- 33. The Petitioner described itself in paragraph 1 of the petition as a Welfare Society registered under the provisions of the *Societies Act* Laws of Kenya. In paragraph 12 of the petition, the Petitioner stated that it brought the action in public interest to vindicate the fundamental rights and freedoms of the resident of Emuhaya sub-county to a clean and healthy environment guaranteed to them by the provisions of article 42 and 70 of *the Constitution*.
- 34. While it is correct that a society registered under a *societies Act* Cap 108 Laws of Kenya has a right to originate litigation the manner of originating such litigation or approaching the court is important; namely that such society can only originate litigation in the name of its officials or the entire membership as such society is an unincorporated body and hence not a legal person. In *Kisumu Bar Owners Association vs Cabinet Secretary Ministry of Interior & Coordination of National Government & 2 others. (Constitutional pet E002 of 2024)* (2024) KEHC 6003(KLR) 27 May 2024 the court concluded that the petitioner being a society registered under the *Societies Act* did not have capacity to originate litigation in its own name and can only do so in the names of its officials and the entire membership. Also see Trustees of Kenya Redeemed Church & another vs Samuel Mubiya & 5 others (2021)eKLR and African Orthodox Church of Kenya vs Rev Charles Omuroka and another (2014) eKLR.
- 35. I find that the Petitioner being an un-incorporated body lacks the capacity to bring the petition.
- 36. The second issue for determination is whether or not the suit land is community land belonging to Emwatsi village community.
- 37. One of the Petitioner's complaints or grounds of the petition is that the Respondents have selected to develop the granite factory on community land without going through the process of compulsory acquisition of the land thereby unlawfully depriving the Petitioner's community of the land. The Respondents deny that the land is community land and aver that the land parcel No. No. West Bunyore/Embali/1057 is public land.
- 38. There was no evidence placed before the court by the Petitioner to support the contention that the land is community land. It was not denied that the land was first registered in the name of the County Council of Kakamega and reserved for mining of marram and is currently registered in the name of National Government. There is no evidence that the land was so registered in trust for petitioner's community.
- 39. I find that the suit land is public land which was held by the defunct Kakamega County Council and later the County Government in trust for the people of the County under article 62 (2) and therefore not community land as defined under article 63 of *the Constitution*.
- 40. The next issue is whether or not the Petitioner has demonstrated a cause of action against the Respondents.



41. In the case of Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court of Kenya held that: - “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 grievance. 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.”
42. In the present case the burden to prove the allegations in the petition lay with the Petitioner. However, no evidence was adduced, inter alia, that the Respondents had acquired community land without following the lawful process of compulsory acquisition, that the proposed project is a project of the Respondents sued and that the 2nd Respondent failed to conduct Environment and Social Impact Assessment (ESIA) or to engage the Petitioner’s members in public participation for the project. The Petitioner did not discharge the burden of proof.
43. I find that no cause of action has been established against the Respondents sued. Issuing the relief sought against the present Respondents will be in vain. Court orders are never issued in vain.
44. The next issue for determination is whether the petitioner is entitled to the relief sought.
45. Having found that the petitioner lacked capacity to bring the petition, that the suit land is not community land and that the petitioner has failed to discharge the burden of proof of its claim, I find no basis on which the petitioner can be entitled to the relief sought.
46. Regarding costs, the petition was stated to have been brought in public interest and as the Petitioner is not a legal person, it is expedient that there be no order as to costs.
58. For the foregoing reasons, the petition is hereby dismissed. No orders as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Ajevi: Court Assistant.

F. N. Wamalwa for the Petitioner.

No appearance for the Respondents.

