



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND PETITION NO. 10 OF 2015

**GEORGE ODERO
PETITIONER**

VERSUS

**LAKE VICTORIA ENVIRONMENT MANAGEMENT
PROGRAMME (LVEMP II.....1ST RESPONDENT**

**BLOOTEX CONTRACTORS LTD 2ND
RESPONDENT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
1ST INTERESTED PARTY**

**THE COUNTY GOVERNMENT OF HOMABAY 2ND
INTERESTED PARTY**

RULING

1. The petitioner is a resident of Makongeni estate in Homa Bay town within Homa Bay County. The petitioner is a fisherman. He carries out his fishing activities in Lake Victoria. The 1st respondent is a project of the East African Community. It is being implemented in five (5) East African Countries that share Lake Victoria namely, Kenya, Uganda, Tanzania, Rwanda and Burundi. In Kenya, the implementation agency for the project is the Ministry of Environment, Water and Natural Resources. The project according to its proponents is intended **“to improve collaborative management of trans-boundary natural resources of Lake Victoria Basin and to reduce environmental stress in the targeted pollution hot spots and selected degraded sub-catchment areas as a means of improving the livelihoods of communities who depend on the natural resources of Lake Victoria basin”**. See, the Environmental and Social Impact Assessment Study Report dated January, 2013 which is annexed to the affidavit of Christine Akinyi Adino filed herein on 26th February, 2015 as annexure “CAA2”. Sometimes in the year 2014, the 1st respondent in pursuance of its objectives set out above entered into a contract with the 2nd respondent under which the 2nd respondent was to undertake certain works within Homa Bay town on its behalf. The said works which shall hereinafter be referred to only as “the project works” where the context so admits involved the rehabilitation and augmentation of Homa Bay town sewerage system. The petitioner was aggrieved with the manner in which the said works were being undertaken by the 2nd respondent. This is what prompted this petition.

2. The petitioner brought this petition on 11th February 2015 seeking the following reliefs:-

(a) An injunction restraining the respondents from continuing with the implementation of the project works pending full compliance with the Environmental impact assessment report and the hearing and determination of this petition.

(b) A mandatory injunction compelling the respondents to provide an alternative, safe and environmentally clean interim sewer and waste disposal system and site.

(c) An order of mandatory injunction to compel the respondents to remove waste and affluent deposited along undesignated and unsafe areas within the project locality and to take measures to cure (sic) the pollution caused in Lake Victoria water by the reckless discharge of raw sewer therein.

(d) The costs of the petition to be borne by the respondents.

3. In his petition, the petitioner averred that the 1st respondent had contracted the 2nd respondent to rehabilitate Homa Bay town sewerage system which project is being undertaken under the supervision of the interested parties. The petitioner averred that in the process of undertaking the said project, the 2nd respondent has committed and is continuing to commit acts which are injurious to the environment. The petitioner averred that the 2nd respondent has committed the following offensive acts:-

(i) Dismantling the old sewerage system without providing an alternative system for use in the interim period.

(ii) Exposing raw sewer and discharging the same in undesignated places.

(iii) Discharging raw sewer directly into Lake Victoria.

(iv) Exposing the petitioner and other residents of the project locality to pollution and environmental degradation.

(v) Failing to comply with the terms of the Environmental Impact Assessment License that was issued by the 1st Interested Party.

(vi) Failing to provide for safe and sustainable implementation of the project.

4. Together with the petition, the petitioner brought an application by way of Notice of Motion dated 27th January 2015 under order 40 rules 1 and 2 of the Civil Procedure Rules, Articles 70 and 91 (2) and (3) of the Constitution of Kenya and sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders:-

(i) Spent

(ii) Spent

(iii) That the court be pleased to grant a temporary injunction restraining the respondents by themselves or through their agents, servants, employees or any person acting with their authority from proceeding with the implementation of the rehabilitation and augmentation of Homa Bay Sewerage System or any part thereof pending the hearing and determination of this petition.

(iv) That the court be pleased to grant an order of mandatory injunction to compel the respondents to remove the waste deposited in non designated areas within the project vicinity and to take measures to stop raw sewer from flowing

into lake Victoria and to carry out such purification measures as may be necessary to restore cleanliness and freshness of the Lake water.

(v) That the costs of the application be provided for.

5. The application was brought on the grounds that were set out on the face thereof and in the affidavit of the petitioner sworn on 27th January 2015. In his grounds in support of the application, the petitioner has contended that in the process of undertaking the rehabilitation and augmentation of Homa Bay town sewerage system (hereinafter referred to as “the sewerage project” where the context so admits), the 2nd respondent has been discharging raw sewer and other waste material directly into Lake Victoria. The applicant has contended further that the 2nd respondent has also been depositing raw waste in undesignated places without any regard to environmental safety. The petitioner has contended that on account of the foregoing, his right to clean and healthy environment guaranteed under the Constitution of Kenya has been violated by the 2nd respondent. In his affidavit in support of the application, the petitioner has stated that he had personally seen the 1st respondent ferrying raw solid waste on their trucks and depositing the same in open fields at Makongeni estate where he resides and in other areas within Homa Bay town. The petitioner has stated further that the 2nd respondent has diverted the old sewer lines that used to drain sewer into designated treatment ponds so that the sewer from these lines now flow directly into Lake Victoria at Makongeni beach. The petitioner has contended that since the sewer flowing into the lake is raw, the same is polluting the lake water. The smell from solid waste is also unbearable. The petitioner has contended that his fishing activities have been adversely affected by the said acts and omissions of the 2nd respondent.

6. The petitioner’s application was opposed by the respondents. The 1st respondent opposed the application through a replying affidavit sworn on 24th February 2015, by one Isaiah Mawinda who described himself as a water specialist with the 1st respondent. The 2nd respondent opposed the application through grounds of opposition dated 17th March 2015 and a replying affidavit sworn by one, Christine Akinyi Adino on 25th February 2015. In its replying affidavit, the 1st respondent has admitted that it contracted the 2nd respondent to carry out the rehabilitation and augmentation of Homa Bay Sewerage System (“the sewerage project”). The 1st respondent denied the petitioner’s claim that it had ferried raw solid waste using its trucks and deposited the same in open fields at Makongeni estate and in other areas within Homa Bay town. The 1st respondent contended that once they contracted the 2nd respondent to carry out the project works, they had no other role to play in the execution of the said project save for supervision. The 1st respondent contended that the 2nd respondent has been using its own trucks to carry the excavated material and other waste to the dumping sites. The 1st respondent denied that the 2nd respondent is disposing raw sewer into Lake Victoria. It contended that before sewer is allowed to flow into the lake, the sewer inlet must flow into a primary pond and maturation pond before the same is discharged into the lake. The 1st respondent has termed the petitioner’s claim that raw sewer is being discharged into Lake Victoria as a mere allegation with no basis. The 1st respondent contended that before the sewerage project commenced, environmental and social impact assessment study (ESIAS) was carried out and it was anticipated that incidences such as that of foul smell would arise. The 1st respondent contended that the 2nd respondent has complied with all the recommendations that were contained in the report that followed ESIAS and that the petitioner has failed to demonstrate how he has been affected by the manner in which the 2nd respondent is implementing the sewerage project. The 1st respondent has contended that the sewerage project is being undertaken for the benefit of the public and when completed, the residents of Homa Bay town will enjoy a cleaner and healthier environment. The 1st respondent has contended that the orders sought if granted would be against public good.

7. On its part, the 2nd respondent has termed the petitioner’s application as frivolous and an abuse of the process of the court. The 2nd respondent has contended that the injunctive reliefs sought against the respondents cannot issue in law. In her affidavit, the 2nd respondent’s managing director, Christine Akinyi Adino has stated that the 2nd respondent was engaged by the 1st respondent to carry out the

rehabilitation and augmentation of Homa Bay Sewerage System (“the sewerage project”) following a public outcry over the state of the previous sewerage system. The purpose of the project was to rehabilitate and improve the sewer system in Homa Bay town for the benefit of the public. The project is being undertaken under the supervision of a project manager appointed by the 1st respondent and the interested parties. In their work plan, the old sewer system was to remain intact and functional as it was before the rehabilitation works commenced. This ensured that the sewer flow was not disrupted in any way. She stated that the sewer treatment ponds that were in existence were not interfered with and the same had been rehabilitated and were in use as at the time the petitioner came to court. She denied that the 2nd respondent was ferrying and disposing raw sewer in open fields. She contended that it is not practical to carry raw sewer in a normal trucks like the ones the petitioner has referred to in his affidavit in support of the application. She stated that the trucks mentioned in the petitioner’s affidavit were ferrying excavated marram and soil from the area where a new anaerobic pond was being constructed.

8. She stated that the said marram and soil were being deposited in dumping sites approved by the 2nd interested party. She denied that the old sewer system was interfered with in any way. She stated that the main objective of the project was to enhance the capacity of the sewer treatment plant to meet the needs of the growing population of Homa Bay town. She stated that even as they carried out the rehabilitation works, the sewer still passed through three treatment ponds namely, the primary anaerobic pond, the first maturation pond and the second maturation pond before the same is discharged into the lake. She termed the petitioner’s claim that the 2nd respondent is discharging raw sewer into the lake as baseless. The 2nd respondent’s said managing director contended that the 2nd respondent involved all key stakeholders in the project from the inception and has been holding regular site meetings to address emerging issues of concern including those touching on the environment. She denied that the project works have in any way posed a threat to the environment. She contended that the petitioner is pursuing a personal agenda. She stated that the petitioner had grabbed the sewerage plant land and constructed fish ponds thereon which land was recovered from him by the 2nd interested party. According to the 2nd respondent, the petitioner is out to hit back at the 2nd interested party by stopping the project. The 2nd respondent’s managing director urged the court to allow the project to continue.

9. When the petitioner’s application came up for hearing on 26th February, 2015, the petitioner sought leave to file a supplementary affidavit in response to the issues that were raised in the respondents’ affidavits the contents of which I have highlighted above. The petitioner was granted the leave sought and the application was adjourned to 5th March 2015 for hearing. When the matter came up on 5th March 2015, the petitioner had not filed the supplementary affidavit in respect of which he had obtained leave. The petitioner’s advocate informed the court that the petitioner did not wish to make any submission with respect to his application. Counsel informed the court that the petitioner wished to rely entirely on his affidavit in support of the application. The advocates for the respondents however made submissions in opposition to the application. The advocate for the 1st respondent submitted that the content of the affidavit that was filed by the 1st respondent in opposition to the application was not controverted by the petitioner. He argued that the public would be injured if the orders sought by the petitioner are granted. The 1st respondent’s advocate argued further that the 1st respondent being an initiative of the East African Community; it is immune from suit pursuant to Article 138 of the East African Community Treaty. The 2nd respondent’s advocate adopted the submissions by the advocate for the 1st respondent and added that the petitioner’s application is misconceived.

10. I have considered the petitioner’s application together with the grounds of opposition and replying affidavits that have been filed by the respondents in opposition thereto. Article 42 of the Constitution of Kenya guarantees every person a right to a clean and healthy environment. Article 70 (1) of the Constitution gives a person who alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution has been or is likely to be denied, violated, infringed or threatened a right to apply to court for redress. The petition herein is based on Articles 42 and 69 of the Constitution. The petitioner has contended that his right to clean and healthy environment has been violated or infringed by the respondents.

11. It is not in dispute that the 2nd respondent has been contracted by the 1st respondent to carry out rehabilitation and augmentation of the Homa Bay Sewerage system. It is also not in dispute that this is a public project which is aimed at rehabilitating and improving the sewer system in Homa Bay town for the benefit of the residents and general public. The project involves the rehabilitation of the primary sewer treatment units for screening and grit removal, rehabilitation and augmentation of the existing sewerage settlement tanks and sewer maturation ponds and, the construction of anaerobic ponds. The petitioner has contended that in the process undertaking the said project works, the 2nd respondent; dismantled the old sewerage system and failed to provide an alternative system for use in the interim period, exposed and discharged raw sewer in undesignated places, discharged raw sewer into Lake Victoria, disposed waste materials from construction sites in undesignated areas, failed to comply with the recommendations in the environmental impact assessment study report and failed to ensure that the project is implemented safely and in a sustainable manner.

12. The petitioner has contended that due to the foregoing wrongful acts and omissions, the petitioner and other Homa Bay town residents have been exposed to dangers of pollution and environmental degradation in violation of their constitutional rights. The petitioner has contended that his profession as a fisherman has been adversely affected more particularly by the discharge of raw sewage into the lake.

13. In the application before me, the petitioner has sought interim orders pending the hearing and determination of the petition. The application is indicated to have been brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 1A, B and 3A of the Civil Procedure Act and Article 70 of the Constitution. I am of the view that the provisions of the Civil Procedure Act and Rules that have been cited by the petitioner are not relevant to the application before the court. The petitioner has as I have stated above brought this petition to enforce his right to a clean and healthy environment under Article 42 of the Constitution. Under Article 22 (3) and Article 165 (3) of the Constitution, the Chief Justice made rules for the enforcement of Constitutional rights and fundamental freedoms. The rules are known as The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to only as “the rules” where the context so admits). Rule 23 (1) of the rules gives the court power once a petition for enforcement of constitutional rights or fundamental freedoms has been lodged to hear and determine an application for conservatory or interim order. This is the rule that the petitioner should have invoked in the application before me. Failure by the petitioner to invoke the correct provisions of law under which he has moved the court is however not fatal to the application. Article 159 (2) (d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicalities. Furthermore, rule 24 of the rules allows an application for conservatory or interim order to be made by way of informal documentation. I would therefore deem the petitioner’s application herein to have been brought under rule 23 of the rules.

14. It is now fairly settled that an applicant for a conservatory or interim order under rule 23 of the rules must demonstrate that:-

- (i) He has a prima facie case.
- (ii) Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution.
- (iii) It would be in the public interest to grant the order.

In the Supreme Court case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Petition No. 2 of 2014 (unreported)**, the court stated that:-

““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 injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during pendency of a case; or “high

probability of success” in the applicant’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.”

15. As I have stated at the beginning of this ruling, the respondents have denied the petitioner’s claims in their entirety. The 2nd respondent has given a step by step account of how it is executing the project works. The 2nd respondent has explained that the old Homa Bay town sewerage treatment plant was not discarded when they commenced the rehabilitation and augmentation of the sewerage system. It remained functional as before and the existing sewerage treatment ponds were not interfered with. The 2nd respondent has explained the steps that it had put in place to ensure that the sewer flow was not disrupted as they continued with the rehabilitation works on the sewer inlets. The 2nd respondent’s managing director has stated that by the time the petitioner came to court, all the sewer treatment ponds had been rehabilitated and were fully functional. The 2nd respondent’s said managing director has stated that the sewer continued to pass through three treatment ponds before the same was discharged into the lake. The 2nd respondent denied carrying raw sewer in trucks and disposing of the same in undesignated areas. The 2nd respondent explained that what the petitioner referred to as raw sewer/waste was in fact marram and soil that was excavated from the site where the 2nd respondent was constructing a new anaerobic pond and that the same were being deposited in approved sites. The 2nd respondent also denied dumping raw solid waste in open fields in the residential estate where the petitioner lives. The 2nd respondent dismissed the allegations made against it in the petition filed herein as baseless. The 1st respondent has similarly denied the petitioner’s claims and termed the same as mere allegations without any basis. The petitioner did not controvert the contents of the respondent’s replying affidavits.

16. The onus was upon the petitioner to establish on a prima facie basis that the respondents have violated his constitutional right to clean and healthy environment. The petitioner has annexed to his affidavit in support of the application herein photographs of what he claimed to be waste being deposited in open fields in Makongeni estate and elsewhere in Homa Bay town. He also annexed to the said affidavit photographs of what he claimed to be raw sewer being discharged into Lake Victoria by the 2nd respondent. The petitioner also presented to court a compact video disk (CD) which he claimed to be containing moving pictures of the activities complained of. As I have stated hereinabove, the petitioner’s advocates did not make any submission in support of the present application. They did not therefore explain the various photographs that were annexed to the petitioner’s affidavit. The CD that was presented to court was also not played. The court did not therefore have an opportunity to view its contents. I am unable to determine whether what are shown in the photographs annexed to the petitioner’s affidavit are raw solid waste as he claims or marram/soil as claimed by the 2nd respondent. I am also unable to determine from the said photographs whether raw sewage is being discharged into Lake Victoria. Although the petitioner has claimed that the respondents have failed to comply with the recommendations that were contained in the Environmental and Social Impact Assessment Report (ESIAR) for the project, he has not demonstrated in any way how the respondents have failed to comply with the said recommendations. I am not satisfied on the material before me that the petitioner has established a prima facie case against the respondents. I am not persuaded on the material before me that the respondents are either dumping raw solid waste in open fields within Homa Bay town or discharging raw sewage into Lake Victoria. I am not convinced therefore that the petitioner’s constitutional right to clean and healthy environment has been violated by the respondents. The chances that the petitioner would suffer prejudice through violation of his constitutional rights if the orders sought herein are not granted are therefore remote.

17. I have noted also that the project sought to be stopped by the petitioner is a public project aimed at rehabilitating and augmenting the sewerage system within Homa Bay town for the benefit of the residents and the public at large. According to the affidavit of Christine Akinyi Odino sworn on 25th February 2015 that I have referred to above, the project commenced on 10th July 2014 and the same is almost complete. I am of the view that it will not be in the public interest to stop the project at this late stage. I am of the opinion that the environment may suffer more if the orders sought are granted. The project is

intended to overhaul Homa Bay town sewerage system. The work involved as explained by the said managing director of the 2nd respondent in her affidavit includes; the demolition of existing sewer inlets and replacing the same with large ones, construction of an anaerobic pond, rehabilitation of the settling tanks, rehabilitation of the sludge pumping station, shifting of sludge thickening tank and drying beds, the rehabilitation of inter-connections between the anaerobic pond to settling tanks, settling tanks to maturation ponds and between the existing maturation ponds. The rehabilitation works are being carried out within an existing sewerage system which has to continue functioning while at the same time accommodating changes and adjustments being made. To me the work involved is delicate and if the same is stopped abruptly, the system may fail and pose serious danger to public health and environment. We may end up with sewer flowing freely all over Homa Bay town. This is a situation that must be avoided. I am in agreement with the submissions by the advocates for the respondents that in the circumstances, the interest of the public would be better served if the petitioner's application is disallowed. As was stated by Korir J. in the case of **Samuel Sabuni & 2 others vs. Court Martial & 8 others**[2014]eKLR that was cited by the advocate for the 1st respondent, at times the public interest outweighs the perceived fears held by individual citizens that their rights are threatened or are being breached.

18. Due to the foregoing, I am not persuaded that the petitioner has made out a case for the grant of the interim injunction sought. I therefore find no merit in the application dated 27th January 2015. The same is accordingly dismissed with costs to the respondents.

Delivered, Signed and Dated at Kisii this 24th day of April 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Agure Odero holding brief for Onyango for the applicant

N/A for the respondents

N/A for interested parties

Mobisa Court clerk

S.OKONG'O

JUDGE