



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 63 OF 2013

IN THE MATTER OF ARTICLES 2 (1) (2), 19 (1) (2), 22, 23, 24, 27, 46 (1) (C), 165, 258 AND 259
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 46 (1) (C), 186(1) AS
READ WITH SECTION 7 (B) (C) OF PART 2 OF THE 4TH SCHEDULE, 199 (1) AND 47 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTION 25, 30, 34, 87 AND 96 OF THE COUNTY GOVERNMENTS ACT
NO. 17 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF PART XX (20) OF THE MACHAKOS COUNTY FINANCE ACT 2013

1. **DAVID NGUNYI KIMANI**
2. **JEDIEL MUTHURI**
3. **ASHFORD MWANGI**
4. **JOHN MIRITI MBURIA**

(Suing in their own interest and in a representative capacity representing 41 fellow Transporters from
Githurai, Ruiru and Thika) **PETITIONERS**

VERSUS

1. **COUNTY GOVERNMENT OF MACHAKOS**
2. **THE HON. ATTORNEY GENERAL** **RESPONDENTS**

RULING

1. The application dated 15/1/2014 seeks orders that leave be granted to the Applicants to be enjoined in the petition herein.
2. The Applicants are residents of **Mumbuni Sub-location, Mbiuni Location, Ndovoini area, Kundu village, Nyanyaa area**, and their proximal environs to **Machakos County**. The Applicants have further described themselves as Interested Parties with an identifiable stake and legal interest in the petition herein. According to the affidavit in support of the application, the said areas are heavily exploited for their sand. That the indiscriminate sand harvesting and transportation has caused severe environmental degradation which has lead to the following socio

economic and environmental adversities:-

- i. **“The areas in question have little to no water as the excessive harvesting of sand has caused a drop in the water levels and the drying up of boreholes.**
- ii. **The drop in water levels has in effect caused agricultural activities both subsistence and commercial to stall with the effects that here is no food security in the areas.**
- iii. **The use of heavy duty lorries and trailers in the transportation of sand has caused the infrastructure to break down namely through the damage and unnecessary wear and tear of newly repaired roads which cost millions of shillings to repair and the washing away of bridges during the rainy season.**
- iv. **The young boys in the areas have been lured away from their studies to work as harvesters and transporters, a habit that is not only condoned but encouraged by the groups lobbying for the sand harvesting due to the fact that the young boys provide cheap labour, whereas our young girls have been lured into a life of prostitution.**
- v. **The deep gullies that are caused by the excessive sand harvesting pose a health risk to the residents who are prone to injury if they fall into them.”**

3. That the petitioners have not undertaken any environmental impact assessment. It is asserted that the petitioners have further flouted the rule of law by ignoring the procedures set out in the **Environmental Act of 1999** and the **National Sand Harvest Guidelines of 2007** which require the obtaining of approval of the **National Environmental Management Authority (NEMA)** before commencing the act of sand harvesting and transportation.

4. The Applicants accuses the County government and the police of doing nothing to avert the situation.

5. The application is opposed. The 1st Respondent, the County Government of Machakos raised the following grounds of opposition:-

1. **“THAT both the Notice of Motion Application and the Petition contravene Articles 201, 209 (3), and 259 of the Constitution.**
2. **THAT the application and the petition lack merit as they do not disclose any constitutional violation in a clear and precise manner and as such the court ought not grant the prayers sought.**
3. **THAT the petitioner’s interpretation of the Constitution and the various provisions of the Machakos County Finance Act 2013 is self serving and meant to mislead and misguide this honourable court into allowing their application and petition.**
4. **THAT the Machakos County Finance Act 2013 is very clear in its provisions relating to sand harvesting and as such the said provisions cannot be unconstitutional as they are anchored by law and the Constitution.**
5. **THAT the Machakos County Finance Act 2013 was duly enacted by the Machakos County Assembly after the people of Machakos participated by giving their views.**
6. **THAT Article 186 of the Constitution and Section 7 of Part 2 of the Fourth Schedule are crystal clear to the effect that the County Governments have authority to regulate trade and to issue trade licenses.”**

6. The Petitioners filed a replying affidavit in opposition to the application. The Petitioners have contended that the application has not demonstrated an identifiable stake, legal interest or duty in these proceedings and that the joinder of the Applicants will lead to the delay of this petition and

escalate the costs to the detriment of the Petitioners. That it has not been sufficiently demonstrated that the application has the support of the residents of the area they claim to represent. It is further averred that the Petitioners' complaint is on the unconstitutionality of the imposition of the monthly charges for the sand transportation. The Petitioners' stand is that it is the Applicants who harvest the sand while the Petitioners only transport the same and pay the 1st Respondent transporting levies yet the 1st Respondent has not taken any steps to improve the infrastructure in the region. The Petitioners have denied any responsibility for the breakdown of the social fabric in the area and have also denied having overlooked any procedures relating to environmental issues.

7. The application was argued before me on 4/2/14. The firm of **Mouki and Company Advocates** appeared for the Applicants. The firm of **Waiganjo Wachira and Company Advocates** appeared for the Petitioners while **Kilukumi & Company Advocates** appeared for the 1st Respondent. The 2nd Respondent did not enter any appearance though served.
8. One of the grounds the Applicants have premised their application on is that they are Interested Parties with an identifiable stake and legal interest in the petition herein. Under **rule 7 of the Constitution of Kenya (Protection and Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (Legal Notice 117 of 2013** the court has discretion to join and Interested Party. **Rule 7** provides:-

7 (1):-

“A person, with leave of the court, may make an oral or written application to be joined as an interested party.”

(2):-

“A court may on its own motion join any interested party to the proceedings before it.”

9. An Interested Party is defined under **rule 2** as **“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”**
10. The Applicants claim to bring the application on their own behalf as residents of **Mumbuni Sub-location** and on behalf of the residents **Mbiuni Location** and proximal environs. Although the Petitioner's counsel has submitted that there is no nexus between the application and the signatures said to belong to the residents of **Mbiuni Location**, the rules do not brook unreasonable restriction by way of procedural technicalities (*see Article 22 (3) (d) of the Constitution*).
11. Do the Applicants have an identifiable or legal interest in the petition herein? The Petitioners' complaint relates to the Machakos County Finance Act 2013 (hereinafter Finance Act) which they claim has introduced punitive licence fees for the transportation of sand and penalties in default of payments of the said licence fees. The petition challenges the Constitutionality of section 20 of the said Finance Act which provides for inspection of business permits by the County's enforcement officers. The Petitioners have described themselves as Kenyan citizens who engage in the transportation of various goods including sand which is harvested in Machakos County.
12. On the other hand, the Applicants' concern is the environmental degradation caused by sand harvesting and transportation and the consequential socio-economic ills brought about by the same including juvenile delinquency and prostitution.
13. In my view, Applicants' interest is totally different from the proceedings herein. The Applicants' subject matter and that of the Petitioners are as different as day and night. The Petitioners' interest is specifically on the license/permit fees in respect of transportation of sand. The Applicants' interest as described above is not on the amount charged for the obtaining of the license. The Applicants therefore have no identifiable stake or legal interest on the issue of amount paid for the licenses for the transportation of and that can be said to be over and above any person would have in litigation which is of a public nature. The Applicants will not be directly affected by the prayers sought in the petition. Since the subject matter of the petition and the Applicants' interest are unrelated, enjoining the Applicants will prejudice the hearing of the petition as it would

change the course of litigation, cause delay and bring in additional costs. The best way forward is for the Applicants, if they are so inclined, to file separate proceedings.

14. Who will meet the costs of this application? I agree with the decision of High Court in **John Harun Mwau & 3 Others –vs- Attorney General and 2 Others [2012]** where it was held that in cases concerning enforcement of fundamental rights and freedoms are for the enforcement of the Constitution, the court has discretion in awarding costs which discretion is to be exercised judicially in the light of particular faces of the case.

15. With the foregoing, I dismiss the application. Each party to meet own costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of March 2014.

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B. THURANIRA JADEN

JUDGE