



REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Civil Application 47 of 2012

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION FOR THE JUDICIAL REVIEW WRIT OF PROHIBITION

AND

IN THE MATTER OF THE WATER ACT 2002

AND

IN THE MATTER OF ARTICLE 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE MIGORI WATER SUPPLY AND SANITATION PROJECT

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

LAKE VICTORIA SOUTH WATER SERVICES BOARD.....1ST RESPONDENT

SCC INTERNATIONAL ENGINEERING COMPANY LTD.....2ND RESPONDENT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY

WATER RESOURCES MANAGEMENT AUTHORITY

JUDGMENT

1. Introduction:

The exparte applicants, **Michael Soti, Timon Odoyo** and **Alfred Mdeizi** are the officials of Lower Oyani Water Users Association on whose behalf they have brought this application. The applicants applied for and obtained leave of this court on 29th August, 2012 to institute an application for judicial review in the nature of an order of prohibition against the respondents herein. Upon obtaining leave as aforesaid, the applicants filed a notice of motion application dated 13th September, 2012. In the application which is the subject of this judgment, the applicants have sought an order of prohibition to prohibit the respondents from continuing with, undertaking or completing the Migori Water Supply and Sanitation Project contract No. LVSWSB/C/40/2010-2011 from Oyani River in Uriri Sub-county to Migori Sub-County. The application is brought on the grounds set out on the face thereof, on the supporting affidavit of Alfred Mdeizi sworn on 13th September, 2012, the statement of facts dated 22nd August, 2012 and the verifying affidavit of the said Alfred Mdeizi sworn on 22nd August, 2012 that was filed in court in support of the application for leave.

2. The application is opposed by the 1st respondent while the 2nd respondent did not file grounds of opposition or a replying affidavit. On their part, the 1st interested party supported the application while the 1st and 2nd interested parties filed neither grounds of opposition nor replying affidavit to the application. The 1st respondent filed a replying affidavit sworn by its legal officer one, **Phyllis B. Chepkemboi** on 8th November, 2012 in opposition to the application while the 1st interested party on their part filed a replying affidavit sworn by its compliance and enforcement officer one, Bakari Mangale on 10th December, 2012 in support of the application.

3. I have perused the application, the affidavits filed in support thereof and the affidavit filed in opposition thereto. In my view, the issues that present themselves for determination in this judgment are the following:-

i. Whether the Migori Water supply and Sanitation project being undertaken by the 1st respondent is being undertaken illegally in breach of the Constitution of Kenya, 2010, the Environmental Management and Co-ordination Act, No. 8 of 1999 and other statutes dealing with regulation and management of water resources in Kenya.

ii. Whether this is an appropriate case to issue an order of prohibition.

iii. Who is to bear the cost of the application.

4. Before going to the determination of the aforesaid issues, I would like to analyze the rival contentions of the parties herein as set out in their affidavits and submissions presented to court. The applicants are chairman, secretary, and coordinator respectively of the association known as Lower Oyani Water Resource Users Association (the Association) which was registered as a society by the Registrar of Societies on 6th August, 2012. Water Resource Users Associations are established under section 15(5) of the Water Act, No.8 of 2002 and Water Resources Management Rules, 2007. Under the Water Resources Management Rules, a Water Resource Users Association is defined as “**an association of water users, riparian land owners, or other stakeholders who have formally and voluntarily associated for the purposes of co-operatively sharing, managing and conserving a common water resource**”. The objectives of Water Resource Users Associations are supposed to be set out in their constitutions. However, borrowing from section 15(5) of the Water Act, No. 8 of 2002 and the definition of Water Resource Users Association in the Water Resource Management Rules, 2007, Water Resource Users Associations are supposed to act as a forum for conflict resolution and co-operative management of water resources in water catchment areas. I have not had sight of the constitution of Lower Oyani Water

Users Association as none was attached to the various affidavits filed in support of the application herein. There was also no mention of its objectives either in the application or the affidavits filed in support thereof. I have however noted from the letter by the Sub-Regional Manager of Lake Victoria South Water Catchment Area dated 23rd July, 2012 attached to the affidavit of Alfred Mdeizi sworn on 13th September, 2012 as exhibit "AM2(b)" through which he approved the registration of this Association that, the association is carrying out water resource management activities in lower Oyani river area. Lower Oyani Water Resource Users Association is therefore concerned with the management and conservation of water from the lower end of river Oyani.

5. The 1st respondent is a board constituted under section 51 of the Water Act, 2002 for the purposes of efficiently and economically providing water services as authorized under a license issued under that Act. On the other hand, the 1st interested party is a body constituted under the provisions of section 7 of the Environmental Management and Co-ordination Act, No. 8 of 1999 with the object of exercising general supervision and co-ordination over all matters relating to the environment and to be the principal institution of Government in the implementation of all policies relating to the environment. This background information was necessary so as to appreciate the involvement of the various parties herein on the issues at hand.

6. The Applicant's Case:

Alfred Mdeizi who is the coordinator of the Association has deposed in the affidavit in support of the application herein that, sometimes in January, 2012 the community living around the lower part of river Oyani noted some movements in the area in the form of photographs and measurements being taken along the river bank accompanied with ground markings. After complaining about non-involvement of the local communities in whatever project that was being undertaken along the said river, they were informed that the project was known as Migori Water Supply and Sanitation Project and that they would be supplied in due course with all the information on the project. On inquiring from the 1st interested party whether they were aware of the project and if the project had been licensed or permitted, they were informed that the project was not licensed and was being carried out unlawfully. The 1st interested party went ahead and asked the 1st respondent to stop the implementation of the project until appropriate license was issued to which request the 1st respondent did not heed. It is the applicant's contention that the 1st respondent is continuing with the implementation of the said project illegally without appropriate license from the 1st interested party. The applicants are apprehensive that if the project is implemented to completion, it will have adverse impact on the environment and consequently upon the local community. The applicants claim that no environmental impact assessment has been done and as such no mitigation plans have been put in place to meet the possible negative impacts of the project. The applicants claim that there was no adequate consultation with the local community prior to the commencement of the project and as such conflicts are bound to arise as the implementation progresses as concerns land use and resource allocation. The applicants claim that the local communities were not involved the project planning, design and implementation and as such the same is being carried out in a manner that is insensitive to the needs of the local communities who have not been informed of how they stand to benefit from the same. The applicants therefore want the project to be stopped so that the project sponsors and implementers can go back to the drawing board. The applicants' have annexed to the supporting affidavit of Alfred Mdeizi, the certificate of registration of their association and the correspondence exchanged by various stakeholders on the implementation of the project. In their statement of facts filed pursuant to the provisions of Order 53 rule 1(2) of the Civil Procedure rules the applicants have put forward the following four(4) grounds in support of their prayer for an order of prohibition:-

i. The project complained of is being undertaken in contravention of Articles 42(1) and Article 69(d) of the Constitution of Kenya.

ii. The project is being undertaken in contravention of the provisions of the Environmental management and co-ordination Act, 1999

- iii. The project is being undertaken in contravention of section 25 of the Water Act, 2002 and;**
- iv. The project is being undertaken without public participation and local community involvement.**

7. The interested Party's Case:

In support of the application, the interested party has put forward several grounds on which they oppose the project being undertaken by the respondents herein. It is their prayer that the project be stopped until the respondents obtain appropriate license permitting them to proceed with the same. In his affidavit sworn on 10th December, 2012, **Bakari Mangale**, the 1st interested party's compliance and enforcement officer has deposed that, the 1st respondent's project should not proceed unless and until an environmental impact assessment license (EIA License) is granted to the 1st respondent for the project in accordance with the provisions of sections 58 and 63 of the Environmental Management and Co-ordination Act No. 8 of 1999 (hereinafter referred to only as "EMCA") and Regulation 24 of the Environmental Management and Co-ordination (Environmental Impact Assessment) Regulations, 2003. The 1st interested party received a complaint from the applicants that the respondents had commenced the construction of a water line from river Oyani in Uriri sub-county to Migori sub-county without obtaining EIA License and without any form of public consultations or participation. Pursuant to the said complaint, the 1st interested party directed the respondents to stop the project but they refused and/or declined to comply. The respondent thereafter lodged an application for EIA License with the 1st interested party which application was accompanied by an Environmental Impact and social Assessment Study Report (EIAS Report) for the project prepared by Otieno Odongo & Partners Consulting Engineers on behalf of the 1st respondent which highlighted several environmental and social impacts of the project. Among the social and environmental impacts that were identified were;-

§ Reduced amount of river water flow downstream.

§ Reduced water quality including contamination with heavy metals.

§ Interference with animal drinking points.

§ Competition for resources.

§ Destruction of private property

§ Risk of flooding and landslides.

8. Upon receipt of the said EISA Study Report from the 1st respondent, the 1st interested party forwarded it to lead agencies for their comments. It also caused the project to be advertised in the local daily newspapers and called upon members of the public to comment on the same. The project was also supposed to be advertised in the Kenya Gazette but the 1st respondent did not provide funds for such advertisement. The 1st interested party has in the meantime received comments from the public on the project more particularly the communities living in the area which is affected by the project who have raised objection to the project on several grounds. Some of the grounds on which the project has been opposed by the local communities are the following;-

§ Lack of water points for some local communities on whose land the pipes would be laid.

§ Some of the members of the local communities have not been compensated for the use of their land for laying pipes and water tanks.

§ The EISA Study report was full of lies and did not reflect the actual position on the ground.

9. In view of the objections raised by the local communities and the negative impact of the project

highlighted in the EISA Study Report, the 1st interested party is in the process of organizing public hearings so as to obtain comments from the public for the purposes of engaging the 1st respondent herein on the issues of concern to the public and local communities before EIA License can be issued to the 1st Respondent. In the meantime, the 1st interested party contends that it is in the public interest that the respondents are prohibited from proceeding further with the implementation of the project. The 1st interested party claims that an order of prohibition is necessary so as to enable the 1st interested party to regulate and monitor the implementation of the 1st respondent's project so as to ensure sustainable development and sound environmental management.

10. **The 1st Respondent's Case:**

The application is opposed by the 1st respondent. In their affidavit in reply sworn by their legal officer **Ms. Phyllis B. Chepkemboi** on 8th November, 2012, the 1st respondent has denied all the allegations contained in the affidavit of **Alfred Mdeizi** in support of the application herein. **Ms. Chepkemboi** has stated in her affidavit that the aim of Migori Water supply and Sanitation Project (the project) is to provide sufficient, clean, and safe drinking water to the residents of Migori Municipality. She has deposed further that the local communities were involved in the project from the commencement and that they did raise concerns which the 1st respondent has addressed. She has denied that the project when completed will affect the water supply to the persons living downstream of Oyani river maintaining that the water to be extracted from Oyani river is only 0.2m²/s which will leave the river with water volume of 0.3m²/s even during the dry season when the lowest water flow in the river is 0.5m²/s. **Ms. Chepkemboi** has deposed further that they are in the process of obtaining EIA License from the 1st interested party and that their failure to obtain a permit to extract water under the water Act, 2002 was occasioned by lack of EIA License which is one of the documents that must be attached to the application for such permit. She has maintained that the 1st interested party is in the process of obtaining all the necessary licenses and permits and as such the present application is premature and has been brought in bad faith. She has highlighted the benefits that will accrue to the local communities once the project is completed and the extent they have gone to involve the local communities in the implementation of the project, the negotiations they have had with the persons who would be directly affected by the project and the compensation they have so far paid. According to the 1st respondent, this application is the work of few disgruntled people who are ill bent on frustrating this project which is aimed at bringing development to Uriri and Migori Districts in line with Vision 2030. The respondent has dismissed as baseless the allegations that the project will negatively impact upon the local communities. The applicants have been termed as inciters who are out to personally enrich themselves at the expense the larger community. In conclusion the 1st respondent contends that the residents of Migori district are also Kenyans and as such are equally entitled under the constitution to equitable distribution of resources like clean and safe drinking water which they stand to gain under this project. It is also contended by the 1st respondent that, this is an African Development Bank funded project and any delay in the implementation of the same would impact on the loan repayment schedule with the consequence that the tax payer will have to pay more in terms of interest. Such delay it is claimed would also put at risk future funding by the said bank. It is the 1st respondent's case therefore that this is not a proper and fit case to grant the order sought.

11. The 1st respondent's affidavit in reply the contents of which I have summarized herein above was filed before the 1st interested party's affidavit was filed in support of the application. On 11th December, 2012, the 1st respondent sought leave to file a reply to the 1st interested party's affidavit which leave was duly granted. On the same day, the parties agreed to argue the application by way of written submissions, the filing of which was to commence once the 1st respondent had filed the said affidavit in reply to the 1st interested party's affidavit as aforesaid. The 1st respondent did not file a replying affidavit in response to the 1st interested party's affidavit following the leave that I had granted as aforesaid. The applicants proceeded therefore to file their written submissions on 2nd January, 2013 followed by the 1st interested party on 11th January, 2013. The 1st respondent filed its submissions in reply on 15th January, 2013.

12. When the application came up on 15th January, 2013 for highlighting of submissions, the parties indicated to the court that they did not wish to highlight the same. The matter was left for the court to proceed and make its judgment. I have considered the application and the affidavits filed in support thereof both by the applicants and the 1st interested party. I have also considered the submissions made in support of the application by the advocates for the Applicants and the advocate for the 1st interested party. Equally, I have considered the affidavit filed on behalf of the 1st respondent in opposition to the application and the submissions of its counsel in that regard. This is the view I take on the matter.

13. Deliberation and determination of the issues raised: Issue No.1.

The 1st respondent herein is in the process of undertaking a project known as Migori Water Supply and Sanitation Project (hereinafter referred to only as “**the project**”). The purpose or aim of the project according to the Environmental Impact Assessment Study Report (EIAS Report) dated July, 2012 prepared by **Otieno Odongo & Partners Consulting Engineers** on behalf of the 1st respondent, is to improve the sanitation in Migori Municipality by supplying the residents with adequate, clean, treated piped water and to construct on site sanitation facilities for Migori town. According to the said EIAS Report, the project will have both environmental and social impact. Among the potential impacts highlighted some of which I have already set out earlier in this judgment are, soil erosion and compaction, increased river sediments, obstruction of natural water channels, reduced amount of river water flow downstream, reduced water quality, diversion of water, loss of vegetation, degradation of air quality, migration by local communities, communicable diseases, resource competition, destruction of private property, loss of land, flooding and landslides. It is clear from the foregoing that the project is going to have serious environmental and social impact on the local communities. In the said EIAS Report, it is indicated that the 1st respondent was ready to comply with all relevant regulations, standards, laws and project plans as may be recommended by relevant authorities and professionals. Although scattered in a multiplicity of sector specific laws and policy papers, Kenya has some form of policy, legal and constitutional framework governing environmental management. This framework is aimed at addressing causes of environmental degradation and negative impacts arising from industrial and economic development programs. It is now accepted worldwide that development projects must not only be economically viable but the same must be socially and environmentally acceptable. The project herein must therefore be in accord with the Kenyan policy and laws on environmental management. It must also be processed through the institutions set up by law for that purpose. This application has been brought on the grounds that the 1st respondent is proceeding with the implementation of the project in breach of the laws regulating the activities of that nature. The 1st Interested party which is charged with the responsibility of supervising and coordinating matters relating to the environment claims that the 1st respondent has failed to co-operate with it in the discharge of its mandate in relation to this project. The legislation that deals with environmental management in Kenya are among others; The Constitution of Kenya, Environmental Management and Co-ordination Act of 1999 (“**EMCA**”), the various land statutes, the Forest Act, No. 7 of 2005, the Agriculture Act, Cap. 318 Laws of Kenya, the Public Health Act, Cap. 242, Laws of Kenya, Local Authority Act, Cap. 265 Laws of Kenya, Physical Planning Act, 1999, Land Planning Act, Cap. 303 Laws of Kenya and the Water Act, Cap. 2002.

These statutes are all highlighted in the EIAS Report. The 1st respondent has been accused of failing to adhere to the provisions of the Constitution of Kenya, EMCA and the Water Act, Cap. 2002 while planning for and implementing the project.

14. Article 42 of the Constitution of Kenya, 2010 which the 1st respondent is accused of breaching guarantees the applicants a right to clean and healthy environment. The applicants claim that their right to clean and healthy environment is likely to be contravened by the respondents if they are allowed to proceed with the implementation of the project. The applicants have not indicated clearly how their right to clean and healthy environment is likely to be infringed but from the possible impacts set out in the EIAS Report that I have referred to hereinabove, there is no doubt that the applicants right to clean and healthy environment would be breached unless adequate mitigation measures are put in place to meet these impacts. The respondents are also accused of contravening the provisions of Article 69(1)(d) of the

Constitution of Kenya, 2010. This provision imposes an obligation upon the state to encourage public participation in the management, protection and conservation of the environment. It is the applicants' contention that they were not involved in the project planning and implementation in breach of this article.

The respondents have also been accused of planning and implementing the project in contravention of EMCA. It is the applicants' and the 1st interested party's contention that the 1st respondent is continuing with the implementation of the project without Environmental Impact Assessment License that they are required to obtain from the 1st interested party under Sections 58 and 63 of EMCA. It is the 1st interested party's case that it has to discuss with the public and the 1st respondent the negative impacts that have been identified in the 1st respondents EIAS Report and the objections that have been raised by the local communities before it can form an opinion on whether or not to issue the 1st respondent with Environmental Impact Assessment License (EIA License) to enable it proceed with the project which license is normally issued on terms. The 1st respondent has however been continuing with the implementation of the project without the requisite license and has ignored an order from the 1st interested party to stop the project implementation until a license is obtained. It is the 1st interested party's position that, it is at this stage of preparation and scrutiny of the EIAS report that the public is involved so that all issues arising from the project are thrashed out before the development license is either issued or denied by the 1st interested party.

15. The 1st respondent has also been accused of breaching the provisions of the water Act, 2002 particularly section 25 thereof in that, the 1st respondent has not obtained a permit from The Water Resources Management Authority to use the water from river Oyani for the project as required under that section. Under Section 57(5) of the Water Act, 2002, an application for such permit is supposed to go through the process of public consultation and where applicable environmental impact assessment under EMCA. In fact, under section 94(1) of the said Act, it is an offence to willfully obstruct, interfere with, divert or abstract water from any water course or any other water source without authority granted under the Water Act, 2002.

16. In their written submission, the applicants have maintained that the 1st respondent is in breach of the provisions of the constitution that guarantees clean and healthy environment and which imposes an obligation on the state to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the benefits in addition to encouraging public participation in the management, protection and conservation of the environment. They have submitted further that the 1st respondent has breached the provisions of the Water Act, 2002 and EMCA. On their part, the 1st interested party has submitted that the fact that the project is proceeding without EIA license is not disputed from the contents of the replying affidavit filed in court by the 1st respondent. The project is therefore illegal according to the 1st interested party for being in breach of the provisions of sections 58, 63 and schedule 2 (4) of EMCA. It is the interested party's further submission that since the project is being carried out illegally, the 1st respondent is acting ultravires its legal mandate conferred under the water Act, 2002 which provides that the 1st respondent should carry out its mandate within the confines of the law.

17. In response to the said accusations, the 1st respondent has denied infringing on the applicant's constitutional right to clean and healthy environment. The 1st respondent has contended that it has put measures in place to mitigate the social and environmental impacts of the project that were highlighted in their EIAS Report. It has also placed material evidence before the court to show that they consulted the local communities widely on the aim and the impact the project would have on them. The 1st respondent has annexed to their replying affidavit, minutes of some of the meetings they held with the stakeholders interested in the project before they presented EIAS Report to the 1st interested party. The 1st respondent has maintained therefore that they did engage the local communities in the project's planning and implementation as required under the provisions of the constitution and EMCA. On the issue of breach of the provisions of EMCA and the Water Act, 2002, by failure to obtain the necessary license to carry out

the project and a permit to use the water from river Oyani , the 1st respondent has admitted that it has not obtained the requisite license and permit. Their contention is that they are in the process of obtaining the requisite license from the 1st interested party after which they will make appropriate application to the Water Resources Management Authority for the necessary permit. The 1st respondent claims that this application is premature to the extent that it is questioning their failure to obtain the said license and permit. In their view, they have not breached the provisions of EMCA and the Water Act, 2002.

18. In its written submissions in reply to the submissions of the applicants and the interested party, the 1st respondent has reiterated that there was adequate public participation in the project and that the applicants' could not be consulted as they were registered after the consultations had been conducted. The 1st respondent has also maintained that the process of securing EIA License from the 1st interested party and a permit from the Water Resources Management Authority is on course.

19. Having considered the rival contentions and submissions by the parties, it is my finding that from the evidence on record, the 1st respondent did engage the local communities who are to be affected by the project in discussions on what the project entails, its impact and how they intended to respond to the same. The list containing the names of people who attended stakeholder meetings that were organized by the 1st respondent and the minutes of those meetings which are annexed to the affidavit of Phyllis Chepkemboi have not been challenged either by the applicants or the interested party. It is also a fact that the applicants' association was registered on 6th August, 2012 while these proceedings were instituted on 27th August, 2012. The applicant as an organization could not have been consulted prior to its date of registration. I am therefore of the view that the applicants have failed to demonstrate that their right to participate in the management, protection and conservation of the environment has been infringed by the respondents.

20. On the issue of their right to clean and healthy environment, again, the applicants have an obligation to prove that this right guaranteed under Article 42 of the constitution of Kenya, 2010 and conferred also under section 3(1) of EMCA has been breached or is threatened with violation. The applicants placed no material before the court to show that their right to clean and healthy environment has been violated. It is not enough to allege a breach of a constitutional right. The alleged breach must be proved. I am however satisfied that violation of the applicant's right to a clean and healthy environment is threatened. The EIAS Report submitted by the 1st respondent to the 1st interested party has as I had stated earlier highlighted serious negative social and environmental impacts which will flow from the project. The said report has also highlighted measures the 1st respondent intends to take to mitigate the said negative impacts. This report must however be subjected to public discussion so as to confirm the impacts highlighted and identify any more and the adequacy, or appropriateness of the mitigation measures proposed. This public debate is supposed to be conducted by the 1st interested party who has the responsibility of licensing the project which license can only be issued after public consultations on the EIAS Report aforesaid. The license to be issued by the 1st interested party would factor in all the issues that have arisen during the public consultations. The 1st respondent herein has decided to proceed with the project without a license from the 1st interested party. In the circumstances, the applicants have every reason to be apprehensive that their right to clean and healthy environment is threatened now that the 1st respondent has ignored the regulator and has decided to proceed with the implementation of the project without waiting for a debate on the social and environmental impact of the project and the efficacy of the proposed mitigation measures.

21. On the issue of the alleged violation of EMCA, there is no dispute that the 1st respondent is going on with the implementation of the project without EIA License. This is a breach of the provisions of EMCA that I have stated above. It is therefore my finding that the project herein is being carried out in breach of the provisions of EMCA. With regard to the alleged breach of the provisions of the Water Act, 2002, again, there is no dispute that the 1st respondent has not obtained a permit or authorization from the Water Resources Management Authority to use the Water from Oyani river or to divert the river water. The project to the extent that it is intended to extract water from river Oyani and divert it to Migori town is

illegal because the activity is not authorized under section 25 of the Water Act, 2002.

22. Due to the foregoing, I have to answer the first issue in the affirmative. It is my finding that the project is being undertaken in contravention of the law. This takes me to the next issue namely, whether this is an appropriate case to grant an order of prohibition. Prohibition is one of the public law remedies available to persons whose legally recognized interests have been infringed by public bodies or officers exercising statutory powers. In Halsbury's, Laws of England, 4th Edition paragraph 46, the author has stated that;

“the courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused”.

23. The applicants herein have sought an order of prohibition to prohibit the respondents from continuing with the implementation of the project. This court has power under section 13(7)(b) of the Environment and Land court Act, 2011 to grant prerogative order of prohibition. As I have observed above the respondents are implementing the project herein in breach of the law. The project is therefore being carried out illegally. Is illegality a ground for judicial review or an order for prohibition for that matter? In the case of **Council for Civil Service Unions –vs- Minister for Civil Service [1985] A.C. 374 at 401D**, lord Diplock had this to say on the purview of judicial review;

“Judicial Review has I think developed to a state today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality”. The second “irrationality” and the third “procedural impropriety”.....By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it....”

24. Our own court of Appeal had an occasion in the case of **Kenya National Examination council –vs- Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997] e KLR** to lay out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedy of prohibition as;

“an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land (emphasis mine)”.

25. There is no doubt therefore from the foregoing that this court has the jurisdiction to issue an order of prohibition and that the illegal activities of the respondents herein justify the issuance of such an order. The issue does not end there though. An order of prohibition like other public law remedies is discretionary. This means that even in cases where grounds do exist for issuing the order, the same can be denied if the circumstances so dictate. What are the circumstances that have given rise to this application? The 1st respondent claims that the Government of Kenya has obtained a loan from African Development Bank to finance the project herein which is aimed at providing sufficient, clean and safe drinking water to the residents of Migori Municipality. The project involves diverting some of the water from river Oyani and channeling it through pipes laid on the ground to Migori Municipality. The 1st respondent claims that there is no adequate clean and safe water in Migori town and that the supply of water to the area will contribute to the development of the area. The 1st respondent claims that stopping the project would be counter-productive as the Kenyan tax payer will be subjected to heavy penalties in the form of additional interest payable for the loan and the risk of donors shying away from giving loans to the country for water sector improvement. The 1st respondent has submitted that they are in the process of addressing all the issues raised by the applicants and the interested party and as such no good reason exist to warrant the granting of the orders sought.

26. In the exercise of this court's jurisdiction, the court is supposed to be guided by among others,

§ **The principles of sustainable development.**

§ **The principles of judicial authority under Article 159(2) of the constitution.**

§ **The national values and principles of governance under Article 10(2) of the Constitution.**

§ **The principles of land policy under Article 60 (1) of the constitution.**

27. Sustainable development has been defined in EMCA as

“development that meets the need of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems”.

28. For sustainable development to be realized, there must be a balance between economic development and environmental sustainability. According to **Patricia Kamere-Mbote and Collins Odote in their article, Courts as champions of sustainable development: Lessons from East Africa**, sustainable development requires mediation between the interests of current generations and those of future generations as well as competing interests of the current generations. As I have already mentioned above, I have been asked by the 1st respondent to consider the positive aspects of the project which I have been told would contribute to Kenya’s achievement of its vision 2030 and millennium Development Goals. On the other hand, I have the applicants who are faced with soil erosion, air pollution, water pollution, destruction of flora and fauna, communicable diseases, reduced amount of water, reduced amount of land for cultivation among other negative social and environmental impacts of the project. I have to balance these competing interests in arriving at my ultimate decision in this matter.

29. I also have to consider the conduct of the parties more particularly whether they are in accord with our national values and principles of governance set out in Article 10 of the constitution of Kenya, 2010 which includes democracy and participation of the people, the rule of law, human dignity, social justice, human rights, good governance and accountability. The 1st respondent herein is proceeding with the project without EIA License from the 1st interested party and a permit from the Water Resources management Authority which are mandatory for projects of this nature. Their attention has been drawn to this breach by the applicants and the 1st interested party who have asked them to stop the implementation of the project until they secure the necessary approvals. They have ignored the stop order from the 1st interested party which is the statutory body charged with the responsibility of exercising general supervision and co-ordination over all matters relating to the environment. The 1st respondent’s conduct as described hereinabove falls short of the aspirations contained in our national values and principles of governance set out in Article 10 of our constitution which should be observed by our institutions and citizens. We are in a new Kenya which is governed by the rule of law. Every citizen corporate or otherwise must operate within the law or face legal sanctions. The law is a double edged sword which cuts both ways. A person who has breached the law cannot seek the aid of the law against the person whom the breach has been committed.

30. Lastly, there is the principle of judicial authority under Article 159 of the constitution of Kenya, 2010 which provides among others that justice shall be done to all irrespective of status. The 1st respondent has been dismissive of the applicants as trouble makers who are ill bent in derailing a multi-million project funded by African Development Bank. I must say that, however much the 1st respondent may loathe the applicants herein, they are entitled to have their day in court and while considering their grievances, this court would not be swayed by the value of the project being undertaken by the 1st respondent vis-a-vis the applicants’ status of, ordinary folk neither will it be moved by the status of the project donors or financiers.

31. In line with the principles that I have outlined herein above and balancing the various interests in this matter, I am not inclined to exercise my discretion in favor of the respondents herein by refusing to grant the order sought. The applicants and the interested party have made out a case for a prohibitory order to

issue and there are no factors that militate against granting the said order. I will however not stop the project permanently because it has been demonstrated that if carried out in a lawful manner, it will have some positive impact both on the local communities and on their neighbors in Migori sub-county. The respondents should be at liberty to proceed with the project in the event that they comply with all the legal requirements. I therefore issue forthwith an order of prohibition prohibiting the 1st and 2nd respondents from continuing with, undertaking or completing the Migori Water supply and Sanitation Project from Oyani river in Uriri sub-county to Migori sub-county until they comply with all the requirements under Environmental Management and co-ordination Act, 1999 and the regulations and rules made there under relating to but not limited to Environmental Impact Assessment and are issued with the Environmental Impact Assessment License and also the provisions of the Water Act, 2002 relating to but not limited to the abstraction and diversion of water from a water resource and are issued with the necessary permits and authorizations under the said Act and the regulations and rules made there under. The applicants and the interested party shall have the costs of this application to be paid by the 1st respondent only.

Dated, signed and delivered at Kisii this 11th day of February, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:-

N/A for the Applicants

N/A for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 1st Interested Party

N/A for the 2nd and 3rd Interested Party

Mobisa Court Clerk

**S. OKONG'O,
JUDGE.**