



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**Petition 38 of 2011**

**IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA  
AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 40,42,69,70 OF THE CONSTITUTION,  
ARTICLE 12 OF THE INTERNATIONAL COVENANT ON SOCIAL ECONOMIC AND  
CULTURAL RIGHTS AND THE ENVIRONMENTAL MANAGEMENT AND COORDINATION  
ACT**

**BETWEEN**

**ERIC MOGIRE NYAKOGA & OTHERS.....  
PETITIONERS**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....1<sup>ST</sup>  
RESPONDENT**

**THE HON. MINISTER FOR ENVIRONMENT AND MINERAL RESOURCES.....2<sup>ND</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup>  
RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4<sup>TH</sup>  
RESPONDENT**

**RULING**

The twenty two (22) petitioners who are residents of Ronda Estate within the Nakuru Municipality have petitioned this court to declare that:

- a) the respondents have violated their right to a clean and healthy environment by failing to provide a proper drainage system;
- b) their parcels of land have been wasted by the 1<sup>st</sup> respondent's failure to construct a proper drainage system;

c) they (the petitioners) do adduce *viva voce* evidence on the loss they have suffered.

The petitioners also seek orders to compel the 1<sup>st</sup> respondent to construct a proper drainage system and also to compel the 4<sup>th</sup> respondent to visit the *locus in quo* and conduct an environmental impact assessment.

The 1<sup>st</sup> respondent (the Municipal Council of Nakuru) did not file any papers in reply although the firm of Musembi Ndolo and Company Advocates entered appearance on their behalf.

For the 2<sup>nd</sup> respondent, (The Hon. Minister for Environment and Mineral Resources) and the 3<sup>rd</sup> respondent (the Hon. the Attorney General) were represented by counsel who submitted from the bar that they (the 2<sup>nd</sup> and 3<sup>rd</sup> respondents) have improperly been joined in these proceedings as they have not done or failed to do anything being complained of and further that the 4<sup>th</sup> respondent (the National Environment Management Authority) being a body corporate can be sued without joining the Attorney General. The 4<sup>th</sup> respondent has submitted that it is not its duty to conduct environmental impact assessment.

In terms of **Article 165 (3) (b) (4)** of the **Constitution** this court is only concerned at this stage with the sole question whether the petition raises a substantial question of law to warrant it to ask the Chief Justice to constitute a bench of judges to determine that question.

In considering that question this court has not been called upon to make any determination on the merit of the petition but to find if the petition discloses a *prima facie* case. The burden is on the petitioners to demonstrate *prima facie*, that their rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed on threatened by the actions or omissions of the respondents.

From the annexures, the petitioners have shown that they have proprietary or beneficial interest in the properties, the subject of this petition. They have annexed share certificates, copies of sale agreements, receipts and title deeds. They have also demonstrated by the annexed photographs and their averments that due to poor drainage and waste disposal system their properties are in danger of being wasted and their health affected. The petitioners have averred that this situation notwithstanding, the respondents have failed to address it.

The question is, who is responsible for this situation?

Apart from a general statement in the petition that the respondents have failed to ensure that the petitioners live in a clean and healthy environment by allowing their land to be wasted through erosion, the petitioners have not specifically alleged how the 4<sup>th</sup> respondent has failed in doing so.

Instead, the petitioners seek that the 4<sup>th</sup> respondent be compelled by an order of this court to visit the *locus in quo* for the purpose of conducting an impact assessment and to report the extent of environment degradation to the court.

**Section 2** of the **Environment Management and Coordination Act** defines environment impact assessment as:

**“A systemic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.”**

Who is to conduct the assessment? **Section 58** aforesaid stipulates that:

**“The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report.....”**

A proponent is a person:

**“..... proposing or executing a project, programme or an undertaking specified in the second schedule.”**

In the second schedule and relevant to the matter at hand is paragraph 12 dealing with a project of waste disposal which comprise, among other things, sites for solid waste, sewerage disposal works or works emitting offensive odours. From these provisions, it is clear that the 4<sup>th</sup> respondent has no role, in so far as this matter is concerned, to initiate environmental impact assessment and I find, therefore, that it is improperly joined in these proceedings. The prayers against it are dismissed with costs.

On the other hand, the petitioners have demonstrated *prima facie* that the properties in question are in Ronda within the municipality of the 1<sup>st</sup> respondent. This is supported by the copies of the clearance certificates and receipts for payment of council rates issued by the 4<sup>th</sup> respondent. **Part X of the Local Government Act** and especially **Sections 160 and 179** define the powers of the 4<sup>th</sup> respondent in situations such as those raised in this petition.

The State is obligated under **Article 69(1)(g)** of the **Constitution** to:

**“(g) eliminate processes and activities that are likely to endanger the environment.”**

The State in the circumstances is represented by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

In the result, I find that the petitioners have demonstrated that their petition raises a substantial question of law in view of the state of their properties and the potential health hazard to them and their families as a result of the waste disposal and sewage and drainage systems, which in turn poses a serious environmental risk.

This matter for those reasons is referred to the Hon. the Chief Justice to empanel a bench of judges to hear the petition. There are four judges in this station.

**Dated, Signed and Delivered at Nakuru this 3<sup>rd</sup> day of August, 2012.**

**W. OUKO**  
**JUDGE**