



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 223 of 2011

HON. GIDION MBUVI KIOKO alias SONKOPETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION.....2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

KENYA PIPELINE COMPANY LIMITED 4TH RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY5TH RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED6TH RESPONDENT

KENYA RAILWAYS CORPORATION.....7TH RESPONDENT

RULING

Introduction and background

1. The subject of this ruling is whether the 4th, 5th, 6th and 7th respondents are necessary parties to these proceedings.

2. The petitioner is the Member of Parliament for Makadara Constituency. He states that he has a duty to fight on behalf of his constituents. He has sued the respondents for various violations of fundamental rights and freedoms of the people of his constituency.

3. The petition is rather prolix and contains legal arguments based on the Constitution, *the Convention on Elimination on all forms of Discrimination, the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights, the Vienna Declaration and Programme of Action, the Cairo Declaration on Population and Development, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, the Declaration on the Elimination of Violence against Women* and other United Nation General Assembly resolutions. The petitioner has cited the entire provisions of these international instruments as having been violated in one form or other.

4. In short, the petitioner's petition is the kind of pleading that would normally attract the Court's sanction by way of striking out but the Court is alive to its duty under **Article 22** of the Constitution. It is the obligation of the court to examine the pleading in order to understand the petitioner's grievance in order to do justice. But the Court must also be alive to the fact that the respondents are entitled to receive a fair trial and the allegations against them must be clear and capable of being answered. If any authority were required for this proposition it is the case of ***Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)***. The Court observed that, "*a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.*"

5. What then is the petitioner's case as set out in the petition? Shorn of the descriptive parts, legal arguments and propositions, opinions and recitation of the provisions of international conventions and treaties, I think the petitioner's case disclosed is simple and straightforward.

6. The petitioner avers that the affected residents of Makadara Constituency reside in slums known as Fuata Nyayo, Mariguini, Mukuru Kaiyaba, Kisii Village, Masai Village, Shimo La Tewa Village, Donholm Village, Sinai Village, Kanoro, Hazina Market Village, Kenya Wine, Commercial, Kabereza, Barclays Village, Tetra Part and Uchumi Village.

7. The petitioner avers that frequent fires in Makadara have destroyed the lives and livelihoods of these residents and that the fire outbreaks were caused by the collective negligence of the respondents jointly and severally.

8. In a nutshell the case against the respondents is as follows. The 3rd respondent, the City Council of Nairobi, is accused of never having constructed roads, provided water or any infrastructure making the area inaccessible. The 4th respondent, Kenya Pipeline Company, is accused of negligently with reckless disregard to the welfare of the residents constructed a pipeline in the middle of a residential area and has no fire fighting equipment in place. The 5th respondent, the National Environmental Management Authority, has failed to execute its statutory mandate to enforce sustainable environmental policies exposing residents of Makadara to great danger, risk and hazard. The 6th respondent, the Kenya Powers and Lighting Company, is accused of disconnecting electricity to the residents in the informal sector exposing them to danger. The 7th respondent, the Kenya Railways Corporation, is said to own large tracts of land which has never been utilized property and it is only fair and just if they can offer alternative settlements to the constituents.

Relief sought in the petition

9. The petitioner has set out a total of twenty two prayers in the petition. The prayers are as follows;

(a) *A declaration that the residents' rights to enjoy a clean and healthy environment as provided under **Article 42** has been infringed, violated, denied and or threatened.*

(b) *A declaration that the residents right to equal treatment before the Law under **Article 27** of the Constitution has been denied, infringed, violated and or threatened.*

(c) *A declaration that the residents rights to have access to adequate housing and to reasonable*

standards of sanitation under **Article 43(1)(b)(c)(d)** have been denied, infringed, violated and or threatened.

(d) A declaration that the resident's right to have access to goods and services of reasonable quality under **Article 46(1)** of the Constitution have been denied, infringed, violated and or threatened.

(e) A declaration that the rights of the residents to have expeditious, efficient, lawful, reasonable and fair administrative action under **Article 47(1)(3)** of the Constitution has been denied, infringed, violated and or threatened.

(f) A declaration that the rights of the residents role in participation in management, protection and conservation of the environment envisaged by **Article 69 (d)(f)(c)** of the Constitution has been violated, infringed and or threatened.

(g) A declaration that the rights of the residents to enjoy their democratic right to vote under **Article 38(3)(a)** as read with **Article 83** of the Constitution has been denied, infringed, violated and or threatened.

(h) A declaration that the rights of the residents to engage with political parties in exercising their democratic principles and other party activities in promotion of the constitutional principles under **Article 91(1) (d) and (g)** of the Constitution have been denied, infringed, violated and or threatened.

(i) A declaration that the Residents of Makadara are entitled to decent housing and health services.

(j) An injunction do issue restraining the respondents jointly and severally or their agents, servants or howsoever from evicting the slum dwellers until they are either compensated and or allocated alternative settlements.

(k) A declaration that the purport, object and spirit of the constitution outlaws evictions without consultation and adequate and reasonable notice.

(l) A declaration that a forceful eviction of slum dwellers in Makadara Constituency will destroy livelihoods degrade the environment and impact on the ecosystem.

(m) A declaration that slum dwellers are entitled to Judicial Review within the meaning of **Article 47(2)** of the constitution before they can be evicted.

(n) A declaration that forceful evictions of slum dwellers in Makadara constituency are inhuman and degrading within the meaning of **Article 25(a) 29(f)** of the Constitution

(o) A declaration that forceful eviction of slum dwellers in Makadara constituency is tantamount to condemning the poor just because they are poor and this offends **Article 27(1)(2)(3)(4)(5)** of the Constitution.

(p) A declaration that the slum dwellers in Makadara constituency have legitimate expectation to have decent housing, water and electricity.

(q) A declaration that failure by respondents to provide basic infrastructure like electricity, water and shopping malls has exposed Makadara residents to insecurity where life is short nasty and brutish.

(r) A declaration that the Respondents have a statutory duty to provide basic services to the Makadara Citizens and particularly slum dwellers.

(s) A declaration that the slum dwellers in Makadara constituency having stayed continuously in the suit premises for over 50 years have acquired prescriptive rights.

(t) *A declaration that other than the respondents trying to evict the residents they should embark on programs to improve the situation in the slums.*

(u) *A declaration that it is irreconcilable that Makadara is home to many industries and enjoys the highest per capital income yet the residents are in abject poverty.*

(v) *An order for compensation to all residents and or slum dwellers in Makadara constituency who have been affected by the respondent's negligence and or failure to provide basic services as donated to them by the statute and the Constitution.*

The Supporting Affidavit

10. The petition is supported by the affidavit of the petitioner sworn on 31st October 2011, which states as follows;

1. *That I am an adult of sound mind therefore competent to swear this affidavit.*

2. *That I am the duly elected Member of Parliament for Makadara Constituency on a NARC Kenya ticket and I have reason to belief that I am duly authorised to swear this affidavit for and on behalf of the informal settler in Makadara Constituency.*

3. *That I have instructed my lawyers to pursue the respondents with a view to securing compensation and or remedying the situation but the respondents have ignored my pleas as shown by the exhibits.*

4. *That it is inhuman and degrading to evict persons during this rainy season and the respondents have threatened to evict the slum dwellers from Monday 31.10.2011 as shown by the exhibits.*

5. *That there is no plausible reasons and or explanation why people who have lived in this area of Makadara constituency for over 50 years must be evicted now without notice and or reasonable consideration of the predicament facing the threatened persons.*

6. *That some of the people, residents or dwellers having lived in their areas of settlement for at least 50 years.*

7. *That some of the people being evicted are weak and vulnerable including but not limited to the following:-*

(i) *Pregnant women are being evicted at the wee hours of the night between 4.00 am and 5.00 am*

(ii) *Elderly women who are vulnerable to cold weather*

(iii) *Elderly men*

(iv) *The sick and elderly*

(v) *The sick and vulnerable*

(vi) *The children and the poor and other individuals as abject poverty*

8. *That the slum dwellers have been exposed to untold suffering that they have been exposed to inhuman and degrading treatment.*

9. *That the slum dwellers and informal settlers have been treated in a worse manner than animals.*

10. *That the slum dwellers have no choice but to live where they do until they get alternative settlement.*
11. *That it was never contemplated by the respondents that the government policy is to create more IDPs in the urban areas rather than creating to realize their full potential.*
12. *That the slum dwellers have endured gross violations of their basic rights and fundamental freedoms leading to colossal social injustices.*
13. *That the slum dwellers are human beings and I am informed by my advocates on record with information I verily believe that Article 40(4) of the Constitution allows compensation to occupants of land who do not have title.*
14. *That respondents will not suffer any prejudice if the slum dwellers are given adequate, notice for legal redress and or resettlement in other convenient places.*
15. *That I am aware and it is within my knowledge that the majority of the slum dwellers is in abject poverty and cannot afford decent housing*
16. *That I am aware and it is within my knowledge that the majority of the slum dwellers and the vulnerable who will suffer if forcefully evicted*
17. *That I am informed by my advocates on record which information I eerily belief to be correct that the National Accord promotes peace and reconciliation, love and unity and it will be against these values to evict people forcefully particularly when appreciating that IPDs are still unsettled four years later.*
18. *That the residents of Makadara constituency live where there are industries and factors which generate a lot of foreign exchange and creates a lot of employment opportunities yet these industries and factories have never benefited the Makadara residents.*
19. *That the resident's evictions of informal settlers at Makadara Constituency are being carried out at night and without notice which exposes the residents to criminal acts and other sexual violence crimes.*
20. *That the residents of Makadara are being subjected to inhuman and degrading treatment as the evictions are done in bad faith and manifest acts of impunity by state officers who are selectively focusing on the following; Fuata Nyayo, Mariguini, Mukuru Kaiyaba, Kisii Village, Masai Village, Shimo La Tewa Village, Donholm Village, Sinai Village, Kanaro, Hazina Market Village, Kenya Wine, Commercial, Kabereza, Barclays Village, Tetra Part Uchumi Village.*
21. *That I swear this affidavit in support of the Chamber summons herein.*
22. *That whatever is deponed herein is true to the best of my knowledge, information and belief.*

The directions

11. On 4th November 2011 I struck out the 2nd respondent, the Independent Electoral and Boundaries Commission, from these proceedings as I found that there was no cause of action. The 3rd, 4th, 5th, and 7th respondents have all opposed the petition by filing replying affidavits. On 27th February 2012, I heard the parties and framed the following issues;

(1) Whether the petitioner's rights and fundamental freedoms guaranteed under Articles 26, 27, 28, 29, 31, 33, 36, 39, 40, 42, 45, 47, 48, 50, 53, 54, 56, and 57 of the Constitution have been threatened, infringed or violated by the respondents' acts as alleged in the petition.

(2) Whether the petitioners are entitled to the reliefs set out in the petition as against the respondents.

12. I also directed the petitioner to file statements/Affidavits for the witnesses it intends to call. The petitioner has filed twelve statements from witnesses and bundle of documents containing inter alia P3 Forms, hospital records, death certificates, permits for burial, copies of hospital bills and demand letters.

13. The respondents have also filed affidavits in opposition to the petition and the common ground is that the petition does not disclose any cause of action against them. Having reviewed the matter and the statements filed, I called upon parties to address me on the issue of joinder of the respective parties and whether they should be struck out of the proceedings.

Submissions

14. Mr Nyaanga, counsel for the Kenya Railways, submitted that the entire petition, witness statement and affidavits do not disclose the violations of the petitioner's rights as against the 7th respondent. According to the Replying Affidavit of David Njogu sworn on 13th March 2012 the land which the petitioner purportedly claims belongs to it and it is to be used for its purposes in accordance with ***Kenya Railways Act (Chapter 397 of the Laws of Kenya)***. The corporation denies that it is in any way responsible for the petitioner's plight and contends that to allow the prayers sought would amount to forceful expropriation. Counsel submitted that it is the State to be looked upon to provide the land for settlement. Counsel submitted that no violation has been alleged against the Corporation and the case against it should be struck out.

15. Mr Fraser, counsel for the Kenya Power and Lighting Company Limited, also submitted that there was no cause of action against the Company. There are two affidavits filed on behalf of 6th respondent; the first is sworn by Gideon Githu, the Senior Technical Manager, Revenue Protection, on 18th November 2012 and the second one sworn by John Muriuki, the Wayleaves Officer, sworn on 18th November 2012. The thrust of the two affidavits is that the Company is a commercial concern with many customers who have Supply Agreements around the Mukuru area. Apart from the customers, there are illegal connections in the area which pose a risk to where the electricity is consumed and the Company often disconnects illegal connections in the area. The Company's position is that it has three powerlines constructed on wayleaves granted by the Government. The purpose of the wayleave is to secure the powerlines over private land. The Company avers that although the wayleaves are to be clear of building and other structures, the company has been unsuccessful in persuading the residents of the area to vacate the area designated as a wayleave.

16. Mr Fraser relied on the written submissions dated 23rd October 2012. He submitted that there is no averment that KPLC was guilty of setting the fire to the villages or that there was any breach as against KPLC and therefore there was no cause of action. Counsel further submitted that **Article 43** does not refer to electricity and there is no duty to supply electricity generally.

17. Mr Wabwoto, counsel for National Environment Management Authority (NEMA), submitted that the joinder of the 5th respondents amounts to misjoinder. The core issue was one of a threat of eviction. It has nothing to do with the mandate of NEMA, which is a statutory body with a defined mandate. Counsel argued that nothing has been said or stated against in reference to its statutory authority. In the circumstances counsel urged the court to dismiss the petition against it.

18. Kenya Pipeline Company Limited has opposed the petition through the affidavit of its Managing Director, Mr Selest Kilinda sworn on 17th November 2011. The thrust of the deposition is that the Company is wholly owned by the Government of Kenya and it is a State Corporation. Its main objective is to provide an efficient means of transporting fuel via a pipeline from Mombasa to the hinterland. In order to provide for the pipeline, the Company operates under the ***Wayleaves Act (Chapter 292 of the Laws of Kenya)***. As concerns this case, the company avers that certain people have encroached on the land reserved for use by the company particularly the wayleave for the pipeline. The company denies that

it intends to evict the petitioner's constituents.

19. Mr Ondieki, counsel for the petitioners, contended that all the parties joined are necessary parties and the court has power to join parties who are necessary to determine the issue. Counsel relied on the case of *Republic v Ministry of Finance* [2007] 2KLR 299 and *Kotut v Judicial Commission of Inquiry into Goldenberg* [2008] KLR 390. Counsel submitted that this suit raises important matters of socio-economic rights and the court must adopt a wider view of its jurisdiction. Counsel stated that the court will determine the matter and allocate liability depending on the evidence and it was therefore unnecessary to strike out any of the parties.

Analysis and determination

Joinder and necessary party

20. The issue for consideration here is whether the 4th, 5th, 6th and 7th respondent are necessary parties. The key approach to this issue is the fact that this matter is one that concerns fundamental rights and freedoms and the courts adopt a liberal attitude towards procedure consistent with **Article 22** in order to provide free and unhindered access by the petitioners to the court. Joinder of parties imposes costs on parties and at all times the court must be cognisant of its duty to minimise the costs of litigation. Further, joinder of unnecessary parties will not only convolute the matter but tend to obscure the real issues and prolong the proceedings thereby undermining the objective of expeditious disposal of cases as envisaged by **Article 159**.

21. It is against this background that I have considered the petitioner's case, the pleadings, witness statement and submissions. Although the petitioner has called in aid various provisions of treaties, conventions and statutes, I think the tenor of the petitioner's case squarely falls within **Article 43(1)(a)(b)(c)(d)(e)** and **(f)** of the Constitution which protects economic rights and it is against these provisions that the petitioner's case against the respondents must be seen.

22. Although Constitution contemplates that the Bill of rights applies to all persons, social economic rights are by virtue of their nature enforceable against the State. Under **Article 21**, the State has the fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Under **Article 21(2)**, the State is required to take, "*legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of rights guaranteed under Article 43.*" I am not stating that private entities may not bear any responsibility for protection of the economic and social rights. The nature and extent of the obligation must depend on the circumstances of each case and each case must be determined on what has been pleaded and material placed before the court.

Private law and public law action

23. I must state that the evidence that has been presented by the petitioner and the witness statements raises two fundamental causes of action and conflates what would be private law actions on behalf of certain persons and public law action to enforce fundamental rights and freedoms under the Bill of Rights. On the one hand, there is claim which is located, as I have stated in **Article 43** where residents of the slum areas in Makadara seek to be provided with housing, sanitation, water and education for their children.

24. Then there is a specific claim from some of the witnesses seeking compensation arising from the tragic Sinai Village fire. Although the witness statements and parts of the petition and affidavit allude to the fire, the petition is not clear on the specific incident or incidents that are complained about. The complaints are of a general nature and lack an element of specificity.

25. The witness statements are clear that the residents of the Sinai Village which is situated in the petitioner's constituency have suffered terribly as a result of a fire that engulfed the Sinai-Jamaica Village on or about 12th September 2012. Several persons were injured and others died in the fire. The victims of

the fire blame various authorities; the Kenya Pipeline Company, the Nairobi City Council and the National Environmental Management Authority for their injury, loss and damage.

26. Such a case would ordinarily be a private law action for negligence on the part of the parties considered blameworthy. Such a claim is a private action and each plaintiff would be required to individually file suit, unless of course the parties file a class action, to prove negligence or culpability on the part of any of the defendants and establish loss and damage. The tort of negligence emanates from the private law sphere and is against each party and in order to find any of the respondent's negligent, the petitioner must prove each act of negligence against each tortfeasor.

27. Prayer (v) of the petition is an omnibus prayer for, "*An order for compensation to all residents and or slum dwellers in Makadara constituency who have been affected by the respondent's negligence and or failure to provide basic services as donated to them by the statute and the Constitution.*" This is the kind of prayer that would, I dare say, attract the sanction of the court for being embarrassing. How would the Court separate the liability of each and every party? In my view, lumping all these claims together would cause confusion, embarrass the respondents and obscure the real issues in controversy.

28. I now turn to a consideration of **Article 159(2)(d)** which provides that, "*justice shall be administered without undue regard to technicalities.*" The issues I have considered are not mere technicalities but go to the root of who can be sue and it is the duty of the petitioner to outline their case clearly to enable the other side properly defend the case in accordance with the law. **Article 159 (2)(d)** is not an elixir for slovenly pleadings. The promulgation of the Constitution did not sweep away a century of settled law of procedure or substantive legal obligations. The duty imposed on the court is to infuse these principles with the values and principles of the Bill of Rights.

29. I think these two aspects of the case should be separated and reconsidered by the petitioner's counsel and I will now consider the positions of the respective respondents.

Kenya Pipeline Company Limited

30. The case against Kenya Pipeline Company Limited denies any liability for the threatened eviction of the petitioner's constituents. Moreover, the allegation that the company negligently constructed a pipeline cannot, when the pipeline was constructed in accordance with the provisions of the **Wayleaves Act**, negate any liability on the company per se. If the **Wayleaves Act** permitted such action then liability must rest with the State rather than the Company. The petition does not disclose a cause of action against the Company.

Kenya Railways Corporation

31. The case against Kenya Railways Corporation is not that it has done anything wrong but rather that it should make available its land for settlement to the petitioner's constituents. Kenya Railways is a statutory corporation with a specific mandate. In this respect, I agree with Mr Nyaanga that if there was any responsibility then it would fall to the State to provide land for resettlement. In the circumstances, I find that the Kenya Railways Corporation is not a necessary party to these proceedings and it is therefore struck out.

Kenya Power and Lighting Company

32. I have considered the case against the KPLC as pleaded in the petition, is not clear. The Company as a commercial entity is in the business of supplying electricity. The petition does not disclose any violation of fundamental rights and freedoms on its part. This is not to say that the right of access to housing does not include the right to be supplied with electricity, this obligation would fall on the State to take necessary measures as required in **Article 21(2)**. I strike out the 6th respondent from these proceedings.

National Environment Management Agency

33. NEMA is established under the ***Environmental Management and Co-ordination Act (Act No. 8 of 1999)***. Under **section 9(1)** of the Act, the object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. The functions NEMA are in the nature of policy formulation and advice to various government entities. In view of the legislative objects of NEMA and the matters outlined in the petition, I do not think there is a cause of action against it and consequently the suit is struck out.

Conclusion

34. Apart from the State which bears the overall authority, the City Council of Nairobi as the local authority has statutory authority for planning, provision of infrastructure, housing and other social amenities. In carrying out its functions under the ***Local Government Act (Chapter 265 of the Laws of Kenya)***, it acts in concert with the central government. This case is primarily one for eviction of the petitioner's constituents and the responsibility for the plight of the people living in the slums areas lies in the hands of the 1st and 3rd respondents (see ***Susan Waithera Kariuki and Others v Town Clerk, Nairobi City Council and Others Nairobi Petition 66 of 2010 (Unreported)***).

35. An analysis of the facts, depositions and the witness statement and prayers sought in the petition demonstrate that the petitioner's concern for his constituents is that they should not be evicted and that the State should be ordered to meet its responsibility in that regard. This ruling points the petitioner to the correct direction on the road to judgment.

36. The petitioner has filed this representative suit in good faith to protect his constituents' cause but as I have demonstrated, it must be properly pleaded and placed before the court. The affected constituents still retain their individual right to enforce specific causes of action against any of the respondents in the case of negligence or misfeasance.

Disposition

37. In light of what I have stated, the inclusion of the 4th, 5th and 6th and 7th respondents is unnecessary for the determination of the petitioner's case. They are therefore struck out from these proceedings with no order as to costs.

38. In light of the aforesaid order I direct the petitioner, to amend the petition, if necessary, within 30 days from the date hereof.

DATED and DELIVERED at NAIROBI this 4th day of December 2012

D.S. MAJANJA

JUDGE

Mr E. Ondieki instructed by Ondieki and Ondieki Advocates for the petitioner.

Ms Matunda instructed by Moronge and Company Advocates for the 3rd respondent.

Mr Wabwoto, Advocate instructed by for the 5th respondent.

Mr K. Fraser instructed by Hamilton, Harrison and Mathews Advocates for the 6th respondent.

Mr Nyaanga instructed by Mwaniki Gachoka and Company Advocates for the 7th respondent.