



REPUBLIC OF KENYA



KENYA LAW

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**Kiboko Water Resource Users Association v Kenya Pipeline Company
Limited & 3 others (Environment & Land Petition 13B of 2019)
[2022] KEELC 15439 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 13B OF 2019
CG MBOGO, J
DECEMBER 20, 2022**

BETWEEN

KIBOKO WATER RESOURCE USERS ASSOCIATION PETITIONER

AND

KENYA PIPELINE COMPANY LIMITED 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

WATER RESOURCES AUTHORITY 3RD RESPONDENT

**ENERGY AND PETROLEUM REGULATORY AUTHORITY 4TH
RESPONDENT**

RULING

1. The plaintiff filed this suit on September 2, 2019 against the respondents seeking various reliefs in the petition inter alia:
 - a) A declaration that the petitioner's right to a clean and healthy environment as guaranteed by articles 42 and 43 of the *Constitution of Kenya* 2010 has been violated by the actions and omissions of the respondents.
 - b) A declaration that the variation by the 1st respondent of the Environment Impact Assessment License No NEMA/EIA/PSL/556 dated September 12, 2014 for the construction of Line V Oil Pipeline traversing the Counties of Mombasa, Kwale, Taita Taveta, Makueni, Kajiado, Machakos and Nairobi was unconstitutional, illegal and in contravention of sections 58, 59, 60, 61, 62 and 63 of the *Environmental Management and Coordination Act* and regulation 25 of the *Environmental (Impact Assessment and Audit) Regulations*, 2003.



- c) A declaration that the omission, failure, neglect and refusal by the 2nd, 3rd and 4th respondents to stop the activities of the 1st respondent, after repeated and continuous oil leaks and spillages is a contravention of the constitutional duty under articles 3, 10 and 17 of the Constitution and section 108 of the Environmental Management and Coordination Act.
 - d) An order of *certiorari* to issue to bring to this court to quash and/or cancel the Environmental Impact Assessment License No NEMA/EIA/PSL/556 dated September 12, 2014 issued to the 1st respondent for the construction of Line V Oil Pipeline traversing the Counties of Mombasa, Kwale, Taita Taveta, Makueni, Kajiado, Machakos and Nairobi.
 - e) An order to the board of directors of the 1st respondent, by themselves, their agents, employees and/or representatives to cease and desist from pumping, transmitting and or in any way transporting petroleum, petroleum products or any other form of hydrocarbons through Line V Oil Pipeline or its sections without first installing a fibre optic cable digital pipeline leak detection system carrying out Environmental and Social Impact Assessment (ESIA) on the leakages and spillages.
 - f) An order to the board of directors of the 1st respondent, by themselves, their agents, employees and/or representatives to submit afresh to the 2nd and 4th respondents, Environmental Impact Assessment (EIA) report of Line V Oil Pipeline traversing the Counties of Mombasa, Kwale, Taita Taveta, Makueni, Kajiado, Machakos and Nairobi and apply a fresh approval and new license in accordance with the law.
 - g) An order of environmental restoration requiring the board of directors of the 1st respondent, by themselves, their agents, employees and/or representatives and with the participation of the petitioners and residents of the affected areas to clean up the oil leakage and spillage sites, catchment areas, aquifers, springs, streams, Kiboko River at Kiboko Area, Makueni County, Samburu Area, Kwale County and at the intrusion site of Line V Oil Pipeline near Mlolongo Town on the border of Nairobi County and Machakos County.
 - h) An order that the 1st respondent provide immediate food mitigation measures to members of the petitioner and the affected residents at Kiboko Area, Makueni County.
 - i) An order that the 1st respondent purchase five water bowsers for the petitioner for the provision of clean water to the affected residents at Kiboko Area, Makueni County.
 - j) The respondents to pay the petitioner's costs of the suit.
2. On February 4, 2020, the 2nd respondent filed a preliminary objection to the suit herein on the grounds that the petitioner being an association lacks legal capacity to institute the current suit.
 3. The parties herein duly filed submissions to canvass the preliminary objection. The 3rd and 4th respondents did not participate in the preliminary objection.
 4. The 2nd respondent filed its submissions on April 26, 2021. Counsel for the 2nd respondent argued that, being an association, the petitioner lacks *locus standi* under the Societies Act to institute the suit in its own name and as such this court lacks jurisdiction to entertain the suit. That an association is not a legal person that can sue or be sued as envisaged under article 22 (1) of the Constitution. The 2nd respondent relied on the case of Peter Taracha & another v International Pentecostal Holiness Church & another [2016] eKLR in support of its submissions.
 5. On May 10, 2021 the petitioner filed its submission. Counsel for the petitioner argued that the promulgation of the Constitution in 2010 enlarged the scope of *locus standi* in Kenya. That articles



22 and 258 of the Constitution have empowered every person whether corporate or non-incorporated to bring a suit where there is a contravention of the Constitution. That as such, the Societies Act must be interpreted in conformity with the Constitution. Counsel placed reliance on article 260 of the Constitution which provides for the inclusion of an association in the definition of a person who can file constitutional petitions.

6. Counsel for the petitioner also submitted that this court is bound by the decision of the Supreme Court in Civil Application No 29 of 2014 Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR by virtue of article 163 (7) of the Constitution. That the preliminary objection is misplaced, vexatious and an abuse of the court process and that it ought to be dismissed with costs.
7. The 1st respondent filed its submissions on May 12, 2021. On its behalf, counsel submitted that this is a properly raised preliminary objection because the issue of *locus standi* touches on the jurisdiction of the court. That the petitioner lacks *locus standi* to sue in these proceedings. It was prayed that the petition be struck out. The 1st respondent relied on the authorities cited in the list of authorities dated May 3, 2021 to buttress its submissions.
8. The only apparent issue for determination in this suit is whether the petitioner herein has *locus standi* to institute the instant petition.
9. As correctly pointed out by the parties herein, *locus standi* is a preliminary issue which goes to the jurisdiction of the court to hear and determine the dispute. It is therefore a pure point of law which if proved would have the consequence of disposing the suit before the matter could proceed further.
10. In the case Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR, Lady Justice L Gacheru considered the issue of *locus standi* and ably delivered the following rendition: -

“It is therefore evident that *locus standi* is the right to appear and be heard in court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no *locus standi*, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this court was to find that the applicant has no *locus standi*, then the applicant cannot be heard and that point alone may dispose of the suit. In the case of Quick Enterprises Ltd ...vs... Kenya Railways Corporation, Kisumu High Court Civil Case No 22 of 1999, the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

Having now considered the objections raised by the 1st respondent, the court finds that lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. The preliminary objection raised by the defendants fits the description of preliminary objection as stated in the Mukisa Biscuit case (*supra*).”

11. I have perused article 258 of the Constitution which sanctions the bringing of petitions to court and outlines such entities which can file a suit for the enforcement of the Constitution. Article 258 provides as follows: -
 - (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—



- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

12. I have examined the instant petition and from the preamble, the petitioner is described as a duly registered society under section 10 of the Societies Act. I have also scanned through the supporting annexures marked as “WMM1” and “WMM2”. The Registrar of Societies issued a certificate of registration as well as certificate of the office bearers of the petitioner. It is therefore not in doubt that the petitioner is a duly registered association.

13. In the circumstances, I am in agreement with the petitioner’s submission that *locus standi* has been given an expanded scope unlike in the older constitutional regime. In particular, the astute decision of the Supreme Court in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR is testament to the championing and promotion of wider berth on *locus standi* to persons who can present constitutional petitions. The Supreme Court held: -

“(67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of *locus standi*, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya v Attorney General, Petition No 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

“...the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in articles 22 and 258 of the Constitution which ensures unhindered access to justice...”

14. Similarly, in National Environmental Tribunal v Overlook Management Limited & 5 others [2019] eKLR, the Court of Appeal observed thus: -

“It would also set back the advances or leaps made in expanding the strict requirements of the capacity to sue especially in environmental matters envisaged by the Act. As already explained, the Act expanded *locus standi* to enable any person, group or association whether acting on its behalf or in public interest to raise environmental concerns geared at environmental conservation. And this still holds while recognising the requirements that existed under the former constitution to the effect that only a party aggrieved and whose interests were directly affected could institute proceedings before courts.”

15. I have taken note of the fact that the constitutional violations alleged to have occurred pertain to the petitioner’s right to a clean and healthy environment. These are not light violations.

16. As such, it is my finding that the petitioner has valid *locus standi* to institute these proceedings. I find no basis in the preliminary objection herein. It is accordingly dismissed. Costs shall abide the final determination of the suit.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 20TH DECEMBER, 2022

MBOGO C.G.

JUDGE



20/12/2022

