



Wamaua & 2 others v Attorney General & 4 others; Huts of Gold Limited (Interested Party) (Petition E002 of 2022) [2022] KEELC 15378 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
PETITION E002 OF 2022
LN GACHERU, J
DECEMBER 8, 2022**

BETWEEN

**MARY WAMAUA 1ST APPLICANT
NAGAMI DAM SELF-HELP GROUP 2ND APPLICANT
SUSAN WANJIRU WAITHAKA 3RD APPLICANT**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 3RD RESPONDENT
WATER RESOURCES AUTHORITY 4TH RESPONDENT
HARVESTING AND STORAGE AUTHORITY 5TH RESPONDENT**

AND

HUTS OF GOLD LIMITED INTERESTED PARTY

RULING

- 1 The matter for determination is a notice of motion application dated April 5, 2022, brought by the petitioners/applicants herein, seeking the following orders: -
 1. That pending the hearing and determination of this application and the substantive petition, the court do issue a conservatory order restraining the respondents from preventing the petitioners from farming, and use of the dam water and be restrained from uprooting, cutting,



destroying and/or otherwise interfering with the petitioners' and community members' grown plants on the split way area adjacent to the dam;

2. An order directing NEMA to conduct an environmental impact assessment and social audit by way of control audit on Nagami Dam situated at Kenol, Murang'a County;
 3. An order that a survey be conducted to ascertain the actual boundaries of Nagami Dam;
 4. An order directing the 5th respondent to ensure compliance over the conservatory orders issued.
- 2 The application is premised on the grounds that the petitioners/applicants are a group of fifty(50) residents of Nagami area in Murang'a County, who have been deriving their livelihoods directly from traditional farming practices on land adjacent to the farm. That they have farmed using relatively small farm tools, deploying small amounts of capital and energy from the areas immediately adjacent to the spill waterway/paths of the dam for the last 20 years.
- 3 They further stated that they have acquired traditional farming rights related to the social and economic rights now protected under article 43 of the Constitution, the right to life guaranteed under article 26; the right to human dignity protected under article 28, and the right to property guaranteed under article 40 of the Constitution.
- 4 The petitioners/applicants also stated that the respondents have prevented the local farmers from exercising their traditional rights along the pathways reserved as spilt way for Nagami Dam situated at Muranga County, as well as destroying crops belonging to the traditional farmers thereby violating their constitution rights.
- 5 The petitioners/applicants also stated that they have a right to a clean and healthy environment as residents of Nagami area and Maragua Constituencies where Nagami Dam is situated.
- 6 The petitioners/applicants further stated that there is no proper boundary demarcation to ascertain the riparian side of the Dam, and the private lands adjacent to the dam hence fuelling conflicts within the Nagami Dam area. They also stated that the dam has not been subjected to any Environmental Impact Assessment(EIA) or social audit by way of control audits and/or Environmental Monitoring Audit, hence exposing the residents to tragedies. Lastly, that the respondents have denied the residents of Nagami the abstraction or use of overflow water from Nagami Dam.
- 7 The application was supported by the affidavit of Susan Waitthaka, the 3rd petitioner/applicant herein and member of the 2nd petitioner.
- 8 Huts of Gold Limited were joined as an interested party on the grounds that they are the registered owner of land parcel title No Mitubiri/Wempa/Block 1/12345, situated in Gikono area of Kabati, Murang'a county. Their application to join the suit was supported by the affidavit of Peter Maina, a director, wherein he avers that the dam is situated on private property and that the petitioners/applicant had encroached on private land without their consent.
- 9 The interested party thereafter filed a preliminary objection on May 27, 2022, and prayed that the application be dismissed. They additionally filed a replying affidavit to the notice of motion in which they opposed the instant application and describe the events leading up to the interested party's acquisition of the property and the encroachment by the applicants on the private suit property.
- 10 The 2nd respondent filed a notice of preliminary objection on June 3, 2022, praying that the petition be struck out on the grounds that this court lacked the requisite jurisdiction pursuant to section 129 of the Environmental Management and Coordination Act (EMCA), and in light of the Court of Appeal's



decision in civil appeal No 153 of 2019 – [*Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others*](#) (2020) eKLR .

- 11 The 3rd respondent, through Ms Patricia Musau, filed a replying affidavit on June 3, 2022, in which they opposed the petition as the designated agent of the national government, by the [*Water Act*](#) 2016, in its responsibility to regulate the management and use of water resources in the country.
- 12 The 3rd respondent avers that farmers, the applicants included have encroached on riparian reserves and undertaken cultivating activities on the said reserve and therefore cannot benefit from their own misdoing in the guise of protecting their constitutional rights when in fact they seek to use this court to rubber stamp an illegality. The 3rd respondent further avers that there has been no violation of the applicants' constitutional rights. The 3rd respondent also avers that on the contrary, they have enforced the obligations imposed on the state under [*the Constitution*](#) and within its statutory mandate. The 3rd respondent prays that the application be dismissed with costs.
- 13 On July 25, 2022, the 3rd petitioner/applicant filed a supplementary affidavit wherein it was averred that the interested party's claim that the petitioners had destroyed the perimeter wall around the suit property thus causing the loss of Kshs. 500,000/=, was false and made in order to paint the petitioners in bad light. That it was the interested party who entered onto the 2nd and 3rd applicants farming area and destroyed their crops. She further averred that the petitioners' have no issue relocating out of the said riparian land which they have been using to make ends meet by farming during the law rainy season. She stated that the interested party should not be permitted to develop on riparian land.
- 14 The 2nd respondent filed a replying affidavit on August 25, 2022, through Ms Njoki Mukiri, the County Director Environment, wherein she averred that the Dam rested on private land. However, that its development on the suit property had not been issued with an Environmental Impact Assessment Licence as the same is likely to have been developed before the National [*Environmental Management and Co-ordination Act*](#), 1999, came into force. The 2nd respondent avers that the petition is untenable as an environmental impact assessment ought to be conducted pre-project and not post project as the subject dam has been in existence and operation for a long time. They pray that the petition and application be dismissed.
- 15 On September 20, 2022, the 1st and 5th respondents filed grounds of opposition to the application on the grounds that the petition does not meet the test and threshold for constitutional petition as laid down in the case of [*Anarita Karimi Njeru v. Republic*](#) (1979) eKLR and furthermore in the case of [*Mumo Matemu v Trusted Society of Human Rights Alliance*](#) (2014) eKLR.
- 16 The matter was canvassed by way of written submissions.
- 17 The applicants through the law firm of Keaton & Keaton Advocates, filed their written submissions in support of the application on July 6, 2022. They relied on the following authorities:
 - i. On the issue of whether the applicants' could mount a legal challenge before their constitutional rights were threatened with breach or violation, they relied on the case of [*Benard Murage v. Finserve Africa Ltd & 3 Others*](#) (2015), wherein it was held that a party does not have to wait until a right or fundamental freedom has been violated or for a violation of [*the Constitution*](#) to occur before approaching the court. He has a right to do so if there is a threat of violation or contravention of [*the Constitution*](#).
 - ii. The applicants directed the court to the following constitutional provisions that were being violated; these are article 43 of the [*Constitution*](#) which provides for economic and social rights, article 36 of then [*Constitution*](#), which provides for freedom of association, article 28 of then



Constitution which provides for human dignity, and article 40 of the Constitution which provides the freedom to the right to property.

- iii. On the grounds required to be met for granting of injunctive relief, the applicant relied on the case of *Giella v Cassman Brown Co Ltd* (1973) E.A 358, wherein it was held for a party to succeed, they must have a prima facie case with a high chance of success; that the applicant stand to suffer irreparable loss in the events the orders sought are not granted and that the balance of convenience squarely lied in favour of the applicants.
- iv. Lastly, the applicants relied on the case of *Mrao v First American Bank Ltd of Kenya Ltd & 2 others* wherein the Court of Appeal defined a *prima facie* case as a civil case in which in the material presented to the court, a tribunal properly directing itself will conclude that there exists a right, which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18 The interested party through Patricks Law Associates Advocates filed their written submissions on the July 1, 2022, opposing the application.

19 The 3rd respondent through Tracy Makori, advocate filed their written submissions on August 18, 2022, opposing the application and relied on the following authorities:

- i. Under the constitution, the 3rd respondent relied on article 69 which sets out the government’s obligations in respect to the environment and natural resources., article 70 on enforcement of environmental rights, article 62 on public land, and article 66, on the regulation of land use and property.
- ii. The 3rd respondent further relied on the ELC Petition No E017 of 2021 – *Sultan Palace development Ltd v Water Resources Authority* in wherein the court held that while declining to grant conservatory orders restraining the respondent from proceedings to carry out its mandate in the protection of catchment areas. that the measures therefore being undertaken by the respondent were in tandem with its statutory mandate as provided for the Constitution of Kenya and the Water Act.
- iii. It further relied on the case of *Milimani Splendor Management Ltd v NEMA & 4 others* (2019) eKLR where the court held:

It now behoves every person to play an active role in Environmental Protection in light of article 69(2) of the Constitution which places the duty on every person to cooperate with State Organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa.”

- iv. The 3rd respondent also relied on the case of *Kenya Association of Manufacturers & 2 others v. C.S Ministry of Mining and Natural Resources & 3 others* (2017) eKLR wherein it was held:

Besides the Constitution guaranteeing the right to a clean and healthy environment to every person, article 69 of the Constitution sets out the obligations of the state in respect of the environment. One of these is the requirement to ensure sustainable exploitation, utilisation, management, and conservation of the environment. This



state is also enjoined to eliminate processes and activities that are likely to endanger the environment.”

- v. The 3rd respondent further relied on the case of *Aloys Mataya Moseti v NEMA & another* (2020) eKLR, which quoted the case of *Bogonko v NEMA* (2006) eKLR, wherein the court noted that in pronouncing itself, it could not curd NEMA’s power given by statute.
- vi. On the issue of whether owners of land should be allowed to use it as they wish, whether or not it falls within a riparian area, the 3rd respondent relied on the case of *V/D Berg Roses & Project Agro Lease Ltd v Attorney General & Minister of Environment and Mineral Resources* (2016) eKLR, in where the court held:

It will be seen from the above, that firstly, every person has the right to own property. The petitioner has issue with the cited provisions of the LNMO because it is their view that they are the horticultural business will be greatly affected. The petitioner has stated that they undertake a agricultural activities within the riparian land and that they have structures on the riparian area of Lake Naivasha....There is no absolute right given to one to use his land as he wishes. All land must be used in a manner that does not endanger the environment.”

- vii. The 3rd respondent further relied on the case of *Baljit Sokhi & another vs Charity Ngilu, C.S. Ministry of Lands, Housing and Urban Development & Another* (2021) eKLR, where the court held that:

The importance of the environment to the people of Kenya is demonstrated by the fact that respect for the environment as our heritage forms part of the preamble of our Constitution.”

- viii. The 3rd respondent further relied on the case of *Nzioka & 2 others v Tiomin Kenya Ltd* (2001) eKLR, in wherein the court held that environmental degradation is not necessarily an individual concern or loss but a public loss.
- ix. Lastly, the 3rd respondent relied on the case of *Editb Wangari Gitata v Athi Water Service Board* (2012) eKLR, where it was held that the public’s rights will be upheld over the rights of an individual.

Having had the opportunity to review the pleadings and the rival written submissions of the parties, the following are the issues for determination and will be answered herein.

- a. Whether the preliminary objections are merited?
- b. Whether the petitioners/applicants rights were violated by the respondents?
- c. Whether the petitioners/applicants are entitled to conservatory orders to prevent the violation of their constitutional rights?
- d. Whether the suit property is on riparian land?

- 20 There are preliminary objections filed by the 1st & 5th respondents on the grounds that the petition does not meet the threshold as laid down in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR, where the court held as follows:

Locus standi had operated, in the earlier constitutional dispensation, to limit the scope for litigants to pursue causes in the public interest. Articles 22 and 258 of the current



constitution opened the doors for such litigants to lodge causes on constitutional matters. In order to avoid frivolous suits, Courts in cases such as *John Wekasa Khaoya v Attorney-General*, High Ct Pet No 60 of 2012 have set out parameters to guide the filing of causes in the public interest. These include (i) the intended suit must be brought in good faith, and must be in the public interest; and (ii) the suit should not be aimed at giving any personal gain to the applicant.”

- 21 In the case of *John Harun Mwau & 3 others v Attorney General & 2 others* [2012], the court expressed itself thus:-
- 22 In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.
- 23 In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.
- 24 Therefore, the petition herein meets the threshold of a petition. The application before this court as filed by the petitioners/applicants is one for conservatory orders to restrain the respondents from interfering with the petitioners’ farming on the suit property pending the hearing and determination of this suit.
- 25 In reality, the party the petitioners/applicants seek to restrain is the interested party from interfering with their farming activities on the suit property. A Dam is located on the suit property. It is not in dispute that the suit property is private land under the development of the interested party.
- 26 A revelation brought to light in this suit is that the interested party is the private owner of the property in which the dam is situated and that they do not have an environmental impact assessment report that was issued following the audit of a proposed development. The reason given is that the development of the dam commenced prior to the enactment of the NEMA Act, 1999.
- 27 Other than the foregoing pleadings, the applicants have also submitted expansively on the issue that the impugned development has been carried out and/or undertaken without compliance with various provisions of the law, namely, section 58 of the *Environment Management and Coordination Act* (1999) which provides the requirement of an.
- 28 The public interest that the petitioners(applicants) are advancing is the preservation of the riparian land that is situated near the dam, and the private suit property. A question however arises as to what is the result of a development project without an environmental impact assessment report, which may have a major impact on the residence of an area?
- 29 The applicants contend that the respondents sought to retrospectively apply regulation 31(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003 (“the regulations”) against the interested party. These regulations can only be applied prospectively unless the law expressly states otherwise, which in the present case the applicants contends it does not. However, EMCA only provided for it to act retrospectively. The regulations state:
- (1) An environmental audit study shall be undertaken on the following development activities which are likely to have adverse environmental impacts—



- (a) ongoing projects commenced prior to the coming into force of these Regulations; or
- (b) new projects undertaken after completion of an environmental impact assessment study report.

30 The dam in issue built in the 1980 as per the 3rd respondent's exhibits. Therefore, there would be no logical way to conduct an environmental impact assessment on the project since it was ongoing at the time the Act was enacted. Therefore, the requirement for a EIA Report was therefore not a requirement. Accordingly, this court finds that an environmental impact assessment could not have been carried out retrospectively. (See *Sky Africa Holdings Limited v National Environment Management Authority (Nema)* [2021] eKLR).

31 The following issue relates to the riparian land which the applicants aver sits on the suit property which is registered in the name of the interested party and whether this has violated the Act? Article 62 of the [Constitution](#) provides for public land to include all land between the high and low water marks.

32 The contention arises as to whether the interested party owns the suit property. indeed, the interested party purchased to property on which the dam sits. In this particular scenario, the owner of the property had a portion of riparian land on his suit.

33 Assuming the interested party is owner, do the impugned provisions violate the [Constitution](#) especially article 40 which protects the right to property?

34 This court does not think so. If the court got the argument of the objectors' right, it was their views that since the interested party owns the land in issue, then it should be allowed to use it as he wishes whether or not it falls within a riparian area.

35 The argument of the objector is erroneous and flawed for the reason that just the fact that one owns land, does not give that person a licence to use it as he may wish. The [Constitution](#) itself provides at article 60 that land should be held in a manner that is sustainable. One of the principles of land use and management under article 60 is the sound conservation and protection of ecologically sensitive areas. The entire article 60 states as follows;

60

- (1) Land in Kenya shall be held, used, and managed in a manner that is equitable, efficient, productive, and sustainable, and in accordance with the following principles—
 - a. equitable access to land;
 - b. security of land rights;
 - c. sustainable and productive management of land resources;
 - d. Transparent and cost-effective administration of land;
 - e. Sound conservation and protection of ecologically sensitive areas;
 - f. Elimination of gender discrimination in law, customs and practices related to land and property in land; and
 - g. Encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.
- (2) These principles shall be implemented through a National Land Policy developed and reviewed regularly by the National Government and through legislation.



36 (See *V/D Berg Roses & Project Agro Lease Limited v Attorney General & Minister for Environment and Mineral Resources* [2016] eKLR), where the Court held as follows:-

37 In the same case the court held as follows:

I am appalled to hear from the petitioner that she wants to do as she wishes on the land in issue simply because she believes she owns the land or has leased it. There is no such room. As I have said earlier, the *Constitution* itself requires that land must be used in a manner that is sustainable and friendly to the environment. Let shame be upon the person who faults a law that is aimed at protecting the environment and let bigger shame be upon the person who wishes to undertake activities that will no doubt cause harm to the wetland of Lake Naivasha which is our pride and our heritage.

37 Petitioner were located within riparian areas and it should not have registered the properties in the name of the private proprietors. That it is the duty of the government to protect riparian lands by ensuring that such lands are not infringed upon or used for any other purpose other than conservation of the environment. It is the Petitioner’s case that the County Government of Siaya ought not to have approved the architectural drawings and that NEMA should have determined whether the proposed project was on riparian land.”

38 Premised on the foregoing, the applicants have averred, that the disregard and/or violations of the provisions of the law by the respondents herein, poses a grave danger to the applicants rights to a clean and healthy environment and thus the same ought to be averted. Consequently, this court allows the application with regard to the survey to be conducted to ascertain the boundaries of the NagamiDam in order to ensure that no public land, in this case riparian land, is owned privately and whose use could be detrimental to the environment.

40 Having now carefully considered the instant notice of motion application, dated April 5, 2022, the court finds it merited and the same is allowed entirely in terms of prayers No(3) and (5) with costs to the petitioners/applicants

41 On prayer No 6, there is no evidence that the respondents would defy the court order and therefore there is no need to involve the police at this juncture, this being a civil matter.

42 The parties are also directed to prepare and set the main petition for hearing expeditiously so that the underlying issues can be resolved at once.

43 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of;

Petitioners/Applicants

1st Respondent - Absent

2nd Respondent – Absent



Ms Makori for the 3rd Respondent

Mr Mollo for the 4th Respondent

5th Respondent – Absent

Mr Mwangi for the Interested Party.

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

8/12/2022

