



Kiboko Water Resource Users Association v Kenya Pipeline Company Limited & 3 others (Environment & Land Petition 13B of 2019) [2024] KEELC 837 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 13B OF 2019
TW MURIGI, J
FEBRUARY 14, 2024**

BETWEEN

KIBOKO WATER RESOURCE USERS ASSOCIATION PETITIONER

AND

KENYA PIPELINE COMPANY LIMITED 1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND RESPONDENT

WATER RESOURCES AUTHORITY 3RD RESPONDENT

ENERGY AND PETROLEUM REGULATORY AUTHORITY 4TH RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 2nd September 2019 brought under Articles 2, 10, 22, 23(3) (c), 40, 42 and 69 of *the Constitution* of Kenya, Sections 3 and 86 of the Environmental Management Coordination Act, Rule 18 and 19 of the High Court (Organization and Administration) Rules 2016, Rule 3(1), (2), (3), (4), Rule 4(1), (2). Rules 5, 6 and Rule 13 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, the inherent jurisdiction of the court and all other enabling provisions of the law in which the Applicant seeks the following orders:-

1. Spent.
2. That pending the hearing and determination of the application, the 1st Respondent stop and cease pumping, transmitting and or transporting petroleum or petroleum products or any other form of hydrocarbons through Line v Oil Pipeline.



3. That pending the hearing and determination of the Petition, the 1st Respondent do file in court within 14 days the following:-
 - 3.1 A copy of the Project Report detailing the capacity and scope of the project for construction of Line V Oil Pipeline including Environment Impact Assessment Report submitted by the 1st Respondent in its application for a construction license.
 - 3.2 A copy of the Environment Impact Assessment License No. NEMA/EIA/PSL/556 dated 12th September 2014 issued to the 1st Respondent by the National Environmental Management Authority(NEMA), 2nd Respondent.
 - 3.3 The 1st Respondent'S letter dated 26th July 2014 of acceptance of the conditions by NEMA.
 - 3.4 The Hydrological Report assessment report detailing the underground spread, extent and any possible movement of the pollutants consequences of oil leak and spillage at Kiboko Area, Makueni County, Samburu Area, Kwale County and Machakos County.
 - 3.5 All the reports and plans filed with the 2nd Respondent pursuant to the Restoration Order dated 16th May 2019
 4. That this Honourable Court be pleased to order that this application and Petition is of great public interest and therefore all costs associated with the filing and hearings be dispensed with in toto.
 5. That the Court be pleased to give further orders/and or directions as it may deem fit to meet the ends of justice of the case.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Wilson Mbithi Munguti, sworn on even date.

The Applicant's Case

3. The deponent, the Chairman of the Petitioner herein, averred that on 30th March 2019, residents of Kiboko area experienced traces of oil in water from various springs in the area which prompted him to report the matter to the relevant authorities. That upon investigations dangerous levels of hydrocarbons were found on the surface and underground water from samples taken from Kiboko mainsprings, Earthpan and Kathimani springs.
4. That on 8th April 2019, the 3rd Respondent issued a compliance order directing the 1st Respondent to clean up and remove the soil containing oil products within Kiboko springs water catchment area.
5. He went on to state that on 10th May 2019, the 3rd Respondent issued a public notice advising members of the public to seek alternative water sources since the water in the area was contaminated with oil products associated with the oil spillage.
6. He stated that he was aware that on 12th September 2014, the 2nd Respondent issued a license to the 1st Respondent to construct Line V Pipeline traversing the Counties of Mombasa, Kwale, Taita Taveta, Makueni, Kajiado, Machakos and Nairobi.
7. That following the leakage, the 2nd Respondent issued a restoration order dated 16/05/2019 to the 1st Respondent where it raised concerns on the integrity of the pipe line since another leakage was detected on 31st March 2019 on the same pipeline in Samburu area.



8. According to the deponent, the 1st Respondent in its application for a construction permit indicated that it would install a Fibre Optic Cable Digital Pipeline Leak Detection system but failed, refused and/or omitted to do so. He stated that the pipeline in Kiboko area had been leaking for a long time without being detected thereby polluting the surface and underground water flowing into Kiboko and Athi rivers. He argued that the restoration order did not address the issue of compensation to the victims.
9. He contended that the oil spillage poses serious environmental risks to the residents of the affected areas since they have been left destitute due to lack of alternative water resources. He argued that the 2nd – 4th Respondents have failed, neglected and/or refused to stop the 1st Respondent from continuously degrading the environment. He urged the court to allow the application as prayed.

The 1st Respondent's Case

10. The 1st Respondent filed a replying affidavit of Joshua Mutuea dated 11th November 2019 in opposition to the application.
11. The deponent averred that upon receiving a report of a hydrocarbon release on Line V in Kiboko area, the 1st Respondent dispatched its emergency team which located and repaired the defect within a private farm owned by Mr Thaddeus K Mutiso and normal services resumed on 31st March 2019. He averred that the spill occurred despite comprehensive systems having been put in place to prevent it. That prior to 30th March 2019, there was no indication of any leakage either by the presence of product on the ground or pressure on Line V.
12. According to the Deponent, the damage to the pipeline was caused by corrosion which was accelerated by the presence of water. He argued that the presence of a Fibre Optic Leak Detection System would not have prevented the leakage from occurring since they would still have mobilised an emergency response team to remedy the leakage as was done in the present case.
13. He averred that the assessment results for water samples taken between 18/6/2019 and 9/7/2019 from Kiboko main spring, Kathimani Spring, Hunters Lodge, SGR Bridge, Mombasa Nairobi Highway Kilometre 304 spill site Outermost Ring and Kwa Kyalo Spring points showed that the water was not contaminated with hydrocarbons
14. He asserted that the remediation programmes put in place by the 1st Respondent were effective and geared towards ensuring that Kiboko area was restored to its pre spillage status.
15. As regards production of documents sought by the Petitioner, the deponent argued that the Petitioner has not shown the relevance of the said documents which in any case were to attached to his replying affidavit. According to him, Regulation 47 of the Environmental (Impact Assessment and Audit) Regulations (2003) provides for alternative methods of securing the said documents which the Petitioner has not invoked.

The 2nd Respondent's Case

16. The 2nd Respondent filed a replying affidavit sworn by Zephaniah O. Ouma on 16th March 2020 in opposition to the application. The deponent averred that vide a letter dated 1/4/2019, the 1st Respondent informed the Authority of the oil spillage from their pipeline, Line V at KM 304-Kiboko area. That following the report, the Authority staff visited the site on 4/4/2019 and upon assessing the extent of the oil spillage, the Authority issued an order directing the 1st Respondent to undertake an immediate environmental audit.



17. He further averred that after going through the report on the oil spillage incident, the 2nd Respondent on 16/5/2019 issued a restoration order to the 1st Respondent, who in response confirmed that it would comply with the order.
18. That based on the reports forwarded by the 1st Respondent in further compliance with the Restoration order, the Authority undertook a monitoring and verification exercise at the incident site between 24th - 28th June 2019.
19. That as part of the verification process, the Authority sampled water at various points and prepared a report. That to ensure the accuracy of the results, sampling of water from contaminated sites was done by WRA, UON, County Government of Makueni and Bureau Veritas Ltd.
20. He further averred that a technical committee comprised of the County Government of Makueni, Water Resource Authority, University of Nairobi, Energy and Petroleum Regulatory Authority and Bureau Veritas analysed the reports and prepared a report which showed that the clean-up exercise was yielding fruit.
21. He averred that the Authority was monitoring the ongoing clean-up exercise and water quality so as to ensure that the Petitioner's right to a clean and healthy environment was protected
22. According to the deponent, the accusations levelled against the 2nd Respondent were baseless and were aimed at tarnishing the image of the Authority given the measures that it had undertaken.
23. He contended that a fresh Environmental Impact Assessment Study Report is unattainable because it can only be undertaken before the commencement of a project and not thereafter. The 2nd Respondent urged the court to dismiss the application.

The 3rd Respondent's Case

24. The 3rd Respondent opposed the application through the affidavit of John.N. Kinyanjui sworn on 30th April 2021.
25. He averred that following the oil spillage incident, the 3rd Respondent swiftly issued a precautionary notice informing water users in Kiboko area that the water was unfit for human consumption. That a team of its hydrogeologists carried out hydrogeological assessment of the site and established the presence of oil plumes around the oil leak sites.
26. He stated that the remediation works had contained the oil spillage since much of it had been recovered. He further averred that upon analysis of water samples collected in the spillage areas, the 3rd Respondent revoked the precautionary notice earlier issued to the 1st Respondent. It was averred that the 3rd Respondent was engaged in monitoring the directives on compliance issued to the 1st Respondent so as to ensure that the water was not contaminated.
27. He contended that the 3rd Respondent has performed its legal mandate and urged the court to dismiss the suit.

The 4th Respondent's Case

28. The 4th Respondent opposed the application through the affidavit of Edward Kinyua sworn on 25th September 2019.
29. He averred that on 18/7/204 the 1st Respondent applied for a construction permit to construct Line V for purposes of transporting petroleum products.



30. That upon compliance and submission of the Environmental Assessment Report and EIA licence, the 4th Respondent issued a permit to the 1st Respondent on 22/9/2014. He further averred that the 1st Respondent advised that it would install a Fibre Optic Cable Digital Pipeline Leak Detection System as measure in addressing possible leakages as well as human and aerial patrol.
31. That following the leakage on Line V at KM 304, the Board of Directors and Senior Management of the 4th Respondent visited the site on 15/8/2019 to assess the progress of the clean-up exercise initiated by the 1st Respondent.
32. That to safe guard the integrity of the pipe line as well as the Petitioner's livelihood, three independent/ accredited laboratories were identified to collect and test water samples whose results subsequently indicated that Kiboko water springs and downstream were free from hydrocarbons.
33. That pursuant to the findings, the 4th Respondent held a meeting on 13/9/2019 with the 1st Respondent with a view to setting the timelines within which the leak detector systems would be installed. He denied the allegations that the 4th Respondent had failed or neglected to stop the activities of the 1st Respondent and asserted that the leakages on Line V were sufficiently rectified with the pipeline operating in its full capacity owing to the directives issued by the 4th Respondent.
34. The application was canvassed by way of written submissions

The Applicant's Submissions.

35. The Applicant's submissions were filed on 13th November 2020.
36. Counsel reiterated the contents of the Petitioner's supporting affidavit sworn on 2nd September, 2019. On behalf of the Petitioner, Counsel submitted that Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, and to have obligations relating to the environment fulfilled.

Counsel further relied on the provisions of Articles 69 (2), 70 (1), 70 (2), 70 (3) of *the Constitution* in addition to Section 3 of the *Environmental Management and Co-ordination Act* to buttress his submissions.
37. Counsel submitted that the Petitioner's complaint is that their right to a clean and healthy environment has been violated by the Respondents. Counsel submitted that:-
 - a. The 1st Respondent failed, refused and omitted to construct KM 304 Line V Oil Pipeline in accordance with the documents submitted in the application for Construction Permit including the Environmental Impact Assessment (EIA) report which indicated that the Respondent was to install a Fibre Optic Cable Digital Pipeline Leak Detection System for real time monitoring.
 - b. The oil leakage and spillage from the 1st Respondent's pipeline at Kiboko Area, Makueni County which has been continuing for a very long time without a detection system, has polluted and continues to pollute the soil, the surface and the underground water comprising among other aquifers and springs flowing into Kiboko River and Athi River.
 - c. The oil spillage site is a catchment with porous volcanic formation with high water table and the source of water serving the residents, downstream users and ecosystem as it drains into the Athi River.



- d. There was also recent intrusion of the same pipeline near Mlolongo Town on the border of Nairobi County and Machakos County.
 - e. The 2nd Respondent issued a Restoration Order dated 16th May, 2019 directed at the 1st Respondent while expressing concern on the integrity and safety of the pipeline which is barely 1 (one) year since its commissioning after another petroleum oil product leakage and spillage was detected on 31st March, 2019 at KM 40.5 on the same pipeline in Samburu Area, Kwale County.
 - f. The Restoration Order dated 16th May, 2019 issued by the 2nd Respondent after the oil leakage and spillage at Kiboko Area, Makueni County did not address the issue of compensation to the victims of the activities of the 1st Respondent.
 - g. The oil leakages and spillages pose serious environmental and health risks to the residents of the affected areas who have been left destitute on account of lack of alternative water sources for domestic use and irrigation thereby rendering the affected and surrounding areas unsafe for human habitation.
38. Counsel submitted that the public interest for clean and healthy environment far outweighs the Respondents' private interest. That in exercising the jurisdiction conferred upon it under Section 3 (3) of the Environmental Management and Coordination Act, the Court is to be guided by the principles of sustainable development, the principles of intergenerational equity, the polluter-pays principle and the precautionary principle.
 39. Counsel submitted that the Restoration Order dated 16th May, 2019 issued by the 2nd Respondent after the oil leakage and spillage at Kiboko Area, Makueni County did not address the issue of compensation of the victims of the activities of the 1st Respondent. That the 2nd, 3rd and 4th Respondents have failed, neglected and refused to stop the activities of the 1st Respondent, despite repeated and continuous degradation of the environment.
 40. Counsel submitted that it is in the interest of justice that the court allows the application as sought.

1st Respondent's Submissions

41. The 1st Respondent's submissions were filed on 12th May 2021.
42. On its behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the Petitioner meets the threshold for a grant of conservatory order.
 - ii. Whether the documents sought should be produced by the 1st Respondent.
43. On the first issue, Counsel submitted that the principles applicable for the grant of conservatory orders were set out in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) where the Supreme Court held that:-

“conservatory orders should be granted on the inherent merit of case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes”.
44. Counsel submitted that the test for the grant of conservatory orders was laid down in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* (2015)



eKLR where the court outlined the principles for the grant of conservatory orders in summary as follows:-

“The principles are that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

45. As regards the first requirement, Counsel submitted that the Petitioner has not established a prima facie case to warrant the grant of a conservatory order. Counsel submitted that the Petitioner has not demonstrated that there exists a right which is under threat of violation or which is being violated.
46. That apart from stating that the oil spillage poses environmental concerns, the Petitioner has not demonstrated the prejudice that will be occasioned should the pipeline remain in operation. It was submitted that the hydrocarbon release was remedied and remedial programmes initiated by the 1st Respondent were geared towards environmental restoration, conservation and protection.
47. Counsel submitted that the instant application is moot because the issues presented by the Petitioner are no longer alive since they had been remedied.
48. On whether the Petition will be rendered nugatory if the orders sought is not granted, Counsel submitted that the Petitioner must demonstrate that the substratum of the Petition will be rendered nugatory if the application is not allowed. It was submitted that the Petitioner will not suffer any prejudice if the orders sought are not granted as the orders do not remedy any wrong or protect any right threatened with breach. It was submitted that the Petitioner has failed to show the nexus between the order sought and the substratum of the Petition.
49. On whether the conservatory order will serve public interest, Counsel submitted that the Petitioner has failed to demonstrate that the public would suffer peril if the orders sought are not granted. That given the fact that the leakage has been rectified the Petitioner has failed to demonstrate the benefit that would accrue to the society by closing down the pipeline.
50. Counsel argued that granting the orders sought will cause hardship to the public as Line V is used to transport petroleum products from Mombasa to other counties in Kenya and to the neighbouring countries.
51. On the second issue, Counsel submitted that the Petitioner has not shown the relevance of the documents in the Petition. It was submitted that the documents requested are public documents and are available upon payment of the requisite fees. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

The 3rd Respondent's Submissions

52. The 3rd Respondent's submissions were filed on 19th May 2023.
53. Counsel reiterated the contents of the replying affidavit in support of the submissions.



Analysis and Determination

54. Having considered the application in light of the Petition, the respective affidavits and the rival submissions, the issue for determination is whether the Applicant has met the threshold for the grant of a conservatory order.
55. The law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of *Judicial Service Commission Vs Speaker of the National Assembly & Another* (2013) eKLR where the court held that;
- “Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under *the Constitution*, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
56. The principles in regard to granting of interim conservatory orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where the court stated as follows:-
- “Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”
57. It follows that for a conservatory order to issue, the Applicant must satisfy the following principles:-
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*.
 - b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.
 - c. The public interest must be considered before grant of a conservatory order.
58. The first issue for determination is whether the Petitioner has established a prima facie case that warrants the grant of a conservatory order. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.



A prima facie case was defined in the case of Kevin K Mwiti & Others Vs Kenya School of Law & Others (2015) eKLR where the court stated as follows:-

“.....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”

59. The Petitioners alleged that the oil spillage poses serious environmental and health risks to the residents of the affected areas who have been left destitute for lack of alternative water sources. It is the Petitioner’s case that the 1st Respondent refused to construct Line V in accordance with the documents submitted in their application for a construction permit. It was averred that the oil spillage at Kiboko area has been continuing for a long time without a detection system thereby polluting the surface and underground water.

60. The 1st - 4th Respondents narrated the measures they had undertaken towards rectifying the leakage on Line V. The 1st Respondent argued that the Applicant has not established a prima facie case since the leakage has been repaired.

61. In an application seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of Kenya Association of Manufacturers & 2 Others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR where the court stated as follows:-

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute.”

62. The Petitioner has faulted the 2nd – 4th Respondents’ for failing to stop the 1st Respondent in its continued acts of degrading the environment.

63. A close perusal of the application shows that the Petitioner is questioning the legality of the licence issued to the 1st Respondent to construct Line V, failure to address the issue of compensation for the victims in the restoration order and failure by the 2nd - 4th Respondents to stop the activities by the 1st Respondent.

64. The issues raised in the application cannot be determined at the interlocutory stage. These are issues which should be canvassed in a full trial. At this stage, the Applicant is required to establish a prima facie case with a likelihood of success. If the court were to determine the issues raised, it would amount to determining the Petition at the interlocutory stage. I find that the Petitioners have not established a prima facie case to warrant the grant of conservatory orders.

65. Secondly, the Applicant has to prove that the substratum of the Petition will be rendered nugatory if the conservatory order is not granted. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the Applicant. In the case of Centre for Rights Education & Awareness(CREAW)& Another Vs Speaker of the National Assembly & 2 Others (2017) eKLR the court held that;

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory



order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”

66. In the case at hand, the Petitioner has not demonstrated that there is a right that has been violated or is threatened with violation. Having evaluated the material placed before me, I find that the Applicant will not suffer any prejudice if the conservatory orders are not granted. The Applicant has not demonstrated that the Petition will be rendered nugatory if a conservatory order is not granted.
67. On the issue as to whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will be served better by allowing the 1st Respondent to transport petroleum products pending the hearing and determination of the Petition herein.
68. In the end, I find that the Application dated 2nd September 2019 is devoid of merit and the same is hereby dismissed with no orders as to costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM ON 14TH DAY OF FEBRUARY, 2024.

IN THE PRESENCE OF:

Court assistant Kwemboi.

Ms Aremo for the 1st Respondent

