



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 2 OF 2019

(FORMERLY KIAMBU PET 73 OF 2018)

**IN THE MATTER OF: ARTICLES 2, 3, 10, 20, 21, 22, 24,
27, 47 AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 24,
25, 26, 42, 43 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: ENVIRONMENT AND LAND COURT ACT CAP 19 OF 2011

AND

**IN THE MATTER OF: THE ENVIRONMENT MANAGEMENT
AND COORDINATION ACT NO 8 OF 1999**

AND

IN THE MATTER OF: THE MINING ACT CAP 12 OF 2016

BETWEEN

LAWRENCE MUNGAI MUNYUA & 16 OTHERS.....PETITIONERS

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

KIKUYU SUB COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

JUDGMENT

By an Amended Constitutional Petition dated 10th June 2019, and filed on 11th June 2019, the Petitioners herein brought this suit against the **Respondents seeking for the following orders;-**

- 1) A Declaration that that the Petitioners' constitutional rights and fundamental freedoms have been breached and/or are under threat of breach as a result of quarrying activities as sanctioned and propagated by the Respondents herein;*
- 2) A Declaration that all Licenses and permits issued to third parties to undertake quarrying activities in the Baraniki area be cancelled and the Environmental Impact Assessment reports allowing the same be nullified for being unconstitutional in favour of the conservation and repair of the Environment and ensuring the rights and fundamental freedoms of the people of the Baraniki area.*
- 3) A Declaration that the Respondents abdicated their duties as provided by the law, and as a result of their omissions and or commissions the rights of the Petitioners herein have been infringed, violated and denied*
- 4) An Order of Mandamus to compel the Respondents to carry out their duties as expected in the constitution and other laws and regulations more particularly to restore the depreciated land to what it was before the quarrying activities and to fill up the gapping space left open*
- 5) An Order of Prohibition against the Respondents and their agents, representatives or assigns from issuing any further Licenses and or permits for any further excavation of the quarries in the Baraniki area.*
- 6) An Order for Compensation to the Petitioners for the destroyed houses and infrastructure in the Baraniki area as well as the loss and carjackings occasioned at and by the quarries.*
- 7) An Order for Compensation to all identifiable victims who have suffered health adversities and losses as a result of the actions and inactions of the respondents including women, children and the elderly*
- 8) An order for Exemplary and General damages against the respondents for the violations suffered by the Petitioners as a result of their omissions and Commission*
- 9) Such other or further reliefs and/or orders that this Court may deem just and appropriate to grant.*
- 10) Costs of the Petition.*

In their Petition, the Petitioners who are residents of Baraniki area averred that the violations of their rights are as a result of rampant and uncontrolled quarrying activities in the area with total disregard to the Law. That as a result of the said quarrying activities, the people of that area have suffered different types of harm including noise, water, air and sound pollution and additionally children on their way to school have suffered fatal accidents by falling along the cracks and into the spring gaping holes left from the quarrying excavations and blasts and in some instances, it has caused fatalities and extreme loss. That the death of one Evanson Gatuota Macharia was attributed to the quarrying activities.

That school going children are lured in the quarries to work for a few coins and have missed out on the prospects of Education while mining in the quarries. Further that the constant shaking grounds from the blasts has adversely affected pregnant women and the elderly which has occasioned heart failure and loss of hearing and shock. That the constant excavation has threatened the natural flow of river Nyongara.

It was further contended that the open grounds have led to deaths of residents, relatives and passerbys. That the quarrying activities have drastically devalued adjacent parcels of land making them economically redundant, have degraded the Environment as the holes formed after excavation are not refilled. The Petitioners contend that the gaping holes have become hideouts for criminals including rapists and carjackers and despite the Petitioners attempt to report to the relevant authorities like the 1st and 2nd Respondents, they have willingly failed to act. It was alleged that the explosives used to blast the rocks in the quarry are supplied and sold by the 3rd Respondent.

That the Respondents have not shown any interest in addressing the issues and the Petitioners have to constantly repaired the walls of their houses because of the effects of the explosives used to blast the rocks. That the Respondents have allowed the public to be exposed to the dangers of uncontrolled mining .

The Petition was supported by the Affidavits of Lawrence Munyua, Robert Njoroge, Vincent Ndirangu Mungai and John Mungai Gatuota, who averred that they are residents of Baraniki area and should the Court not intervene, the Petitioners stand to suffer irreparable damage and gross contravention of their Constitutional fundamental rights and freedoms.

The Petitioners particularized contravention of the Constitution being that **Article 42** provides that every person has a 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 as contemplated in **Article 69** of the Constitution and to have obligations relating to the environment fulfilled under **Article 70** of the Constitution. Further that, the 1st Respondent is a body created vide the Environment Management and Coordination Act (EMCA), charged with the responsibility of managing the environment and despite it being informed of the problems, no steps have been

take to remedy the situation and thus has failed in its duty under **Section 7 of the Environmental Management Coordination Act**. That in conducting an Environmental Impact Assessment Study, the same was contrary to the state of the Environment. The Petitioners further relied on **Article 69(1)(a), Article 70(1), Article 70(3), Article 258 Clause 1** of the Constitution. Therefore, they contended that the Petitioners are justified to bringing the suit as a matter of public Interest.

The Petition is opposed and the **1st Respondent filed a Replying Affidavit dated 4th April 2019 sworn by Robert Mugoi, its County Environmental Officer, who averred that the authority conducted a site visit and compiled an inspection report on 16th March 2019. That there are abandoned quarries which are very deep and peasants are still excavating stones and hardcore. That the area is predominantly agricultural area with a sloppy terrain, where quarries span over an area of 2 km and they are easily accessible via an Earth Road**

Further that there was one operational quarry under the management of China Wu Yi Company, which is compliant to the NEMA statutory requirements as evidenced in the EIA license NEMA/PR/KMB/5/ 2/5202 License No 0053275 issued on 29th November 2018. That the quarrying activities are being undertaken in lands that are privately owned and there is no buffer zone between the quarries and nearby human settlements, which are less than 500m away and in addressing the said scenario, EMCA provides for Environmental Audits and monitoring activities to be undertaken to determine whether the activities undertaken have an adverse effect on the Environment and provide remedies . Further that the inspection report proposes some recommendations to remedy the situation.

His advocate had advised him that the current suit as framed against the 1st Respondent is ambiguous and does not clearly stipulate how the 1st Respondent has breached Petitioners' rights.

The 2nd and 3rd Respondents filed a Replying Affidavit through Waitaha Wanjohi, its County Attorney sworn on 8th October 2019. He averred that the issues before Court are violations of the Petitioners rights by private individuals, who are not parties to this suit. That the said violations are as a result of rampant uncontrolled quarrying activities by 3rd parties who are not enjoined in the suit. That the duties of the 2nd & 3rd Respondents under the law is to issue business licenses and permits and the said environmental complaint ought to be addressed to the respective governmental agencies, as the allegations raised by the Petitioners are not within their mandate and Control. Further that the attempt to address the issue raised by the Petitioners have never been brought to the 2nd and 3rd Respondents attention. Further, that no injunctive orders can be issued against a government body for performing its duties.

That their mandate is only to issue business licenses in so far as quarrying activities are concerned. That the Petition is incurable defective as it does not disclose any cause of action against the 2nd and 3rd Respondents.

The 4th Respondent entered appearance through the office of the Attorney General and filed grounds of opposition dated 25th October 2019 on the grounds that the Petitioners have failed to plead any particulars of infringement of their fundamental rights. That the Petitioners are merely making allegations and have not sued the Company that is involved in the quarrying activities. Further that the Petition does not meet the threshold as laid out in the Anarita Karimi's case for the grant of the orders sought. That it does not disclose any reasonable cause of action and the Petitioners have not demonstrated what damage they will suffer should the Court fail to grant the reliefs sought in the Petition. The Court was urged to dismiss the Petition.

The interested parties did not participate in the proceedings.

After close of pleadings, parties filed written submissions in support and in opposition of the amended Petition. The Petitioners through the Law Firm of Githuku & Githuku Advocates, filed their written submissions on 17th November 2020. The 1st Respondent through Emma Lisanya Advocate filed theirs on 9th December 2020. The 2nd and 3rd Respondents through Legal Counsel J.J Cheserek put in their written submissions dated 10th November 2020, while the 4th Respondent filed its submissions on 17th November 2020, through the Office of the Attorney General which the Court has carefully read and considered. The issue for determination are

1. Whether the Petitioners' Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions;

2. Whether the Amended Petition is merited.

1. Whether the Petitioners' Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions

It is the 4th Respondent's Contention that the Petitioners have failed to plead any particulars of infringement of their rights with necessary precision as per the requirements in the Anarita Karimi's case. In the case of Anarita Karimi Njeru ...Vs... Attorney General (1979) KLR 154, the Court stated the position in the following terms:

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case), that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

Further the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR held that:-

However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement

as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

This Court has gone through the Amended Petition dated **10th June 2019**, and notes that the Petitioners have stated that which they are complaining of being that the quarrying activities in the **Baraniki area** have affected their health and the right to a clean Environment. They have further stated the provisions of the Constitution upon which they rely on and as to the manner in which they seek that the same have been infringed. In the **Mumo Matemu** case, the Court of Appeal clearly held that there is no formula upon which the said precision may take. It is important that the whole Petition should be read holistically. The Court having gone through the Petition together with Affidavits in support, notes that the Petitioners have alleged that the Respondents failed to perform their Constitutional mandate and hence their rights have been infringed. They have further alleged which provisions of the Constitution have been violated and how.

It is the Court considered view that the purpose of precision is so that the Respondents is able to understand what they are accused of so as to be able to mount a proper defense. In this instant case, having gone through the Amended Petition, the Court finds and holds that the same has been drafted with reasonable precision as per the requirements in the **Anarita Kirimi** case and therefore the said Petition is properly before the Court.

2. Whether the Amended Petition is merited

The Petitioners have sought for various orders amongst them that their Constitutional rights have been breached; the cancellation of licenses and permits issued to third parties to undertake quarrying activities in the area; a declaration that the Respondents abdicated their duties, an order compelling them to carry out their duties , an order of prohibition against the Respondents from issuing any further licenses and or permits, compensation for the destroyed houses and exemplary and general damages.

For the Court to determine whether the Petitioners are entitled to the orders sought, it must first determine whether the Petitioners rights have been violated. A clean and healthy environment is a fundamental prerequisite for life and is not a matter that needs belaboring. It is for this reason that the drafters of the Constitution of Kenya, 2010, saw it fit to provide for the right to a clean and healthy Environment under **Article 42** within the Bill of Rights which provides;

Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under **Article 69** of the Constitution which among others, requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment.

The Petitioners have submitted that the 1st Respondent has failed to undertake and ensure that appropriate Environmental and Social Impact measure were undertaken to protect their rights. That the 1st Respondent ought to have ensured that a study of the project was undertaken after receiving numerous complaints from them. It was their submissions that the 1st Respondent has failed in its mandates.

It is trite that whoever alleges must prove and it was therefore incumbent upon the Petitioners to prove their claim. The Court has seen a letter dated **17th May 2017**, from the interested Party seeking for various information on whether the Environmental Impact Assessment was conducted before quarrying activities were undertaken.

From the Petition, the Petitioners have not claimed that their rights to information have been violated. They have only claimed that the Respondents have abdicated their duties and have allowed that their rights to a clean environment to be violated. However, there is no proof that any such duties have been abdicated or the omissions and commissions that have led to the violations of such rights. The 1st Respondent has contended that the only Company that is in operation was granted a license.

The claim by the Petitioners that third parties have been given licenses without following due process has not been backed by any evidence. Further in the report produced by the 1st Respondent, it is quite evident that the 1st Respondent undertook an **Environmental Assessment**, leading to the issuance of the EIA License and the subsequent approvals, **EIA license NEMA/PR/KMB/5/2/5202 License No 0053275 issued on 29th November 2018** and which License and subsequent approvals were issued to **the management of China Wu Yi Company.**

In the case of *Dr. Rev. Timothy Njoya vs The Hon. Attorney General*

and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013 the Court stated:-

“The Petitioner cannot come to Court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has

been violated.”

The Petitioners have also alleged that as a result of the violation of their rights, they have suffered various harms including death by some of their members and produced in evidence an alleged report produced by a Geologist. Having perused the said report, the Court notes that the report does not state who prepared it nor does it state the credentials of the person who prepared the same and therefore this Court is not satisfied that it lays any credibility as to having been prepared by a Professional to warrant its contents to be taken as proof.

With regards to the 2nd, 3rd and 4th Respondents, the Court is also not satisfied that any evidence has been led to support the allegations that they failed to control air pollution nor protect the degradation of the Environment.

Though the Petitioners have claimed that **people from the said Baraniki area have suffered different types of harm including noise, water, air and sound pollution and additionally children on their way to school have suffered fatal accidents and in some instances, has caused fatalities and extreme loss, there was no evidence tendered to support these allegations.**

They further averred that the constantly shaking grounds from the blasts has adversely affected pregnant women and the elderly which has occasioned heart failure and loss of hearing and shock. No medical evidence or evidence of a medical expert was brought forth to signify that due to quarrying activities, an ailment/disease/disability was as a result of the said quarrying activity. There was no iota of evidence tendered to establish any of the cited acts. The Petitioners further produced burial permits as proof of death, however they failed to produce a postmortem report which indicates the cause of death thus not discharging the burden of proof and linking the deaths to quarrying activities.

Even so, for the Court to find that the Respondents failed to carry out their mandate as provided for in the Constitution, the alleged omission or commission ought to be within its mandate. The Court thus concurs with the 1st Respondent that the authority to grant Mining license does not lie with the Respondents and since there is no proof that 1st Respondent granted any such mining permits, the Petitioners have failed to prove violations of their rights with regards to the permits that may have been granted.

It is trite law that he who asserts must prove. Whereas the Petitioners may have asserted, they however have failed to prove their case. **Section 107 of the Evidence Act** provides that a person who has asserted has the burden of proof and thus, Petitioners have failed to discharge the said burden. A party pleading violation of Constitutional rights is at the very least expected to give credible evidence of the alleged violation and that it is not enough to merely plead and particularize a violation.

Having failed to prove that the Respondents have violated their rights, to a **clean environment** or that their right to a sustainable exploitation, utilization, management and conservation of the Environment have been violated the Court finds and holds that the basis of upon which any other orders sought would have been granted have also failed as the basis for the alleged **cancellation of the licenses, Mandamus and Prohibition Orders** were the violation of the Constitution rights of the Petitioners. Consequently, the Court finds and holds that the Petition herein is **not merited**.

However, the Court takes cognizance of the Recommendations as set out by the 1st Respondent in its report prepared by **Robert Mogoi and Kevin Chirchir**, attached to **Robert Mogoi's** Replying Affidavit dated **4th April 2019** and orders that the Respondents ensure that the said Recommendations are complied with **within 90 days** from the date hereof.

The Upshot of the foregoing is that the Amended Petition dated **10th June 2019**, is found **not merited**, and the same is dismissed entirely. This suit having been brought for the interest of the public, each party will bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF APRIL 2021.

L. GACHERU

JUDGE

29/4/2021

Court Assistant – Phyllis

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Akello for the Petitioners

M/s Lisanza for the 1st Respondent

M/s Cheserek for the 2nd and 3rd Respondents

No appearance for the 4th Respondent

No appearance for the Interested Party

L. GACHERU

JUDGE

29/4/2021