



Wachira & 3 others v China Road & Bridge Corporation – Kenya & 2 others (Environment & Land Petition 2 of 2020) [2024] KEELC 6962 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND PETITION 2 OF 2020
LC KOMINGOI, J
OCTOBER 17, 2024**

BETWEEN

**CHARLES WACHIRA 1ST PETITIONER
ESTHER WAMBUI 2ND PETITIONER
EVANS KINUTHIA 3RD PETITIONER
ELIZABETH MBUGUA 4TH PETITIONER**

AND

**CHINA ROAD & BRIDGE CORPORATION – KENYA 1ST RESPONDENT
COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

JUDGMENT

1. By a Petition dated 24th February 2020 the Petitioners who are officials of Kerarapon Residents Association and Kerarapon Water Association respectively, state that the 1st Respondent leased or obtained a portion of land owned by the Ministry of Agriculture, Livestock and Fisheries for quarrying activities and more specifically to obtain material for the construction of the Southern bypass road.
2. It is their case that the said land is about 600 metres from their residences. The Petitioners opposed the quarrying activities as the blasting caused tremors that shook the foundation of the dwelling houses causing the walls to crack and become uninhabitable.

Further that the noise from the blasts and the dust had compromised the health of the residents.
3. The 1st Respondent entered into a written Memorandum of Understanding with the residents and/or locals in which they promised to restore the site to its near original status when the Southern



bypass was completed. It is their case that the 1st Respondent has not honoured the Memorandum of Understanding but have continued to hold on to the quarry and excavation continues.

4. The 2nd Respondent obtained a lease to a portion of the said land known as Ngong/Ngong/2627 for the establishment of an Integrated Waste Management facility. The Petitioners claim that this will have far reaching repercussions on the delicate ecosystem and environment of the area hence violate the fundamental rights of the residents.

The particulars of the violations of the Constitution, statute and public policy are set out in paragraph 21 a to h, of the petition.

5. The Petitioners therefore seek;
 - a. A declaration that the quarrying activities and intended expansion of the same on LR No. Ngong/Ngong/2627 is unconstitutional.
 - b. A declaration that the quarrying activities and intended expansion of the same of LR No. Ngong/Ngong/2627 is against public policy and national interest.
 - c. A declaration that the intended use of LR. No. Ngong/Ngong/2627 by the 2nd Respondent to establish an integrated waste management facility or dumping site is unconstitutional and against public policy.
 - d. An order of Mandamus compelling the 1st Respondent to decommission the quarry on 40 acres portion of the land known as LR. No. Ngong/Ngong/2627 and to rehabilitate and restore it to its form state.
 - e. Costs and interest.
6. The Petition is supported by the verifying Affidavits of Charles Wachira, Esther Wambui, Evans Kinuthia and Elizabeth Mbugua, the Petitioners herein sworn on the 24th February 2020.
7. Together with the Petition the petitioners filed a Notice of Motion dated 24th February 2020 seeking conservatory orders. The same is supported by the Affidavit of Charles, Wachira, the 3rd Petitioner herein, sworn on the 24th February 2020.
8. In response to the Petition, the 1st Respondent filed a Replying Affidavit sworn by William Ochieng Ouko, the Public Relations Officer, sworn on the 8th January 2024.

It is the 1st Respondent's case that the 3rd Respondent issued the Environmental Impact Assessment Licence for the initial application on 2012 and for expansion of the quarry in 2020.

9. Further that 1st Respondent has already set out plans for decommissioning the site as per a rehabilitation plan dated August 2019, the Environmental Impact Assessment Report and the License conditions.
10. It is also stated that the 1st Respondent has not carried out any blasting on the quarry over the last two (2) years and that there was established a monitoring committee made up of the members of the community to supervise the blasting in the quarry and ensure that the impact is not detrimental to the environment and to the community.

It is also stated that the 1st Respondent commissioned licensed hydrologists and Geologists to prepare a preliminary report assessing the possible impacts of quarrying activities to the Kerarapon Springs and the Report concluded that the surface run off from the quarry does not drain to Kerarapon Springs and



therefore quarrying activities are unlikely to impact on surface flow or pollutant transport the surface run off to Kerarapon Springs.

11. Further that the 1st Respondent has been compliant with the relevant laws and has not breached the Petitioner's Constitutional rights as alleged in the Petition. It prays that the Petition be dismissed with costs.
12. The 2nd Respondent in its Replying Affidavit dated 6th December 2022. The same is sworn by Peter Parsiato Pushati, the Director Environment and National Resources. He deponed that the 2nd Respondent proposed decommissioning of Ngong dump site and commissioning of an Integrated Waste Management System at Kerarapon. That in 2018, the 2nd Respondent with support from United Nations Habitat undertook an Environmental and Social Impact Assessment Study Report for Ngong dumpsite and submitted to the 3rd Respondent.

That after several stakeholder consultations it was agreed that the suit property known as "Vetfarm" was the most suitable and reasonable site for the commissioning of an Integrated Waste Manage System at Kerarapon.

13. The Environmental and Social Impact Assessment Study Report was prepared in 2018 and submitted to the 3rd Respondent and upon reviewing the contents, the 3rd Respondent, issued an improvement notice dated 31st August 2020, which was to be complied with before the Environmental Impact Assessment Licence could be issued.
14. By a letter dated 22nd September 2020, the 2nd Respondent notified the 3rd Respondent that they had resolved to put the project on hold in order to prioritize the decommissioning and rehabilitation of the existing Ngong dumpsite which continues to be an environmental hazard to Ngong residents.

It is the 2nd Respondent's position that should it proceed with the proposed project in future, the same will be subject to public participation as prescribed under the Environment Management and Coordination Act (EMCA) and the regulations made thereunder.

It is deponed that the Petition herein is premature and premised on speculations of alleged future conduct of the 2nd Respondent.

15. It is further deponed that the Petitioners are out to frustrate the noble concern to establish an environment friendly waste management sanitary facility in place of the existing hazardous dumpsite to help the community as this Petition which is meant to stop the Environmental Impact Assessment process is not brought in good faith and it is full of mischief. He prays that the Petition be dismissed with costs.

16. The 3rd Respondent filed Grounds of Opposition dated 13th October 2022. The grounds are;

1. The 3rd Respondent being a statutory authority should not be stopped from discharging its statutory mandate PROVIDED the same is done lawfully. This position was succinctly stated in the case of Republic Vs. NEMA Exparte Peter Bogonko (2006) eKLR.
2. That an Environmental Impact Assessment Licence is issued subject to a full participatory process as set out under Section 58 of Environment Management and Coordination Act and Parts II and III of the Environment (Impact Assessment and Audit) Regulations 2003 where even the petitioners herein are required to give their views. This Petition therefore should not be allowed to stop the EIA process.



3. That any person aggrieved with the issuance of an Environmental Impact Assessment Licence (EIA) can only seek redress at the National Environment Tribunal (NET) as the port of first call pursuant to the well beaten principles of exhaustion and constitutional avoidance.
4. That there exists an EIA Licence given by the 3rd Respondent to the 1st Respondent and dated 21st May 2020.

There is also a Replying Affidavit sworn by Mamo B. Mamo EBS, Director General of the 3rd Respondent, on the 17th November 2022. He deponed that pursuant to the Environmental Impact Assessment by the 1st Respondent and complaints by Kerarapon residents, a site visit was conducted by the 3rd Respondent's Officers on 15th July 2019 which revealed that the 1st Respondent had extended quarrying activities beyond the 40 acres contrary to the requirements of the Environmental Impact Assessment Licence NEMA/PR/5/9579 dated 24th February 2022 by a further 23.8 acres.

The authority then issued restorative Orders to the 1st Respondent to stop any further quarrying activities until rehabilitation activities were conducted on the site and rehabilitation plans submitted to the Authority.

17. It is further deponed that following extensive public participation both from affected persons within the localities of the quarry including the petitioners herein and the lead agencies and guided by the applicable law, the 3rd Respondent was satisfied that the project did not pose any risks or threats to warrant denial of Environmental Impact Assessment License and thus proceeded to issue the 1st Respondent with an EIA License No. NEMA/EIA/PSL/9243 dated 21/5/2020.
18. It is also stated that any person aggrieved with the issuance of an Environmental Impact Assessment License can only seek orders at National Environment Tribunal as the first point of call pursuant to the well stated principles of exhaustion and constitutional avoidance. He prays that this Petition be dismissed with costs.

The Petitioners Submissions.

19. They are dated 12th October 2023.

The Petitioners submitted that the 1st Respondent's quarrying activities have caused much loss and damage to the Petitioners. They suffer from noise pollution. The earth moving machines deployed to do the excavation and or quarrying for road construction material has also compromised the integrity of the foundations of their houses. This is documented in an experts report on visual inspection on buildings for Kerarapon Residents Association (KEREA) that was done by Batiman Consulting Limited.

They also submit that the dust raised during the construction has caused respiratory ailments.

20. The Petitioners further submitted that the area where the proposed Waste Management System will be established by the 2nd Respondent is a water tower and the residents hold the reasonable and genuine fear that if the project proceeds, it would contaminate a delicate ecosystem and source of their water, which would cause even more environmental damage occasioning loss and damage to their livelihoods. The Petitioners further submitted that no sufficient public participation and Environmental Impact Assessment was conducted before the decision to conduct quarrying activities was undertaken.
21. They further submitted that no dumpsite should ever be established in a delicate ecosystem and within close proximity of a residential area. They urge that the prayers sought in the Petition be granted.



The 1st Respondent's Submissions.

22. They are dated 23rd January 2024.

They raise three issues for determination.

- i. Whether this Honourable Court was the proper forum for the determination of the Petitioner's claims?
- ii. Whether the Petitioners are entitled to the reliefs sought?

23. The 1st Respondent submitted that this court is not the proper forum to determine the Petitioner's claim. It has put forward the case of Borbor & 2 Others Vs. NEMA (2022) KEELC 3947 KLR where the court defined the doctrine of exhaustion as below;

“The doctrine of exhaustion requires a party to exhaust any dispute resolution mechanism provided by a statute and/or law before resorting to the courts. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of Nation Assembly Vs Karume 1992 KLR where the court held that; “where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered since there are good reasons for such special procedures.”

24. That the issues raised in the Petition relate to the oversight mandate of the 3rd Respondent and that the 1st Respondent's acts complained about are by the 3rd Respondent which duly licensed it. Section 58 urges any party aggrieved to approach the National Environment Tribunal.

It has put forward the case of KKB Vs. SCM & 5 Others (2022) KEHC 289 KLR which discussed the doctrine of constitutional avoidance. It is submitted that the Petitioners' have recourse at the National Environment Tribunal hence this Petition is premature and erroneously before court owing to the doctrines of exhaustion and Constitutional avoidance.

25. The 1st Respondent, submitted that the Petitioners have failed to prove manifestation of the violation of any fundamental rights and freedoms by the 1st Respondent in any precise manner by failing to show the direct connection between the 1st Respondent's acts or omissions and the alleged infringement.

It has put forward the case of Communications Commission of Kenya & 5 Others Vs. Royal Media Services Ltd and 5 Others (2014) eKLR where the court stated;

“.....although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental rights has been violated, denied or infringed a party invoking this Article has to show the rights said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru Vs. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.”

26. The 1st Respondent, relied on Section 107 and 108 of the Evidence Act to state that the Petitioners have not demonstrated in any form the manner in which public policy and national interest are offended by the 1st Respondent's operations and are therefore mere allegations.

27. The 1st Respondent further submitted that the Petitioners have not demonstrated that the 1st Respondent's quarry expansion was irregular, unprocedural and/or illegal.



It prays that the Petition be dismissed.

The 2nd Respondent's Submissions.

28. They are dated 8th December 2023.

They raise one issue for determination;

Whether the orders sought should be granted.

The 2nd Respondent submitted that courts must consider the public interest principle in determining whether or not to grant conservatory orders, particularly in cases where orders are sought to stop a public agency from carrying out its mandate.

It has put forward the cases of *Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR ; *Martin Nyaga Wambora Vs. Speaker of the County Assembly of Embu & 3 others* (2014) eKLR.

29. It is submitted that the Petitioners are seeking a conservatory order against the 2nd Respondent which is constitutionally mandated with the obligation of waste disposal and management. That the hazardous nature of the existing dumpsite created the urgent need for the establishment of a sanitary waste management facility in the public interest and the impugned site is the most suitable. It is submitted that granting the orders sought will not be in public interest.

30. The 2nd Respondent further submitted that this Petition is premature and premised on speculations of alleged intended future conduct of the 2nd Respondent. The commissioning of the proposed project has been shelved in order to prioritize the decommissioning and rehabilitation of the existing Ngong dumpsite which continues to be an environmental hazard to Ngong residents.

The Petitioners will have an opportunity to participate in future by raising concerns before the Environmental Impact Assessment Licence is issued by the 3rd Respondent.

31. It prays that the Petition be dismissed with costs.

The 3rd Respondent's Submissions.

It appears the 3rd Respondent did not file any submissions.

Analysis and Determination

32. I have considered the detailed Petition, and the Affidavit in support, the responses thereto by the 1st, 2nd and 3rd Respondent's. I have gone through the annexed documents both in support and in opposition. I have also considered the written submissions and the authorities cited. The issues for determination are;

- i. Whether this Honourable Court was the proper forum for the determination of the Petitioners' claims.
- ii. Are the Petitioners entitled to the reliefs sought?
- iii. Who should bear costs of this petition?

33. It is the 1st Respondent's submission that the Petitioners ought to have approached National Environment Tribunal before filing this Petition as the 1st Respondent's acts complained of emanate



from a Licence issued by the 3rd Respondent. That Under Section 58 of Environment Management and Co-ordination Act (EMCA), any party aggrieved ought to approach National Environment Tribunal.

The answer to this is nothing prevents this court from handling this Petition as per Section 13 of the Environment and Land Court Act which provides that;

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land. CAP. 12A Environment and Land Court [Rev. 2012]

The Supreme Court of Kenya in *Nicholus Abidha Vs. AG. & 7 Others* Petition E007 of 2023 (2023) KESC 113 (KLR) where the court affirmed that “Locus Standi in environmental matters has been liberalized so that any person can approach the ELC seeking redress for violation and/or threatened violation of the right to a clean and healthy environment. The court noted that pursuant to Articles 22, 23 (3) and 162 (2) (b) of the constitution as read with Section 4 (1) of the ELC Act it is only the ELC that is vested with jurisdiction to determine allegations of environmental constitutional violations. The court emphasized the right to access the ELC for redress of alleged constitutional violations pertaining to the environment should not be impeded in a manner that frustrates the enforcement of fundamental rights and freedom.

This means nothing prevents this court from hearing and determining the matters raised in this petition

However had the issue been raised in the earliest opportunity the court would have considered referring the parties to National Environment Tribunal. It should be noted that this Petition was filed four (4) years ago. It would not be in the interest of Justice to send the parties to National Environment Tribunal at this late stage.

Are the Petitioners entitled to the reliefs sought?

34. I will first deal with the issue of quarrying activities by the 1st Respondent. It is the Petitioners’ case that the quarrying and or excavation activities have caused them loss and damage. They have suffered noise pollution. The earth moving machines deployed to do the excavation and or quarrying have compromised the integrity of the foundation of their houses.



The Report by Batiman Consulting Limited, on the visual inspection on buildings for Kerarapon Residents Association has not been challenged by the 1st Respondent.

The Petitioners also claim that the dust raised during the construction has caused respiratory ailments.

35. I find that the above factors are linked with the quarrying activities being under taken by the 1st Respondent. I rely on the case of Communications Commission of Kenya & 5 Others Vs. Royal Media Services Limited & 5 Others (2014) eKLR.

I find that the Petitioners' rights to a clean and healthy environment has been infringed by the acts of the 1st Respondent. It is on record that the 1st Respondent has extended their quarrying activities even after the completion of the Southern bypass project.

I find that the extended quarrying activities ought to come to a close.

36. I note from the Replying Affidavit filed on behalf of the 1st Respondent that it has already set out plans for decommissioning the site as per a rehabilitation plan dated August 2019; the Environment Impact Assessment Report and the Licence conditions. The 1st Respondent ought to move with speed and decommission the site to avoid further harm to the Petitioners.

37. As regards the declaration that the intended use of the parcel of land by the 2nd Respondent to establish an Integrated Waste Management facility is unconstitutional and against public policy; I agree with the 2nd Respondent's submission that this prayer is premature. It is clear from the 2nd Respondent's Replying Affidavit and submissions that the proposed project has not taken off, it is yet to be issued with an Environment Impact Assessment Licence by the 3rd Respondent.

No doubt one of the 2nd Respondent's mandate is to manage waste. The Petitioners will have an opportunity to interrogate the issue before the Environment Impact Assessment Licence is issued and raise any concerns. I therefore decline to grant any orders on this limb.

38. In conclusion, I find that the Petition succeeds partly. I grant the following orders;
- a. A declaration is hereby issued that the quarrying activities being conducted by the 1st Respondent on the parcel of land known as LR. No. Ngong/Ngong/2627 are unconstitutional and against Public Policy and National Interest.
 - b. An Order of Mandamus is hereby issued compelling the 1st Respondent to decommission the quarrying on forty (40) acres of the portion of the land and to rehabilitate and restore it to its former state. This process to be undertaken within six (6) months from the date of this Judgement and in accordance with the rehabilitation plan dated August 2019, the Environment Impact Assessment and the Licence Conditions.
 - c. As the Petition has succeeded partly, I order each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Bibiu for Mr. Onyango for the Petitioners.

Mr. Kibaara for the 1st Respondent.



Ms. Michira for the 2nd Respondent.

N/A for the 3rd Respondent.

Court Assistant – Mutisya.

