



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onjako & 9 others v Central Rift Water Works Development Authority & 4 others (Environment & Land Petition 1A of 2022) [2023] KEELC 20010 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20010 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND PETITION 1A OF 2022  
MN KULLOW, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**RAPHAEL ONJAKO ..... 1<sup>ST</sup> PETITIONER  
PETER MADEGWA ..... 2<sup>ND</sup> PETITIONER  
JESCA ODHAMS ..... 3<sup>RD</sup> PETITIONER  
EDWARD ODERA ..... 4<sup>TH</sup> PETITIONER  
JOYCE MUHONJA ..... 5<sup>TH</sup> PETITIONER  
DAVID ODHIAMBO ..... 6<sup>TH</sup> PETITIONER  
FRANCIS SHIKUKU ..... 7<sup>TH</sup> PETITIONER  
PAUL OWITI ..... 8<sup>TH</sup> PETITIONER  
JOHN OPERE ..... 9<sup>TH</sup> PETITIONER  
LOWER OYANI WATER RESOURCE USE ASSOCIATION ... 10<sup>TH</sup> PETITIONER**

**AND**

**CENTRAL RIFT WATER WORKS DEVELOPMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT  
LAKE VICTORIA WATER WORKS DEVELOPMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT  
CAS CONSULTANTS LIMITED ..... 3<sup>RD</sup> RESPONDENT  
SHAUXI GEOLOGICAL ENGINEERING EXPLORATION INSTITUTE .... 4<sup>TH</sup>  
RESPONDENT  
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 5<sup>TH</sup>  
RESPONDENT**



## JUDGMENT

1. The 1<sup>st</sup> – 7<sup>th</sup> Petitioners are Kenyan citizens and residents of Lower Oyani Area within Migori County while the 8<sup>th</sup> Petitioner is a Community based Organization duly registered under the [Societies Act](#), whose aim is to champion for the protection and management of water resources, wetlands and riparian lands around Lower Oyani Area within Migori County.
2. The 1<sup>st</sup> Respondent is a body Corporate and Water Resource Authority established under section 11 of the [Water Act](#) and has jurisdiction and authority to manage water use within Central Rift within Nakuru County.
3. The 2<sup>nd</sup> Respondent is one of the nine Water Works Development Agencies established under the [Water Act](#) 2016, under the Ministry of Water, Sanitation and Irrigation; charged with statutory mandate to develop, maintain and manage national public waterworks within specified area of jurisdiction.
4. The 3<sup>rd</sup> Respondent is a Limited Liability Company currently offering consultancy services to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide a contract undertaken at Oyani River – last mile connectivity.
5. The 4<sup>th</sup> Respondent is a is a Limited Liability Company currently offering consultancy services to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide a contract undertaken at Oyani River – last mile connectivity.
6. The 5<sup>th</sup> Respondent is an Authority established under Section 7 of the [Environmental Management and Co-ordination Act](#), Cap. 387 Laws of Kenya.
7. Raphael Onjako & 9 Others (‘Petitioners’) filed a Petition dated 11<sup>th</sup> February, 2022; seeking the following Orders: -
  - i. An Order of Injunction barring the 1<sup>st</sup> – 4<sup>th</sup> Respondents from continuing with second face of Migori Water Supply and Sanitation project undertaken vide contract No. CRVWWDA/LVS/SAFDB/KTSWSSP/W/MIGORI/2019- 2020 until due process of [the Constitution](#) and the relevant statutes are adhered to.
  - ii. General damages for damage on the farm lands.
  - iii. Costs.
8. The dispute herein relates to the last mile connectivity project undertaken by the 1<sup>st</sup> – 4<sup>th</sup> Respondents vide contract No. CRVWWDA/LVS/AFDB/ KTSWSSP/W/ MIGORI/ 2019-2020 at Oyani River.

### **Petitioners’ Case.**

9. It is the Petitioners claim that the Respondents violated the provisions of Article 69(d) of [the Constitution](#) for having failed to engage them and other residents of Lower Oyani in public participation as envisaged in [the constitution](#) before commencing the second phase of the Migori Water Supply and Sanitation project.
10. They further claim that the Respondents violated the provisions of Article 42 of [the Constitution](#) as read with the provisions of sections 42, 58 and 59 of the [Environmental Management and Co-ordination Act](#), for failing to submit and publish in the gazette and Newspapers of local circulation, the environmental impact assessment report for the additional water supply pipeline.



11. It is also their contention that the Migori Water Supply and Sanitation project, once completed will affect the volume of water in River Oyani and affect water supply to persons living downstream the river Oyani thus creating social and physical conflict from water users and consequently escalate the water stress in the lower riparian parts of the river thus causing environmental disaster. They are apprehensive that the waters of river Oyani are due to be depleted and wasted through excessive usage.
12. Further, the Petitioners also contend that the project is being illegally undertaken without obtaining the requisite licenses under the *Environmental Management and Co-ordination Act*.
13. In addition, it is their claim that the initial stage of the project caused blocking of river Oyani and wanton destruction to the farm lands on the lower Oyani River basin hence the need for the Respondents to provide an Environmental Impact Assessment Report on measures undertaken subsequent to the environmental damage.
14. They dismissed the entire project undertaken by the Respondents as not being beneficial to the residents of Lower Oyani despite their reliance on the river for their day to day usage.
15. In their Further Affidavit; they maintained that they commissioned environmental impact assessment report on the nature and extent of the damage occasioned to their lands by the Respondents' activities and annexed a copy of the said report as carried out by one Dr. Moses Kola and Silas Ojienda in further support of their claim.
16. The Petition was opposed. The 1<sup>st</sup> Respondent filed its Memorandum of Appearance and Grounds of Opposition dated 15.03.2022. The 1<sup>st</sup> Respondent also filed a Replying Affidavit sworn by Eng. Samuel K. Oruma, the Chief Executive Officer of the 1<sup>st</sup> Respondent having the authority of the Board of Directors. The 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 26.10.2022 and sworn by one CHRISPIN O. JUMA, the Chief Executive Officer of the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> – 5<sup>th</sup> Respondents did not file any response to the Petition.

### **1<sup>st</sup> Respondent's Case**

17. The 1<sup>st</sup> Respondent stated that the government of Kenya was funded to undertake the project which was aimed at contributing to the quality, healthy life and reducing poverty levels of the population of Kenya through provision of water and sanitation services and thus, the Migori- Isebania Last Mile project is being conducted on humanitarian basis with the sole purpose of elevating the welfare of the residents of Migori County and its environs.
18. That the project commenced sometimes in the year 2020 and it is on its last mile implementation stage. He dismissed the claims by the Petitioners of lack of public participation before undertaking the project and maintained that as a matter of procedure and fact; preparation and issuance of ESIA commences with public consultation and identification of Project Affected Persons for sensitization and reparation, which process they maintained was undertaken and fully complied with.
19. Further, it was his contention that before the 5<sup>th</sup> Respondent issued its respective licenses, it was satisfied that the 1<sup>st</sup> Respondent had complied with all environmental and social-economic requirements as statutorily required. He annexed copies of the ESIA, RAP Reports and NEMA Licenses in further support of their case.
20. He averred that the Petitioners are not environmentalists neither did they annex a report by an environmental expert to confirm environmental breach or harm that would be suffered as a result of the construction of domestic water supply project. It was his position that the said project is designed to enhance water service provision in favour of the residents of Migori county and its environs who are



in dire need of clean and safe drinking water. He thus dismissed the petition as an afterthought meant to derail and deny the public clean and safe water.

21. The 1<sup>st</sup> Respondent further claimed that the petition seeks redress on alleged breach on fundamental rights without specifically and explicitly stating the actual breach. He thus contended that the petition is clouded in mischief and statements not based in law or facts and does not raise any reasonable cause of action. He urged the court to dismiss the claim against them.

## **2<sup>nd</sup> Respondent's Case**

22. It was the 2<sup>nd</sup> Respondent's case that the Migori- Isebania Last Mile Connectivity Project was a project undertaken with the sole purpose of elevating the welfare of the population of Migori county and its environs. He dismissed the allegation made by the Petitioners that there was lack of public participation and awareness before implementation of the said project and further stated that; the preparation and issuance of NEMA license commenced with public consultation and identification of Project Affected Persons and thereafter the preparation of Resettlement Action Plan, in full compliance with the statutory provisions and regulations.
23. It was his contention that the Petitioners openly declined to participate in the public participation and the ESIA exercise but instead lodged the suit seeking to scandalize the project which is aimed at delivery of social economic rights of the community and the clean and safe drinking water.
24. It was the 2<sup>nd</sup> Respondent's claim that the Petitioners have not challenged the Environmental Expert Report submitted by the Respondents and which formed the basis for the issuance of the NEMA License or pointed out any environmental breach or harm that would be suffered as a result of the construction of the Migori- Isebania Last Mile Connectivity project.
25. Further, he dismissed the report relied on by the Petitioners and prepared by Dr. Moses O. Kola and dated 20.12.2020 as incompetent as the same did not impeach or contradict the NEMA License issued in favour of the Respondents. In addition, it was their claim that the said Dr. Moses O. Kola and Silas Ojienda are not qualified land or crop valuers or assessors to purport to determine the extent of loss of crop or land by the Petitioners.
26. It was also his claim that the Petition as filed is in the wrong forum as it seeks to challenge the EIA License issued by the 5<sup>th</sup> Respondent. It was his contention that a party aggrieved by the decision by a NEMA License should move to the National Environmental Tribunal pursuant to section 129(1) (a) of the EMCA and which in turn ousts the jurisdiction of this court to entertain the dispute in the first instance.
27. In the end, it was their position that the balance of convenience tilts in favour of the Respondents due to the huge public interest element courtesy of the residents of Migori county as opposed to petitioners' unsubstantiated claims and thus urged the court to dismiss the petition.
28. The Petition was canvassed by way of written submissions. However, upon perusal of the court record, I do note that only the Petitioners filed their written submissions dated 25.01.2023 together with authorities. Despite the Respondents being given sufficient time to file their submissions, they failed to do so. Be that as it may, I will proceed to determine the Petition as hereunder;

## **Petitioners' Submissions**

29. Counsel for the Petitioners submitted on 4 main issues. The first issue was whether the threshold for seeking redress through a constitutional petition had been attained; counsel submitted that the petitioners stated with clarity the articles of *the constitution* that were violated and the manner in which



the said articles were violated and the jurisdictional basis for the petition. That Article 42(a) had been violated by the respondents by denying the petitioners the right to clean and healthy environment, Article 69(d) had been violated when the project was commenced without public participation. He thus maintained that the petition established a cause of action against the Respondents.

30. The second issue was whether a proper public participation had been conducted by the Respondent. It was counsel's submission that meaningful public participation is not just about information sharing but it is an opportunity accorded to the community to show how they want things to be done and for the project to adopt their plans to minimize negative impacts and enhance positive opportunities.
31. He relied on Principle 10 of the Rio Declaration on Environment and Development of 1992, the decisions in the cases of Republic vs Independent and Electoral Boundaries Commission (IEBC) Ex-parte National Super Alliance (NASA) Kenya & 6 Others (Al Ghurair case), Robert N. Gakuru & Others vs Governor, Kiambu County and In the matter of the Mui Coal basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR to buttress their point on the issue and importance of meaningful public participation.
32. The third issue was whether an order for injunction, restraining the Respondents from continuing with the second phase of Migori Water Supply and Sanitation project should issue as sought. Counsel submitted that the petition had met the threshold set out by law for the grant of injunctions and stated that the petitioners had been denied the right to public participation as enshrined in Article 69(d) of *the constitution* as well as the right to clean and healthy environment as provided in Article 42(a) occasioned by the acts of the Respondents hence the need to be restrained by an order of the court.
33. It was his contention that the Petitioners will suffer irreparable loss that cannot be compensated by an award of damages. That the project on completion will depend on the water drawn from River Oyani which also served as the main source of water to the residents of lower Oyani area and who are not benefitting from the said project. He relied on the decision by Nyakundi J. in Empeut Resort Limited & Anor vs Tourism Finance Corporation in support of the need of the restraining order of injunction.
34. In conclusion, they urged the court to protect them and allow the petition as sought.

### **Analysis And Determination**

35. I have carefully considered the Petition and the Affidavits in support by the Petitioners, the Replying Affidavits by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the annexures thereto, the submissions by the Petitioners and the applicable law in totality. On that account, it is this court's considered view that the main issue arising for determination is: -
  - a. Whether this Court is vested with the requisite jurisdiction to hear and determine the Petition as filed.
  - b. Whether the Petition as filed meets the threshold of a Constitutional Petition.
  - c. Whether the Petitioners are entitled to the reliefs sought in the Petition.

#### **I. Whether this Court is vested with the requisite jurisdiction to hear and determine the Petition as filed**

36. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's contention that this court is not vested with the requisite jurisdiction to entertain the dispute as filed in the first instance. It is their claim that the Petition seeks to challenge the EIA License issued by the 5<sup>th</sup> Respondent, contrary to the provisions of section 129(1) (a) of the EMCA which provides that; a party aggrieved by the decision by a NEMA License should move to the



National Environmental Tribunal which has the mandate to hear and determine such disputes in the first instance. To this end, they urged the court to dismiss the petition filed against them.

37. The Petitioners on the hand maintained that the court is vested with the requisite jurisdiction to determine the petition since the same seeks to protect them from a violation of their rights to clean and healthy environment as provided under Article 42 of *the constitution* and to guarantee their involvement in the project through public participation as enshrined under Article 69(d) of *the constitution*.
38. In order to determine whether this court is vested with the requisite jurisdiction in the first instance, this court seeks to look at the contents of the petition and the issues in dispute vis-à-vis the contents of section 129(1)(a) of the EMCA to ascertain whether the dispute falls within the ambit of the section 129 of the Act or not.
39. From a cursory look of the petition; the petitioners are basically alleging that the 2<sup>nd</sup> phase of the Migori-Isebania last mile connectivity project is being carried out without conducting proper and meaningful public participation of the area residents of lower River Oyani area, as aptly provided under Article 69 of *the Constitution*. It is their claim that if the project is implemented to completion, then they stand to suffer irreparable loss and their right to clean and healthy environment will have been violated in the process.
40. Section 129 of the *Environmental Management and Co-ordination Act* on Appeals to the tribunals provides as follows: -
  - “(1) Any person who is aggrieved by—
    - (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
    - (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
    - (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
    - (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
    - (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal
41. Taking into account the provisions section 129 of the Act and the Petitioner’s dispute, it is my considered opinion that the petition does not fall within the category anticipated under the said section.
42. In view of the foregoing, it is my finding that this court is vested with the requisite jurisdiction to entertain the instant petition as filed. Having settled the issue of jurisdiction, I will proceed to address the remaining issues as hereunder;



## II. Whether petition meets the threshold of a Constitutional Petition

43. This court is empowered to entertain the instant petition pursuant to Article 162(2) of the Constitution as read with section 13(3) of the ELC Act. Further, Article 22 of the Constitution guarantees the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
44. It is now well settled that in matters involving constitutional petitions; a petitioner must set out with reasonable degree of precision, the nature of the alleged violation, the person/ persons/ authority or institution responsible for the violation, the manner of the violation or likely infringement and the provision of the constitution which creates and gives the constitutional right that is under violation or threatened violation. See Anarita Karimi Njeru vs Republic [1979] eKLR.
45. The question that therefore follows is whether the petition as filed meets the above-mentioned criteria. It is the Petitioners' claim that the Respondents violated the provisions of Article 69(d) of the Constitution for having failed to engage them and other residents of Lower Oyani in public participation as envisaged in the constitution before commencing the second phase of the project.
46. Further, it is their contention that the Respondents violated the provisions of Article 42 of the Constitution as read together with the provisions of sections 42, 58 and 59 of the Environmental and Co-ordination Management Act; for failing to submit and publish in the gazette and Newspapers of local circulation, the environmental impact assessment report. It was also their claim that the Respondents are undertaking the project without obtaining the requisite license under the Environmental Management and Co-ordination Act and without considering the effect that the said project would have on the residents of lower Oyani river.
47. As stated hereinabove; the petitioners must state the alleged violation of their rights with a degree of precision, name those responsible and include the provision of the constitution which creates the said right which has allegedly been violated. From a cursory look of the petition; the petitioners have specifically outlined how the said project is being conducted without their involvement through public participation contrary to the provisions of Article 169 of the constitution.
48. It is also their contention that the actions of the Respondents jointly and severally, in implementing the second phase of the Migori-Isebania Water Supply and Sanitation project; will violate their rights to clean and healthy environment, deplete the water in River Oyani which is their only source of water.
49. This in my view, meets the test as outlined in the famous Anarita Karimi case. Therefore, it is my finding that the Petition herein meets the threshold of a constitutional petition.

## III. Whether the Petitioners are entitled to the reliefs sought.

50. The Petitioners herein have sought for an Order of Injunction, barring the 1<sup>st</sup> -4<sup>th</sup> Respondents from continuing with the project until due process of the constitution is adhered to, general damages for the damage on their farm lands and costs of the suit.
51. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand maintained that the project is aimed for the public benefit and dismissed the claims by the Petitioners as unsubstantiated allegation aimed at delaying and scandalizing the project. They thus urged the court to dismiss the petition with costs.
52. In determining this issue, I will proceed to address the same on account of;
  - i. Public Participation,



- ii. Whether the project was being conducted without obtaining the requisite licenses and gazettelement of the various reports in violation of the provisions of Articles 42 as read with sections 42,58 & 59 of the EMCA and
  - iii. Whether the project if undertaken will violate the rights of the petitioners to a clean and healthy environment.
53. Article 69 of the Constitution on the obligations in respect to the environment provides for Public participation. Article 259(1) on the other hand behooves the court when interpreting the constitution to do so in a manner that promotes its values and purposes. Article 69(1) (d) provides that the state shall: -
- (d) encourage public participation in the management, protection and conservation of the environment;
54. It is the Petitioners claim that the Respondents are implementing the project without conducting meaningful public participation. It is their contention that the Respondents failed to consider their views and involvement to mitigate the adverse effects that may result from the said project especially after the first phase of the project adversely affected their farm lands.
55. Once a Petitioner attacks the legitimacy of the entire project on grounds that the process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the said project fully complied with the laid out procedure and met the constitutional standards of public participation by disproving this contention.
56. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand maintained that proper public participation was duly complied with as a matter of fact and law and it is only after the said public participation was duly conducted that they were issued with the requisite licenses by the 5<sup>th</sup> Respondent, upon being satisfied that the same was undertaken as provided in law. They in turn accused the Petitioners for openly declining to participate in the public participation and the ESIA exercise but instead lodged the suit seeking to scandalize and frustrate the project which is aimed at the common good of the area residents and at delivery of social economic rights of the community and the clean and safe drinking water.
57. Lenaola J (as he then was) in Nairobi Metropolitan PSV Sacco observed that:-
- “Applying the above principles and in the totality of the evidence before me, it is clear that the 1st and 2nd Respondents involved the public in the process leading to the enactment of the Nairobi City County Finance Act of 2013, they engaged those who would be affected by their decision and the latter were given details of the proposals and an opportunity of stating their objections if any. To my mind the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.
- Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;
- “ The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all



interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

58. I have considered the rival position taken by the parties herein and while I do agree with the Respondents that public participation was a condition precedent for the issuance of the requisite licenses by the 5<sup>th</sup> Respondent, the question that follows is whether the said public participation was sufficient as explained in the aforementioned case.
59. What therefore amounts to sufficient and meaningful public participation one may ask. In the case of *Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others* [2015] eKLR the court while addressing sufficient public participation held that there ought to be evidence of “intentional inclusivity” which considers the views of those most affected by a policy or in this case a project. Was the same done in the instant case? The answer to this is in the affirmative.
60. I have looked at the ESIA Project Report marked as annexure “SKO1” and I do note that at No. 1.7.4 in page 5; the 1<sup>st</sup> Respondent has addressed the manner in which public participation and sensitization was conducted before the implementation of the project. The same is explained in detail in chapter 6 at pages 53-55 of the Report; which included 4 different meetings on diverse dates, the names and signatures of the attendees in the said meetings was annexed to the report. They further explained that the said meetings involved the dissemination of information to the various stakeholders, interested and affected parties, sharing of their views and consultation on the sensitive issues.
61. In addition, at chapter 8 of the Report in pages 75 – 93; the 1<sup>st</sup> – 4<sup>th</sup> Respondents have outlined a detailed Environmental and Social Plan which outlined the various mitigation measures that were likely to arise as a result of the project. It is important to point out that the Petitioners did not challenge the said report and the contents thereof thus remain uncontroverted.
62. In view of the foregoing, I find that proper and sufficient public participation was undertaken by the Respondents before proceeding with the second phase of the Migori- Isebania connectivity project.
63. The petitioners also contended that the project was being conducted without obtaining the requisite licenses and gazettment of the various reports in full compliance with the mandatory provisions in law.
64. The 1<sup>st</sup> Respondent in response to the said allegation maintained that all the requisite and necessary licenses and reports were obtained in full compliance with the law and procedure. He annexed copies of the NEMA Licenses and the EASI & RAP Reports to buttress their claim.
65. I have carefully looked and considered the said annexures and I do note that the Respondents duly complied with the outlined procedures and obtained the necessary Licenses before carrying out the last mile Water and Sanitation project. The Petitioners have not disputed/challenged the said Reports and Licenses produced by the 1<sup>st</sup> Respondent from the 5<sup>th</sup> Respondent. In the absence of any evidence on the contrary, I find that the all the necessary reports were complied with and the licenses obtained prior to the commencement of the project and the allegations by the Petitioners are unsubstantiated allegations without proof.



66. The Petitioners further claimed that their rights as enshrined under Article 42 was violated as read with sections 42, 58 and 59 of the EMCA. Article 42 of *the Constitution* provides that 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

67. Sections 42, 58 and 59 of the Environment Management and Coordination Act on the other hand provides as follows: -

42.

- (1) No person shall, without the prior written approval of the Director-General given after an environmental impact assessment, in relation to a river, lake or wetland in Kenya, carry out any of the following activities—
  - (a) erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake or wetland;
  - (b) excavate, drill, tunnel or disturb the river, lake or wetland;
  - (c) introduce any animal, whether alien or indigenous, dead or alive, in any river, lake or wetland;
  - (d) introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or wetland;
  - (e) deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake or wetland;
  - (f) direct or block any river, lake or wetland from its natural and normal course; or
  - (g) drain any lake, river or wetland.

Section 58 on Application for an Environmental Impact Assessment Licence further provides that: -

- “(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection(1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.
- (3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.



- (4) .....
- (5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.
- (6) .....
- (7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
- (8) The Director-General shall respond to the applications for environmental impact assessment license within three months.
- (9) .....

Further, Section 59 of the Act goes ahead to provide that: -

- “(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—
  - a. a summary description of the project;
  - b. the place where the project is to be carried out;
  - (c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and
  - (d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

- 68. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the allegations by the Petitioners of violating Articles 42 of *the constitution* and sections 42, 58 & 59 of the *Environmental Management and Co-ordination Act* and maintained that they complied with laid out procedure and it is only then that they were issued with the requisite NEMA License by the 5<sup>th</sup> Respondent, which they produced in support of their case.
- 69. I have looked at the said NEMA License produced as evidence by the Respondents and marked “SKO 2 a & b” from a cursory look at the same, I do note that the same were issued in accordance with the Environment Impact assessment and Audit Regulations 2003 and the same further outlined the conditions to be adhered to for the proposed project.
- 70. Further, my understanding from a plain reading of section 59 of the EMCA, is that the onus of having the said Environmental Impact Assessment report gazetted rests with the Authority- the 5<sup>th</sup> Respondent herein and not the proponents of the same- in this case the 1<sup>st</sup> – 4<sup>th</sup> Respondents.



71. This court takes judicial notice that the grant of a License by NEMA- the 5<sup>th</sup> Respondent herein; is a culmination of processes required of a party to comply with the provisions of EMCA in so far as the preparation, submission and eventual gazettelement of the Environmental Impact Assessment Report availed by the Respondents by the 5<sup>th</sup> Respondent.
72. Even though the Petitioners are alleging that there was no NEMA License and/or gazettelement of the EIA Report, they have not demonstrated that the Licenses issued by the 5<sup>th</sup> Respondent were fraudulently obtained or issued without complying with the statutory provisions.
73. Lastly, it was the Petitioners contention that if the project is undertaken, the same will violate their rights to a clean and healthy environment. The Respondents have however denied this contention, arguing that the project seeks to provide clean and safe water for the residents of Migori county and its environs.
74. It was the Respondents' claim that the said project was being conducted on humanitarian grounds and that the same was aimed at contributing to a quality and healthy life through provision of water and sanitation services with the sole purpose of elevating the welfare of the residents of Migori county and its environs.
75. Taking the rival positions in totality, it is my considered opinion that the project is not likely to cause any violation of the Petitioners' right to a clean and healthy environment. Further, the Petitioners have not annexed any proof from an expert in the field/area/subject to show how and to what extent the said project will violate their right to a clean and healthy environment or provided any proof showing that they risk being directly affected other than merely stating that they are residents of the lower Oyani river area. Even though they annexed a copy of the Environmental Assessment Report on the impact of the project dated 2/12/2020; on a perusal of the court record, there is a letter from the Petitioners' advocate on record dated 27/01/2023 informing the court that the said report do not form part of their pleadings and seeking to have the same expunged/withdrawn from the court record.
76. To warrant the grant of injunction orders; the onus is on the Petitioners to prove the 3 elements as stated in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* [1973]EA 358. Have the same been done to the required standard? My answer to this is in the negative. The Petitioners did not adduce any proof to show the irreparable loss that they are likely to suffer nor did they demonstrate to this court why the balance of convenience should tilt in their favour. Therefore, in the absence of proof, the petitioners cannot urge the court to find in their favour when they have failed to prove their allegations against the Respondents.

### **Conclusion**

77. The upshot of the above is that the Petitioners have failed to prove their case to the required standard and the Petition filed on 11<sup>th</sup> February, 2022 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

