



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

PETITION CAUSE NO. 4 OF 2020

IN THE MATTER OF THE CONSTITUENTS OF MARAGUA AND MURANG'A SOUTH WATER AND SANITATION COMPANY (MUWASCO)

AND

IN THE MATTER OF CONTAMINATED WATER AND CONSTRUCTION OF SEWAGE

AND

IN THE MATTER OF FAILURE TO ADHERE TO BASIC ENVIRONMENT RULES AND NATIONAL CONSTRUCTION AUTHORITY

AND

IN THE MATTER OF ARTICLE 43(1), ARTICLE 22(1) AND (2) OF THE CONSTITUTION

HON. MARY WAITHIRA NJORGE

(Filing this suit on behalf of her constituents as Member of Parliament Maragua Constituency)PETITIONER

VERSUS

MURANG'A SOUTH WATER AND SANITATION COMPANY (MUWASCO) RESPONDENT

JUDGMENT

By an Amended Petition dated **11th March 2021**, the Petitioner sought for the following orders;

- i. An order to prevent, restrain, stop, or discontinue the act of building a sewage next to a river Sabasaba and or empty by the Respondent, forthwith LOC. 6/ GIKARANGU/562.**
- ii. Order to compel Respondent's to provide fresh hygiene water to the residents of Sabasaba town.**
- iii. Compensation for loss caused by the Respondent's actions.**
- iv. Costs of the Petition.**

The Petitioner averred that she is the Member of Parliament for **Maragua Constituency**, while the Respondent is a **Water and Sewerage** provider for **Maragua Constituency**, and in particular Sabasaba Town. That Plot No. **LOC.6/GIKARANGU/562**, was set aside for the sake of improving basic sanitation for the urban poor and water supply. That on an unknown date about 10yrs ago, the Respondent was unable to provide water to the Residents of Sabasaba Township, but the structures were intact about 1km away from Sabasaba town. That on or about **17th July 2020**, the Petitioner noticed some construction at the plot that was set aside for the Water supply and Sewerage Unit. That the Petitioner also noticed that the construction lacked a mandatory signboard indicating the particulars of the construction. In addition, the Petitioner had not been made aware by **Public Participation** or otherwise of the said construction.

The Petitioner further averred that upon inquiry, she was informed that the construction was for a **Sewage Pit**, which was to **off load** sewage to **River Sabasaba**, which River is the mainstay of the Residents of Sabasaba, for drinking water, farming and other uses. That the water pump of **Kamahuha Girls Secondary School** is barely 50m, downstream from the Point the Respondent want to empty sewage waste, putting all the students and Staff at risk of drinking contaminated water. That the Respondent intends to pollute and contaminate **River**

Sabasaba, with sewerage without due regard to the general population, other users and the environment.

That the Respondent had not followed due process and procedure in building the said sewage.

That the Respondent has violated **Article 42**, of the **Constitution** which guarantees every person a right to **clean** and **healthy** environment. That the Respondent has violated **Article 69** of the **Constitution** and their actions are likely to endanger the environment and further that it does not have authority or consent of the authorities monitoring environmental impact assessment, and conducting environmental audit. Further, that the Respondent failed to carry out public participation in the management, protection, and conservation of the environment.

The Petition was supported by the Affidavit of **Hon. Mary Waithira Njoroge** sworn on **20th July 2020**. In the Supporting Affidavit, the Petitioner stated that she noticed an illegal construction at the area previously occupied by the Respondent to pump and distribute water to Residents of Sabasaba town. That on inquiry, she was informed that the construction was a **Sewerage Plant**, which intends to **off load** the said sewage to **Sabasaba River**. That when she visited the said construction site on 17/7/2020, together with other stakeholders, she found no **sign** Board, indicating the nature and purpose of the construction.

Further, that the foreman at the said construction site confessed that the construction was a **Sewerage Plant**, being constructed and that it was being undertaken by the Respondent. That the area Chief and the area Residents were not aware of the construction or the purpose of the said construction. That **National Environment Management Authority(NEMA)**, wrote a letter dated **13/5/2020**, stating that for the alleged construction, the report on Environment and Social Compliance proved non-compliance on the part of the Respondent as it raised several concerns that were yet to be addressed. That the project was not subjected to **public participation** and as such, it did not reflect the true picture on the ground or the health hazard likely to be caused by the project.

The Petition was opposed in toto by the Respondent through a **Replying Affidavit** sworn by **Mary Nyaga** the Managing Director of the Respondent on **31st August 2020**. She deposed that the Respondent was incorporated on **23rd May 2008**, under the **Companies Act, Cap 486**. That the Respondent is mandated via a Service Provision Agreement of **November 2011**, to provide water and sanitation services to the three Sub Counties of **Murang'a County** namely, **Kandara, Kigumo** and **Murang'a sub-county**. That upon devolution of water services after the enactment of the **Constitution of Kenya, 2010**, the Respondent became wholly owned by the County Government of Murang'a via Legal Notice Number 178 of 2013. That the Respondent is regulated by the **Water Services Regulatory Board** in accordance with the **Water Act, 2016**. That upon enactment of the **Water Act, 2002**, the Respondent took over the function of provision of water services, together with the assets and infrastructure owned by the National Government through **Tana Water Services Board**.

That in 1996, the Government through the Ministry of Water constructed a water treatment Plant together with staff houses on **LOC 6/GIKARANGU/562**. That unfortunately water supply to the Plant from the river and from the Plant to the consumers developed problems with its operation and maintenance due to power surges. That as a result, the Plant has not been operational since 2014, and the infrastructure has become dilapidated.

That the Petition is primarily based on speculations that are not corroborated by evidence. That the Court should appreciate the concept of sanitary engineering of the sewer systems in **Murang'a County**, in order to properly adjudicate this dispute. That skills within sanitary engineering are usually employed for the primary role of disease prevention, within human beings by treatment of waste water and removal of effluents from waste water. That gravity sewer system is the most recommended mode of sanitary engineering for **Murang'a County**, which is largely hilly. That Sewerage Treatment Plant for a gravity sewer is therefore built at the lowest point of land it serves, which in the instant case is **LOC 6/GIKARANGU/562**.

That as a result of the ever increasing population in among other towns, **Sabasaba** and **Kenol Towns** in **Muranga County**, the need for a sewerage system cannot be gainsaid. That without a proper sewerage system to serve the two towns, there is a likely upsurge of waterborne diseases. That contrary to the Petitioner's allegation, the Project being undertaken by the Respondent has the aim of de-polluting **River Sabasaba**. That if the sewerage treatment Plant is not concluded, the environment and human health will be affected negatively. That the photographs annexed by the Petitioner do not comply with **Sections 79** and **106B** of the **Evidence Act**, and the same should be struck out. That there has been a delay in conducting Public Participation as a result of the **Covid 19** pandemic.

That regardless of the above, the Company has been conducting Public Participation and the Members of the public have supported the project. That the Respondent is in the process of complying with the recommendations of **NEMA**, which has allowed them to commence construction of the Sewer Treatment Plant. The Respondent urged the Court to dismiss the Petition with costs as it was largely inspired by rumors, hearsay and speculations.

The Petitioner further filed Supporting Affidavits sworn by **John Mburu Kagiri** and **Jane Muthoni Kagiri** both dated **5th August 2020**.

Parties elected to canvass the Petition by way of Written Submissions. The Petitioner filed the written submissions dated **14th July 2021**, through the **Law Firm of Kimwere Josphat & Co Advocates**. Subsequently, the Respondent's also filed their written submissions dated **2nd December 2021**, through the **Law Firm of Ashreen Mathews Associates**.

The Court has carefully read and considered the pleadings by the parties herein, the rival sworn Affidavits, the annexures attached thereto, the written submissions and the relevant provisions of law and finds that the issues for determination are;

- 1. Whether the initiation and completion of the project was sanctioned by the law.**
- 2. Whether the Constitution has been violated.**

3. Whether the Petitioner is entitled to the orders sought.

1. Whether the initiation and completion of the project was sanctioned by the law

Article 42 of the **Constitution** guarantees every person the right to a **clean** and **healthy environment** and an environment protected for the benefit of present and future generations, through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under **Article 70**, fulfilled.

The right to a clean and healthy environment is an entitlement of present and future generations, which is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; **the right itself;- the right to have unrestricted access to the courts to seek redress where a person alleges that the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act that is harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.**

So what does a clean and healthy environment entails in the context of the matter before this Court?

The **Longman Dictionary of Contemporary English** defines “**clean**” in relation to the environment as containing or producing nothing that is dirty or harmful. “**Healthy**” is defined in relation to persons, animals or plants as physically strong and not likely to become weak or ill.

Black’s Law Dictionary, 10th Edition, defines “**Health**” as the **quality, state or condition of being sound or whole in body, mind or soul**, especially freedom from pain or sickness; or the relative quality or state of one’s physical or mental well-being whether good or bad. The *Longman Dictionary of Contemporary English* further defines “**well-being**” as the feeling of being **comfortable, healthy and happy**.

The **Environmental Management and Coordination Act (EMCA)**, defines the environment to include *physical factors of the surroundings of human beings including land, water, atmosphere, climate; biological factors of animals and plants; and the social factor of aesthetics which includes both the natural and healthy environment.*

Section 77 of the **Water Act** makes provision for the creation of the Respondent. The Respondent within the meaning of **Section 79** of the **Water Act** is a **Company** registered under the **Companies Act**. Its functions and objectives are therefore governed under its **Articles and Memorandum of Association**. The transition to **Devolved Government Act** as read together with the **County Government Act**, provides that Water and Sanitation Services are devolved to the **County Government**, hence the creation of the Respondent.

On the other hand, **National Environment Management Authority (NEMA)**, under section 9 of **Environment Management Coordination Act (EMCA)**, has the *mandate to coordinate, monitor and assess the activities* being carried out by lead agencies for the purpose of ensuring environmental management objectives are adhered to.

Section 9(1) of **EMCA** provides that the “the object and purpose for which NEMA is established is to **exercise general supervision and co-ordination** over all matters relating to the environment and to be the principal instrument of Government, in the implementation of all policies relating to the environment.”

The second schedule of **EMCA** gives a list of activities which require **Environmental Impact Assessment (EIA)**, prior to commencement. In Paragraph 4, the following forestry related activities are listed;

- i. *any project located within a distance prescribed by a written law from a wetland, ocean, sea, lake, river, dams, barrages and piers*
- ii. *river diversions and water transfer between catchments*
- iii. *large scale flood control schemes*
- iv. *drilling for the purpose of utilizing ground water resources including geothermal energy.*

According to the Petitioner, the Project in dispute involved Construction of a **Sewage Treatment Plant**, and release of treated sewage back into the ecosystem via **River Sabasaba**. Therefore, this is a project envisaged by Paragraph 4 of the Second schedule of **EMCA**, and hence it required an **Environment Impact Assessment** license before commencement.

The Respondent admitted that they were yet to acquire and the **Environment Impact Assessment**, but that **National Environment Management Authority(NEMA)**, had allowed them to proceed with the project as they sought the **Environment Impact Assessment** License. This information by the Respondent was neither corroborated nor supported by any evidence.

On the other hand, the Petitioner attached a document marked **MWN 2**, which was said to have originated from **NEMA**, dated **13/5/2020**, that **EIA** License was procured. The Respondent, by its **Replying Affidavit** and Written Submissions objected to the reliance on **MWN 2**, by alleging that the Petitioner had not procedurally acquired the same.

This Court notes that save from merely alleging illegality, the Respondent has not substantiated the said claim.

It is trite that in civil cases, illegally obtained evidence is admissible and it matters not how the same was acquired if the same is relevant. In *John Muriithi & 8 others Vs. Registered Trustees of Sisters of Mercy (Kenya)t/a "The Mater Misericordiae Hospital & another [2018] eKLR* the Court pronounced that,

“in Kenya, illegally obtained evidence is admissible so long as it is relevant to the fact in issue or its admission would not affect the fairness of the trial”, and after making reference to Article 50(4) of the Constitution concluded, on the facts of that case, that: “In determining whether to allow evidence being sought to be expunged, I am guided by the fact that the primary duty of this Court is to do justice. If justice will be done using available documents and evidence not obtained in breach of the Constitution and the law then this Court would admit such evidence in order to have the right resources before it to enable determination of the issues in a just matter.”

Based on the foregoing, this Court finds and hold that the document dated 13/5/2020, is relevant and the same is admissible as evidence.

Having found that the said document is relevant and admissible, the Court will proceed to determine its weight and/or **probative** value on the Petitioner’s case. A perusal of the said document shows that further construction of the project was stopped by **NEMA** on 13/5/2020, until an **Environmental Impact Assessment License** was obtained by the Respondent.

The Respondent on the other hand has deponed that they were in the process of acquiring **Environmental Impact Assessment License(EIA)** and **NEMA**, had allowed them to proceed as they sought the said license. The Respondent has not attached any evidence to support their allegations and the Petitioner did not object or rebut the same. This Court is however bound by the law and cannot sanction an illegality.

As a result, it is evident that the Respondent contravened the law by commencing the Project herein without the EIA license.

Having determined that the Respondent did not have an **EIA** license, from **NEMA**, it automatically follows that commencement of the construction of a **Sewerage Treatment Plant**, was not procedural. The upshot of the foregoing is that the initiation of the Project was not sanctioned by the law.

On the issue of Public Participation, the Petitioner avers and submits that the Respondent did not undertake any public participation before commencement of the impugned Project. The Respondent on the other hand has blamed the delay in conduction of **Public Participation** on the **Covid-19 Pandemic**. The Respondent has further averred that despite the **Covid-19 Pandemic**, it has been conducting **public awareness**, including meetings and questionnaires and the public has supported the project.

The Respondent attached **MN 6**, being questionnaires and minutes for meetings it had conducted. This Court has perused the questionnaires but did not find any minutes of the same, though alluded to, they were not availed by the Respondent. The mere act of attaching questionnaires containing names of person(s) not known to this Court cannot be the basis upon which the Respondent infers public participation. The Respondent is under a duty to go over and beyond the questionnaires to prove to this Court that indeed **public participation** was conducted.

It is no longer in dispute that **public participation** plays a central role in both legislative and policy functions of the Government, whether at the National or County level, and it applies to the processes of legislative enactment, financial management, planning and performance management. **See the case of Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, where the Court held: -

“Once a petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation...there was no attempt on the part of the respondent to show that there was any semblance of public participation in the legislative process leading to the enactment of the impugned Contempt of Court Act. That being the state of affairs, the court has no option but to agree with the petitioner that there was violation of an important constitutional step in the form of public participation and the Act fails this constitutional compliance step.”

Public participation is not a mere formality. An entity must show that the said public participation was real, both **qualitatively** and **quantitatively**. Based on the above, this Court finds and holds that the alleged Public Participation by the Respondent did not meet the constitutional standards of public participation.

I. Whether the Constitution has been violated

The Respondent submitted that the Petition is premised on wrong set of facts, speculations and uncorroborated by evidence. It is important to note that in order for a cause of action to be conclusively determined, it should be stated with precision. This leads this Court to question how precise should the Petition be drafted?

The principles governing the precision with regard to drafting of the Petition were laid down in the case of **Anarita Karimi Njeru Vs. Republic (1976-1980) KLR 1272**, where the Court held that if a Person is seeking redress from the High Court on matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The foregoing principles were followed by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013], eKLR. Court of Appeal at Nairobi, Civil Appeal No. 290 of 2012**, where the Court declined to uphold the Petition filed in the High Court on the ground that it was not pleaded with precisions as required in the constitutional Petitions and that it did

not provide adequate particulars of the claims relating to the alleged violations. Over and again, the courts have been guided by the foregoing two authorities in determining the preciseness of a Petition.

In **Samson Otieno Bala T/A Missam Enterprises v Kenya Bureau of Standards & 4 others [2015] eKLR**, the Court opined as follows;

“The petition, as drawn, is clearly deficient in that it does not cite any particular provision of the Constitution that is violated and demonstrate how it is violated. The title of petition refers to Articles 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 33, 50 and 259 of the Constitution. Apart from Articles 27, 28, 33 and 50 which deal with specific rights and fundamental freedoms protected under the Constitution, the rest of the Articles cited deal with general provisions of the Constitution, its application and interpretation. Even though some of the Articles cited refer to specific fundamental rights and freedoms, the Petitioner did not plead how each right has been violated. The body of the Petition does not mention or cite any of the fundamental rights which are alleged to have been violated. In the circumstances I must find that the Petition is incompetent.”

Further in **Abuya Abuya Vs Independent Electoral and Boundaries Commission & Another [2014] eKLR, Lenaola J.** held as follows;

“What then should I say about the alleged violations of the Petitioner's Constitutional rights and freedoms? In submissions, Counsel for the 1st Respondent correctly stated that "a party alleging violation of a Constitutional right must demonstrate, with a reasonable degree of precision what provisions of the Constitution have been violated, as well as the manner in which they have been violated.”

Lastly, in the case of **Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] e KLR** the Court stated thus;

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous 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."

The Court went on to express itself as follows;

"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

Based on the foregoing this, Court cannot emphasize enough the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court.

The principle in **Anarita Karimi Njeru (supra)** underscores the importance of defining the dispute to be decided by the Court. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

Having established so, the Respondent in the discharge of their duty has the Constitutional mandate to provide a clean and healthy environment. Further, it has a mandate to provide **clean** and **safe** water in adequate quantities for the people of **Murang'a County** and more specifically for the **Residents of Sabasaba**. The Petitioner alleges that by construction of a Sewage Treatment Plant on **LOC/6/GIKARANGU/562**, the Respondent intends to infringe their right to a **clean** and **healthy environment**. Sewerage is defined in the **Oxford Learners' Dictionary** as the removal and disposal of sewage and surface water by sewers. Sewage on the other hand is defined as **waste water** and **excrement** conveyed in sewers.

The Petitioner has averred that the Respondent has violated **Article 42** of the **Constitution of Kenya, 2010**, and the violations have been itemized as;

- **failure to comply with Construction Laws and flouting building regulation;**
- **intention to pollute and contaminate water used by residents for daily use;**
- **lack of public participation;**
- **failure to get authority from NEMA.**

Article 42 of the Constitution provides for the right to a **clean** and **healthy environment**. The Petitioner submits that the Respondent has and/or intends to breach the said right via construction of a Sewage Treatment Plant on **LOC/6/GIKARANGU/562**. The Petitioner avers that said **Sewerage Treatment Plant**, will release the treated sewage back into **River Sabasaba**, which will have adverse health and mental effects on the populace.

This Court has perused the photographs together with other documents attached to the Amended Petition. The Court notes that the said

photographs are only evidence of a **construction site**, which the Respondent confirmed were indeed photographs of its Sewage treatment site that the Respondent was constructing at Sabasaba. It is not in dispute that the Respondent was well within its mandate while undertaking the said project.

However, what is in dispute is the effect that the same project would cause on the Residents of **Sabasaba** and on the environment generally. It is trite that he who alleges must prove. It was not enough for the Petitioner to merely allege an intended pollution, without proving or showing through Expert evidence or otherwise the potential threat to the environment. The Court in **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

The Respondent has opposed the Petition and dismissed the Petitioner’s allegation for using a noble project to gain political mileage at the expense of the public. The Respondent averred and submitted that they were engaging in **Sanitary Engineering**, which was the most appropriate for the **terrain of Murang’a County**, which is mostly hilly. However, the Court notes that the averments by the Respondent were not accompanied by any evidence or expert report. In addition, the Managing Director of the Respondent who swore the Replying Affidavit was not an Expert at Engineering. Therefore, this Court has no way of substantiating the allegations and Submissions of the Respondent. Be that as it may, the Petitioner has the burden of proving a violation and / or intended violation on a balance of probability which burden she has failed to discharge.

Further, the Petitioner in the title of the Petition has cited **Articles 22 (1)+(2), 42, 43(1),69, and 70** of the **Constitution of Kenya 2010**. The Petitioner has alleged that the Respondent has the intention to pollute and contaminate **River Sabasaba**, with sewerage without due regard to the general population. This Court has noted that the said allegations by the Petitioner have not been substantiated in the Supporting Affidavit and neither have they been corroborated by any evidence including but not limited to an Expert Report. While the **Precautionary Principle** of **Environmental** law anticipates the taking of caution before a project can take place, it is the duty of the party alleging the adverse effects to give a **scientific proof** of damage that the project could have on the environment. The Petitioner has neither availed to this Court any **scientific evidence** nor did she avail any Expert opinion or Report to buttress her allegations.

Having analyzed the available evidence as above, this Court finds and holds that the Petition as filed herein is not competent and is ripe for **dismissal** on grounds that the Petitioner has not proved her case on the required standard of balance of probabilities.

II. Whether the Petitioners are entitled to the orders sought

Having found that the Petition is **incompetent**, and that the Petitioner has failed on a balance of probabilities to prove a case for violation of the constitutional rights, this Court **finds and holds** that the Petitioners are **not** entitled to the Orders sought in the Petition and **proceeds** to dismiss the said Petition in **its entirety**. This being a public interest matter, there shall be no orders as to costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 3RD DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered online

IN THE PRESENCE OF;

M/S GACHERU FOR THE RESPONDENT

N/A FOR PETITIONER

KUIYAKI - COURT ASSISTANT

L. GACHERU

JUDGE