REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

PETITION NO. 02 OF 2020

TAWAKAL QUARRY PRODUCERS

CO-OPERATIVE SOCIETY LTD……..………...…....…………PETITIONER

-VERSUS-

TAHLIL CONSTRUCTION AND

GENERAL TRADING COMPANY LIMITED……..…....1ST RESPONDENT

ABDIHAMID MALLIM ALI……..…...…………………....…2ND RESPONDENT

JAMAA HUSSEIN MAALIM………………………...……3RD RESPONDENT

SAEED SHEIKH IBRAHIM……………………......……...4TH RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENTAUTHORITY ……………....…..1ST INTERESTED PARTY

COUNTY GOVERNMENT OF MANDERA…....2ND INTERESTED PARTY

JUDGEMENT

The Petitioner filed this petition simultaneously with a Notice of Motion under certificate of urgency dated 11/05/2020. In the main petition, the Petitioner is seeking the following orders;

1. A declaration that the 1st-4th Respondents quarry activities in Mandera County without prior licensing and or compliance with provisions of the Environment Management and Coordination Act particularly failure to carry out Environment Impact Assessment and Public Participation and failure by the 1st and 2nd

Interested Party to monitor, audit and ensure compliance with the said Environment Management & Co-ordination Act, County Government Act By-Laws is illegal, unlawful, unconstitutional, null and void.

2. A conservatory order of injunction to prevent, stop discontinue or restrain the 1st-4th Respondents and or anyone claiming under them from working in or thereon, setting up and or bringing excavators in the quarries, extracting, excavating or dealing in building stones or construction materials in and or from quarries in Mandera East, Mandera Sub-County in Mandera County using massive excavation machines or otherwise for personal or commercial purposes without prior compliance with public participation requirements, provisions of Part VI of the Environment Management & Co-ordination Act and the Constitution.

3. An order of certiorari to call, remove, deliver up to this Honourable Court and quash or revoke any decision, permits or EMCA licence and or order granted to approve the 1st-4th Respondents quarry activities or exploitation of quarry excavation activities in Mandera East Sub-County in Mandera County using massive excavation machines or otherwise for personal or commercial purposes given without public participation or compliance with Environment Management& Coordination Act, County Government Act, relevant County By-Laws and the Constitution.

4. Costs of the petition.

5. Any other relief the court may deem fit to grant in the circumstance of the petition.

When the Notice of Motion together with the petition was placed before the Deputy Registrar, the same date, he directed the motion to be served for inter-parties hearing on 8th June, 2020. The parties took the following directions by consent;

1) The Notice of Motion dated 11/5/2020 is taken out from today's cause list and stood over to 6/7/2020 for hearing.

2) The 1st, 2nd, 3rd and 4th Respondent are granted leave to file and serve their response to the said application within 14 days from today.

3) The Petitioner/Applicant is also granted corresponding leave to file and serve a supplementary affidavit within 14 days from the date of service thereof.

4) There shall be no quarrying activities taking place until the hearing and determination of the said application.

The gist of the Petitioners' petition is premised on ground that the Petitioner which comprises of 29 natural persons was incorporated as a limited liability Co-operative Society with the purpose and objective to engage in quarry business in Bura Abor and Fikow locations in Mandera East Sub-County in Mandera County.

The Petitioner further averred that the land in which the quarries are situated in Mandera County is unregistered community land for the community living in the area vested and held in trust for them by the 2nd Interested Party and any use and/or exploitation of natural resources such as quarrying business must be sanctioned or authorized by the 2nd Interested Party.

The Petitioner further contends that the business of extraction of construction materials or quarrying is exploitation or use of natural resources which has an impact on the environment and require prior application and licensing by the 1st and 2nd Interested Parties who have the statutory obligation to protect, preserve and regulate any such activities.

The Petitioner stated that the provisions of part VI of the Environment Management and Co-ordination Act and Articles 42, 69 and 70 of the Constitution provides for elaborate procedures to ensure that before any proposed activities are approved by the 1st Interested Party, the public are given an opportunity to comment on the impact of such activities prior to licensing or permitting such activities to be commenced.

The Petitioner also stated that both the 1st and 2nd Interested Parties have a statutory and constitutional mandate to regulate the utilization of natural resources upon compliance with the requisite constitutional and statutory requirements including By-Laws.

Despite these elaborate provisions of the law, the 1st – 4th Respondents have allowed without the compliance with Environment Management & Co-ordination Act, Public Participation requirements and without lawfully and procedurally obtaining the requisite licences commenced quarrying activities in breach of the law.

The Petitioner further averred that by allowing the 1st-4th Respondents to operate quarrying activities without complying with the due process, the proposed activities are likely to have deleterious hazardous, degrading and destructive consequence not only to human and wildlife but also to the environment for the present and future generation.

By allowing the 1st-4th Respondents to exploit and engage in quarry business or activities without compliance with the law, the Petitioners' constitutional and fundamental rights and freedoms and that of the people of Mandera to equality and the right to equal protection of the law are likely to be breached under Article 27(1) of the Constitution of Kenya, 2010.

The Petitioner further stated that failure to give or disclose details of the application and licensing to carry out quarry activities, the Respondents and the Interested Parties have infringed on their right under ***Article 35(1)*** of the Constitution.

The Petitioner also contend that the Respondents and the Interested Parties have jointly and severally violated her right to administrative action that is fair, lawful and efficient.

The Petition further stated that the Respondents and the Interested Parties have jointly and severally violated her right under Article 50 of the Constitution to have a dispute on exploitation of the natural resources of Mandera particularly quarry activities in accordance and in compliance with the EMCA and the County Government Act as well as the By-Laws thereto.

By way of response, the 1st, 2nd 3rd and 4th Respondents filed a replying affidavit dated 18th June, 2020, in which they stated that sometime last year they applied for licences for quarrying and mining business in Mandera East Sub-County and the 1st Respondent was allocated a 9-acre piece of land by the Ministry of Interior and Co-ordination of National Government through the County Director of Environment, Mandera which was annexed and marked **TAHLIL 1.**

The Respondents further contend that as part of the requirements of carrying out quarrying business in Mandera East Sub-County, they carried out extensive public participation to sensitize the members of Fikow community of their quarrying project as required by NEMA. They annexed a record of the purported public participation as **TAHLIL 2 and 3** respectively.

They stated that the National Environment Management authority (NEMA) were satisfied with their compliance requirements and thereby approved their application on 9th June, 2020. A copy of the letter of approval was annexed and marked **TAHLIL 4**.

Following the compliance requirements, they applied a licence from the Mandera County Government which they obtained dated 18th June, 2020. The same was also annexed to the replying affidavit and marked **TAHLIL 5.**

Having acquired the NEMA licence and the licence from the County Government of Mandera, the Respondents believe that they have fully complied with the necessary regulatory requirements.

The 2nd Interested Party also filed a replying affidavit sworn on 8th June, 2020 opposing the application. Through her Deputy Director Energy Environment and Natural Resources of Mandera County Government, the 2nd Interested Party stated that on the present suit, the County Government was engaged as lead agency upon receipt of Environmental Impact Assessment Report and after going through the report, she gave out comments and concerns for the proposed extraction of block quarry project.

The 2nd Interested Party further noted that from the Environmental Impact Assessment Report, the County found out that the project is not site specific as the area mentioned is vast. She also observed that the Environmental Management Plan is not adequate as there is no clear waste management plan from the source to the designated landfill and no clear safeguard measures such as personal protective equipment.

The 2nd Interested Party further stated that the report submitted by NEMA does not show any evidence of land ownership since the Respondent had not attached any evidence of land ownership. She stated that the rate at which unregulated quarry activities are being carried out within the County of Mandera is alarming, and the methods adopted by the quarry operators are wasteful and failure of rehabilitation of quarry pit holes has led to death of children and livestock in the area.

The 2nd Interested Party also stated that those engaged in quarry business have not formulated viable solutions to the environment problems posed by quarry business and that the unfilled and un-rehabilitated quarry pit holes have been a mosquito breeding ground leading to high rate of malaria infections within the area where quarry activities are operated.

It is further contended that since most of the land where quarry is conducted is unregistered community land held in trust for them by the County Government, the 2nd Interested Party is under statutory obligation to protect, preserve and regulate any activities such as quarry business which are majorly exploitation and use of natural resources in the County.

The 2nd Interested Party stated that she has not issued any business permit to the Respondents for the operation of quarry activities in Fikow location and the actions of the Respondents in the area is risky deleterious, hazardous, degrading and destructive to the environment and infringing not only on the right of the Petitioners but also the present and future generations.

When this matter came up for directions on 25/5/2021, the parties agreed to dispose of the petition by written submissions.

PETITIONERS WRITTEN SUBMISSIONS

The Petitioner through the firm of Litoro & Omwebu Advocates submitted on the following two (2) grounds;

> **(i) Whether the Respondents and the 1st Interested Party have complied with the relevant provisions of the EMCA Act Particularly Section 3(5) and Part VI thereof; and**
>
> **(ii) Whether the Petitioners are entitled to the orders sought in the petition.**

On the first ground, the Petitioner's counsel submitted that extraction of construction materials or quarry business is exploitation or use of natural resources which also impacts on the environment and which requires the 1st Interested Party's approval under Rule 2 (10) (a) of the 2nd Schedule to EMCA Act which under Section 58 of EMCA requires that the Respondents shall before commencing such activities and not withstanding any grant under any other law, obtain an Environment Impact Assessment Licence from the 1st Interested Party.

The Petitioners counsel also submitted that although the Respondents purported to obtain a NEMA licence on 6/08/2020 during the pendency of this petition, he submitted that NEMA do not have jurisdiction to redress claims of violation of the right to clean environment now under threat by actions of the Respondents and hence, an appeal to NET is not a viable option or forum to address the violations pleaded in the petition. He further submitted that the NEMA licence obtained violated Article 69(1) of the Constitution hence illegal. He submitted that

the jurisdiction to redress the illegalities lies with the ELC Court and not NET. He cited the case of **Christopher Ngusu Mulwa & 28 Others Vs County Government of Kitui & 2 Others (2017) e KLR**.

The learned counsels further submitted that the quarry activities being done by the Respondents are projects or activities under Rule 6 (g) and (h) of the 2nd Schedule to the EMCA and require compliance with Section 58 of the EMCA before commencing which the Respondents failed to do. They further argued that the said Section 58 of EMCA as well as Rule 16-22 of Environment (Impact Assessment and Audit) Regulations, 2003 and Article 69(1) (d) and (f) of the Constitution enjoin and obligate the Respondents to engage in public participation by consulting with the public including the Petitioners, and the 1st Interested Party and consider their views through Environmental Impact Assessment Report and submit to the 1st Interested Party who shall consider the same in safeguarding the rights of the inhabitants including the Petitioners under Article 42 of the Constitution before issuing a licence.

The learned counsels urged that the purported licence produced by the Respondents is not only illegal and unlawful but the same is in violation of Article 69 and 70 of the Constitution of Kenya, 2010. They relied on the case **of KM & 9 Others Vs Attorney General & 7 Others (2020) e KLR, S. Muiru & 2 Others Vs Tigoni Treasures Limited & 2 Others (2014) e KLR and Kenya Association of Manufacturers & 2 Others Vs Cabinet Secretary- Ministry of Environment and Natural Resources & 3 Others (2017) e KLR**. The learned counsels also cited Section 3 (5) (a) (b) of EMCA.

The Petitioners also submitted that the land the Respondents want to do the quarry activities is community land and that the requirement for public participation is critical since it has a bearing for the future of the land and community as it might prejudice intergenerational and intragenerational equity.

1ST, 2ND, 3RD AND 4TH RESPONDENTS SUBMISSIONS

The 1st, 2nd, 3rd and 4th Respondents submitted that the Petitioners' petition is purely driven by jealousy, spite malice and ill-will towards the Respondents after they registered a parallel company namely Tahlil Construction and General Trading Company Ltd which applies advanced quarrying machines compared to Tawakal Society Ltd which applies old fashioned (manual) way of doing quarrying business.

The Respondents further submitted that the 3rd and 4th Respondents are duly elected as treasurer and secretary of the Petitioner (Tawakal) respectively while Ali Madey Abdirahman who is the deponent of the affidavit in support of the motion filed simultaneously with this petition is the chairman thereof.

The Respondent also submitted that the Constitution of Kenya, 2010 and the existing laws of the land guarantee every citizen the freedom and right to invest and carry out business in any part of this county as long as they observe and comply with the laid down laws and regulations.

They contend that they have at a substantial cost fully complied with the licencing requirements to the satisfaction of NEMA and Mandera County Government and that if the Petitioners have any issue with the licence issued to them, they should appeal to the National Environment Tribunal (NET). They cited the following authorities in support thereof; **Okiya Omtata & 2 Others Vs A.G & 3 Others (Petition No. 58 of 2014 (UR), Patrick Musimba Vs National Land Commission & 4 Others and Republic Vs National Environment Management Authority**.

1ST INTERESTED PARTY'S SUBMISSIONS

The 1st Interested Party submitted that in line with their duties and obligations, they received an Environment Impact Assessment Report from the 1st Respondent on 16th January, 2020 for the proposed quarry project at Fikow location in Mandera.

Guided by the principle of sustainable development, and the 1st Respondent having satisfied all the issues brought up by the County Government of Mandera went ahead and issued the Environment Impact Assessment licence to Tahlil Construction Company.

The 1st Interested Party further submitted that the project in question required submissions of a project report and not a study report, therefore the project does not fall within the ambit of Section 59 of EMCA and does not therefore require to be publicized in the national Gazette nor over the radio.

In conclusion, the 1st Interested Party submitted that they have undertaken its mandate in accordance with the law. They cited the following cases in support thereof; **Evans Nyakwana Vs Cleophas Borana Ongaro (2015) e KLR, Patrick Ayisi Ingoi Vs Republic (2018) e KLR, Chief Land Registrar & 4 Others Vs Nathan Tirop Koech & 4 Others (2018) e KLR.**

2ND INTERESTED PARTY'S SUBMISSIONS

The 2nd Interested Party only filed a replying affidavit but not written submissions.

ANALYSIS AND DETERMINATION

I have carefully considered the pleadings, the Constitution of Kenya, 2010, the statutory laws applicable and the submissions by the parties. From the pleadings and the submissions, the following issues present itself for determination;

(i) Whether the project in dispute required an Environmental Impact Assessment Report or Study and whether one was conducted?

(ii) Whether public participation was conducted before the project was commenced?

(iii) Who will bear the costs of this petition?

(i) Whether the project in dispute required an Environmental Impact Assessment Report or Study?

The requirement for an Environmental Impact Assessment is provided for under Section 58 of the Environmental Management and Co-ordination Act, 1999 (EMCA). The Act requires that any proponent of a project specified in the second schedule to the EMCA is to submit a project report. The same Act also requires proponent of other projects specified thereunder should undergo a full

Environmental Impact Assessment Study. The 1st Interested Party has argued that it was only required to submit and Environmental Impact Assessment report and not an Environmental Impact Assessment Study Report.

I have perused legal notice No. 150 of 2016 which has categorized artisanal mining including quarrying of harvesting of aggregate, sand, gravel, soil, clay, stone and slate among others as a low risk project.

Unlike Environmental Impact Assessment (EIA) Project Reports, all Environment Impact (EIA) Study Report are required to be published in the gazette and in at least two newspapers circulating in the area of the project. In respect of the matter in question which is categorized as artisanal mining of quarrying of harvesting of aggregate, sand, gravel, soil, clay, stone and slate, the same does not fall in this category unless the NEMA in its wisdom finds that the project will have a significant impact on the environment and therefore require the proponent to undertake an Environmental Impact Assessment Study.

The evidence presented by the 2nd Interested Party is that upon being engaged as lead agency upon receipt of Environmental Impact Assessment Report and after going through the same, they raised pertinent issues of concern for the proposed project such as lack of clear waste management plan from the source to the designated landfill and lack of personal protective equipment. The report does not also show any evidence of land ownership since the Respondent did not give evidence of land ownership.

The 2nd Respondent also raised health concerns to the effect that the un-rehabilitated and unfilled quarry pit holes have been a mosquito breeding ground leading to high rate of malaria within the area where quarry activities are operated.

These issues raise pertinent questions which have not been controverted or disputed by the Respondents and the 1st interested party. There is no evidence that the 1st Interested Party did a review of the project report submitted to it by the 2nd Interested Party particularly the issues raised in their objection to the commencement of the project.

In particular, the 1st Interested Party did not address the issue of land ownership where the proposed project was to be undertaken which is a community land. All community land is held by the 2nd Interested Party in trust for the residents of the area and no compensation had been agreed upon. The issue of land ownership is therefore a serious issue which the 1st Interested Party failed to address.

Other than alluding that the subject matter of this dispute does not require an Environmental Impact Assessment (EIA) study report but only a project report, the Respondents and the 1st Interested Party have not supplied one to this Honourable Court.

Despite the objections raised by the 2nd Interested Party through the comments made on the Environmental Impact Assessment (EIA) Report, the 1st Interested Party failed to address the same.

(ii) Whether public participation was conducted before the project was commenced.

Article 69(1) (d) of the Constitution provides that the State shall encourage public participation, in the management, protection and conservation of the environment. ***Section 18 of the Environment and Land Court Act*** provides that in exercise of its jurisdiction, this Honourable Court shall be guided by the principles of sustainable development, including the principle of public participation in the development of policies, plans and processes for management of the environment and land.

The importance of public participation cannot be gainsaid. The Court of Appeal in the case of ***LEGAL ADVICE CENTRE & 2 OTHERS VS COUNTY GOVERNMENT OF MOMBASA & 4 OTHERS (2018) e KLR*** held as follows;

> *"The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-maker. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider*
>
> *these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."*

Again in the case of ***REPUBLIC VS THE ATTONERY GENERAL & ANOTHER EX-PARTE HON. FRANCIS CHACHU GANYA (J.R No. 374 of 2012) (UR)*** the court stated;

> *"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*
>
> *Principle 10 of the RIO Declaration on Environment issues are best handled with participation all concerned citizens, at relevant level."*

Turning to this petition, the Respondents have not provided evidence that they conducted public participation before the subject project was commenced. There is no evidence showing that the Respondents involved members of the public and all Interested Parties including the Petitioners/Applicants about the project and likely impact both on their welfare as well as their livestock and the environment generally.

This is confirmed by the Respondents through their joint affidavit in support of the Notice of Motion dated 23rd June, 2020 sworn the same

date. At paragraphs 4 &5 of the said affidavit, the Respondent deposed as follows;

> "**4 THAT beginning early this year particularly after our quarrying project was stopped courtesy of an injunction court order issued against us by the ELC Court in Mandera (ELC Case No. 2 of 2020) we ceased the quarrying business.**
>
> **5. THAT as part of the requirements to resume the business, we have since carried out extensive public participation to sensitize the members of the Fikow community of our quarrying project as required by the National Environment Management Authority required to their satisfaction. Copies of NEEMA approval and licence from the Mandera County Government were annexed to our replying affidavit dated 18/06/2020 (4 and 5) on record for reference. Also attached was Environmental Impact Assessment Report."**

From the depositions in the said affidavit, the Respondents are admitting that after this Honourable Court issued an interim injunction order stopping the quarrying business on 8th June, 20201, they carried out extensive public participation to sensitize members of the Fikow community regarding the project. This is a clear admission by the Respondents that they had not carried out public participation prior to the issuance of the Environmental Impact Assessment (EIA) licence by NEMA and the business permit by the County Government of Mandera. Even there is no evidence showing how the public were involved before the commencement of the project particularly those most affected by the project.

In the case of **Mui Coal Basin Local Community & 15 others Vs Permanent Secretary Ministry of Energy & 17 Others (2015) e KLR**, the court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation;

> " (a) First, it is incumbent upon the Government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
>
> (b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the courts will not use any litmus test to determine if public participation has been achieved or not. The only test the court use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
>
> (c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information see **Republic Vs The Attorney General & Another Ex-parte Hon. Francis Chachu Ganya (J.R Misc. App No. 374 of 2012).**
>
> (d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiary principle; those most affected by a policy, legislation or action must have a bigger say in that policy, regulation or action and their views must be more deliberately sought and taken into account.
>
> (e) Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views not duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into considerations, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
>
> (f) Sixthly, the right of public participation is not meant to using the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

Applying the principles set out in the above decision, I have no doubt in my mind that no public participation was carried out by the Respondents or the Interested Parties before the purported licence was issued and the commencement of the quarrying activities.

CONCLUSION AND DECISION

This court cannot countenance a party who flouts the law and expecting the court to aid him to sustain the advantageous position he has been placed through violation of the law. The acquisition of the EIA licence by the 1st Respondent was not in compliance with the law and same was void abinitio and liable to be revoked. The Petitioners had a duty and obligation in the interest of the public to have the licence revoked. In the final analysis, I find and hold that the Petitioners have proved their case on the required standard and enter judgement in the following terms;

> **(i) A declaration is hereby issued that the EIA licence issued by the 1st Interested party has been illegally and un-procedurally acquired.**
>
> **(ii) A declaration is hereby issued that the licence to operate quarrying business issued to the 1st Respondent by the**

Mandera County Government was acquired illegally and un-procedurally.

(iii) That an order of permanent injunction is hereby issued restraining and/or stopping the 1st, 2nd, 3rd and 4th Respondents, through themselves, employees and/or representatives from in any way continuing with the quarrying business without complying with the Constitution and all statutory provisions of the law.

(iv) This being a public interest litigation, I order each party to bear her own costs.

READ, DELIVERED and SIGNED in open Court at Garissa this 1st day of October, 2021.

…………………………..…..……..

E. C. Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Muhuyu together with Litoro for Petitioner

2. Kirika for 1st, 2nd, 3rd & 4th Respondents

3. Fardowsa; Court Assistant.