



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION No. 5 OF 2020

ROBERT NJENGA.....1ST PETITIONER

DANIEL IRUNGU MAINA.....2ND PETITIONER

VERSUS

SYLVESTER NJIHIA WANYOIKE.....1ST RESPONDENT

BAHATI AFRICA LTD.....2ND RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....INTERESTED PARTY

JUDGMENT

1. The petitioners herein moved the court through petition dated 9th April 2020 which was later replaced with amended petition dated the 3rd July 2020. The petitioners describe themselves in the amended petition as residents of Subukia Constituency within Nakuru County. They bring the petition against the 1st respondent who they assert is a director of the 2nd respondent. They further aver that the 2nd respondent is a company whose business activities include operating a concrete pole manufacturing and wood pole treatment plant at Kabazi. The interested party (NEMA) is a body corporate established under Section 7 of the Environmental Management and Co-ordination Act, 1999 (EMCA).

2. It is averred in the amended petition that on 2nd March 2018, the 2nd petitioner on behalf of the neighbouring community wrote a letter to NEMA objecting to the respondents' plant. The petitioners further averred that the respondents ignored their complaints and continued to put up the concrete and wood pole treatment plant next to the petitioners' residential homes and that the plant produces a lot of noise, vibration, runaway waste, contaminated water, dust, fumes and general pollution which adversely affects the petitioners and the entire neighbourhood. They also averred that more than 50 members of the neighbouring community wrote to NEMA objecting to the plant and seeking information on evidence of public participation and copies of environment impact assessment and licences among other documents.

3. The petitioners further averred that NEMA through an order dated 17th February 2020 indicated that the respondents were operating their plant without an environmental impact assessment licence. They added that the wood pole treatment plant uses heavy chemicals such as Ammonium Copper Zinc Arsenate (ACZA), Ammonium Copper Arsenate (ACA), Chromate Copper Arsenate (CCA) and Copper Naphthenale which produce fumes and seepage to adjacent water sources thus polluting both water and soil with a likelihood of respiratory problems and permanent damage to stomach.

4. The petitioners allege contravention of **Articles 2 (1), 2 (4), 3, 10 (1) (b) and (c), 10 (2), 35 (1), 27 (1) & (2), 42 (b), 46 (1) (c), 47 (1) & (2), 70 (1) and 259** of the Constitution, **Sections 57 (3), 58 (1), 58 (2), 59 (1), 63, 64 (1), 64 (2), 108 (2) (b), 111 (1), 138, 143 (1) (a)** of EMCA as well as various regulations made under EMCA, various provisions of the Access to Information Act 2016 and various provisions of the Physical Planning Act (repealed). They therefore seek judgement as follows:

(i) A declaration that operations and installation of concrete and wood treatment plant without National Environment Authority license is in breach of petitioners' rights and in violation of Articles 10, 27, 47, 42 and 70 on Plot Nos. Kabazi/Kabazi block (Kihoto)/940/939/804/938 thus unconstitutional and illegal.

(ii) A declaration that the respondents have violated the Environment Management and Coordination Act and regulations and the Physical Planning Act Sections 30, 32 (4), 36 and 52 thus illegal, null and void.

(iii) An order compelling the respondents jointly and severally to have:

a) *An Environment impact assessment audit.*

b) *A public health impact assessment audit.*

c) *A social impact assessment audit.*

(iv) A restoration order directing the respondents to restore the Plot Nos. Kabazi/Kabazi block (Kihoto)/940/939/804/938 to the manner that they were before the commencement of the concrete and wood/pole treatment activities for being in a highly residential area.

(v) A restoration order directing the respondents to restore those who have been affected by concrete and wood/pole treatment activities on Plot Nos. Kabazi/Kabazi block (Kihoto)/940/939/804/938.

(vi) An order directing the National Environment Management Authority to investigate and charge the respondents for offences under Sections 138 and 143 of Environment Management and Coordination Act, 1999

(vii) Or that such other orders as this honourable court shall deem just.

(viii) That costs of this petition be provided for.

5. The petition is supported by an affidavit jointly sworn by the petitioners. They reiterated the allegations made in the petition.

6. The respondents filed a document titled "Response to petition" in which they admitted operating a concrete pole manufacturing and wood pole treatment plant at Kabazi. They denied the petitioners' other allegations and urged the court to dismiss the petition with costs.

7. NEMA filed an affidavit sworn by Mr Zephaniah Ouma, its Acting Director in charge of Compliance and Enforcement. He deposed that NEMA received complaints from the petitioners alleging that the respondents were undertaking a timber treatment plant in their neighbourhood using hazardous chemicals and exposing them to the risks of underground water contamination through seepage of chemicals used in timber treatment. He added that upon receipt of the complaint NEMA's Nakuru office visited the site for a field inspection and verified that indeed there was an ongoing timber treatment plant run by the respondents. That NEMA's officers requested the manager of the 2nd respondent to produce proof of an Environmental Impact Assessment (EIA) licence but none was availed and consequently NEMA issued an Environmental Cessation and Restoration Order directing the respondents to stop all installation activities and to report to NEMA Nakuru office with a copy of the EIA licence. He further deposed that the nature of timber treatment carried out by the respondents is prescribed by the law as chemical works and uses chemicals such as copper chrome acetate and other copper compounds which generate hazardous waste requiring pre-treatment before disposal and that the process requires the EIA mechanism to guide and inform the disposal.

8. Mr Ouma further deposed that regulation 16 of the Environmental Management and Coordination (Waste Management) Regulations, 2006 read with Schedule 4 paragraphs Y5, Y12 and Y22 thereof define and describe formulation of inks, wood preserving chemicals and wastes containing copper compounds as generating hazardous waste. According to him, it is therefore illegal and dangerous for a project that employs use of chemicals that result in hazardous waste to be undertaken without being subjected to the EIA process. He further stated that the respondents were instructed by NEMA in February 2020 to immediately submit an EIA report for processing but they did not do so despite carrying on with the project works.

9. The 2nd respondent filed an affidavit in response to the amended petition sworn by its director Janet Wanjiru Kimani. She deposed that on 5th May 2020 the 2nd respondent submitted to NEMA an EIA report for proposed expansion to include a vacuum pressure wood impregnation plant and that it engaged the local community prior to preparation of the report. She added that although the report erroneously indicated that the plant would be located on Plot No. 643 Kihoto Farm Kabazi, the correct position which was clarified through letter dated 24th July 2020 from Kihoto Farmers Company Limited is that No. 643 relates to a share certificate of Kihoto Farmers Company Limited held by the 2nd respondent which shares entitle the 2nd respondent to plot numbers Kabazi/Kabazi (Kihoto) 939 and Kabazi/Kabazi (Kihoto) 940 where the wood treatment plant is proposed to be situated. That Plot No. 643 belongs to someone else and the wood treatment plant is not situated on it.

10. She added that the 2nd respondent complied with public participation and annexed minutes of a meeting held on 28th March 2020. She further deposed that having addressed issues raised by NEMA, NEMA granted an EIA licence to the 2nd respondent in respect of the wood treatment plant on 28th July 2020. She also deposed that by the time the petition herein was filed, the process of obtaining the necessary approvals had been initiated but the EIA license was yet to be issued and that the 2nd respondent has obtained a notification of approval of development application dated 15th September 2020 from the County Government of Nakuru in respect of the wood treatment plant. She also stated that the plant is a source of employment for many local citizens and that having complied with the law, it should be allowed to operate. According to her, the amended petition is in the circumstances overtaken by events.

11. NEMA also filed another affidavit sworn by Mr Zephaniah Ouma. He confirmed that the 2nd respondent submitted an EIA project report for expansion to include a vacuum pressure wood treatment plant on 7th May 2020 and that NEMA ultimately issued an EIA licence on 28th July 2020. That owing to concerns raised by the petitioners, NEMA limited the project's site to Kabazi/Kabazi (Kihoto)/940.

12. The petition was canvassed through written submissions. All the parties filed and exchanged their submissions except NEMA whose counsel took the position that the petition is spent following issuance of the EIA licence.

13. The petitioners argued that the change of user notification was obtained unlawfully and in contravention of **Section 30** of the **Physical**

Planning Act (repealed) and that there was no change of user from an agricultural and residential use to industrial use. They relied on the cases of **Wainaina Kinyanjui (Hardy Residents Association) vs. Andrew Ng'ang'a** [2013] eKLR and **Carolyn Kerubo Omwoyo & another v Abao Investments Ltd & another; National Environment Management Authority (Interested Party)** [2019] eKLR.

14. The petitioners also submitted that the process by which the respondents acquired the EIA licence from NEMA was flawed since the licence was issued in respect of an expansion yet the wood pole treatment plant is a new and independent plant and further that the licence does not relate to Plot Nos. Kabazi/Kabazi block (Kihoto)/940/939/804/938. They further argued that no public participation took place and that no posters or newspaper advertisements have been availed to demonstrate public participation. They cited the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 others** [2014] eKLR. They also argued that the respondents have not disputed their case as regards the concrete plant.

15. In conclusion, the petitioners argued that there has been a violation of **Article 13** and **14** of the United Nations Guiding Principles on Business and Human Rights and **Articles 42 (b)** and **10 (2)** of the **Constitution** and that the wood pole and concrete plants have disturbed the entire ecosystem therefore violating their rights. They therefore prayed that the petition be allowed as prayed.

16. The 1st respondent submitted that he was not properly enjoined in the petition and that no evidence was adduced to show that he is a director of the 2nd respondent. He submitted further that having been issued with an EIA licence on 28th July 2020, the 2nd respondent has not violated the petitioners' rights, the provisions of EMCA, the Physical Planning Act (repealed) or the constitution. He placed reliance on the case of **Okiya Omtatah Okoiti & 2 others versus Attorney General & 3 Others** [2014] eKLR among other cases and urged the court to dismiss the petition with costs.

17. The 2nd respondent in its submissions argued that it is now fully compliant having obtained an EIA licence from NEMA and an approval of development of wood treatment plant from the County Government of Nakuru. That the petition has consequently been overtaken by events and that it should be allowed to continue with its operations. It relied on the case of **Julius Mutiga & 16 Others v CS Ministry of Agriculture & 3 others** [2020] eKLR and **Tanzania Roads Agency v Kondan Singh Construction Limited & Another** [2013] eKLR among others. It also submitted that the petitioners should have exhausted statutory remedies by appealing to the National Environment Tribunal if they were aggrieved by the issuance of the EIA licence. It relied on the case of **James Kuria v Attorney General & 3 Others** [2018] eKLR. Relying on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR, the 2nd respondent also argued that the petition is without merit and it does not meet the required threshold of a constitutional petition. It accordingly urged the court to dismiss the petition with costs.

18. I have carefully considered the petition, the affidavits and the submissions filed by the parties. The issues that arise for determination are: whether the constitutional jurisdiction of this court has been properly invoked; secondly, whether the petition is overtaken by events and lastly, whether the reliefs sought should issue.

19. I begin the enquiry on the first issue for determination by restating that the petitioners have a right under **Article 22** of the **Constitution** to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Equally, the petitioners have a right to move the court on behalf of other persons who cannot act in their own names or to do so in the interest of a group or class of persons or even in the public interest.

20. That said, access to the court is one thing. Establishing one's case is another. Having set off the litigation, the petitioners must surmount both the procedural and substantive tests. See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** (supra). Procedural law in regard to constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute.

21. Consequently, when formulating his case, a party must take the statutory route where it is available as opposed to the constitutional one. There are many decisions to that effect. In **Sumayya Athmani Hassan v Paul Masinde Simidi & another** [2019] eKLR the Court of Appeal stated:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. ...

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...

22. Similarly, in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another** [2016] eKLR, the Court of Appeal stated:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

...

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.

23. The petitioners have primarily moved this court on the allegations that the respondents have established a concrete and wood pole treatment plant next to their homes and that the plant produces noise, vibration, runaway waste, contaminated water, dust, fumes and general pollution which adversely affects them and the entire neighbourhood. They allege contravention of **Articles 2 (1), 2 (4), 3, 10 (1) (b) and (c), 10 (2), 35 (1), 27 (1) & (2), 42 (b), 46 (1) (c), 47 (1) & (2), 70 (1) and 259** of the Constitution, **Sections 57 (3), 58 (1), 58 (2), 59 (1), 63, 64 (1), 64 (2), 108 (2) (b), 111 (1), 138, 143 (1) (a)** of EMCA as well as various regulations made under EMCA, **Sections 4, 5 and 6** of the **Access to Information Act 2016** and **Sections 30, 32, 36 and 52** of the **Physical Planning Act** (repealed).

24. There is no doubt that the petitioners' allegations of pollution of whatever kind are matters that go to the right to a clean and healthy environment as provided under **Articles 42 and 70** of the **Constitution**. Pursuant to **Article 162 (2) (b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this court has jurisdiction to hear and determine disputes relating to denial, violation, infringement or threat to the right to a clean and healthy environment. That said, not every dispute concerning a violation of a provision of **EMCA** a regulation made thereunder should find its way into the constitutional court.

25. There is no dispute that on 28th July 2020, NEMA issued to the 2nd respondent an EIA licence in respect of proposed expansion and installation of two giant wood treatment plant cylinders, one with a capacity of 24,000 litres and the other 20,000 litres on the parcel of land known as Kabazi/Kabazi (Kihoto)/940 located at Subukia Sub-County. Condition 1.1 of the licence gives the GPS co-ordinates of the site where the plant is to be located. The petitioners have taken issue with legality of the licence and the process leading to its issuance.

26. An EIA licence is sought under **Section 58** of **EMCA** and issued under **Section 63** of the said Act. The appellants acknowledge in their submissions that there is a statutory mechanism under **Section 129** of **EMCA** for appealing against issuance of an EIA licence. Although they claim that they are unable to deploy the appellate procedure in respect of the licence herein on account of lapse of the statutory period of lodging appeal, it is not for this court sitting as a constitutional court to determine if their appeal is time barred, if they have valid reasons for not appealing within time or if they can benefit from enlargement of time. All those are statutory issues to be determined within the framework of **EMCA** and other statutory provisions. The same applies to the petitioners' arguments regarding alleged lack of public participation since even though public participation is one of the national values and principles of governance under **Article 10** of the **Constitution**, in the context of the EIA process, ample statutory provisions regarding public participation are found *inter alia* at **Sections 3 (5) (a) and 59** of **EMCA**. Dispute resolution in the EIA process is, as already stated, amply covered by **EMCA**. It is therefore my finding that the petitioners have ample statutory remedies regarding legality of the EIA licence herein and the process leading to its issuance and I decline the invitation to interrogate those aspects of the petition since I have no jurisdiction on those aspects.

27. The petitioners also challenged the 2nd respondent's plant on the allegation that the change of user notification was obtained in contravention of **Section 30** of the **Physical Planning Act** (repealed) and that there was no change of user from an agricultural and residential use to industrial use. The **Physical Planning Act, 1996** was repealed by **Section 91** of the **Physical and Land Use Planning Act, 2019** which came into operation on 5th August 2019, long before the filing of the original petition herein. A reading of parts IV, V and VI of the **Physical and Land Use Planning Act, 2019** reveals ample statutory provisions on development control, hearing and determination of complaints, claims and appeals against decisions made by local authorities with respect to physical and land use development plans. I equally decline the invitation to enquire into the land use and planning aspects of the 2nd respondent's plant for want of jurisdiction.

28. Thus, the short answer to the first issue for determination is that the petitioners have properly invoked the constitutional jurisdiction of this court in so far as their case concerns alleged denial, violation, infringement or threat to the right to a clean and healthy environment under **Articles 42 and 70** of the **Constitution**. As I have found above, the court has no jurisdiction on all other aspects of the petition.

29. Is the petition overtaken by events? The answer is partly yes and partly no. Part of the petition is overtaken by events to the extent that it is not disputed that on 28th July 2020, NEMA issued to the 2nd respondent an EIA licence in respect of the wood treatment plant. The petitioners' case is however not limited to the wood treatment plant. They averred in the petition that the respondents are also operating a concrete pole manufacturing plant on the suit properties as well. Their complaints of noise, vibration, runaway waste, contaminated water, dust, fumes and general pollution were not limited to the wood pole treatment plant. As previously noted, the respondents filed a document titled "Response to petition" in which they admitted operating a concrete pole manufacturing. Thus, the aspect of the petitioners' claim that deals with the concrete pole manufacturing plant is not overtaken by events.

30. A concrete pole manufacturing plant falls under processing and manufacturing industries under clause 3 (9) of the Second Schedule of EMCA and is hence it is a project requiring submission of an EIA study report prior to financing, commencing, proceeding with, carrying out, executing or conducting such a project. No evidence has been availed by the respondents that they sought and obtained an EIA licence in respect of the concrete pole manufacturing plant as is required by **Section 58** of **EMCA**. In the absence of an EIA licence, the petitioners' fears and complaints that the plant poses a threat to their right to a clean and healthy environment must be taken seriously. Failure to demonstrate possession of an EIA licence *ipso facto* calls for action on the part of the court to preserve the environment from possible deleterious consequences of the plant. Indeed, that is the essence of the pre-cautionary principle which is supposed to guide this court in exercise of its jurisdiction under **Section 18 (a) (vi)** of the **Environment and Land Court Act, 2011** and **Section 3 (5) (f)** of **EMCA**.

31. The petitioners have sought a declaration that the operation and installation of the concrete pole plant is in breach of their rights, orders compelling the respondents to subject the concrete pole plant to the EIA process, a restoration order in respect of the project site and an order directing the NEMA to investigate and charge the respondents for offences under **Sections 138 and 143** of **EMCA**. In view of the foregoing discussion, I am persuaded that save for an order directing the NEMA to investigate and charge the respondents, the above reliefs should issue. The decision as to whether or not to charge the respondents or any of them is a statutory one that is best left to NEMA and other legally competent law enforcement agencies.

32. In the end, I make the following orders:

a) A declaration is hereby issued that the installation and operation of the concrete pole plant on plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938 without an Environment Impact Assessment Licence is in breach of petitioners' right to a clean and healthy environment.

b) The respondents to apply for an Environment Impact Assessment Licence in respect of the concrete pole plant on plot numbers Kabazi/Kabazi block (Kihoto)/940/939/804/938 within 30 (thirty) days from the date of delivery of this judgment and thereafter to fully comply with Environmental Impact Assessment process.

c) In default of applying for an Environment Impact Assessment Licence as ordered in (b) above, an environmental restoration order will automatically issue directing the respondents to restore the site of the concrete pole plant to the state in which it was before the commencement of the project.

d) It is manifest that the petitioners brought this petition for themselves and on behalf of the neighbouring community. This being public interest litigation, each party shall bear own costs.

Dated, signed and delivered at Nakuru this 4th day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

The 1st petitioner present in person

The 2nd petitioner present in person

Mr Kahiga holding brief for Ms Moenga for the 1st respondent

Mr Kahiga for the 2nd respondent

Mr Kahiga holding brief for Mr Gitonga for the interested party

Court Assistants: B. Jelimo & J. Lotkomoi