



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC PETITION NO. 09 OF 2019

MUINDI KIMEU & 3,285 OTHERS .....PETITIONERS/RESPONDENTS

VERSUS

KENYA PIPELINE COMPANY LTD.....1<sup>ST</sup> RESPONDENT/APPLICANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) ..... 2<sup>ND</sup> RESPONDENT

RULING

1. On the 19<sup>th</sup> March, 2021, the 1<sup>st</sup> Respondent/Applicant filed the Notice of Motion application dated 18<sup>th</sup> March, 2021 seeking the following orders: -

1. **THAT** the application be certified as urgent and fit to be heard ex-parte in the first instance.
2. **THAT** pending the hearing and determination of the application inter partes there be stay of implementation of directions issued by this court on 4<sup>th</sup> February 2021.
3. **THAT** this Honourable court be pleased to review and or set aside its directions on the hearing of this matter made on 4<sup>th</sup> February 2021.
4. **THAT** the Honourable court be pleased to enlarge time for filing of response to the petition in this matter by the 1<sup>st</sup> Respondent.
5. **THAT** the honourable court do proceed to direct that this matter to proceed by way of *viva voce* evidence.
6. **THAT** this honourable court be pleased to make any other order it deems fit and just in the circumstances.
7. **THAT** costs of this application be in the cause.

2. The application was filed under certificate of urgency and is predicted on the grounds on its face and is supported by the affidavit of Stanley Manduku, the chief legal officer of the 1<sup>st</sup> Respondent/Applicant.

3. The application is opposed by the Petitioners/Respondents vide their grounds of opposition dated 1<sup>st</sup> April, 2021. The 2<sup>nd</sup> Respondent does not oppose the application.

4. When the application came up for inter partes hearing on 29<sup>th</sup> April, 2021, the parties recorded a consent as follows: -

“By consent of the parties herein it is hereby ordered: -

Application dated 18<sup>th</sup> March 2021 be compromised on the following terms and conditions;

- i. There be extension of time for the 1<sup>st</sup> Respondent to comply with the direction of the court made on the 4<sup>th</sup> February, 2021 i.e. to file and serve their response by 30<sup>th</sup> June 2021. The Petitioners and 2<sup>nd</sup> Respondent to file

their response by 9<sup>th</sup> July, 2021.

ii. Parties to submit orally, on whether the matter should proceed by way of viva voce evidence or/through written submissions.

iii. Costs in the cause.”

5. Pursuant to the aforementioned consent, counsel on record for the 1<sup>st</sup> Respondent/Applicant and the Petitioners/Respondents proceeded to make their oral submissions.

6. In his submissions, Mr. Onindo for the 1<sup>st</sup> Respondent/Applicant urged that the 1<sup>st</sup> Respondent would like to cross-examine the makers of the medical reports and the Environment Assessment Reports contained in the bundle of documents (Vol 3 and 4) that the Petitioners/Respondents filed in support of the petition. The counsel added that in Vol 4 done by Dr. Anthony Mobisa Swaro, there are medical reports which show the Petitioners who suffered harmful effects and it is necessary for the doctor to explain how he arrived at his conclusion.

7. The counsel submitted that the Petitioner will equally get the chance to cross-examine the doctor who will be called by the 1<sup>st</sup> Respondent thus enabling the court to compare the reports by either parties and the evidence by the experts and make a determination on the issue of compensation sought by the Petitioners.

8. The counsel went on to submit that he had not seen an affidavit by the doctor in respect of the medical reports that were filed in court. He pointed out that even if there were affidavits by Dr. Anthony Swaro, it will be in the interest of justice that he and other experts come to court to explain how they arrived at their reports and also their qualification.

9. The counsel went on to submit that with respect to the reports in Vol 3 and 4, the same cannot be confirmed by way of written submissions. The counsel further submitted that the 1<sup>st</sup> Respondent would like to cross examine the Petitioners on the aspect of special and general damages which they have pleaded in their petition.

10. It was also the counsel's submissions that the issue of the large number of the Petitioners will arise but having brought a claim against the Respondents, and which claims the Respondents are expected to abide by and pay the Petitioners, the Petitioners have a duty to adduce evidence. In the alternative, the counsel was of the view that a sample of the petitioners could be cross examined. The counsel for the 1<sup>st</sup> Respondent further raised the issue of a few number of Petitioners who signed to support the petition.

11. From the foregoing, the counsel urged the court to vary the orders **that it issued regarding the disposal of the petition.** (*Emphasis are mine*).

12. In reply, Mr. Ndolo for the Petitioners submitted that in Petition number 8/19, 9/19 and 12/19 though not necessary under Article 22 of the Constitution, the Petitioners in those Petitions have given written authority to the 1<sup>st</sup> Petitioner to plead and to prosecute the petition.

13. It was further submitted that the counsel for the 1<sup>st</sup> Respondent was present in court on 4<sup>th</sup> February, 2021 when the court gave directions regarding the disposal of the petition in accordance with Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule 2013.

14. The counsel pointed out that on the material day, the 1<sup>st</sup> Respondent's counsel did not indicate that they wanted the petition to proceed by way of oral evidence raising the question of whether the court can review the directions it gave on the hearing of the petition.

15. The counsel referred the court to Authority number 6 in the Petitioner's list of authorities dated 1<sup>st</sup> April, 2021. The authority in question is the case of **Republic –Vs- Disciplinary and Ethics Committee & Another, Donald Oyatsi (Ex-parte) AGK (on behalf of WK Minor) Interested Party [2020] eKLR** where the court at paragraph 33 ruled;

**“Court directions do serve a salutary purpose of enabling the court to determined cases expeditiously in line with the constitution dictate in Article 159 of the constitution. The court gives directions for the proper conduct of proceedings. The parties or their advocates have no power to alter the procedural steps or court's directions. They have an obligation to assist the court to achieve the constitutional dictate in Article 159. When parties fail to comply with court's directions on filing pleadings, this constitutional dictate is put into jeopardy.”**

16. The counsel termed the prayer to re-open the directions as one that is premature since the 1<sup>st</sup> Respondent was yet to file any response to the petition, expert, scientific or otherwise to controvert the Petitioners' evidence before the court.

17. The counsel went on to assure that assuming that the court will rule that it has discretion to alter the directions issued, given the circumstances of the petition, he wondered on what basis the 1<sup>st</sup> Respondent will be controverting the evidence. Regarding the reasons why the 1<sup>st</sup> Respondent wants to call certain witnesses for cross examination, the counsel for the Petitioners was of the view that it can be done through submissions and pointed out that since the Petitioners have made their case in their pleadings, it will be dismissed by the court **if it will have been found out that they have not made their case.** (*Emphasis are mine*). It was further submitted on behalf of the Petitioners that the Petitioners believe that they have brought the best evidence in this case and that cross-examination will not add any value to this court.

18. The counsel pointed out that the hierarchy of giving evidence is affidavits, written submissions or oral evidence as per Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The counsel went on to submit that the Respondents can procure the Petitioners evidence through submissions and termed the application by the 1<sup>st</sup> Respondent as another attempt to delay the hearing this matter taking into consideration that matters are supposed to be heard expeditiously.
19. The counsel concluded by submitting that the petitioners will suffer prejudice **if the 1<sup>st</sup> Respondent's application is allowed**. (*Emphasis are mine*) since they have already filed their pleadings and submissions as directed by the court. The counsel was of the view that the matter should proceed as directed by the court.
20. Before Mr. Orundo could respond, Mr. Mugun clarified that on 4<sup>th</sup> February, 2021, he only made an application for extension of time and did not say that the matter should proceed by way of written submissions.
21. In rejoinder, Mr. Orundo submitted that Rule 20 that Mr. Ndolo mentioned allows written submissions and also oral hearing and that was the reason why the 1<sup>st</sup> Respondent made the application. Regarding Mr. Ndolo's reference to review, the counsel submitted that under the civil procedure, a court can review its orders.
22. As for the authority relied upon by the Petitioners, the counsel pointed out that it was in respect of failure to file, filing late and not observing court's directions and in any case, the counsel added, the authority does not apply in view of the consent filed to enlarge time for the 1<sup>st</sup> Respondent to file its response.
23. The counsel submitted that Section 35 of the Evidence Act is very clear that makers of documents should be called to explain and to produce them (since there were no affidavits by the doctors). The counsel cited the case of **Robert Ngande Kathathi –Vs- Francis Kivuva Kitonde [2020] eKLR** where the court made emphasis on oral hearing rather than submissions.
24. Regarding the reference by Mr. Ndolo that the Petitioner had been given authority to plead and file on behalf of others, the counsel submitted that the said Petitioner has his own independent claim against the 1<sup>st</sup> Respondent and then it comes to injury, loss of life and damages, he cannot explain of behalf of the other Petitioners. In response, Mr. Ndolo submitted that Section 35 of the Evidence Act cannot override a clear constitutional provision provided under Article 159.
25. I have read the Notice of Motion application and particularly prayers 3, 5 and 6 of the application as well as the grounds upon which the application is predicated in so far as the grounds are relevant to the prayers sought. I have also read the supporting affidavit and the grounds of opposition more particularly grounds 5(v)(a), (b), (d), (e) and 6 as well as the oral submissions by the counsel on record for the parties. I am of the view that the only issue for determination is whether or not this court can review the directions it gave on 4<sup>th</sup> February, 2021. The Petitioners contend that parties have no power to alter the directions of the court. They further contend that the application to re-open the directions is premature since the 1<sup>st</sup> Respondent has not filed any response to the petition.
26. The Petitioners assert that if they have not made their case in their pleadings, their petition will be dismissed and that since they have already filed their pleadings and submissions pursuant to the directions of the court, they will be prejudiced should directions be re-opened.
27. On the other hand, the 1<sup>st</sup> Respondent has submitted that the authority relied upon by the Respondent concerned failure to file, filing late and not observing the court's directions and as such, the said authority does not apply herein in view of the consent by the parties to enlarge time.
28. Whereas I agree with the Petitioner's counsel that Rule 20 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules has a hierarchy of how a petition should be disposed, it is clear that in addition to the disposal of a petition by way of affidavits, written submissions or oral evidence, at Rule 20(3), the court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. In my view, Rule 20 gives the court the discretion to direct how a petition is to be disposed of. It cannot be said that once directions on the disposal of the petition are issued, the same cannot be varied.
29. From the petition and the affidavits filed herein, it is clear that the Petitioners are seeking damages for amongst others loss of amenities and injuries received. The Petitioners have relied on medical reports which were prepared by medical doctors. I would agree with the 1<sup>st</sup> Respondent that it would be in the interest of justice that the doctors be subjected to cross examination so that they can explain how they arrived at their findings. The Petitioners will not be prejudiced in any way as they will have the chance to re-examine their witnesses and also cross examine those witnesses who will be called by the Respondents. As for submissions, the Petitioners will have the chance of filing supplementary submissions should the need arise.
30. It will be important to call some of the Petitioners for cross examination and in return the Petitioners will also have the chance to cross examine the experts who will be called by the 1<sup>st</sup> Respondents so that the court will have the chance to arrive at a fair and just determination.
31. I acknowledge that these constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are on a pedestal higher than the Ordinary Civil Procedure Rules, it is important to bear in mind that directions are procedural matters that should not override considerations of a fair trial which as observed in this ruling, it is necessary that some witnesses be cross examined.
32. I am fortified on this issue in the case of **Ahad –Vs- CJE [2019] eKLR** where the Court of Appeal had this to say;

**“Although the sentiment by the judge that both parties were present when directions were given was not entirely correct, he**

**was right that the directions had infact been given by court for the disposal of the matter by affidavits and written submissions. That did not however tie his hands for the life of the case .....**"

33. Arising from the foregoing, my finding is that the application has merits and proceed to issue prayers 3 and 4 of the application and direct that the part of the petition thereof shall be heard by oral evidence.

34. Costs shall be in the cause.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 3<sup>RD</sup> DAY OF JUNE, 2021**

.....

**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**