



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC CONSTITUTION PET 14 OF 2021

(Formerly Migori ELC PET NO. 4 of 2019)

JOB OTIENO.....1ST PETITIONER

OBUYA OLANG BENARD.....2ND PETITIONER

MILTON OBOTE.....3RD PETITIONER

-VERSUS

SUKARI INDUSTRIES LTD.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....2ND RESPONDENT

ETHICS AND ANTI – CORRUPTION COMMISSION.....3RD RESPONDENT

JUDGMENT

1. On 13th September 2018, Job Otieno, Obuya Bernard Olang and Milton Obote, the 1st, 2nd and 3rd Petitioners respectively through Messrs H. Obach and partners Advocates lodged this petition dated 9th September 2018 pursuant to the various provisions of the Constitution of Kenya, 2010 (The Constitution herein) and the Fair Administrative Action Act No. 4 of 2015 set out on its face. They are seeking the prayers infra; -

- a. An injunction restraining the respondent's from continuing with the manufacturing of sugar pending full compliance with the Environment Impact Assessment Report.
- b. A mandatory order compelling the respondents to provide an alternative, safe and environmentally clean interim sewer and waste disposal system and site.
- c. A mandatory order compelling the respondents to provide an alternative, safe and clean water to the people along Kuja river.
- d. An order of mandatory order compelling the respondents to remove waste and affluent deposited into river Kuja and to take measures to cure the pollution caused in the said river by their reckless discharge of raw sewer therein.
- e. An order of compensation to the petitioners and on behalf of all the local residents of South Kanyikela Ward in Ndihiwa Constituency for breach of their Constitutional rights by the 1st respondent.
- f. An order directed to the 3rd respondent to carry out an audit on the previous complaints against the 1st respondent and take necessary action if determined that the 2nd respondent's officers have aided and abetted the said illegal action.
- g. Any other orders that this Honourble court deem fit and just to grant in the circumstances.
- h. Costs of this petition

2. In sum, the petitioners' complaint is to the effect that they are residents of South Kanyakela living around River Kuja in Ndihiwa

Constituency within Homa-Bay County. That they rely on the river as a source of water for economic and social activities including irrigation, livestock keeping, fishing and domestic use. That in the year 2015, the 1st respondent sanctioned an Environmental Impact Assessment (EIA) which was carried out by the 2nd respondent before it would begin the process of expanding its factory. That after the 2nd respondent gave the green light to proceed with the expansion, the 1st respondent failed to follow the EIA report especially regarding waste disposal as raw waste is being discharged from the factory causing pollution on the river while the 2nd respondent has ignored to take appropriate action. Therefore, it provoked this petition.

3. The 1st respondent, Sukari Industries Limited through M/s Olendo, Orare and Samba Advocates LLP reacted to the petition in form of a notice of preliminary objection dated 17th September 2018 and filed in court on even date seeking to have the petition struck out with costs based on grounds as stated thereon. However, the court (JR Karanja, J) observed that the matters raised in this petition are “hybrid” and thus overruled the preliminary objection in its entirety with an order that the entire petition be transferred to this court for hearing and determination with effect from 7th March 2019.

4. The 1st respondent also responded to the petition by way of a replying affidavit sworn on 27th May 2015 by Boaz Amoke, the factory manager of the 1st respondent. The petition is opposed therein.

5. Subsequent to the transfer order stated in paragraph 3 hereinabove and upon the establishment of the Environment and Land Court at Homa-Bay, on 28th July 2021, I ordered that the petition be transferred accordingly for delivery of judgment. So, the target is to enhance access to justice as provided for under Articles 6 (3) and 48 of the Constitution.

6. The 2nd respondent is represented by Cynthia Sakami Advocate and participated in the preliminary objection disclosed in para 3 hereinabove. Nonetheless, in spite of service as discerned in affidavits of service including the one sworn on 24th September, 2018, the 2nd respondent neglected to file any response to the petition.

7. The interested party was duly served, too. However, no documents or at all, were filed by the interested party herein.

8. This petition was heard by way of written submissions. This was further to this court’s orders and directions of 16th March 2021.

9. The petitioners’ learned counsel filed submissions dated 1st April, 2021 on 15th June 2021 giving background information and brief facts of the petition. Counsel submitted that high pollution load released into the river has degraded the river water quality, increased prevalence and incidences of water borne diseases as well as made the river water acquire unpleasant colour, foul odour bad taste, increased turbidity and enhance algae blooming. Counsel framed four (4) issues for determination including whether the petitioners have the locus standi to initiate this petition and whether the respondents have violated the petitioners’ rights.

10. Counsel analysed the issues in favour of the petitioners’ case. To buttress the submissions, counsel cited the Court of Appeal decision in **Mumo Matemu vs= Trusted Society of Human Rights Alliance and 5 others (2013)**, and the persuasive decision in **Kibwezi Water Resources Users Association and 4 others vs= Attorney General and 5 others (2019) eKLR**, among other authorities.

11. In their submissions dated 8th July 2021 and filed in court on 12th July 2021, learned counsel for the 1st respondent referred to the petition, the 1st respondent’s replying affidavit and the grounds of opposition dated 17th September 2018 but termed the petition baseless and devoid of any constitutional pedestal. That the petition is want of jurisdiction and unproved herein. Counsel submitted inter alia, that sections 7, 29, 31 and 125, of the Environmental Management Co-ordination Act, 1999 (EMCA) establish National Environment Management Authority (NEMA), County Environment Committee (CEC), National Environmental Complaints Committee (NECC) and National Environmental Tribunal (NET) respectively with requisite functions. That the petitioners did not attempt to seek remedy in any of the said institutions before choosing to file this petition.

12. Counsel further submitted that the petitioners have recourse through civil suit but opted to file the petition hence an abuse of constitutional petitions. That this court should decline jurisdiction as noted by the Court of Appeal in **Gabriel Mutava and 2 others vs= Managing Director Kenya Ports Authority and another (2016) e KLR**. That the petition is a nonstarter and amenable to dismissal with costs for lack of proof of violation of any rights or freedoms on a balance of probabilities as held by the Court of Appeal in the case of **Gitobu Imanyara and 2 others vs= Attorney General (2016) eKLR**, among other authoritative pronouncements.

13. The 2nd respondent and the interested party did not file submissions in this petition.

14. I have anxiously considered the entire petition, the 1st respondent’s replying affidavit together with grounds of opposition, the petitioners’ submissions and the 1st respondent’s submissions including the issues and authorities cited therein. On that account, the issues for determination herein boil down to whether; -

a) This court has jurisdiction over the petition

b) Subject to issue number (a) hereinabove, is the petition merited?

15. In respect of the first issue (a), it is the contention of the 1st respondent that this court is not seized of jurisdiction over the petition. That they should have first presented their grievances before NET and may be thereafter under the Fair Administrative Act, 2015, if need be, before filing this petition.

16. The petitioners stated otherwise. They urged that they have the locus standi to initiate this petition by virtue of Articles 22,258, **Matemu case (supra)**, among others.

17. The Halsbury's Laws of England 4th Edition volume 9 at page 350 defines the term "**Jurisdiction**" as :-

".....the authority a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision....."

18. In **Samwel Kamau Macharia and another =vs= Kenya Commercial Bank Ltd and others (2012) eKLR**, the Supreme Court of the Republic of Kenya held; -

".....A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It can not arrogate jurisdiction....."

19. In **Desai =vs= Warsame (1967) EA 351**, it was noted that a court cannot confer jurisdiction on itself. That assumed jurisdiction is a nullity.

20. In the case of **Republic =vs= Karisa Chengo and 2 others (2017) eKLR**, the Supreme Court of the Republic of Kenya cited the decision of Lord Denning in the Privy Council case of **Benjamin Leonard Macfoy United Africa Co. Ltd (UK) (1962) AC 152** and succinctly stated; -

"..... Lack of jurisdiction renders a court's decision void as opposed to it being merely voidable....."

21. In the celebrated case of the **Owners of Motor Vessel Lilian "S" =vs= Caltex Oil Kenya Ltd (1989) KLR1**, the late Nyarangi JA held that :-

"..Jurisdiction is everything... without it a court has no power to take one more step.."

22. By the ruling rendered on 7th March 2019 regarding the preliminary objection dated 17th September 2018, JR Karanja J, referred to the case of **Leisure Ltd =vs=Commissioner of Lands and another (2016) eKLR** and observed in part;-

"This petition resolves around a cocktail of constitutional provisions some of which clearly fall under the jurisdiction of the Environment and Land Court..... Both the High Court and the Environment and Land Court have concurrent and or coordinate jurisdiction on the constitutional matters raised in this petition....."

23. Indeed, this court has jurisdiction to deal with any constitutional issue as stipulated at section 13 (3) of the Environment and Land Court Act,2015 (2011); see also **James Francis Angalia =vs= Masinde Muliro University and others (2012) e KLR**.

24. As regards the second issue, it is settled law that where there is clear procedure of redress of any particular grievance, the same ought to be adhered to since there are good reasons for such special procedures; see the Court of Appeal decision in **Speaker of National Assembly =vs= Karume (1992) 1KLR 425**.

25. Similarly, I endorse the reasoning in **Republic =vs= Jubilee Party and another exparte Wanjiku Mulwa and another (2017) eKLR** that once jurisdiction is conferred on a body, let it be allowed to handle and determine the matter. I also approve the High Court decision in the case of **Governor of Kericho County =vs= Kenya Tea Development Agency and 30 others (2016) eKLR** that the Competition Act offers efficacious remedy.

26. I bear in mind the various Articles of the Constitution referred to and being legal foundation of this petition and the sections of the Fair Administrative Act stated on the face of the petition. The lamentations of the petitioners are that the respondents have violated their constitutional rights and freedoms as the EIA report has not been complied with.

27. It is important to note the Supremacy of the Almighty God of all creation as acknowledged in the **preamble to the Constitution**. Thereafter, Chapter 1 of the Constitution stipulates the sovereignty of the people and supremacy of the same Constitution. In the case of **Gabriel Mutava (supra)**, the Court of Appeal cited it's own decision in **Daniel N. Mugendi-vs-Kenyatta University and 3-others (2013) eKLR** that legislation and not the underlying Constitutional right, becomes the primary means for giving effect to the Constitutional rights where a fundamental right is regulated by such legislation.

28. In the case of **Benson Ambuti Atega and 2 others-vs- Kibos Distillers Limited and 5-others (2020) eKLR**, the Supreme Court of the Republic of Kenya held that abstention (Pullman) doctrine is established through common law. That a court of law cannot choose to arrogate itself jurisdiction in cases where there are proper institutions that are mandated to hear and determine issues. The court thus, remitted back the petition to the appropriate institution (NET) for deliberation and determination. It reserved the constitutional issues on the rights to a clean and healthy environment, pending the outcome of the decision of NET in the best interest of fair hearing under Article 50 of the Constitution.

29. In upholding the preliminary objection by the 1st, 2nd, 3rd 5th and 6th respondents, the Supreme Court struck out the petition and ordered each party to bear it's own costs. In paragraph 55 (b) of it's ruling, the Court observed, inter alia;

“.....noting the nature of the matter, the petitioners are at liberty to pursue their claims at the appropriate forum, taking guidance from this judgment and that of the Court of Appeal.....” (Emphasis added)

30. In the instant matter, the petitioners should have first knocked at the doors of NEMA under sections 7 and 108 of EMCA, NECC as envisaged under sections 31 and 32 of the said Act and thereafter NET pursuant to sections 125, 126 (2), 127 (1) and 129 of the same Act. Appeals from NET lie to this court as provided for under sections 129 and 130 of EMCA. I agree with the 1st respondent’s submissions that there is nothing to show that the petitioners first sought relief in the aforesaid institutions that are mandated by legislation to hear and determine the issues raised in this petition as held in **Gabriel Mutava and Daniel Mugendi cases** (supra).

31. Wherefore, I decline jurisdiction in respect of this petition as I subscribe to **Benson Adega** and the **Owners of Motor Vessel Lillian “S” cases (supra)**. I proceed to reserve all the issues raised in this petition pending the outcome of the decisions of the institutions stated in paragraph 30 hereinabove. The petition is hereby struck out and each party to bear its own costs.

DELIVERED, SIGNED AND DATED AT HOMABAY THIS 21ST DAY OF SEPTEMBER 2021

G.M.A ONGONDO

JUDGE

Mr. Robert Ochieng’ learned counsel holding brief for Mr. Olendo for the 1st Respondent.