REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 1 (1), 3, (2) (1)(5), 3 (1), 10(1),19, 20,21,

(1)23 (1)13(a) (f), 24 (1), 26 (1) 35(1), (3), (40), 47(1), 48, 60(1), 159(1), 2(a), (d),

(e) 165 (3) (b) 258 (1), (2), (a), (d), (e) 165 (3), (b) 258 (1) AND 259 (1), (3)

SUSAN WANGARI MBURU.....1ST PETITIONER

TERESA WANJIRU KAMAU.....2ND PETITIONER

NJOROGE NJUGUNA.....3RDPETITIONER

JAMES MUGO MBOGO.....4TH PETITIONER

NGANGA GACINGWA WANDUTU.....5TH PETITONER

JANE WANJIKU WARARI.....6TH PETITONER

VERSUS

ELDORET WATER & SANITATION COMPANY LIMITED.....1ST RESPONDENT

THE UASIN GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

The petitioners herein moved to court vide a petition dated 5th February 2020 seeking for the following reliefs:

a. A declaration that the intended passage of the sewer line onto their parcel of land is unconstitutional and in breach of the Petitioners economic and social rights.

b. An order declaring that the Respondents action of seeking to curtail undermine/or deprive the Petitioners off their rights to their various properties without just and adequate compensation is unfair, unlawful and unconstitutional.

c. An order preserving the Petitioners' parcel of land.

d. Orders to adequately compensate the Petitioners before compulsory acquiring their parcels of land.

e. Costs of the Petition from the Respondents.

f. Any other order the court may deem just fit and just to grant.

Counsel agreed to canvas the petition by way of written submissions which were duly filed.

PETITIONER'S CASE

The Petitioner filed a supporting and supplementary affidavits sworn by Susan Wangari Mburu on her own behalf and on behalf of the rest of the Petitioners with their authority. The 1st Respondent opposed the Petition through a replying affidavit sworn by Nicholas

K. Serem but the 2nd Respondent despite filing its notice of appointment it never filed any response to the Petition.

It was the Petitioners case that they are the registered owners of those parcels of lands known as ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/306, ELDORET MUNICIPALITY BLOCK 15 (HURUMA)/204, ELDORET MUNICIPALITY (BLOCK15 (HURUMA)/267, ELDORET MUNICIPALITY/BLOCK 15 (HURUMA)/400, ELDORET MUNICIPALITY(BLOCK15 (HURUMA)/463, AND ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O) 3291 and that pursuant to section 24 of the Land Registration Act No. 3 of 2012 are vested with absolute ownership of the Lands together with all rights and privileges being or appurtenant thereto.

The Petitioners also stated that the Respondents servants and/or their agents entered upon the Petitioners' parcels of land and marked them for purposes of passage of sewer lines within Huruma Ward.

It was the Petitioner's further testimony that the Respondent neither published a notice of intention to acquire land nor a notice of inquiry on the County Gazette or Kenya Gazette. The petitioners stated that this was unprocedural as proper procedures were not followed which required the respondents appoint a date for any inquiry to hear property claims issues and compensation.

The Petitioners further stated that the Respondents did not conduct public participation in respect of the intended compulsory acquisition. Further that the Respondents ought to have engaged the public and especially the Petitioners before acquiring their various parcels of land and that one of the core values of public participation is based on the beliefs that those are affected by a decision making process ought to be heard and the Respondents ought to have involved the Petitioners before acquiring their parcels of land.

It was the Petitioners 'case that their attempts to amicably resolve this matter has been frustrated by the Respondents who have willfully refused and/or neglected to meet them for any further consultative meeting on the issue of compensation.

The Petitioners averred that whenever there is a need for compulsory acquisition of a citizen's property and/or land there must be just, full and prompt compensation. That the intended Respondent's action of construction of sewer lines on the Petitioner's land is an infringement of their constitutional right to peaceful and use of their properties.

It was the Petitioners further averment that they have constructed both residential and rental houses in the said parcels of land and they risk being rendered homeless hence the orders should be granted as prayed in the petition.

PETITIONERS' SUBMISSIONS

Counsel for the petitioners filed submissions and stated that a party that alleges violation of his or her rights must plead with reasonable precision of such alleged violation and cited the case of **Anarita Karimi Njeru —vs- the Republic (1976 — 1980) KLR 1272** where the court stated: -

> **"Unconstitutional violations must be pleaded with a reasonable degree of precision."**

Counsel further submitted that the Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Further that the manner in which the alleged violations were committed and to what extent must show by way of evidence based on the pleadings.

Counsel also relied on the Court of Appeal Case of **Mumo Matemu —Vs- Trusted society of Human rights Affiance & another [2013] eKLR** where the court stated that:

> "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. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637** at 639 holds true today:
>
> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

The court further stated that

> " We wish to reaffirm the principle holding on this question in **Anarita Karimi Njeru** (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case**.** At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the

petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."

Counsel submitted that the Petitioners are registered proprietors of suit parcels of land and relied Article 40 of the Constitution of right to property and Sections 24, 25 and 26 of the Land Registration Act which provides that:-

> **" The registration of a person as the proprietor of land shall vest in that person the absolute and privileges belonging or appurtenant thereto". Further section 25 of the Land Registration No. 3 of2012 provides that: -**
>
> ***The rights of a proprietor whether acquired on first registration of subsequently for* valuable consideration or by an order of court shall not be liable to be defeated except as provided in this act and shall be held by the Proprietor, together with all privileges and appurtenances belonging thereto free from other interests and claims whatsoever but subject-**
>
> > **a. To the leases, charges and other circumstances and to the conditions and restrictions if any shown in the register; and**
> >
> > **b. To such liabilities, rights and interests as affect the same and are declared by section 28 no to require noting on the register, unless the contrary is expressed in the registered.**

It was counsel's submission that Section 143(2) (a) of the Land Act No. 6 of 2012 defines a public right of was as follows;

> **"A right of way created for the benefit of the National County Government, a county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions, referred to in this act as a way leave".**

Mr. Mathai submitted that in order for such way leave to be created an application for the creation of a wayleave has to be made unless the commission is making Suo Moto pursuant to section 144 of the Land Act No. 6 of 2012. The Applicant is therefore required serve a notice on

> **a. All persons occupying land over which the proposed way leave is to be created including persons occupying land in accordance with customary pastoral rights.**
>
> **b. The county Government in whose area of jurisdiction land over which the proposed way leave is to be created is located.**
>
> **c. All persons in actual occupation of land in an urban and pre-urban area over which the proposed way leave is to be created; and**
>
> **d. Any other interested person.**

Counsel also cited Section 148 of the Land Act No. 6 of 2012 provides that: -

> **"Subject to the provisions of this section compensation shall be payable to any person for the use of land of which the person is in lawful or actual occupation, as a communal right of way and/ with respect to a way leave in addition to any compensation for the use of/and for any damages suffered. In respect of trees crops and building and shall in cases of private land be based on the value of land and determination by a qualified valuer".**

Counsel further cited the repealed way leave Act Ca 292 at section 4 (1) which provided that: -

> **"The Government shall at least before carrying any sewer, drain or pipeline into, through, over or under any private /and without the consent of the owner of the land give notice of the intended work wither by notice in the Gazette or in such other manner as the minister May in any case direct".**

Subsection 3 section 4 provides that;

> **"A copy of the notice shall either be served on every person resident in Kenya whose place of residence is known and who is known or believed to be the owner of any private land through, over or under which it is intended that any sewer drain or pipeline shall be carried or shall drain or pipeline shall be carried or shall be posted in a conspicuous position on that land".**

Mr. Mathai therefore submitted that a wayleave notice has to be given, not only on the owner of the Land but on all people in occupation of the land, whether they are land owners or not, that notice is mandatory that the same must be served. Further that the notice was never served on the petitioners and urged the court to allow the petition as prayed.

1 ST RESPONDENT'S CASE

The 1st respondent filed a Replying Affidavit sworn by the 1st Respondent's Security officer Mr. Nicholas K. Serem, who denied all the allegations of infringement of the Petitioners' right to peaceful enjoyment of their property.

The 1st respondent filed a detailed replying affidavit together with annexures showing the sewer line was in existence since 2005. It was the 1st Respondent case that during the construction of the sewer line in 2005 all constitutional and statutory requirements were complied with and thus the Petitioners have not disclosed material facts. The 1st respondent also stated that the continued existence of the unapproved structures is posing a risk to the health and safety of members of the public, the Petitioners included.

1ST RESPONDENT'S SUBMISSION

Counsel filed submissions and relied on the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where (supra) and the Court of Appeal case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR on the the constitutional thresholf for petitions.

Counsel further cited the case of **Timothy Njoya v Attorney General & another [2014] eKLR** where the learned judge stated: -

> **"The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and eyen state the Article of the Constitution that has been violated and the manner in which it has been violated."**

Mr. Langat submitted that where there is a remedy in civil law, a party should pursue that remedy appropriately as not all ills in the society should attract a constitutional sanction and relied on the case of **Bernard Mura Vs.Fineserve Africa Ltd & 3 others [20151 eKLR** that:-

> **"Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first"**

Further counsel cited the case of **Uhuru Muigai Kenyatta V Nairobi Star Publications Limited (2013) eKLR** cited by Githua J. in **Veronica Sum v National Bank Of Kenya Ltd [2016] eKLR** where Lenaola J. while applying the holding in the **Re application by Bahadur (1968) LR C (cost) 297** held that;

> **"where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (Supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction ….".**

Mr Langat listed the following issues for determination

> **a. Whether the petition meets the legal threshold on constitutional litigation.**
>
> **b. Whether the Petitioners have a remedy in civil law on the alleged acts forming the cause of action in this petition.**
>
> **c. Whether the Petitioner is entitled to the reliefs sought.**

On the first issue as to whether the petition meets the legal threshold on constitutional litigation, counsel submitted that the Petition does not raise any constitutional issues that cannot be addressed by the statutory provisions on Way leaves and Compulsory Acquisition Act if the Petitioners can be able to prove that the Respondents intend to construct a sewer way leave or compulsorily acquire their land under the Land Act, 2012 and the Land Acquisition Act, Cap 295.

Further that the although the Petitioners have listed various articles of the constitution as entitling them the locus standi to file the petition and seek the exercise of this court's judicial authority over the Respondents, the only Articles alleged to have been violated are Articles 26 (1), 40, 47, 60 (1) & 67(1) and some of the Articles alleged to have been infringed have nothing to do with the petitioners case.

Counsel further submitted that the particulars of violations of the constitutional provisions by the Respondents are not pleaded anywhere in the Petition and neither is any proof of violation offered through a proper Supporting Affidavit and the Respondents hence the respondents are at a loss what to respond to.

Counsel cited the case **of Leonard Otieno Vs. Airtel Kenya Limited [2018]eKLR** cited with approval by Muchemi J in **David Gathu Thuo v Attorney General & another [2021] eKLR**, that proof of the alleged violations of the constitutional provisions enumerated in a constitutional petition is paramount.

In Leonard Otieno's case (supra) Mativo J.held that;.

> **"It is fundamental principle of law that a litigant bears the burden (or onus) of proof in *respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt***

to do so would trivialize the constitution an inevitable result ill ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses. "

Muchemi J. while agreeing with Justice Mativo's holding above on her part stated:

> **"Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. "**

Counsel submitted that the Petitioners Affidavits in support of the Petition offend the provisions of Sections 2 (1) and Sections 4 (1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya as the oath is indicated to have been taken before a Law firm and not before a person practicing as an advocate who has been duly appointed by the chief Justice to take oaths as provided below. section 2(1)

> **"The Chief Justice may, by Commission signed by him, appoint persons being practicing advocates to be Commissioners for Oaths, and may revoke such appointment. "**

Section 4(1) :

> **''A Commissioner for Oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya…."**

Counsel stated that both Affidavits filed together with the Petition and the Supplementary Affidavit sworn on 30[11]- April 2021 have been commissioned by Ntenga Marube & Co. Advocates, which offend the express statutory legal provisions and the same ought to be struck out and any factual depositions thereto ignored.

Counsel relied on the case of **David Wamatsi Omusotsi v Returning Officer Mumias - East Constituency & 2 others [2017] eKLR** where Njagi J while striking out Affidavits that had been commissioned before a law firm and not a commissioner for oaths stated:

> **"In the foregoing the supporting affidavit of the petitioner and the annexures in form of affidavits are not commissioned by a commissioner for oaths. The documents are not affidavits *as known in law. It is the commissioning of an affidavit that distinguishes it from other documents. It would be an abuse of the process of the court to allow these kind of documents to remain in record to form the basis of the case for the petitioner. The documents are thereby* struck out and expunged from the record. "**

The learned judge went on further to state:

> **"An affidavit clearly declares before whom it is sworn. The petitioner did not appear before anybody to swear the affidavit. He did not demand to see the person who was to commission the affidavits. "**

Mr. Langat also submitted that the Supreme Court while addressing the issue of compliance with the provisions of the Oaths and Statutory Declarations Act in the case **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** held that:

> **"Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths. We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal *requirements for the making of an affidavit. Hence it has no legal value in the matter before us. "***

It was counsel's submission that lack of compliance with the provisions of the Oaths and Statutory Declarations Act is not a technical issue that can be cured by article 159 (2) (d) of the constitution as was held in the case of **Zacharia Okoth Obado vs Edward Akone'o Ovugi & 2 others (2014) eKLR** that:-

> **"Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from *the court. "***

Counsel therefore urged the court to find that the petition does not meet the threshold on constitutional litigation for lack of clear particularity and for its failure as regards the burden of proof.

On the second issue as to whether the Petitioners have a remedy in civil law on the alleged acts forming the cause of action in this petition, counsel submitted that not every ill in the society should attract a constitutional sanction and that since remedies on compulsory acquisition and creation of Wayleaves by government institutions are available under the Land Act, 2012 and under the Compulsory Acquisition Act, the Petitioners ought to have exhausted all those remedies before they could approach the court's jurisdiction as a constitutional court.

On the third issue as to whether the orders sought should be granted, counsel submitted that the 1st Respondent's Wayleave for a sewer line was constructed way back in the year 2005, hence the 1st Respondent ought not be restrained from carrying out maintenance, inspection and cleansing of the sewer line for benefit of the whole public to prevent circumstances where members of the public will be exposed to risk of

exposure to diseases.

Counsel therefore urged the court to dismiss the petition with costs.

The 2nd respondent did not file any response to the petition.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the petition meets the threshold of a petition, whether the petitioners' rights have been infringed and whether they are entitled to the orders sought. There are laid down principles on the threshold petitioners must adhered to when filing constitutional petitions. The **Anarita Karimi** and **Mumo Matemu cases** discussed such thresholds.

The **Mumo Matemo case** *(supra)* reaffirmed the principle in the ***Anarita Karimi case*** when the Court at paragraph 44 of the judgment stated as follows: -

> **"(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent"**

Further at paragraph 87(3) in the same judgment the Court in its findings stated as follows:-

> **"It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."**

The Petitioners claim that the 1st Respondent constructed sewer lines on their land without following the due compensation process as outlined in law but in the Petitioners' Supplementary Affidavit sworn on 27th May 2020, have made allegations that the Respondents are contemplating the construction of sewer lines on their land without following due process. This makes the petition unclear of the facts and the violations that they are claiming to have been infringed upon by the respondents.

When claiming an infringement on right the same should have happened and not a situation which you anticipate to happen. Black's Law Dictionary defines violation as "*Injury; infringement; breach of right, duty or law;"* The Petitioners must set out their claims seeking redress for violation of their constitutional rights in a clear and precise manner. This is not the position in this case. It is not clear which rights the petitioner is claiming to have been violated or they are claiming for future violation of rights as the affidavits are contradictory.

The 1st Respondent's submitted that the sewer lines in issue were constructed in the year 2005 and that their attempt to carry out routine maintenance of the said sewer line caused the Petitioners to file this Petition. Is the issue lack of public participation or is it compulsory acquisition without prompt compensation? Has the sewer line been constructed or it is yet to be constructed. Courts do not give orders in vain and the pleadings must be clear and be proved to avoid the court issuing orders that might aid illegality or injustice.

Article 22 of the Constitution entitles the petitioners to sue if their rights have been infringed, however, whether the petitioners' rights have been infringed, it should be noted that the petitioners are not clear and precise on what rights they are claiming to have been infringed and courts do not guess what is in the petitioners' mind or what they meant to state/ought to have stated.

In the case of **JAPHETH ODODA ORIGA V VICE CHANCELLOR UNIVERSITY OF NAIROBI & 2 OTHERS [2018] eKLR** the Court stated as follows:

> **"It is a principle in Constitutional Litigation that a party seeking reliefs through a Constitutional Petition on the basis of violation of the Constitution, Constitutional Rights and fundamental freedoms, the Petitioner must plead with a higher degree of precision; show constitutional or fundamental freedoms violated, the manner of violation, the Constitutional provision in question or violated and the jurisdictional basis for the litigation…"**

Similarly, in the case of **MANASE GUYO & 260 OTHERS V KENYA FOREST SERVICES [2016] eKLR** the Court stated as follows:

> **"To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of the Constitution they belief (sic) to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in LYOMOKI AND OTHERS VS. ATTORNEY—GENERAL [2005] E.A. 127, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the Petitioner or the Plaintiff to establish a prima facie case, and thereafter the burden shifts to the Respondents to justify the limitation to those rights".**

It is not enough for the petitioners to cite articles of the Constitution and not relate it to the infringement complained of against the

respondents.

In the case of **MUEMA MATIVO V. DIRECTOR OF CRIMINAL INVESTIGATION & 2 OTHERS; HFC LIMITED (INTERESTED PARTY) [2021] eKLR** the Court observed that claims that are constitutional in nature, require the Court's interpretation of a constitutional provision as follows:

> **"*In Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385, Nyamu, J*** held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193, Court the expressed itself as hereunder:

> **"We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed, there is a wealth of authorities on the point… Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry… It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters… In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one… The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

The petition as pleaded does not plainly disclose any breach of fundamental rights therefore there cannot be any basis for an inquiry. The issues to be determined by a court flows from the pleadings and not anywhere else.

Further the sewer lines are of public interest which benefits the larger public including the petitioners. In the case of **Kenya Guards Allied Workers Union v Security Guards Services & 38 others, Misc. 1159 of 2003** where Justice Nyamu (as he then was) expressed himself as follows:

> **"Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts…"**

Why would the petitioners not want to benefit from the sewer lines which serve the public at large? If the wayleaves for the construction of the sewer lines were gotten in 2005 and currently they are just carrying out maintenance jobs, where were the petitioners when the same was done?

In the case of in the case of **Veronica Waithira (Trustee of Inter Christian Churches and 3 Others) vs Kenya National Highways Authority [2014] e KLR**, the learned Judge stated that;

> **"The wider public good and interest would militate against the Court granting an injunction in favour of the Plaintiffs who only constitute a small segment of the public …"**

I have considered the petition, the submissions by counsel and the relevant judicial authorities and find that the petition lacks merit and is dismiss with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF OCTOBER, 2021

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.