



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 3 OF 2020

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA).....RESPONDENT

COUNTY GOVERNMENT OF

NAKURU.....INTERESTED PARTY

AFRICAN CENTRE FOR RIGHTS AND

GOVERNANCE (ACRAG).....EXPARTE

J U D G M E N T

1. This judicial review is an off shoot from the determination of Nakuru ELC Petition No.50 of 2012 ***Africa Centre for Rights and Governance (ACRAG) & 3 others -vs- Municipal Council of Naivasha*** in the sense that it seeks the implementation of the decree issued in the said petition. The exparte applicant was granted leave and filed the substantive Motion dated 9th December 2020 on 18th December 2020. The exparte applicant at the leave stage had instituted the suit only against the National Environment Management Authority (NEMA) as the Respondent. After reviewing the pleadings, it was evident that the County Government of Nakuru was a key participant as it operated the dump site on land parcel **(Naivasha) Maraigushu Block 11/4 (Karai)**. The court suo moto directed that the County Government of Nakuru be joined in the proceedings as an interested party.

2. The exparte applicant in the application seeks the following orders: -

(a) An order of mandamus compelling the Respondent to issue an Environmental Restoration Order stopping the County Government of Nakuru and/or any other person or entity from dumping waste on Naivasha/Mairagushu Block 11/4 (Karai) and restore Naivasha/Maraigushu Block11/4 (Karai) to its original stated in accordance with the orders arising from the decree made on 31st May 2017 in Nakuru ELC Petition No.50 of 2012. African Centre for Rights and Governance (ACRAG) & 4 others -vs- Naivasha Municipal Council (Now Nakuru County Government).

(b) That the respondent and the interested party pay the exparte applicant's costs of the application.

3. The application is premised on the grounds set out on the body of the application and on the verifying and supplementary affidavits sworn by Zachary Mokuu Nyang'au. The respondent and the interested party filed replying affidavits in opposing the application for an order of mandamus.

4. The brief background to the matter is that the interested party (Naivasha Municipality Council) over a long period of time had been using land parcel **Naivasha /Maraigushu Block 11/4 (Karai)** as a dump site for disposal of solid waste generated within the Naivasha Municipal Council. In doing so the Municipal Council was not being sensitive to environmental concerns as relates to clean and healthy environment. That prompted the applicant to institute against Naivasha Municipal Council, **Nakuru Petition No. 50 of 2012** praying for inter alia a declaration that their rights to a clean and healthy environment guaranteed and protected under Article 42 of the constitution had been violated.

5. The court after hearing the petition affirmed vide its judgment delivered on 31st May 2017 that the petitioners rights to a clean and healthy environment had been violated by Naivasha Municipal council in the manner they managed and operated the dump site facility. The court in its judgment issued orders/directions that were to be implemented progressively. To contextualize the instant application it is necessary to set out in extensio the decree issued by the court on 8th June 2017 arising from the judgment delivered on 31st May 2017:-

- 1. That a declaration be and is hereby issued that the petitioners' rights under Article 42 of the Constitution have been violated by the respondent.*
- 2. That the respondent, now the County Government of Nakuru, be and is hereby ordered to engage personnel and measures to immediately collect all plastic bags littering the area and to ensure that on a daily basis, plastic bags will continue being put aside for incineration or other forms of destruction so that the area is not prone to these.*
- 3. That the County Government of Nakuru be and is hereby ordered to forthwith, it intends to continue using the site as a dump to apply for the requisite licence from the National Environment Management Authority (NEMA), as required under Section 87 and 88 of the Environment Management and Coordination Act (EMCA) and such application to be made within 14 days of the date of judgment.*
- 4. That if the application in Order 3 above is made the National Environment Management Authority, be and is hereby ordered to proceed to assess the application having in mind all requisite criteria and either decline or permit it with the necessary conditions for operations.*
- 5. That the National Environment Management be and is hereby directed to ensure that a thorough Environment Impact Assessment (EIA) is done with a consideration of among other things, alternative site all necessary mitigation measures including fencing of the site and annual auditing.*
- 6. That it be and is hereby directed that the option of having a landfill other than an open dumpsite should also be considered.*
- 7. That the National Environment Management Authority be and is hereby ordered to consider such application if made and issue the appropriate directions within 45 days of receipt and report to Court.*
- 8. That it be and is hereby ordered that if no application to operate the site is made within 14 days as ordered it Order 3 above, then it will be clear that the County Government of Nakuru no longer wishes to have the same site utilized as a dumpsite and must then stop any further dumping of waste on the site, and proceed to restore it to its original state and such restoration must be done within 90 days of the date of judgment.*
- 9. That it be and is hereby ordered that this judgment be served upon the National Environment Management Authority so that they can proceed to ensure compliance with the orders issued herein and to report to Court as ordered.*
- 10. That it be and is hereby ordered that this judgment be served upon the Cabinet Secretary of the Ministry of Environment and Natural Resources and the Council of Governors to consider issues of policy compliance with Environment Management and Coordination Act on the subject of solid waste management, cooperation, funding and all other matter touching on the topic.*
- 11. That the respondent (County Government of Nakuru) be and is hereby ordered to pay the petitioners of this petition.*

6. It is the exparte applicant's position that the National Environment Management Authority (NEMA) who were required to oversee the implementation of the judgment by the interested party failed to do so necessitating the institution of the present application for an order of mandamus. The respondent was not a party in the petition but the court ordered the judgment to be served upon NEMA, the cabinet secretary Ministry of Environment and Natural Resources, and the Council of Governors. The petitioners contended that the respondent (NEMA) though having been served with the judgment and being statutorily vested with the mandate and duty to exercise general supervision and co-ordination over all matters relating to the environment had failed, refused and/or neglected to discharge its statutory mandate to protect the environment. That despite the delivery of the judgment over 4 years ago, the interested party continued to operate the dumpsite illegally. The petitioners contended that unless the court intervened, the environment will continue to be degraded to their detriment and that their right to a clean and healthy environment guaranteed under the constitution will continue to be violated.

7. The Respondent and the interested party responded to the application vide their respective replying affidavits. The Respondent filed a replying affidavit dated 10th November 2020 sworn by Zephania Ouma, Ag Director in charge of compliance and Enforcement of the Respondent. The Respondent acknowledged having been served with the court decree in Nakuru, ELC Petition No. 50 of 2012 and affirmed that following being served with decree NEMA issued an Environmental Restoration Order on 25th September 2017 to the interested party in compliance with the court decree and thus asserted it would be superfluous to issue another restoration order against the Respondent. The respondent averred that a further restoration order and/or an order for the immediate closure of the dump site would not have the desired effect and opined that a gradual implementation of the court decree in Nakuru ELC petition No.50 of 2012 would best serve the interest of all concerned parties.

8. The respondent asserted that there had been actions taken to ensure compliance with the court decree such as the issue of an Environmental Restoration Order on 25th September 2017 and further engaging with the interested party and entering into a compliance plan "ZO3(b)" with the interested party. The respondent stated that their intervention had significantly improved the operations at the Kayole/Karai dumpsite. The respondent averred that its role was that of supervising and Co-coordinating environmental management which they have not reneged from. The respondent hence contended the orders sought by the applicant against it are not merited.

9. The Interested Party swore a replying, affidavit through James Kimotho Mungai the incharge of solid waste Management for the interested party. The interested party stated that they initiated and took measures to comply with the court decree. They engaged personnel to clear the littered areas around the dumpsite; engaged private waste service providers to ensure solid waste management was appropriately handled and managed in all the 23 Zones into which they mapped Naivasha sub county. The respondent stated that the interventions taken following the judgment had significantly improved the solid waste disposal and management at the dump site.

10. The interested party averred that as directed in the judgment they initiated the process to have the dumpsite licensed by NEMA pursuant to Section 87, 88 and 89 of the Environmental Management and Co-ordination Act (EMCA). The interested party stated it submitted the Environmental Impact Assessment (EIA) to NEMA in January 2018 for approval and the process was ongoing as confirmed by NEMA vide its letter of 22nd January 2018 (JKM2”).

11. The interested party asserted that they have since the delivery of the judgment co-operated with the Respondent in seeking compliance with the directions of the court as per the court’s judgment of 31st May 2017. The interested party stated they had allocated resources in the sum of **Kshs.8 million** in securing the dumpsite, rehabilitating the access road, erecting a gate and constructing sanitary facilities and an office unit in an effort to attain the standards set in the National solid waste management strategy of 2015. The interested party thus maintained it has endeavored to have the court decree implemented and that it was not true that it had disregarded and/or disobeyed the court decree. The interested party urged for the dismissal of the exparte applicant’s application.

12. The parties argued the application by way of written submissions. The exparte applicant filed their submissions on 16th March 2021, the respondent on 30th August 2021 and the interested party on 8th September 2021. The exparte applicant’s position is that the respondent and the interested party had failed and/or neglected to have the judgment of the court given on 31st May 2017 complied with and that having regard to the circumstances an order of mandamus was appropriate. The exparte applicant relied on the cases of **Shah -vs- Attorney General (No.3) (1970) EA 543; Kenya Examination Council -vs- Republic Exparte Geoffrey Gathenji Njoroge & 9 others (1997 eKLR**, and **Rep -vs- Attorney General & Another Exparte Ongata Works Ltd (2016) eKLR** all of which discussed the circumstances under which an order of Mandamus may issue. In the Kenya National Examination Council case (supra) the court of Appeal referred to **Halsbury’s Laws of England, 4th Edition Volume 1 at page 111 paragraph 89** where mandamus is defined thus: -

“The order of mandamus is of a most extensive remedial measure, and is, in form, a command issuing the High Court of Justice, directed to any person, corporation or inferior Tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual”.

13. The court of Appeal in the same case stated as follows: -

“ – an order of mandamus will compel the performance of a public duty which is imposed on a person or body if persons by a statute and where that person or body of persons has failed to reform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

14. The applicant submitted that the respondent has a duty of issuing to the interested party an Environmental Restoration Order stopping the dumping of waste at the impugned dumping site and to seek that the dumping site be restored to its original state in compliance with the orders arising from the decree of the court in Nakuru ELC Petition No. 50 of 2012. The applicant argued that the respondent failed to honour the terms of the decree that were clearly expressed and contended that only an order of mandamus issued against the respondent would yield the desired results. The applicant reiterated that the interested party did not obtain a licence as directed by the court and was therefore operating the dumpsite unlawfully and that constituted impunity and the respondent had failed to perform a statutory duty conferred by statute to ensure that the dumpsite was being operated within the law. The applicant averred that the inaction by the respondent was detrimental to the applicant’s rights and the other citizenry, to have their right to clean and healthy environment protected.

15. The Respondent through its submissions has endeavored to illustrate that the respondent had indeed taken action to have the court decree complied with.

16. The respondent submitted that no factual or legal basis existed to warrant an order of mandamus against the Respondent and in favour of the exparte applicant. The respondent argued that the exparte applicant had failed to demonstrate that the Respondent had not taken any action in the exercise of its mandate in regard to the Karai dumpsite following the issue of the decree in Nakuru ELC Petition No.50 of 2012. The respondent submitted that for the relief of mandamus to be granted the applicant must firstly, satisfy the court there had been abuse of discretion of legal duty imposed by law; secondly, the public officer had unreasonably neglected to perform that duty; and thirdly, there was no alternative remedy to redress the violation or infringement of the right (see the case of **Republic -vs- Governor Kijiando County ex-parte Gabriel Gachigo Marigi (2018) eKLR**.

17. The respondent has contended that an order of mandamus cannot issue against it as it complied with the judgment of the court by submitting the court mandated report to the court, and further by issuing the Restoration Order which was issued after a ground inspection of the site by the Respondents inspectors on 13th July 2017, and inter alia it directed the interested party to act in accordance with the law thus: -

(a) To apply for an EIA License for the dump site.

(b) To apply for waste transportation license for all their waste transportation trucks;

(c) To commence the spreading of waste compaction and covering with day soil;

(d) To fence the dumpsite and deploy guards to man it 24 hours daily to curb vandalizing.

(e) To identify the content of all incoming waste and to weigh all the trucks before dumping; and

(f) To ensure that only authorized personnel were allowed at the sump site.

18. The Respondent contended that by issuing the restoration order, it was a manifestation that it had not unreasonably neglected to perform its statutory duties and the issue could be one of the interested party's failure to comply with the terms/conditions of the Restoration Order. The Respondent further submitted that as it had demonstrated that it indeed complied with the decree of the court when it issued the Environmental Restoration Order of 25th September 2017, the issue of an order of mandamus against it would be superfluous and that the *ex parte* applicant's application was an abuse of the court process.

19. Finally, the Respondent submitted that the order sought by the *Ex parte* Applicant may also be issued at the discretion of the court under Section 111 of the Environmental Management and Coordination Act (EMOA) but such an order to be directed against the interested party being the agency that is operating and managing the dumpsite. However, the Respondent acknowledged that would lead to the existence of two Restoration Orders – one by NEMA and the other by the court which could create confusion.

20. The interested party in their submissions have stated that the dumpsite served the entire Naivasha sub country and that they in 2018 initiated a EIA process to have the dump site licensed and approved by the respondent. The interested party has urged the court to adopt a graduated approach in dealing with dumpsite. The dumpsite being the only one within Naivasha, its sudden closure would pose serious challenges to solid waste disposal. The interested party indicated it was acting in collaboration with the respondent in having the dumpsite meet the National operating standards of dump sites.

21. The parties are all in agreement that the judgment in Nakuru Petition No.50 of 2012 set out elaborate terms and conditions to be adhered to for the Karai dumpsite to continue in operation by the interested party. NEMA though not a party to the petition was thrust at the center being the lead Agency, in environmental matters charged with the duty of general supervision and co-ordination over all matters relating to the environment. The court recognized that there were some specific actions that needed to be undertaken if the dumpsite was to be made compliant and to ensure the right to clean and healthy environment was to be protected for the petitioners and other members of the public.

22. There was what I would describe as uninspired, timid and/or meek intervention by the Respondent in seeking to have the Court decree implemented and/or complied with. For instance, the interested party was required to apply for a licence from NEMA within 14 days of the judgment date and NEMA was to consider such application and to issue appropriate directions within 45 days and to report back to the court. If the application for a license was not made within 14 days, the interested party was to be deemed as not interested with continuing operating the dumpsite and the same was to be restored to its original state within 90 days of the date of judgment.

23. Though it is not clear when the interested party made an application for a license there is an acknowledgement of receipt by NEMA vide a letter dated 22nd January 2018 that it had received the Environmental Impact Assessment (EIA) project report from the Interested Party. There is also an uncontroverted Environmental Restoration Order for the Kayole Dumpsite (the subject dumpsite in the petition) issued by NEMA to the Interested Party dated 25th September 2017. The Restoration Order was issued following an inspection of the site by the Respondent's inspectors on 13th July 2017. The Restoration Order spelt out what the Interested Party required to do for the dumpsite to be compliant though apparently no time lines were given for compliance with the terms of the Restoration Order. There does not appear to have been any monitoring and/or follow up to confirm compliance with the Restoration Order by the Respondent. Equally even though the interested party applied for a license for the dump site and submitted an Environmental Impact Assessment (EIA) project report way back in January 2018 it is not clear what became of the application for the licence. It is not possible that for over 3 years now, the Respondent has not evaluated the EIA report to determine whether or not to issue the licence.

24. The judgment by Munyao, J in Nakuru ELC Petition No.50 of 2012 acknowledged that the dumpsite was in a poor state and considering the dumpsite was the only one that was serving Naivasha Municipality, the Judge came up with a cocktail of orders some of which were to be implemented immediately on a short time basis and others were to be implemented gradually. The intent was to have a dumpsite that met health standards and hence to ensure the citizen's rights to a clean and healthy environment was safeguarded as envisaged under Article 42 of the constitution. The orders that ought to have been implemented gradually such as obtaining approval and license for the dumpsite and consequential monitoring of compliance on the part of the interested party appear to have largely been ignored by the Respondent. The Respondent definitely took its eyes off the ball and the matter was allowed to glide at its own pace with the result that the full implementation of the judgment as remained in limbo. Indeed, one is not able to ascertain the status of the implementation.

25. The environmental concerns raised by the petitioners in Nakuru Petition No. 50 of 2012 were well articulated and analyzed in the judgment rendered by Munyao J therein and I need not regurgitate the same here. The court found and held the facility in the condition it was posed a threat to a clean and healthy environment and that its operations were illegal. It is against those findings the court in the judgment made the orders that it deemed appropriate to remedy what was already a bad situation.

26. In the instant application, the applicant in essence seeks the enforcement of the said judgment against the Respondent by way of an order of Mandamus. The applicant seeks an order of mandamus compelling the respondent to issue an Environmental Restoration Order stopping the interested party from dumping waste at the Kayole/Karai dumpsite and to restore the same to its original state in terms of the court decree in Nakuru ELC Petition No.50 of 2012. In the literal sense the applicant seeks the closure and the restoration of the site to as near as possible to its original state. The court in its judgment in the petition found this was the only dumpsite within the Naivasha area and that its closure was bound to have serious negative implications as the interested party did not have an alternative dumpsite where they could dispose the solid waste. There is no evidence that this position has changed. For the interested party to retain the operation of the dumpsite, the same must be environmentally safe and must not be a threat to a clean and healthy environment. The residents of Naivasha and indeed all Kenyans are entitled to have a clean and healthy environment as provided for under Article 42 of the Constitution. As per the judgment in the petition the court held that this Constitutional provision had been violated and the court issued measured orders which if fully implemented would have redressed the situation.

27. With respect, the Respondent exercised its mandate even with the force of the court decree halfheartedly and it's no wonder the applicant had to seek the intervention of the court. The Respondent failed to follow through the compliance with the restoration order it issued against the interested party on 25th September 2017 and further slept on the application for EIA licence for the dumpsite by the interested party otherwise the situation ought to have markedly improved if the respondent acted proactively and undertook environmental monitoring as envisaged under sections 68 and 69 of EMCA.

28. I do not consider that issue of a second restoration order by the respondent against the interested party would be appropriate. The respondent having issued the restoration order dated 25th September 2017 against the interested party, it was duty bound to superintend and ensure the Restoration Order was complied with and if necessary employ such sanctions as may have been appropriate in accordance with the law in case of failure to comply. The respondent simply does not appear to have done any follow up to ensure there was compliance with the Restoration order. I find both the Respondent and the interested party at fault in the implementation of the judgment in Nakuru ELC Petition No.50 of 2012. However, rather than direct the issuance of a fresh Restoration Order by the Respondent, I direct that the Restoration Order issued by the Respondent to the interested party on 25th September 2017 be deemed to have been issued on the date of the delivery of this judgment the 16th December 2021, and consequently issue the following directions/orders: -

1. That the interested party shall within 21 days from the date of this judgment prepare a status report to be filed in court respecting compliance with terms of the Environmental Restoration Order dated 25th September 2017 detailing the actions undertaken and when.

2. The Respondent (NEMA) to inspect the dump site within a period of 30 days from the date of this judgment and to file a report in court respecting the state of the dumpsite having regard to the Environmental Restoration Order dated 25th September 2017 setting out what has been done and what requires to be done.

3. The Respondent (NEMA) to consider and evaluate the EIA project report submitted by the interested party and determine whether to issue or not to issue a license and if a license is issued, the conditions to attach to the license within the next 60 days from the date of this judgment. In any event NEMA to cause to be filed in court a copy of its determination on the application.

29. The court is cognizant of the fact that on the delivery of the judgment it ought to become *functus officio* and not entitled to take any further proceedings on the matter. However the court considers that this is a matter that involves and touches on the degradation of the environment. Article 69 (2) of the constitution places a duty on every person to co-operate with all state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. The court ought in my view to play a pivotal role in ensuring conservation of the environment and fostering sustainable development. In the instant matter since a competent court had decreed there was violation of Article 42 of the Constitution as pertains to the right to a clean and healthy environment and the court is through this judicial review being asked to grant orders that may necessarily invite supervision by the court in their implementation, the court considers this to be an appropriate case to undertake post judgment supervision in order to attain compliance.

30. I have given the final directions/orders herein above and the only issue that remains is one of costs. The applicant has been successful in the application. I have faulted both the respondent and the interested party for their inaction in the implementation of the decree in Nakuru ELC No.50 of 2012. I order that the respondent and the interested party will bear the costs of the application which I award to the ex-parte applicant on 50-50 basis.

31. As I have indicated there will be post judgment court supervision of compliance. I direct that the matter be mentioned on 15th March 2022 to confirm compliance and all parties to attend.

JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 16TH DAY OF DECEMBER 2021.

J M MUTUNGI

JUDGE