



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 8 OF 2021

(FORMERLY HIGH COURT PETITION NO. E496 OF 2021)

IN THE MATTER OF ARTICLES 21, 22, 23, 165 & 258 B

OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 10, 35, 42 69,174(c),

196 (1)(b),201 (a), & 232 (1) (f) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTE ROF PROVISIONS OF SECTIONS 125(2)

OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF REGULATION

17 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION

(IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

BETWEEN

COMMUNIST PARTY OF KENYA.....PETITIONER

VERSUS

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT

DIRECTOR -GENERAL OF NAIROBI METROPOLITAN SERVICES....2ND RESPONDENT

COUNTY ASSEMBLY OF NAIROBI.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

RULING

Introduction

1. The Petitioner filed the application dated **22nd November 2021** seeking for conservatory orders stopping all renovations, cutting down of trees and works on **Uhuru Park** (hereinafter the “**Park**”) by the 1st and 2nd Respondents either acting by themselves, their agents or any other persons acting under their instructions. The application has been brought on several grounds set out on the face thereof and on the supporting affidavit of **Booker Ngesa Omole** the current Vice Chairperson and National Organizing Secretary of the Petitioner.
2. The Petitioner herein is a registered Political Party in Kenya, whose objectives include the defence of the progressive gains made under the Constitution of Kenya 2010, and mobilizing Kenyans towards a future that is based upon sustainable development.
3. The 1st Respondent is the Nairobi Metropolitan Services, established under **Article 187 of the Constitution of Kenya** where part of the functions of the County Government of Nairobi were transferred to the National Government and are effected through the Nairobi Metropolitan Services.
4. The 2nd Respondent is the Director General of the Nairobi Metropolitan Services and is mandated to oversee and manage the functions of the Nairobi Metropolitan Services.
5. The 3rd Respondent is the County Assembly of Nairobi established under **Article 176 of the Constitution of Kenya** and is mandated to legislate, appropriate budgets and oversight the County Executive of Nairobi.
6. The 4th Respondent is the principal legal advisor of the government of Kenya.
7. NEMA which is the interested party is the Principal Government Agency on environmental matters. It exercises general supervision and co-ordination over all matters relating to the environment within the Republic of Kenya.
8. Pursuant to the directions of this Court issued on **29th November 2021**, it was directed that the said application be served upon the Respondents for consideration and further directions on **6th December 2021**.
9. On **6th December 2021**, **Mr. Nelson Havi Advocate** and **Mr. Benedict Wachira Advocate** attended and made oral submissions for the Petitioner while **Mr. Ngararu Maina Advocate** attended on behalf of the Interested Party. There was no representation from the 1st, 2nd, 3rd and 4th Respondents despite being served and notified of the proceedings. The Court was also furnished with a copy of the affidavit of service dated and filed on **2nd December 2021** which indeed confirmed service.

Petitioner’s case

10. It was pleaded that on or about the **29th September 2021**, the Park was closed from the public by the 1st Respondent who also failed in its constitutional mandate to involve the public in the making of such decision.
11. It was contended that the Park is the largest open green space and recreational park in Nairobi County and was opened to the general public in **1969**.
12. Additionally, it was contended that the Park is monumental and historic to Kenya as it symbolises popular struggles against dictatorship, struggles for democracy, struggles for conservation of the environment among other historic events including being the venue where the **Constitution of Kenya 2010** was promulgated as the highest law of the Country.
13. According to the Petitioner, the Park is also used by Kenyans of all walks of life as a popular resting and recreation place and it also hosts many petty traders who earn their living from conducting their business in the Park.
14. The Petitioner also averred that there was interference and destruction of the flora and fauna at the park, the historic pavilion had been demolished, the grass had been replaced with cement blocks and that there were massive excavation works currently being undertaken at the Park for the purposes of putting up a hotel. The Petitioner also rekindled the struggles and efforts that had been previously undertaken by the late **Prof. Wangari Maathai** in successful stopping the construction of a 60-storey Kenya Times Media Trust Complex at the Park.
15. It was also disclosed that the 3rd Respondent had on **23rd September 2021** moved a motion titled “Renovation of Uhuru Park and Central Park” which motion involved closing down the Park for renovations. The motion was subsequently adopted on **28th September 2021** without any public participation and contrary to **Regulation 17 of the Environment Management and Coordination (Impact Assessment and Audit) Regulations, 2003**.
16. The Petitioner also pleaded that the project did not adhere to the principles of public finance enshrined under **Article 201 (a) of the Constitution** and is contrary to the provisions under **Section 125 (2) of the Public Finance and Management Act** that requires the County Executive Committee member for finance to involve the public in all finance matters, which obviously includes expenditures such as the ones concerned with the project. Given that there was no public participation as anticipated by the above cited legal provisions, it was the

Petitioner's case that the 1st, 2nd and 3rd Respondents actions were in total contravention of the Constitution and the Statute.

17. In urging the court to grant a conservatory order, the Petitioner argues that the people of Kenya stand to suffer immensely if the construction works are not stopped and it is imperative that this Court intervenes and grants the orders sought.

1st, 2nd, 3rd and 4th Respondents' case

18. The 1st, 2nd, 3rd and 4th Respondent despite being served and notified of the Court's directions earlier issued, failed to file any response or submissions in respect to the application.

The Interested party's case

19. Counsel for the interested party **Mr. Maina Advocate**, while supporting the application submitted that no Environmental Impact and Social Assessment report had been submitted to NEMA for consideration in respect to the said project and as such no Environmental Impact and Social Assessment licence had been issued.

Issues and determination

20. The Court has considered the substance of the Petition, the grounds upon which the application for a conservatory order is based, the Petitioner's affidavit and oral submissions in support of the application, the applicable constitutional and legal framework on the environment and the existing local and international jurisprudence. The main issue therefore is whether the Petitioner herein has established a prima facie case that warrants the grant of conservatory orders.

21. This court is urged to grant a conservatory order within the framework of **Article 23 of the Constitution**, stopping all renovations, cutting down of trees and any works at the park pending the hearing and determination of this Petition. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of **Article 23 of the Constitution** are well settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.

22. The Supreme court of Kenya has clearly set out the prerequisite requirements for granting of conservatory orders. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, the Supreme Court clearly outlined that: -

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

23. In the case of **Platinum Distillers Limited vs. Kenya Revenue Authority [2019] eKLR**, it was held that: -

“The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.”

24. Similarly, in **Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others [2017] eKLR** that:

“The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

25. Section 58(1) and (2) of Environmental Management and Coordination Act (EMCA) provides as follows:

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.

Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 (EMCA Regulations) provides for public participation as follows:

During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

26. The Second Schedule of EMCA as amended vide Legal Notice No. 31 of 30th April 2019 lists activities for which an environmental impact assessment study is required unless exempted by the National Environment Management Authority (NEMA). They include projects for urban development including the establishment or expansion of recreational areas in National Parks, National reserves, forests, nature reserves and any areas designated as environmentally sensitive. There is no doubt that the development being carried out by the 1st and 2nd Respondents being a significant public Park falls under the Second Schedule of EMCA and as such the same requires an environmental impact assessment study prior to its commencement.

27. The evidence before this court shows that the Respondents did not only breach the provisions of **Section 58 of the Environmental Management and Co-ordination Act**, but also **Article 69(1) (d) of the Constitution** which provides that the State shall encourage public participation in the management, protection and conservation of the environment. As was held in the case of **Ken Kasinga vs. Daniel Kiplagat Kirui & 5 others (2015) eKLR**, where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that, there would be greater harm to the environment.

28. In addition to the above domestic laws which the Respondents breached, **Principle 10 of the Rio Declaration on Environment and Development (1992)** was also not complied with. The said principle states as follows:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process...”

29. By virtue of the provisions of **Article 2(5) of the Constitution**, the **Principles in the Rio Declaration on Environment and Development** are binding on the Respondents. The 1st and 2nd Respondents should have complied with both the domestic and international law on involving the public fully, and giving the said public information about the project.

30. In **Mui Coal Basin Local Community & 15 Others v. Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR**, the court relied on the definition of public participation provided by **Principle 10 of the Rio Declaration on Environment and Development, 1992** by stating that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

31. Equally in the case of **Mohamed Ali Baadi & others v. Attorney General & 11 others [2018] eKLR**, the Court addressed public participation by stating as follows:

“We are bound to review the evidence and determine whether there was adequate notification, education and information, review and reaction and, finally, consultation, dialogue and interaction. The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then per se there is no adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance”.

32. In the instant Application, the Respondents have not placed any evidence before the court showing that they have carried out a study on the likely impact to the environment. Environmental Impact Assessment Study is mandatory for the project being undertaken herein by the 1st and 2nd Respondents unless they are exempted. There is no evidence that the Respondents' project has been exempted from Environmental Impact Assessment Study. The Interested party confirmed as much that no such report had been submitted for consideration and as such no EIA licence had been issued.

33. In the absence of Environmental Impact Assessment Study that would have highlighted the impact of the activities currently being

undertaken at the Park, the Petitioner's contention that the activities are likely to have negative environmental impact towards the conservation of the park and the environment is not farfetched.

34. Due to the foregoing, I am satisfied that the Petitioner has established a prima facie case against the Respondents. The Petitioner has established that the 1st and 2nd Respondents are carrying out the said activities without adhering to the law. There is no reason to deny the conservatory orders sought.

Disposition

35. In the end, the Petitioner's application dated 22nd November 2021 is allowed in the following terms: -

- i) Pending the hearing of this petition, a conservatory order be and is hereby issued stopping all renovations, cutting down of trees and any works on Uhuru Park by the 1st and 2nd Respondents either acting by themselves, their agents or any other person under their instructions.*
- ii) The petition shall be heard by way of reliance on the pleadings, affidavit evidence and written submissions.*
- iii) The Respondents and the Interested party shall file and serve their respective responses to the Petition within 21 days of this ruling.*
- iv) Once served, the Petitioner will, within 14 days thereof, file and serve any supplementary responses, if need be, together with written submissions.*
- v) The Respondents and the Interested Party shall thereafter file and serve their written submissions within 14 days of service.*
- vi) Matter shall then be fixed for highlighting of submissions to the main petition on a date to be fixed after delivery of this Ruling.*
- vii) Each party to bear their own costs of the application.*

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF DECEMBER 2021

E. K. WABWOTO

JUDGE

IN THE PRESENCE OF: -

MR. NELSON HAVI AND BENEDICT WACHIRA FOR THE PETITIONER.

MR. JEREMIAH MOTARI FOR THE 1ST, 2ND AND 4TH RESPONDENT.

MR. NGARARU MAINA FOR THE INTERESTED PARTY.

N/A FOR THE 3RD RESPONDENT.

COURT ASSISTANT; CAROLINE NAFUNA.