



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC PETITION NO. 8 OF 2020**

**AS CONSOLIDATED WITH NYERI ELC PETITION 9 OF 2020**

**IN THE MATTER OF**

**ARTICLES 10, 42(A), (B), 69(1)(F), (G), (H), 2,**

**43, 69, 70(1), (2) (A), (B), (C) AND 73(1)(A),**

**(I),(II), (III), (IV), (B), (2)(A), (B), (C), (D)(I), (II), (E)**

**OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF SECTION 3, 58, 59, 73, 87 AND 88**

**OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION**

**ACT 1999, AS READ WITH THE SCHEDULE 2 OF THE ACT**

**AND**

**IN THE MATTER OF**

**THE CONTRAVENTION OF ENVIRONMENTAL**

**MANAGEMENT AND COORDINATION (WASTE MANAGEMENT)**

**REGULATIONS 2006**

**IN THE MATTER OF**

**ALLEGED VIOLATION OF ARTICLE 42 OF**

**THE CONSTITUTION OF KENYA IN REGARD**

**TO THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT**

**BETWEEN**

JOSEPH GACHIHI NGUGI.....1<sup>ST</sup> PETITIONER/APPLICANT

STEVEN NDIRITU GITHAU.....2<sup>ND</sup> PETITIONER/APPLICANT

KIRUGA THUKU.....3<sup>RD</sup> PETITIONER/APPLICANT

AND

COUNTY GOVERNMENT OF NYERI.....1<sup>ST</sup> RESPONDENT

THE GOVERNOR NYERI COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT

THE CEC MEMBER OF WATER, ENVIRONMENT NATURAL

RESOURCES & SANITATION NYERI COUNTY.....3<sup>RD</sup> RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4<sup>TH</sup> RESPONDENT

### RULING

1. This Ruling relates to the related application in the two consolidated petitions being No. 8 and 9 of 2020.

2. By the Notice of Motion dated 21<sup>st</sup> August, 2020 as filed in Petition No. 8 of 2020. Joseph Gachihi Ngugi and Stephen Ndiritu Githae (the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners) pray for orders:

(a) Spent

(b) That pending the hearing and determination of the Petition this Honourable court be pleased to issue a temporary order of prohibition prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves, their servants, agents and/or contractors restricting them from further dumping of waste at Gikeu dumping site at Karima Ward Othaya Sub- County;

(c) That the officer in charge of Othaya Police Station to ensure compliance with order (b) above;

(d) Spent.

(e) Spent.

(f) Spent.

(g) That this Honourable court be pleased to grant such further order or orders as may be just and appropriate; and

(h) That the costs of the application be borne by the Respondents.

3. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Petitioner is premised *inter alia* on the grounds:

(i) That the Petition touches on failure to have regard to the right to a clean and healthy environment for the citizens and residents of Othaya Sub-County in Nyeri by the Respondents as required by the Constitution, the Environmental Management and Coordination Act 1999, the Public Health Act and other relevant statutes;

(ii) That the infringement of the Petitioners' right to a clean and healthy environment relates to the poor management of the Gikeu dumpsite located in Karima Ward by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as failure to collect garbage from Othaya Township.

(iii) That under Part 2 of the Fourth Schedule of the Constitution, the function of refuse removal, refuse dumps and solid waste management is a devolved function and thus the duty of the 1<sup>st</sup> Respondent;

(iv) That the Gikeu dumpsite has served the residents of Othaya sub-County for about 25 years and covers approximately 0.69 Ha of land. However, since mid 2019, the 1<sup>st</sup> Respondent started bringing and dumping garbage from other sources in Nyeri County such as Nyeri Town, Tetu and Mukurweini and thus overwhelming the already overloaded site;

(v) That besides overloading the said dumpsite, the 1<sup>st</sup> Respondent has managed it so poorly and negligently causing the waste to spill into the adjacent public roads, adjoining private property, passageways and drainage systems leading to blockage of water ways that drained off the surface water. This has worsened the perennial flooding situation experienced in the area during the rainy seasons;

(vi) That despite the fact that the dumpsite is full and overloaded, the 1<sup>st</sup> Respondent has failed and or refused to look for alternative land for the garbage disposal to the detriment of the lives and health of the residents of Karima Ward;

(vii) That the contamination of water sources and the soil within the area and the odious smoke from the dumpsite have adversely

affected the lives of the residents who are unable to access clean air, clean water, grow crops for food and live healthy lives;

(viii) That the residents of the area depend on water drawn from wells and from the surrounding rivers like the River Thuti for domestic purposes. However, the seepage from the dumpsite has contaminated the water in the wells and in the River Thuti thus rendering it unfit for use both domestically and for irrigation purposes. This has infringed on their right to clean and safe water as provided under **Article 43(1)(d) of the Constitution**;

(ix) That children and adults have been experiencing respiratory diseases and asthmatic attacks which are attributed to the smoke and smell from the site;

(x) That the move by the County Government of Nyeri to bring into the Gikeu dumpsite garbage from other townships other than Othaya did not involve a public participation perspective; nor did it involve a publicized environmental impact study. This would have brought together stakeholders including the 4<sup>th</sup> Respondent to advise on the suitability of the site;

(xi) That despite protests by the area residents, the 1<sup>st</sup> Respondent has continued to forcefully dump garbage at the site at night using police protection to intimidate and muzzle any form of resistance from the residents; and

(xii) That consequently and as a result of the acts and/or omissions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, they have failed in their responsibilities set out in **Article 42 and Part Two of the Fourth Schedule of the Constitution as read with Section 3 of the EMCA**.

4. By a near similar application dated 1<sup>st</sup> September, 2020 and filed in Petition No. 9 of 2020 Kiruga Thuko (*hereinafter the 3<sup>rd</sup> Petitioner*) prays for an order of injunction to restrain the County Government of Nyeri (*the 1<sup>st</sup> Respondent*) from dumping, or continuing to dump and incinerate solid waste and/or any other form of waste at the Gikeu Dumpsite situated within LR No. Othaya/Thuti/425.

5. The second application is by and large based on the very same grounds as those raised by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners in the lead file.

6. The two applications are opposed by the County Government of Nyeri (*the 1<sup>st</sup> Respondent*). In a Replying Affidavit sworn on its behalf by the County Secretary Benjamin Gachichio, the 1<sup>st</sup> Respondent avers that the Gikeu dumpsite has been in existence since March, 2013 when it took over the operations thereof from the previous County Council of Nyeri.

7. The 1<sup>st</sup> Respondent further avers that the Gikeu dumpsite is the only designated dumpsite serving residents of Othaya Sub-County in Nyeri and denies that it serves other Sub-Counties. The 1<sup>st</sup> Respondent denies in particular it has managed and operated the dumpsite poorly and negligently as stated by the Petitioners and asserts that the problem of solid waste disposal is not unique to the 1<sup>st</sup> Respondent but is one facing all the 47 County Governments due to the increase in population.

8. The 1<sup>st</sup> Respondent further avers that it has been engaging the relevant stakeholders including the 4<sup>th</sup> Respondent with a view of addressing emerging concerns and challenges. In this respect, the 1<sup>st</sup> Respondent annexed various reports from itself and other stakeholders and asserts that it is not true the site has been managed in a haphazard and unregulated manner. On the contrary the 1<sup>st</sup> Respondent asserts that it has taken several initiatives to mitigate most of the environmental, safety, health and social impacts associated with any dumpsite.

9. The 1<sup>st</sup> Respondent avers that it has since been advised by its environment experts as a long term measure and in line with the National Solid Waste Management Strategy to consider converting the dumpsite into a Waste Transfer Station (WTS) and developing a sanitary landfill.

10. The 1<sup>st</sup> Respondent further avers that the 4<sup>th</sup> Respondent has confirmed receipt from itself of an Environmental Audit of the site and an Environmental Impact Assessment (EIA). The 4<sup>th</sup> Respondent has accordingly issued an improvement order for the dumpsite vide a letter dated 9<sup>th</sup> September, 2020 with specific recommendations which the 1<sup>st</sup> Respondent is willing to carry out.

11. The 1<sup>st</sup> Respondent however avers that the implementation of the NEMA recommendations requires huge and significant resources and would require co-operation between itself and the National Government.

12. The 1<sup>st</sup> Respondent avers that there is absolutely no evidence tabled by the Petitioners to buttress their arguments that the seepage from the dumpsite has contaminated the water in the wells and rivers thereby breaching the resident's right to a clean and healthy environment. On the contrary, the 1<sup>st</sup> Respondent avers that the Othaya – Mukurweini Water and Sewerage Company (OMWASO) did conduct water analysis for four (4) different sample points that showed that only one site has a significantly higher Biochemical Oxygen than recommended.

13. The 1<sup>st</sup> Respondent asserts that considering what it has been doing in the area, the two Petitions are premature as it is already working on improving the dumpsite as guided by the 4<sup>th</sup> Respondent.

14. The National Environment Management Authority (NEMA) sued as the 4<sup>th</sup> Respondent in the Lead File and as the 2<sup>nd</sup> Respondent in Petition No. 9 of 2020 is similarly opposed to the grant of the orders sought. In a Replying Affidavit sworn by the Nyeri County Director of Environment Isaiah Kyengo, NEMA states that it is the principal instrument of Government established under **Section 9 of the Environment Management and Co-ordination Act (EMCA)** to exercise general supervision and co-ordination over all matters relating to the environment.

15. The 4<sup>th</sup> Respondent avers that the Gikeu dumpsite has over the years functioned basically as an open dumpsite just like many other dumpsites in the Republic of Kenya. This, the 4<sup>th</sup> Respondent notes, has led to some negative impacts such as uncovered garbage, odour from waste decay and cases of water stagnation. The 4<sup>th</sup> Respondent however avers that the 1<sup>st</sup> Respondent herein has since undertaken several initiatives including adoption of some of the NEMA “Ten Minimum Points” to improve the dumpsite condition through levelling of waste and construction of a boundary fence.

16. The 4<sup>th</sup> Respondent further avers that in order to address flooding challenges, the 1<sup>st</sup> Respondent has been advised to liaise with the Kenya National Highways Authority (KENHA) and the Kenya Rural Roads Authority (KERRA) on management of storm water draining towards the dumpsite from the nearby main road.

17. The 4<sup>th</sup> Respondent concedes that the current open water disposal is not environmentally friendly and can be a potential cause of health and safety hazards to the area residents. It asserts however that as a long term measure, the 1<sup>st</sup> Respondent has been advised in line with the National Solid Waste Management Strategy to consider converting the dumpsite into a waste transfer station and develop a sanitary landfill in some other safe zone within the County.

18. The 4<sup>th</sup> Respondent further avers that in order to comply with its (NEMA) regulations, the 1<sup>st</sup> Respondent has undertaken an Environmental Audit of the site as well as an Environmental Impact Assessment (EIA) for the fencing of the site which were all submitted to the 4<sup>th</sup> Respondent on 23<sup>rd</sup> June, 2020. The Reports have since been dispatched to lead agencies and are awaiting comments for final decision making which is part of the review process. In the meantime, the 1<sup>st</sup> Respondent has been issued with a statutory improvement notice to which they have agreed to abide by.

19. I have carefully perused the two applications and the respective responses thereto. I have similarly perused the submissions and authorities placed before me by the Learned Advocates for the parties.

20. The two Petitions and the applications filed contemporaneously therewith are based on the contention by the Petitioners that the Respondents have breached the Petitioners’ right to a clean and healthy environment by the negligent and poor manner in which they have managed the Gikeu dumpsite situated in Karima Ward, Othaya Sub-county within Nyeri County.

21. The Petitioners accused the Respondents of not only overloading the dumpsite but of managing it so poorly as to cause waste to spill into adjacent public roads, adjoining private property, passageways, leading to blockage of waterways and other drainage systems that drained off the surface water within the area. It is their case that despite their knowledge of the hazardous situation on the ground, the Respondents have deliberately and intentionally refused to look for an alternative site for garbage disposal.

22. Accordingly the Petitioners pray for a prohibitory order and/or an order of injunction to restrain the Respondents from dumping garbage at the Gikeu dumpsite pending the hearing and determination of the consolidated Petitions.

23. In response, the County Government of Nyeri (*the 1<sup>st</sup> Respondent*), the Governor of the County (*the 2<sup>nd</sup> Respondent*) and the County C.E.C. Member in charge of Water, Environment, Natural Resources and Sanitization (*the 3<sup>rd</sup> Respondent*) have told the court through the County Secretary that the Gikeu Dumpsite has been in existence for a period close to 30 years and that it is the only dumpsite serving Othaya Sub-county.

24. The Respondents told the court that the site was initially located in an area far from residential areas but due to an increased population in the area over the years, some people have moved closer thereto with some encroaching on land initially reserved for the dumpsite and thereby aggravating the situation on the ground. The Respondents however deny that the dumpsite serves other areas other than Othaya Sub-County. They also deny that the same is managed poorly and /or negligently.

25. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents while acknowledging they have faced some challenges with the dumpsite however asserted that they have since engaged other relevant stakeholders including the National Environment Management Authority (the 4<sup>th</sup> Respondent) to address the same.

26. **Article 70 of the Constitution of Kenya** provides that if a person alleges that a right to clean and healthy environment recognized and protected under **Article 42 of the Constitution** has been, is being or is likely to be denied, violated, infringed or threatened, such a person may apply to court for redress in addition to any other legal remedies that are available.

27. **Article 70 (2)(a) of the Constitution** further provides that the court may make an order, or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.

28. While the Petitioners pray for orders of prohibition and/or injunction to restrain the Respondents from any further dumping of waste on the suit property described as Othaya/Thuti/425, it was clear to me that what the Petitioners desire and crave are conservatory orders. As the Supreme Court of Kenya observed in **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**:

**“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.”

29. The issue before this court therefore is whether this is a proper case where the interlocutory reliefs sought by the three Petitioners should be granted. As was stated in **Centre for Rights Education and Awareness (CREAW) and 7 Others -vs- The Attorney General (2011) eKLR:**

**“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”**

30. The Petitioners before me are residents of Othaya Sub-County within Nyeri County. They reside within Karima Ward near the parcel of land described as Othaya/Thuti/425 where the 1<sup>st</sup> Respondent operates a dump or waste disposal site known as Gikeu. In the Replying Affidavit filed herein by the 1<sup>st</sup> Respondent County Secretary, he deposes that the dumpsite has been in existence for approximately 30 years while the 1<sup>st</sup> Respondent only came into existence in the year 2013.

31. There was of course no dispute that the Gikeu dumpsite was originally established and operated by the now defunct County Council of Nyeri then a local government body established under **Section 12 of the Local Government Act (Cap. 265)** (now repealed). Upon the promulgation of the Constitution of Kenya 2010, the 1<sup>st</sup> Respondent County Government was established pursuant to **Article 176 of the Constitution and the County Governments Act, 2012.**

32. Under **Section 160(a) of the repealed Local Government Act**, the County Council of Nyeri had the mandate:

**“to establish and maintain sanitary services for the removal and destruction of, or otherwise deal with, all kinds of refuse and effluent and, where any such service is established, to compel/the use of such service by persons to whom the service is available.”**

33. Following the promulgation of the Constitution of Kenya 2010, and the establishment of the County Governments, the functions of refuse, removal, refuse dumps and solid waste disposal were devolved to County Governments such as the 1<sup>st</sup> Respondent

pursuant to **Section 2(9) of Part 2 of the Fourth Schedule of the Constitution.** That then explains how the 1<sup>st</sup> Respondent came to take over the operations of the Gikeu dumpsite in 2013.

34. The Petitioners who reside near the dumpsite are unanimous that the site has deteriorated to the extent that the waste occasionally spills into adjacent public roads, adjoining private property, passageways and drainage systems. They have told the court that the odious smoke from the dumpsite has adversely affected their lives and that they are no longer able to access clean air or water. They aver that both children and adults around the area have been experiencing respiratory diseases and asthmatic attacks all which are attributed to the smoke and smell from the Gikeu dumpsite.

35. From the annexures attached to the two applications, it is apparent that it is not just the three (3) Petitioners in court that are bothered by the situation at the Gikeu dumpsite. Area residents have held demonstrations calling upon the 1<sup>st</sup> and 4<sup>th</sup> Respondents to come to their aid.

36. While the 1<sup>st</sup> Respondent termed such demonstrations as “politics”, it does not entirely deny that the situation at Gikeu could be made better. According to the 1<sup>st</sup> Respondent, the problem of solid waste disposal is not unique to itself but is one fanning all the 47 devolved Governments. In recognition of that problem, and to its credit, the 1<sup>st</sup> Respondent has now engaged other stakeholders including the 4<sup>th</sup> Respondent with a view to addressing the emerging concerns and challenges.

37. The 4<sup>th</sup> Respondent, the body charged with the overall supervision and co-ordination on matters relating to the environment tacitly admits the problem at the Gikeu dumpsite. It states in its Replying Affidavit herein that the site has over the years been run as an open dumpsite and that this has led to some negative impacts such as uncovered garbage, odour from waste decay and cases of water stagnation. For those transgressions, the 4<sup>th</sup> Respondent has issued the 1<sup>st</sup> Respondent County Government with a Statutory Improvement Notice to which, thankfully, the 1<sup>st</sup> Respondent has agreed to abide.

38. Arising from the foregoing, I was left in no doubt that the Petitioners had made out a *prima facie* case with a likelihood of success and that they are likely to suffer prejudice as a result of the violation or threatened violation of their right to a clean and healthy environment.

39. I have however agonized about the nature of the orders sought herein and I was not persuaded that a grant of the same would be in the public interest. I say so because the Gikeu dumpsite happens to be the only dumpsite within Othaya Sub-County. Waste within the Sub-County is being generated daily and it has to be deposited somewhere.

40. While an order forthwith prohibiting delivery of waste disposal at the Gikeu site would be very pleasing to the Petitioners and other residents, a grant thereof would mean that the waste collection or removal from the entire Sub-County would be stopped to the greater prejudice of the area residents. That would not be in the public interest.

41. In the circumstances and having looked at the Statutory Improvement Notice dated 9<sup>th</sup> September, 2020 issued to the 1<sup>st</sup> Respondent by

the 4<sup>th</sup> Respondent, I hereby order the 1<sup>st</sup> Respondent to immediately comply therewith and for both the 1<sup>st</sup> and the 4<sup>th</sup> Respondents to submit a Report to this court within 60 days on the status of compliance with the directive.

42. The Petitioners shall have the costs of this application.

43. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYERI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021.**

**In the presence of:**

Mr. Musili for the Petitioner/Applicant

Mr. Njomo for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Kiruga Thuku - 3<sup>rd</sup> Petitioner present in person

Court assistant - Wario

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**J. O. OLOLA**

**JUDGE**