



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 37 OF 2017

IN THE MATTER OF: ARTICLES 2 (1), 3 (1), 10, 19, 20, 21, 22, 25, 28, 42, 69, 70, 159, 162, 165, 259 AND PART 2 OF THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 42, 69 AND 70 OF THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: SECTIONS 4 AND 13 OF THE ENVIRONMENT AND LAND COURT ACT;

AND

IN THE MATTER OF: SECTIONS 19 AND 20 OF THE INTERGOVERNMENTAL RELATIONS ACT;

AND

IN THE MATTER OF: SECTIONS 3, 4, 6, 7, 9, 10 AND 22 OF THE KENYA ROADS ACT;

AND

IN THE MATTER OF: VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

BETWEEN

ADRIAN KAMOTHO NJENGA.....PETITIONER

AND

THE COUNCIL OF GOVERNORS.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

KENYA RURAL ROADS AUTHORITY.....3RD RESPONDENT

KENYA URBAN ROADS AUTHORITY.....4TH RESPONDENT

JUDGEMENT

1. Through the petition dated 19/01/2017, the Petitioner sought a declaration that the Respondents have breached Article 42 of the Constitution and a prohibitory order to restrain the Respondents, their agents, employees or any person acting on their behalf from charging any fee, or obstructing citizens from accessing or using existing public sanitary facilities or toilets. Further, he sought an order of mandamus to direct the Respondents to set up and operate hygienic sanitary facilities including functional public toilets within their lawful jurisdictions and throughout Kenya's road network within 60 days.

2. The petition was supported by the Petitioner's affidavit sworn on 19/01/2017 in which he deposed that Article 42 of the Constitution entitles every citizen to a clean and healthy environment and reasonable standards of sanitation. He averred that sanitation is a first

generation right that citizens should not be arbitrarily denied, and that responding to a call of nature is an inevitable human process for which citizens have entirely no control. He averred that in places where there are public toilets in Kenya, citizens are charged a fee and those who cannot afford to pay are turned away.

3. He stated that due to the lack of options for proper sanitary facilities, motorists and commuters urinate, defecate and excrete human waste on the streets, road reserves, adjacent bushes or open spaces. He contended that the Respondents had made no effort towards providing critical sanitary amenities to the users of public roads as a result of which commuters on public roads relieve themselves on the roadside subjecting commuters to suffer immense biological, metabolic and physiological torture when faced with a call of nature while travelling on Kenyan roads.

4. The Petitioner urged that the situation is worse for those who travel on the highways since there is no provision for basic amenities including toilets. Out of necessity, road users are compelled to respond to calls of nature in the full glare of their children, relatives and other commuters which is humiliating and degrading. He added that children, girls and women bore the bigger brunt and go through the greatest agony and dilemma when they need to relieve themselves while travelling on Kenyan roads. He stated that ingenious methods have had to be devised through the use of plastic bags and containers for human waste which are flung out through the windows of moving vehicles.

5. He urged that the Respondents continue to receive taxpayers' funds some of which they ought to utilise to provide the necessary sanitation and hygienic facilities to road users. The Petitioner contended that the Respondents had refused to recognise or respect the rights of commuters to a clean and healthy environment with proper sanitation facilities and urged the court to intervene and avert a calamity that may arise from the deplorable state of sanitation and the environmental mess on the Kenyan roads.

6. The 1st Respondent opposed the petition through the replying affidavit of its Chief Executive Officer, Jacqueline Mogeni, sworn on 08/04/2019 who deponed that the petition against the 1st Respondent does not lie in law citing the reason that the 1st Respondent's mandate was distinct and separate from that of county governments which are mandated to provide water and sanitation. She urged that the 1st Respondent's mandate is set out under Section 20 of the Intergovernmental Relations Act, No. 2 of 2012 and that that Act did not give the 1st Respondent any role to play in the provision of basic sanitation facilities to members of the public. She added that the Petitioner had not provided sufficient particulars on the allegations and manner of the alleged constitutional violations by the 1st Respondent.

7. The 2nd Respondent opposed the petition through the affidavit sworn by Walter B. Nyatwanga, who deponed that the Petitioner had misapprehended the law regarding the functions and duties of the 2nd Respondent. He contended that the 1st Respondent played no role in the provision of basic sanitation facilities such as public toilets and added that water and sanitation services fell within the docket of the county governments. He averred that the 2nd Respondent is a national government agency whose functions under the Constitution included road traffic and the construction of national trunk roads. He outlined the 2nd Respondent's functions under the Kenya Roads Act.

8. The 3rd Respondent filed a notice of preliminary objection dated 17/10/2018 and grounds of opposition dated 04/04/2019 in opposition to the petition. It argued that its functions are set out under Section 7 of the Kenya Roads Act, and that it does not have a constitutional mandate to provide sanitation services, the mandate is conferred upon the county governments pursuant to the Fourth Schedule to the Constitution, Part 2, paragraph 11(b).

9. Parties filed submissions which the court has considered. The Petitioner contended that the Respondents have failed to provide reasonable standards of sanitation and cleanliness in their areas of jurisdiction which are necessary to secure the citizens' right to a clean and healthy environment. He faulted the Respondents for failing to provide amenities that would guarantee this right. Due to this failure, the Petitioner urged that road users and public highways have no way of disposing of human waste flowing from human biological functions and end up relieving themselves in bushes and on the roadside which is inhuman and degrading.

10. In urging his case the Petitioner relied on the Bible and quoted Deuteronomy 23:12-14 which commands that we must have a place where people can go when they need to relieve themselves. He faulted the Respondents for failing to designate places for road users to relieve themselves while on their journeys. He added that the Respondents did not deny in their responses that there were no toilets, they only contended that they were wrongly sued.

11. The Respondents contended that the mandatory orders sought are incapable of implementation since the Respondents do not play any role in the provision of health and sanitation services. They maintained that they were wrongly sued since the provision of water and sanitation was the preserve of county governments.

12. The 1st Respondent denied that it collected any fees for the use of toilets. It urged that the Petitioner had not met the threshold for the enforcement of constitutional rights and that the Petitioner had failed to demonstrate how his rights had been infringed by the 1st Respondent.

13. The 2nd Respondent submitted that the petition was imprecise as it did not state the prayers sought against the 2nd Respondent. It urged that the petition was moot since the courts have already determined the issue of the entity obligated to provide water and sewerage services. The 2nd Respondent added that the petition seeks orders of prohibition and mandamus yet Articles 21, 22, 23, 42 and 259 call for the progressive enforcement of the Constitution. It contended that the mandate of the Kenya National Highway Authority does not include any limb under Article 42 of the Constitution. Further, that the orders sought are against individual counties which are required to provide water and sanitation services, and not the Council of Governors.

14. The 3rd Respondent submitted that the gravamen of the petition was that sanitation facilities have not been provided which falls under Article 43 of the Constitution. It added that the petition was speculative since there was no material placed before the court to show that there are no toilets along the road and the court was to speculate that there was human waste all over the road because there were no toilets and

that the environment is therefore very unclean. The 3rd Respondent argued that the court should not issue orders of mandamus and prohibition if the supervision of these orders would pose a challenge to the courts.

15. The 3rd Respondent contended that county governments are in charge of providing sanitation facilities yet they were not made parties to the petition. It urged that if the orders sought were granted there was no policy in place for county governments to construct toilets on road reserves and added that the State had not set standards for the sanitation facilities that would need to be constructed. Further, that there was no budgetary allocation for the construction of the toilets and that the right to sanitation ought to be realised progressively after the State takes measures to develop policies.

16. The Petitioner reiterated that his case was about the provision of sanitary amenities that will eliminate waste and other pollutants along the roads so as to secure cleanliness and public health. He urged that one cannot bypass the Council of Governors and sue individual counties when an issue is of uniform concern to all the counties. He submitted that the court could grant the orders under Article 70 of the Constitution which does not require him to demonstrate that he had suffered loss or damage. The Petitioner emphasised that sanitation and a clean and healthy environment go hand in hand and that the State is enjoined by Article 21(1) to uphold these rights. He urged the court to apply Article 259 of the Constitution and give effect to the right to a clean and healthy environment and not fetter it. He concluded that he was seeking amenities for road users to relieve themselves when they use the country's road network and suggested that he Respondents can provide mobile toilets in compliance with any orders the court may make.

17. The issue for determination is whether the court should grant the orders sought in the petition. In determining this issue, the court will have to decide whether the Respondents were wrongly sued in these proceedings, taking into consideration their statutory mandates. The Petitioner seeks to have road users provided with toilets and other sanitation facilities when they travel on Kenyan roads to give effect to the right to a clean and healthy environment. He contended that where public toilets exist, charges have been imposed which some people cannot afford to pay.

18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.

20. It is useful to define what a clean and healthy environment entails in the context of the use of public roads which is the subject of this petition. The Longman Dictionary of Contemporary English defines "clean" in relation to the environment as containing or producing nothing that is dirty or harmful. "Healthy" is defined in relation to persons, animals or plants as physically strong and not likely to become weak or ill. Black's Law Dictionary, 10th edition defines "health" as the quality, state or condition of being sound or whole in body mind or soul especially freedom from pain or sickness; or the relative quality or state of one's physical or mental well-being whether good or bad. The Longman Dictionary of Contemporary English defines "well-being" as the feeling of being comfortable, healthy and happy.

21. The Environmental Management and Coordination Act (EMCA) defines the environment to include physical factors of the surroundings of human beings including land, water, atmosphere, climate; biological factors of animals and plants; and the social factor of aesthetics which includes both the natural and healthy environment.

22. A clean and healthy environment for persons using a road would be one that is devoid of dirt or anything harmful which may interfere with the physical or mental well-being of persons using the road. Some of the factors that are deleterious to the environment can be discerned from Part VIII of EMCA include effluents, emissions, waste, toxic and hazardous material, noise, radiation and noxious smells. The Traffic Act mentions other factors that are likely to infringe on the right to a clean and healthy environment on the roads. These include reckless and careless driving, driving under the influence of alcohol, and parking of vehicles carrying explosives or petroleum along the road, use of vehicles that are not in a roadworthy condition among others. Roadside developments should not be unsightly or the road reserves littered with garbage, they should be clean and well planned to give effect to the right to a clean and healthy environment on the public roads.

23. A clean and healthy environment includes the physical infrastructure and road aesthetics which behoves the roads authorities to plant trees and suitable vegetation on the road reserves. Where trees are cut during road construction, they must be replaced once the roads are completed. Article 69 which enjoins the State to work towards achieving and maintaining a tree cover of at least ten per cent of the land area in Kenya binds the roads authorities and the county governments.

24. Article 69 (1) (g) of the Constitution obligates the State to eliminate processes and activities that are likely to endanger the environment. Such processes include road users' relieving themselves in bushes and open spaces along the Kenyan roads. The State needs to provide clean and decent toilets for road users to relieve themselves while on their journeys to give effect to the right to a clean and healthy environment.

25. Article 70 empowers any person who alleges that a right to a clean and healthy environment has been infringed or is threatened to apply for redress from the court in addition to any other legal remedies available in respect of the matter. An applicant alleging that a right to a clean and healthy environment need not demonstrate that any person has incurred loss or suffered injury. The court may make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and may compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. In the court's view, the Petitioner did not have to demonstrate that any person had suffered injury in the petition.

26. Section 3 of EMCA allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to apply to the Environment and Land Court in the public interest. The Petitioner was not obliged to prove that he had suffered loss or damage in his application for enforcement of the right to a clean and healthy environment.

27. The Respondents argued that the provision of water and sanitation facilities was the preserve of county governments. The court has looked at the Constitution and the Acts relating to devolution. The Fourth Schedule to the Constitution distributes functions between the national and county governments. Transport and communications including road traffic, the construction and operation of national trunk roads and the standards for the construction of and maintenance of other roads by counties is a function of the national Government under Part 1 of the schedule.

28. One of the functions of the county under Part 2 of the Fourth Schedule to the Constitution is county health services including in particular refuse removal, refuse dumps and solid waste disposal. County transport including county roads and public road transport also fall under the mandate of the county, as well as county public works and services including water and sanitation services.

29. The court agrees with the Respondents that it is the county governments that are mandated to deal with water, sanitation and solid waste disposal. In the court's view, the broad function of road transport is conferred on both the national and county governments under the Fourth schedule of the Constitution; and the function therefore falls under the concurrent jurisdiction of each of the two levels of government pursuant to Article 186(2) of the Constitution. Article 189 provides the framework of how the national and county governments are to cooperate in the performance of their functions and exercise of their powers. The road authorities and the counties have to cooperate in the performance of their duties.

30. Looking at the Kenya Roads Act, some of the functions of the 2nd Respondent under Section 4 of the Act include constructing, upgrading, rehabilitating and maintaining roads under its control. The Authority controls national roads, road reserves and roadside developments, which are described in the Act as physical structures or facilities on land within or adjoining a road reserve. The Authority plans the development and maintenance of national roads and liaises and coordinates with the other road authorities in planning and on operations in respect of roads. It also prepares the road works programmes for all national roads. Similar mandates are bestowed on the 3rd Respondent by Section 7 of the Act.

31. Section 22 of the Kenya Roads Act empowers every road authority to provide such amenities or facilities for persons making use of the services or facilities provided by the authority as may appear necessary or desirable to the authority. In the court's view, the amenities and facilities contemplated by this section include toilets and related amenities which ought to be constructed as roadside developments for the use of persons making use of the roads in the country.

32. Additionally, Section 22 of the Act gives the roads authorities power to enter into arrangements with other entities which are likely to promote or secure the provision of any service or facilities which they may separately provide. Based on this, the 2nd to 4th Respondents can enter into arrangements with the counties through the 1st Respondent for the maintenance of the toilets and other sanitation facilities to be constructed for the benefit of road users.

33. The mandate of the roads authorities includes constructing pedestrian walkways and cyclist lanes on the road to give effect to the right to a clean and healthy environment for road users.

34. The 2nd Respondent argued that there was no policy or standards set for the construction of public toilets and added that there was no budgetary allocation for the construction of public toilets. In the court's view, these aspects are taken care of in the law. Part XI of the County Governments Act deals with county planning. One of the objectives of county planning under Section 103 of the Act is to make reservations for critical national infrastructure and other utilities and services. Section 104 enjoins a county government to plan for the county for the use of public funds with the planning framework integrating social and environmental planning. The county planning unit is responsible for ensuring linkages between county plans and the national planning framework (Section 105). County plans are to be based on the functions of county governments' specified in the Fourth Schedule to the Constitution and on relevant national policies- Section 106. The types and purposes of county plans are set out at Section 107 which makes the county plans the basis for all budgeting and spending in the county.

35. The Respondents argued that county governments should have been joined to these proceedings. Under the Kenya Roads Act, roads are classified as national, rural or urban and are either vested in the national government or the counties. County governments cannot construct toilets and other sanitation facilities on the national trunk roads, which are vested in the 2nd Respondent. National roads traverse different counties. For instance a bus passenger travelling from Mombasa to Busia traverses Mombasa, Taita Taveta, Makueni, Machakos, Nairobi, Kiambu, Nakuru, Kericho, Kisumu, Siaya and Busia counties. It would have been impracticable for the Petitioner to sue all the county governments to enforce the right to a clean and healthy environment in respect of all roads in the country.

36. The 1st Respondent argued that it was wrongly joined to this petition. The Council of Governors comprising the governors of all counties is established by the Intergovernmental Relations Act to provide a forum for among other functions, consultation amongst the county governments and to consider matters of common interest to county governments. Under Section 5, the Council of Governors is to facilitate cooperation and consultation between the national and the county governments and amongst county governments as provided in the Constitution; and provides a forum for coordinating governments' policies, legislation and functions. The Council may establish committees for the better carrying out of its functions. The 1st Respondent was not improperly sued in this petition.

37. The court notes that Section 6(3) of the Urban Areas and Cities Act designates Nairobi as the city to provide infrastructure necessary to sustain among others, the efficient transport network connecting to rural areas, towns and other local, regional and international cities.

38. Section 120 the County Governments Act empowers the county government or other agency delivering services in the county to adopt and implement a tariffs and pricing policy for the provision of public services. Based on this provision, the court declines to grant a

prohibitory order to restrain the Respondents from charging fees for the use of the existing public sanitary facilities.

39. Taking into account the budgetary implications of formulating and implementing the policy on the provision of toilets and proper sanitation along the country's road network, it is impracticable for the Respondents to set up and operate functional public toilets within their jurisdiction and throughout the road network in Kenya within 60 days as the Petitioner sought in the petition.

40. The Cabinet Secretary in charge of transport shall constitute and chair the Working Group which will include representatives of all the Respondents, to formulate the policy for the provision of toilets and other sanitation facilities on the country's road network to give effect to the right to a clean and healthy environment on the roads. The national transport policy should incorporate toilets and other sanitation facilities as part of the roadside developments in the road designs for existing and new roads; and designate a sufficient number of such facilities on road stops on the national and international trunk roads. The policy should take into account the need to have the toilets and other sanitation facilities maintained properly by the county governments once constructed.

41. Considering that some roads are vested in the county governments while others are maintained by the national government, the policy should take this into account with the overall objective of guaranteeing every person using the country's road network reasonable access to decent toilets and sanitation facilities.

42. The 1st Respondent is directed to constitute a committee under Section 20 of the Intergovernmental Relations Act which will liaise with the 2nd to 4th Respondents through the Ministry in charge of transport in the formulation and implementation of the policy for the provision of toilets and other sanitation facilities along the Kenyan road network to give effect to Articles 42 and 43 on the right to a clean and healthy environment with reasonable standards of sanitation.

43. This being a suit brought in public interest, each party shall bear their own costs.

Dated and delivered at Nairobi this 16th day of January 2020

K.BOR

JUDGE

In the presence of:-

Mr. Adrian Kamotho- the Petitioner

Mr. J. Omollo holding brief for E. Lawi for the 1st Respondent

Mr. J. Omollo holding brief for F. Gekone for the 2nd Respondent

Mr. J. Omollo for the 3rd Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 4th Respondent