



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**PETITION NO. 13 OF 2018**

**JUSTICE AND ENVIRONMENT FOUNDATION**

**& 124 OTHERS.....PETITIONERS**

**VERSUS**

**PERRY PATEL MANSUKHLAL KANSAGRA.....1<sup>ST</sup> RESPONDENT**

**SOLAI GROUP OF COMPANIES.....2<sup>ND</sup> RESPONDENT**

**KENSALT LIMITED.....3<sup>RD</sup> RESPONDENT**

**PATEL COFFEE ESTATES LIMITED.....4<sup>TH</sup> RESPONDENT**

**VINOJ JAYA KUMAR.....5<sup>TH</sup> RESPONDENT**

**WATER RESOURCES AUTHORITY.....6<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY (NEMA).....7<sup>TH</sup> RESPONDENT**

**NATIONAL CONSTRUCTION AUTHORITY.....8<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> to 5<sup>th</sup> respondents' Notice of Preliminary Objection dated 13<sup>th</sup> November 2019. The objection was pleaded as follows:

*1. THAT the Honorable court does not have the requisite jurisdiction to determine the amended petition.*

*2. THAT the amended petition does not raise disputes relating to the environment and the use and occupation of, and title to land as contemplated under Article 162(2) (b) of the Constitution of Kenya, 2010 as read with section 13 of the Environment and Land Court Act, 2011.*

*3. THAT as confirmed by the petitioners' advocates in the attached advertisement, this is an ordinary running down claim for compensation and damages for alleged fatal or personal injury that should be litigated upon in the ordinary way before the magistrate's courts at the first instance by way of plaint and in accordance with the provisions of the Civil Procedure Act, CAP 21 Laws of Kenya and the Civil Procedure Rules, 2010 among other provisions of the law but not by way of the present amended petition.*

2. The objection was triggered by the petitioners' amended petition which was filed on 7<sup>th</sup> June 2019 following grant of leave "to file and serve an amended petition". So as to put matters in perspective, I will highlight some key features of the amended petition.

3. Through the amendment, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners were removed from the petition while the title of the petition was amended to

include as additional petitioners, some “118 others (as more particularised and continued in the Amended Register of Petitioners (Annexure 1))”. The 1<sup>st</sup> petitioner, Justice and Environment Foundation is described as a Public Benefit Organizations operating in Kenya and regulated by the Public Benefit Organizations Act, 2013. It is further averred that JEF has been instrumental in offering humanitarian aid to the victims of Solai Dam tragedy (SDV) and that it has provided guidance and assistance including linking up the rest of the petitioners with the advocates on record for the petitioners.

4. The petition revolves around the events of 9<sup>th</sup> May 2018 when a dam within Patel Coffee Estates located in Solai, Nakuru County, broke its banks sending torrents of water through settlements and leaving in its wake damage, deaths and destruction of property. The petitioners’ case is that they and their relatives or dependents were amongst those affected. There are averments to the effect that legal provisions governing design and approval of dams were not followed and that as a result the petitioners’ right to life has been infringed and violated contrary to Article 26 of the Constitution, that their right of equality and freedom from discrimination have been infringed and violated contrary to Article 27, that their right to freedom and security of the person, right to a clean and healthy environment under Articles 42, 69 and 70. Further that their right to fair administrative action, rights of the Child, under Article 53, right of elderly members of the society under Article 57 and rights of persons with disabilities under Article 54 have all been violated. They further aver that they have therefore brought this petition by way of a class action in respect of all persons who are/or were members, residents, occupants of the Solai (Milmet) community or neighbouring the surrounding areas who are/or were affected by the Solai Dam tragedy and persons who suffered loss or damage by reasons of the tragedy.

5. The petitioners further categorize their claims to some 18 headings including but not limited to Dependents/ Relatives/ Spouse claims, Death/Fatal claims, Personal injury Physical harm, diseases, illness, Personal injury of the nature of Psychological emotional trauma causing stress, landlord’s property destroyed, land owners lost farm produce/unusable land, loss of business previously operating, investments, good will/ customers/ stock, tools of trade, equipment, lost personal belongings including documents, IDs, Academic Certificates, Title Deeds and other property of sentimental attachments value e. g photographs, loss of livestock, loss of earning and affected livelihoods, disruption of family life and environment where they lived previously, loss/disruption to education, medical expenses / costs of treatment, Cost / expenses of renting alternative place to live, hotel/transport expenses, miscellaneous & incidental expenses such as telephone costs to friends, family and legal advice or support from NGOs in relation to the tragedy. In its heading, the amended petition is stated to be in the in the matter of Article 22(1) of the Constitution of Kenya 2010, in the matter of violation of rights and fundamental freedoms under Articles 2(4) & (5), 10, 19, 20, 21, 22, 27(1) & (2), 28, 29(c), 39(3), 40(1), 42(b), 47 (1), 69, 70 and 258 of the Constitution, violation of the right to life under Article 26, violations of the right to a clean and safe environment under Article 42, 43, 69 and 70, violation of the right to property under Article 40, the Environmental Management and Co-ordination Act, the Water Act No. 43 of 2016 and the National Construction Authority Act, No. 41 of 2011.

6. In view of all the foregoing, the petitioners therefore “on their own behalf and on behalf of group members duly registered for this suit, their dependents and representatives in interest” pray for judgment jointly and severally against the respondents as follows:

1. A declaratory relief in favour of the Petitioners’ and on behalf of the applicable petitioners’ herein of SDVs with respect to the Respondents liability.
2. A declaration that the Respondents have violated and/or infringed on the Petitioners’ Constitutional rights under Articles 26, 27(1) & (2), 28, 29(c), 39(3), 40(1), 42(b), 43 (a), (b), (c), (d), (f), 47 (1), 48 and 70.
3. A declaratory relief to claim damages on an individual basis and collectively.
4. Damages for breach of Constitutional Rights.
5. Damages for Fatal Injuries suffered by the Petitioners.
6. Damages for pain and suffering physical injuries suffered by the Petitioners.
7. Damages for psychological injuries suffered by the Petitioners.
8. Damages for loss of property, business and or business tools/equipment by the Petitioners.
9. Damages for loss of earnings/or livelihood by the Petitioners.
10. Damages for loss or destruction of Petitioners’ homes.
11. Damages for medical expenses/treatment costs by the Petitioners, including future medical expenses.
12. Damage for care and assistance claims costs.
13. Damages for costs of relocation and resettlement.
14. Damages for costs of re-constructions of houses/homes and or repairs (where applicable)
15. Exemplary and/or aggravated damages.
16. Any other or further order this Honourable Court may deem fit to grant in the circumstances.

17. *Costs of the Petition and interest on the above prayers.*

7. The objection was canvassed through written submissions. The 1<sup>st</sup> to 5<sup>th</sup> respondents, the petitioners and the 8<sup>th</sup> and 9<sup>th</sup> respondents filed submissions. Although they did not file any submissions, the 6<sup>th</sup> and 7<sup>th</sup> respondents supported the objection and associated themselves with the submissions of the 1<sup>st</sup> to 5<sup>th</sup> respondents.

8. In their written submissions the 1<sup>st</sup> to 5<sup>th</sup> respondents advanced their arguments along two broad lines: firstly, that this court does not have the requisite jurisdiction to determine the amended petition and secondly, that the amended petition does not raise disputes relating to the environment and the use and occupation of, and title to land as contemplated under **Article 162 (2) (b)** of the **Constitution of Kenya, 2010** as read with **Section 13 of the Environment and Land Court Act, 2011**. Under the first limb, the 1<sup>st</sup> to 5<sup>th</sup> respondents argued that the petition seeks for the compensation and damages for the alleged fatal and personal injury of the victims and does not in any way touch on the use, tenure, boundaries, administration and management and/or occupation of land. Citing **Patrick Musimba vs. National Land Commission & 4 Others [2015] eKLR**, they argued that the reliefs sought in this petition such as damages for personal injury and fatal claims are only available in ordinary claims brought through plaint under the Law Reform Act and Fatal Accidents Act. Consequently, the petition does not deserve to be before this court.

9. On the issue of whether the petition is merited considering the cause of action of fatal and/or personal injury, the 1<sup>st</sup> to 5<sup>th</sup> respondents cited **Section 3 of the Fatal Accidents Act** and the **Law Reform Act** and argued that the petitioners' claim ought to be advanced by way of a claim for damages through plaint. Further, that **Article 23 (3)** does not contemplate an award of damages for fatal injuries, pain and suffering, psychological injuries, loss of property, loss of earnings, medical expenses, care and assistance and/or exemplary damages as prayed for by the petitioners and that the intention of **Article 23 (3)** was to grant reliefs for infringement and violations of fundamental rights of individuals and not override the statutory stipulations and guidelines within the Law Reform Act and the Fatal Accidents Act. Citing the case of **Jorum Kabiru Mwangi & 2 Others v Co-Operative Bank of Kenya, Kawangware Branch [2016] eKLR**, it was argued that the doctrine of constitutional avoidance requires that where a dispute is one which can be determined under another area of law other than under the constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such. The 1<sup>st</sup> to 5<sup>th</sup> respondents therefore urged the court to dismiss the petition.

10. The 8<sup>th</sup> and 9<sup>th</sup> respondents generally agreed with the 1<sup>st</sup> to 5<sup>th</sup> respondents and argued in their submissions that the petition herein does not meet the threshold of constitutional matters as it does not raise any constitutional question for deliberation as envisaged under **Article 42** of the constitution and that instead, the issues raised are of tortious liability which are disputed and can be adequately canvassed in the normal way in the Magistrate's Court or the Civil Division of the High Court. In support of these arguments, they cited the case of **Hon. Uhuru Kenyatta -vs- The Nairobi Star Limited High Court Petition No I87 of 2012** wherein the case of **Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost. 755** was cited.

11. In response, the petitioners argued that the amended petition is premised on Articles 42, 69 and 70 of the constitution and raises fundamental questions touching on the environment, land use, exercise of statutory power and the law of private obligations. That all the violations stem from the question of land use as applied to construction of artificial dams, regulation of such construction and attendant obligations by state and private actors. That the matter is therefore properly before this court in view of the jurisdiction of the court as provided under **section 13 of the Environment and Land Court Act** and **Article 162 (2)** of the **constitution**. They cited the case of **Mohammed Said v. County Council of Nandi [2013] eKLR** and **Patrick Musimba vs. National Land Commission & 4 Others** (supra). Regarding the question of whether the amended petition relates to personal injury claims, they argued that the petition is removed from the domain of private plaintiff claims for compensation as applicable in personal injury claims. They argued that the petition is a class action under the doctrine of strict liability as stated in the case of **Rylands v Fletcher**. They further argued that it is untenable to bring the claims under the **Fatal Accidents Act** and the **Law Reform Act** as that will deny the petitioners their entitlement and claims under the various constitutional heads.

12. The petitioners further argued that the objection is an attempt to vary the court's orders issued on 16<sup>th</sup> September 2019, which orders allowed the petitioners to publish notice of institution of the petition in a daily newspaper with an invitation to any person who wishes to be joined as a co-petitioner to apply to be so joined. They further argued that the respondents have submitted to the jurisdiction of the court and are now precluded from objecting to the court's jurisdiction. They cited the case of **Astra Exito Navegacion SA v Hsu [1984] 1 Lloyds Rep 266** in support of that argument. They therefore urged the court to dismiss the objection with costs.

13. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

*So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*

14. Charles New Bold, P. added as follows:

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*

15. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Looked at from these perspectives, the objection herein raises points of law and therefore merits consideration.

16. It has been argued that this court does not have the requisite jurisdiction to determine the amended petition. As is reasonably clear, jurisdiction is the entry point in any litigation. Without it, a court cannot take any further step. See Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR. As was reiterated by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR:

*A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...*

17. This court’s jurisdiction is provided for under **Article 162** of the **Constitution** which provides:

**162. System of courts**

*(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(a) ...*

*(b) the environment and the use and occupation of, and title to, land.*

*(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

18. As contemplated by **Article 162 (3)**, parliament further legislated the court’s jurisdiction under **Section 13** of the **Environment and Land Court Act, 2011** which provides as follows:

**13. Jurisdiction of the Court**

*(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

*(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

19. Thus, the court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR.

20. This matter was filed from the onset as a constitutional petition. As expected, the petitioners therefore clearly defined their case. See Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. The petitioners herein, although claiming violation of the right to a clean and healthy environment under **Articles 42, 69** and **70**, also claim that certain other fundamental rights and freedoms have been violated. The claim under **Articles 42, 69** and **70** falls squarely within the jurisdiction of this court.

21. Further reading of prayer 2 of the petition shows that the petitioners also seek, inter alia, declaration that the respondents have violated and/or infringed on their constitutional rights under **Article 26** which deals with the right to life, **Article 27** which deals with equality and freedom from discrimination, **Article 28** which deals with human dignity, **Article 29** which deals with freedom and security of the person, **Article 39** which concerns freedom of movement and residence and **Article 43** which deals with economic and social rights. Even though the jurisdiction of this court when dealing with disputes involving environment and land is not straight jacketed to only that category, that jurisdiction ought not to be stretched unnecessarily. The claims under Articles 26, 27, 28, 29, 39 and 43 are outside this court’s jurisdiction and ought to be litigated in the High Court. Unfortunately, the petitioners have bundled everything together and brought the whole mass

before this court in a 65 page amended petition. As was counselled in Daniel N Mugendi v Kenyatta University & 3 others (supra), parties should not file “mixed grill” causes in any court they fancy as that will only delay dispensation of justice.

22. As noted earlier in this ruling, the petitioners have themselves categorized their claims into some 18 headings including death/fatal claims, personal injury, diseases, psychological and emotional trauma, destroyed property, loss of business, loss of personal belongings including various types of documents, medical expenses, costs of renting alternative accommodation and even what they have termed miscellaneous & incidental expenses. A reading of prayers 1 and 3 to 15 of the petition shows that the petitioners’ claim largely raises issues of compensation in the form of damages owing to death and other injuries suffered as a result of the tragedy. I agree with the respondents that those are claims based on statute and common law and that there are ample avenues for the petitioners to seek redress in ordinary claims. Those options are still open and all that the petitioners need to do to access justice is to fashion appropriate cases in the correct forum. Needless to state, there will be need to address issues such as capacity to sue and whether any compensatory award actually reaches a particular victim or his estate. Those are matters that are best handled in an ordinary suit. **Article 258** does not anticipate for example that one can claim compensation for the benefit of the estate of a deceased person without first obtaining letters of administration.

23. Indeed, the doctrine of constitutional avoidance frowns upon the practice of bringing ordinary disputes to the constitutional court. The Supreme Court observed as follows in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR:

*[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*

*“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.” ....*

*[258] From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.*

24. The petitioners have argued that the respondents have submitted to the jurisdiction of the court and are now precluded from objecting to the court’s jurisdiction. One hardly needs to look far to see the fallacy in that argument. Jurisdiction flows from either the constitution or legislation or both. See Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (supra). It cannot be conferred by parties simply submitting to a court’s supposed jurisdiction or even by consent.

25. I am therefore satisfied that the objection herein has merit to the extent that large parts of the petitioners’ claim constitute issues that should not be before this court. Nevertheless, some parts of the petitioner’s claim fall within the jurisdiction of the court.

26. I have agonised over what to do with the aspects of the claim that fall outside this court’s jurisdiction. The respondents have urged the court to strike out the petition. I have reminded myself that striking out is a draconian remedy that should only be resorted to in the clearest of cases and where life cannot be injected into the matter in some other way. See Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR. As noted earlier, the petitioners have lumped everything together in a 65 page amended petition running into very many paragraphs. It would be cumbersome to strike out the many paragraphs. Upon considering the matter, I have come to the conclusion that all the prayers that fall outside the jurisdiction of this court should be struck out. The petitioners’ claims are still within the relevant limitation periods and they can seek relief in the appropriate courts. They do not therefore suffer any prejudice.

27. The petitioners argued that the objection is an attempt to vary the courts orders issued on 16<sup>th</sup> September 2019 which allowed the petitioners to publish notice of institution of the petition in a daily newspaper with an invitation to any person who wishes to be joined as a co-petitioner to apply to be so joined. The said orders were granted at petitioners’ request and were only directions as regards to notice of institution of the suit. The objection does not in any way seek to vary the orders.

28. In view of the foregoing discourse, I make the following orders:

**a) Prayers 3 to 15 of the amended petition are hereby struck out.**

**b) All aspects of prayer 2 of the amended petition that deal with Articles 26, 27, 28, 29, 39 and 43 of the constitution are hereby struck out.**

**c) Costs of the objection shall be to the respondents.**

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of February 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Barongo for the petitioners

Mr Masinde and Mr Mwangi for the 1<sup>st</sup> to 5<sup>th</sup> respondents

Mr Masinde holding brief for Mr Omollo for the 6<sup>th</sup> respondent

No appearance for the 7<sup>th</sup> respondent

No appearance for the 8<sup>th</sup> and 9<sup>th</sup> respondents

Court Assistants: Beatrice & Lotkomoi