



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTION PETITION NO. 13 OF 2018

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND

FREEDOM IN ARTICLES OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONSTITUTION KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION (PRACTICE AND PROCEDURE RULES)

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT

HASSAN ALI KASSIM.....1ST PETITIONER

FATULA ABDULLAHI.....2ND PETITIONER

SAID HASSAN MOHAMMUD.....3RD PETITIONER

VERSUS

HASSAN ABDI ALLI.....1ST RESPONDENT

AFRO NATURAL DAIRY PRODUCTS.....2ND RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....3RD RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....4TH RESPONDENT

PHYSICAL PLANNING OFFICER ISIOLO COUNTY.....5TH RESPONDENT

HON. THE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGEMENT

1. The petitioners filed this suit on 14/12/2018 against the Respondents where they sought the following orders: -

A. A declaration that the Petitioners constitutional right to a clean and healthy environment as guaranteed by Article 42 of the Constitution has been violated and/or threatened by the Respondents, their agents, employers and/or servants.

B. A Permanent injunction restraining the 1st and 2nd Respondents whether by themselves, their agents and/or servants from carrying out any activities, wasting, constructing on, alienating or otherwise interfering or dealing with the Milk Processing Plant within that area known as PLOT NO. 314 Taqwa Residential Area Isiolo County where the Petitioners reside.

C. An order cancelling all licenses respectively issued to the 1st and 2nd Respondents by the 3rd Respondent for the illegal operation of a Milk Processing Plant.

D. An order for the payment of general damages by the respondents to the petitioners for violating their right to a safe, clean and healthy environment.

E. Costs of this petition and interest at court rates.

2. The Petition was contemporaneously filed with a Notice of Motion Application whereby applicants/ petitioners sought injunctive orders against 1st and 2nd Respondents restraining the later from carrying out activities of milk processing in the area known as Plot No. 314 Taqwa Residential area in Isiolo County. This court delivered a detailed ruling on 10/7/2019 allowing the prayers sought in the application. Therein, I summarized the cases of each of the litigant, which summary I will consider in the determination of this matter.

3. On 29/7/2019, the court gave directions to the effect that the petition was to be heard by way of written submissions; Petitioners were to file their submissions by 27/8/2019 while respondents were to file by 29/9/2019. The petitioners and the 4th – 5th Respondents have complied with the aforementioned directions. The 1st, 2nd and 3rd respondents did not file any submissions.

4. However, it is noted that the 3rd respondent (National Environmental Management Authority –NEMA) was represented in court on 20.12.2018, when their advocate addressed the court as follows; **“We asked for the emission and discharge licenses on 3.10.2018 and they were not provided. We do not oppose the application”**. In essence, NEMA appears not to oppose this suit. As for the 6th respondent (office of the Attorney General), the case was withdrawn against them on 7.2.2019.

Submissions of the petitioners.

5. In regard to prayer No. 1 in the petition, it was submitted that the petitioners being residents of Taqwa area have suffered immensely due to the setting up of the milk processing plant. They relied on annexures HAK 3-7 in support of their case and they also cited the provisions of **Article 42 and 70 of the Constitution**. On Prayer No. 2, the petitioners have relied on annexure HAK 2 which are medical reports in respect of the residents dating back 27/11/2018 (annexures in the replying affidavit of 1st petitioner dated 5,2,2019). The petitioners also contend that 1st and 2nd Respondents did not obtain a change of user as required by the law in the establishment of the Milk Processing Plant in a residential area. On prayer no. 3, the petitioners have averred that the license of the milk processing plant was not issued in compliance with the law, is not valid and should be cancelled, while in prayer No. 4, the petitioners have sought for general damages in light of their evidence.

Submissions of 4th and 5th Respondents

6. These Respondents have averred that they performed their part in so far as the claim of the petitioners is concerned. They have made reference to annexure HAK 7 which is an enforcement notice they issued to 2nd Respondent. They also relied on the document titled “Interno- memo” HAK 1 where they are giving some recommendations to be met by 1st and 2nd Respondents. They further relied on annexure AAK 5 a letter from the County Public Office directed to the 1st and 2nd Respondents. The 4th and 5th Respondents contend that they were not in breach of any law, that they were wrongly sued and that the petition should be dismissed.

DETERMINATION

7. I have considered all the issues raised herein. I have also taken cognizance of the fact that some of the issues raised in the petition have duly been dealt with in my ruling of 10/7/2019. The issues for determination is whether the prayers sought in the petition are merited.

8. Right to clean and healthy environment

This issue was aptly and exhaustively captured in paragraph 20-33 of my ruling of 10/7/2019 and I need not dwell on same again. Thus, prayer A in the petition is allowed.

9. Permanent injunction

Again, I make reference to my ruling of 10/7/2019 whereby I gave injunctive orders after analyzing the issues raised in the application. However, in my final findings paragraph 33 (3), I stated as follows: -

“Meanwhile, the 1st and 2nd respondents are directed to engage with the 3rd respondent with a view to submitting a response to NEMA in respect of NEMA’S letter of 12.12.2018”.

10. This is a case whereby the 1st and 2nd respondents appeared to have defied compliance notice, from NEMA prompting the later body to concede to the application for injunction. It is clear that in my ruling of 10/7/2019, I gave the 1st and 2nd Respondents a window to engage NEMA particularly in terms of compliance with the law, rules and regulations. However, the 1st and 2nd respondents appear to be disinterested in these proceedings as they have not in any way made any attempt (known to this court) to show that they are mitigating their situation by engaging NEMA and the County Government. In the circumstances I find that the prayer for a permanent injunction is merited unless and until the 1st and 2nd respondents meet the conditions set by 3rd-5th respondents.

11. Cancellation of licence.

The 1st and 2nd Respondents have an EIA license dated 25/4/2016. The condition set forth on the first page of the license is that: ***“This license is valid for a period of 24 months.”***, which means that the same expired on 25/4/2018. There is nothing to cancel.

However, I must add that generally, the challenges to EIA reports and or issuance of EIA licenses lies in the first instance with the National Environmental Tribunal. **See ELC Nakuru Petition 9 of 2017 Luo Council of Elders and 7 Others Vs County Government of Bomet and 24 Others (2018) eKLR, Taib Investments Limited Vs Fahim Salim (2016) eKLR.**

Thus, even if the license from NEMA was still valid, this court would certainly have referred the matter to the Dispute Resolution Mechanism laid out in the relevant bodies as stipulated under the Environmental Management and Co-ordination Act (EMCA).

12. Damages

Though this claim for damages was pleaded, the same was not properly put forth during the trial. Firstly, this case was heard by way of written submissions, at the request of the petitioners through their counsel on 29/7/2019. Thus, none of the alleged affected residents have given a testimony as to the nature and extent of the injuries suffered by the petitioners. The submissions of the petitioners refer to the medical reports marked HAK 2 in the affidavit of 1st petitioner dated 5.2.2019. (where I have found 8 documents). The said documents can hardly be termed as medical reports. They appear to be medical prescription notes. The petitioners ought to have adduced sufficient evidence geared towards a proper assessment of damages. This claim must fail.

13. Final orders:

The petition partially succeeds in the following terms:

- 1) **A declaration is hereby issued to the effect that the Petitioners constitutional right to a clean and healthy environment as guaranteed by Article 42 of the Constitution has been violated and/or is threatened to be violated by the 1st and 2nd Respondents, their agents, employees and/or servants.**
- 2) **A permanent injunction is hereby issued restraining the 1st and 2nd Respondents whether by themselves, their agents and/or servants from carrying out any activities, wasting, constructing on, alienating or otherwise interfering or dealing with the Milk Processing Plant within that area known as PLOT NO. 314 TAQWA RESIDENTIAL AREA ISIOLO COUNTY where the petitioners reside, unless and until the 1st and 2nd Respondents comply with the statutory compliance standards set forth by 3rd- 5th Respondents**
- 3) **The 1st and 2nd Respondents are condemned to meet the costs of the suit.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH FEBRUARY, 2020.

IN THE PRESENCE OF:

C/A: Kananu

M G Kaume for 1st and 2nd Respondent – absent

Muriuki for 4th and 5th Respondent

1st petitioner present

Other parties absent

HON. LUCY. N. MBUGUA

ELC JUDGE