REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 21 OF 2019

BETWEEN

PATRICK ROMANUS OMUTO ODUNDO.....1ST PETITIONER

MAXWELL OTIENO.....2ND PETITIONER

AND

AGRO CHEMICALS & FOOD COMPANY LTD.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction

Patrick Romanus Omuto Odundo and Maxwell Otieno, through a Notice of Motion under certificate of urgency dated 16th December 2019, the Petitioners are seeking orders to suspend the operations of the 1st Respondent at its main plant in Muhoroni pending the hearing and determination of the petition. Moreover, to compel the 1st and 2nd Respondents to supply the Petitioner with a comprehensive Environmental Impact Assessment Report and Audit on the extent of the effluent discharge into River Nyando and the adjunct report and/or statistics of the waste and its disposal.

Furthermore, to certify that the petition raises issues on interpretation of the Constitution going to the root if the enforcement of the fundamental rights and freedoms relating to protection of the environment as contemplated in Article 42, 69, and 70 of the Constitution of Kenya 2010 and the same ought to go for final disposal and determination immediately and that the Respondents be condemned to pay costs.

The application is based on the grounds that there is deliberate and incremental discharge of toxic industrial waste into the Nyando River Basin and Muhoroni Township with adverse consequences to the health of all residents downstream. That the 2nd Respondent has withdrawn the 1st Respondent's licence on account of breaches and non-compliance with the law regarding refuse disposal, a factual proof of imminent danger posed by the Respondents to the Petitioner and fellow residents.

That the Respondents have abdicated their duty to protect and enhance safety within the environment with far reaching consequences. That the Respondents have ignored the need to establish more efficient systems controlling, preventing and regulating toxic waste, including using new technologies for environmental impact assessment, auditing and monitoring.

The Petitioner asserts that unless the court intervenes with the orders sought above, the Respondents shall sustain their illicit activities with perilous consequences to the residents and beneficiaries of the Nyando River Basin. That farming, fishing, livestock keeping, laundry, domestic and other such related activities derivative of the Nyando River waters have been disrupted to the colossal harm of the Petitioner and their fellow residents. That this court is obligated under Article 70 (2) (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, in this case the 2nd and 3rd Respondents as against the 1st Respondent. That the Respondents are in violation of Articles 42, 69 and 70 of the Constitution and have failed to respect promote and fulfil the fundamental rights and freedoms in the Bill of Rights contrary to Article 21 of the Constitution.

The Petitioners filed similar supporting affidavits to the effect that the Respondent has permitted the continued dumping of both solid, liquid

and toxic waste into River Nyando and Muhoroni Township to the great harm of its residents. That the 1st Respondent also emits offensive gases likely to be harmful to the residents, livestock and crops in the area. That the waste is not segregated and safely contained within the plant, and that the 1st Respondent has failed to construct a waste matter processing and treatment facility for reusing organic waste and other disposables. That the waste is poorly transported, outweighed and deposited recklessly into River Nyando and the surrounding without sorting, processing and treatment. The Petitioners attached to their affidavits a news article to the effect that NEMA had withdrawn the 1st Respondent's effluent discharge licence following its violation of environmental laws.

Grounds of Opposition

The 1st Respondent filed Grounds of Opposition on 20th December 2019 opposing the application on the grounds that the application was misconceived, misconstrued, devoid of any merits and ought to be dismissed. That the application was based on hearsay and devoid of any facts warranting the granting of the orders sought. That the Applicants have not demonstrated how they stand to suffer should they not obtain the orders. That the Applicants have not met the necessary requirements to grant the orders sought. That the Applicants seek to grind to a halt the operations of an entire company without any basis whatsoever and without consideration of the employees who stand to be affected.

1st Respondent's Response

The 1st Respondent responded through a replying affidavit of Peter Kihunyu Macharia, its Environment and Safety Manager. The Environment and Safety Manager deponed that the 1st Respondent was compliant with the legal and regulatory requirements and has been issued with the requisite licences, including occupational licence, workplace registration, annual Environmental Audit and establishing effluent monitoring and sampling points for internal and external accredited laboratories. That the 1st Respondent has diligently carried out environment sustainability, monitoring and reporting to NEMA upon which it was issued with certificates of compliance, licences and letters of acknowledgment; copies of which were attached to the affidavit. That the 1st Respondent has been carrying out annual Environmental Audit as statutorily required and NEMA has in the last three years 2015-2018 acknowledged receipt of the reports.

The Environment and Safety Manager asserted that the 1st Respondent has an elaborate, functional and efficient effluent treatment plant system, attaching a copy of layout of the system and purchase orders for maintenance of the treatment facility. That the 1st Respondent has been carrying out regular quarterly external effluent analysis as per the regulations and that it does not discharge raw effluent since it has a functional effluent treatment plant. That the 1st Respondent has never failed to implement advices issued by NEMA on negotiated compliance and agreed timelines. That the 1st Respondent carries out self-effluent monitoring on a daily and quarterly basis through an external accredited laboratory. That the 1st Respondent has always involved her neighbouring communities through participatory approach and has never been involved in litigation with the communities on environmental issues since inception.

That NEMA has not withdrawn the Effluent Discharge Licence as alleged by the Petitioners, which has also been confirmed by the 2nd Respondent in its replying affidavit. That no licence has been cancelled or any document produced by the 2nd Respondent expressing any intention to cancel the licence. That the Petitioners are merely relying in information sourced from social media without any backing whatsoever. That the Petitioners have no evidence of such withdrawal or negative impact to persons or community.

That the 2nd Respondent is not being genuine in supporting the granting or Prayers 2 and 3 knowing that they have not cancelled any licence. That the 2nd Respondent's exhibits are dated 6th March 2019 and 10th April 2019 yet the 2nd Respondent still went ahead and issued a licence in September, and besides invoicing the 1st Respondent for licence renewal fees which the was paid and has not been refunded to date.

That the Water Sample Analysis report attached to the 2nd Respondent's affidavit recommended further treatment of waste before discharge is dated 20th November 2019, and this application was filed nearly a month later on 16th December 2019, meaning that the 2nd Respondent has not followed up to confirm whether or not the recommendations were effected. That the 2nd Respondent demonstrated lack of good faith by not even sharing or forwarding the document to the 1st Respondent to give her the opportunity to act or remedy the situation.

That during the 2nd Respondent's monitoring, samples were collected together and analysed independently, but the results obtained by the 1st and 2nd Respondents are different. That the 1st Respondent's results shows a much better quality result than the 1st Respondent's. Attached to the affidavit was a copy of the 1st Respondent's effluent monitoring result. The Environment and Safety Manager asserted that the Petitioners had not proved any violation of their fundamental rights and freedoms under the Constitution as alleged. That the 1st Respondent has a workforce of over 250 employees and more than 1,000 indirect beneficiaries who stand to be affected economically and socially if the orders sought are granted. That in view of this and the 1st Respondent's demonstrated commitment to setting up an elaborate effluent treatment process, even if the court were to find that there was a measure of effluent discharge, it would be in the interest of justice to give the 1st Respondent time to explore and identify workable solutions rather than to shut down the facility and its operations.

2nd Respondent's Response

The 2nd Respondent response was through the replying affidavit of Tom Togo, NEMA's Kisumu County Director of Environment. The Director stated that the 1st Respondent had been on their radar following complaints of pollution through discharge of untreated effluent in the environment especially River Nyando. That upon the 1st Respondent's application for an Effluent Discharge Licence (EDL) for 2019, the Director and his team conducted an inspection at their premises on 6th March 2019 where a recommendation of suspension of the operations of the 1st Respondent was made due to the dire state of liquid waste management.

That the Director subsequently prepared a report which he has attached to the affidavit. That a follow up inspection/monitoring was

conducted on 10th April 2019 which found the situation still wanting and a recommendation to issue and Improvement Order given. That the Acting Director General of NEMA, while on a visit to Kisumu on 9th December 2019, had his attention drawn to the issues of pollution surrounding the 1st Respondent and made a public announcement of his intention to cancel any existing EDL and making a possible closure order as empowered by EMCA. That the intention of cancelling the EDL has yet to be implemented but is in the pipeline.

That the Environmental Restoration Orders and Improvement Notices could not be produced within the time allocated for filing the reply as the relevant file had been forwarded to the head office in Nairobi to inform the decision to cancel the EDL.

That sampling of effluent from the 1st Respondent's plant was conducted on 20th November 2019 and a laboratory result issued on 9th December 2019, a copy of which was attached to the affidavit. That from the report, it is evident that the parameters of checking pollution in waste water as provided in the Environmental Management and Coordination (Water Quality) Regulations 2006 were all exceeded significantly.

That based on the foregoing averments, the 2nd Respondent supports Prayers 2 and 3 of the Notice of Motion. That the 2nd Respondent opposes Prayer 4 as an EIA Report is only relevant for projects under conception, not existing or ongoing projects. That the 2nd Respondent opposes Prayer 7 as it has done all it could to guarantee the residents of Kisumu and beyond their right to a clean and healthy environment.

1st Respondent's Written Submissions

Counsel for the 1st Respondent submitted that Prayer 2 was spent as it sought orders pending hearing and determination of this application.

Counsel submitted that the prayers sought are dependent on all the Respondents being found to have abdicated their responsibility and cited for breach. That even the Petitioners agree that closure of the 1st Respondent's operations should be a last resort, and after the 1st Respondent has been given a chance to remedy the situation. That the Petitioners have not indicated the kind of operations carried on in the plant and whether they have an effect on the environment or neighbouring community. That closing the plant at interlocutory stage would be premature and have a colossal effect on the 1st Respondent's business and the economy of Kisumu County.

Counsel submitted that the Petitioners filed no initial affidavit in support of the application and have not availed proof of their factual statements. That the Petitioners seem to be relying on a supposed withdrawal of a license and relying on the contents of the 2nd Respondent's affidavit. That Sections 107 and 108 of the Evidence clearly provide that he who alleges must prove.

That the 2nd Respondent cannot be supporting an application based on alleged cancellation of a licence which it has not cancelled, and would amount to an abdication of its duty to investigate and monitor instances of breach and take necessary action. That the annexures to the 2nd Respondent's affidavit speak of suspension of production in the plant, issuance of an enforceable restoration order within 7 days, and further treatment of the effluent before discharge and not closure of the plant or suspension of its licence. That the question should then be whether the restoration order has been issued and the 1st Respondent given time to implement the restoration order. Counsel concluded by submitting that by virtue of Article 70 (2) of the Constitution, the court should give the 2nd Respondent time to take measures to prevent harm to the environment.

Counsel relied on the case of ***Kibos Sugar & Allied Industries Ltd & 2 others v Benson Ambuti Adega & 2 others; National Environment Management Authority & another (Interested Party)*** **[2018] eKLR** in which the Court of Appeal stayed the execution of orders to shut down the Applicant's operations on the basis of the potential colossal losses that would have had an irreversible effect on the Applicant's business.

Issues for Determination

1. Whether the prayers for conservatory orders are merited

The Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** **[2014] eKLR** laid out the principles guiding a court's consideration of whether to grant conservatory orders thus:

> **[86] "*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*."**

A five judge bench of the High Court in ***Patrick Musimba v National Land Commission & 4 others*** **[2015] eKLR**, relying on the public interest principle set out in the *Gatirau* case above, declined to grant conservatory orders that would halt the operations of the Standard Gauge Railway project, elaborating as follows:

> **"We started our discussion by reference to the Supreme Court's observations on the importance of considering conservatory orders vis-à-vis public interest. We would like to end there too but not before we point out that in such matters as this, the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice…**

> **The SGR project has no doubt generated extensive public interest…The public interest would be better served if the orders now sought are not granted. Granting the orders would mean that even areas not affected by the Petition would grind to a halt as far as the SGR project is concerned. The public interest principle set out in Gatirau Peter Munya - V- Dickson Mwenda Githinji (Supra) and the balance of prejudice militate against the grant of the conservatory orders sought."**

In **Micro & Small Enterprises Association of Kenya (Mombasa Branch) v Mombasa County Government [2014] eKLR**, the court held:

> **"In such circumstances, the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of right pending hearing and determination of the petition for breach of fundamental human rights and freedoms. Needless to state, in terms of Article 24 of the Constitution, the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardised or affected by the enjoyment by the applicant of the rights in question."**

Analysis

The only evidence tabled by the Petitioners to support their assertions for the prayers sought is a news article indicating the intention of the 2nd Respondent's Acting Director-General to withdraw the effluent discharge licence issued to the 1st Respondent. There has been no evidence demonstrating that the licence has been withdrawn. Further, the Petitioner has not tabled any evidence to demonstrate the disruption of the various activities on the Nyando River due to the actions of the 1st Respondent.

In its supplementary affidavit the Petitioners have attempted to piggy back on the affidavit evidence of the 2nd Respondent, namely the inspection and monitoring reports, and the laboratory result. However, the recommendations of these documents only specify the corrective measures to be taken by the 1st Respondent, facilitation of the 1st Respondent to acquire an Effluent Discharge Licence for 2019, and for an Environmental Improvement Order to be issued. They do not recommend the withdrawal of the 1st Respondent's EDL licence. The 2nd Respondent has not tabled any evidence to demonstrate that Environmental Restoration Order and/or Improvement Notices were issued, the specific terms of the orders, and that the 1st Respondent has failed to comply with those orders. Therefore, at this stage, the Petitioners are yet to establish a *prima facie* case meriting the grant of the conservatory orders. Further, the test of the balance of convenience tilts in favour of the 1st Respondent which stands to suffer significant losses should the orders be granted, and in favour of the workforce and various stakeholders that directly or indirectly benefit from the operations at the 1st Respondent's plant.

2. Appropriate orders

Having failed to establish a meritorious case against the Respondents at this stage, the Petitioners' application is dismissed. Costs in the cause.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2020.

In the presence of:

Mr Aoko for petitioners

Mr Aoko for Gitonga for 2nd respondent

M/S Asuna for the 1st respondent

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE