



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. 1 OF 2018**

**ROSE JUMA NYANJOM**

**GEORGE ONYANGO ONDERE**

**TITUS ACHAR OKUTO**

**IBRAHIM OLOO ONDITI.....PETITIONERS**

**VERSUS**

**THE COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**DORIS C. OMBARA.....2<sup>ND</sup> RESPONDENT**

**NAYA HOLDINGS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Petitioners' case is that, pursuant to a tender for rehabilitation of Kachok dumpsite, the 3<sup>rd</sup> Respondent was contracted by the 1<sup>st</sup> Respondent to transport waste and toxic substances from the Kachok dumpsite to the abandoned Kisumu Concrete quarry located in Mamboleo area of Kisumu City, disregarding the Petitioners' right to clean and healthy environment under Article 42 of the Constitution.

The Petitioners claim that even though an Environmental Impact Assessment (E.I.A) study has been conducted and submitted to National Environmental Management Authority (N.E.M.A) on 11<sup>th</sup> December 2017, no N.E.M.A license has been issued to the Respondents. That the project will certainly have the effect of exposing the residents of Mamboleo area to health hazards, given that Mamboleo is a densely populated residential area. That this constitutes a violation of Sections 58 and 59 of the Environmental Management and coordination Act 1999, as read with the Schedule 2 of the Act.

The Petitioners further contend that the Kenya Civil Aviation Authority was never consulted nor involved in the process of relocating the dumpsite to Mamboleo, despite the fact that the quarry is located within a 13km radius of the Kisumu International Airport Aerodrome reference point and within the flight path of runway 6 of the airport, posing a bird strike danger to aircraft operations due to birds feeding from the dumpsite. The Petitioners also contend that the residents of Mamboleo were never consulted or involved in the relocation process. That there was no public participation in the EIA.

That the quarry is 100 metres deep and filled with underground water, and if garbage is dumped therein, there is eminent risk of seepage of poisonous, hazardous substances/waste and effluent into the water table covering Kisumu County and polluting water in the region, threatening public health, safety, and welfare of the population, flora and fauna. That this will be a gross violation of intergenerational equity, offending Sections 3, 73, 87, and 88 of EMCA as well as Articles 10, 42, 43, and 69 of the Constitution of Kenya.

According to the petitioners, the dumping of garbage in the quarry will expose the neighbouring River Kibos to poison, effluent and hazardous waste from the site, affecting the population, wildlife, aquatic life and plants of residents living alongside the river, and Lake Victoria, which River Kibos ultimately drains into and that the 3<sup>rd</sup> Respondent is not licensed to transport waste and has failed to comply with the provisions of the Environmental Management and Coordination (Waste Management) Regulations 2006.

The proposed new dumpsite is next to a wetland and water bodies (River Kibos and Riwa Makopela stream). That the proposed dumpsite is next to various social amenities including schools and hospitals. The resident taxpayers of Kisumu County stand to suffer economic loss from the astronomical contract amount of Kshs. 99,250,000/= by virtue of a project that exposes residents to health hazards.

The Petitioners are therefore seeking a declaration that the award did not follow the provisions of Environmental Management and

Cordination Act, Kenya Civil Aviation Act and the regulations thereunder and that the relocation and transfer of the Kachok dumpsite to Kisumu Concrete quarry in Mamboleo will expose the residents to Mamboleo to health hazards and the contract issues to the 3<sup>rd</sup> Respondent be cancelled for want of compliance with the provisions of EMCA and Kenya Civil Aviation Act. **Furthermore**, a conservatory order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through themselves, their appointed agents, servants, employees and/or officers from transferring the dumpsite from Kachok pursuant to the provisions of Article 70 (2) (a). Last but not least, a **prohibitory** order restraining the 3<sup>rd</sup> Respondent through itself, its Directors, officers, agents, servants and/or employees from lifting and transporting the garbage from Kachok dumpsite to the abandoned quarry at Mamboleo since the same would arrogate the Petitioners and Kisumu residents' rights under Article 42 of the Constitution.

Considering the fact that the application is brought in the public spirit to defend constitutional rights of citizens, orders for costs be reasonable and commensurate to the cause in any event.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied awarding the tender to the 3<sup>rd</sup> Respondent in disregard to the Petitioners' right to clean and healthy environment. They asserted that the contract was for transportation of inert waste and not toxic waste. That EIA was done and NEMA granted the licenses to rehabilitate the quarry at Mamboleo and use inert waste from Kachok dumpsite in accordance with the law, hence there was no violation of EMCA.

According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the Kenya Airports Authority was consulted and it carried out risk assessment and prepared a report dated 24<sup>th</sup> November 2017 to the effect that as long as inert waste was to be used for rehabilitation of the quarry, it had objection\* to the same. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents asserted that there was documented public participation of all the affected persons and full report and mitigation factors taken into account. That steps have been made to ensure that there is no seepage of any hazardous substances or waste into any water table nor any danger to human life, public safety, welfare, flora and fauna; as Sections 3, 73, 87, and 88 of EMCA as well as Articles 10, 42, 43, and 69 of the Constitution have not been violated. That the transportation of inert waste shall be carried out in strict conformity with EMCA (Waste Management) Regulations 2006 under the supervision of NEMA and other agencies.

They state that only inert waste is being used to rehabilitate the abandoned quarry at Mamboleo and hence surrounding rivers and amenities will not be affected. That, contrary to the Petitioners' assertions, the KAA has recommended the relocation of the Kachok dumpsite as a matter of urgency as it endangers the aviation industry in Kisumu County.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents claim that the Petitioners have relied on falsehoods, misapprehension of documents and facts and rumours without any data to back their allegations. That 2<sup>nd</sup> Respondent is an employee of the 1<sup>st</sup> Respondent and thus the petition was improperly filed against her and should be struck off.

### **3<sup>rd</sup> Respondent's Response**

Through a replying affidavit of its Managing Director, the 3<sup>rd</sup> Respondent asserted that the procurement process for the rehabilitation of the Kachok dumpsite was above board and compliant with the law. That the proprietors of the disused quarry made an application for the rehabilitation of the quarry to prevent environmental degradation, which was approved by NEMA.

The 3<sup>rd</sup> Respondent contended that the letter of the tender award was for rehabilitation of Kachok dumpsite and not relocation. That relocating inert waste from Kachok to Mamboleo would not occasion health problems and the Petitioners' argument was made from a point of ignorance or malice. That in contrast to quarry which is on the outskirts of Kisumu town and sparsely populated, the Kachok dumpsite is located in a densely populated, high traffic area and is sandwiched by many facilities and institutions. That the 3<sup>rd</sup> Respondent has the technical skills and resources to address the problem, and that their quarry is large enough to absorb all the garbage from Kachok and take many more over the years.

The 3<sup>rd</sup> Respondent also described how it would prevent water from entering the proposed dumping pan in the quarry using impermeable geo-liner sheeting at the bottom, and also how it would redirect rain water that percolates into the dumping pan into a separate collection pan. It also described how the tipper tracks transporting the inert waste would be covered to prevent the material from flying off in transit.

The 3<sup>rd</sup> Respondent asserted that the waste material at Kachok was inert and without a smell but as a mitigation measure the 3<sup>rd</sup> Respondent had introduced a liquid to be added to the waste while loading to kill the smell and smell inducing organisms, and that they would layer every meter of waste with quarry dust. That the inert waste would therefore not attract birds and pose a risk to airplanes' flight paths, so much so that the Kenya Civil Aviation Authority green lit the project.

That the EIA was done and the report handed to NEMA, which showed that public participation was carried out and mitigation measures noted. That all the concerns of the Petitioners have been considered by experts and responsible agencies and their input has been incorporated into the project. That the relocation of the dumpsite will have far-reaching positive health and socio-economic benefits to the residents of Kisumu. That the Petitioners have not annexed any contrary expert report or study to warrant the orders sought.

That the petition was mischievous and premature, in that the Petitioners ought to have first lodged a complaint with NEMA which has the powers to issue a stop order where no EIA report for a major project has been submitted to it, to cancel a NEMA license, and to prosecute any offender polluting the environment. That if the Petitioners were dissatisfied with the NEMA decision, they would still have the right to lodge an appeal to the National Environment Tribunal, after which they could appeal the Tribunal decision to the Environment and Land Court. That the Petitioners have not established a *prima facie* case, and that the 1<sup>st</sup> Petitioner was a busy body that is using the petition to blackmail the 3<sup>rd</sup> Respondent, having filed and withdrawn a previous petition Kisumu ELC Petition No. 32 of 2017 only to file the present

petition without settling costs in the withdrawn petition.

### **Petitioners' Submissions**

Counsel for the Petitioners submitted that the 3<sup>rd</sup> Respondent confirmed in their affidavit that the EIA report has been submitted for the issuance of a license but have not led sufficient proof of the NEMA license. That failure to conduct EIA and obtain license before commencing any activities offended the mandatory requirements of Section 58 of the Environmental Management and Coordination Act (EMCA).

Counsel submitted that KCAA never issued a license to the Respondents to undertake the project within the flight funnel. That in the assessment report annexed to the 3<sup>rd</sup> Respondent's affidavit, the KCAA gave several recommendations to be complied with first before approval, including carrying out an aeronautical study. Counsel cited the case of **Kenya Civil Aviation Authority & another v Timothy Nduvi Mutungi [2017] eKLR**

Counsel asserted that there was no public participation conducted by the Respondent on the project in total breach of the Constitution, particularly Article 10 (2) (a) and 69 (1). That the Respondents led no evidence of ever having conducted a public participation process.

Counsel submitted that failure by the Respondents to follow the law in the relocation project is a clear demonstration of violation of the Petitioner's rights. Counsel cited the case of **County Government of Kitui v Sonata Kenya Limited & 2 others [2018]** which held that where the procedures for the protection of the environment are not followed, including public participation, an assumption can be drawn that the right to a clean and healthy environment is under threat.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

Counsel for the Respondents submitted that both Kenyan and international laws were considered in the use of inert waste from Kachok dumpsite to rehabilitate the Mamboleo quarry. That NEMA, in their letter of 30<sup>th</sup> January 2017 had given the owners of the proposed waste refill site at Mamboleo the permission to have the same rehabilitated by use of inert waste from the Kachok dumpsite upon conditions.

Counsel submitted that records of the 1<sup>st</sup> Respondent, various committees and departments of the city of Kisumu show that due process was followed in the whole process. That as evidenced by the documents on record, NEMA issued a license for the use of inert waste from the Kachok dumpsite to be used for the rehabilitation of the abandoned quarry at Mamboleo. That an application for the rehabilitation of the disused quarry was approved with various conditions. That an audit by expert consultants was undertaken before the project began providing an elaborate road map addressing the environmental, health, planning and land use issues. That an EIA was carried out and lodged at NEMA and a license granted for the project to proceed with conditions. That KCAA was involved in the project and gave a green light to the project vide their letter dated 24<sup>th</sup> November 2017. That WARMA was also consulted and it gave its inputs. That the project was subjected to public participation involving various leaders and stakeholders.

Counsel submitted that even though Article 70 of the Constitution provides for the enforcement of environment rights, the Petitioners have to clearly show how the Respondent has violated the particular right and to extent. That the concerns of the Petitioners have been considered by experts and responsible agencies and that there is no contrary expert report or study provided by the Petitioners. Counsel cite the case of **African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR**.

### **3<sup>rd</sup> Respondent's Submissions**

Counsel submitted that the Petitioners bypassed lodging a complaint to NEMA and an appeal at the National Environment Tribunal and lodged this suit without exercising due diligence and following the laid down due procedure. That the Petitioners ought to have approached the court after exhausting the other mechanisms. That by the court proceeding to hear the matter as a first instance court, it will have denied the parties the right of appeal. That the petition had exposed the Petitioners as enemies of progress standing in the way improving the quality of life of the residents of Kisumu.

Counsel submitted that the 3<sup>rd</sup> Respondent exercised due diligence and conducted a full EIA with a team of experts which was approved by NEMA and the 3<sup>rd</sup> Respondent was issued with a license.

Counsel submitted that the court ought to consider the principles, values and objectives to be attained by the project with a sense of proportionality, public interested and public policy consideration as stated in **Kenya Bus Services Ltd & 2 others v The Attorney General & 2 others [2005] eKLR**.

## **Issues for Determination**

### **1. Whether the petition is properly before the court**

The 3<sup>rd</sup> Respondent argued that the issues raised by the Petitioners ought to have been lodged first with the National Environment Complaints Commission and then the National Environment Tribunal on appeal before being brought on appeal to this court.

**Section 32** provides that the Complaints Committee is mandated to investigate:

**(i) any allegations or complaints against any person or against the Authority in relation to the condition of the environment in**

Kenya;

**(ii) on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary.**

Under **Section 129 of EMCA 1999, the National Environment Tribunal** is mandated to handle appeals against various decisions of NEMA including decisions relating to the granting, limitation, revocation, suspension or variation of licences under the Act; as well as the imposition of environmental restoration orders or environmental improvement orders.

### Analysis

While most of the issues raised by the Petitioners fall within the purview of the above mentioned bodies under EMCA, other issues have been raised to do with alteration of the environment in a manner that may create a potential hazard to civil aviation operations under the Civil Aviation Act. Further prayers (d), (e), and (f) fall outside the mandate of the Complaints Committee or Tribunal but within the jurisdiction of the Environment and Land Court. Since this court has jurisdiction to handle all the issues tabled by the Petitioners at once, it would therefore be most efficient to hear and determine the petition in a single forum in this court, in the spirit of the **Article 159 (1) of the Constitution**.

### **2. Whether the Respondents are operating without an EIA license**

As was determined in the earlier application in this case, the subject matter of petition is the “Rehabilitation of Kisumu Concrete Quarry using inert waste from Kachok Dumpsite”, and that the quarry is situated at Mamboleo area on land parcel Kisumu/Wathorego/88. The Petitioners central argument is that the project awarded to the 3<sup>rd</sup> Respondent has commenced and is ongoing without the requisite impact assessment studies being carried out and licenses issued. ,

The evidence produced by the Respondent shows that NEMA issued an EIA license for the project on 30<sup>th</sup> January 2018, allowing the implementation of the project subject to a raft of conditions attached. The Petitioners have failed to lead evidence demonstrating that the EIA license is invalid, or that the EIA license has been revoked, suspended or cancelled.

The EIA study of the proposed project attached to the affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents also contains a section titled “**Public Participation List**” containing an Attendance Register for what appears to be a public participation forum on the project on 23<sup>rd</sup> November 2017, and which appears to have been attended by various stakeholders concern.

The Respondents have therefore demonstrated to the required standard of proof that an EIA study was conducted, the EIA study was reviewed by NEMA and a license for the project issued, subject to various conditions. There is also evidence that public participation was conducted in the course of the EIA study. The upshot is that the Respondents complied with Section 58 of EMCA and conformed to Article 69 (1) of the Constitution.

### **3. Whether the Respondents required and obtained the approval of KCAA/KAA**

The Petitioners argued that KCAA was never consulted nor involved in the project. Counsel for the Petitioners further argued that the KCAA never approved the project and issued a license allowing the project to be undertaken within the flight funnel. That the KCAA gave various recommendations to be complied with first before approval.

The import of Sections 9, 56 and 57 of the Civil Aviation Act and Sections 8, 14 and 15 of the Kenya Airports Authority Act is that the KCAA and KAA are mandated to ensure that developments on land that falls within gazetted flight paths and/or are near gazetted aerodromes do not pose a hazard to aircraft operations.

Counsel for the Petitioner cited the case of **Kenya Civil Aviation Authority & another v Timothy Nduvi Mutungi [2017] eKLR** to support the argument that the Respondents were required to obtain an approval of the KCAA. The cited case refers to the requirement of approval of the construction of buildings or structures that may interfere with aircraft operations as provided under **Section 15 (3) of the Kenya Airports Authority Act**, particularly with reference to height specifications of the building. There is an established regime and procedure for this approval which includes a standard form titled “Aerial Masts and Other Such Height Approval Application Form” to be filled by the applicant.

However, when it comes to developments that may involve a potential wildlife hazard such as this case, neither the Civil Aviation Act nor the Kenya Airports Authority Act contemplates an approval mechanism. The regulations for management of wildlife hazards are contained in Part VII of the Civil Aviation (Aerodromes) Regulations 2013. Regulation 65 provides:

**“(6) An operator shall consult with the relevant authorities to take action to eliminate or to prevent the establishment of refuse collection sites, garbage disposal dumps, landfill sites, or any other source which may attract wildlife to the aerodrome, or its vicinity, unless an appropriate wildlife assessment indicates that they are unlikely to create conditions conducive to a wildlife hazard problem.”**

**(7) Subject to sub-regulation (6), refuse collection sites, garbage disposal dumps and landfill sites shall be located no closer than a 13km circle centred on the aerodrome reference point and shall be located further, if located in the vicinity of an approach and take-off path of an aerodrome, where studies of flight lines of birds attracted to these sites prove that they may be problematic for the aerodrome.**

**(8) Where the elimination of existing sites is not possible, the operator and the relevant authorities shall ensure that any risk to aircraft posed by these sites is assessed and reduced to as low as reasonably practicable.**

From the above, it appears that the Civil Aviation Act contemplates a consultative process with relevant authorities, rather than an application and approval mechanism, in matters concerning the location and wildlife hazard management of dumpsites and landfill sites.

The 3<sup>rd</sup> Respondent approached the KCAA requesting it to carry out an aeronautical study/risk assessment and inspection regarding the quarry and proposed activities thereon. KCAA referred the 3<sup>rd</sup> Respondent to the KAA. The KAA subsequently carried out the risk assessment exercise and sent a final report to both the 1<sup>st</sup> and 3<sup>rd</sup> Respondent vide a letter dated 24<sup>th</sup> November 2017 from the Managing Director. The report contained various recommendations, with the central ones being that the exercise should be carried out only after establishment of an alternative dumping/landfill site meeting the criteria set by KCAA and KAA, and the exercise be carried out with the conditions provided. The aeronautical study recommended by the report is not in reference to the subject project in Mamboleo but refers to the alternative dumping/landfill site to be provided by the 1<sup>st</sup> Respondent, as elaborated by the second letter from the Managing Director of KAA dated 24<sup>th</sup> November 2017.

The Petitioners have not demonstrated that the alternative dumping/landfill site is indeed located within an aircraft flight funnel and therefore necessitating an appropriate aeronautical study.

**4. Whether the Petitioners have demonstrated breach of EMCA and the Civil Aviation Act**

The 3<sup>rd</sup> Respondents have demonstrated that they properly obtained an EIA license from NEMA and consulted the KCAA and KAA which provided recommendations and conditions regarding how to undertake the project. NEMA also issued the EIA license with elaborate conditions for undertaking the project. The Petitioners have failed to demonstrate any breach of any of the conditions placed upon the Respondents by the relevant authorities.

The Petitioners have also not demonstrated that the project would violate residents' rights to a clean and healthy environment under Article 42 of the Constitution. The 3<sup>rd</sup> Respondent's affidavit, on the other hand, has gone to great lengths to elaborate on the measures to be put in place to address the concerns raised by the Petitioners. The upshot of the above is that, the petition lacks merit and is hereby dismissed.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**In the presence of:**

M/S Imbaya For Petitioners

MR Owino For 3<sup>rd</sup> Respondent

M/S Namusubo For 1<sup>st</sup> And 2<sup>nd</sup> Respondents

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**