



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 22 OF 2015

IN THE MATTER OF ARTICLE 47 AND 69 (1) (A) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE GEOTHERMAL DEVELOPMENT COOPERATION ACT

AND

**IN THE MATTER OF APPOINTMENTS OF BOARD MEMBERS TO GEOTHERMAL DEVELOPMENT COOPERATION
(G.D.C.BOARD)**

AND

IN THE MATTER OF VIOLATION OF ARTICLE 27 AND 69(1) (A) OF THE CONSTITUTION

JOACHIM NJUI & 612 OTHERS.....PETITIONERS

VERSUS

GEOTHERMAL DEVELOPMENT CO-OPERATION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Parties

1. The Petitioners are residents of Nakuru County who live around Menengai Crater while some are landowners within Menengai Crater exploration area. The 1st Respondent is a limited liability company owned wholly by the Government of Kenya and is a special purpose vehicle to fast track development of geothermal resources in Kenya.

2. The 2nd Respondent is a constitutional office established by Article 156 of the Constitution of Kenya and is the principal legal advisor to the Government.

Petitioners' case

3. The Petitioners filed a Petition dated the 5th May, 2015 and amended on the 6th August, 2015 seeking orders that:-

a) A determination that the constitution of the board of the 1st Respondent is discriminative and against the Constitution in Article 27 and 69 (1)(a).

b) An order directing the 2nd Respondent to reconstitute the board and allow the Petitioners 95% of the appointments in the 1st Respondent's board.

c) An order directing that the 1st respondents do give priority of all positions to the residents of Nakuru County.

d) An order directing that the 1st Respondent do make public the Environmental Impact Assessment Report.

e) (i) An order that the 1st Respondent do compensate the Petitioners for the infections and the environmental damages that has been caused to the Petitioners as well as clearing the air of the bad smell of sulphur.

f) Costs of the Petition.

4. It is the Petitioners' allegation that while appointing its board of directors, the 1st Respondent failed to appoint residents of Nakuru County to 95% of the board's slots who are duly qualified and competent and instead chose to appoint the President's friends to the board in contrast to other parastatals thereby unlawfully discriminating against the residents of Nakuru County.

5. It was further alleged by the Petitioners, that the 1st Respondent unlawfully discriminated against them by giving casual jobs such as drivers, sweepers and tea girls to people who lived in hotels in Nakuru town and had to be ferried to the site on a daily basis instead of giving such opportunities to people from the local community who were able to walk to the site. They alleged that they were further informed that the only jobs available to them were those of watchmen since they most likely knew thieves who would attack the site.

6. The Petitioners alleged that the 1st Respondent failed to share the national resources equitably to ensure that the Petitioners benefited. It was alleged that the 1st Respondent failed to make any meaningful contribution to the local community as it failed to create jobs, the water provided was unsafe for human consumption and the murrum road to the site does not benefit the community. Further it was alleged that when the 1st Respondent expanded the road from Kabarak to the site it failed to compensate the community for public utility land where the community had intended to build a school.

7. The Petitioners blamed the 1st Respondent for deterioration of the environment around the crater as the green cover of trees had reduced. Further, the drilling by the 1st Respondent resulted in release of unknown gases which caused a bad smell and skin allergies to the Petitioners and additionally, the noise pollution due to the drilling at night caused the Petitioners sleepless nights. The Petitioners complain that the 1st Respondent has refused to compensate them for the loss of amenities and the health hazards suffered.

1st Respondent's case

8. The 1st Respondent opposed the Petition by way of a Replying Affidavit of Godwin Mwagae Mwangongo, the Acting Managing Director of Geothermal Development Company Limited (GDC) dated 18th May, 2015. He averred that the Petition referred to Geothermal Development Co-operation as the 1st Respondent and not GDC being the Geothermal Development Company Limited pointing out that the two were distinct entities; that GDC was established to harness geothermal resources in Kenya and it was expected to drill 1400 stem wells to provide 5000MW of geothermal power by 2030, and; was mandated to foster successful interaction with governments, community based groups by creating employment opportunities for local communities where GDC operates.

9. Mr. Mwangongo deposed that clause 2 of the GDC's Articles of Association provided for the appointment to the board of the GDC to be governed by the State Corporations Act, 2010 and further that under clause 4 of the Articles directed that the appointments would be by name in the Gazette. Further Section 6(1) (e) of the State Corporations Act empowered the Cabinet Secretary, Ministry of Energy and Petroleum to make appointments to the GDC board members.

10. In further averments, Mr Mwangongo stated that on the 21st April, 2015, by way of Gazette Notice No. 2892, the Acting Cabinet Secretary for energy and Petroleum, Mr. Henry Rotich, appointed Salaton Letaipan, Michael Ogwapit, Dr. Stephen Njiru and Florence Chepngetich Bore to the GDC board for a period of 3 years. The appointments were made in accordance to the Articles of Association of the GDC and the State Corporations Act, 2010; that the appointees were qualified and met all the parameters including Chapter Six of the Constitution and the diversity principle and that there was no basis therefore for impugning the appointments. He further averred that the Petition was incompetent for failure to enjoin the Cabinet Secretary for Energy and Petroleum who was the appointing authority.

11. Mr. Mwangongo further deposed that under Section 3 of the Geothermal Resources Act the geothermal resources were vested in the government to manage and exploit and do not belong to the people of Nakuru County as claimed by the Petitioners but geothermal resources were found in other counties such as Turkana, Baringo, Homa Hills in Nyanza, Nyambene ridge in Meru and Mwananyamala at the Coast.

12. On the issue of environmental degradation, Mr. Mwangongo averred that the Petitioners had not adduced any evidence of damage to the environment and stated that the projects undertaken by the GDC had been approved by the National Environmental Management Authority (NEMA) and had been issued with Environmental Impact Assessment License and an Environmental Social Impact Assessment License. He further averred that the GDC had identified steps to improve identified effects of the projects and were progressively implementing the same.

13. Mr. Mwangongo averred that the GDC had benefited the local community and listed a number of benefits such as reduced power costs, providing internships for students, creation of SACCOs for women and youth, provision of water by sinking boreholes and exploring new method of harvesting rain and underground water, created employment by employing residents of Nakuru County and has promoted sports as the main sponsor of the Menengai Half Marathon.

The 2nd Respondent's case

14. The 2nd Respondent opposed the Petition by way of grounds of opposition dated 25th July, 2015 and further by the Replying Affidavit of Eng. Joseph K. Njoroge the Principal Secretary of the State Department of Energy under the Ministry of Energy and Petroleum dated 30th May, 2016.

15. The 2nd Respondent's case was based solely on the appointment of the members of the Board of the 1st Respondent and its arguments

that the appointments were in accordance to the law which arguments are similar to those of the 1st Respondent and I therefore see no need to reproduce the same.

Submissions

16. The Petition proceeded by way of written submissions. The Petitioners filed their submissions dated the 14th March, 2017 on the same day while the 1st Respondent filed its submissions dated 23rd June, 2016 on the 1st July, 2016 and the 2nd Respondent filed its submissions dated the 20th March, 2016 on 21st March, 2017.

Petitioners' submissions

17. The Petitioners submitted that they had been discriminated against by the 1st Respondent's failure to give them a chance to serve on its board of directors or offering them a sizeable share of its other jobs. That the 1st Respondent being a public institution had an obligation to respect, uphold and defend the Constitution which it failed to do by not giving effect to the constitutional criteria for regional diversity in appointing persons to the board; and in particular failing to accommodate members of the local community thereby violating their fundamental rights.

18. The Petitioners submitted that despite the Environmental and Social Impact Assessment Report annexed by the 1st Respondent showing that the H2S concentrations at the site were within the offensive odour limit of between 0.003 and 0.005ppm, the local community had suffered negative health effects demonstrable by treatment notes annexed to the Petition.

1st Respondent's submissions

19. The 1st Respondent identified two issues for determination as follows: whether the appointment to the GDC Board of Directors was made in accordance to the law; and whether the operations of the 1st Respondent violated the Petitioners' right to a clean and healthy environment.

20. On the appointment of the board of directors, the 1st Respondent submitted that the appointments satisfied all the statutory declarations as it was in accordance to clause 2 of the 1st Respondent's Articles of Association and Section 6(1) (e) of the State Corporations Act, 2010 as the appointments were done by the Acting Cabinet Secretary in the Ministry of Energy and Petroleum and the said appointments duly gazetted. Further, it was submitted that the Petitioners failed to appreciate that the Cabinet Secretary for Energy and Petroleum was the appointing authority and that failure to enjoin him in the suit was fatal as the prayers sought would be in vain.

21. The 1st Respondent further submitted that the Petitioners misapprehended the principles of non-discrimination under Article 27 of the Constitution. That Article 232 of the Constitution provides that values and principles of public service included representation of Kenya's diverse communities and the Petitioners submission that the board of directors should comprise 95% of the local community was in contravention with the Constitution. Further it was submitted that the Petitioners had failed to prove that the persons employed by the 1st Respondent were not from Nakuru County.

22. The 1st Respondent further submitted that under Article 69 of the Constitution, the enjoyment of natural resources was for the benefit of the people of Kenya and under Section 3 of the Geothermal Resources Act were vested in the National Government for the equitable enjoyment of all Kenyans and not Nakuru residents only.

23. On the second issue on whether the 1st Respondent's activities violated the Petitioners right to a clean and healthy environment, the 1st Respondent submitted that the projects undertaken were in accordance with the requirements of the Environmental Management and Coordination Act (EMCA), 1999. That NEMA approved all projects and issued Environmental and Social Impact Assessment License and Environmental Impact Assessment License. It was further submitted that the Petitioners had failed to provide evidence of environmental damage by the 1st Respondent.

2nd Respondent's submissions

24. The 2nd Respondent submissions were solely based on the appointment of the members of the board of directors of the 1st Respondent and were similar to the submission by the 1st Respondent to the effect that the appointments were in line with the statutory provisions and therefore lawful.

Analysis and determination

25. I have considered the pleadings and the written submissions by the parties and the only issue for determination is whether the Petitioners' constitutional rights were violated.

Whether the Petitioners were discriminated

26. The right against discrimination has been provided for under **Article 27** of the Constitution where Article 27 (1) states:

'Every person is equal before the law and has the right to equal protection and equal benefit of the law'.

While **Article 27 (4) and (5)** provides:

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause (4)”.

27. Discrimination has been defined in the *Black’s Law Dictionary*, 10th Edition, as: **“Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”** In **Peter K. Waweru vs. Republic Misc Civil App 118 of 2004 (2006) eKLR** the court defined discrimination as follows:-

‘...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by... sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured’

28. As earlier stated, the Petitioners allege that they were discriminated in the appointment of the board of the 1st Respondent and in the employment of its workers. The Respondents have defended the appointments to the board stating that the said appointments were done in accordance to the law and the Constitution and that the residents were not excluded in the employment.

29. It is trite that where a Petitioner alleges that his rights have been contravened it is incumbent to prove that such right has indeed been proved. The Court of Appeal in the **Mohammed Abduba Dida v Debate Media Limited & another Civil Appeal No. 238 OF 2017 [2018] eKLR** stated that:-

“In the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;*

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”.

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the Petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the Petitioner’s knowledge. Once the case is made out, the burden shifts to the other party.”

30. Similarly in the case of **Samuel Nduati & 3 others v Cabinet Secretary Ministry of Health & 9 others [2018] Petition No. 42 of 2018 eKLR, Makau J** held that:-

‘Once again, the burden of proof lies with the Petitioners to prove the alleged discrimination by adducing evidence to substantiate the alleged violation. At the risk of repeating myself, the Petitioners have not tendered any iota of evidence to prove the alleged disparity in the terms of service between the Cuban doctors and their Kenyan counterparts. On that ground of lack of evidence alone, the alleged violation of Article 27 and 41 fails.’

31. It is only after the Petitioners have shown that their alleged rights have been violated that the burden of proving that a fundamental right has not been breached or that a limitation of such a right is justified shifts to the respondent. This was the position held by Odunga J in **Lucy Nyaguthii Wachira v Council for Legal Education & 3 others Petition No. 444 of 2016 [2017] eKLR** where the learned judge stated that:-

‘The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in *Lyomoki and Others vs. Attorney General [2005] 2 EA 127, the principles of constitutional interpretation are that firstly, the onus is on the Petitioners to show a prima facie case of violation of their constitutional rights. Thereafter the burden shifts to the Council to justify that the limitations to the freedom from discrimination in the impugned decision is justified.’*

32. I have perused the pleadings together with the annexures of the Petitioners and all I have seen are attached C.V.’s, driving licenses, and; recommendation letters among other documentations of 5 out of the 613 Petitioners showing that they are qualified to be drivers. The annexures do not include the qualifications and the testimonials of those who were successful and the selection criteria to demonstrate that the Petitioners, though equally qualified, were discriminated. They have further failed to show that the 1st Respondent had hired workers exclusively from outside Nakuru County. Without such evidence it is impossible to shift the burden of proof to the 1st Respondent to explain why the residents have not been afforded equal opportunities.

33. The Petitioners submission that the 1st Respondent was obliged to appoint residents of Nakuru County to 95% of the posts in its board of directors is baseless and is not supported by any law. The Constitution under **Article 232** provides values and principles of public service

which call for a '**representation of Kenya's diverse communities.**' There is no law that provides directly or indirectly that consideration for appointment to state corporations or institutions should consist of members from a particular County but rather must encompass the diversity of the people of Kenya.

34. Further, and as pointed out by the 1st Respondent, the board of the 1st Respondent undertakes projects in other counties across the country such as Meru, Turkana and Baringo Counties. There is therefore no justification for such a board to comprise 95% of members from Nakuru County as desired by the Petitioners.

35. For these reasons I find the Petitioners' claim that they have been discriminated bereft of constitutional or legal basis and must fail.

Whether the Petitioners rights under Article 69 of the Constitution were violated

36. The Petitioners have argued that they have not benefited from the natural resources as the 1st Respondent has failed to equitably share the natural resource it has exploited against **Article 69 (1)(a) of the Constitution**. **Article 69 of the Constitution** provides that the State shall '**ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.**' Natural resources have been defined under Article 260 as: '**The physical non-human factors and components, whether renewable or non-renewable, including—Sunlight, surface and groundwater, forests, biodiversity and genetic resources; and, rocks, minerals, fossil fuels and other sources of energy.**'

37. It is clear from the project of the 1st Respondent at Menengai Crater that the natural resource being harnessed is geothermal energy. The Petitioners have not shown how the geothermal energy that is being harnessed by the 1st Respondent has not been utilized and how the accruing benefits have not been equitably shared for the benefit of the people of Nakuru County. On the contrary the 1st Respondent has stated how it has started a number of projects for benefit of the community though the said projects may not be the sort of projects that the Petitioners may have had on their mind as seen from their Affidavit.

38. Further the Petitioners have failed to prove a nexus between the appointments of the board to the utilization of natural resources. As defined by Article 260 natural resources are non-human factors which are obtained from our environment. Appointment of persons to the board of directors does not constitute natural resources and therefore the contention that the constitution of the board of directors of the 1st Respondent goes against the provisions of Article 69 of the Constitution is without basis. It has not been shown that the Board in its management of the natural resource has denied the people of Nakuru the enjoyment of the said resource.

Whether the rights of the Petitioners to a clean and healthy environment were violated

39. On whether the rights to a clean and healthy environment have been violated, the first question that arises is whether this court has the jurisdiction to deal with this question.

40. The jurisdiction of a court flows from the Constitution or from legislation or both as was held by the Supreme Court in the case of **Samuel Kamau Macharia Vs. Kenya Commercial Bank Limited and 2 Others [2012] eKLR** where it held that:-

"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....."

41. The jurisdiction of the High Court stems from **Article 165 of the Constitution, 2010**. Further **Article 165(5) of the Constitution** goes to limit the jurisdiction of the court by specifically stating that '**the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2)**'

42. Pursuant to **Article 162(2)(b)** of the Constitution Parliament established the Environment and Land Court with the mandate to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

43. Subsequently, and in line with **Article 162(2) (a) and (3)**, and **Article 72** of the Constitution, Parliament amended Section 3 of the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) through the Environmental Management and Coordination (Amendment) Act No. 5 of 2015 (EMCAA, 2015) to provide for environmental rights, protection of the environment, redress for violation of such rights and the mode of enforcing the rights through the Environment and Land Court.

44. It is clear from a reading of the Constitution together with that of the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) that this court's jurisdiction to hear and determine an environmental dispute is limited as the exclusive original jurisdiction to do so has been given to the Environment and Land Court. As stated the celebrated case of **Owners of the Motor Vessel 'Lillians' versus Caltex Oil (Kenya) Ltd [1989] KLR1**, 'where the court lacks jurisdiction it must down its tools.' In the interest of justice however, I will strike out the prayers for environmental redress to enable the parties approach the right court.

Final orders

45. For all the above reasons, and save for the prayers for environmental redress which I hereby strike out, the Petition fails and is dismissed.

46. This being public interest litigation, each Party shall bear their costs.

Orders accordingly

Judgement signed

R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru this 3rd day of April, 2019

JANET MULWA

JUDGE

In the presence of:

.....**Court Assistant**

.....**For the Petitioners**

.....**For the 1st Respondent**

.....**For the 2nd Respondent**