



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.116 OF 2016**

**BETWEEN**

**WASTE AND ENVIRONMENT MANAGEMENT ASSOCIATION  
OF KENYA (WEMAK).....PETITIONER**

**AND**

**NAIROBI CITY COUNCIL .....RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY.....INTERESTED PARTY**

**RULING**

**Introduction**

1. The Application before me is dated 4<sup>th</sup> April 2016 premised on **Articles 23(3) and 258** of the **Constitution and Rules 1(3), 9 and 23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

2. The Petitioner claims that it is an association of Waste Management Companies operating in Nairobi County and whose members have been collecting and disposing solid waste for some years. Its Petition is grounded on alleged violations of **Articles 42, 43, 46, 47, 69, 70 and 72** of the **Constitution** by the Respondents in enacting the **Nairobi City County Solid Waste Management Act, 2015** which it contends is unlawful by purporting to grant the County Executive in-Charge of the Environment, powers to *inter alia* create zones in the County, issue licences for waste transportation and disposal as well as to impose levies on waste generators and waste management. Other complaints have been set out in the Petition and before me now is a Notice of Motion dated 4<sup>th</sup> April 2016 in which the Petitioner seeks Conservatory Orders “**suspending the implementation of the Nairobi Solid Waste Management Act**” pending the hearing and determination of the Petition herein.

**Petitioner’s case**

3. In the Motion aforesaid and Submissions thereon, the Petitioner's case is that the Act aforesaid is *prima facie* unconstitutional because reading the **Fourth** and **Fifth Schedules** to the **Constitution**, the enactment of any legislation to govern the handling, storage, transportation, segregation and destruction of waste is a function of the National Assembly which has already enacted the **Environmental Management and Co-ordination Act (EMCA)** in that regard. That the creation of other entities by the **Nairobi City County Solid Waste Management Act** to deal with issues for which the **National Environment Management Authority** was created under EMCA is consequently unconstitutional.

4. The other complaint by the Petitioner is that under **Article 196** of the **Constitution**, the Nairobi County Assembly was obligated to ensure that there was public participation prior to the enactment of the Act which it had failed to do.

5. Other issues raised are that:

i) By failing to establish a County Environment Committee, the Respondents have violated **Article 72** of the **Constitution**.

ii) By imposing a specific waste collector on a private citizen for privately generated domestic waste, **Article 46** of the **Constitution** was thereby violated.

iii) By subjecting members of the Petitioner Association to double licensing procedures and levies, **Articles 42, 43** and **47** of the **Constitution** were violated.

6. In seeking the Conservatory Orders to suspend the Act, the Petitioner has relied on the decision in **Council of Governors & 3 Others v Senate and 53 Others (2015) e KLR** where the principles for declaring a statute as being unconstitutional were set out.

7. It has further relied on **Institute of Social Accountability and Anor v National Assembly and 4 Others [2015] e KLR** for the same principles and for the above reasons, it prays for orders as in the Motion under consideration.

### **Respondent's case**

8. In response to the Motion aforesaid, the Respondent filed two Replying Affidavits both sworn on 27<sup>th</sup> April 2016 by its Director of Environment and Solid Waste Management, Mr. Isaac Muranja, and the Nairobi City County Assembly Clerk, Mr. Jacob Ngwele.

9. Its case is that prior to the publication and enactment of the Act in question, all processes envisaged by both the Standing Orders of the Nairobi County Assembly and the Constitution were followed. Specifically, that stakeholders in the waste management sector as well as members of the public were invited by a notification in the *Daily Nation* newspaper of 3<sup>rd</sup> April 2015 to submit and make representations on the Bill before its enactment into the Act. One of the stakeholders that made representations is the present Association amongst others and it is the Respondent's case therefore that any complaint that there was no public participation prior to the enactment of the Act is false.

10. On the law governing waste management, it is the Respondent's case that under the **Fourth Schedule** to the **Constitution**, there is a clear division of functions between the County and National Governments and that refuse removal, refuse dumps and solid waste disposal are the preserves of County Governments necessitating the enactment of the impugned Act. Attendant to that function is the need to license transportation of waste without any way conflict with the provisions of EMCA.

11. Regarding zoning of the Nairobi County for purposes of waste collection and disposal, the Respondent has urged the point that the said action is an administrative means of managing waste collection and disposal without in any way creating new boundaries contrary to the law.

12. Lastly, it is the Respondent's case that the Motion before me is bad in law, an afterthought and

brought 6 months after enactment of the impugned Act and it would not be in the public interest to suspend the said Act. That therefore the Application ought to be dismissed with costs.

### **Interested Party's case**

13. The National Environment Management Authority (NEMA) in response to the Motion filed two Replying Affidavits sworn on 21<sup>st</sup> April 2016 and 4<sup>th</sup> May 2016 by Prof. Geoffrey Wahungu, its Director-General.

14. Its case is that the Petition and Application are merited because the provisions of the impugned Act are unconstitutional and *ultra vires* the powers of NEMA as donated by EMCA. That the only way the Respondent can interact with issues of waste management is by establishing a County Environment Committee as is required of it by **Section 29** of **EMCA** which it has failed to do.

15. Further, that the Respondent has misapplied the spirit and intent of the Fourth **Schedule** to the **Constitution** on division of functions between the National and County Governments because Part V places on the National Government the obligation to guarantee the right to a clean and health environment to all Kenyans. That the Respondent has therefore misunderstood **Part 2** of the **Fourth Schedule** to the **Constitution** which grants it the function of dealing with refuse removal, refuse dumps and solid waste disposal but it has no authority to license waste transportation or the creation and operation of waste treatment plants and facilities. In the alternative, it has urged the point that even if the above functions are not expressly provided for in the Constitution, then under **Article 186(3)** of the **Constitution**, a function not assigned specifically to any of the two levels of Governments is deemed to be a function of the National Government.

16. In addition to the above, it is the Interested Party's case that where there is a conflict of laws, then pursuant to **Article 191** of the **Constitution**, the national legislation must prevail. That in the same regard, while some aspects of the impugned law are commendable, **Sections 2, 26, 27, 28** and **29** primarily on licensing of transport waste, revocation of such licenses and permits to install incinerators, recycling facilities and treatment waste, are in conflict with EMCA and should not be allowed to stand.

17. On alleged lack of public participation before enactment of the impugned Act, it is the Interested Party's case that NEMA was not granted sufficient time to comment on the Bill leading to the impugned Act.

18. Regarding the zoning of Nairobi City, the Interested Party states that being a governance decision, it supports the Respondent's position and prays that only the Sections stated above should be suspended in the public interest and to avoid double licensing of waste management companies.

### **Determination**

19. The Application before me seeks an order that the operation of the **Nairobi County Solid Waste Management Act** should be suspended pending the hearing of the Petition for reasons set out above. The Interested Party has however suggested a middle ground which is the suspension of parts of the Act and not the whole of it.

20. The Respondent is completely opposed to the suspension of the whole Act but has said nothing about the Interested Party's position. In that context, what is the law regarding Conservatory Orders more so where an Act of the County Assembly is sought to be suspended pending the determination of a Petition seeking a declaration, *inter alia*, that it is wholly unconstitutional?

21. In addressing the above question, I will avoid any indepth analysis of the Constitution, the impugned Act or EMCA as that would obviously be a pre-determination of the heavily contested question whether the impugned Act is unconstitutional. In that regard, in **Munya v Kithinji and 2 Others Supreme Court Application No.5 of 2014**, the Supreme Court stated as follows in addressing Conservatory Orders in constitutional Petitions:

***“‘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 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 applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added)***

22. Further, the Privy Council in **AG v Sumair Bansraj (1985) 38 WIR 286** stated as follows (per Braithwaite J. A);

***“Now to the formula..... The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution, the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have ... the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too ... The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.” (Emphasis added)***

23. Distilling the applicable principles therefore, for a party to succeed in an application for Conservatory Orders, the following conditions, *inter alia*, ought to be met:

- i) The inherent merit of the case must be a determinant.
- ii) The public interest involved would be crucial.
- iii) The constitutional values at play must be considered.
- iv) The proportionate magnitude in the grant or denial of the order is important.
- v) The priority levels attributable to the cause at hand are a necessary component.
- vi) The grant or denial of the order is a matter of discretion.
- vii) The order should be for a very limited period.

In applying the above principles however, there is also the oft stated fact that all legislation is deemed to be constitutional unless it can be shown that by purpose, content and effect, an impugned legislation is unconstitutional *per se* – See **Olum and Anor vs A.G of Uganda (2000) 2 EA 508**. If that be so, what are the reasons advanced by the Petitioner (and partly by the Interested Party) that the impugned Act ought to be suspended for being *prima facie* unconstitutional? I gather them to be that the Respondent,

- i) acted *ultra vires* the Fourth **Schedule 4** to the **Constitution** by abrogating to itself functions

reserved for the National Government.

ii) did not involve relevant stakeholders wholly or sufficiently (by way of public participation) prior to the enactment of the impugned Act.

iii) has subjected the Petitioner's members to double licensing in respect of solid waste management.

24. Other issues such as creation of zones within Nairobi County and setting up of a County Environment Committee are peripheral to the above issues and cannot be resolved on their own at this stage of the proceedings.

25. Are the above grounds sufficient to cause the suspension of the Act which has been in operation since assent by the Governor of Nairobi in October 2015?

26. I should dispose of the easier matter because it is admitted by all Parties that the Petitioner and the Interested Party, among other stakeholders, prepared and submitted their memoranda on the Bill leading to the enactment of the impugned Act. Their complaint however is that their views were not taken into account but in my view, the fact that they were given that opportunity is *prima facie* evidence of public participation and the sufficiency of it or not is not a matter to be determined conclusively at this interlocutory stage.

27. On whether the impugned Act is *prima facie* unconstitutional and has subjected the Petitioner's members to double licensing, the issues can only be addressed by a look at the **Fourth Schedule** to the **Constitution** which provides at **Part 2, Section 2** that County Governments shall have *inter alia* the following functions;

**"1)**

**2) County health services, including, in particular—**

**(a) county health facilities and pharmacies;**

**(b) ambulance services;**

**(c) promotion of primary health care;**

**(d) licensing and control of undertakings that sell food to the public;**

**(e) veterinary services (excluding regulation of the profession);**

**(f) cemeteries, funeral parlours and crematoria; and**

**(g) refuse removal, refuse dumps and solid waste disposal**

**3-14) .....”** (Emphasis added)

28. I have seen no similar provision in **Part 1** of the **Fourth Schedule** save the general provision in **Part 1 Section 22** that the National Government shall be responsible for protection of the environment. *Prima facie* therefore, the Respondent has the responsibility to manage refuse renewal, dumps and solid waste disposal and it is very difficult to follow the argument that it does not.

29. On licensing of transport waste and permits to install incinerators etc, this is admittedly a function previously conferred on NEMA by EMCA. Whether in fact, post the **Constitution 2010** the same functions can be sustained by NEMA cannot be determined at these interlocutory proceedings as it is a matter that requires resolution at the hearing of the Petition. **Where is the evidence in any event that**

**the Petitioner has been subjected to double licensing?** I would have expected Samwel Onyancha in his Supporting Affidavit or a further Affidavit to give instances where one of the Petitioner's members has actually had to pay twice for the same undertaking (one to NEMA and the other to the Respondent). No such evidence exists and it is not possible to exercise discretion in such a vacuum.

30. From what I have stated above, it is obvious that while the Petition before me is not frivolous and raises issues that require deeper interrogation, suspension of the impugned Act would be a drastic measure in the circumstances - See Ruling by Odunga J in **Coalition for Reform of Democracy (CORD) v Republic & Another Petitions Nos.628 & 630 of 2014**.

31. Turning back to the principles that I sought to invoke, I have stated that the merits of the Petitioner's case are debatable in view of **Part 2 Section 2** of the **Fourth Schedule** and more fundamentally, whether in fact licensing of solid waste disposal is outside the scope of the functions donated to County Governments in that regard.

32. On the public interest and constitutional values involved, it is my view that devolution was intended to give Counties semi-autonomy within the context of the **Constitution** and where institutions such as NEMA hold onto their Pre-2010 autonomy, there may be need to interrogate those powers at the hearing of the Petition.

33. On the priority levels attributable to the matter at hand, the impugned Act in the context of the need to make devolution work is in place and my discretion is tilted towards allowing it to work.

#### **Disposition**

34. From what I have stated above, the Application dated 4<sup>th</sup> April 2016 is one for dismissal which I hereby do.

35. Let costs await the outcome of the Petition which should be fixed for expeditious hearing and disposal.

36. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**

**In the presence of:**

Victor – Court clerk

Mr. Muchoki for Mr. Saende for Petitioner

Miss Karanja for Respondent

No appearance for the Interested Party

**Court**

Ruling delivered.

**EDWARD MURIITHI**

**JUDGE**