



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.621 OF 2014**

**BETWEEN**

**PASRED YOUTH GROUP/FORUM AND THE OTHER PETITIONERS AS NAMED IN THE  
SCHEDULE ANNEXED.....  
.....PETITIONERS**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER FOR ENVIRONMENT, WATER AND**

**NATURAL RESOURCES.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENT AND**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**THE MINISTER OF MINING.....4<sup>TH</sup> RESPONDENT**

**CAMAC ENERGY (K) LIMITED.....5<sup>TH</sup> RESPONDENT**

**BGP INCORPORATED.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petition dated 16<sup>th</sup> December 2014 raised important questions regarding the right to a clean and healthy environment under **Article 42** of the **Constitution** and it is the Petitioners' contention that the Respondents have contravened that right by their oil exploration activities in Fafi area of Garissa county. Other issues raised in the Petition include the right to participate in cultural life under **Article 44** of the **Constitution**, right to information held by the State under **Article 35** of the **Constitution** and issues relating to rights of persons living in Community Land as defined in **Article 63** of the **Constitution**.
2. Before the Petition could be heard however, the Petitioners, by an Amended Notice of Motion dated 22<sup>nd</sup> January 2015, have sought the following orders;

***“(1) That this application be certified as urgent and service of this Application be dispensed with in the first instance.***

***(2) The Court be pleased to grant a temporary injunction restraining the 5<sup>th</sup> and 6<sup>th</sup> Respondents whether by themselves, their agents and/or servants from continuing to trespass on, wasting, constructing on, alienating or otherwise interfering or dealing with the Community’s land in Fafi area of Garissa County pending the hearing and determination of this Petition.***

***(3) The Officer Commanding Garissa Police Station enforces compliance of the orders above.***

***(4) The costs of this Application be provided for***

***(5) The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.”***

3. In his Affidavit in support of the Motion, Mr. Bilal Osman Mohamed as Chairman of Pasred, the 1<sup>st</sup> Petitioner, and in submissions by Mr. Bashir, learned Counsel for the Petitioners, the Petitioners’ case is firstly, that sometime in November 2014, it came to their attention that unknown persons had set up camp in Ahagdera area within Fafi Sub-County and later, they discovered that the said persons were on an oil exploration mission. That the said mission was undertaken without the local community’s participation and/or consent.
4. Secondly, that attempts at engaging the said persons, later identified as agents and/or employees of the 6<sup>th</sup> Respondent, came to naught and so their activities on the land is unlawful.
5. Thirdly, that there was no Environment Impact Assessment done before the oil exploration mission commenced and that the risks to the Community are therefore immense.
6. Fourthly, that the area in which the exploration is being undertaken serves as a significant religious and cultural site and the prejudice to be caused by that activity is immeasurable.
7. Fifthly, that all the issues raised above have great constitutional implication in the manner elsewhere set out above.
8. In addition to the above, Mr. Bashir submitted that whereas the Community Land Bill, 2014 is yet to be passed into law, it has outlined comprehensive steps to protect Community Land and in any event, the **Trust Land Act** is still in force and the land in question is held in trust for the persons who ordinarily reside in it. That therefore any activities on that land must receive their consent.
9. Further, that no evidence has been tendered to show on what authority the 5<sup>th</sup> and 6<sup>th</sup> Respondents entered the land. That due process was thereby not followed and the Community is in the dark as to the conduct of the Respondents not to mention that the loss to it would not be compensated in damages.
10. For the above reasons, the Petitioners seek the orders elsewhere set out above.
11. In response to the Application, the 5<sup>th</sup> Respondent filed a Replying Affidavit sworn on 22<sup>nd</sup> December 2014. In addition, Mr. Wetangula, learned Counsel, made submissions and their case is that while the Petition and Application have raised an issue to the effect that the 5<sup>th</sup> Respondent is a trespasser, in fact it is on the land in question, lawfully, pursuant to a binding contract and having gone through all the necessary statutory processes.
12. The 5<sup>th</sup> Respondent pursuant to the above position has exhibited a Production Sharing Contract dated 10<sup>th</sup> May 2012 relating to Block LIB and for purposes of oil exploration in parts of Tana

- River and Garissa Counties. In that contract, the 5<sup>th</sup> Respondent was to conduct exploration operations for an initial period of two years but was extended for a further one year by the Cabinet Secretary, Ministry of Energy and Petroleum.
- 13.Regarding the allegation that the project did not have public participation, the 5<sup>th</sup> Respondent stated that the local Community was involved through a number of consultative meetings in which the survey and its purpose was explained. That in those meetings, members of the Community asked questions which were answered and in addition, questionnaires were circulated and answers received in writing. That in fact one of the Petitioners, Yusuf Halane Jele, filled and returned one such questionnaire. Further, that the 5<sup>th</sup> Respondent, at its own initiative, went further and held stakeholder consultations where it shared its exploration activities and plans as well as Community input as to how it can work even more closely with the said Community.
  - 14.On the environmental concerns raised, the 5<sup>th</sup> Respondent's case is that the 3<sup>rd</sup> Respondent had on 22<sup>nd</sup> May 2014, after reviewing the Environmental Impact Assessment Report on the 5<sup>th</sup> Respondent's exploration activities, issued a license for the activity to be undertaken.
  - 15.In any event, save for the mere assertion that the exploration may have a huge impact on the environment, the Petitioners' claims are speculative with no evidence to back them up.
  - 16.It is also the 5<sup>th</sup> Respondent's case that around 300 employees working for the project are local people and they enjoy a cordial relationship with the 5<sup>th</sup> Respondent and any stoppage of the project will affect both of the two.
  - 17.On the allegation that the area affected by the oil exploration activities is also used for religious and cultural activities, it is the 5<sup>th</sup> Respondent's case that the said allegation is new to it and has not been previously made and no evidence back it has been given.
  - 18.Mr. Wetangula added that whereas the land in issue is Community Land, the 5<sup>th</sup> Respondent, upon obtaining the necessary approvals, had the right to enter into it and conduct its oil operations.
  - 19.In any event that there is no evidence that it has engaged in the degradation of the environment and the National Environment Management Authority (NEMA) has not raised any such issue.
  - 20.Further, that there is no obligation on the part of the 5<sup>th</sup> Respondent to pay compensation to the Community during exploration and seismic survey and the Petitioners cannot claim such compensation to the exclusion of all other members of the Community.
  - 21.Lastly, that the National and County Governments authorized the oil exploration and the latter in fact provided security at the 5<sup>th</sup> Respondent's Camp before the said Camp was moved from Ahagdera area. That all the competing interests, if looked at objectively, would in the end mean that the Petitioners' claims stands to be dismissed.
  - 22.I have considered the rival positions and submissions by the Parties and I note that save for the 5<sup>th</sup> Respondent, no other Respondent participated in the present Application.
  - 23.I am also alive to the fact that at this interlocutory stage, I ought to be careful not to make firm or determinate findings on every contested issue lest I pre-judge the outcome of the Petition. Having said so, I note that the Petitioners have sought a temporary injunction pending the hearing of the Constitutional Petition herein. In that regard, I am aware that such an order is a matter of discretion on the part of the Court and as was stated by Brathwaite J.A in **AG vs Bansraj (1985) 38 WIR 286**, a judge confronted with such an application must **“hold the scales of justice evenly not only between man and man but also between a man and State.”**

24. In the same case, the learned judge added that such a Court “**must therefore be astute to balance these competing interests in the interim while it deals with the substantial complaints of the Claimants.**”
25. In addition, it is generally agreed that any party invoking the remedy of an injunction under **Article 23(3)(b)** must at the interlocutory stage show *inter alia* that;
- i. It has an arguable case.
  - ii. The Petition would be rendered nugatory or useless, if the order is not granted.
  - iii. That damages are not an adequate remedy.
  - iv. On a balance of convenience, it is entitled to the Court’s discretion.
26. There is no doubt that the Petitioners have established, and it has not been denied, that they have a lawful interest in the land in question. It is however arguable whether their claims of environmental degradation have been supported by sufficient evidence where NEMA has given all the necessary licenses to the 5<sup>th</sup> Respondent and has raised no red flag so far.
27. It is also debatable whether, upon completing the seismic survey, there is anything left to injunct. I note for example that the 5<sup>th</sup> Respondent has even moved its Camp from the Ahagdera area which is the subject of the Petition.
28. There is also doubt as to the authenticity of the claim that the land in question is used for religious and cultural ceremonies. The nature of the ceremonies has not been stated and the bare statement to that effect is not sufficient, in my view.
29. In addition, save for the bare assertion that the right to information under **Article 35** of the **Constitution** has been violated, no other issue was raised in that regard and I am not certain what exactly the Petitioners had wanted this Court to do on that aspect of the Petition.
30. From the above facts, while I am also satisfied that the Petition raises a number of issues that are not frivolous, principally, the right of Communities to natural resources in their land, many other issues require more than assertion and I implore the Petitioners to fill in their gaps during the hearing.
31. I am also certain that should I not grant the injunction as prayed, the Petition will not be rendered nugatory and I have said why.
32. On damages, it is clear to me that should it ever be found that the 5<sup>th</sup> and 6<sup>th</sup> Respondents unlawfully entered Community land, and *prima facie* I have seen no such evidence, damages are certainly an adequate remedy as compensation under **Article 23(3)(e)** of the **Constitution**.
33. Lastly, on a balance of convenience, I have seen evidence of public participation prior to the 5<sup>th</sup> Respondent’s entry into the Community land. There has been no answer, for example, to the rejoinder by the 5<sup>th</sup> Respondent that the 5<sup>th</sup> Petitioner, Mr. Jele, was in fact one such participant. Whether however the public participation was adequate or not, is a matter to be determined at the hearing. Suffice it to say that had there been no public participation at all, I may have had different thoughts but with evidence of meetings held and questionnaires issued, filled and returned, discretion must favour the 5<sup>th</sup> Respondent.
34. In addition to the above, the 5<sup>th</sup> Respondent has already moved out of the disputed land once it completed the seismic survey and within its contractual period. In such a circumstance, any orders against it would be superfluous.

35. In the end, I see no reason to accede to the Petitioner's prayers and will instead dismiss the Application dated 16<sup>th</sup> December 2014.

36. As for costs, the nature of the matter is such that costs should abide the outcome of the Petition.

37. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Angwenyi holding brief for Mr. Mogere for 5<sup>th</sup> and 6<sup>th</sup> Respondent

Mr. Kuria for 1<sup>st</sup> – 4<sup>th</sup> Respondent

Mr. Orare holding brief for Mr. Hassan for Petitioner

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Mention on 17/9/2015

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**