



**REPUBLIC OF KENYA**

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

**ELC. PETITION NO. 10 OF 2020**

**AHMED BASHIR ABDI.....1<sup>ST</sup> PETITIONER**

**ABINOOR AHMED MAGAN.....2<sup>ND</sup> PETITIONER**

**VERSUS**

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

**THE CEC ENVIROMENT, ENERGY & NATURAL**

**RESOURCES WAJIR COUNTY.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT**

**AUTHORITY (NEMA).....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Coming up for determination is the applicant's petitioners Chamber Summons application dated 26<sup>th</sup> June, 2020 seeking the following orders:

- 1) **THAT** this application be certified urgent and service thereof be dispensed with in the first instance and the matter be heard ex parte on priority of other matters.
- 2) **THAT** this Honourable Court be pleased to grant interim Conservatory Orders preventing and/or stopping the 1<sup>st</sup> and 2<sup>nd</sup> Respondent continued construction of incinerators, pending the inter parties hearing of the instant application.
- 3) **THAT** this Honourable Court be please to grant interim Conservatory Orders preventing and/or stopping the 1<sup>st</sup> and 2<sup>nd</sup> Respondent continued construction of incinerators, pending the inter parties hearing of the instant application.
- 4) **THAT** this Honorable Court be pleased to grant interim Conservatory Orders suspending the operations and/or Construction of incinerators in Hodhan Location Wajir County, pending the Inter-Partes hearing and determination of the instant application.
- 5) **THAT** this Honorable Court be pleased to grant interim Conservatory Orders suspending the operations and/or Construction of incinerators in Hodhan Location Wajir County, pending the Inter-Parties hearing and determination of the present petition.
- 6) **THAT** cost of this application be in the cause.

2. The applicants in their grounds in support of the instant application aver that they are the residents of Wajir County and the owners of unsurvey land known as R6311 within Wajir County, and that they have been paying land rent to the 1<sup>st</sup> Respondent.

3. It is their case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent unlawfully and without compulsory acquisition of the part of their parcel of land began constructing incinerators on their land and relocated previous dump site to the subject land and have begun dumping harmful waste to their parcel of land which is harmful to their community and the petitioners herein.

4. In addition, they aver that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent actions herein were undertaken without public participation, as the local communities were not engaged nor their views sought on the relocation of the subject dumb site to their land. Further, they aver that the 1<sup>st</sup>

and 2<sup>nd</sup> Respondent actions violate the values and Principles in the Constitution and specifically the Environmental Management and Coordination Act, as no impact assessment on the community was undertaken and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not applied for Dump site license from the 3<sup>rd</sup> Respondent.

5. Vide their written submissions filed on 7<sup>th</sup> October, 2020, the applicants addressed five issues. The first issue addressed is on the jurisdiction of this court to hear and determine their petition. In this regard they submitted that they have brought the instant petition pursuant to Article 22 of the Constitution, and that they have a right to approach court on alleged infringement of the Constitutional rights. They rely in the case of **Anarita Karimi Njeru vs Republic 1979 KLR 154 and Samuel Kamau Macharia vs Kenya Commercial Bank Limited and 2 Others (2012)Eklr.**

6. The second issue addressed by the applicants is on whether their instant petition is frivolous and an abuse of the court process. In this respect it is their submissions that their petition is rightly before the court, as it is evident that their rights as residents of Hodan protected under the Constitution, International treaties and instruments are being infringed by the Respondents and that this court can issue commensurate remedies under Article 23 of the Constitution. It is their case that the petition is not fanciful, frivolous and a waste of the court time. They rely in the case of **Dr. Kiama Wangai vs John Mugambi and Another (2012)Eklr.**

7. The third issue addressed by the applicants is on whether the Respondents violate their health and property rights. In this regard they submit that the Respondents action violates their Constitutional rights as protected under Article 42 and 43 of the Constitution, being the right to a clean and healthy environment, and that their petition is made pursuant to Article 70 of the Constitution which empowers them to make an application to this court for address of their complaint. In addition, they allege that the Respondents action are in contravention of sections 87, 88 and 89 of the Environmental Management and Coordination Act as any license allegedly issue for dumping of waste by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was done without public participation as the same infringes the health rights of the Hodhan Community. They rely in the case of **African Center for Rights and Governance and 3 Others vs Municipal Council of Naivasha (2017)eklr.**

8. The fourth issue addressed by the applicants is on whether this court should issue the sought conservatory orders. It is their submission that this court has the power to issue injunctive reliefs pursuant to Article 23(3) of the Constitution, and that they have met the threshold for grant of interim reliefs as laid down in the case of **Giella vs Cassman Brown 1973 EA 158 and in Gatirau Peter Munys vs Dickson Mwenda Kithinji an 2 others (2014)eklr.** It is their case that the impact of the respondent action on the health rights and property rights of the Hodhan Community in Wajir County requires that the court should issue the sought interim relief in view of public interest.

9. The final issue addressed by the applicants is on costs of the application, and in this respect they submitted that costs follow the event and in this case the court ought to allow the application and award the costs. They rely in the case of **Jasbir Singh Rai an 3 others vs Tarlochan Singh Rai & 4 others (2014)eklr.**

10. In response to the instant application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit, where they aver that the subject property in which they have a dump site and are in the process of constructing an incinerator is public land belonging to Wajir TB Manyatta Health Center, and not owned by the applicants Petitioners.

11. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent aver that they have complied with all the requirements for setting up a dump site as required under the Environment Management and Coordination Act. They adduced the Environmental Impact Assessment License and Environmental Impact Assessment Report in compliance with regulation 7 of the Environmental (Impact Assessment an audit) Regulations, 2003.

12. Through their filed written submissions dated 14<sup>th</sup> October, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent addressed the following issues. They first submitted that the subject petition herein does not raise any substantial question of law thus unmerited as it does not meet the provisions of Article 165(4) of the Constitution. In this regard they relied in the cases of **Community Advocacy Awareness Trust an others vs The AG and others Petition No. 243 of 2011.**

13. The second issue addressed by the Respondents is the issue of jurisdiction, where they submitted that this court lacks the jurisdiction to determine the subject issues raised herein. They challenged this court jurisdiction on two fronts, first is that the applicants Petitioners claim herein is based on trespass and that being the case, the Magistrates Court would have been the right forum to determine the issue in the first instance and not this court pursuant to section 3 of the Trespass Act and section 9 of the Magistrate Court Act. They rely in the case of **Law Society of Kenya Nairobi Branch vs Hon. Attorney General Court of Appeal No. 287 of 2016.** And secondly, that the applicants ought to have raised their claims in the National Environmental Tribunal created pursuant to section 125 of the Environmental Management and Coordination Act, which would determine issues relating to compliance with section 58 and 59 of the Act, including the issue of environmental impact assessment as raised by the applicants.

14. On the issue of public participation as raised by the applicants, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the same was not tenable in the circumstances as the use of the land in question was contractual as it was between the owners of the land and the Respondents and therefore public participation does not arise.

15. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted on whether the instant application has met the threshold for grant of interim reliefs as envisaged in the case **Giella vs Cassman Brown** and in this regard they submitted that the applicants have failed to establish a prima facie case, nor demonstrate that they would suffer irreparable loss or tilt the balance of convenience in their favour. They submitted that it is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who would suffer loss as they have adduced a license from NEMA and an Impact assessment report and therefore they are disadvantaged. They urged the court to dismiss the instant application.

#### **Analysis and findings:**

16. I have considered both parties pleadings and submissions, and the main issues for determination at this stage are two, first is whether this

Court has the jurisdiction to determine the subject petition and secondly whether this court ought to issue the conservatory orders sought by the applicants.

17. Since Jurisdiction is everything, am incline to first make a determination on the same. The applicants are alleging that the petitioners claim border on trespass and that the same ought to be determined at the magistrate's court and secondly that the Petition should have been filed in the National Environment Tribunal (NET) at the first instance.

18. Section 129(1) of the Environmental Management and Co-ordination Act, empowers the National Environment Tribunal (NET) to hear and determine appeals arising from persons aggrieved by decisions of National Environmental Management Authority (NEMA), such as the issuance of a licences for waste disposals.

19. It is apparent to me from the pleadings herein that what is before the court is a Constitutional Petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for under Article 42 of the Constitution. In this regard Article 162(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act provides that this court can hear and determine any matter related to the Environment and Land. Section 13(3) of the Environment and Land Court Act further provides as follows:

**“13(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.”**

20. Furthermore, Article 70 of the Constitution provides as follows:

**“70(1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate--**

**a) to prevent, stop or discontinue any act or omission that is harmful to the environment;**

**b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or**

**c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.**

**(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”**

21. The petitioners are alleging that the setting up of a dumpsite by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in their locality is a threat to their health and property, and that the legal procedure was not followed including public participation. Therefore it is apparent to me that the Petition before the court is basically seeking for the reliefs that are provided for under Article 70 above that is, preventing, stopping or discontinuing any act or omission that is harmful to their surrounding environment and infringement on property rights to wit land. Consequently, it is this court that has the requisite constitutional and statutory jurisdiction to determine the dispute and not the National Environment Tribunal (NET) whose jurisdiction is limited. Therefore the Respondent challenge on this court jurisdiction has no basis and therefore the same fails for the foregoing reasons.

22. On the second issue as to whether the applicants have met the grounds for grant of interim reliefs sought, it is clear to me from the petitioners claim herein that their main concern is that the process leading to the setting up of a dumping site at the subject property was undertaken without public participation, a fact that seem not denied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

23. Principle 10 of the Rio Declaration on Environment and Development (1992), which is part of Kenyan Laws pursuant to Article 2(5) of the Constitution states as follows:

**“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process...”**

24. Further, in the case of Ken Kasinga vs. Daniel Kiplagat Kirui & 5 others (2015) eKLR, it was held that where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat. Therefore, without delving too much into the issues herein, as this court at this stage is not required to make definitive findings, it is my view that the instant application is merited, as it is apparent to me from the pleadings herein that public participation was not conducted before the decision to relocate a dumpsite to the subject property was undertaken.

25. In view of the foregoing, it is my finding that the instant application is merited and I allow the same as prayed. Costs shall be in the cause.

Read, delivered and signed in the Open Court this 27<sup>th</sup> day of November, 2020.

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E. C Cheronno (Mr.)

**ELC JUDGE**

**In the presence of:**

1. Mr. Kimanzi for Petitioner
2. Respondents/Advocate: Absent
3. Fardowsa: Court Assistant