



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Petition 163 of 2011**

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER  
CHAPTER FOUR ARTICLES 22 AND 23 (1) & (3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 42, ARTICLE 60 (1), ARTICLE 69,  
ARTICLE 70 AND ARTICLE 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 9 OF THE ENVIRONMENTAL MANAGEMENT AND CO-  
ORDINATION ACT NO. 8 OF 1999 LAWS OF KENYA**

**JOSEPH MUTHOKA MAPI T/A**

**MUANGINI RIVER MANAGEMENT PROJECT (C B O) ..... PETITIONER/APPLICANT**

**VERSUS**

- 1. ADAM KISOI**
- 2. BENJAMIN KIMINZA**
- 3. KITAVI MUTUA**
- 4. NGEI KIMINZA**
- 5. KITHUKA VILI**
- 6. KAMUTI KITISE**
- 7. MUSILI MAKITI**
- 8. KATUNGE MUINDI**
- 9. LUMUMBA MUINDI**
- 10.MRS MWAYAU**
- 11.MRS NYELELE NGWILI**

**12.ILUKA NGUI**

**13.PETER KIMEU**

**14.DAN MBITHI NDAKU**

**15.NTHIWA MUTHIANI**

**16.PAUL KASOO**

**17.NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY**

**18.WATER RESOURCES MANAGEMENT AUTHORITY**

**19.THE MINISTER FOR PROVINCIAL ADMINISTRATION**

**AND INTERNAL SECURITY**

**20.THE PERMANENT SECRETARY MINISTRY OF STATE**

**FOR PROVINCIAL ADMINISTRATION**

**AND INTERNAL SECURITY ..... RESPONDENTS**

### **R U L I N G**

A petition was filed on the 7<sup>th</sup> July 2011 by Joseph Muthoka Mapi t/a Muangini River Management Project (CBO). In the petition, twenty respondents were named.

On the same date, a Notice of Motion was filed by the said petitioner, against the said twenty respondents. This is the Notice of Motion application that comes for decision today.

The application was filed under Article 22, 23 (1) & (3), 42, 60 (1), 69, 70 and Article 165 of the Constitution. The prayers in the application are as follows:-

- 1. THAT this application be certified urgent and service thereof be dispensed with in the first instance.**
- 2. THAT an interim injunction be issued restraining the respondents, their agents, servants and/or employees and anyone claiming through them or under them from harvesting sand, uprooting napier grass, spilling oil and fuel or in any other manner whatsoever enhancing the environmental degradation of Muangini River pending the hearing and determination of the petition herein.**
- 3. THAT an interim injunction be issued against the 17<sup>th</sup> to 20<sup>th</sup> respondents compelling them to arrest and prosecute or cause to be arrested and prosecuted the 1<sup>st</sup> -16<sup>th</sup> respondents, their agents, servants and/or employees and anyone acting through them or under them if found harvesting sand, uprooting napier grass, spilling oil and or fuel or in any other manner whatsoever enhancing the environmental degradation of Muangini River without the requisite licences from the 17<sup>th</sup> and or 18<sup>th</sup> respondents pending hearing and determination of the petition filed herein.**
- 4. THAT an interim injunction be issued against the 17<sup>th</sup> to 20<sup>th</sup> respondents compelling them to arrest and prosecute or cause to be prosecuted anyone found harvesting sand, uprooting napier grass, spilling oil and or fuel or in any other manner whatsoever enhancing the environmental**

**degradation of Muangini River without the requisite licence from the 17<sup>th</sup> and or 18<sup>th</sup> respondents.**

**5. THAT such orders and direction be given as the honourable court deems just and fit to grant.**

**6. THAT costs of and incidental to this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are in summary that the petitioner is a registered Community Based Organization whose core objective is the conservation of Muangini River which object it had pursued through planting of napier grass and trees along the river banks to minimize soil erosion for the benefit of its members and community at large; that the 1<sup>st</sup> to 16<sup>th</sup> respondents had been harvesting sand from the river and uprooting the napier grass without care for the rights to a clean and safe environment as guaranteed by the Constitution; further the 1<sup>st</sup> to 16<sup>th</sup> respondents had caused fuel spillage in the water making it unsuitable for domestic or agricultural use; that a public meeting was held on 04/09/2010 between the community and the 17<sup>th</sup> respondent where it was resolved that the river be closed to sand harvesting, however the 1<sup>st</sup> to 16<sup>th</sup> respondents have failed and or ignored to adhere to the resolution and the 17<sup>th</sup> and 18<sup>th</sup> respondents had not taken any steps to prosecute the well known perpetrators; that unless the activities of the 1<sup>st</sup> -16<sup>th</sup> respondents are curtailed by an order of the court the petitioner's rights to a clean and sustainable environment will continue to be violated by the respondents without any redress; that the petitioners wrote seeking redress from the 18<sup>th</sup> respondent which is the head agency in water resource management under section 8 of the Water Act 2002 but the same had borne no fruits prompting the petitioners to seek assistance from the Provincial Administration.

The application was filed with a supporting affidavit sworn by Joseph M Mapi described as the Chairman of Muangini River Management Project (CBO). This affidavit purports to support the contents of the affidavit filed with the main PETITION. I have perused the said affidavit, and it merely echoes what is contained in the grounds of the application.

The application is opposed. The 17<sup>th</sup> respondent (NEMA) filed a replying affidavit sworn on 11<sup>th</sup> October 2011 by Kenneth J Angaluki the Makueni District Environment Officer. It was deposed that it was true that sand harvesting was a menace and challenge in Makueni District; that it was not true that the 17<sup>th</sup> respondent had been indolent in dealing with the situation; that there was no law expressly prohibiting sand harvesting as only guidelines exist; that on 14/9/2010 he convened a District Environment Committee public meeting to discuss the protection of river Muangini from illegal sand harvesting; that security in the district was a challenge as security appeared to have totally broken down to the extent that sand harvesters were accompanied by loaders armed with crude weapons even in broad daylight; that when he managed to arrest and take sand harvesters to court, they ended up being released on paltry fines on pleading guilty; that therefore prayers 3 and 4 of the Notice of Motion dated 6<sup>th</sup> July 2011 should not issue in the absence of reinforced security personnel.

The application is also opposed through an affidavit sworn on 10<sup>th</sup> October 2011 by one Daniel Kilonzo Ndaku. It is said to have been sworn on behalf of the 1<sup>st</sup>, 6<sup>th</sup> to 14<sup>th</sup> respondents. This affidavit has attached to it a number of annexures. I will ignore this affidavit because the deponent is described at the beginning of the affidavit as DAN MBITHI NDAKU, and at the last page where the deponent signed as DANIEL KILONZO MBITHI. No explanation was given for the variance of names. The variation is not minor. The two names must be referring to different persons. The affidavit is therefore incurably defective and cannot be relied upon.

The Attorney-General on behalf of the 19<sup>th</sup> and 20<sup>th</sup> respondents filed Grounds of Opposition, which were in the following terms:-

**1. The 19<sup>th</sup> and 20<sup>th</sup> respondents should be struck off the petition as it is the Attorney-General who enforces Constitutional rights being the government legal advisor.**

## **2. Court cannot issue orders to compel a public officer to perform his statutory duty.**

The petitioner filed written submissions dated 20<sup>th</sup> February 2012. It was contended that prayer 2 had been granted, and what remained for consideration and decision was prayers 3, 4, 5 and 6 of the application. It was also contended that the 18<sup>th</sup> respondent though served did not enter appearance. The laws creating relevant criminal offences were referred to in the submissions. It was contended that the 18<sup>th</sup> respondent was under the control of the 17<sup>th</sup> respondent. The court was urged to grant the prayers sought.

The 1<sup>st</sup>, 6<sup>th</sup> – 14<sup>th</sup> respondents filed submissions dated 22/02/12 through their counsel J.M. Mutua & Company. The contention in the said submissions is that the said respondents are not harvesters of sand. They have even planted napier grass to protect the environment. It is their contention that some thugs are responsible for harvesting sand and uprooting the napier grass. They urge the court not to issue orders in vain.

The 17<sup>th</sup> respondent filed submissions dated 21<sup>st</sup> November 2011. It was their contention that the sand harvesting in the area is a challenge and a menace; that the District Environment Officer Makueni convened a public meeting at Kasikeu village to discuss the protection of the river Muangini from sand harvesting; and that the District Environment Officer ordered a closure of the area as it had not been approved for sand harvesting but this order had been ignored due to lack of enforcement machinery in the area. They conclude by stating that the 17<sup>th</sup> respondent was against sand harvesting, and had arrested culprits and taken them to court but they had been given only light fines. They asked that the prayer against the 17<sup>th</sup> respondent be amended to include reinforced enforcement by the relevant government department.

On the hearing date, Ms Ngatia for the petitioners highlighted the submissions. Mr Getonga for the 17<sup>th</sup> respondent also highlighted their submissions. Other parties were not present.

It is important to observe at the outset that the 17<sup>th</sup> respondent does not appear to oppose the application. They however state that they need the cooperation and support of other government departments, as well as an amendment of the laws relating to the harvesting of sand. They consider that the existing laws do not create comprehensive offences on sand harvesting, and that the sentences applicable are too light. I take judicial notice of the fact that the prayers sought are mainly against the said 17<sup>th</sup> respondent.

Having considered the issues and arguments in the application, I am of the view that the orders sought herein are principally against the 17<sup>th</sup> respondent, NEMA. The orders will also affect all the other respondents. Some of the respondents did not come to court to contest the orders. The 1<sup>st</sup>, 6<sup>th</sup> to 14<sup>th</sup> respondents, through their counsel J.M. Mutua & Company Advocates filed written submissions. The affidavit filed on their behalf was defective as the name of the person who was responsible for the contents of the affidavit was different from the name of the person who swore and signed the affidavit. In the submissions, they claim that they are not the perpetrators of the degradation of the environment. They are not the sand harvesters. Therefore, in my view, they cannot complain if the orders sought are granted because their position supports the side of the petitioner and the 17<sup>th</sup> respondent. The effect of the orders sought will not be adverse to them, but be in support of their stated efforts to conserve the environment and the river basin, which they claim to be doing by planting the napier grass. The 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> respondents will be affected only to the extent that they will be required to do what the law expects them to do as government institutions or officials in support of the 17<sup>th</sup> respondent.

The rights to enjoyment of a clean and healthy environment are in large measure meant to be enforced through the government. In my view, that is the intendment of Article 70 (2) (b) of the Constitution which provides:-

**70 (2) On application under clause (1), the court may make any order, or give directions it**

**considers appropriate.**

**(a)** .....

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

Protection of the environment is the right and heritage of the present and future generations and other living things.

Considering the totality of the matter, the prayers sought are justified, pending the hearing and determination of the petition, in order to protect the environment. The 17<sup>th</sup> to 20<sup>th</sup> respondents are public offices, and the orders sought if issued only operate where the law creates offences. I will therefore allow the application, as in my view, it has merits.

For the above reasons, I allow the application and grant prayers 3 and 4. Prayer 5 is superfluous. Costs in the cause.

It is so ordered.

Dated and delivered at Machakos this **4<sup>th</sup>** day of **October** 2012.

.....  
**George Dulu**  
**Judge**

**In the presence of:**

E.K Getonga for 17<sup>th</sup> respondent

Mr Kanuvi holding brief for Ms. Ngatia for petitioners

Court clerk: Nyalo