



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC PETITION CASE NO. 41 OF 2019

GIDEON KIBINDU & 24 OTHERS.....PETITIONERS

VERSUS

KENYA PORTS AUTHORITY & 3 OTHERS.....RESPONDENTS

JUDGMENT

THE PETITIONERS' CASE

1. By a petition dated 9th September, 2019, the petitioners are seeking the following orders:

(a) A declaration that the petitioner's rights, individually or in association with others to a clean and healthy environment guaranteed by Article 42 of the Constitution have been and will be contravened if the sand harvesting and dumping off south Coast Kwale Beaches in its present form and that if the Respondents proceed in such form and manner as they have today, they will violate the fundamental right of the petitioners as envisioned under Article 42 of the Constitution.

(b) A declaration that the Respondents have contravened Article 10 of the Constitution in that the national values and principles of governance set out have not been observed and that the decision regarding the implementation of the said sand harvesting and dumping activities require that participation and general approval of the residents of Kwale, Tiwi and Shelly beach within Kwale County.

(c) A declaration that NEMA has been in breach of the petitioners fundamental rights and freedoms under Articles 42 of the constitution, failed to discharge its statutory obligation and responsibility under the EMCA Act No. 8 of 1999 to safeguard South Coast, Diani, Tiwi and Chale areas within Kwale and the environment against the inevitable large sand harvesting and degradation that will be wrongful by continuing activities.

(d) An order compelling NEMA, to ensure that all conditions necessary to safeguard the environment including marine system for present and future generation, are complied with, and the said activities stopped forthwith or relocated to another coastline as the court may direct.

(e) A conservatory order restraining and prohibiting the 2nd and 4th Respondents from harvesting sand and dumping materials along the Kenya Southern Coastline between Likoni and Diani.

(f) An order that the proponent carrying out the sand harvesting and dumping along the Kenyan Southern Coastline between Likoni and Diani, being the 1st Respondent, KPA, and their financiers, pay out the full and prompt compensation to the local fishermen and the local tour operators (being the petitioners herein) as assessed and accepted by the court from the expert witness on assessment of present and future damages.

(g) Costs of the petition.

(h) Any other relief as the court may deem just and fit to grant.

2. In support of the petition, the petitioners filed witness statements of Gideon Kibindu on behalf of South Coast Association of Local Tour operators, Alfan Mwadarashi on behalf of Okoa Bahari Association, Hamadi Ali Mwakutengeza on behalf of Tiwi Beach operators and 71 others and of Mohamed Abdalla on behalf of Tibwane Likoni Beach management unit and its 284 members.

3. The petitioners' case as set out in the petition and the supporting affidavit and accompanying witness statements is that in a bid to expand terminal in Mombasa, the 1st Respondent initiated a sand harvesting and dredging exercise in Tiwi, Diani and Chale in Kwale County. It is their case that the Mombasa Port Development Project and its sea sand harvesting and the dumping of dredged material components are destroying the environment and specifically the marine ecosystem in the South Coast of Kenya to the detriment of residents of Kwale County. The petitioners allege that the 2nd Respondent illegally granted the 1st Respondent the Environmental Impact Assessment (EIA) Licence and the subsequent variations to carry out sea sand harvesting and dumping activities. As a result, the petitioners claim that their constitutional rights have been violated. The petitioners aver that fishing which is a major livelihood activity for the local community has drastically deteriorated since most of the aqua species in the area have migrated to other safe areas because of the sand harvesting and dredging, causing loss to the fishermen. The petitioners add that the ocean water has become cloudy thus obstructing tourists from going for diving, resulting in huge loss in terms of employment and earning to beach operators. The petitioners further aver that the dredging machine has been depositing harmful particles in the ocean leading to death of seaweeds and grass which support aquatic life. It is the petitioners' contention that no proper public participation was undertaken by the 1st Respondent before the issuance and variation of license by the 2nd Respondent to the 1st Respondent.

1st RESPONDENT'S RESPONSE

4. The petition is opposed by the 1st Respondent by way of Grounds of Opposition dated 22nd October, 2019, preliminary objection dated 22nd October, 2019, Replying Affidavit, Further Affidavit and witness statement all by Daniel Githinji sworn on 22nd October, 2019 and 10th September, 2020 respectively and filed in court on 23rd October, 2019 and 14th September, 2020.

5. The 1st Respondent states that in mid-2000's, it conceptualized a project known as the Mombasa Port Development Project which was designed to be implemented in various phases. That phase 1 of the project which has been completed and implemented involved increasing container handling capacity on the northern side of the port. That Phase 2 of the project involved terminal modernization which involves construction of civil works and Buildings and relocation of the Kipevu Oil Terminal. It is averred that phase 2 of the project is substantially completed and is more than 90% complete.

6. The 1st Respondent states that among other components, two of the components of phase 2 of the project involved the harvesting of sea sand for construction of civil works and Buildings on one hand and the dredging of material for the relocation of the Kipevu Oil Terminal on the other hand. That the dredged sea material would be dumped at a meticulously designated site in the sea. It is averred that the two components of sea sand harvesting and dredging were completed and halted in August 2019 and April 2020 respectively.

7. The 1st Respondent contends that they commenced the suit project about the year 2006, conducted the EIA in 2006 and the 2nd Respondent granted them an EIA license dated 7th August 2007. A copy of the EIA license has been exhibited. It is the 1st Respondent's contention that the EIA process and the granting of the EIA license was legally and validly undertaken. The 1st Respondent avers that during the process of conducting the EIA and prior to the issuance of the EIA License, that 1st Respondent through the Environment Lead Expert/Consultant carried out a comprehensive public participation exercise where various stakeholders were invited to attend public participation forums in relation to the project. That the main purpose of the public hearings was to give an opportunity to stakeholders and the public to present their views, objections, suggestions and concerns about the project. Copies of the public hearings reports have been annexed.

8. It is contended that at the time the 2nd Respondent exercised its legal mandate to issue the EIA License to the project, all the analysis and findings by the Environmental Lead Expert/Consultant and the input from members of the public were taken into account. They aver that in subsequent years, the need arose for the updating of the EIA by way of addenda in order to address emerging issues associated with the implementation of the suit projects. That the first addendum was prepared in February, 2012 and approved by the 2nd Respondent in March 2012, while the second addendum was prepared in September, 2013 and approved in April 2014. It is contended that at the point when the EIA License and subsequent approvals were granted by the 2nd Respondent, no person including the petitioners herein, challenged the grant of the EIA License by way of appeal as provided for under the provisions of the Environmental Management and Coordination Act (EMCA), 1999. That even as the implementation of the project continued the 1st Respondent in liaison with the 2nd Respondent published an invitation to members of the public to give their views on the implementation of the projects. A copy of the sensitization forums and minutes have been annexed. Further, that apart from the exhaustive public participation that was conducted prior to the commencement of the project, the whole project in itself incorporates a continuous robust, open and voluntarily grievance redress mechanism which the 1st Respondent, the consultants, the contractors and sub-contractors are required to adhere to. It is further contended that with mitigation measures put in place, and the continuous monitoring process, the sand harvesting is not damaging the environment as alleged or at all. That the petitioners have not tabled any scientific reports supported by scientific data to support their assertions that sea sand harvesting and dumping were eroding the environment while the 1st Respondent has tabled sufficient reports prepared after the studies conducted by experts to put across its position. The 1st Respondent contends that the petitioners have not demonstrated any sufficient grounds or at all to support their claim that the 1st Respondent has failed to observe the provisions of EMCA, or that the suit project has resulted on damage of the environment and/or that the suit project has led to reduced fish catch volume. The 1st Respondent therefore contends that the petitioners have not proved their case and urged the court to dismiss it with costs. The 1st Respondent further contends that looking at where the project has reached, the bulk of the petition and the reliefs sought therein have been overtaken by events. This is because the project which has been ongoing for over 12 years is or almost complete while the petition herein was only filed in September, 2019.

2ND RESPONDENT'S RESPONSE

9. The petition is opposed by the 2nd Respondent by way of a Replying Affidavit of Zephaniah Ouma sworn on 7th October, 2020. It is deposed that the core object and purpose for which the 2nd Respondent is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. That the 2nd Respondent is tasked with issuing Environment Impact Assessment Licenses as provided under EMCA, and

that this is issued in consultation with other lead government agencies.

10. It is deposed that with regard to this case the 2nd Respondent was furnished with an EIA report for the proposed container terminal modernization project for the 1st Respondent for purposes of consideration and issuance of an EIA License. A copy of the acknowledgement letter dated 6th December, 2006 has been annexed. That in the spirit of collaboration with lead agencies and undertaking due diligence, the 2nd Respondent vide its letter dated 28th December, 2006 wrote to the relevant lead agencies seeking their views on the proposed project. That before issuance of the License, the 2nd Respondent vide its letter dated 9th January, 2007 wrote to the 1st Respondent informing them of their requirement to publish for two successive weeks in both the Kenya Gazette and in a newspaper of nationwide circulation a public notice, inviting the public to submit oral or written comments on the environmental impact assessment study report. That before the issuance of the license, there was public participation/hearings held on 13th September, 2006, 13th October, 2006, 9th November, 2006 and 25th May 2007 in which various stakeholders were in attendance. That the 2nd Respondent considered the views submitted and addressed them before the 1st Respondent was issued with an EIA License. The 2nd Respondent also wrote to the 1st Respondent to comply with certain conditions. That thereafter the 2nd Respondent issued the 1st Respondent with the License No. 0001206 dated 7th August 2007. The license was a conditional license which had 13 conditions attached to it. Copies of the raid documents have been annexed.

11. It is further deposed that the 1st Respondent filed applications with the 2nd Respondent for variation of the EIA License, and after reviewing the applications and satisfying itself that it met the statutory requirements the 2nd Respondent issued the 1st Respondent with a certificate of variation dated 26th January, 2011. That after reviewing the addendum report the 2nd Respondent noted that the proposed additional sites would lie along the same borrow pit area identified in the EIA report and also the amount of sand harvested would be the same. That the 2nd Respondent informed the 1st Respondent to observe mitigation measures in the approved EIA report for the additional sites and to also provide GPS coordinates for each new site for monitoring and future assessment of impacts. The 1st Respondent also submitted an addendum to the 2nd Respondent for approval to mine additional 8.3 million cubic metres of sand from the same offshore sand borrow pit used for phases II and III and after reviewing the application and satisfying itself that the Environmental Management plan in the EIA report plus proposed interventions contained in the addendum report would suffice, proceeded to issue the 1st Respondent with a License.

12. The 2nd Respondent avers that at the time of issuing the License and throughout the development of the project no appeal was filed challenging the same as provided for under the EMCA. The 2nd Respondent states that it ensured that the project was subject to the public and met the threshold for public participation leading to the issuance of the EIA License and the subsequent approvals. That in addition, the 2nd respondent is still charged with monitoring compliance of projects throughout the cycle of the project which the 1st Respondent has been undertaking with other agencies. The 2nd Respondent denied the petitioners allegation that the project is proceeding without an EIA License. It reiterated that the project is licenced and the License has not been challenged by way of an appeal. The 2nd Respondent prayed that the petition herein be dismissed with costs.

RESPONSE BY 4TH RESPONDENT

13. The 4th Respondent opposed the petition through Grounds of Opposition dated 19th October, 2020 in the following grounds:-

- i. That the petition is misconceived, frivolous, vexatious and an abuse of the court process.*
- ii. That the Ministry of Transport & Infrastructure, Housing, Urban Development and Public works has the mandate to provide transport policy management inter alia for the Kenya Ports Authority who have the mandate to develop, maintain, operate, improve and regulate all scheduled seaports along the Kenya's coastline all in accordance with the Forth Schedule of the Kenyan Constitution.*
- iii. That the operations and management of the Kenya Ports Authority are issues of national interest primarily in accordance with the Constitution of Kenya and are national assets that support the national budget and the utilization by the people of Kenya.*
- iv. That the subject matter of the suit involves an environment dispute which falls under the resolution by the National Environmental Management Authority.*
- v. That the allegations in the petition are that the respondents are harvesting sand and dumping materials along the Kenyan Southern Coastal line between Likoni and Diani.*
- vi. From the position is merely hypothetical since no evidence of adverse effect has produced in this petition.*
- vii. That the dispute involves concerns that the respondents are required to procure an Environmental Impact Assessment License from NEMA.*
- viii. That the respondents had applied to the Environmental Impact Assessment License and were issued with the first one for 24 months from 7th August, 2007.*
- ix. That an application for extension of the said license which request was granted for another 24 months from 17th January, 2011.*
- x. That the right procedure to be taken by the petitioners was to appeal to the National Environmental Tribunal as provided under Section 129 of the Environmental Management and Co-ordination Act and Rule 3 of the National Environmental Tribunal*

Procedure Rules.

xi. That the National and regional interests in the port development outweigh the petitioners' rights.

xii. That filing of this petition at the High Court of Kenya is an abuse of the statutory procedures and violates the doctrine of exhaustion of administrative remedies.

xiii. That the suit should be dismissed with costs for non-compliance of statute.

SUBMISSIONS

14. In their submissions dated 22nd July 2020 and filed on 23rd July, 2020 by the petitioners through their advocates on record, Messrs Martin Tindi & Company Advocates, the petitioners submitted that the 1st Respondent failed to comply with the provisions of Section 57A of EMCA which provides for strategic Environment Assessment before embarking on any of the components of the project. It is therefore the petitioners submission that the project is procedurally infirm. Further it was submitted that the 1st Respondent failed to adhere to the EIA License issued. The petitioners' submission is that the EIA License was initially valid for 24 months. They also submitted that there was no sufficient public participation in the conceptualization and implementation of the project, including failure to involve the County Government of Kwale. The petitioners submission is that their constitutional rights to life and to a clean and healthy environment have been violated and therefore are entitled to compensation. The petitioners urged the court to grant them an award of Kshs 2 billion as compensation. They relied on the case of **Mohamed Ali Baadi & Others –versus- Attorney General & Others (2018) eKLR** and ELC Petition No. 1 of 2016 – **Kelvin Musyoka & 9 Others –vs- Hon. Attorney General & 7 Others**.

15. In their submissions dated 5th October, 2020 through Munyao Muthama and Kashindi Advocates, the 1st Respondent submitted that the Petition is based on speculative and unfounded allegations. It is the 1st Respondent's submission that the petitioners have not demonstrated any constitutional elements in the petition, that they have failed to demonstrate the lack of an EIA License for the project, failed to demonstrate lack of public participation prior to the project, failed to demonstrate destruction to the marine environment and/or any reduced fish catch volumes. It was submitted that the claim for compensation must fall as the petitioners have not established that they are entitled to an award of damages. It was further admitted that the project has been or is about to be completed hence the petition has been overtaken by events.

16. The 2nd Respondent filed submissions dated 8th October, 2020 on 14th October, 2020 through Cynthia J. Sakami Advocate. It was the 2nd Respondent's submission that the petition does not suffice to be a constitutional petition as the issues raised and/or alleged by the petitioners herein do not suffice to be issues that can be raised by way of a constitutional petition to be litigated before this court. It was submitted that the petitioners have failed to demonstrate and establish a prima facie case because the EIA License and the subsequent approval for addenda for the suit project were issued procedurally and legally. Further, that there was public participation in the whole project. The 2nd Respondent submitted that mitigation measures were put in place and a continuous monitoring process undertaken and denied that the sand harvesting, dredging and dumping activities is destroying the environment. It was also submitted that the petitioners have completely failed to adduce any evidence to support their allegation of reduced fish volumes. Counsel for the 2nd Respondent urged the court to consider public interest in the matter vis-à-vis private rights, noting that the project has reached almost completion and therefore the bulk of the petition and reliefs sought therein have been overtaken by events.

17. The 4th Respondent filed submissions dated 19th October, 2020 and filed in court on 23rd October, 2020 by the Attorney General. It was submitted that the petitioners failed to exhaust the statutory provided appellate mechanism, hence the suit is bad in law for violating the doctrine of exhaustion of available remedies under EMCA. It was therefore submitted that the petition is premature and not ripe as the petitioners failed to follow the procedures laid down in EMCA and the National Environmental Tribunal Procedure Rules 2003.

ANALYSIS AND DETERMINATION

18. I have considered the petition, the responses made and the rival submissions. The issues falling for determination are:-

- i. Whether there was a valid EIA License for the project known as Mombasa Port Development Project.*
- ii. Whether there was proof of violation of the petitioners right to clean and healthy environment.*
- iii. Whether the Petitioners are entitled to the reliefs sought in the petition.*
- iv. What orders should be made with regard to the petition?*

19. In order to appreciate the petition, one has to go through all the paragraphs in the petition. I can deduce from the pleadings that the petitioners complaint is about the validity of the EIA report and the EIA License dated 7th August, 2007 issued to the 1st Respondent by the 2nd Respondent and the approvals for the subsequent addenda. Section 58(1) and (2) of EMCA provides thus:

“(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.”

20. Under Regulation 4 (1) of the Environmental (Impact Assessment and Audit) Regulation, 2003, no proponent shall implement a project likely to have a negative environment impact or for which an environmental impact assessment is required under the Act or the Regulations, unless an environmental impact assessment has been concluded and approved in accordance with the Regulations.

21. In the Affidavit of Zephaniah Ouma, the 2nd Respondent has shown that it was furnished with an EIA report for the proposed container terminal modernization project for purposes of consideration for issuance of an EIA License. There is evidence that upon receipt of the EIA report, the 2nd Respondent submitted a copy of the project report to each of the relevant lead agencies. And in undertaking due diligence, the 2nd Respondent vide its letter dated 28th December, 2006 wrote to the relevant lead agencies seeking their views and comments on the proposed project. These lead agencies included Kenya Wildlife Service, Coast Development Authority, the defunct Mombasa Municipal Council, Ministry of Transport among others. It has also been shown that notice to the public for a meeting were issued in respect to the project that ran in the dailies and in the Kenya Gazette. The Respondents have produced correspondences, notices and minutes as proof that public hearings were conducted. In the affidavit in support of the petition, the petitioners admit an EIA study was done and a report prepared. The petitioners also admit that an EIA License was issued for the project. Therefore the petitioners argument that the projects are being undertaken without a valid EIA License is in my view farfetched, unfounded on facts and unmerited. From the material on record, it is evident that the 2nd Respondent exercised its legal mandate to issue the EIA License to the 1st Respondent in accordance with the law. There is evidence that public participation was conducted where stakeholders and the public aired their concerns, views, objections and suggestions. Moreover, no person, including the petitioners herein, challenged the grant of the EIA License as provided for under Section 129 of EMCA. The project commenced in 2006/2007. The petitioners, in my view, are also guilty of laches and have brought this petition as an afterthought when the project is almost completed if not, completed, and after a period of over 12 years.

22. Have the petitioners proved that their rights, including the right to clean and healthy environment have been violated? From the material placed before me, it is quite evident that the 1st Respondent undertook a vigorous public participation exercise in the period leading to the issuance of the EIA License and the subsequent approvals, and which License and subsequent approvals were issued after the relevant authorities, including the 2nd Respondent, were satisfied that all conditions and requirements preceding the issuance of the same had been fully met. Even after the EIA approvals were granted by the 2nd Respondent for the suit projects, the 1st respondent has shown that it kept engaging with stakeholders during the implementation of the suit projects. Indeed the petitioners in their pleadings acknowledge that they have been able to access several documents related to the project from the websites of the 1st and 2nd Respondents. Further, apart from the exhaustive public participation that was conducted prior to commencement of the project, the 1st Respondent has also shown that the whole project in itself incorporated a continuous robust, open and voluntary grievance redress mechanisms which the 1st Respondent, the consultants, the contractors and sub-contractors are required to adhere to. It is also key to note that the grievance redress mechanism does not take away the statutory rights of any complainant to undertake legal proceedings where he/she feels the grievance redress mechanisms was not sufficient. The respondents have also shown that there were mitigation measures put in place and continuous monitoring process to ensure that the environment was not damaged. Further, there was no credible evidence presented before this court showing that the project led to dwindled fish volume, or indeed that there was any reduction of fish in the area. There was no empirical study showing the volume of catch before the project commenced and the alleged dwindled volumes after the project commenced. On the other hand, the Respondents have tabled scientific reports that clearly show that the project has had no adverse irreversible impact on the environment, including the marine ecosystem. The claim for compensation is therefore unfounded and the same must fail. I am in agreement with the Respondents submissions that the entire petition is based on speculative and unfounded allegations which have not been proved. I am also in agreement with the Respondents' averments that sea sand is able to replenish itself within a short period of time.

23. The Respondents have also urged the court to consider public interest in these proceedings. It was submitted that the project subject of these proceedings is an important national facility which is meant for the economic and social benefit of the country and the public at large.

24. In the case of **Kenya Medical Supplies Agency (KEMSA) vs- Mavji Kanji Hirani & 8 Others (2018) eKLR**, the Court of Appeal stated:

“Looked at as a whole, we think that on a balance of probabilities, the case by KEMSA stood on firmer ground and ought to have been upheld and the respondents case dismissed, not least because in a contest between private interests of dubious legitimacy and solid public interest claims, the latter ought to prevail..... We accept as good law the rather commonsensical proposition that in the tussle for supremacy between private and public interest, the latter must prevail. The courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good.”

25. Being guided by the above decision of the Court of Appeal, I am also of the view that the project the subject of these proceedings is of great public importance and to uphold the public interest, the petition herein ought to be dismissed.

26. In the final analysis, the upshot of the foregoing is that this petition lacks merit and is hereby dismissed.

27. On costs, I have noted that in the petition, the petitioners prayed for compensatory damages for alleged violation of their constitutional rights. Indeed the petitioners submitted that they were entitled to Kshs2 billion as compensation. The court has already found that the petition has no merit. In the circumstances; I am obliged to follow the long established dicta that costs follow the events. Accordingly, the petitioners shall jointly and severally bear the costs of this petition.

Judgment delivered virtually at Mombasa due to Covid-19 pandemic this 11th day of November, 2020.

HON C. YANO

JUDGE