



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC PETITION NO 3 OF 2019

IN THE MATTER OF: ARTICLES 2(2), 10(2), 19, 20(2), 21(1), 22(1) & (2), 23 (1), 40(2), 47(2), 50(1), 165 & 259 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF: ENVIRONMENT MANAGEMENT & COORDINATION ACT, 1999

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT, 2016

AND

IN THE MATTER OF: LR NO. KISII MUNICIPALITY/BLOCK III/566

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

ALOYS MATAYA MOSETI.....PETITIONER

AND

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner instituted suit through a Petition dated 22nd February 2019 seeking the following reliefs:-

a) Declaration that the Petitioner is entitled to Protection under the law and the Constitution, 2010.

b) Declaration that having duly and lawfully issued the requisite Environment Impact License, pursuant to and in accordance with the provisions of the Environment Management and Coordination Act, 1999, the Respondents herein and in particular, the 1st Respondent is bound by the terms of the said License.

c) Permanent Injunction restraining and/or prohibiting the 1st Respondent herein either by herself, agents, servants and/or anyone acting on her instructions from entering upon, destroying and/or demolishing the building and/or demolishing the building and/or construction standing on LR NO. KISII MUNICIPALITY/BLOCK III/556.

d) Costs of the Petition be borne by the Respondents jointly and/or severally.

e) The Honourable Court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.

2. The National Environment Management Authority (NEMA) is the 1st Respondent and the Attorney General is the 2nd Respondent.

3. The Petitioner's case is expressed through the petition, the supporting affidavit and supplementary affidavit both sworn by Aloys Mataya Mosei and submissions. The 1st Respondent filed its response to the petition.

PETITIONER'S CASE

4. The Petitioner asserts that 14th January 1998 he was issued with an allotment letter by the Commissioner of Lands over the un-surveyed Commercial Plot-7 Kisii Municipality. Following the issuance of the allotment letter the Petitioner complied with the conditions contained in the allotment letter. The office of the Commissioner of Lands subsequently liaised with the Director of Physical Planning and Survey to facilitate the preparation of the Part Development Plan and the Registry index map over the allotted plot and the relevant part development plan was prepared endorsed and acted upon. After the preparation of the Part Development Plan, the un-surveyed plot was assigned a parcel number and the same became known as LR NO. KISII MUNICIPALITY/BLOCK III/566 ('suit property') and the registration was captured in the Registry Index Map.

5. The Petitioner contends that he became the proprietor of the suit property and annexed copies of the Lease instrument, Certificate of Lease and Certificate of Official Search as proof of ownership.

6. On or about November 2013, the Petitioner sought to develop the suit property and obtained consent and approval from the relevant authorities with a view to facilitating the intended development. The Petitioner prepared the requisite building plans, in respect of the intended building which were submitted to the County Government of Kisii for approval. The Petitioner asserts that the 1st Respondent directed that an Environmental Impact Assessment (EIA) Report be prepared and the same was duly prepared and submitted for approval. The Petitioner alleged that he had contracted an environmental expert to prepare the EIA report which was subjected to due process including public participation. The report was approved culminating into the issuance of the Environmental Impact License dated 22nd May 2014 by the 1st Respondent.

7. After obtaining all the requisite licenses and approvals from the relevant authorities the Petitioner commenced construction of the approved project which was completed in December 2018.

8. On 13th February 2019 the 1st Respondent proceeded to the Petitioner's premises and threatened to demolish the suit property because the development was not licensed. Persons claiming to be representatives of the 1st Respondent claimed that the suit property encroached onto the 6 metres riparian section and hence the same was unlawful. The Petitioner was constrained to lodge a complaint at the Police station following the threats from the 1st respondent.

9. The petitioner asserts that contrary to the claims by the 1st Respondent, the suit property does not lie within the riparian section and that in any event the project was subjected to the EIA and was found to have satisfied the conditions under the provisions of the **Environment Management and Coordination Act, 1999 ('EMCA')**. The Petitioner contends that the action of the 1st Respondent amounts to an infringement of his constitutional rights and that the actions of the 1st Respondent were ultra vires. According to Petitioner, the actions of the 1st Respondent are bound to interfere with and violate his fundamental rights to ownership of property and protection under the law and in particular **Articles 10, 27, 28, 40, 47, and 50 (1) of the Constitution 2010**.

PETITIONER'S SUBMISSIONS

10. The Petitioner identified the following as the issues for determination:

a) *Whether a person threatened with breach and/or violation of constitutional rights can commence and/or mount a Petition, prior to and before actual damage?*

b) *Whether the development and/or construction by the petitioner was duly approved by the 1st respondent and if so, whether the 1st respondent was bound by the terms contained in the license?*

c) *Whether the 1st respondent could seek to destroy and/or demolish the development on the suit property, without giving the petitioner notice and/or a right to be heard on the complaint, if any?*

d) *Whether the actions and/or threats by the 1st respondent were informed by Mala-fides and/or bad faith?*

e) *Whether the petitioner is entitled to monetary compensation on the face of breach and/or threatened breach of Constitutional Rights?*

11. On the first issue, the petitioner submitted that the provisions of the Constitution of Kenya 2010 as far as the threatened breach and infringement are concerned are sufficient and explicit. The petitioner relied on **Article 22 (1) of the Constitution of Kenya**. He also relied on the case of **Bernard Murage v Fineserve Africa Limited & 3 Others [2015]** where the court held that “*a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the court. He has a right to do so if there is a threat of violation or contravention of the Constitution*”.

12. The Petitioner’s submission on the second issue was that having been granted the EIA license, the 1st respondent was obliged to comply with the terms of the License and could not renege on the terms of the license. If at all the petitioner acted in contravention with the terms of the license, then the 1st Respondent could issue a Ceasure Notice. Since the Petitioner complied with the terms of the license including setting aside the 6 metres riparian section which had been identified and delineated by the 1st Respondent’s own officers the 1st Respondent had no reason to dispatch officers to threaten the Petitioner.

13. The petitioner also noted that in case the terms of the license were violated then provisions of **section 101 of the Environmental Management and Coordination Act, 1999** would apply. The Petitioner contends that the 1st Respondent neither served him with any warning letter nor issued any restoration order upon the purported violation. It was further submitted that the 1st respondent being a state organ is enjoined to act in accordance with provisions of **Article 10 and 47 of the Constitution, 2010**.

14. In regards to the 4th issue the petitioner advanced that the intended demolition of the suit property was botched plan as the 1st petitioner relied on Minutes of the Kisii County Government where the issue of encroachment into riparian land had been discussed however the purported minutes dated 27th February 2015 were allegedly held on 24th March 2015. The petitioner submitted that the actions of the 1st respondent were grossly unreasonable and wrought with mala-fides and cited the case of **Republic v Anti-counterfeit Agency exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR**.

15. Finally the Petitioner submitted that on the face of the flagrant disregard and violation of the petitioner’s rights the 1st respondent is obliged to compensate the petitioner. The petitioner submitted that he is entitled to an award on account of general and aggravated damages in the sum of Kshs 10,000,000/-. They relied on the case of **Reuben Njuguna Gachukia & Another v Inspector general of the National Police Service & 4 others [2019] eKLR**.

THE RESPONDENT’S CASE

16. The Respondent filed its Replying Affidavit on 7th November 2019. The 1st Respondent asserts that on or about February 2015, it noted that there was rampant encroachment of riparian reserves within Kisii town and resultantly held a meeting with other lead agencies with a view of getting a way forward. A follow up meeting was held on 27th February 2015 and the 1st Respondent together with identified lead agencies undertook joint inspections along the two major rivers within Kisii Town and noted that the Petitioner’s development had encroached on the riparian reserve contrary to the EIA license.

17. The respondent advanced that prior to issuing the EIA license, the 1st Respondent wrote to the Petitioner giving conditions to be adhered to once the license was issued. The Respondent contends that the Petitioner received and acknowledged their letter and wrote back stating as follows;

“in the event the project site borders a river stream, the proponent pursuant to regulation 6(c) of the Water Quality Regulations 2006, shall protect the riparian reserve by ensuring that NO development activity is undertaken within the full width of river or stream to minimum of six (6) metres and a maximum of 30 meters on either side, based on the highest recorded flood level.”

18. The Respondent contends that the petitioner undertook construction on the riparian reserve and has further gone ahead to canalize the river on the whole stretch fronting his property creating a drainage effect as opposed to a river as evidenced by his pictures.

19. Upon discovery that the Petitioner’s development had encroached on the riparian reserve, they advised the petitioner to demolish all offending structures that had encroached on the riparian reserve to avoid the same being undertaken by the 1st respondent but the petitioner has and continues to ignore such directives.

20. The 1st Respondent’s position was that an EIA license is not absolute and is subject to conditions which the petitioner herein undertook to adhere to. According to the 1st Respondent, the Petitioner is the author of his misfortunes. They contend that the Petitioner’s assertion that the project was approved and found to meet the established conditions under the provisions of EMCA and as such it should not be demolished are misguided and based on a poor comprehension of the EIA process. According to the 1st Respondent, its approval is usually followed up with environmental audit of the petitioner’s project in case the conditions contained in the license have not been adhered to and the 1st Respondent is mandated under EMCA to remedy such breach.

21. In response to the alleged violations, the Respondent contended that the Petitioner merely made constitutional references without any nexus to the breach occasioned to such articles. It further stated that the riparian reserve is public land and encroachment on the same does not fall within the protection provided under **Article 40 (1)** but is liable to challenge as provided for under **Article 40 (6)** of the **Constitution of Kenya 2010**.

RESPONDENTS SUBMISSIONS

22. The Respondents identified the following 3 issues: Having laid a background of the petition at hand, they proceeded to submit on the following issues:

a) Is issuance of an Environmental Impact Assessment (EIA) License absolute?

b) Does issuance of an EIA License prevent the 1st Respondent from enforcing conditions attached to it?

c) Has the Petitioner proved any breach of his Constitutional Rights by the 1st Respondent?

23. On the first issue the respondent submitted that pursuant to **Section 2** of the Environmental Management and Coordination Act (**EMCA**), No. 8 of 1999 the purpose of an EIA is to determine whether a project will have adverse impacts on the environment in future and how the same can be mitigated. They did not dispute that the Petitioner's license was obtained in accordance to the provisions of **section 58(1) EMCA**. They contended that Petitioner subsequently proceeded to act contrary to the conditions of the license by undertaking his construction up to the edge of the riverbed as evidenced by the pictures on page 14, 15, 16 and 17 of the 1st Respondent's bundle of documents and as well as the Petitioner's annexures on page 71, 72 and 74 of his petition. It is further submitted that it can be observed that the boundary of the Petitioner's wall cannot be said to be six meters away from the river.

24. On the second issue, it was submitted that the 1st Respondent has a mandatory duty in law to check compliance of any conditions issued with the EIA License and such a duty cannot be curtailed through an injunction as prayed for by the Petitioner. They relied on **section 69** of EMCA which states as follows;

a. *The Authority or its designated agents shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.*

b. *An environmental inspector appointed under this Act may enter any land or premises for the purposes of determining how far the activities carried out on that land or premises conform to the statements made in the environmental impact assessment study report issued in respect of that land or those premises under [section 58\(2\)](#).*

c. *The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made shall keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under [section 58\(2\)](#).*

Regulation 33, of the **Environmental (Impact Assessment and Audit) Regulations, 2003** on its part provides as follows;

1. A control audit shall be carried out by the Authority, whenever the Authority deems it necessary to **check compliance with the environmental parameters set for the project** or to verify self-auditing reports.

2. A control audit shall—

a. confirm that the environmental management plan of the project is **being adhered to**; and

b. verify the adequacy of the environmental management plan in mitigating the negative impacts of a project.

25. The Respondent also cited the case of **Bogonko v National Environment Management Authority (2006) 1 KLR (E&L)** where the Applicant sought an order of prohibition directed at the Respondent restraining it from stopping or in any other manner whatsoever interfering with the Applicant's project known as Pebo Retail Petrol Station West Mugirango along Kisii-Kericho High way. The Honourable court in pronouncing itself on this issue noted as follows;

“Under section 69 (1) of the Act, NEMA in consultation with other lead agencies is charged with the duty of monitoring all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impact or operation of any projects or activity with a view to determining its immediate and long term effects on the environment. The court cannot curb NEMA's powers given by statute. The order cannot be granted.”

26. Finally, the Respondent faulted the petition which they urged was not drafted in accordance with the established principles of law that require that the pleadings must be drafted in a precise manner stating the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. (See **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154**).

27. It was not disputed that the 1st Respondent instructed the Petitioner to remove all offending structures that had encroached on the riparian reserve from his property as opposed to structures legally on his land. **Section 12 (2)** of the Land Act further provides for allocation of public land and notes that the Commission in allocating land shall ensure that public land that is along watersheds, **river and streams catchments**, public water reservoirs, lakes, beaches, fish landing areas, riparian and the territorial sea as may be prescribed is not allocated.

28. The **Water Act, 2016** on its part under **Regulation 116 (2)** of the Water (Plan of Transfer of Water Services) Rules, 2005 provides as follows;

*“Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a **minimum of six metres** or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank.”*

29. **Regulation 118** on its part prohibits any activities on riparian land provided under Schedule 6 of the Regulations. Schedule 6 notes that no tillage, cultivation, clearing of indigenous trees or vegetation, **building of permanent structures**, excavation of soil or planting of exotic

species that may have adverse effect to the water resource is allowed.

30. In conclusion, the 1st respondent submitted that he who comes to equity must come with clean hands and the Petitioner having encroached on a riparian reserve cannot come crying wolf to court in the guise of protection of his constitutional rights when in fact he seeks to use this honourable court to rubberstamp an illegality. It was further submitted that the Petitioner has not established any breach of his rights to warrant any monetary award.

ISSUES FOR DETERMINATION

31. Having considered the pleadings and rival submissions, the following issues arise for determination in this petition;

a) Whether the Petitioner complied with the terms of the license; and

b) Whether the actions of the 1st respondent amounted to violation or infringement of the petitioner's constitutional rights.

32. In determining the first issue, the Petitioner must demonstrate that he complied with the general condition 2.4 provided by the 1st Respondent in their letter dated 1st January 2014. The said condition reads:

“in the event the project site borders river stream, the proponent pursuant to regulation 6(c) of the Water Quality Regulations 2006, shall protect the riparian reserve by ensuring that NO development activity is undertaken within the full width of river or stream to minimum of six (6) metres and a maximum of 30 meters on either side, based on the highest recorded flood level.”

33. The 1st Respondent has argued that the photograph marked as NEMA 5a depicts that the Petitioner did not comply with condition 2.4 of the license. A cursory glance at the said photo together with the ones marked NEMA 5(b), (c) and (d) clearly show that the distance between the perimeter wall of the Petitioner's premises is dangerously close to the edge of the river and is certainly less than 6 meters from the river. This is also evident in the photos attached to the Petitioner's Supplementary Affidavit and marked as annexure AMM 4 at pages 12, 12 (b) and 12 (c). It is not in dispute that the 1st Respondent instructed the Petitioner to remove all offending structures that had encroached on the riparian reserve to ensure adherence to **Regulation 116 (2) and 118** of the Water (Plan of Transfer of Water Services) Rules, 2005.

34. **Section 108 of the EMCA** on environmental restoration orders provides as follows;

(1) Subject to any other provisions of this Act, the Authority may issue and serve on any person in respect of any matter relating to the management of the environment an order in this Part referred to as an environmental restoration order.

(2) An environmental restoration order issued under subsection (1) or section 111 shall be issued to-

(a) require the person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment;

(c) award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;

(d) levy a charge on the person on whom it is served which in the opinion of the Authority represents a reasonable estimate of the costs of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order.

(3) An environmental restoration order may contain such terms and conditions and impose such obligations on the persons on whom it is served as will, in the opinion of the Authority, enable the order to achieve all or any of the purposes set out in subsection (2).

(4) Without prejudice to the general effect of the purposes set out in subsection (2) an environmental restoration order may require a person on whom it is served to-

(a) take such action as will prevent the commencement or continuation or cause of pollution;

(b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in the particular order;

(c) take such action to prevent the commencement or continuation or cause of environmental hazard;

(d) cease to take any action which is causing or may contribute to causing pollution or an environmental hazard;

(e) remove or alleviate any injury to land or the environment or to the amenities of the area;

(f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on or under or about the land or sea specified in the order or land or the environment contiguous to the land or sea specified in the order;

(g) remove any waste or refuse deposited on the land or sea specified in the order and dispose of the same in accordance with the provisions of the order;

(h) pay any compensation specified in the order.

(5) In exercising the powers under this section, the Authority shall-

(a) be guided by the principles of good environmental management in accordance with the provisions of this Act; and

(b) explain the right of appeal of the persons against whom the order is issued to the Tribunal or if dissatisfied with the decision of the Tribunal, to superior courts.”

35. The Petitioner has sought injunctive orders against the 1st Respondent and thus was required to establish the criteria spelt out in the case of **Giella v Cassman Brown (1973) EA 358**. The **Petitioner** must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the petitioner demonstrates that he stands to suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

36. In this case the photographs reveal that the perimeter wall erected by the petitioner is on the riparian land. The petitioner thus not only infringed the conditions of the EIA license but was also in breach of **Regulation 116 (2) and 118** of the Water (Plan of Transfer of Water Services) Rules, 2005. The petitioner thus has failed to demonstrate that he is entitled to the injunctive orders sought.

37. In **Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR** the court observed as follows;

“40. Section 9 of EMCA enjoins the 1st Respondent to co-ordinate the various environmental management activities being undertaken by lead agencies and to promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of environmental resources. Sections 108 and 111 of EMCA empower NEMA and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. This places the court and NEMA on the forefront in the protection of the environment and lends credence to the preamble to the Constitution which states that the people of Kenya are respectful of the environment and are determined to sustain it for the benefit of future generations.

.....

53. It now behoves every person to play an active role in environmental protection in light of the Article 69 (2) of the Constitution which places the duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa.”

38. In my view the Petitioner is not entitled to the riparian land adjacent to the suit property. The 1st respondent being an agency of the National Government is mandated to ensure the protection and conservation of the environment and ensure that there is ecologically sustainable development. In doing so the 1st Respondent are guided by the provisions of the **EMCA**. The 1st Respondent in effecting their mandate cannot be deemed to be in breach of the petitioner’s right to ownership of property as the riparian land cannot be privately owned by the petitioner. **Section 12 (2) (c) of the Land Act** allows for allocation of public land but prohibits the allocation of public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed. **Section 2 of the Land Act** defines riparian reserve to mean the land adjacent to the ocean, lake, sea, rivers, dams and water courses.

39. In the premises, granting an injunction against the 1st Respondent would go against the spirit of the preamble to the Constitution which enjoins the people of Kenya to protect the environment not just for the current but also for future generations.

40. On the material placed before the court, I am not satisfied that the Petitioner has established that his property rights have been or are about to be violated and that he is entitled to protection thereof. Accordingly, the petition lacks merit and it is hereby dismissed.

41. In view of the circumstances of this case, each party shall bear its own costs.

Dated, signed and delivered at KISII this 9th day of December 2020.

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J.M ONYANGO

JUDGE