



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION ELCLEPPET E004 OF 2024
IN THE MATTER OF ATHE CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 35,
40, 42, 47, 50(1), 69, 70, 259 OF THE CONSTITUTION OF
KENYA 2010
AND
IN THE MATTER OF SECTIONS 3, 3A, AND 9 OF THE
ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT
CHAPTER 387 LAWS OF KENYA
BETWEEN
SUYIANKA LEMPAA.....
PETITIONER
VERSUS
COUNTY GOVERNMENT OF KIAMBU.....1ST
RESPONDENT
NGUGI PATRICK MWIBERI.....2ND
RESPONDENT
GRACE WANJIRU.....3RD
RESPONDENT
AND

**NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY(NEMA)
.....INTERESTED PARTY**

JUDGMENT

1. This Judgment is in respect to the Petition dated 8/10/2024 wherein the Petitioner sought the following orders against the Respondents jointly and severally:-

- i) A declaration that the actions of the Respondents were in violation of Article 42 of the Constitution of Kenya in relation to the Petitioner.
- ii) A declaration that the 1st Respondent has violated the Petitioner's right to access information against Article 35 of the Constitution.
- iii) An order compelling the 1st, 2nd and 3rd jointly and severally to pay general, exemplary and punitive damages as may be assessed by this Honorable Court for the unjustified physical and psychological suffering.
- iv) An order of restoration compelling the 1st, 2nd and 3rd Respondents to remedy the environmental damage on the easement

adjacent to the Petitioner's two parcels of land in Kiahuria Estate.

- v) An order compelling the 1st, 2nd and 3rd Respondents to put culverts at the gates of Juja/Komo Block 2/715 and Juja/Komo Block 2/715.
- vi) A declaration that the Respondent violated Article 28 of the Constitution of Kenya 2010 in relations to the Petitioner.
- vii) A declaration that the Respondent violated Article 47 of the Constitution of Kenya 2010 in relation to the Petitioner.
- viii) A declaration that the Respondent violated Article 39 (1) of the Constitution of Kenya 2010 in relation to the Petitioner.
- ix) Costs and interest thereof of this Petition.
- x) Such further other and consequential orders as this Honorable Court may deem fit to make.

2. The Petition was supported by an Affidavit sworn by the Petitioner relying inter alia on the following grounds:

- i. He is the owner of the parcels of land Juja/Komo Block 2/715 and Juja/Komo Block 2/716 on which he has constructed his residential home.
- ii. That on 1st August 2024, the 3rd Respondent through her agents and/or employees commenced the work of grading Kiahuria Estate Roads.

- iii. That the 3rd Respondent's agents and/or employees operating an earthmoving tractor, unilaterally blocked and/or obstructed an easement by digging a deep trench at the Petitioner's gates thus blocking him from his home as shown via the annexed photographs in a bundle marked as SL 2.
- iv. That the agents and/or employees damaged cabro blocks mounted outside the Petitioner's gate to prevent dust and mud from getting into his compound. Also around his home flower gardens were extensively damaged without notice that they would be removed.
- v. That the road grading project has occasioned serious environmental effect not only to the two parcels of land belonging to the Petitioner and others residents of Kiahuria Estate in Witeithie Ward, Kiambu County.
- vi. The Applicant is apprehensive that the Respondents are likely to continue carrying out further developments that have deleterious environmental impact without submitting an environmental report to the Interested Party as evidence by the letters annexed as SL 3 and SL 4.
- vii. At the same time no EIA report was submitted to the Interested Party's office in Kiambu for grading of the Kiahuria Road as stated in the letter annexed as SL 6.

- viii. That the Petitioner made a formal complaint on environmental impact assessment offences at Karamaini Police Post as per annexure SL 5 which is a copy of the OB Report.
- ix. Despite the Petitioner making a cease and desist demand to the 3rd Respondent seeking admission of liability as evidenced by SL 7, he did not receive a response as at the time of filing the Petition. That despite seeking intervention of the 2nd and 3rd Respondents to restore the environment prior to the commencement of the grading work and install culverts on the easement but they were not willing.
3. When the Petitioner filed the Petition he also filed a Notice of Motion Application dated 8/10/2024. When the parties appeared in Court on 28/10/2024 the Court issued interim orders granting prayers 2 and 3 of the Application. The 2nd and 3rd Defendants later filed a Notice of Motion dated 19/06/2018 seeking a stay of execution of the interim orders and setting aside of the said orders but the Court declined to grant the prayers.
4. The Petition was canvassed by way of written submissions.
5. I have noted from perusal of the documents filed in Court that the Respondents and the Interested Party did not file any response nor submissions to the Petition. As it were the Petitioner's Affidavit evidence is uncontroverted.

Petitioner's submissions

6. The Petitioner filed submissions dated 14/03/2025 and identified four issues for determination namely:
- a) Whether the Kiahuria road grading project was undertaken in accordance with the constitutional and legal requirement?
 - b) Whether the Respondents violated the Petitioner's Article 35 of the Constitution of Kenya 2010?
 - c) Whether the Respondents violated Article 42 in relations to the Petitioner?
 - d) Whether this Honorable Court can issue the orders sought by the Petitioner?
7. The gist of the Petitioner's submissions was that the grading project violated constitutional principles of safeguarding the environment as required under Article 69 (2). That even the Interested Party confirmed that there was no EIA undertaken by the 1st Respondent.
8. In his submissions the Petitioner has relied on the following cases among others **African Climate Alliance & 2 Others vs Minister of Mineral Resources and Energy Case No. 56901 OF 2021, Adrian Kamotho Njenga vs Council of Governors & 3 Others [2020]eKLR, Kibos Distrillers Limited & 4 Others vs Benson Ambuti Adegga & 3 Others [2020]eKLR, M'ithilai vs County Government of Meru & Another (Environment & Land Petition E011 of 2021) [2022] KEELC 14956(KLR), Ken Kasing'a v Daniel Kiplagat Kirui & 5 Others [2015], Wangari**

Mathai case Greenbelt Movement & 5 Others vs National Environmental Management Authority & another; Kenya Highways Authority (2-P) 2020 eKLR, Ken Kasing'a vs Daniel Kiplangat Kirui & 5 Others [2015]eKLR.

9. The Petitioner submitted that this suit concerns the question of environmental democracy and urged the Court to find that the Respondent violated the environmental democracy. He relied on the case of **Mohamed Ali Baadi and Others vs Attorney General & 11 Others [2018] eKLR.**

Site Visit

10. The Petitioner requested for site visit when the parties attended Court on 19/11/2024 and the Court granted the request for site visit which was conducted on 27/11/2024 at 3.05 pm by the Hon Deputy Registrar F. Koome. The site visit was conducted in the presence of the Counsel for the Petitioner, Counsel for the 1st Respondent, Counsel for 2nd Respondent and Counsel for the 3rd Respondent including other residents of Kiahuria area who are not parties to the Petition.
11. The observations made with regard to Plot No. Komo Block 2/715 were that during grading cabros were removed and there is no trench outside the gate since the soil has been filled back where it had been dug out. With regard to flowers, the observation made was that the flower garden was damaged during grading but one could not tell whether

the damaged part falls within road reserve or not since this could only be answered vide a technical report.

12. With regard to plot Komo Block 2/716 it was observed that some cabros were buried inside the road and there is a shallow drainage outside plot No. Komu Block 2/716 and there are no culverts serving any part of the road where the two parcels are located.

13. There were also pictures attached to the site visit report.

Analysis and Determination

14. From the pleadings and the submissions of Counsel, it is my view that the following issues are up for determination:-

(i) *Whether the constitutional avenue is available to the Petitioner.*

(ii) *Was there a breach of Article 42 of the Constitution?*

(iii) *What orders are appropriate in the circumstances.*

Issue (i): Whether the constitutional avenue is available to the Petitioner

15. The case of the Petitioner is that there is an infringement of his rights to a clean and healthy environment as provided by Article 42 of the Constitution. The said law is drawn as follows:-

“42. Every person has the right to a clean and healthy environment, which includes the right—

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**
- (b) to have obligations relating to the environment fulfilled under Article 70.”**

16. If a person is of the view that his right to a clean and healthy environment is being violated, he has recourse to apply to Court for redress. This is brought out in Article 70 of the Constitution which is drawn as follows:-

“70. (1) If a person alleges that a right to a clean and healthy environment recognised 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.”

17. The Petitioner has of course presented what he feels is a raft of legislative violations in his Petition. Inter alia, the Petitioner put up gates on the easements and planted trees and grass on the side of the road of parcels of land known as Juja/Komo Block 2/715 and Juja/Komo Block 2/716 (suit properties) on the understanding that should any development be required, the Petitioners would be given adequate notice to remove any strutter on the road reserve.
18. However, that the 3rd Respondent through her employees never gave the Petitioner any notice when they embarked grading Kiahuria Estate Roads. The exercise of upgrading blocked and or obstructed an easement on the suit properties and damaged flower gardens around the Petitioner’s home.
19. As a matter of fact, the Petitioner discovered that no Environmental Impact Assessment (EIA) was done before

commencement of the work. This he came to know when the Interested Party sent an email to him on 7/08/2024 after making an inquiry on 5/08/2024.

20. That despite making a cease and desist demand and requiring the 1st, 2nd and 3rd Respondents to indicate their willingness which they did not for them to restore the environment prior to commencement of the grading work and install the culverts on the easement.

21. The Petitioner has itemized at paragraph 34 the nature of the injury listing from paragraph (a) to (h). I have considered and read through each of the alleged injuries.

22. The legal foundations of the Petition are stated to be Article 10 (2) on public participation, Article 35 (a) on right to information, Article 42 on right to a clean and healthy environment, Article 69 (d) on public participation in management protection and conservation of the environment, Article 70 on redress for violation to a clean and healthy environment, Article 258 on right to institute Court proceedings where the Constitution is infringed and Article 259.

23. The burden of proof of the above allegations was upon the Petitioner who claims that his rights are threatened with violation and or have been violated by the actions of the 1st Respondent.

24. Considering the site report that was filed in Court, I was not able to establish that the Petitioner has not proved the

allegations of violation or infringement of the Petitioner's right to a clean and healthy environment arising out of the actions of the 1st Respondent as alleged or at all.

25. It cannot be denied that the project in issue had important impact on contiguous land and while this was being done, the Petitioner was never informed, in the form required by law. It cannot therefore be argued that the Petitioner was granted opportunity to participate in the decision, of whether or not, the grading of the road should be done in a manner that does not impact the health and environment of the area occupied by the Petitioner.

26. The Respondents have not contested the averments of the Petitioner and have not demonstrated that the development was only begun after the EIA licence was issued. To me, there appears to have been a violation of Section 58 of EMCA which provides that no projects should be commenced without at least there having been tabled an EIA project report.

27. Be as it may, the main complaint is that the Petitioner was never consulted and the cabros and flower garden were destroyed. Further that the project being undertaken has an impact on the environment and health of the citizens including the Petitioner. This has not been countered by any of the Respondents.

28. The requirements under Section 58 of EMCA make provision for an EIA report for any intended project and where it is

foreseen that the project may, or is likely to have, or will have, a significant impact on the environment, then NEMA will direct the proponent of the project to conduct an EIA and present an EIA study report. This was of course never done; I do not know why, but probably NEMA thought that the project did not have significant impacts on the environment or that sufficient mitigation measures had been taken. That was their prerogative.

29. The Rio Declaration on Environment and Development (1992) at Principle 10 emphasizes the need for Public Participation. It is drawn as follows:-

(c) Principle 10

(d) Environmental issues are best handled with 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 processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and

administrative proceedings, including redress and remedy, shall be provided.

(e)66. Principle 10 above is echoed in the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. Part II thereof which comprises of Guidelines 8 to 14 is drafted as follows:-

(f) Guideline 8

(g) States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned (The "public concerned" being defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest.) should be informed of their opportunities to participate at an early stage in the decision-making process.

(h) Guideline 9

(i) States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

(j) Guideline 10

(k) States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

(l) Guideline 11

(m) States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

(n) Guideline 12

(o) States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any

such review process to the extent that circumstances permit.

(p) Guideline 13

(q) States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

(r) Guideline 14

(s) States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

30. It is apparent from the above that the State, through its relevant organs, has the duty to ensure that the persons most affected by the project are consulted and this inevitably includes the Petitioner.

31. Public participation for purposes of EIA ought to be real and actual. It has a critical role, for the persons to be most affected, may offer alternatives to the project or propose important mitigation measures. It is not a window dressing exercise, and neither should it be looked at as a mere formality, aimed only at ticking the boxes.

32. In the current Petition, NEMA even confirmed that the 1st Respondent did not carry out an EIA study nor produce an EIA report about the project. Unfortunately, NEMA did not file any response to the Petition to ensure that proper public participation was done. When NEMA received the inquiry from the Petitioner about the EIA report it ought to have referred the proponents of the project back to the ground for proper public participation. This was not done and NEMA clearly slept on the job.

33. What all the above presents to me is that the Respondents were hell bent on proceeding with the project, whether or not there were objections to it, and in fact, it seems to me, that the Respondents deliberately wanted to avoid engaging the persons whom they thought would be opposed to the project. That is not how to conduct public participation. In fact, the views of the person who is most likely to oppose the project are the most important views, for it is that person who will bring out the negative environmental impacts that the project is likely to bring forth, so that concrete mitigation measures are considered early enough.

34. I hold that the constitutional avenue is therefore available to the Petitioner.

Issue (ii) Was there a breach of Article 42 of the Constitution?

35. The Petitioner argues that his rights to a clean and healthy environment have been infringed. Since the Respondents did

not file any response, there is no contention that a road was being upgraded and there was damage to the suit properties and as I have already held, there was no public participation before the project was set up. It may be that if the law was followed, the project would have been disallowed, or allowed with some modifications. It may also be that the project would have been allowed to continue as it is now. But all that is conjecture because the process was not followed.

36. I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment.

37. It is informative that one of the principles of environmental law is the precautionary principle. The precautionary principle applies where there is uncertainty as to whether a matter has potential to cause environmental harm. The approach in the face of such uncertainty is to exercise caution, and where possible, stop the activity that is suspected to have potential to cause environmental harm. The burden of proof in instances where the precautionary

principle is invoked, in my view, ought to rest upon the proponent of the project, who needs to demonstrate that the project at hand is not harmful to the environment or that the harm to the environment is tolerable, owing to the greater public benefit, especially where there are no better alternatives to the project. This was not done in our case.

38. Again, Section 58 of EMCA provides for at least a project report to be provided for the certain projects set out in the Second Schedule and where such project has a significant impact on the environment, a full EIA should be done.

Issue 3 : What orders are appropriate in the circumstances?

39. I had set out at the beginning of this Judgment, the various orders sought by the Petitioner. I have considered the same.

40. On whether or not the Petitioner is entitled to a declaration that his rights to a clean and healthy environment have been infringed, I allow the same on the reasoning of my discourse above. But there are more prayers that have been asked for.

41. At the same time the Petitioner has asked for an order to compel the 1st, 2nd and 3rd Respondents to jointly and severally pay general, exemplary and punitive damages as may be assessed by the Court for unjustified physical and psychological suffering.

42. The Petitioner has not provided the Court with enough information either a report or a doctor's note to confirm the

physical and psychological suffering and so I am not able to grant this prayer.

43. The Petitioner further asked for orders to compel the 1st, 2nd and 3rd Respondents to not only remedy the environmental damage on the easements but also put the culverts at the gates of the suit properties.

44. On my part, I wish to reprimand the 1st, 2nd and 3rd Respondents for the rather casual approach when undertaking projects such as this. They may be and they are very good projects and intentions are very noble however the law provides of the procedures to be followed to undertake these projects and it is only proper that the law is followed. The issue of public participation is key in any project being undertaken and those charged with the responsibility can no longer carry on as though lives of Kenyans do not matter.

45. The Kenyan Constitution establishes public participation as a foundational principle of governance. Key articles that mandate public participation in projects and other government business include:

***“Article 10 (2) (a): Public participation is listed as one of the national values and principles of governance that binds all state organs, state officers, public officers, and all persons in the discharge of public functions.*”**

Article 118 (1) (b): Parliament "shall... facilitate public participation and involvement in the legislative and other business of Parliament and its committees."

Article 174 (c): The objectives of devolution are to "enhance the participation of people in the exercise of the powers of the state and in making decisions affecting them."

Article 196 (1) (b): This extends the requirement for public participation to county assemblies, which "shall... facilitate public participation and involvement in the legislative and other business of the assembly and its committees."

46. These articles, among others, establish public participation not as a goodwill gesture but as a constitutional requirement for **legitimate governance** (emphasis added). The principle applies to various aspects of government, **including public finance, legislative processes, and, by extension, public projects** (emphasis added)

47. The Petitioner also sought a restoration order. An order of restoration in this context would compel Respondents to jointly address environmental damage on an easement next to the Petitioner's property. This means the Respondents, who are likely responsible for the damage, must take actions to fix the environmental issues and restore the easement to its original or acceptable condition. This could involve

physical cleanup, removal of pollutants, or implementing measures to prevent further damage.

48. Now, I believe that it will be going too far to suspend the project however, NEMA needs to step in and ensure that the EIA report is done and there is public participation which is meaningful and also NEMA should investigate any complaints raised against the 1st Respondent and is also free to undertake any disciplinary action.

49. Given the foregoing I will issue the following orders:-

a) A declaration that the actions of the Respondents violated Article 42 of the Constitution in relation to the Petitioner.

b) A declaration that 1st Respondent violated the Petitioner's right to access information against Article 35.

c) An environmental restoration order is issued directing the Respondents to jointly remedy the environmental damage on the easement adjacent to the Petitioner's two parcels of land in Kiahuria Estate within 30 days.

d) I direct the 1st, 2nd, and 3rd Respondent to put culverts at the gates of Juja/Komo Block 2/715 and Juja/Komo Block 2/715 within 30 days.

e) The Petitioner has asked for exemplary and punitive damages on this, I will award a token of Kshs. 100,000/= jointly against the

Respondents in recognition that his rights were duly infringed.

f) The Petitioner will also have the costs of this Petition jointly against the Respondents but it is capped at Kesh 50,000.

Judgment accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 2ND DAY OF OCTOBER, 2025.

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**MOGENI J
JUDGE**

In the presence of:-

Mr. Lempaa for the Petitioner

Ms. Kibathi for the 1st Respondent

Interested Party - Absent

Melita - Court Assistant

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**MOGENI J
JUDGE**