REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 1 OF 2012

IN THE MATTER OF ENVIRONMENTAL DAMAGE AND VIOLATION OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION UNDER ARTICLES 42 AND 70 OF THE CONSTITUTION OF KENYA

BETWEEN

MICHAEL KIBUI.....1ST PETITIONER

GEORGE OSUNDWA.....2ND PETITIONER

BALLET MURENGU.....3RD PETITIONER

(Suing on their own behalf as well as on behalf of the inhabitants of

Mwamba Village of Uasin Gishu County)

AND

IMPRESSA CONSTRUZIONI GIUSEPPE MALTAURO S.P.A.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....3RD RESPONDENT

JUDGMENT

Petitioners Case

1. Michael Kibui, George Osundwa, Ballet Murengu ***(suing on their behalf and on behalf of*** **Mwamba** ***Village of Uasin Gishu County)*** *came to this court by* Petition filed on 4.12.2012 which is supported by the affidavit of George Osundwa authorized to swear on behalf of the petitioners and who depones that the petitioners have brought the petition herewith on their own behalf and also on behalf of 339 other inhabitants of Mwamba Village, hereinafter referred to as the Mwamba Village.

2. It is claimed that in pursuance of its mandate and/or responsibility to manage develop and rehabilitate trunk roads, the 2nd respondent sometimes in the year 2001 did contract the 1st respondent to carry out the design for rehabilitation of the Eldoret-Webuye section of the Eldoret-Malaba Highway.

3. The petitioners state that for accomplishment of its duty, the 1st respondent was authorized and/or given green light by the 2nd and 3rd respondents to extract some construction materials such as rocks from Mwamba Quarry which is in the locality of Mwamba community and that in extracting rocks and other construction materials as mentioned above, the 1st respondent uses methods such as blasting and drilling which have immensely denied the petitioners and the entire Mwamba Community their constitutional right to a clean and healthy environment as envisaged and/or contemplated under Article 42 of the Constitution.

4. This is in view of the grave negative effects consequential to the said blasting and drilling such as emission of heavy smokes of dust which

pollute water and renders it unsafe for consumption by the Petitioners and members of the community and emission of heavy smokes of dust which is inhaled by the Petitioners and members of the community hence visiting on them grave and untold health problems. Moreover, emission of heavy smokes of dust which has destroyed the Petitioners crops.

5. The blasting leads into extremely heavy and inordinate noise which causes massive sound pollution whence making it impossible for the Petitioners and members of the community to engage in any useful and/or meaningful activity and/or business.

6. The noise also makes it impossible for the children in the three schools in the community. The noise also makes it impossible for the smooth learning activities in the community and especially in the surrounding schools like Mwamba Primary School, Edmonds Academy and Life Transformation Centre to go about their learning activities.

7. Besides the damage to their crops and effect to their health, the quarrying activities also cause massive earth quakes and/or trembling of the earth surface which has led to massive destruction of the Petitioners' houses and those of other members of the Mwamba community which houses have sustained cracks on the walls and floors.

8. The quarrying activities by the respondent have visited immeasurable suffering upon the petitioners and the community as the same have denied them their constitutional right to stay in a clean and healthy environment besides leading to massive destruction of their properties hence exposing them to suffer damages.

9. The Petitioners have complained to the respondents severally but all these complaints have fallen on deaf ears. The 1st respondent has on several occasions promised to compensate the petitioners and other inhabitants of the community but all these promises have proved hollow and have gone unfulfilled.

10. That it is just and expedient that the activities be stopped and the 1st respondent be permanently restrained from engaging in the same in future.

11. That besides the damage to their crops and effect to their health the quarrying activities also cause massive earth quakes and/or trembling of the earth surface which have led to massive destruction of the Petitioners' houses and those of other members of the Mwamba community which houses have sustained cracks on the walls and floors.

12. That before carrying out the activities like the ones outlined above, he is advised by his advocates that the law requires that Environmental Impact Assessment must be carried out in compliance with the Environmental Management and Coordination Act (EMCA) 1999, and an assessment (hereafter the report) prepared stating the nature of the project, the location, the effects of such project on the environment and the community around, and ways of mitigating such effects.

13. That one of the requirements in carrying out an environmental impact assessment is to include the community around the project area in the whole process of carrying out the said assessment through consultative meetings. This was not done by the 1st Respondent.

14. That the environmental impact assessment reports made pursuant to the assessment alluded to in (15) above made certain recommendations and proposed mitigation factors that would reduce the effect of quarrying on the environment and the community for example sprinkling of water before blasting as well as covering the blasting area to reduce the amount of dust produced and emitted into the environment. The 1st Respondent has continued with the quarrying activities in complete disregard of these recommendations.

15. That the 1st and 2nd Respondents did not consult the Mwamba community while carrying out Environmental Impact Assessment, a requirement that he has been advised by his advocate on record which advice he verily believes to be true that the same is a mandatory requirement in law.

16. That the 1st Respondent carried out the aforesaid quarrying activities in complete disregard of the environmental impact assessment reports alluded to in (16) above thereby causing gracious harm to the environment around the community yet the 3rd Respondent has refused and/or declined to revoke the licence granted to the 1st Respondent hence allowing the aforesaid quarrying activities to continue in complete breach of the Petitioners' constitutional rights to a clean and healthy environment.

17. That the quarrying activities by the 1st Respondent have visited immeasurable suffering upon us and the community as a whole as the same have denied us our constitutional right to stay in a clean and healthy environment besides leading to massive destruction of our properties hence exposing us to suffer damages.

18. That the petitioners have complained to the respondents severally but all these complaints have fallen on deaf ears.

19. The petitioners in further demonstration of the massive demonstration occasioned to their houses by the 1st respondent's quarrying activities at the Mwamba Quarry have annexed bundles of photographs.

20. The said quarrying activities have continued and still continue to occasion substantial damage to the petitioner's houses as the more blasting is done the more the destruction continue.

21. That it is also instrumental to note that the public complaints committee upon collecting views and complaints from the petitioners and members of the Mwamba Community sometimes in December, 2012 and upon its own analysis and evaluation recommended that the 3rd respondent in conjunction with the mines and geology department immediately issue a stop order to the quarrying activities complained of a

recommendation that has been ignored to date.

22. That the 3rd respondent ignored the said recommendation by the public complaints committee despite the said committee having been established statutorily. He is advised as such by his advocates on record which advise he believes to be true.

23. That the 1st respondent has on several occasions promised to compensate the petitioners and other Inhabitants of the community but all these promises have proved hollow and have gone unfulfilled.

24. That it is as such just, fair and expedient that the activities complained of herein be stopped and the 1st respondent be permanently restrained from engaging in the same in future.

25. That it is also just, fair and expedient that the other reliefs sought in the petition be granted.

26. The petitioners pray for a declaration that the ongoing quarrying activities by the 1st respondent at the Mwamba Quarry in Uasin Gishu County has infringed, violated and/or threatened the right to a clean and healthy environment by the Petitioners and the people of the Mwamba community.

27. An order stopping the 1st respondent from the said quarrying activities at Mwamba Quarry and permanently injuncting the 1st respondent from carrying on any future quarrying activities at the said site by way of blasting and drilling rocks.

28. An order permanently restraining and/or injuncting the 2nd and 3rd respondents from granting consent to any other person and/or legal entity from carrying on quarrying activities at the Mwamba Quarry in Uasin Gishu County by way of blasting and drilling rocks.

29. An order compelling the respondents to compensate the Petitioners and 339 members of Mwamba community on whose behalf this petition is presented in terms that the honourable court shall determine.

The 1st Respondents Reply

30. In the replying affidavit of Anil Puri, the Branch Manager of the 1st respondent, he states that he is undertaking the construction of the Eldoret-Webuye road under a contract it entered into with the 2nd respondent on behalf of the Government of Kenya and therefore the injunctive orders sought would in effect be against the Government of Kenya and he is advised by the 1st respondent's advocate, Mr. Gad Gathu that injunction orders cannot issue against the government.

31. That pursuant to the aforesaid said contract, the 2nd respondent procured for the 1st respondent the Mwamba Quarry site for use for purposes of extracting materials to be used in the aforesaid project.

32. That as required under the Environment Management and Co-ordination Act No. 8 of 1999, the 1st respondent caused an Environmental Impact Assessment study to be conducted on the aforesaid site. The said report was conducted by a duly authorized expert who prepared an Environmental Impact Assessment Report.

33. The allegation that the members of the Mwamba community were not consulted in preparation of the report is false as can be seen from pages 2, 3 and 30 of the report where the input of the community is referred to. That the aforesaid report was approved by the 3rd respondent who issued a licence dated 14.08.2012 for the project to the 1st respondent. The aforesaid licence contained a list of conditions which the 1st respondent has been complying with and the Environmental Impact Assessment Report also proposed measures that should be undertaken to mitigate any impact on the environment as can be seen from paged 22-29 of the aforesaid report. The 1st respondent has been undertaking the proposed mitigation measures.

34. That further the 1st respondent has compensated the 1st Petitioner for damage caused by the excavation works at the Mwamba quarry. The 1st respondent engaged the Ministry of Public Works which carried out a valuation of the damage caused to individual members of the community.

35. The 1st Petitioner duly collected an amount of Kshs. 42,000 which was the value of the damage on his Plot No. 3587. The 1st Respondent annexed a copy of a discharge voucher for the same signed by the 1st Petitioner. The 2nd and 3rd petitioners refused to collect payment for the value of the damages on their respective plots. The allegation that the 1st respondent has refused to compensate the petitioners is therefore false.

36. According to the 1st respondent, the petitioners have not presented any alternative expert valuation of the damage to their plots so as to challenge the valuation by the Ministry.

37. The Petitioners' concerns were taken into account at the time of undertaking the Environmental Impact assessment study and issuance of the licence by the 3rd respondent. The mitigation measures which the 1st respondent is continually undertaking are sufficient to address the Petitioners' concerns.

38. That further the project is being undertaken for the greater public good including that of the petitioners. To halt the project will be detrimental to the interest of the petitioners and against public policy.

39. That he also verily believes that there are other political and economic motivations for filing of the present petition and application apart from concerns for the environment as is well captured by annexture GO7 in the affidavit of George Osundwa sworn on 31.10.2012 and annexed to the petition herein. It is clear that the project has been politicized with the community demanding for employment from the 1st respondent.

40. That while the 1st respondent is willing to and has been providing the members of the community with employment from the project, this is dependent on the dynamics of the project and availability of positions.

41. That in the circumstances, he verily believes that the Petitioners' petition and the application herein are devoid of merit and should be dismissed with costs.

2nd Respondent's Reply

42. The 2nd respondent through Engineer Samuel O. Omer, the General Manager of Kenya National Highways Authority states that the Petitioner does not raise a cause of action against the 2nd respondent.

43. That the mandate of the 2nd respondent Kenya National Highways Authority is an autonomous road agency, responsible for the management, development, rehabilitation and maintenance of international trunk roads linking centres of international importance and crossing international boundaries or terminating at international ports (Class A road), national trunk roads linking internationally important centres (Class B roads) and primarily roads linking provincially important centres to each other or two higher class roads (Class C roads).

44. That it is not in dispute that the 2nd respondent awarded a contract to the 1st respondent on behalf of the Kenya Government for the rehabilitation of the Eldoret-Turbo-Webuye Road. That it is clear from the contract that the 2nd respondent's mandate in this case was limited to contracting the rehabilitation of the Eldoret-Turbo-Webuye Road and that subsequent to the signing of the said contract, the 1st respondent would require a quarry to be able to discharge its duties to the standards of the 2nd respondent.

45. The 2nd respondent did submit the environmental and Social Impact Assessment Project Report for the Mwamba Ballast Quarry Project which is marked.

46. The 2nd respondent so as to hasten the issuance of the necessary clearance for a quarry by the 3rd respondent did pay a sum of Kshs. 100,000 for processing of the requisite approvals. That it should be noted that the 2nd respondent conducted public consultations with the members of the Mwamba Community and therefore the allegations by the Petitioners that there were no consultations can simply be a misrepresentation of facts.

47. That the approvals for quarrying activities to be carried out at Mwamba Quarry were dependent upon certain conditions being met which conditions the 2nd respondent duly met.

48. That the 2nd respondent acquired the Mwamba Quarry through compulsory acquisition vide Gazette Notice No. 5078 and 5079 of 14th May, 2010.

49. That even before the 1st respondent could use the quarry, the Commissioner of Mines and Geology Personnel inspected the site and recommended a safe blasting zone of at least 100 metres from the blasting area, free from human activity. That even after acquiring the land vide Gazette Notice No. 5078 and 5079 of 14th May, 2010 the 1st respondent could not use explosives on the quarry due tot the proximity of human activity to the site and was denied authority to use explosives in the quarry. That this necessitated the acquisition of additional land around the blasting area. The extra land was surveyed and gazette for compulsory acquisition vide Kenya Gazette Notice Nos. 7960 and 7961 of 8th July, 2011. There is therefore no doubt that the extra land was obtained to achieve the safe blasting area.

50. The extra land was procured, the necessary approval was obtained from the Ministry of Environment and Mineral Resources as contained in the letter to the 1st respondent dated 16th July, 2011.

51. That it is therefore clear that all necessary requirements in law were fulfilled before the Mwamba Quarry could operationalize and this has been admitted by the Petitioners at paragraph 7 of the Affidavit in support of the Petition.

52. That contrary to the allegations and/or assertions, the 2nd respondent consulted members of the Mwamba Community before the quarry was established.

Petitioners Supplementary Affidavit

53. On the 17th May 2013, the petitioners filed a further affidavit annexing an environmental analysis and evaluation on the state of quarry activities in Mwamba village. The report lays blame on the failure of the 1st respondent to observe the conditions preceding the grant of the approval by the 3rd respondent. The damages occasioned to their houses and health is a direct consequence of the 1st respondent's activities. The damage is likely to continue if the 1st respondent does not take into account and implement the mitigation measures set out by the 3rd respondent. That as such, it would only be fair to infer that the 1st respondent is in breach of his contractual obligations to take mitigation measures to minimize against the massive negative effects and/or consequences that the quarry activities continue to pose to the local inhabitants of Mwamba village.

54. That more risks are anticipated from the quarrying activities ranging from health risks to extensive environmental degradation if alternative mitigating methods are not explored or the complaints from the local residents are not properly looked at.

55. That in view of the foregoing, it would be just, fair and expedient that the activities in the quarry be stopped and a comprehensive environmental audit be done to address the damages caused by the project.

1st Respondents Supplementary Affidavits

56. In four supplementary affidavits of Ivan Ferrari, John Mwani Shilindwa, Robert Musumba filed on 25.7.2013 by the 1st respondent, it is stated that the local community was adequately compensated and that the 1st respondent has contributed to the socio-economic impact Strategy of the areas such as schools, before blasting the community is warned 3 times. The quarry is fenced properly and that the audit report is not accurate. The 1st respondent, through Anil Puri filed an Environmental Audit Report conducted on Mwamba quarry by the 1st respondent. The audit report was prepared and filed.

THE CONSENT

57. On 22.9.2014, a consent order was recorded adopting the Control Audit Report filed on the 11.8.2014 by the 3rd respondent. On the 2.3.2015, the matter was set down for determination of liability as between the 1st and 2nd respondents. In the audit report filed by consent, it is reported that the site is surrounded by schools, dispensaries and homesteads which had been affected by quarry activities on site. Land owners have been compensated. The site is not fenced. There is visible uncontrolled drainage causing erosion of top soil. There is water pollution caused by oil spill. NEMA and Ministry and Geological department were required to issue a stop order and to preempt the blasting of stones and to control noise pollution. The above report was adopted by the court. The only pending issue is the apportionment of liability.

ANALYSIS AND DETERMINATION

58. I have considered the Control Audit Report filed on the 11.8.2014 by the 3rd respondent and the submissions of counsel on record and do find that the 1st respondent breached the petitioners' rights to a clean and healthy environment by causing, water, air and noise pollution and excessive vibrations which is enshrined in Article 42 of the constitution of Kenya 2010. The Article provides as follows: -

> ***"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."***

59. It is alleged by the respondents that the petitioners were compensated though there is no evidence of compensation. I do find that the petitioners are entitled to damages due to breach of their right to clean and healthy environment.

60. Article 70 of the constitution of Kenya provides for Enforcement of environmental rights as follows: -

> ***(1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.***
>
> ***(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate-***
>
> ***(a) To prevent, stop or discontinue any act or omission that is harmful to the environment;***
>
> ***(b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;***
>
> ***Or***
>
> ***(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.***
>
> ***(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."***

61. On the issue of compensation due to the land taken by the respondents, this court finds that no evidence has been adduced to show that the petitioners owned land that was taken away by the respondents. It is not enough for the petitioners to allege that they lost land, they ought to prove that they owned land which they lost to the respondents.

62. On compensation for damages caused by the excavation works, pollution and blasting, I do find that the petitioners have not demonstrated how they reached the figures they claim for compensation. They do not provide valuation reports or medical reports.

63. However, it is evident that the 1st respondent has breached the petitioners right to a clean and healthy environment by causing, water, air and noise pollution and excessive vibrations hence the petitioners have suffered damage that require compensation and therefore, I do order that they each be paid Kshs. 30,000 for breach of their right to a clean healthy environment. However, I do decline to grant compensation for damaged houses and loss of land as there is no evidence in respect of each petitioner that their houses were damaged and that they lost their land. Moreover, there is no evidence of loss of livestock, damaging of toilet, damaging of green houses and public facilities. It was not enough for the petitioners to claim that their houses were damaged and that they lost their land as it was incumbent upon the petitioners to prove that actually their houses were damaged and that they lost their land.

64. On the issue, as to who is liable to pay, this court is called upon to apply environmental law principles under Kenyan Law jurisprudence. Environmental law is principally concerned with ensuring sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both domestic and international processes. Ideally, the utilization of land and land-based resources should adhere to the principles of sustainability, intergeneration equity, prevention, precautionary, polluter pays and public participation.

65. The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.

66. I do order that the 1st respondent pays Kshs. 30,000 to each and every petitioner for breach of their right to a clean and healthy environment. Costs of the petition to the petitioners. Orders accordingly.

Dated and delivered at Eldoret this 22nd day of February, 2019.

A. OMBWAYO

JUDGE