



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 16 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION CONTRARY TO ARTICLES 27, 40, 47, 46, 50, 40 AND 70 OF
THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ILLEGAL ESTABLISHMENT OF TREATMENT PLANT

AND

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF FAILURE TO OBTAIN AN ENVIRONMENT IMPACT ASSESSMENT/AUDIT

AND

**IN THE MATTER OF FAILURE TO INVITE PUBLIC PARTICIPATION AND SOCIAL IMPACT ASSESSMENT CONTRARY
TO ARTICLE 10 OF THE NEW CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF FAILURE TO PROVIDE A SECURE ENVIRONMENT CONTRARY TO ARTICLE 70 OF THE NEW
CONSTITUTION OF KENYA, 2010**

CAROLYNE KERUBO OMWOYO.....1ST PETITIONER

YUSUFU MAHMOUD ATHMAN.....2ND PETITIONER

VERSUS

ABAO INVESTMENTS LTD.....1ST RESPONDENT

UASIN GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....INTERESTED PARTY

JUDGMENT

PETITIONER'S CASE

Carolyn Kerubo Omwoyo and **Yusuf Mahmoud Athman** (*hereinafter referred to as Petitioners*) have sued the Abao Investments Ltd and Uasin Gishu County Government claiming breach of Articles 26(1), 42 and 70 of the Constitution of Kenya, 2010. Moreover, the National Environment Management Authority (NEMA) was enjoined as an interested party. The facts giving rise to the petition are that the petitioners reside on land parcel Number Uasin Gishu/Mile Thirteen Scheme/826 which they own and which comprises their matrimonial home.

The respondent operates a pole treatment plant on land parcel number Uasin Gishu/Mile Thirteen/244 which is adjacent to the aforesaid petitioners' residential home. According to the petitioners, the pole treatment plant produces a lot of noise, stench and vibration both day and night and the said effluents have adversely affected the petitioners, their family and other residents of the scheme. As a result of the stench, noise and general pollution, the petitioners have suffered a lot of prejudice and have treated numerous life-threatening diseases caused by the said pollution.

The petitioner's children have been seriously affected both medically and academically as a result of which they have been forced to transfer them to boarding schools to abate the effects of the respondent's activities on them.

As a result of the decision to transfer their children to boarding schools as aforesaid, the petitioners have incurred numerous expenses to meet the required fees a burden which they are now not in a position to continue bearing and the fee balances continue to increase to unbearable levels. The Petitioners claim that the 2nd respondent is in breach of its constitution mandate by:

- a. Failing to control air pollution, public noise pollution and other nuisance occasioned by the 1st respondent.
- b. Failing to ensure that an Environment Impact Assessment is obtained and the mitigation measures recommended enforced.
- c. Failing to ensure that National Environment Management Authority had issued its permit for it to license the establishment.

The petitioners further state that the license issued by 2nd Respondent without the authority of the Interested Party as mandated at law is ultra vires the powers donated by the Constitution of Kenya, 2010 and Environment Management and Co-ordination Act Chapter 387, Laws of Kenya and hence unlawful and illegal for the establishment.

That no findings/investigation or mitigation measures recommended enforced by the 1st Respondent, findings furnished them associating the operation of the treatment plant neighbouring both residential and Agricultural land with churches, shops and a school constructed to the North of the establishment to the alleged compliance of the environment law.

That the Petitioners contend that no mitigation measures as recommended by the National Environment Management Authority to be undertaken by 1st Respondent associating the alleged establishment of treatment plant near Agricultural land and residential premises which actions.

The Respondents activities are illegal since the respondent did not comply with the mandatory requirements of the law regarding Environmental Impact Assessment, Environmental Impact Assessment (EIA) Report and the requirement of advertisement under section 58, 59 and 63 of the Environmental Management and Co-ordination Act.

The EIA report was not published for two successive weeks in the gazette and in a newspaper circulating in the area or proposed area of the project as required under section 59(1) of the Environmental Management and Co-ordination Act or at all.

The Applicants were not consulted, warned and/or involved in any way in the plans leading to the commencement of the life-threatening project despite the fact that the number 244 where the Respondent's tortuous activities are being conducted.

Article 42 of the Constitution of the Republic of Kenya provides for the right to a clean and healthy environment while Article 70 provides for the mode of enforcement of the said right and the remedies available as well as the powers of the court to prevent, stop or discontinue any act that is harmful to the environment.

Article 26(1) of the Constitution provides for the right to life. It is the Petitioners' contention that their right under Article 26(1) is threatened by the Increasing activities of the Respondent.

The Petitioners also content that statutory requirements under sections 58, 59 and 63 of the Environmental Management and Co-ordination Act have not been complied with and the Respondent is in breach of the same.

The 2nd Respondent is authorized and empowered by Article 185 and the 4th Schedule of the Constitution of Kenya, 2010 in Part 2- County Governments.

The functions and powers of the County are, the management and exploitation of the county's resources and the development and management of its infrastructure and infrastructure and institutions,

(I.) Control of air pollution, noise pollution, other public nuisance and outdoor advertising

(7) Trade development and regulation including:

(a) Markets.

(b) Trade licences.

Pursuant to the exercise of those powers in paragraph 15 above, the Respondent without a National Environment Management Authority Licence but with a County Government licence established a wood treatment plant Jua Kali along Eldoret-Webuye road. The treatment plants neighbourhood is both residential and Agricultural land with churches, shops and a school constructed 10 the North of the establishment. As an agricultural/residential area, any application for change of user must be made to the local County Government and consent for change of user obtained after obtaining a National Environment Management Authority licence and a Risk Assessment and Public Health and Social Impact Assessment done to ascertained through the relevant Impacts and how to mitigate against them.

Without obtaining a certificate of authorization to continue with the project, the Respondent has established a wood treatment plant at the Maili Thirteen land without the requisite National Environment Management Authority certificate and hence persists in emitting and subjecting the environment and neighbourhood to threats and pollutants inconsistent with a clean and secure environment.

In its recommendations, the National Environment Management Authority had made several mitigation measures to be undertaken by the 1st Respondent in order to harmonize the operations of the plant with the neighbourhood.

The Petitioner contents that Article 70 of the New Constitution of Kenya, 2010 provides the right to any person who deems that his/her environment is likely to be adversely affected by denial, violated, infringed or threatened by infringing on the environment adversely may approach court for protection.

The petitioners emphasize article 70 of the constitution of Kenya which provides

The Petitioner avers that the operationalization of the plant before mitigating the adverse effects generated the machinery, treatment, chemicals and rotting bark leads to contamination of water, destruction of matter (housing) and adverse effects on the health and welfare being of the public. As a result of the failure to mitigate against the hazards identified as vibration stench, dust, chemical seepage, (Pollutions) noise, the Petitioners have been subjected to the negative impacts to the detriment of their person and the environment subjected to degradation that needs urgent mitigation measures to avoid further pollution.

PARTICULARS OF INJURY.

- (a) Health injury to the Petitioners and the public.
- (b) Material damage to the houses, buildings, tanks etc.
- (c) Permanent damage to the soil due to CCA chemical seepage into the ground.
- (d) Poisoned water seepage.

The contamination of air, water and soil without visible mitigation measures behoves the court in applying the precautionary principle to issue conservatory orders to restrain the plan (1st Respondent) from persisting in polluting the atmosphere till a licence of fitness to operate is obtained from the Interested Party.

PARTICULARS OF SOIL CONTAMINATION.

- a. The application (treatment) using CCA chemical which soaks into the ground on drying and contaminates the soil by seepage.
- b. Unlawfully chemicals before testing the effects to the environment and soil.
- c. Failing to mitigate the hazards
- d. Res Ipsa Loquitor.

PARTICULARS OF PUBLIC HEALTH RISK:

As a result of the precipitate dust containing CCA treatment chemical and normal dust cycle movement, the following have been diagonized with upper respiratory complications.

- a. AISHA YUSUF.
- b. ZULFA YUSUF
- c. SHADAU FAWAZ

Pursuant to the exercise of those powers and functions, the Uasin Gishu County Government licenced and authorized the 1st Respondent to operate and has persisted in renewing the 1st Respondents licence annually.

The Petitioners aver that the licensing was done in total disregard of the functions in clause 3 (control of pollution) and in disregard of National Legislations — Environment Management and Control Act that provides for the 1st interested Party Agency to permits establishment to operate after meeting set criteria before being licenced by the 2nd Respondent.

In spite of repeated demand, the 1st Respondent persists in maintaining the operation of the treatment plant to the, detriment of their health and clean environment.

The Honourable Court has Constitutional jurisdiction to determine the Petition exclusively and grant the orders sought.

The petitioners pray for:

a. A declaration that the continued operations of the 1st respondent without a National Environment Management Authority licence constitutes a breach of the Petitioners constitutional rights.

b. A conservatory order to restrain the respondents jointly and severally from operating the plant other than in compliance with due process established vides Article 70 of the Constitution of Kenya, 2010.

c. An order of court to compel the 1st Interested Party to discharge its Constitutional mandate and ensure a clean and healthy environment for the Petitioners against the respondents.

d. An order of court to compel the respondents jointly and severally to have:

i. An environment impact assessment audit.

ii. A public health impact assessment audit.

iii. A social impact assessment audit.

e. Damages for pollution of environment and heath risks caused to Petitioners.

f. The respondent and/or its agents be restrained from carrying out its pole treatment activities on plot number Uasin Gishu/Mile Thirteen/244.

g. A declaratory order be issued that the respondent's actions are in breach of the applicant's constitutional right to a clean and healthy environment.

h. The respondent be ordered to pay the Petitioners general damages for breach of their constitutional rights.

RESPONSE BY 1ST RESPONDENT

The 1st respondent admits that the Petitioners reside on land parcel number UASIN GISHU/MILE THIRTEEN SCHEME/826 which they own and which comprises their matrimonial home. It is also true that the 1st Respondent operates a pole treatment plant on land parcel number UASIN GISHU/MILE THIRTEEN SCHEME/244 which is adjacent to the aforesaid Petitioners' residential home. The 1st Respondent avers that other than the Petitioners, the 1st Respondent also has other neighbours.

The 1st Respondent denies contents of paragraph 5 of the Amended Petition particularly as it regards the production of noise, stench and vibration attributed to it. Further, the petitioners have not stated how they have been affected by the alleged noise, stench and vibration.

This being a Constitutional Petition, it is a well settled principle that the Petitioners ought to demonstrate with some degree of precision the right they allege has been violated and the manner it has been violated.

There is no proof of the treatment of the so called " life threatening diseases" as well as what is alleged to have happened to the Petitioners' children as alleged in paragraphs 7 and 8 of the Amended Petition.

The Petitioners have not transferred their children to boarding schools as alleged; the children are still schooling where they used to school previously. But if any transfer was done then the same cannot be attributed to the operations of the 1st Respondent as it is even clear from the Petitioners' pleadings that one of the 1st Respondent's neighbours is a learning institution.

The 1st Respondent denies the particulars of breach of constitutional mandate by the 2nd Respondent. In response to paragraph 9 of the Amended Petition, the 1st Respondent denies the averments therein. The 1st Respondent contends that it complied with the law as stipulated under the Environmental Management and Co-ordination Act particularly regarding Environmental Impact Assessment and the petitioners

are thus put to strict proof thereof.

The 1st Respondent further avers that its operations are legal as it has been issued with the Environmental Impact Assessment License by the Interested Party. The 1st Respondent followed the due procedure to obtain the Environmental Impact Assessment License.

In response to paragraph 10 of the Amended Petition, the 1st Respondent contends that the requirements under section 59(1) of the Environmental Management and Co-ordination Act were also complied with. Mitigation measures were undertaken and have always been undertaken. The petitioners are thus put to strict proof to the contrary.

The 1st Respondent contends that the Interested Party shall confirm that the law was followed and thus the 1st Respondent's activities are lawful.

The petitioners as well as the members of general public were consulted. Public participation was facilitated through administration of interviews and focused group meetings in the neighboring site. The 1st Respondent further avers that it applied for change of user for its parcel of land from agricultural to industrial/timber and the members of public were given time to forward any objections to the change of user.

The 1st Respondent contends that none of the Petitioners' rights have been violated by the 1st Respondent and particularly the right to a clean and healthy environment. It is the 1st Respondent's contention that the Petitioners have not demonstrated how their right under Article 26(1) of the Constitution has been violated. The 1st Respondent denies the allegations of breach of Constitution leveled against it. The petitioners are put to strict proof thereof.

The 1st Respondent denies the particulars of breach of the Constitution, particulars of injury, particulars of soil contamination, particulars of public health risk and all other particulars of breach as stipulated in the Amended Petition. The remedies sought by the Petitioners are unavailable to them for reasons that:-

- a. The 1st Respondent's activities are legal as they are licensed.
- b. The 1st Respondent's activities are the only source of livelihood for the 1st Respondent and many other employees.
- c. There are other neighbours of the 1st Respondent who have not complained about the operations of the 1st Respondent.
- d. The Petitioners have not demonstrated that they have suffered in a unique way (over and above the other neighbours).

The project has the support of the local community and it is a huge investment outlay. In the presence of an E.I.A License, the Honourable Court is bereft of jurisdiction to grant the remedies being sought.

The first respondent believes that the Petitioners' claim should have been filed at the National Environment Tribunal as established by the Environmental Management and Co-ordination Act. Sections 125, 126, 127 and 129 of the Environmental Management and Co-ordination Act should have guided the Petitioners.

It is trite law that an aggrieved party must first exhaust the stipulated primary dispute resolution mechanism before moving to the Honourable Court. The Constitution of Kenya and particularly Articles 162 and 169 (1) (d) approve the establishment of Tribunals.

The Environmental Management and Co-ordination Act (EMCA) vide Section 129, establishes the National Environment Tribunal which is empowered under the provisions of section 129(2) thereof, to hear and determine appeals against decisions of NEMA. Regulation 46(1) of Environmental (Impact Assessment and Audit) Regulations 2003 allows an appeal to the Tribunal where any person is aggrieved by approval by NEMA of an EIA License.

Where an infringement can be addressed within a legislative framework, the course to follow is to take out proceedings under the framework and not under the Constitution unless that framework does not provide an efficacious and satisfactory answer to the litigant's grievance.

Article 42 of the Constitution is couched in a manner that means that the constitutional redress should be resorted to only where the other available remedies are not efficacious or adequate and that Constitutional redress is in addition, not a substitute, to the other legal remedies.

The E.I.A License issued to the 1st Respondent is valid and there is no indication in the Amended Petition that the implementation of the project post the License date is not in conformity with the terms and conditions of the License. The Petitioners have not demonstrated that the project is being implemented in a manner that is harmful to the environment. The activities being undertaken by the 1st Respondent are not out of character as there are many treatment Plants within Jua Kali area.

According to the 1st respondent, the Petitioners have disclosed no reasonable cause of action against the 1st Respondent and the Petitioners thus fall short of the standard of proof in a Constitutional Petition. The Amended Petition is frivolous, vexatious and gross abuse of the Court Process.

THE RESPONSE BY INTERESTED PARTY

The Interested Party states that the process of consideration and issuance of an Environmental Impact Assessment license has not been completed and the respondent is not supposed to be operating the facility hence the stop orders issued on 18th June, 2015 and an improvement order issued on 30th June, 2015.

The Interested Party had on numerous occasions implored the respondent to comply with the requirements for licencing by advertising the project for public consultation but the respondent took too much time hence the conflict between the parties concerned. And this was in line with the principles of negotiated compliance (carrot rules) applied by the Interested Party in some cases to encourage its stakeholders and the public to comply with environmental regulation before they apply the law as it is (stick rules).

That the Interested Party denies vigorously the claim that it was its responsibility to publish the EIA report for comments from the public in the newspaper with nationwide circulation and avers that the respondent has misled this honourable court knowing very well that it had been advised to advertise the project study for comments from the public and to inform the Interested Party once it had published the advert to allow the process to be completed.

That the Interested Party avers that the respondent failed to comply with its instructions until after the Interested Party served it with the improvement notice on 18th June, 2015.

That the respondent then published notices in the newspaper and called for comments on the project, albeit late (22nd and 29th June, 2015).

That despite that attempt to comply, the petitioners continued complaining that there were operations being undertaken at the respondent's premises. And there are numerous correspondences attached to the affidavit of the Interested Party's deponent and the petition to that effect and hence the improvement notices issued on 18th June, 2015 and on 30th June, 2015.

That the cardinal rule when considering matters environment is to apply the applicable international rules and principles on public participation, precautionary principle, the principle of prevention, the right to a clean and healthy environment e.t.c. in decisions relating to the environment which in the long terms seek to ensure sustainable development.

That it is in the interest of substantive justice and the wider public good that the improvement order be restored and the prayers sought herein be granted. That this honourable court has the powers and the prerogative to grant the prayers sought by the Interested Party.

The Interested Party prays that:

- a. Set aside its orders of 6th July, 2015 staying the Improvement Notice issued by the Interested Party.
- b. In the alternative and without prejudice to (a) hereof, this honourable court be pleased to close down the respondent's facility pending the hearing and determination of this petition.
- c. In the alternative and without prejudice to (a) and (b) hereof, the parties be ordered to follow the law in so far as the process of Environmental Impact Assessment licensing is concerned in accordance with the Environmental Management and Coordination Act and the Environmental Management and Coordination (Impact Assessment and Audit) Regulations, 2006 is concerned and await the determination of the process.
- d. Any other orders it may deem appropriate in the circumstances in the interest of the wider public good and protection and conservation fo the environment.

I have seen the Memorandum of Appearance of the 2nd respondent filed by Lilan & Koech Associates, however, I have not seen the response filed by the 2nd respondent.

SUBMISSIONS BY PARTIES

Petitioners submit that they have the locus standi to bring the petition before court as they have suffered adverse effect of the plant which is pollution and diseases. The petitioners refer to Article 10(3) of the Constitution that has opened up the ambit of locus standi and section 3(4) of the Environment Management and Co-ordination Act (EMCA). The petitioners submit that Article 42 of the Constitution of Kenya, 2010 has been violated. The petitioners claim capacity under Article 70 of the Constitution of Kenya.

The petitioners rely on Article 69 of the Constitution of Kenya, 2010, Section 3(1) of the Environment Management Co-ordination Act,1999, Section 3(3) and (4) of Environment Management Co-ordination Act, Section 3(5) of the Environment Management Co-ordination Act, Section 87, 93, 101, 102 and 103 of Environment Management Co-ordination Act.

On jurisdiction, the petitioners argue that this court has jurisdiction pursuant to Article 162(2) of the Constitution of Kenya, 2010 and section 13 of the Environment and Land Court Act of 2011.

The petitioners further argue that failure to engage the public was contrary to Article 10 of the Constitution of Kenya, 2010.

The 1st respondent submits that there was public consultation. The 1st respondent published in the Kenya Gazette it proposed that the petitioners did not make their comments. The 1st respondent was issued with a licence but the parties did not appeal to the Tribunal. The Interested Party submits that there is no specific order against it and that the interested party is ready to comply with prayer (c).

ANALYSIS AND DETERMENT DETERMINATION

I have considered the petition and the responses and rival submissions and do find that the petitioners have capacity to bring the petition before court. This court finds that the provisions of Article 10 has enlarged the ambit of locus standi. Article 22 of the Constitution of Kenya 2010 has enhanced the ambit of Locus Standi. The 1st respondent has admitted that the petitioners are neighbors to the timber treatment plant and therefore the court finds that the petitioners have the locusts standi and should have been consulted under the provisions of Article 10 2(a) of the Constitution of Kenya that provides that people participation is important before a policy or a decision is made by a public body especially affecting them.

I do find that this court has jurisdiction to entertain this dispute. The issues raised touch on breach of Article 42 of the Constitution of Kenya and thus, the National Environment Tribunal (NET) has no provisions to determine breach of constitutional provision and award of damages.

This court finds that though the petitioners have not proved that there is a threat to pollution and diseases caused by the project of the 1st respondent, there is no evidence by the respondents that there was public participation in commencing the project.

There is evidence that of an Environmental Impact Assessment License ***but how was it obtained without people's participation?*** The interested party states that the right procedure was not followed as the report was not published and that it was the duty of the 1st respondent to publish the report.

There is no evidence of change of user and therefore it is possible that the 1st respondent is undertaking a pole treatment plant in a residential area.

The court finds that due process for obtaining the E.I.A. license was not followed and complied with, and therefore, orders that the plant be closed after expiry of a 30 days' notice. National Environment Management Authority to do an audit of the plant with a view of addressing environmental issues raised by the petitioners. I do find no evidence of diseases and damages suffered by the petitioners. There be liberty to apply. No orders as to costs.

Dated and delivered at Eldoret this 30th day May, 2019.

A. OMBWAYO

JUDGE