



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 2 OF 2016

IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER CHAPTER 4 ARTICLES 22 AND 23 [1] AND [3] OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER ARTICLES 40, 42, 43, 60 [1], 69, 70 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 9 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT CAP 387 LAWS OF KENYA

CELESTINE JOHN AOKO

RICHARD ODENY ABUOGI

BENJAMIN AWINO OWUOR

JAMES ONUNGA OKELLO

JOSEPH WANDO OKETCH

WILLIAM OTIENO ODHIABO (Suing in their own interest and in a representative capacity representing 214 other fellow land parcel owners in Kochieng West Location, Kadibo division within Kisumu County affected by sand harvesting and transportation in Kochieng West Location Kadibo Division).....PETITIONERS

VERSUS

SHEM OWINO MUGA.....¹ST RESPONDENT

ODHIAMBO MUGA.....²ND RESPONDENT

GEORGE AMIMO.....³RD RESPONDENT

OMONDI OLWENY.....⁴TH RESPONDENT

MARK DERO NYADIANGA.....⁵TH RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....⁶TH RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....⁷TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....⁸TH RESPONDENT

AND

JUDGEMENT

1. Celestine John Aoko, Richard Odeny Abuogi, Benjamin Awino Awuor, James Onunga Okello, Joseph Waudu Aketch and William Otieno Odhiambo, the Petitioners, suing in their own interest and in a representative capacity representing 214 other fellow land parcel owners in Kochieng West Location, Kadibo Division, within Kisumu County, affected by sand harvesting and transportation in Kochieng West Location, Kadibo Division, Commenced these proceedings against Shem Owino Muga, Odhiambo Muga, George Amimo, Omondi Olweny, Mark Dero Nyadianga, National Environmental Management Authority, County Government of Kisumu and The Attorney General, the 1st to 8th Respondents respectively, through the petition dated the 29th July 2016 seeking for the following reliefs;

- a. **“A declaration that the 1st – 5th Respondents actions as aforesaid is, unconstitutional, illegal unlawful oppressive and a violation of the Petitioners socio-economic rights.**
- b. **A permanent injunction restraining the 1st to 4th Respondents by themselves or their servants/agents from harvesting sand from Kochieng West Location Kadibo Division, Nyando Constituency within Kisumu County IN THE ALTERNATIVE an order do issue to compel the 1st to 4th Respondents to rehabilitate the damage caused by harvesting sand.**
- c. **An order compelling the 6th Respondent to arrest and prosecute or cause to be prosecuted anyone found harvesting sand from Kochieng West Location, Kadibo Division, Nyando Constituency, within Kisumu County or in any other manner whatsoever enhancing the environmental degradation in the area without the requisite licence from the 6th Respondent.**
- d. **General damages for loss suffered by the Petitioners.**
- e. **Respondents to pay costs of this petition.**
- f. **Any other suitable and/or alternative relief this Honourable Court may deem fit and just to grant.”**

2. The Petitioners list the following grounds in support of their petition-

24. **“At all material times to this suit the Petitioners are the legal owners of various parcels of land in Kochieng West Location, Kadibo Division, Nyando Constituency, within Kisumu County and are in actual occupation of the same.**

25. **The Petitioners aver that the aforementioned area is heavily exploited for sand and that the indiscriminate sand harvesting and transportation has caused severe environmental degradation which has lead to the following socio economic and environmental adversities:-**

- a. **The areas in question have little water as the excessive harvesting of sand has caused a drop in the water levels.**
- b. **The heavy harvesting of sand has caused dykes of the lake to collapse causing the area residents farms to flood in effect caused agricultural activities both subsistence and commercial to stall with the effects that there is no food security in the areas.**
- c. **The use of heavy duty lorries and trailers in the transportation of sand has caused the infrastructure to break down namely through the damage and unnecessary wear and tear of roads.**
- d. **The deep gullies that are caused by the excessive sand harvesting pose a health risk to the residents who are prone to injury if they fall into them**
- e. **The heavy harvesting of sand along the lake has caused dykes to collapse causing water to overflow and flood the petitioner’s home destroying the same and displacing the residents.**

26. **The Petitioners aver that the 1st – 4th Respondents have not obtained the necessary approvals from the County Government herein to carry out the exercise and hence its actions are illegal and further that the County Government has done nothing to avert the situation in violation of Article 69 (1) (a) of the Constitution.**

27. **The Petitioners aver that the 1st to 4th Respondents have not undertaken any environmental impact assessment and further that they have flouted the rule of law by ignoring the procedures set out in the Environmental Act 1999 and the National Sand Harvest Guidelines of 2007 which require the obtaining of approval and authorization of the National Environmental Management Authority (NEMA) before commencing the act of sand harvesting and transportation.**

28. **The Petitioners states in the alternative that if the approval of NEMA (6th Respondent) was obtained then NEMA failed or neglected to invite members of the public to submit oral or written comments on the sand harvesting activities with a view to assist NEMA in its decision making process with respect to the project thus all the environmental soundness of the subject (sand harvesting).**

29. **From the aforementioned, the Petitioner contends that the sand harvesting and transportation thereof is illegal, un-**

procedural, unlawful, and defeats justice.”

3. The Petition is supported by the affidavit sworn by William Otieno Odhiambo, the 6th Petitioner, on the 20th July 2016 in which he among others depones to the following;

a) That he has the authority of the other Petitioners and Area Residents to swear the affidavit.

b) That the Petitioners are owners of, and in occupation of various parcels in Kochieng West though not issued with titles. That the lands are at risk of being rendered uninhabitable by the actions of 1st to 4th Respondents of indiscriminately harvesting and transporting sand with the authority of the 5th Respondent.

c) That the said harvesting and transportation activities has been without the 6th and 7th Respondents approvals and that the 6th Respondent has violated Article 69 (1) of the Constitution.

d) That the residents have sought the intervention of the 6th Respondent and Water Resources Management Authority without success and hence this petition.

4. The Petitioners also filed the notice of motion dated the 29th July 2016 under certificate of urgency for conservatory orders which was granted in the interim in terms of prayer 2 on the 3rd August 2016. The order was confirmed by consent on the 23rd March 2017 pending hearing and determination of the petition.

5. The 1st to 5th Respondents filed their memorandum of appearance dated the 6th August 2016 through M/s Ogone Angienda & Co. Advocates. The Litigation Counsel entered appearance for the 8th Respondent through the memorandum dated the 24th August 2016, while the 7th Respondent entered appearance through M/s Amondi & Co. Advocates through the memorandum dated 3rd June 2016. The 6th Respondent was represented by M/s Simion Ngara Advocate who filed their notice of appointment dated the 20th March 2017. That Mr. Ogone Advocate for the 1st to 5th Respondents was later reported to have passed on and M/s Olel, Onyango Ingutiah & Co. Advocates came on record for 1st to 3rd Respondents vide their notice of appointment dated the 17th May 2017. The Kenya National Commission on Human Rights moved the court vide their motion dated 3rd March 2017 to be enjoined as amicus curiae/friend of the court and the application was granted on the 23rd March 2017.

6. The 7th Respondent responded to the petition through the replying affidavit sworn by Loice Omoro, the Chief Officer Environment and Natural Resources of the Respondent sworn on the 8th November 2016, among others deponing to the foregoing;

a) That the Protection and Conservation of the environment is the responsibility of both the National and County Governments plus the residents of any area under Article 60 (1) (e) of the Constitution and that the 6th Respondent has issued guidelines for regulating sand harvesting business.

b) That the 7th Respondent has not received any complaints on the alleged threats and degradation to the environment from the petitioners. That had such complaints been received, appropriate action would have been taken as was the case on the Nyandiwa Beach, Kolwa East Location where sand harvesting has been stopped.

c) That the Petitioners have not particularized the complaints they have against the 7th Respondent, and that their petition is premature for they had not exhausted the statutory avenues provided under the Environment Management and Coordination Act No. 8 of 1999, through which complaints would have been lodged with the Public Complaints Committee or the National Environmental Tribunal before filing the matter in Court.

7. The Court gave directions on filing and exchanging written submissions on the 23rd March 2017. Thereafter M/s Beryl Orai Advocate for the Amicus Curiae filed their submission dated the 6th November 2017, while M/s Mwamu & Co. Advocates for the Petitioners filed theirs on the 3rd April 2018. That the submissions of the 1st to 4th Respondents dated 18th September 2018 was filed by M/s Olel, Onyango, Ingutiah & Co. Advocates, while M/s Amondi & Co. Advocates filed submissions for the 7th Respondent dated the 26th November 2018. The following are the summaries of the said submissions;

A: KENYA NATIONAL COMMISSION ON HUMAN RIGHTS SUBMISSIONS:

a) That Articles 2 (5) and (6) of the Constitution acknowledges the general rules of international Law and any treaty or convention ratified by Kenya to be part of the laws of Kenya. That therefore the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural rights (ICESCR) and African Charter on Human and Peoples’ Rights (ACHPR), ratified by Kenya on the 1972, 1972 and 1992 respectively, are applicable in this petition together with the Constitutional and other legislative provisions.

b) That economic development of the Country should not hinder the social wellbeing of its citizens whose human rights and fundamental freedoms can only be restricted when strictly necessary to attain an equally legitimate goal. That as sand harvesting has been shown to result in destruction of underground aquifers and loss of safe water; and adversely affects surface water quality, quantity and damages the ecosystem among others, and the beneficial effects of sand harvesting in employment and monetary benefits to the locals is minimal, the restrictions imposed on the human rights because of said harvesting activities are in no case proportional to the economic benefits of the activity.

c) That guided by the 6th Respondent's 2007 National Sand Harvesting Guidelines that regulate sand harvesting in the Country, and the decision in Joseph Leboo & 2 Others vs Director Kenya Forest Service & Anor [2013] eKLR, the activities of the 1st to 5th Respondents should be deemed unlawful and unconstitutional.

d) That the right to a clean and healthy environment is interwoven with the realization and enjoyment of other fundamental rights that its infringement sabotages the realization of all the other basic rights including life, health, livelihood, and wellbeing, among others. That the Court should be mindful of the fact that the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.

e) That the said extraction and harvesting activities pose a serious threat to the enjoyment of the right to adequate housing by the residents of Kochieng West Location. That in the absence of regulation of the sand harvesting activities, it is possible the terrain to the land will be greatly altered predisposing it to flooding and other environmental hazards that may affect adversely their security of tenure, and force the residents to relocate to other areas.

f) That the activities of the 1st to 4th Respondents have caused the flooding of the lands of the Petitioners and other residents hence adversely affecting their farming activities and negatively impacting on their right to adequate food.

g) That the sand harvesting has adversely affected the Petitioners' right to safe and clean water and violated their human dignity.

h) That Article 20 (2) of the Constitution declares the right of every person to enjoy the rights and fundamental freedoms enshrined in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. That further Article 20 (1) of the Constitution specifically notes that the Bill of Rights applies to all Laws and binds all state organs and all persons and any person, including the Petitioners herein, have the right to institute court proceedings when their rights in the Bill of Rights has been denied, violated, infringed or is threatened.

i) That when balancing what is convenient for the sand harvesters and the public at large, the Court should ensure that the quest for economic prosperity by any person should be pursued within a framework that supports the full realization of human rights by all without unduly burdening the communities in the neighborhood of such activities.

B: PETITIONERS SUBMISSIONS:

a) That the indiscriminate sand harvesting and transportation has caused severe environmental degradation resulting to the following social economic adversities:

- Drop in water levels.
- Collapse of lake dykes leading to flooding of the farms hindering subsistence activities.
- Infrastructure damages through unnecessary wear and tear of the roads.
- Deep gullies posing a health risk to the residents and injuries in case they fall into them.
- Flooding of their homes resulting to damages and displacement.

b) That the 7th Respondent, has by failing to take action to address the unapproved activities by the 1st to 5th Respondents, violated Article 69 (1) (a) of the Constitution that obligates it to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits.

c) That the damages caused to the environment and the negative impact caused on the Petitioners' rights and fundamental freedoms by the 1st to 5th Respondents uncontrolled sand harvesting and transportation far outweighs any benefits that the activities may be accruing to the Respondents.

C: 1ST TO 4TH RESPONDENTS' SUBMISSIONS:

a) That the Petitioners have not availed evidence of the negative impact to the environment by the 1st to 4th Respondents' activities through for example photographs. That the photographs annexed are of roads, beaches and alleged self-help group projects.

b) That as deponed in the replying affidavits by the 1st to 5th Respondents, they harvest sand about 2 to 3 kilometers inside the lake that is then loaded onto boats and transported to the shores from where it is collected by trucks. That accordingly there are no gullies caused by sand harvesting on the land surface as alleged.

c) That clause 8 of the National Sand Harvesting Guidelines 2007 allows sand harvesting from the river and lake beds and their activities are therefore not illegal.

d) That the Petitioners have not availed evidence in the form of a study or expert report to confirm that the loss or denial of

basic rights they may have suffered is a consequence of the Respondents' activities of sand harvesting. That further, there is no nexus shown between the collapse of the Self Help Group projects and the sand harvesting activities by the Respondents.

e) That some of the people said to be supporting the petition had died long before filing of the petition as confirmed by the Chief of the area through the letter annexed to the Respondents' replying affidavit. That the petition is therefore based on a lie and is bad in law. That the Petitioners have not availed evidence of land ownership in the area, which omission is fatal to the petition.

f) The Petitioners have not tendered any evidence of the alleged loss and no compensation can be considered by the court.

g) That the conservatory order issued has curtailed the livelihood of the 1st to 4th Respondents as it stopped all sand harvesting at Kochieng location, and the Petition should be dismissed with costs.

D: THE 7TH RESPONDENT'S SUBMISSIONS:

a) That the 7th Respondent is the lead agency on matters of natural resources and Environmental Conservation in the area under its jurisdiction as mandated under Article 10 of 4th schedule of the Constitution, with the 6th Respondent having the monitoring and assessment role under Section 9 of the National Environment Management and Coordination Act No. 8 of 1999, for the two levels of Governments. That Article 60 (1) (e) of the Constitution enjoins the individual citizens like the Petitioners to notify the 7th Respondent of any threat to the environment for its attention before coming to court. That there is nowhere in the petition, supporting affidavit or submissions that the Petitioners indicated that they had notified the 7th Respondent of the alleged degrading activities to the environment.

b) That as the 6th Respondent has issued National Sand Harvesting Guidelines, 2007 the 7th Respondent did not need to do similar guidelines. That the 7th Respondent is ready and willing, through its Departments of Environment and Mining and Energy to act on any environmental degradation activities reported to it as it did in relation to the Nyandiwa Beach Environment Destruction problem complaint.

c) That the Petitioners had not exhausted the complaints resolving channels established by the National Environmental Management Coordination Act No. 8 of 1999 before coming to court, and the attempt to condemn the 7th Respondent should be disallowed. The learned Counsel referred to the case of Dr. Reverend Timothy Njoya vs The Attorney General & The Kenya Revenue Authority, Petition No. 479 of 2013 and Anna Rita Karimu Njeru vs Attorney General [1979] KLR 154, [1976-1980] IKLR 1272 on what a person coming to Court in a matter of this nature ought to plead and submitted that the Petitioners have not done so.

d) The learned Counsel also referred to decisions in Speaker of the National Assembly vs Njenga Karume [2008] IKLR 425, "Nakuru Petition No. 26 of 2014", "Kisumu 22 of 2011" and "Belafonte vs AG in Trinidad & Tobago", and submitted that as the Petitioners had not exhausted the avenues set by the statute, this Constitutional Petition was premature and should be dismissed with costs.

8. The following are the issues for the Court's determination;

a) Whether the Petitioners have established that the 1st to 4th Respondents' sand harvesting and transportation activities have adversely affected the environment.

b) Whether the Petitioners' right and fundamental freedoms have been violated and or infringed by reasons of the action or omissions by the Respondents or any of them.

c) Whether the Petitioners have established any loss or damage suffered as a result of the action and or omission by the Respondents or any of them.

d) What order(s) to issue.

e) Who pays the costs.

9. The Court has carefully considered the grounds on the petition, the supporting and replying affidavits, the written submissions filed, the decided cases cited in the submissions and come to the following determinations;

a) That this petition is primarily about securing and protecting the rights and fundamental freedoms that the Petitioners alleges have been violated, infringed upon and or threatened by the actions and or omissions of the Respondents. The petition has referred specifically to the violation of rights to property, environment, economic and social rights provided for by **Articles 40, 42 and 43 of the Constitution** respectively. That **Article 19 (1) of the Constitution** declares the Bill of Rights as an integral part of our democratic state and the framework for social, economic and cultural policies. That it further at **Sub-Article (2)** states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. That **Sub-Article (3)** goes on to provide as follows;

“3. The rights and fundamental freedoms in the Bill of rights-

- (a) belong to each individual and are not granted by the state;**
- (b) do not exclude other rights and fundamental freedoms not in the Bill of rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and**
- (c) are subject only to the limitations contemplated in this Constitution.”**

b) That the enforcement of the Bill of Rights is provided for under **Article 22 of the Constitution**. The Sub-Articles (1) and (2) provides as follows;

“22. (1) Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

(3).....”

c) That **Article 70 of the Constitution** provides as follows on the enforcement of environmental rights;

“70. (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 of the same.

(2) On application under clause (1), the Court may make any order, or give 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.”

d) That from the provisions of **Articles 22 (1) & (2) and 70 (1) & (3) of the Constitution**, the Petitioners have the right to move the court on their own behalf and on behalf of the other living residents of the affected area. That it is immaterial whether or not they have provided evidence of owning land in the area as that is not a prerequisite for one to have capacity to file a petition or approach the court for protection of the environment and fundamental rights contrary to the submissions of the 1st to 4th Respondents Counsel. That this is because the backbone of their petition is their right to clean and healthy environment, which they allege has been, and continues to be violated, infringed and or threatened by the actions and or omissions of the Respondents.

e) That the 1st to 4th Respondents have admitted that they carry out sand harvesting activities in the said area. That they have however disputed that their activities had led to gullies developing, insisting that they do their sand harvesting about 2 to 3 kilometers inside the lake. That deposition has not been controverted by the Petitioners through a further affidavit and may explain why none of the photographs availed by the Petitioners has captured any gully. That however the 1st to 4th Respondents have not disputed or rebutted the Petitioners’ depositions that their sand harvesting activities has not been approved by the 6th and 7th Respondents, and further that no Environmental Impact Assessment has been carried out. The response by the 1st to 4th Respondents that their activities are centered at the lake bed and are in compliance with **clause 8 of the National Sand Harvesting Guidelines, 2007** falls short of addressing the absence of Environmental and Impact Assessment and the need for approval by the relevant statutory agencies. That inevitably the Petitioners and other members of the public have been denied an opportunity to make their representations or have their say before the sand harvesting activities are carried out in the area.

f) That the **National Sand Harvesting Guidelines, 2007**, issued pursuant to **Section 42 (4) of the Environment**

Management and Coordination Act by the Director General may not have had public participation input being of **pre-Constitution 2010**. That clause 3 shows clearly that it applies to all sand harvesting activities in Kenya and is aimed at ensuring sustainable utilization of sand resource and proper management of the environment. That **clause 7 and 8** of the said guidelines provides for the farm, Lakeshore/Seashore and Riverbed sand harvesting as follows;

“7. On- Farm Sand Harvesting and Lakeshore/Seashore Sand Harvesting

On- farm sand harvesting and Lakeshore/Seashore Sand Harvesting will be carried out as follows:

- (a) Scooping/harvesting of sand should not exceed six (6) feet in depth.**
- (b) Designated sand collection sites should be at least 50 metres from the riverbanks or dykes for on-farm sand harvesting.**
- (c) Scooping/harvesting should be done concurrently with restoration of areas previously harvested. Such restoration will be undertaken with guidance from the Technical Sand harvesting Committee.**
- (d) The scooping/harvesting should be strictly open-cast harvesting,**
- (e) Where underground tunneling or extraction of sand is to be undertaken, appropriate extraction technology should be applied to safeguard human safety.**

8. Riverbed harvesting

- (a) Sand harvesting from any riverbed shall be undertaken in a way that ensures adequate reserve of the sand is retained to ensure water retention.**
- (b) Sand harvesting will not be allowed on any river banks.**
- (c) Loading of sand will be done in the designated harvesting sites through controlled access points.**
- (d) No sand harvesting shall take place within 100 metres of either side of any physical infrastructure including bridges, roads, railway lines, dykes, among others.”**

That as can be discerned from the foregoing two clauses, the sand harvesting is not supposed to be done anyhow and everywhere. There are restrictions on the depth to be excavated, distance to the bridges, roads, railway line, dykes or riverbanks among other infrastructures, and the extraction technology to be used to ensure human safety and retention of water. The two guidelines are aimed at ensuring sustainability. That the guideline at **Clause 9** provides for the authority to remove and transport sand as follows;

“9. Authority to remove and transport sand

- 1) Any person who wishes to remove and/or transport sand will fill an application form available at the District Environment Office.**
- 2) Upon the approval of the application, the District Environment Officer will issue the applicant with an approval document.**
- 3) The period of the validity of the approval to remove and/or transport sand will be indicated in the approval document.**
- 4) No person will remove or transport sand, or cause sand to be removed or transported, unless such person is in possession of the relevant approval.**
- 5) Where a vehicle is used for the transport of sand the approval document will remain in the custody of the driver while the sand is on transit.**
- 6) The approval document issued will be made available to any public officer upon request for verification.”**

That **clause 9** of the guidelines leaves no doubt that the 7th Respondent has an obligation to ensure the sand harvesting and transportation by the 1st to 4th Respondents is not only done upon obtaining the appropriate approvals, but also ensure those carrying out the activities without such approvals are sanctioned in accordance with the law. That further; the 7th and 6th Respondents have a duty under **Article 69 (1) (a), (f), (g) and (h) of the Constitution** to ensure the sand harvesting and transportation is carried out in a sustainable way, and eliminating processes and activities that are likely to endanger the environment, and thereby infringe or threaten the rights and fundamental freedoms of the Petitioners. That whereas it may be true that the Petitioners had not notified the 7th Respondent of their complaints before filing the petition, the copies of the letters addressed to the Assistant County Commissioner, the Chief Kochieng, West Location and District Officer dated 4th July 2016, 3rd December 2014 and 3rd December 2014 on the sand harvesting complaints, which have not been disputed by the 8th Respondent, leaves no doubt that the National Government agents at the ward and sub-county levels were aware of the matter. There is

however no evidence of any steps having been taken by the said offices to either confirm or remedy the situation. The Petitioners having waited for action without seeing any, may not be faulted for coming to court as they did. The Petitioners had also done a letter to the Water Resources Management Authority – Lake Victoria South Catchment Area- Regional and Sub-Regional offices, dated the 15h December 2014 seeking action in stopping the excessive sand harvesting. That however, as the said Water Resources Management Authority has not been enjoined in the petition, and there is not disclosure by the Petitioners on whether there was a response or action, following their letter, the court will leave it as it is.

g) That the Court agrees with the 1st to 4th Respondents submissions that the Petitioners have not presented to the court any study or experts reports that confirms their allegations that the sand harvesting and transportation by the 1st to 4th Respondents have for example, reduced the water supply, caused dykes to collapse leading to flooding in their farms, residential and commercial areas. That in the absence of such evidence, the court is left to imagination or to make deductions without the advantage of the facts on the ground. That situation makes it difficult to make a finding on whether the actions or inactions by the Respondents has led to any identifiable and quantifiable loss and damage to any of the Petitioners', that the court could assess and order compensation.

h) That now that the Petitioners complaints are known to the 6th and 7th Respondents, and even though the Petitioners could have pursued the matter through other forums as submitted by the 7th Respondent, it is only fair that this being a matter of the environment, which by its very nature is fragile, it should be dealt with without undue regard to procedural technicalities or any further delay in accordance with **Article 159 (2) (b) and (d) of the Constitution**, by referring it to the 6th and 7th Respondents to deal with, and report to Court on the action taken and progress made periodically.

i) That this being also a matter on the Bill of Rights and as the issues addressed are for the wider public good, each party will bear their own costs.

10. That flowing from the foregoing, the court finds that whereas the Petitioners have failed to prove any actual violation or infringement of their Constitutional Rights provided for under **Articles 40, 42 and 43 of the Constitution**, the Petitioners have shown clearly that the sand harvesting and transportation activities being carried out by the 1st to 4th Respondents at Kochieng West Location is done without any supervision and prior approval by the 6th and 7th Respondents. That they have also shown that the said activities are likely to lead to a threat to the Petitioners' and residents' rights to a clean and healthy environment unless urgent action and steps are taken by all the actors concerned. That accordingly the court orders as follows;

a) That a declaration is hereby issued that the sand harvesting and transportation activities being carried out by the 1st to 4th Respondents at Kochieng West Location, with the alleged approval of the 5th Respondent, but without the approval and supervision of the 6th and 7th Respondents, is likely to threaten the Petitioners' Constitutional right to clean and healthy environment and therefore are unlawful and illegal.

b) That the 7th Respondent is hereby directed to within three (3) months, engage the Petitioners, including the other residents of the affected area, the 1st to 4th Respondents, other stakeholders including the Amicus Curiae herein with a view of coming up with a way forward that will ensure the sand harvesting and transportation, if it is found viable to be continued, will be done in accordance with the law and ensuring the peoples' right to a clean and healthy environment for the present and future generations is assured and sustained. That quarterly Reports be filed with the court.

c) That until the report in (b) above is presented to the court and adopted, the 1st to 4th Respondents are hereby restrained from harvesting and transporting sand from Kochieng West Location, Kadibo Division, Nyando Constituency, Kisumu County.

d) That each party to bear their own costs.

e) That liberty to apply granted.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2019

In the presence of:

Petitioners Present

Respondents 1st to 5th present

Amicus Curiae Absent

Counsel M/s Adwar for Mwamu for Petitioners

Mr. Onsongo for Onyango for 1st to 4th

Respondents

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE