



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC PETITION NO 1 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEURE RULES, 2013**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2,3,10,19,20, 21,22,23,42,69,70,159,165,258, 259 AND THE FOURTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

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

**BETWEEN**

**BENCHMARK MURIKWA NGANGA.....APPLICANT**

**VS**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY**

**OF TRANSPORT & INFRASTRUCTURE DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT & FORESTRY....3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY, WATER & SANITATION.....4<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENT & MANAGEMENT AUTHORITY.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner commenced these proceedings by way of petition dated the 7/5/18. In his petition he sought interalia the following reliefs;
  - a. A declaration that this is a public interest case.
  - b. A declaration that the Petitioner has all the rights and guarantees as provided for under the Constitution and as specifically referenced herein.
  - c. A declaration that the 5<sup>th</sup> Respondent act of abdicating their responsibility contravenes Article 42 of the constitution of Kenya, 2010.
  - d. A declaration that the act of the 2<sup>nd</sup> Respondent is null and void Art 174 as read together with the Fourth Schedule of the constitution

e. A declaration that the Petitioner and the residents of Mitubiri have a right of redress for orders on injunction pursuant to Article 23 (3)(b) of the Constitution

f. A mandatory injunction to compel the 2<sup>nd</sup> Respondent to identify an alternative site for waste disposal for the 5 beneficiary counties in accordance with the Environment and Management Coordination Act.

g. Costs, and

h. Such other orders as the Court shall deem just and expedient to grant.

2. Together with the Petition, the Petitioner filed the Motion of even date and sought the orders as follows;

a. Spent

b. Spent

c. pending the hearing and determination of this petition, the Honourable Court do issue conservatory orders restraining the 2<sup>nd</sup> Respondent, through themselves, their agents, servants, employees and or officers from continued construction of Mitubiri Sanitary Land fill site.

d. the Honourable Court be pleased to issue orders allowing the Petitioner to advertise this application and the petition in a Daily Newspaper of national circulation to enable any affected and or interested parties to be enjoined in the petition since the Petition is of great public interest.

e. That all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.

f. That costs of this application be borne by the Respondents.

3. The application is anchored on the following grounds;

a. That the Applicant / Petitioner is a resident of Mitubiri Area within Murang'a County.

b. That the area has a high level of human settlement with residents carrying out both rain fed and irrigation crop farming for both domestic and export markets. Residents have also reared a variety of domestic animals including cows and goats which graze freely in the village.

c. That on 19<sup>th</sup> February, 2018 the Applicants learnt through a meeting convened at Gikono village, Mitubiri by the Nairobi Metropolitan service improvement project a department in the office of the second Respondent that the second Respondent had awarded a tender contract No.ICB/MOTH&UD/SDOU & Civil Engineering Company Limited for the Construction of a Sanitary Land Fill Site within Gikono Village, Mitubiri and which project was jointly funded by the world bank.

d. That during the meeting the residents were informed that the proposed project would sit on a massive 50 acres of land in the lower Gikono village and that it would handle waste from counties including Nairobi, Kajiado, Machakos, Murang'a and Kiambu, both biodegradable and non-biodegradable.

e. That the 2<sup>nd</sup> Respondents officials informed the residents that the construction of the Land Fill site was already underway and the scheduled and or project period was only twelve (12) months.

f. That the award of the said tender was shrouded in secrecy as no public participation had been called for in the process and no Environmental Impact Assessment Report had been availed during and after the above-mentioned meeting or even prior to the said meeting that is of public interest.

g. That the land fill site once complete and depositing of waste commences, the degradation of waste would lead to production of leachate, gases posing great threat to the health of the residents and the environment including contamination of the water table.

h. That the residents rely exclusively on water from shallow wells which is likely to be contaminated as a result of the dumping of the massive waste from the five counties.

i. That on the lower area of the site of the Land Fill, there exists a large dam known as Gikono Dam and whose water some of the residents rely on for their consumption, toxic seepage is likely to contaminate the dam and such seepage would adversely affect people, crops, livestock, and the aquatic life within the dam.

j. That the land fill is likely to create nuisance including flies, fumes, smoke and noise which may eventually force the village residents to move to more habitable areas.

k. That the Petitioner and residents stand to suffer irreparable loss unless the orders sought are granted.

4. The Applicant has annexed his supporting affidavit in which he deposes that he has brought the instant application on his own behalf and on behalf of the residents of Gikono village Mitubiri Area and the surrounding villages and then he proceeds to largely reiterate the grounds on the face of the application. In further support thereof he has annexed a copy of the signage of the project erected within the vicinity of the Land fill site and a copy of the environmental impact assessment report for the improvement of the Access Road to the land fill site.
5. In addition, he states that they were informed that the proposed project sits on 50 acres of land in the lower Gikono village and would handle both biodegradable and degradable waste for 5 counties. That the scheduled project would take a period of 12 months and that the upgrading of the access road was underway. His main concern was that the award of the tender was kept secret with no public participation and no Environmental Impact Assessment report was availed during and after the meeting despite requesting for the same from the Muranga County Government offices.
6. He enumerated the threats that are likely to be posed by the project once complete as such production of leachate and gases; contamination of water resources including wells and Gikono dam by toxic seepage which would adversely affect human animal and plant life in the area. Further that the land fill is likely to create nuisances such as flies, fumes, smoke and noise which may force the residents to move to more habitable areas.
7. He avers that the residents of the area stand to suffer irreparable loss unless the orders sought herein are granted.
8. The 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed replying affidavits and grounds of opposition there to.
9. The 2<sup>nd</sup> Respondent opposed the motion. In the Replying Affidavit sworn by the 2<sup>nd</sup> Respondent's employee, Eng Benjamin K Njenga, it deponed that the project will be situate on 50 acres acquired by the Government of Kenya for construction of an integrated waste management land fill in Mitubiri area, Muranga. That the integrated system encompasses waste filling into an engineered containment and compacting with soil on daily basis and does not allow for any visible waste hence no environmental effect of odor, fumes, flies, water seepage interalia hence there will be no environmental injury. Further, that the technology provides for leachate, collection and treatment. Further that 3 boreholes have been sunk for monitoring the quality of the water. He distinguished the characteristics of a dumping site from a sanitary land fill, which is the project.
10. He reiterated that the land fill is to be used for the solid waste disposal emanating only from Muranga County.
11. In respect to public participation, he deponed that project information has been relayed to the residents of Gikono and Muranga County generally through numerous public participation and information meetings. The meetings cited include MCAs workshop, MCAs benchmarking tour of Arusha to inspect a similar land fill, stakeholder meetings held at the Kenya School of Monetary Studies (KSMS) which disseminated information and collected feedback on the project and other stakeholder consultative meetings.
12. The deponent stated that contrary to the Applicant's assertion, the Kimorori/wempa county Assembly ward which hosts the land fill has a total population of 32,365 people and that the area surrounding the land fill has no human settlement contrary to the Applicant's allegations, a factor that made the area suitable for the project.
13. In respect to the allegations of secrecy, he maintained that the award of the contract for the construction of the project was advertised and he attached a copy of the gazette notices on the project tenders. Terming the process consultative, he deposed that the contract was awarded to Concordia Building & consultation Engineering co limited on 30/5/17. In addition, he stated that under the procurement and Asset Disposal Act there is no requirement for public participation in the tendering process.
14. Maintaining that the project is at the Environmental Impact Assessment report stage, he stated that the Environmental Impact Assessment license was yet to be issued. He termed the motion frivolous vexatious and an abuse of the process of the Court filed in bad faith. Further, that the application is premature because the project is at its infancy (Environmental Impact Assessment and licensing stage) and public participation is ongoing.
15. The 5<sup>th</sup> Respondent opposed the motion and through its employee namely Boniface Mamboleo who deponed that it received an Environmental Impact Assessment project report on the 19/12/17 and on 22/12/16 circulated the report to relevant lead agencies interalia; relevant departments of Muranga County and Regional Manager Water Resources Authority. On 30/3/17 the 2<sup>nd</sup> Respondent was advised to submit a full study which study together with the consultation and public participation report was submitted to the 5<sup>th</sup> Respondent on the 15/5/18. On the 28/5/18 the full study was sent to various lead agencies which included interaila, National Government institutions, county Government and Water Resources Authority for further review. That in addition to the review process it directed the 2<sup>nd</sup> Respondent to publish an advert notice in a format prepared by the 5<sup>th</sup> Respondent with the objective of inviting the public to submit comments on the report. The 2<sup>nd</sup> Respondent was directed to publish the notice to the public during working days between Monday and Friday in accordance with the provisions of Environment Management and Coordination Act. Under para 14 the 5<sup>th</sup> Respondent made further recommendations to be undertaken by the 2<sup>nd</sup> Respondent.
16. The deponent added that the 5<sup>th</sup> Respondent was awaiting the said publication which had not been done as at the filing of the Replying Affidavit on the 3/7/18. In conclusion he stated that the Environmental Impact Assessment report is still under consideration as the process has not been completed and faulted the petition and the motion for being premature, anticipatory and ill advised.
17. In respect to the orders to advertise the petition the 5<sup>th</sup> Respondent averred that such orders are tantamount to usurping the powers of the 5<sup>th</sup> Respondent. He was of the view that the concerns of the Applicant would be cured once the advertisement inviting public comments is advertised by the 2<sup>nd</sup> Respondent in which event the Petitioner and the public would have their say known and considered in whether to grant the licence or not.

18. The 2<sup>nd</sup> Respondent vide a further affidavit dated 7/3/19 and deponed that the 2<sup>nd</sup> Respondent was issued with an Environmental Impact Assessment on 1/2/19 which is annexed thereto.

19. Parties canvassed the application through written submissions.

20. The Applicant submits that the jurisdiction of the Court in granting conservatory orders flows from article 23(2) of the Constitution and that Courts are tasked to examine the material placed before it in reaching a verdict on whether the Applicant has satisfied the elements of grant of conservatory orders. The Applicant borrowing from case law has identified the following elements for the grant of conservatory orders;

- a. That the Applicant has a prima facie case
- b. That unless the Court grants the conservatory orders, prejudice will be suffered as a result of violation or threatened violation of the constitution
- c. That the petition will be rendered nugatory
- d. That the grant of conservatory order is in public interest.

21. The Applicant submits that he has a prima facie case with high chances of success because the he has laid before the Court crucial information on the non-compliance by the Respondents to the dictates of Article 10 (2) c as well as Article 69(1) of the Constitution of Kenya in that the Respondent authorized the commencement of the project without an Environmental Impact Assessment report from National Environmental Management Authority (NEMA). That there was no public participation in the award of the tender for the construction of the said project and the same was couched in secrecy and kept away from the residents of the area.

22. That the concept of public participation entails public participation in conduct of public affairs, and the guiding principles include the right to be engaged in public debate and dialogue, the duty to facilitate public participation in conduct of public affairs and ensuring that the ordinary citizens have the necessary information

23. The Applicant claims that the residents of the area were not engaged in any public gathering discussions in which they could have the opportunity to air their views about the project that they were not informed of the implications associated with the project, if they shall be required to relocate or not, the ramifications associated with the project. That the alleged meeting held on 19/2/18 does not qualify as a public participation as envisaged under Art 10(2) of the Constitution but was a mere call for information to the residents without giving them an opportunity to have their say.

24. As to whether the Applicant will suffer prejudices as a result of violation or threatened violation of the constitution, the Applicant submitted that the implications associated with the construction of the sanitary land fill are massive with direct infringement on residents rights to environmental, economic and social rights to healthy clean and safe water as guaranteed in Article 42 & 43 of the Constitution. That the residents shall be compelled to relocate and secure housing elsewhere given the health and sanitation risks posed by the toxic gases and leachate.

25. That unless the orders are issued the Respondents will proceed with the construction rendering the petition nugatory and that it is in the public interests for the orders sought to be given. That since this matter is of great public interest it is necessary for the petition to be advertised in the papers in order to invite any member of the area who wishes to be enjoined therein to as interested parties to do so in order to avoid multiplicity of suits.

26. The 1<sup>st</sup> – 4<sup>th</sup> Respondents submitted that the land fill technology which will be deployed in the project is different from an open dump site. The technology does allow leakage, seepage or drawing of any waste into the environment or water bodies as the underground of the land fill contains plastic liner all round to contain any leakage and contamination. That the land fill has provision for leachate and collection and which is carried out through sampling and testing from the 3 boreholes for water quality and assessment. They further submitted that the construction of the land fill is yet to begin.

27. In respect to the award of tender they submitted that this does not fall within the jurisdiction of the Environment and Land Court.

28. They submitted that various foras of public participation has been held by the 2<sup>nd</sup> Respondent which involved interalia the residents of Gikono Village, county Executive Committee, Deputy Governors and other opinion leaders and as such the 2<sup>nd</sup> Respondent has fully complied with public participation as envisaged in Art 10 of the Constitution. They exhibited minutes of the various meetings conducted for stakeholders. That in any event they argued that public participation is a continuous process and the exercise is still ongoing given that the project is yet to begin and the Environmental Impact Assessment report is under process.

29. Maintaining that the acquisition of the land was from a single owner, they adverted that no displacements will take place and faulted the Applicant for misleading the Court. That the area was found suitable due to its low population. That in the absence of the Environmental Impact Assessment licence, the application is premature and therefore the Applicant has not met the threshold for conservatory orders. Further that the issuance of conservatory orders will prejudice the provision of a clean environment to the People of Muranga County, who are the beneficiaries of the land fill project.

30. The 5<sup>th</sup> Respondent did not file any written submissions.

## Determination

31. Having considered the motion, the supporting grounds, the affidavits in opposition and the submissions, the following issues are for determination;

- a. Whether the Applicant is entitled to the conservatory orders.
- b. Whether the Applicant should be allowed to advertise the petition in a national newspaper?

32. One of the cardinal aspirations of Kenyans as captured in the preamble of the 2010 Constitution is that the environment is their heritage and are determined to sustain it for the benefit future generations. This expression finds itself in Article 42 that guarantees every person a right to a clean and healthy environment. It includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures articulated under Art 69 and 70 of the constitution. Article 70 (1) of the Constitution gives a person who alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution has been or is likely to be denied, violated, infringed or threatened a right to apply to Court for redress. The petition herein is based inter alia on Articles 42 and 69 of the Constitution.

33. The Petitioner has contended that his right to clean and healthy environment, public participation, access to information has been violated or infringed by the Respondents.

34. Article 22 provides that every person has a right to institute Court proceedings claiming a right or fundamental freedom has been denied violated infringed or is threatened. A person may institute Court proceedings on behalf of others. The ELC Court has jurisdiction to determine applications for the redress of a denial violation or infringement of or threat to a right or freedom and may grant appropriate relief as set out in Art 23(3).

35. Section 3(3) of the Environment Management and Coordination Act mirrors the Constitutional provisions in Art 42 and under 3(3) of Environment Management and Coordination Act an aggrieved party may apply to the ELC for redress and the ELC Court may make orders as it deems appropriate.

36. In this case the Petitioner has moved the Court on his behalf and that of the residents of Gikono village Mitubiri area and the surrounding villages. The Petitioner has described the area to be highly populated with residents carrying out both rain fed and irrigation farming for domestic and export market. The Petitioner contends that the residents exclusively rely on water from shallow wells that are likely to be contaminated by the dumping of the waste from 5 counties. In addition that the Gikono dam which is a source of water for residents is likely to suffer contamination.

37. The Petitioners case is that the project is to handle biodegradable and non-biodegradable waste from 5 counties; Kajiado, Nairobi, Kiambu Machakos and Muranga; construction was already commenced; award of the project was done in secrecy; no public participation; no Environmental Impact Assessment report was availed despite requesting from the County Government; contamination of the environment through leachate, gases; health risks to people plant and animal life; nuisances from flies, fumes and some noise which might make the residents to relocate to more habitable areas.

38. The project proponent has contended that the project is an integrated waste management system with inbuilt mechanisms to eliminate seepage, leachate and production of toxic gases. Briefly that the system does not allow for visible waste as it deploys an approach of waste filling and compacting of the soil on daily basis. It exuded confidence that there will be no contamination of water flora and the environment. It differentiated it from an open dumping site. It confirmed that the project will handle waste from Muranga only. That it has relayed the information to the residents and stakeholders through various public meetings. The proponent averred that the project is yet to commence as it is at the Environmental Impact Assessment stage. It argued that the area is low density, an attribute that attracted the project to the locality. It maintained that the contract award was advertised publicly. That the petition is premature.

39. The 5<sup>th</sup> Respondent detailed its involvement in the project as the agency charged with the mandate to exercise general supervision and coordination of all matters relating to the environment. It gave a history of the Environmental Impact Assessment reports submitted by the Project proponent, its review and recommendations resting with its directive to the project proponent to publish an advert in the Kenya Gazette inviting comments from the public on the Environmental Impact Assessment study report. Further it gave additional recommendations to be undertaken by the proponent which included engagement with the political leadership and technical team in Muranga County and to form a team including the county Government of Muranga and its residents who will conduct benchmarking tours to Arusha and Durban to appreciate the project. It argued that the Petitioner will have the forum to address the issues as per the notice. It stated that it was waiting for the public to register their issues whether positive or negative to enable the final review and decision as to whether to grant or deny the license. That the application is premature.

40. It is now settled that an Applicant for a conservatory or interim order under rule 23 of the Constitution of Kenya (protection of the rights and fundamental freedoms) Practice and Procedure Rules, 2013 must demonstrate that: -

- a. He has a prima facie case.
- b. Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution.
- c. It would be in the public interest to grant the order.

41. The Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Petition No. 2 of 2014 (unreported)**, stated that:-

“Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”

42. In the case of **Kenya Association of Manufacturers & 2 Others -vs- Cabinet Secretary Ministry of Environment and Natural Resources & 3 Others [2017] eKLR** the Court stated thus:-

“...In an application for a conservatory order the Court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the Applicant has made a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted the Applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest.”

43. As to whether there is a prima facie case, the Court will delve into each issue raised by the Petitioner as the bedrock of his application. In respect to public participation, the Applicant has argued that there was no public participation in respect to the approval and award of the tender for the construction of the project and that the same was couched in secrecy and the residents learnt about it when the access road to the project site was upgraded.

44. The Applicant’s issue in respect to the award of the tender and the contract are with respect not within the jurisdiction of this Court and this can best be pursued using the dispute resolution mechanism provided under the Public Procurement and Disposal Act. The jurisdiction of this Court is as set out in Art 162(2)(b) of the Constitution read together with section 13 of the Environment and Land Act.

47. With respect to public participation, the Court in **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR** set out the elements of public participation as thus;

“First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya** (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

48. In the instant case the Court was presented with minutes of meetings held by the 2<sup>nd</sup> Respondent with the residents of Gikono, media personalities, CEC Muranga County at KSMS, Wempa residents, waste pickers in Gikono area community leaders at Maragwa Muranga county steering committee, public participation at Utalii College, P K Kariuki secondary school at Gikono village. It is on record that the county representatives were taken for benchmarking in Arusha to inspect a similar system. Other benchmarking tours of South Africa and Arusha has been recommended by the 5<sup>th</sup> Respondent. I have also seen advertisements and programs designed in Kikuyu language calling for the meeting of the residents at P K Kariuki Secondary School and a number of questionnaires with comments from persons named as residents of the area. In its review of the Environmental Impact Assessment study reports the 5<sup>th</sup> Respondent made reference to the stakeholder engagements and also recommended further engagements as it deemed necessary.

49. The Applicant has not controverted the evidence of public participation. Indeed, under para 5 of his supporting affidavit he has alluded that the residents learnt of the project from such meeting held on 19/2/18.

50. The Respondents have held the position that public participation is a continuous exercise.

51. It is on record that the 5<sup>th</sup> Respondent directed the 2<sup>nd</sup> Respondent to publish a notice in the Kenya Gazette calling for the public to give their comments on the project. It was the contention of the 5<sup>th</sup> Respondent that this will enable the members of the public to register their issues whether positive or negative to enable the final review and decision as to whether or not to grant the licence. I will return to this later in the ruling.

52. It is the Courts view therefore that public participation has commenced and there is evidence that it is ongoing. It is understood that further public participation took place once the notice for a full Environmental Impact Assessment study was published so much so that further comments from the residents and all concerned and that the feedback was obtained to inform the licensing of the project.

53. On the 11/3/19 it was brought to the attention of the Court that the 2<sup>nd</sup> Petitioner had filed an affidavit annexing the Environmental Impact Assessment licence on record. All the counsels representing the parties were present and none raised any objection. The parties were therefore aware of the licence. It is presumed that all the processes including but not limited to public participation, mitigation steps against contamination inter alia were carried out.

54. The Petitioners alleged that the project is to serve 5 counties which are Muranga, Kajiado, Nairobi, Kiambu and Machakos. The Petitioners have informed the Court that the project is solely for waste management for the county of Muranga. There is evidence on record to support this in form of the environmental study reports on record. There is no document produced by the Petitioners to state otherwise.

55. In respect to the assertion that the area is highly populated, the parties with the leave of the Court carried out a site visit and a report was filed on record. The details are; the project sits on approx. 50 acres; the site offices are being constructed; There are no human settlement around the land fill and the houses are situate more than 500 meters away; There are no obvious signs of human displacement; 4 boreholes have been sunk to facilitate the feasibility study.

56. From the site report it is evidence that the project has not commenced.

57. I agree with the project proponent that the Environmental Impact Assessment report submitted by the Applicant refers to the upgrading of the access road to the project site. It is not in dispute.

58. It is therefore doubtful that the Applicant has shown a prima facie case.

59. Is the Applicant likely to suffer prejudice if the conservatory orders are denied? As explained in the preceding paragraphs, the project has not commenced. The Environmental Impact Assessment licence was issued and from the evidence on record the Court is not persuaded that there is any prejudice that will be suffered by the Applicant if denied the conservatory orders. At the very least none has been shown by the Petitioners.

60. Is it in public interest to grant the orders? The Applicant has not demonstrated which rights have been or threatened to be violated at this stage especially with the issuance of the Environmental Impact Assessment Licence.

61. Whether the Applicant should be allowed to advertise the petition in a national newspaper? Section 9 of the Constitution of Kenya (Protection of the rights and fundamental freedoms) practice and Procedure Rules, 2013 provides that the Court may direct that notice of the institution of the petition may be published in a daily newspaper with national circulation of the judiciary website. The 5<sup>th</sup> Respondent has asserted that allowing the publication of the petition will usurp its powers. I fail to understand how this can happen. The Respondents have not shown how they stand to be prejudiced by the publication of the petition. It is allowed subject to the approval by the Deputy Registrar in accordance with section 9(1) and (2)(b) of the said Rules.

62. Due to the foregoing, I am not persuaded that the Petitioner has made out a case for the grant of the conservatory orders sought.

63. The application is dismissed.

64. I make no orders as to costs.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> DAY OF JULY 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Motari with Ms Nyawira for the 1<sup>st</sup> – 4<sup>th</sup> Respondents

5<sup>th</sup> Respondents – Absent

Plaintiff/Respondent – Present in person. Advocate is absent.

Irene and Njeri, Court Assistants