



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MERU

PETITION NO. 7 OF 2019

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS

AND RIGHTS OF THE PETITIONER UNDER ARTICLE 19,20,22,23,

24,42,69 AND 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ACTIONS OF THE TANA WATER SERVICES BOARD,

COUNTY GOVERNMENT OF MERU, HANKUK ENGINEERING CONSULTANTS

AND ECOSITE DEVELOPMENT CONSULTANTS LIMITED IN ARBITRARILY

PLANNING TO CONSTRUCT A SEWERAGE PROJECT ONTOP OF A WATER

CATCHMENT BODIES NAMELY RIVER KINYARITHAAND A SWAMP

BOTH OF WHICH PROVIDES DRINKING WATER AND FARMING

WATER TO THEINHABITANTS AND THOSE LIVING DOWNSTREAM

BETWEEN

RWANYANGE RESIDENT SELF HELP GROUP (suing Thro'

CHARLES KARIUKI, NICK MUTIGA, its

Chairman and Secretary respectively.....PETITIONER

AND

TANA WATER SERVICES BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT

HANKUK ENGINEERING COUNSULTANTS LIMITED...4TH RESPONDENT

RULING

1. Before me is a Notice of Motion dated 23.4.2019 and filed in court contemporaneously with the petition on 29.4.2019. There is no

indication as to which law and procedure the motion is brought under.

2. The background to this application is that a sewerage project is set to be undertaken in Ndiine sub-location of Meru County and petitioners want the same stopped. The application has been opposed by all the respondents.

Case for the Applicant/Petitioner

3. The prayers sought in the Notice of Motion dated 23.4.2019 are:

(i) That the application be certified as urgent.

(ii) That pending inter-partes hearing of the application, a temporary injunction be issued restraining the respondents and or their servants or agents or whomsoever from carrying out the intended construction of the proposed sewerage project in Ndiine Sub-location Rwanyange location.

(iii) That pending hearing and determination of the application, a permanent injunction be issued restraining the respondents and/or their servants or agents or whomsoever from carrying on the intended construction of the proposed sewerage project in Ndiine Sub-Location Rwanyange location.

(iv) That costs of the application be provided for.

4. The grounds in support of the application are that:

(a) That this matter is extremely urgent and needs urgent intervention by the court.

(b) That the applicant/petitioner is a registered self-help group of over 10,000 residents of Rwanyange area, suing through its chairman and secretary with a mandate of among others, to ensure conservation of environment.

(c) That the respondents are in the process of beginning the construction of a sewerage project in Ndiine sub-location Rwanyange location on two water bodies, river Kinyaritha and a swamp and on a densely populated area with a population of approximately 10,000 people.

(d) That the intended construction of a sewerage project is on a parcel of land which harbors a swamp and a water catchment body namely "River Kinyaritha" which supplies both drinking and farming water to the residents and their livestock and drains all the way to River Tana.

(e) That the residents are large scale farmers of French beans among other food and cash crops. Farmers Cooperatives provides market for their French beans and have threatened to withdraw their market should the sewerage project be put up on the water catchment as the same would obviously affect the quality of the produce.

(f) That the activities by the respondents are injurious to the health of the residents as well as other inhabitants and their farming activities.

5. The application is also supported by the affidavit of Charles Kariuki and Nick Mutiga who are the Chairperson and the Secretary of the petitioners herein. They have deponed as follows;

(i) That the petitioner is a registered self-help group of residents of Rwanyange made up of close to 1,000 members and have their main mandate as farming and environmental protection.

(ii) That the 1st respondent has contracted both the 3rd and 4th respondents to construct a sewerage project on a parcel of land in Ndiine Sub-location Rwanyange Location under the supervision of the 2nd respondent.

(iii) That the intended project was being carried out without the environmental impact assessment, without any involvement of the national environmental management authority or the residents and stakeholders on public participation engagement.

(iv) That there was no stakeholders' engagement as alleged by the respondents in their minutes of 28th March, 2018 and the list purportedly signed by stakeholders present which included the name and details of the area member of the County Assembly one Hon. Robert Kithinji Ringera was false as the said Kithinji was away in Japan on official duty.

(v) That the intended construction of a sewerage project is on a parcel of land which harbors a swamp and a water catchment body namely "River Kinyaritha" which supplies both drinking and farming water to the residents and their livestock before draining all the way to River Tana, while on the other side, there is the Meru Children's Remand home where children in conflict with the law are remanded.

(vi) That the residents are large scale farmers of French beans among other food and cash crops. Farmers Cooperatives provides market for their French beans and have threatened to withdraw their market should the sewerage project be put up on the water catchments as the same would obviously affect the quality of the produce.

(vii) That the process of putting up the sewerage project has begun and the contractor has already cleared the site, cut down all the trees, delivered some materials and is now putting up site houses despite the cries of the residents to halt the project in the area.

(viii) That putting up the project at the site posed grave danger to the inhabitants of Rwanyange among other consumers of the water as this would have the effect of contaminating water flowing on the said stream as well as the swamp which would obviously be injurious to their health.

(ix) That the residents are susceptible to contract cholera among other epidemics.

6. The annexures availed by the applicants in support of their application are a certificate of registration of the self-help group and a list of members of the group, list of attendance register of stake holders, a research report of 2008 and photographs.

7. During the hearing of the application it was argued that construction is ongoing in a swamp yet there was no Environmental Impact Assessment report from NEMA and that what has been availed as MMN 4 is a report – done by the respondents. The counsel for the petitioners therefore posed the questions;

- Did they pay for the report
- Did they submit it to NEMA

8. In conclusion on this point it was submitted that respondents have no licence from NEMA.

9. The other issue raised during the hearing touches, on public participation, it was submitted that public participation was done in Three Steers Hotel and there was no notice of the same. It is averred that participants are chiefs from the municipality and that the questionnaires are filled in hand writing by residents of the municipality ward.

10. It is further contended that the questionnaire indicated that the area member of county assembly who is alleged to have been present was actually in Japan.

11. Finally the court was urged to invoke the pre-cautionary principle and give a stop order in respect of the project.

Case for 1st, 3rd and 4th respondents.

12. As far as the application is concerned these respondents have relied on the supporting affidavit sworn by one Engineer John N. Mbogori where he has deponed as follows:

(i) That he is the technical Services manager of Tana water services board (first respondent).

(ii) That the 3rd and 4th respondents are agents of the 1st respondent engaged to construct the New Meru Sewerage Treatment plant on land parcels Nyaki/Thuura/1785, 1786 and 5349 under clear terms of a contract.

(iii) That in paragraph 8 of the supporting affidavit of the applicants, it is averred that the process of putting up the sewerage project has begun and the contractor has already cleared the site, cut down all trees, delivered some materials and is now putting up site houses, which is an admission that the contractors are on site and have started the process of constructing the sewerage project, hence an injunction cannot be issued to restrain the implementation of the said project due to damages that would be prompted by such an order.

(iv) That the 1st respondent is a national government agency mandated to be the custodian of assets belonging to the national government existing in year 2002 and subsequently acquired in matters regarding provision of water and sanitation services in its area of jurisdiction.

(v) That the first respondent had acquired the land upon which the plant was being constructed on behalf of the national government, for the benefit of the residents of Meru Town County and other counties downstream the river basin.

(vi) That the 1st respondent with the approval of the National government had borrowed a sum of Kshs.874,506,524.37 from African Development Bank (ADB) which loan has clear terms or repayment and penalties for failure to repay.

(vii) That upon the 3rd and 4th respondents taking possession of the site, the agreement is that they will undertake the construction of the plant without disruption for a period of 18 months.

(viii) That the construction of the plant is beneficial to the public, including the applicants, since the design is done in accordance with the acceptable international standards.

(ix) That the applicants had not met the basic threshold for the granting of an injunction and their application ought to fail.

(x) That in the documents filed together with the response to the petition, there is evidence that NEMA was involved and that there was public participation. Furthermore, the initiation of the plant was advertised in the standard newspaper and the Daily Nation.

(xi) That the applicants had also exhibited the list of attendants to the public participation meeting and the photographs taken on that day of 28th of March 2018.

(xii) That the area member of the county assembly one Hon. Robert Kithinji Ringera, attended the public participation meeting and that his allegations that he was away in Japan ought to be substantiated by exhibition of his passport which he has failed to do.

(xiii) That the applicants have not been specific as to the constitutional rights that have been violated as by law provided.

(xiv) That the applicants have not established a prima facie case with a probability of success and the balance of convenience does not favour them.

13. In support of their case, the 1st, 3rd and 4th availed the following annexures:

- The contract documents
- Gazette notice for the water (plan of transfer of water services) rules - 2005
- Copy of asset transfer plan
- Consents to transfer land from land control board
- The loan agreement documents
- Newspaper advert

14. In paragraph 13 of Mr. Mbogoris affidavit, he has also relied on the documents filed in support of the petition. The said documents run from page 5 to page 189 as annexures to the affidavit of one engineer Moses M. Naivasha, and the said documents include:

- Opinion by water services regulatory board
- Final detailed design review report of April 2018
- Environmental & Social impact Assessment report for the proposed Meru sewerage project
- List of participants and photographs at stake holders meeting.
- Application for effluent discharge

15. During the hearing of the application, it was submitted for the 1st 3rd and 4th respondents that the applicants want an injunction for a project which has started and hence the "horse has bolted", that there was public participation and that the project was duly approved even by the water regulatory body (WARMA).

16. Further it is contended that there are cost implications in the building of the project whereby the government has borrowed 1.6 billion and the loan was disbursed, the contract for the project has already been signed and there are consequences of breach thereof.

17. The court has been urged to take into account the three principles of granting an injunction taking into account that the project is underway.

Case for 2nd defendant

18. The case for 2nd defendant (county government of Meru) has been advanced by one George Kimathi Kobia who has deponed as follows;

(i) That he is the chief officer in charge of water working with the 2nd respondent and in such capacity, was authorized to make these depositions on behalf of the 2nd respondent.

(ii) That the petition does not meet the required standards in that, as a basic minimum the petition was required to cite the provisions of the constitution which have been violated and the remedy which they seeks thereof. In demonstrating the manner of violation, a petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.

(iii) That the aforesaid project was in sync with sustainable development goal number 6 of the United Nations Development program on access to water and sanitation for all, which Kenya is also a signatory.

(iv) That under the **Kenya constitution 2010, Article 43 (1) (d)** provides that every person has the right to clean and safe water in adequate quantities.

(v) That he was alive to the national values and principles of governance as enunciated under **Article 10 of the Kenyan constitution 2010** and the contents of vision 2030.

(vi) That the application by petitioners was a concoction of lies and half-truths which was only geared towards stalling the mega project christened as Meru sewerage project.

(vii) That the aforesaid project was a project of the national government and the 2nd respondent was only a beneficiary who was in the office for purposes of serving Meru County and protecting the interests of the people of Meru. The said project had been approved by the water services and regulatory board.

(viii) That while the said project had commenced, the same was meant to improve on the existing sewerage system which was constructed way back in the year 1974 to only handle a capacity of 750 cubic meters per day when the population of the town was only eleven thousand and seven hundred (11,700), that currently, the plant operates three times its design capacity at 2,000 cubic meters which causes it to perform below its optimal design thus the treatment is inefficient and does not achieve its required biological and chemical guidelines for discharge into the environment.

(ix) That during the rainy seasons, storm water infiltrates the system and this causes the ponds to overflow into the main road and outside the plant environs hence posing a public danger.

(x) That due to rapid urbanization and subsequent population growth of Meru Town and its environs, a need has arisen to come up with a new sewerage treatment plant in order to take care of the risen population estimated at 156,000 people. The new project will cover a wide area and it will prove to be of benefit to the residents. The same will also achieve optimal performance and it will improve the living conditions, town environment and even circumferential natural surroundings will be made better through improvement of the sewerage system.

(xi) That in order to achieve optimal conveyance, the siting of the new treatment plant was driven by the topography of the collection area since location of the current plant restricts collection from a wider scope due to hydraulic reasons.

(xii) That as opposed to the averments by the petitioners, the project would be of benefit to the public and even the petitioners who claims to be the residents.

(xiii) That the land on the project site had been lawfully acquired and all the legal processes leading to commencement of the project had been strictly adhered to.

(xiv) That the petitioners had not provided evidence to the effect that they were the residents living around on land parcel numbers Nyaki/Thuura/1785, 1786 and 5349 and termed the petitioners as busybodies.

(xv) That the application is a sheer product of ignorance on the way a modern sewerage plant works.

19. During the hearing of the application, it was submitted for the 2nd respondent that it associated itself with the submissions of the other respondents. It was further stated that the petition doesn't state with precision the constitutional provisions which have been violated and in which manner the violations have occurred.

20. It is further argued that NEMA and WARMA have not been enjoined in this suit, that the applicants don't even know where the suit land is and they have not indicated how close they are to the sewerage.

21. Further, it is contended that applicants have not availed an expert report to show how the project will be hazardous and that when there is compliance under NEMA, then one can't claim that there is violation of environmental rights.

Determination

22. I have considered all the arguments raised by the parties and the authorities proffered by 1st, 3rd and 4th respondents.

23. I have also perused the application over and over again and I am unable to see under which laws this application is brought under. Save for the part of the heading **“in the matter of infringement of fundamental freedoms and rights of the petitioner under article 19, 20, 22, 23, 24, 42, 69 and 70”** which is similar to the heading in the petition, the Notice of Motion itself is bare!. Nevertheless, I will still consider the application guided by the provisions of **order 51 rule 10 of the Civil Procedure rules and article 159 (2) (d) of the constitution.**

24. The main prayers sought by the applicants are a **temporary** and **permanent injunction** pending the hearing of the application. Ordinarily, a temporary injunction is sought for pending an event, usually the hearing and determinations of the main suit. Thus an injunction ultimately has to have a nexus with the prayers in the main suit. In the present application the orders have not been sought pending the hearing of the petition! It may have been a typo error but certainly, the applicants ought to put their house in order.

25. The main concern raised by the applicants is that the respondents are carrying out illegal actions without carrying out an environmental impact assessment and without involvement of the **National Environmental and Management Authority (NEMA)**. The respondents aver that all the relevant legal processes have been complied with. The legal platform concerning matters of environment is to be found under the **Environmental Management and Co-ordination Act (EMCA)**.

26. Section 9 of the Environmental management and co-ordination Act (EMCA) provides for the objects and functions of NEMA *inter alia* as follows;

“(1) The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

(2) Without prejudice to the generality of the foregoing, the Authority shall— (a) co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya”

27. It is clear that NEMA is the body mandated to deal with matters appertaining to environmental management and to this end a proponent of a project must comply with the requirements set out under EMCA and the regulations.

28. **Section 57A of EMCA provides for the Strategic Environmental Assessment as follows:**

“(1) All Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment.

(2) For the avoidance of doubt, the plans, programmes and policies are those that are— (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment. (3) All entities shall undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and shall submit such assessments to the Authority for approval. (4) The Authority shall, in consultation with lead agencies and relevant stakeholders, prescribe rules and guidelines in respect of Strategic Environmental Assessments”.

29. **Section 58 of EMCA** provides that:

(1) “Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases”.

30. **Section 63 of the EMCA further provides as follows in terms of the Environmental Impact Licence:**

“The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.

31. In seeking the prayer for injunction, the applicants have contended that there was no E.I.A. and that NEMA has not been involved in this project. The 1st, 3rd and 4th respondents dispute this and have availed the environmental and social impact assessment report for the proposed project as annexure MMN 4. I have looked at this document which runs from page 84 to page 189. It is a very detailed report capturing such issues as the magnitude of the project, social economic set ups including population size and impact of the project. The report also contains technical information like the nature of treatment and work designs. On the face of it, it cannot be said that an E.I.A was not done.

32. The question however is; was the report submitted to NEMA in line with section 57A (3) of EMCA? If it was submitted, was it approved, was there an application for the EIA licence in terms of section 58 of EMCA and finally If it was approved, was the licence issued in line with section 63 of EMCA?

33. Generally, the challenge to EIA reports and/or issuance of EIA licenses lies in the first instance to **National Environment Tribunal**, see **ELC Nakuru petition 9 of 2017 Luo Council of Elders and 7 others vs County Government of Bomet and 24 others (2018) eKLR** where the court made reference to the court of **Appeal case in the Republic vs NEMA exparte sound equipment Ltd – CACA No. 84 of 2010 (2011) eKLR** where the court considered the mandate and function of the **National Environment Tribunal (NET)** establishment under **section 125 of EMCA**.

34. It was their determination that challenges to Environmental Impact Assessment Study Reports and/or Environmental Impact Assessment Licences should be made to the National Environment Tribunal and not to the regular courts. In essence therefore, the tribunal should be accorded the first opportunity to consider the matter and it is only after it has made a decision that a party can refer the matter to the ELC court by way of appeal. However, in this case the applicant’s need an entry point as far as the dispute resolution mechanism provided for under **EMCA** is concerned hence there is a need to ascertain that **NEMA** was involved in the approval of the project.

35. In the instant case, the respondents have admitted that the project is underway. However the Environmental & Social Impact Assessment Report availed from page 84 by 1st, 3rd and 4th respondents simply bears a heading ***“SUBMITTED TO NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) P.O Box 67839 – 00200 NAIROBI. There is no evidence of actual submissions, approval or issuance of the relevant licence. How then did the respondents commence the project without compliance with the law?***

36. In the case of **Taib Investment Limited vs. Fahim Salim Said & 5 Others (2016)eKLR**, the court stated thus;

“Section 63 of the Environmental Management and Coordination Authority (EMCA) states that National Environment Management Authority (NEMA) can only issue a licence on such terms and conditions after being satisfied as to the adequacy of an environmental impact study, evaluation or review report. It is only after the issuance of such a license or refusal to issue the licence that an aggrieved party may appeal to the tribunal. That licence has not been exhibited by the defendants”.

37. I am alive to the fact that a modern sewerage treatment is crucial for the protection of the ecosystem and survival of the human race. However, it is common ground that sewerage contains filth and other pollutants including microbial pollutants which can pose a threat to human, animal and plant health. As rightly put by George Kimathi Kobia the Chief Officer in charge of water working for the 2nd respondent sewerage treatment plant needs to comply with the required biological and chemical guidelines. That is why the setting up of a sewerage system is a matter in the technical area requiring input of experts to elaborate on negative impacts of the project. And that is why in this case the respondents ought to demonstrate that their Environmental Impact Assessment (E.I.A) report was submitted and approved by National Environment Management Authority (NEMA) and thereafter, the licence was issued.

38. On the issue of public participation, the nature and extent of such public participation ought to be captured in the Environmental Impact Assessment (E.I.A) study report. In the present case, the 1st, 3rd and 4th respondents have availed a rather detailed document titled “*Public consultation document*” running from page 149 to 189 in their report. However, as alluded to herein, the document must be scrutinized by National Environment Management Authority (NEMA) so as to be issued with the relevant licence.

39. Once the respondents demonstrate that their involvement with National Environment Management Authority (NEMA) complies with the provisions of Environmental Management and Coordination Authority (EMCA) and the regulations thereof, then this court may refer the dispute to the laid down dispute resolution mechanism under Environmental Management and Coordination Authority (EMCA). For now, the respondents should avail the licence before they can make any other move on the project.

40. In the circumstances, I do grant a temporary injunction in terms of prayer 2 of the application for a period of three weeks for the respondents to avail the licence. In the event that there is none, the orders herein shall stand as confirmed until the suit is heard and determined. In the event that the respondents will have availed the licence, then the court will give further directions on the matter.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 31ST DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Ndonge

Munene holding brief for Maranya for applicant

Petitioner

Kiome holding brief for Mwai L. for 1st, 3rd and 4th respondents

Mwiti holding brief for Kiunga for 2nd respondent

Charles Kariuki Chairman

HON. LUCY. N. MBUGUA

ELC JUDGE