



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION NO. 24 OF 2017

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER

AND

JAMES KINUTHIA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY.....2ND INTERESTED PARTY

DIRECTOR OF SURVEY.....3RD INTERESTED PARTY

JUDGMENT

1. Proceedings in this matter started on 30th June 2017 when the petitioner filed petition dated the same date. The petitioner is a human rights organisation registered pursuant to the **Non-Governmental Organizations Co-ordination Act, 1990**. It filed the petition on behalf of members of the public and residents of Menengai Ward, Nakuru.

2. It is averred in the petition that the first respondent acting at the instance of the second respondent and without any sanction from the interested parties in line with the provisions of **section 58** of the **Environmental Management and Co-ordination Act, 1999** or public participation of stakeholders or members of the public, commenced construction of a commercial development on a public access road purportedly registered as **LR No. Nakuru Municipality Block 16/295** to the detriment of the area's residents. That by undertaking the said construction, the first respondent acts which are injurious to the environment and to members of the public since the development has interfered with drainage in the area. That the actions of the first respondent which were within the knowledge of the second respondent are in total disregard of safety of the environment and will cause degradation of the environment owing to blockage of the drainage. That the petitioner which is a stakeholder in the area is not aware of any processes taken by the 1st respondent towards obtaining approval from the second respondent and the interested parties prior to commencement of construction. That the actions of the respondents are illegal and in violation of **Articles 40(1), 42, 43(1), 47(1) and 69** of the **Constitution of Kenya, 2010** and deny the petitioner and stakeholders the right to a clean and healthy environment.

3. The petitioner therefore seeks the following orders:

*1. A declaration that the 1st respondent's construction of a commercial development on **LR No. Nakuru Municipality Block 16/295** a public access road with the approval of the 2nd respondent is illegal, unlawful and violates the petitioner's right to a clean and healthy environment as entrenched in the provisions of **Article 42** of the **Constitution of Kenya, 2010**.*

*2. A declaration that the 1st respondent's construction of a commercial development on **LR No. Nakuru Municipality Block 16/295** a public access road with the approval of the 2nd respondent amounts to a violation of the rights attached to the rights of ownership guaranteed by **Article 40** of the **constitution** and the provisions of the Registered Lands Act (sic) of the residents of Menengai Ward.*

3. *An order of injunction to restrain the 1st and 2nd respondents by themselves, servants, agents or whosoever authorized on their behalf from proceeding with the construction of the commercial development constructed on an access road purportedly registered as **LR No. Nakuru Municipality Block 16/295** or any part thereof pending the hearing of this petition inter partes and or further orders of the honourable court.*

4. *A mandatory injunction compelling the 1st and 2nd respondents to demolish the commercial development constructed on an access road purportedly registered as **LR No. Nakuru Municipality Block 16/295** and to take measures to surrender the road access to the members of the public and repair the blocked drainage.*

5. *The costs of this petition be borne by the respondents in any event.*

4. The petition is supported by an affidavit sworn by Elijah Sikona, the chairman of the petitioner. He deposed that the petitioner received a complaint from residents of Menengai Ward concerning a construction by the 1st respondent of a commercial development on **LR No. Nakuru Municipality Block 16/295**. The construction was on a road reserve and was being carried out with the knowledge of the second respondent, without public participation and without sanction by the interested parties under **Section 58 of the Environmental Management and Co-ordination Act, 1999**. That the first respondent's actions are injurious to the environment and to members of the public and that the petitioner and other stakeholders are denied the right to a clean and healthy environment, right to an easy access, peaceable occupation and enjoyment of their properties.

5. The first respondent responded to the petition through a replying affidavit in which he deposed that he is the registered proprietor of the parcel of land known as **LR No. Nakuru Municipality Block 16/295** (the suit land) pursuant to certificate of lease issued to him on 24th March 2014. He confirmed that he is in the process of erecting a residential/commercial structure on the suit land and that prior to commencement of construction he sought and obtained approval of building plans through a letter from the second respondent dated 21st July 2017. He added that the project was also approved by the second interested party and that there have been other allegations in the past that he erected the building on a public access road. He annexed a copy of a ruling delivered on 1st August 2014 in **CMCC No. 565 of 2014 (Nakuru) Lucas M. Kariuki v James Kinuthia**. He further deposed that another case being **Nakuru ELC No. 104 of 2017** was also filed raising similar complaints as the ones herein. Additionally, his predecessor in title was sued in **Nakuru HCCC No. 237 of 2009**.

6. The second respondent is a county government established pursuant to **Article 176 of the Constitution of Kenya, 2010** and the **County Governments Act, 2012**. It opposed the petition through a replying affidavit sworn by Robert Kiprono, its Director of Land and Physical Planning. He deposed that sometime in the year 2015 the first respondent submitted to the second respondent proposed plans for a 12 one bedroom residential flats on 2 levels and 3 shops development on the suit land for approval. The plans were circulated within the relevant departments of the second respondent and were ultimately approved through minute 584/15 of the Lands Housing and Physical Planning Technical Committee held on 11th November 2015. He therefore termed the petitioner's allegations vindictive and malicious. He added that when the second respondent was served with pleadings in **CMCC No. 565 of 2014 (Nakuru)**, he suspended the approval which had been issued to the first respondent pending determination of the case.

7. The first interested party is a body corporate established under the **Environmental Management and Co-ordination Act, 1999** (EMCA) with the objective of exercising general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in implementation of all policies relating to the environment. It responded to the petition through a replying affidavit sworn by Willice Omondi Were, its Director of Environment based at Nakuru County. He deposed that the first interested party is in support of the petition since the project is not approved by the first interested party and therefore the soundness of its environmental parameters cannot be ascertained. He added that he first came to know about the project on 2nd March 2017 when the first respondent submitted an Environmental Impact Assessment Report (EIA). He immediately informed the first respondent not to commence or proceed with any development until he receives a green light from the first interested party. He followed up with a letter dated 16th March 2017 listing issues to be addressed. He added that the first respondent has not yet addressed the issues yet the project has been ongoing. Consequently, on 29th May 2017 he sent Environmental Inspectors to the site who found that the project was ongoing. He therefore served upon the first respondent a statutory improvement order dated 29th May 2017 and wrote a letter dated 26th June 2017 to the Physical Planner Nakuru County seeking confirmation of the possibility of the suit land being on a road reserve. That in view of the existence of this case and **CMCC No. 565 of 2014 (Nakuru)** and considering that the EIA process is a participatory one, he decided to put the EIA process on hold to await the court's determination.

8. The second interested party is a body corporate established under **Section 3 of the National Construction Authority Act**. It responded to the petition through a replying affidavit sworn by Stephen Mwilu, an architect and the manager in charge of its regional office. He deposed that on 29th March 2017 a complaint was made to the second interested party that the project was non-compliant. As a result the second interested party's officers carried out an investigative inspection on the site on 31st March 2017 which was the second day of the excavation of the foundation and suspended the construction works since the site was non-compliant for among other reasons failing to register the project with the second interested party. That the first respondent ultimately complied with the requirements leading to lifting of the suspension on 3rd July 2017 and issuance of a Certificate of Compliance on dated 6th October 2017. He therefore took the position that the petition lacks merit and is an abuse of the court's process in so far as it relates to the second interested party.

9. The third interested party is a public officer appointed under **Section 3 of the Survey Act**. Although duly served and although counsels from the Attorney General's Chambers attended court on his behalf on a number of occasions when this matter came up, he neither responded to the petition nor filed any submissions.

10. The petition was canvassed through affidavit evidence and written submissions. In the petitioner's submissions it was argued that despite there being in existence another case being **Nakuru ELC No. 104 of 2017**, proceedings herein are not sub judice since these proceedings have the special character of a constitutional petition and since the issue of right to a clean and healthy environment is not substantially in issue in **Nakuru ELC No. 104 of 2017**. It was further argued that the first respondent's project is contrary to the spirit of the constitution and EMCA as regards the environment and the principle of sustainable development. In particular, the petitioner cited the provisions of **section**

58 of EMCA and **regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003** as well as the case of **Patrick Musimba v National Land Commission & 4 Others [2016] eKLR** and argued that the project was undertaken without approval by the 2nd respondent and the interested parties and that there was no public participation since the residents of Menengai Ward were not consulted.

11. For the first respondent it was argued that this petition is sub judice in view of the existence of **Nakuru ELC No. 104 of 2017** where the issues are substantially similar to those in this petition. The first respondent cited the case of **Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another [2016] eKLR** among others to support the contention that a constitutional petition is amenable to the sub judice rule just like other types of proceedings. Regarding the question of whether the right to a clean and healthy environment has been breached, the first respondent argued that he followed the right procedure and obtained all necessary approvals. Consequently, the project cannot be said to breach the right to a clean and healthy environment. He cited the case of **Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015] eKLR** among others.

12. The second respondent argued in its submissions that it followed due process in approving the building plans submitted by the first respondent and therefore no orders should issue against it and no costs should be imposed against it.

13. I have not seen any submissions by the first interested party.

14. On its part, the second interested party reiterated in its submissions that it fulfilled its mandate as far as the project is concerned and that it ought not therefore to have been enjoined in these proceedings.

15. I have considered the petition, the affidavits and the submissions. The issues that arise for determination are firstly, whether this petition offends the sub judice rule; secondly, whether the right to a clean and healthy environment is threatened or breached by the project and lastly, whether the reliefs sought should issue.

16. Sub judice is provided for under **section 6 of the Civil Procedure Act**. It provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

17. Sub judice is a principle of general application that applies even in constitutional petitions. Its purpose is to ensure that no court proceeds to determine a matter which is also directly and substantially in issue in a previously instituted suit pending either before it or before another court of competent jurisdiction. The idea is to avoid a multiplicity of decisions on the same issue and the attendant risk of conflicting decisions from different courts or even the same court on the same issue. Additionally, it avoids litigants being vexed by other litigation on the same issue in the same or different courts.

18. There is no dispute that there exists another case being **Nakuru ELC No. 104 of 2017** which is still pending and wherein the first respondent herein is the first defendant. A perusal of the Amended Plaintiff filed in the said matter suggests that the matter was filed in March 2017. This petition was filed on 30th June 2017. One of the prayers in **Nakuru ELC No. 104 of 2017** is for cancellation of the first respondent's title to **Nakuru Municipality Block 16/295** which is the suit land in this petition. Within the body of the amended plaintiff there are averments that the first respondent's title to **Nakuru Municipality Block 16/295** was issued fraudulently since the said land is a public road reserved for access. There are allegations in this petition that the suit land is a public access road. The issue of validity of the first respondent's title to **Nakuru Municipality Block 16/295** and whether the suit land is a public road reserved for access is therefore sub judice in **Nakuru ELC No. 104 of 2017**. I also note that one of the documents that the petitioner has annexed to the affidavit in support of the petition is a copy of a Statement of Defence and Counterclaim filed by the third Interested Party herein in **CMCC No. 565 of 2014 (Nakuru)** and wherein it is averred that the first respondent's title to **Nakuru Municipality Block 16/295** was obtained illegally. Among the prayers in the counterclaim is a declaration that **Nakuru Municipality Block 16/295** belongs to the Nakuru County and an order that the first respondent surrenders the Certificate of Lease in respect thereof for cancellation. It follows therefore that prayers 2, 3 and 4 of this petition run afoul of the sub judice rule. The same applies to part of prayer 1 to the extent that it alleges that the first respondent's project is on a public access road.

19. Nevertheless, I am aware that the remaining part of prayer 1 of the petition raises the issue of whether the project violates the petitioner's right to a clean and healthy environment as entrenched in the provisions of **Article 42 of the Constitution of Kenya, 2010**. That is an issue which is not raised in **Nakuru ELC No. 104 of 2017**.

20. Under **Article 259 of the constitution**, the court is enjoined to interpret the constitution in a manner that promotes the purposes, values and principles of the constitution; that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; that permits the development of the law; and that contributes to good governance. Taking cue from those constitutional edicts, I will sever the petition so as to allow this court to deal with aspects of the claim which are not sub judice. I do so bearing in mind that under **Article 70 of the constitution**, a person who alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened has a right to move this court for redress. I further take into account that matters of environment protection call for urgent attention.

21. What then do I do with the parts of the petition which are sub judice? While not expressly asking the court to strike them out, the first respondent in his submissions has cited several authorities which are all in favour of striking out such proceedings. For example, in **Kiama Wangai v John N. Mugambi & Another [2012] eKLR** Odunga J stated as follows with regard to section 6 of the Civil Procedure Act:

The above provision expressly bars a Court from entertaining a matter in circumstances mentioned therein. Therefore where the Court finds that the suits in question fall within the four corners of section 6 aforesaid the Court has no discretion in the matter

but has to stay the subsequent suit or suits. However, it must always be remembered that the Court is clothed with inherent jurisdiction to strike out proceedings which are deemed to be an abuse of the process of the Court. Therefore where a party decides to file suit after suit between same parties with the same cause of action with either an intention of vexing or annoying his opponent, and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the process of the Court.

22. I am alive to the draconian nature of striking out and that it should be resorted to in the clearest of cases. Nevertheless, I am persuaded that this is a clear case in which to order striking out of the sub judice aspects of the claim since doing so will enable the court to deal with the rest of the claim as regards whether the right to a clean and healthy environment as entrenched in the provisions of **Article 42** of the **Constitution of Kenya, 2010** has been threatened or violated. I therefore strike out prayers 2, 3 and 4 of this petition as well as the part of prayer 1 which alleges that the first respondent's project is on a public access road. That resolves issue number one.

23. Is the right to a clean and healthy environment is threatened or breached by the project? **Article 42** of the constitution provides as follows:

Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

24. Further, under **Article 69** the state has an obligation to protect and conserve the environment by ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensuring the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. The duty extends to every person to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Provisions similar to those at **Articles 42, 69** and **70** are found at **Section 3** of EMCA.

25. So as to better secure protection and conservation of the environment and to ensure ecologically sustainable development, **Section 58** of EMCA provides:

(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. ...

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

26. Additionally, **Section 63** of EMCA provides:

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.

27. Under **section 2** of EMCA “**project**” is defined to include any project, programme or policy that leads to projects which may have an impact on the environment while “**proponent**” is defined to mean a person proposing or executing a project, program or an undertaking specified in the Second Schedule.

28. There is no dispute that the first respondent is a project proponent in respect of a commercial/residential development on the suit land. It was deposed in the replying affidavit filed by the first interested party that although the first respondent submitted an EAI in respect of the project, the first interested party informed him not to commence or proceed with any development until he addresses issues listed in a letter dated 16th March 2017 and until he receives a green light from the first interested party. The twin issues listed for redress were that a chapter on project alternatives was to be included in the EIA and that the first respondent was to provide a valid EIA/EA practicing license for the lead expert. It was further deposed that the first respondent has not yet addressed the issues yet he has been proceeding with the project. Further, that he was served with a statutory improvement order dated 29th May 2017 and that the EIA process has since been put on hold. Those are serious allegations. The first respondent has not responded to them by any affidavit to demonstrate that he made any effort to address the issues that were raised by the first interested party. In these circumstances, I agree with the first interested party that the soundness of the environmental parameters of the project cannot be ascertained. The obligation to show that a project is environmentally sound is cast on the proponent and he has to discharge that obligation by satisfactorily going through the EIA process and obtaining an EIA licence. The first respondent has so far not done so.

29. As was stated by Munyao J in **Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015] eKLR**:

73. I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far outweigh the adverse

effects to the environment. It is informative that one of the principles of environmental law is the precautionary principle. The precautionary principle applies where there is uncertainty as to whether a matter has potential to cause environmental harm. The approach in the face of such uncertainty is to exercise caution, and where possible, stop the activity that is suspected to have potential to cause environmental harm. The burden of proof in instances where the precautionary principle is invoked, in my view, ought to rest upon the proponent of the project, who needs to demonstrate that the project at hand is not harmful to the environment or that the harm to the environment is tolerable, owing to the greater public benefit, especially where there are no better alternatives to the project. ...

30. Although the second respondent and the second interested party have both given the project their seals of approval, it must be noted that the mandate of those two entities does not extend to exercising supervision and co-ordination over matters relating to the environment. Hence, until the first respondent complies with the EIA process and obtains an EIA licence, there remains a presumption that the project does not facilitate sustainable development and sound environmental management. Thus, I resolve the second issue for determination by finding that the project in its present state presents a potential threat and a potential breach of the right to a clean and healthy environment. Considering that the first interested party had put the EIA process on hold to await the determination, I will give the first respondent a chance to comply with the EIA process and hence rebut the presumption.

31. In the circumstances, should the reliefs sought should issue? Following the striking out of prayers 2, 3 and 4 of this petition as well as the part of prayer 1 which alleges that the first respondent's project is on a public access road, the only relief that is now sought is a declaration that the 1st respondent's construction of a commercial development on LR No. Nakuru Municipality Block 16/295 violates the petitioner's right to a clean and healthy environment as entrenched in the provisions of Article 42 of the Constitution of Kenya, 2010. Arising from the above discourse, it is clear that the first interested party put the EIA process on hold to await the determination of this case. It is the EIA process that will determine the project will facilitate sustainable development and sound environmental management. This will in turn determine whether the project violates the right to a clean and healthy environment. It is thus premature to declare at this point in time that the project violates the right to a clean and healthy environment. I will however give directions to guide the way forward.

32. In the end I make the following orders:

- a) The first respondent to address the issues listed in the first interested party's letter dated 16th March 2017 or to renew the application for Environmental Impact Assessment Licence for the project on LR No. Nakuru Municipality Block 16/295 within 60 (sixty) days from the date of delivery of this judgment and thereafter to fully comply with Environmental Impact Assessment process.
- b) In default, an environmental restoration order will automatically issue directing the first respondent to restore the site to the state in which it was before the commencement of the project.
- c) Further, in default of (a) above, a declaration will automatically issue that the 1st respondent's construction project on LR No. Nakuru Municipality Block 16/295 violates the petitioner's and the public's right to a clean and healthy environment as entrenched in the provisions of Article 42 of the Constitution of Kenya, 2010.
- d) Pending compliance with (a) above, the first respondent is hereby ordered not to commence or proceed with the construction project on LR No. Nakuru Municipality Block 16/295.
- e) The first interested party is at liberty to give further directives to the first respondent within its mandate under the Environmental Management and Co-ordination Act, 1999.
- f) Each party to bear own costs.

33. Judgment herein was to be delivered on 20th March 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the petitioner

Mr Kimani holding brief for Mr Kisilah for the 1st respondent

No appearance for the 2nd respondent

No appearance for the 1st Interested Party

Mr Kimani holding brief for Mr Kariuki for the 2nd Interested Party

No appearance for the 3rd Interested Party

Court Assistants: Beatrice & Lotkomoi