



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC PETITION NO.4 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10(1)(B), 20(1), 20(1), (2), (3), & (4), 21(1), 22(1) & (2), 23(2), 23(1) & (3), 24(1), 27(1) & (2), 36, 47, 62, 69, 70, 159(1) & (2), 165(3), 185, 258(1), 259(1) & (3) & 260 OF THE CONSTITUTION OF KENYA, AND THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE MAKUENI COUNTY SAND CONSERVATION AND UTILIZATION ACT 2015**

**BETWEEN**

**JACKSON MUTUA KAVILA.....PETITIONER**

**AND**

**1. GOVERNMENT OF MAKUENI COUNTY**

**2. COUNTY ASSEMBLY OF MAKUENI**

**3. MAKUENI COUNTY SAND CONSERVATION & UTILIZATION**

**AUTHORITY.....RESPONDENTS**

**JUDGEMENT**

1. By his petition dated 26<sup>th</sup> April, 2016 filed in court on even date, Jackson Mutua Kavila, the Petitioner herein, prays for orders: -

**a. A DECLARATION THAT: the Makueni County Sand Conservation and Utilization Act 2015 in its entirety was unconstitutionally enacted by the County Assembly of Makueni, which had NO Constitutional authority to legislate on matters vested in the National Government, and is therefore null and void.**

**b. The provisions of Makueni County Sand Conservation and Utilization Act 2015, and particularly section 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, and 38 of the said Act, are inconsistent with, and contravene the Constitution of Kenya, and are therefore null and void.**

**c. A DECLARATION THAT: the 3<sup>rd</sup> Respondent, which is a creation of an unconstitutional County Legislation (Makueni County Sand Conservation and Utilization Act), is an unlawful entity.**

**d. A DECLARATION THAT: in purporting to implement Makueni County Sand Conservation and Utilization Act, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's acted unconstitutionally.**

**e. Costs of this petition be paid by the Respondents.**

2. The petition is supported by the supporting affidavit of the Petitioner sworn at Machakos on the 26<sup>th</sup> April, 2016.
3. The Petition is opposed by the Respondents vide the replying affidavit of Joshua Willy Wambua, its County Secretary, sworn at Nairobi on 27<sup>th</sup> May, 2016 and filed in court on even date. J. W. Wambua has deposed in paragraphs 7, 8, 10, 19, 20, 21, 24, 25, 36 and 32 of his affidavit that the Constitution of Kenya 2010 has granted the 1<sup>st</sup> Respondent the power and function to conserve soil and water in accordance with section 10 of part 2 of the Fourth Schedule to the constitution which provides inter alia: *“the functions and the powers of the county are implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry,”* that Environmental policies are significant as they establish a framework for implementing the relevant provisions of the Constitution and Statutory law, that like the national government, each of the 47 county governments has its own legislative assembly with the power to enact environmental legislation and the two primary organs of the 47 county governments are the County Assembly and County Executive which work together to develop and implement policies, growth plans and budgets, that the executive arm of the county government of the 1<sup>st</sup> Respondent appointed a task force with a mandate to research, make recommendations and prepare a report on sustainable sand harvesting within the county, that since public participation in environmental decision making is crucial to the enforcement of environmental rights, all stakeholders were consulted and they gave their views to the Task Force as exhibited in its report dated June 2013, that from the task force report on sand dated June 2013 it's evident that consultations were conducted before the recommendations were made, that in exercise of its legislative authority the 2<sup>nd</sup> Respondent enacted the Makueni County Sand Conservation and Utilization Act 2015, that the 2<sup>nd</sup> Respondent in enacting the Makueni County Sand Conservation and Utilization Act 2015 created the 3<sup>rd</sup> Respondent as envisioned under Section 6(5) of the County Government Act which allows the county government to establish a company, firm or body, or contract a person, company, firm or body to deliver a particular service or carry out a particular function of the county government, that the Petitioner has not shown and or demonstrated violation of his constitutional rights and freedoms if any and is on a fishing expedition to justify the claim, that from the petition, there is nothing to suggest that the Petitioner's constitutional rights were violated or that the Respondents breached the constitution in any manner in the process of enacting the Makueni County Sand Conservation and Utilization Act 2015 and thereafter putting it into operation.
4. Directions to dispose off the petition by way of written submissions were issued on 16<sup>th</sup> December, 2016.
5. The Counsel for the Petitioner submitted that the Petitioner was sub-contracted by the main contractor, China Road Bridge Corporation (Kenya) to supply it with appropriate quantities of sand which was one of the main materials used in the construction of the Standard Gauge Railway line (hereinafter referred to as the SGR). That the SGR is a project of the National Government. That pursuant to the written agreement dated 12<sup>th</sup> November, 2014 between the Petitioner and China Road Bridge Corporation (Kenya), the Petitioner hired a considerable number of lorries to supplement his fleet of lorries in order for him to be able to deliver on daily basis the required tonnage of sand. That since the date of aforesaid written agreement, the Petitioner harvested sand from specific sites in the rivers in Makueni County as approved by the National Environment Management Authority (NEMA). That the Petitioner always paid to the 1<sup>st</sup> Respondent the lawful levies until on or about December, 2014 when the 1<sup>st</sup> Respondent started intercepting, impounding and unlawfully detaining lorries in the Petitioner's fleet of lorries.
6. It was further submitted on behalf of the Petitioner that during the pendency of this case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents published “The Makueni County Sand and Conversation (sic) Bill- 2005 which they have now purported to enact. The Petitioner's Counsel added that vide a notice published in the Daily Newspaper for 26<sup>th</sup> October, 2015, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents notified the public, which includes the Petitioner of the operationalization of the aforesaid Act, which purported to prohibit sand harvesting in all the rivers within Makueni County for commercial purposes/for sale. The Counsel pointed out the Act went further to purport to permit sand harvesting for local (domestic) use only (use within Makueni County), but in areas designated by the relevant County Executive Committee member.
7. The Petitioner's Counsel further submitted that during the 4<sup>th</sup> annual devolution conference in Naivasha, County Governments were urged to plan for better management of their natural resources while ensuring synergy with the existing national policies and laws. The Counsel went on to submit that the constitution of Kenya (2010), which obliges the state to ensure a clean and healthy environment that benefits both current and future generations, provides a positive path forward on natural resources.
8. The Counsel added that rivers are public land which is vested in the National Government as provided for under Article 62 (h) (i). The Counsel was of the view that sand being a natural resource vested in the National Government under schedule the Fourth Schedule of the constitution, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot purport to legislate over a matter that is vested in the National Government which can only be legislated on by the National Assembly. The Counsel added that the Makueni Sand Conservation and Utilization Act, 2015 contravenes the constitution and is null and void. The Counsel pointed out that the Act is discriminative against the Petitioner in that the said Act gives preference to those harvesting sand for use within Makueni County and discriminates against the Petitioner who is harvesting sand for commercial purposes in and outside Makueni County. The Counsel added that that contravenes Article 27 of the Constitution. The Counsel went on to submit that the Act also contravenes section 36 of the Constitution in that it requires the Petitioner to be part of, or to associate with associations being created by the Respondent at the County and sub county levels in Makueni County in order to gain access to and to harvest sand in the rivers within Makueni County. The Counsel went on to submit that the Act also contravenes Article 47 by subjecting the Petitioner to unfair and unlawful administrative actions and processes.
9. On the other hand, the Respondents' Counsel submitted that the petition does not comply with the mandatory provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Counsel added that Rule 10(2) (d) of the aforementioned Rules states that a petition must disclose the nature of the injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit. The Counsel asked the court to determine whether the constitutional violations alleged by the Petitioner in this petition dated 26<sup>th</sup> April, 2016 were pleaded with the requisite degree of precision so as to be entertained. To buttress his submissions, the Respondents' Counsel cited the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where the Court of Appeal held thus;

“It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

10. Arising from the above, the Counsel submitted that the petition lacks a reasonable degree of precision in drafting, the few constitutional provisions that have been strewn in the petition albeit haphazardly have only been towards an attempt to breathe life into the pleadings that are themselves incurable.

11. The Respondents’ Counsel further submitted that the County Government of Makueni appointed a task force with a mandate to research, to make recommendations and prepare a report on sustainable sand harvesting within the county. That after engaging in extensive public participation, the task force prepared a report which led to Makueni County Sand Conservation and Utilization Act, 2015 whose main objective was to regulate and ensure sustainable conservation and utilization of sand, to protection of the environment and equitable sharing of the accruing benefits and exercise of the powers of the county government under the Fourth Schedule.

12. Regarding the Petitioner’s assertion that the County Assembly of Makueni had no constitutional authority to legislate on matters vested in the National Government, the Respondents’ Counsel submitted that the County Assemblies are empowered under Article 185 of the Constitution to make laws that are necessary for, incidental to, the effective performance of the functions and exercise of the powers of the County Governments. The Counsel went on to cite section 10 of the Fourth Schedule of the Constitution which gives County Governments the power and duty to implement National Government policies on natural resources and environmental conservation, including soil, water conservation and forestry.

13. In support of his submissions, the Counsel referred the court to the case of Thuku Kiroro & 4 others vs. County Government of Murang’a [2014] eKLR where the court held:

“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than restrictive manner. As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.”

14. The Counsel added that the 2<sup>nd</sup> Respondent was well guided in enacting and operationalization of the said Makueni County Sand Conservation and Utilization Act, 2015 to achieve the 1<sup>st</sup> Respondent’s objectives and functions as mandated by the Constitution and urged the court to uphold the power vested in the 1<sup>st</sup> Respondent to execute its constitutionally mandated duties.

15. The Counsel further cited the case of Directive Assurance Company Ltd vs. Attorney General [2011] eKLR where the Applicant held the position that a notice issued to public transport operators to join SACCOS in carrying out business is a limitation of the freedom of association and the said limitation is not reasonable and justifiable in an open and democratic society. The Court was of the opinion that: -

“The issue of public interest is one of the main issues in this petition. Public interest means, the interests and convenience of the members of the public as a whole. This court has to ensure no person or party whatever his position or his status endangers public interest, public safety and public security. The paramount consideration in giving an adequate protection is an existence of a right which has been infringed or is about to be infringed. In assessing whether a right has been infringed or is about to be infringed, the Applicant has to demonstrate that he would suffer, or he has suffered some prejudice or damages which is foreseeable, and which is directly resulting from the action or the inaction complained from.”

And further held that

“The notice by the licensing board does not target the business and the interests of the Applicants. It is a mere notice to individual PSV owners encouraging them to come together to have an orderly service industry. The interests the Applicant are purporting to champion in this case are unknown in law, hence, no prima facie case with high chances of success has been established.”

16. The Counsel concluded by submitting that the Makueni County Sand Conservation and Utilization Act, 2015 aims to regulate and to ensure sustainable conservation and utilization of sand and to provide for protection of the environment and equitable sharing of the accruing benefits and connected purposes. The Counsel urged the court to find that the Petition lacks merit and proceed to dismiss it with costs to the Respondent.

17. The Petitioners Counsel framed the following issues for determination: -

**a. Whether the Makueni Sand Conservation and Utilization Act 2015 contravenes the Bill of Rights as enumerated hereinabove.**

**b. Whether Makueni County Sand Conservation and Utilization Act 2015 contravenes the Constitution of Kenya as enumerated hereinabove.**

**c. Whether the Makueni County Sand Conservation and Utilization Act is unconstitutional and therefore null and void.**

**d. Whether the provisions of Makueni County Sand Conservation and Utilization Act are inconsistent with the Constitution of Kenya and are therefore null and void to the extent of the inconsistency.**

**e. Whether sections 19, 25, and 26 of Makueni County Sand Conservation and Utilization Act 2015 are inconsistent with, and contravene the Constitution.**

My answer to the aforementioned five issues for determination are as follows: -

18. Firstly, apart from stating that Makueni Sand Conservation and Utilization Act, 2015 contravenes the Constitution and is null and void and that the said Act discriminates against the Petitioner, I would agree with the Respondents Counsel that the petition does not disclose the nature of the injury caused or likely to the Petitioner. It is apparent that the constitutional violations that the Petitioner has alleged by the Petitioner were not pleaded with the requisite degree of precision to enable this court to entertain the petition.

19. Secondly, Section 10 of the Fourth Schedule of the constitution requires County Government to implement national policies on natural resources and environmental conservation. In the instant petition, it was pertinent for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to come up with legislation on how to implement the said National Government Policy. I see no contravention of the Constitution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in enacting and assenting to the aforementioned Act. Petitioner has not in any way demonstrated how the said Makueni Sand Conservation and Utilization Act, 2015 and more particularly sections 19, 25 and 26 are inconsistent with, and contravene the constitution. I hold that neither the 2<sup>nd</sup> Respondent nor the 1<sup>st</sup> Respondent contravened the provisions of the constitution by enacting and assenting to the said Makueni Sand Conservation and Utilization Act, 2015. As was correctly submitted by the Respondent's Counsel, the objective of the said Act is to regulate and ensure sustainable conservation and utilization of sand and to provide for protection of the environment and equitable sharing of the accruing benefits and connected purposes.

20. The upshot of the foregoing is that the petition must fail as it lacks merit. In the circumstances, I hereby proceed to dismiss it with costs to the Respondents.

**Signed, Dated and Delivered at Makueni this 28<sup>th</sup> day of November, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Kamiru holding brief for Mrs. Nzei for the Petitioner

No appearance for the Respondents

Mr. Kwemboi – Court Assistant

**MBOGO C. G., JUDGE,**

**28/11/2019.**