



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 5 OF 2019

MICHAEL OTIENO NYAGUTI PETITIONER

VERSUS

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

NYANZA GOLF CLUB 2ND RESPONDENT

JUDGMENT

The Petitioner filed this petition on 8th April 2019 seeking a declaration that the Respondents' actions have violated the Constitution and orders:

- (a) That Respondents be permanently restrained from engaging in any activity that may be harmful to the riparian wetland(s) around Lake Victoria.**
- (b) Compelling the Respondents to vacate the wetlands and cease any activity that may be harmful to the wetland ecosystem.**
- (c) A restoration order directed to the Respondents to restore the wetlands to its original status.**
- (d) That the costs of this suit be provided for.**
- (e) Any other relief that the court deems just to grant.**

The bone of contention is a lakefront development project being undertaken by the Respondents. The Petitioner claims that the Respondents have started reclaiming the wetlands area around River Kisat without properly convening public participation and without carrying out an **environmental impact assessment, and without being issued with a licence** from National Environmental Management Authority and the National Construction Authority as required by law.

Petitioner contends that the reclamation is illegal and harmful to the ecosystem, breeding ground of fish, and source of raw materials for the fisher communities. That the residents of Kisumu City will be exposed to the dangers of sewerage waste drifting to the KIWASCO intake point. That the reclamation is likely to lead to depletion of fish stock in Lake Victoria which will expose the fisher folk communities to loss of income and livelihood from fishing. That the reclamation risks eliminating the function of the wetland of removing heavy metal substances from the sewerage and municipal runoff water.

2nd Respondent's Reply

The 2nd Respondent responded through a Replying Affidavit sworn by its Secretary General Sam O. Onyango. In the replying affidavit, the Secretary General admitted that the Respondents had agreed to undertake lakefront development projects targeting the hospitality industry within Kisumu City, and admitted that they have started reclaiming the wetland area but averred that there was public participation in the exercise. In this regard, a copy of minutes of stakeholder meetings were annexed to the affidavit.

That the 2nd Respondent averred that they also obtained environmental impact assessment report from NEMA and approval report from the Water Resources Authority, copies of which were attached in the affidavit. That the Petitioner's claims were untenable because the Petitioner lacked the necessary competence to carry out an environmental impact assessment and contradict the findings of the report that the Respondents had obtained.

That there were other wetlands where raw materials grow and that the project is set to create new employment opportunities for the locals and improve their living standards.

1st Respondent's Reply

The 1st Respondent responded through a replying affidavit sworn by its County Secretary, Charles Olang'o Onudi. The Secretary deponed that the Respondents jointly ensured that the projects comply with constitutional requirements as well as statutory provisions. That they carried out Environmental Impact Assessment and public participation as required and also obtained an approval report from the Water Resources Authority.

That the 1st Respondent on various occasions conducted meetings with various stakeholders including the Kisat Farmers Community on 3rd February 2019 and 6th February 2019.

That the mouth of river Kisat is exclusively within the 2nd Respondent's land. That the photographic evidence adduced by the Petitioner were misleading and did not reflect the facts on the ground since they do not show any activity at the mouth of River Kisat which is situate right inside the 2nd Respondent's golf course.

The application was to proceed by way of written submissions but none of the parties has filed written submissions.

Issues for Determination

1. Whether the petition is merited

The onus was upon the Petitioner to demonstrate that the Respondents had contravened, violated or threatened its constitutional rights. The Petitioner claimed that the Respondents were carrying out developments on the lakefront without following procedure namely carrying out public participation, carrying out environmental impact assessment, and obtaining licences and approvals from National Environmental Management Authority. The Respondents presented minutes of various meetings with diverse stakeholders including farmers and fisher communities from around the area of River Kisat. The Respondents also filed copies of the Environmental Social and Impact Assessment Report carried out pursuant to the development, and copies of the approvals from NEMA and the Water Resources Authority. The Petitioner did not challenge any of these documents.

The Petitioner claimed that the development posed various environmental and economic threats to the residents of River Kisat and the wider Kisumu city. However, the Petitioner failed to back up his claim with sufficient evidence. The Petitioner annexed to the supporting affidavit photographs described as **"photos taken at the wetland showing the extent of the ongoing reclamation and remaining portions of the wetland."** However, without further elaboration of the photos by the Petitioner on matters such as the exact location where the photographs were taken, the developments being depicted in the photographs and the effects of those developments, the court cannot determine any of the threats to the environment or community as claimed.

The rights under the Bill of Rights are very specific and a petitioner who comes before the court must set out with some level of particularity of the specific right allegedly breached and how it is violated. The principle was set out in the case of Anarita Karimi Njeru v Republic No.1 (1979) I KLR, 54 and which was echoed in the case of Mumo Matemu v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR: the court said:

"if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

In Mumo Matemu Case, the Court said:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... 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"

The Petitioner did not challenge the findings of the Respondents Environmental Impact Assessment Report, nor provide its own independent expert findings that were contradictory to the report. As things stand, the environmental and water regulators are not opposed to the development and in fact view the project as a potential economic boon for the region. As was held in Samuel Sabuni & 2 others v Court Martial & 8 others [2014] eKLR, "Although the most appropriate action is to forestall a threatened breach of constitutional rights, at times the public interest outweighs the perceived fears held by the individual citizens that their rights are about to be breached."

The Petitioner has not met the threshold to warrant granting of the orders sought and therefore the petition ought to be dismissed and is hereby dismissed with no orders as to costs this being public interest litigation.

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER, 2019.

In the presence of:

MR NYAGUTI –APPELLANT

N/A FOR RESPONDENTS

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE