



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 53 OF 2012

MARTIN OSANO RABERA.....1ST PETITIONER

JOHN NDUNGU KINYANJUL.....2ND PETITIONER

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

RULING

1. This ruling is in respect of 2nd respondent's Notice of Motion dated 16th October 2018, an application brought under **sections 90 and 111** of the **Environmental Management and Coordination Act (EMCA)**. The following orders are sought in the application:

1. That this court be pleased to issue an order immediately stopping 3rd respondent from dumping or disposing any waste, refuse or solid matter on Nakuru Municipality Block 21/236 otherwise known as the Gioto dumpsite in Nakuru County, and

2. That consequently, this court be pleased to issue an Environmental Restoration Order against the 3rd respondent requiring it to restore the environment being Nakuru Municipality Block 21/236 otherwise known as the Gioto dumpsite, to such a condition as shall be certified by the applicant upon inspection, as being safe to human health.

3. Costs be provided for.

2. The application is supported by an affidavit sworn by Anthony Aura Saisi who is employed by the 2nd respondent as Director of Environment in Nakuru County. He deposed that his office wrote to the 3rd respondent a letter dated 24th April 2018 reminding it of the judgment and orders of this court dated 14th February 2018. He annexed a copy of the letter and added that the 3rd respondent had not lodged any application for a waste disposal licence with the 2nd respondent and that activities at the Gioto dumpsite continue unabated and unregulated.

3. The 2nd petitioner responded to the application through his replying affidavit sworn on 27th November 2018. He deposed that the 3rd respondent had indeed not fully complied with the orders of the court despite being granted ample time to do so. He added that the failure to comply raises issues of health.

4. Despite being given several opportunities to do so, the 3rd respondent did not file any replying affidavit to explain any efforts towards compliance. Instead, it filed grounds of opposition in which it stated that the prayers in the application are inconsistent with the orders in the judgment, that the application amounts to reopening the petition for litigation and that the 3rd respondent had undertaken various measures including commissioning a report with a view to seeking an alternative site for waste disposal. Needless to emphasize, in the absence of a replying affidavit, factual statements in the grounds of opposition are of no consequence.

5. Counsels for the applicant and the petitioners urged the court to allow the application and to invoke the provisions of **section 29** of the **Environment and Land Court Act, 2011**.

6. I have considered the application and the materials on record.

7. Judgment in this matter was delivered on 14th February 2018. This court made the following orders :

a) A declaration is hereby made that the 1st and 3rd respondents have violated the petitioners' right to a clean and healthy environment under Article 42 of the Constitution of Kenya, 2010 as regards the manner in which they have operated the Gioto waste disposal site.

b) The 3rd respondent shall apply for a waste disposal site licence in respect of Gioto waste disposal site under sections 87,88 and 89 of EMCA or other relevant legal provisions within 30 (thirty) days from the date of delivery of this judgment.

c) NEMA shall consider such application and process it pursuant to the relevant legal provisions within forty-five (45) days from the date the application is made.

d) If no application for a waste disposal site licence is made as ordered above or if the terms of any licence granted by NEMA are not complied with, NEMA shall make an application to this court under section 90 of EMCA.

e) NEMA shall monitor compliance with these orders and cause this matter to be mentioned periodically as necessary to update the court on compliance by the 3rd respondent and compliance by NEMA itself.

f) The petitioners are awarded costs of this petition. The costs to be paid by the 3rd respondent.

8. Upon delivery of judgment, the matter was set for mention on 24th May 2018 so that the court could be updated on compliance. Since it considered that there was no compliance, the 2nd respondent filed the present application some 8 months after delivery of the judgment. The application came up for hearing on 7th November 2018, 30th November 2018, 10th June 2019 and 20th June 2019. On all those occasions save for 20th June 2019, the 3rd respondent sought and was granted time to file a replying affidavit. Ultimately, none was filed.

9. On 10th June 2019 counsel for the 2nd respondent urged the court to issue summons to the County Secretary Nakuru County so that he attends court and reports on any efforts made towards compliance. Counsel for the 3rd respondent informed the court that they had severally requested the 3rd respondent to avail material to enable counsel draft and file a replying affidavit but there had been no response. He therefore did not object to the application for summons. The court then issued summons to the County Secretary to attend court on 20th June 2019. He did not attend. It was reported that he had travelled outside the country. No explanation was however offered as to why he would travel while being fully aware of the summons which were issued with the consent of his advocates.

10. In the judgment this court declared that the 1st and 3rd respondents had violated the petitioners' right to a clean and healthy environment under **Article 42** of the **Constitution of Kenya, 2010** as regards the manner in which they operated the Gioto waste disposal site. The court therefore ordered the 3rd respondent to apply for a waste disposal site licence in respect of the waste disposal site under **sections 87, 88 and 89** of EMCA or other relevant legal provisions within 30 (thirty) days from the date of delivery of the judgment. The orders were further clear that if no application for a waste disposal site licence was made as ordered or if the terms of any licence granted by NEMA were not complied with, NEMA was to make an application to this court under **section 90** of EMCA. Thus, consequences of failure to comply were very clear. In view of the orders made in the judgment, the 3rd respondent's arguments that the present application amounts to reopening the petition for litigation and that the prayers in the application are inconsistent with the orders in the judgment do not pass muster.

11. The 3rd respondent has so far not applied for the waste disposal site licence almost two years after the orders were made. No explanation has been offered as to the failure to apply despite being given several opportunities and reminders to do so. One can only conclude that there is no willingness to obey this court's orders and to make the simple step of applying for a waste disposal site licence so that Gioto is regulated by the 2nd respondent and by the law.

12. The 3rd respondent does not have the luxury of choosing what to do with this court's orders. There is only one acceptable course of action: obedience and compliance. That is the irreducible minimum. The Court of Appeal recently rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** as follows:

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. ...

13. The present application has been made under **sections 90** and **111** of EMCA. **Section 90** provides:

The Authority may apply to a competent court for orders compelling any person to immediately stop the generation, handling, transportation, storage or disposal of any wastes where such generation, handling, transportation, storage or disposal presents an imminent and substantial danger to public health, the environment or natural resources.

14. On the other hand, **section 111** provides:

(1) Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.

(2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this under this section to show that he has a right or

interest in the property, environment or land alleged to have been or likely to be harmed.

15. This court found in the judgment that the manner in which the 3rd respondent is operating Gioto dumpsite is a violation of the right to a clean and healthy environment. The court would have ordered immediate closure of the dumpsite upon delivery of the judgment but it was deemed prudent to give the 3rd respondent a chance to comply. Yet now we are faced with a situation where the 3rd respondent has not only failed to comply but is also unwilling to demonstrate efforts towards future compliance. We can no longer wait in uncertainty. Compliance with the orders and the law must now be immediate. I am satisfied that the 2nd respondent has made a case for the orders sought in the application.

16. The 2nd respondent also urged the court to invoke the provisions of **section 29** of the **Environment and Land Court Act, 2011**. The section provides:

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

17. The section creates the offences of refusal, failure or neglect to obey an order or direction of this court. It seems to me that proceedings under the section would be criminal in nature. Whilst I see nothing in the law that limits jurisdiction of this court to civil matters only, I think criminal proceedings under the section would need to take the normal course: investigations, criminal charges, plea taking and a trial. Plea taking and trial would have to be in the subordinate courts. In the circumstances, I am not inclined to make any orders under **section 29** of the **Environment and Land Court Act, 2011**. The 2nd respondent may wish to use its powers and functions or collaborate with other law enforcement agencies with a view to commencing criminal proceedings.

18. In the end, I make the following orders:

a) The 3rd respondent is hereby ordered to immediately stop dumping or disposing any waste, refuse or solid matter on Nakuru Municipality Block 21/236 otherwise known as the Gioto dumpsite in Nakuru County.

b) An Environmental Restoration Order is hereby issued against the 3rd respondent requiring it to restore the environment being Nakuru Municipality Block 21/236 otherwise known as the Gioto dumpsite, to such a condition as shall be certified by the 2nd respondent (NEMA) upon inspection, as being safe to human health.

c) Costs of the application shall be borne by the 3rd respondent.

19. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 11th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the petitioners

Ms Kiumbuku holding brief for Mr Biko for the 1st & 3rd respondents/respondents

No appearance for the 2nd respondent/applicant

Court Assistants: Beatrice & Lotkomo