



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION CASE NO.1 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION**

**AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE**

**INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLES 2, 20, 19(2) & (3), 23, 42, 69, 70. 159, 165, 258 &**

**259 REGARDING PROTECTION OF RIGHT OF CLEAN AND HEALTHY**

**ENVIRONMENT OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION**

**ACT 1999**

**IN THE MATTER OF KENYA CIVIL AVIATION ACT CAP 394**

**BETWEEN**

**ROSE JUMA NYANJOM.....1<sup>ST</sup> PETITIONER**

**GEORGE ONYANGO ONDERE.....2<sup>ND</sup> PETITIONER**

**TITUS ACHAR OKUTO.....3<sup>RD</sup> PETITIONER**

**IBRAHIM OLOO ONDITI.....4<sup>TH</sup> PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**DORIS OMBARA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**1. Rose Juma Nyanjom, Gorge Onyango Ondere, Titus Achar Okuto and Ibrahim Oloo Onditi, the 1<sup>st</sup> to 4<sup>th</sup> Petitioner, vide notice of motion under certificate of urgency dated 29<sup>th</sup> January 2018 seeks for the following prayers:**

**“ 1. That this application be certified as urgent and be heard ex-parte in the first instance with and service be dispensed with.**

**2. That pending the hearing and determination of this application the Honourable court do issue conservatory orders restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, through themselves, their appointed agents, servants, employees and/or officers from commencing transfer of solid waste from Kachok dumpsite to Kisumu Concrete Quarry pit in Mableoa.**

**3. That pending the hearing and determination of the petition the Honourable court do issue conservatory orders restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, through themselves, their appointed agents, servants, employees, and/or officers from transferring solid waste from Kisumu concrete abandoned quarry pit in Mamboleo.**

**4. That the Honourable court be pleased to issue order allowing the petitioners to advertise this application and the petition in daily newspaper of national circulation to enable any affected and or interested parties to apply to be enjoined in the petition owing to the fact that the petition is of great public interest.**

**5. That costs of the application be provided for.”**

The application is based on the 15 (fifteen) grounds marked (a) to (o) on its face summarized as follows;

a. That on the 23<sup>rd</sup> November 2017, the “Petitioner” established that the 1<sup>st</sup> Respondent had through the 2<sup>nd</sup> Respondent awarded tender number CGK/COK.ENVT/2017-2018/001 of Ksh.99,250,000/=, for the relocation of waste from Kachok dumpsite to Kisumu Concrete abandoned Quarry pit, without adhering to the **Environmental and Co-ordination Management Act 1999, Civil Aviation Act and Kenya Civil Aviation aerodromes Regulations 2013.**

b. That the award of the tender was shrouded in secrecy and if allowed to be executed, will expose the “Petitioner and the residents of Mableoa” who have not been consulted, to health hazards and deny them their right to clean and healthy environment which contravenes **Articles 42, 69 and 70 of the constitution 2010.**

c. That the award of the tender by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the 3<sup>rd</sup> Respondent was without carrying out the Environmental Impact Assessment which contravenes the **Environmental Management and Co-ordination Act 1999.**

d. That the Respondents have not obtained the National Environment Management Authority’s license to transfer the waste from Kachok dumpsite to Kisumu Concrete abandoned quarry pit in Mamboleo.

e. That the Kisumu Concrete abandoned quarry pit is filed with underground water and if the Kachok waste is dumped there, poisonous and toxic substances from the waste are likely to contaminate the water table, making it unfit for human and livestock consumption.

f. That the toxic seepage is likely to contaminate the Kibos river which drains to Lake Victoria, and is less than 200 metres from the Kisumu Concrete abandoned quarry pit. That such a seepage

would adversely affect the people, livestock and aquatic life along the river (downstream) and ultimately Lake Victoria waters.

g. That the waste at Kachok dumpsite contains biodegradable, non-biodegradable and medical waste and if they are not sorted out before relocation to Kisumu Concrete abandoned quarry pit, it would expose the “Petitioner and many other people who reside in the environs of Mamboleo estate, and entire Kisumu County to health hazards.

h. That though the Kisumu Concrete abandoned quarry pit falls within the Kisumu International Airport runway, and is also within 13 KM of the said Airport, the relocation project was awarded without carrying out aeronautical study in accordance with the Civil Aviation Aerodromes Regulations 2013, and is therefore a great danger to the aircraft passing through the flight path.

i. That the Kisumu Concrete Abandoned Quarry pit is next to human settlement and social amenities for example Kibos river and Disciple of Mary Primary School.

j. That due to the wrongful actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the **“Petitioner has been arbitrarily deprived of his right of access to information for a project that is of public interest.”**

k. That the public stand to suffer economic loss of Ksh.99,250,000/= which is to be paid from tax payers funds, for a contract that was procured illegally.

l. “That the Applicant has been denied his fundamental rights and freedoms as enshrined in the Constitution of Kenya”

m. That the 3<sup>rd</sup> Respondent is a construction Company and not licensed to transport waste under Environmental Management and Coordination (Waster Management Regulations).

2. The application is supported by the affidavit sworn by Rose Juma Nyanjom, the 1<sup>st</sup> Petitioner, on the 29<sup>th</sup> January 2018 in which she depones to the matters listed in the grounds on her “own behalf and on behalf of 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Petitioners.”

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application through the grounds of opposition in respect of the 2<sup>nd</sup> Respondent, dated 31<sup>st</sup> January 2018, replying affidavit sworn by Doris C. Ombara, the 2<sup>nd</sup> Respondent, on 31<sup>st</sup> January 2018, and that sworn by Dr. Olango Onudi, the Acting County Secretary on 31<sup>st</sup> January 2018, on behalf of the 1<sup>st</sup> Respondent.

A. That the grounds of opposition are summarized as hereinbelow;

a. That the application and petition are frivolous, legally untenable and based on falsehoods and the prayers sought incapable of being granted.

b. That the petition against the 2<sup>nd</sup> Respondent in her individual capacity ought to be struck off with costs as she is clearly described and acknowledged as City Manager and therefore an employee of the 1<sup>st</sup> Respondent.

c. That none of the orders sought can be granted against the 2<sup>nd</sup> Respondent.

d. That the application and petition are based on the wrong understanding of facts, is totally misplaced, does not meet the legal threshold and therefore is an abuse of the process of court.

B. That the deposition in the two affidavits are as summarized below;

- i. That though the 1<sup>st</sup> Petitioner deponed that she had the authority of 2<sup>nd</sup> to 4<sup>th</sup> Petitioners to swear the affidavit on their behalf, no such authority was exhibited.
- ii. That from the records held by the various committees and departments of County of Kisumu and the 1<sup>st</sup> Respondent, the due process was followed in awarding the contract.
- iii. That contrary to the claims by the Petitioners, the documents availed, including RN -1 annexed to the Petitioner's affidavit show the contract was for rehabilitation of Kachok Dumpsite and not for its relocation.
- iv. That NEMA has issued a license for the use of inert waste from Kachok Dumpsite for rehabilitation of the abandoned quarry at Mamboleo belonging to Kisumu Concrete Products Ltd. That two licenses dated 30<sup>th</sup> January 2017 and 30<sup>th</sup> January 2018 are attached.
- v. That the rehabilitation of Kachok Dumpsite is a temporary measure to address the concerns raised by NEMA as a site for a new dumpsite is sought and commissioned in accordance with the law.
- vi. That the Abandoned Quarry had been approved for rehabilitation.
- vii. That the Environment Impact Assessment (EIA) report for the project was carried out covering geological and hydrological aspect plus laboratory analysis of the inert waste to be relocated.
- viii. That the project has been subjected to public participation involving various leaders and stakeholders.
- ix. That the Kenya Airport Authority was involved in the study on the suitability of use of inert waste from Kachok Dumpsite to fill the abandoned quarry, and in their letter dated 24<sup>th</sup> November 2017, gave their blessings but set some conditions.
- x. That the water Resources Management Authority (WARMA) has been consulted and given its inputs.
- xi. That the project will not move raw waste which shall continue to be treated at Kachok Dumpsite and can only be moved to the Mamboleo Quarry when it is in inert state, covered with quarry dust and compacted.
- xii. That the inert waste shall be properly handled as directed by the experts once it reaches the Mamboleo quarry, to not only mask any smell but also kill disease causing pathogens.
- xiii. That the Petitioners concerns have all been taken care of by the experts and agencies that are legally obligated to deal with such concerns, whose inputs have been incorporated in the whole process of project formulation, execution and audit, during and after the project.
- xiv. That the 3<sup>rd</sup> Respondent, will engage licensed transporters of the inert waste as provided for under the law.
- xv. That the 1<sup>st</sup> Petitioner is a busy body who is using this petition to blackmail the Respondents, and had filed Kisumu ELC petition No.32 of 2017 which she withdrew, and then filed the current petition without settling the costs of the earlier one.

4. The application is also opposed by the 3<sup>rd</sup> Respondent through the replying affidavit sworn by Chirag Chotal, the Managing Director, on the 13<sup>th</sup> February 2018 whose depositions are as summarized hereinbelow;

- a. That though the 1<sup>st</sup> Petitioner claims that she has the authority of the other Petitioners to swear the affidavit on their behalf, she has not availed the said authority.
- b. That the 3<sup>rd</sup> Respondent specializes in waste management and when they saw the Star Newspaper advert of 24<sup>th</sup> October 2017 inviting bids for an abandoned quarry for relocation of Kachok Dumpsite, they submitted their tender.
- c. That the 3<sup>rd</sup> Respondent was awarded the tender after a vigorous vetting process and emerging the best.
- d. That the project is for rehabilitation of the Kachok Dumpsite and not relocation, and will not occasion health problem as claimed.
- e. That unlike the Kachok Dumpsite which is in the middle of Kisumu City and on a 4.7 acre wetland, the Mamboleo Quarry is far from the middle of the Kisumu and is in a sparsely populated area. That the quarry is on a 5 Acres land with depth of 20 to 25 metres that is surrounded by a perimeter fence.
- f. That the 3<sup>rd</sup> Respondent owns the abandoned quarry which is large enough to absorb all the garbage being moved from Kachok Dumpsite.
- g. That the 3<sup>rd</sup> Respondent has separated the dry part of the quarry with a dyke to prevent water from going to the dumping pan. That the quarry has been lined with a 3 feet quarry dust after which a geo-liner, which is an impermeable PVC sheeting will be laid at the bottom of the pits and the proposed dams to prevent seepage or leachate going into the ground water aquifers. That the leachate, which is the liquid that is collected at the bottom when rain water percolates, is collected with all the toxins in it, through pipes and deposited in collection pans outside the dumping pan.
- h. That inert waste from Kachok Dumpsite will be loaded onto tipper trucks and then covered with tarpaulins to prevent any material flying off while on transit to Mamboleo Quarry. That all appropriate licenses for the project have been obtained and the application should be dismissed to allow the project be implemented.

5. The application came up for hearing on the 19<sup>th</sup> February 2018 with Mr. M.M. Omondi, Mr. Yogo, Mr. Ogenjo Advocates making their submissions on behalf of the Petitioners, 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and the 3<sup>rd</sup> Respondent respectively.

6. The 4<sup>th</sup> Petitioner, named Ibrahim Oloo Onditi, addressed the court protesting that he had neither instructed counsel for the Petitioners to file the petition and application on his behalf nor authorized the 1<sup>st</sup> Petitioner to swear the affidavit on his behalf. The court heard all the counsel present and directed that the name of the 4<sup>th</sup> Petitioner be struck out from the petition.

7. The following are the issues for the court's determinations;

- a. Whether the Petitioners have made a reasonable case for conservatory orders to issue at this stage.
- b. Who pays the costs.

8. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both the Petitioners and Respondents, grounds of opposition by the 2<sup>nd</sup> Respondent, the oral submissions by all counsel for the parties and come to the following determinations;

- a. That though the Petitioners had in ground (L) of the application and deposition of the 1<sup>st</sup>

Petitioner specifically at paragraphs 18, 26 and 30 of the supporting affidavit, questioned the legality of the award of the tender to the 3<sup>rd</sup> Respondent, their counsel Mr. M.M. Omondi, clarified during submissions that the petitioners are not challenging the award.

b. That from the available affidavit evidence and submission by counsel, the project, subject matter of the petition and the application which is subject matter of the ruling is for the “Rehabilitation of Kisumu Concrete Quarry using inert waste from Kachok Dumpsite.” That is clear from the heading on the following documents,

- NEMA license dated 30<sup>th</sup> January 2018.
- ESIA project report dated 1<sup>st</sup> December 2017.

That the project had been captured in the advertisement for expression of interest as “**Provision of Land or Abandoned Quarry for Land Fill Construction within Kisumu County.**” That the letter of award of tender headed “**Notification of Award**” dated 17<sup>th</sup> November 2017 referred to the works as “Conversion of Abandoned Quarry for rehabilitation of Kachok Dumpsite”, while the report by Greenchem Consultancy Firm of October 2017 referred to the project as “**Landfill project at Kajulu Quarry, Mamboleo, Kisumu County.**”

c. That as seen in (b) above, the project has been described with different terms by various persons and agencies, and possibly has been understood by different persons differently. That from the position taken by the Petitioners, the project is about relocating the waste at Kachok Dumpsite to Kisumu Concrete Abandoned Quarry at Mamboleo. That the Quarry is situated on land parcel **Kisumu/Wathorego/88**, that is registered in the name of Kisumu Concrete Products Ltd, as confirmed by the certificate of official search annexed to the Petitioners supporting affidavit. That the Respondents position is that the project is about removing the inert material or waste from Kachok dumpsite and using it to fill or rehabilitate the Kisumu Concrete Abandoned Quarry. That having considered the available evidence and submissions by counsel, the court finds that the Petitioners may have misapprehended the nature of the works involved in the project. That their fear that the Kachok Dumpsite waste would without exception be moved to the Kisumu Concrete Abandoned Quarry is misplaced.

d. That though Kisumu Concrete Products (Ltd) Quarry had engaged the National Environment Management Authority [NEMA] who issued them with a no objection document dated 30<sup>th</sup> January 2017, it was not until the 30<sup>th</sup> January 2018 that they were issued with the license to implement or carry out the rehabilitation of the Quarry using inert waste from the Kachok Dumpsite. That it follows that the license was issued a day after the filing of this petition and the application. That though the complaints by the Petitioners based on absence of the license may have been based on some solid ground at the time of filing, the situation changed upon the issuance of the license and that ground fails.

e. That the Petitioners fears that the project has been awarded and commenced without appropriate studies being carried out by the various agencies with statutory obligations to ensure the people, flights, the flora and fauna in the area of the Kisumu Concrete Abandoned Quarry and beyond are not negatively affected has been adequately addressed by the Respondents who have annexed to their affidavits copies of the reports and recommendations made. That the Respondents have gone ahead to explain in details how a multi-agency committee is charged with the responsibility to audit and oversee the execution of the works to ensure it is carried out in accordance with the various experts recommendations. That it goes without saying that the enforcement agencies like NEMA will be interested to receive and act on any reports made to them by any person, including the Petitioners, on any infringement by the 3<sup>rd</sup> Respondent of the conditions attached to their license, dated 30<sup>th</sup> January 2018 under the sub-headings of extraction, remediation, notification and decommissioning.

f. That on suitability of the 2<sup>nd</sup> Respondent as a party in the petition and application, the court has

taken note of the contents of the Petitioners pleadings, that she is sued in her capacity as City Manager of the 1<sup>st</sup> Respondent and not in her personal capacity. That contrary to the Respondents submissions that there are no orders sought against the 2<sup>nd</sup> Respondent, prayer C of the petition and prayer 2 and 3 of the notice of motion seeks orders against her among others. That accordingly, the 2<sup>nd</sup> Respondent objection to her inclusion in these proceedings is rejected.

g. That the Petitioners have not offered any evidence or particulars of the information they sought and failed to get from the Respondents or any other public body concerning the project. That there is therefore no evidence of the Petitioners rights to information having been deprived or denied.

h. That though the petition and application are indicated to have been filed by four petitioners, the pleadings and affidavit in support of the notice of motion is mostly in singular, that is “**the Petitioner**” **instead of Petitioners**. That the court is left wondering whether the proceedings are only by one Petitioner in view of what the 4<sup>th</sup> Petitioner told the court on 19<sup>th</sup> February 2018 when his name was removed from the petition. That the court notes that the 1<sup>st</sup> Petitioner has not filed a written authority from the other named Petitioners authorizing her to sign the pleadings and swear the affidavit on their behalf.

i. That though the Petitioners have failed to establish a reasonable basis for conservatory order to issue, the court finds no harm in allowing the prayer to advertise the petition in daily newspaper with national circulation for those affected and or interested to apply to be enjoined.

9. That flowing from the foregoing, the court allows only prayer 4 of the notice of motion dated 29<sup>th</sup> January 2018 with costs in the cause.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MARCH 2018**

**In presence of;**

**Petitioners Absent**

**Respondents Absent**

**Counsel Mr. Omondi for the Petitioners.**

**Mr. Ojuro for Yogo for 1<sup>st</sup> and 2<sup>nd</sup> Respondents. and Mr. Ogeyo for 3<sup>rd</sup> Respondent.**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/3/2018**

**7/3/2018**

**S.M. Kibunja Judge**

**Joane Court assistant**

**Parties absent**

**Mr. Omondi for the Petitioner**

**Mr. Ojuro for 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Mr. Ogeyo for the 3<sup>rd</sup> Respondent**

**Court: The ruling dated and delivered in open court in the presence of Mr. Omondi for the Petitioner, Mr. Ojuro for Yogo for 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr. Ogeyo for the 3<sup>rd</sup> Respondent.**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/3/2018**