



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 343 OF 2017**

**RICHARD CHEPKONGA.....1<sup>ST</sup> PLAINTIFF**  
**WILLIAM CHEPTOO.....2<sup>ND</sup> PLAINTIFF**  
**CHEROP KIPTORIS.....3<sup>RD</sup> PLAINTIFF**  
**PAUL BIWOTT.....4<sup>TH</sup> PLAINTIFF**  
**JOHN KIPROP YEGO.....5<sup>TH</sup> PLAINTIFF**  
**JOSEPH CHEBET MOGEN.....6<sup>TH</sup> PLAINTIFF**  
**KIPTLEGE CHEBOI.....7<sup>TH</sup> PLAINTIFF**  
**CHEPKONGA KIPSOGOM.....8<sup>TH</sup> PLAINTIFF**  
**YEGO KIPTORIS.....9<sup>TH</sup> PLAINTIFF**

*(For and on behalf of the residents of Kipsaiya Location)*

**VERSUS**

**KERIO VALLEY DEVELOPMENT AUTHORITY.....1<sup>ST</sup> DEFENDANT**  
**AROR MULTIPURPOSE DAM**  
**DEVELOPMENT PROJECT2.....<sup>ND</sup> DEFENDANT**  
**NATIONAL ENVIRONMENTAL**  
**MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT**  
**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

Richard Chepkonga and 8 others have come to court for and on behalf of the residents of Kipsaiya location against Kerio Valley Development Authority, Aror Multipurpose Development project, NEMA and the Attorney General. The County Government is the interested party. The plaintiff seeks orders of Injunction restraining the defendants, their agents, servants or any other lead agency/authority from undertaking or constructing the Aror Multi-purpose Dam Development Project on the plaintiffs parcel of land namely Elgeyo Marakwet/Kapsowar/1902, Moiben/Kapsowar/2114, Elgeyo Marakwet/Kapsowar/1994, Elgeyo Marakwet/Kapsowar/1993, Moiben/Kapsowar/1821 and Elgeyo Marakwet/Kapsowar/169 situated at Kipsaiya Location within Elgeyo Marakwet County pending the hearing and determination of the application and thereafter the main suit and an order do issue compelling and/or directing that the 1<sup>st</sup> and 3<sup>rd</sup> defendant to adhere to the plaintiffs' constitutional rights to public participation on the intended construction project and giving proper recommendations on the Environment and Social Impact Plan pending the hearing and determination of the application and main suit. They

also pray for cost.

The application is based on grounds that the plaintiffs/applicants are the legal or registered owners of the parcels of land where a multi-billion dam project is intended to be undertaken or constructed by the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant/respondents. The plaintiffs/applicants and the entire residents of Kipsaiya Location are opposed to the construction of the Aror Multi-Billion Dam Project as the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant have not consulted the plaintiffs/applicants or held any public participation as required by law before initiating the process of constructing the purported project. The 1<sup>st</sup> defendant/respondent intended multi-billion projects will adversely affect the plaintiffs as there are no compensation plans or re-allocation through a meaningful public participation exercise. The plaintiffs/applicants have no confidence in the 1<sup>st</sup> defendant/respondent (KVDA) in undertaking the multi-billion dam project supervision basing on its poor past track record.

The applicants lament that 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant have not reached the families of the plaintiffs/applicants targeted for re-allocation and that it is the plaintiffs/applicants position that the residents of Kipsaiya location cannot be excited over the multi-billion shillings funding for the establishment of both Aror and Kimwaror Hydro-electro power irrigation project if the projects so initiated are to the expense of their people who will end up paying more price of losing their land and source of livelihood. That it is therefore necessary that this Honourable court intervenes to direct the 1<sup>st</sup> defendant/respondent to conduct a comprehensive fresh public participation and bring on board the relevant stakeholders before the multi-billion dam and hydroelectric power project is commence at the plaintiffs'/applicants' ancestral parcels of lands.

According to the applicants, they have demonstrated a prima facie case to warrant them being granted the injunctive orders sought and that this application has been brought promptly and in utmost good faith.

In the supporting affidavit sworn by Richard Chepkonga, on his behalf and on behalf of other affected persons, it is stated that the applicants are registered owners of the parcels of land where the multibillion Development project is to be undertaken or constructed by 1<sup>st</sup> Defendant. According to the deponent entire community of Kipsaiya location is opposed to the project as they have not been consulted and yet the project will affect their environment and that they will be displaced without compensation.

The 1<sup>st</sup> respondent has had a poor record and has been having night meetings promising politicians hefty kick-backs. The applicants accuse the 1<sup>st</sup> defendant of corruption and that he has been enticing politicians to support this project. The applicant states further that the area intended for construction of the dam is covered with various cultural diversity such as rivers, hills, valleys forests, minerals, traditional shrines and some of herbal medicine. The applicants claim that the respondent have not initiated this project in compliance with section 59 of the Environment and Management and coordination Act Cap 387 Laws of Kenya. Moreover, Article 10 of the constitution has not been complied with. This Article requires the National values and Principles of Governance to be observed. The applicant learnt that previously, the plight to displace features to pave way for establishment of National project has not been addressed such as in Kapsowar, Marakwet sub-county, Tapach.

In response to the application, Francis Kapkech the Deputy Managing Director of the 1<sup>st</sup> Defendant states that the application is filed to frustrate the ongoing consultation, public participation, mapping and identification of persons likely to be affected by the project. Contrary the allegation by the plaintiff, the respondents have been consulting all the stake holders for the last 7 years and has engaged, the 3<sup>rd</sup> respondent for initial EIA on the viability of the project and its report. The report which okayed the project was disseminated to the locals with. After the 1<sup>st</sup> report the 1<sup>st</sup> respondent engaged a team of surveyors and other experts for a comprehensive mapping exercise that determines the parcels of land that would be affected when the project is rolled out and their respective properties.

The mapping exercise is ongoing and the 1<sup>st</sup> respondent believes that it would be premature for the applicants to agitate for compensation. The respondent alleged that all the location affected including Kapsaiya location has a representative selected by the location who regularly meets and briefs the 1<sup>st</sup> respondent in essence, the 1<sup>st</sup> respondent states that they have complied with Section 49 of the Environment and Management and coordination Act Cap 387 Laws of Kenya and have observed any salient provision of the Constitution.

Mr. Omboto, learned counsel for the applicants submits that the 1<sup>st</sup> and 3<sup>rd</sup> defendants have not adhered to application in public participation on the project and yet they are the owners of land which project is to be done. They are likely to suffer irreparable harm as they will be evicted. According to the plaintiffs the County Government of Elgeyo Marakwet has not been consulted.

Mr. Odongo, learned counsel for the 1<sup>st</sup> respondent submitted that the application is incompetent and that the whole suit is incompetent as the applicants have not listed the person who instructed them contrary to order 1 rule 8 and 13 of the Civil Procedure Rule 2010. The issues raised in petition No. 2 of 2017 which was dismissed are the same issues raised in this suit. According to Mr. Odongo, the applicants have not demonstrated a prima facie case with a likelihood of success. Mr. Odongo further argues that the Governments intends to acquire 2000 acres of land from the resident of 4 location including Kipsaiya and has initiated the process of identifying the affected areas and at the moment, mapping is being carried out. The plaintiffs have not demonstrated that their land falls within the area, the learned state counsel argues that no notice of eviction has been given and therefore there is no civil wrong. Mr. Odongo further argues that this is a matter to be determined in public interest which out weights private interest.

I have considered the application from the plaintiffs and the response by the 1<sup>st</sup> respondent, rival submission and do find that the applicants are guilty of material non-disclosure having come to this court vide petition No E&L 2 of 2017 which was dismissed with costs. The relief sought by the applicants are the same reliefs sought by the same application hence filing of the suit herein by way of plaint is an abuse of the process of court having filed a petition on the same subject matter. However, since the petition was dismissed for noncompliance and want of prosecution and not on merit, I will entertain this application for the interest of justice and due to the fact that this is a matter of great public interest. The plaintiffs claim to be land owners in the project area and therefore their parcels of land will be affected by the construction of the dam. The plaintiffs have not demonstrated that their parcels of land are likely to be taken by the government. It is prudent for plaintiff to

wait until mapping is done to ascertain whether their parcels will be affected. I do agree with the learned state counsel that at this point no wrong doing has been demonstrated.

On public participation, this court finds that the same is important one of the pillars of the constitution of Kenya 2010. Article 10 of the Constitution provides for National values and principles of governance as follows: -

***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

***(2) The national values and principles of governance include—***

***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***

***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***

***(c) good governance, integrity, transparency and accountability; and***

***(d) sustainable development.***

Section 59 of Environment and Management and coordination Act Cap 387 Laws of Kenya provides; -

#### **Publication of Environmental Impact Assessment**

**(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2) the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—**

**(a) a summary description of the project;**

**(b) the place where the project is to be carried out;**

**(c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and**

**(d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.**

**(2) The Authority may, on application by any person extend the period stipulated in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.**

**(3) The Authority shall ensure that its website contains a summary of the report referred to in subsection (1)."**

The import of the above is that Without public participation, the project cannot proceed. I do find that the 1<sup>st</sup> respondent has partly engaged the public and partly complied with Article 10 of the Constitution of Kenya and section 59 of Environment and Management and coordination Act Cap 387, Laws of Kenya. On compensation, I do find that the same is a process and follows mapping of the project. Moreover, the applicants land has not been taken away without compensation. The applicants are not likely to suffer any irreparable loss as they will be compensated by the government if the government acquires their land.

***This court observes that a country that respects its people will always apply the rule of law, democracy and people's participation in its making and implementation of public policy decisions. In this case the respondents should adhere to the provision of Article 10 of the Constitution of Kenya 2010 in implementing the project and Section 59 of Environment and Management and coordination Act Cap 387, Laws of Kenya.***

Lastly, the court finds that public interest in this matter out weights private interest and therefore the prayer for injunction cannot be granted to stop the process of acquiring land for the project. I do decline to grant an injunction; however, I do hereby make an order that that the Kerio Valley Development Authority, and National Land Commission fully complies with the provision of Article 10 of the constitution of Kenya, 2010 and section 59 of Environment and Management and coordination Act Cap 387, Laws of Kenya and part viii of the land Act No. 6 of 2012 that provides for the compulsory acquisition of interests in land in carrying on with project in issue. There be liberty to apply.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of April of 2018.**

**A. OMBWAYO**

**JUDGE**