



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

PETITION NO. 2 OF 2018

IN THE MATTER OF ENFORCEMENT AND

INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 2 (1) (2) (5) 3, 10, 21, 22, 23, 35, 40, 42, 43,

47, 69, 70, 156, 165, (3), 174, 258, 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE WORLD COMMISSION

ON DAMS AND INTERNATIONAL LAW

AND

IN THE MATTER OF PROPOSED BONYUNYU DAM PROJECT

BETWEEN

SIMON OTWORL.....1ST PETITIONER

ZACHARIA OMANGI.....2ND PETITIONER

ORIOKI JOSEPH NDEGE.....3RD PETITIONER

OGUTU GWARO.....4TH PETITIONER

JUSTUS ATUTI MOBUNDE.....5TH PETITIONER

SAMUEL KEYOYE OGATO.....6TH PETITIONER

SILVANOS NYAGAKA.....7TH PETITIONER

PETER NYANGAU KERORE.....8TH PETITIONER

VERSUS

LAKE VICTORIA SOUTH

WEATHER SERVICE BOARD.....1ST RESPONDENT

WATER RESOURCES MANAGEMENT

AUTHORITY (WARMA).....2ND RESPONDENT

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.....3RD RESPONDENT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....4TH RESPONDENT

THE ATTORNEY GENERAL OF THE

REPUBLIC OF KENYA.....5TH RESPONDENT

THE PRINCIPAL SECRETARY

WATER & IRRIGATION.....6TH RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA...7TH RESPONDENT

RULING

1. The petitioners vide a petition dated 8th February 2018 filed in court on the same date seek the following substantive orders:

1) Conservatory order restraining the respondents by themselves, their agents, their servants, consultants, employees or any other persons acting on their instructions/directions from erecting beacons, surveying, demolishing houses, entering farms, remaining, visiting or constructing any structures or in any other manner whatsoever dealing with any land in Bonyunyu, Bonchira, Kanyimbo, Gechona, Nyamakairo, Kerongieta, Botabori and adjoining villages within Gachuba ward, Kitutu Masaba Constituency, Nyamira County proposed for the construction of a water dam.

2) A declaration that the choice, proposal and locus which negates public views or participation and shrouded in secrecy by the respondents is null and void and devoid of legal justification.

2. The petition was presented simultaneously with a Notice of Motion under certificate of urgency expressed to be brought under Article 23 and 24 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules, Articles 10, 20, 22, 40, 64, 159 and 165 of the Constitution. By the Notice of Motion the petitioners seek an injunctive order in the following terms:-

“That a temporary injunction do issue restraining the respondents by themselves, their agents, servants, employees and/or functionaries or officials by whatever name called from encroaching, surveying, mapping and/or erecting beacons on any or all parcels of land constituting Bonyunyu, Bonchura, Kanyimbo, Gechona, Nyamakairo, Kerongieta, Botabori and adjoining villages within Gachuba Ward pending hearing and determination of the Petition.”

3. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support thereof by one Orioki Joseph Ndege the 3rd petitioner herein. The grounds upon which the application is founded are set out as hereunder:-

1. THAT the respondents by themselves, their agents and or employees have moved into parcels of land currently occupied by the petitioners and are to commence work at any time as survey, mapping and erecting of beacons has finalized.

2. THAT the applicants are aware through various newspaper reports, public statement by various public officers and through visits that the construction has to commence by March 2018 in flagrant breach of Article 40 of the Constitution 2010, Section 107 of the Land Act, 2012.

3. THAT the respondents are in violation of Articles 10 and 232 of the Constitution 2010.

4. THAT the proposed water dam will inflict massive displacement of people and occasion irreparable losses and social disruption.

5. THAT the threat to evict is real, imminent and continuing.

6. THAT public policy and constitutionalism is enjoining the respondents to adhere to the law from the onset.

7. THAT the project, its initial work of survey, mapping and marking of beacons has commenced without public participation of any form.

8. THAT there is no information disseminated to the petitioners, no EIA report and is done in secrecy yet the affected parcels are private.

9. THAT there is no scientific findings that would ensure that the petitioners and the grant number of people will reap benefit.

10. THAT it is imperative and in the best interest of justice that the prayers herein are granted.

4. The applicants position is that the respondents have set out and mobilized and have identified the petitioners parcels of land which are located within Bonyunyu, Bonchura, Kanyimbo, Gechona, Nyamakairo, Botabori and the adjoining villages where they have commenced survey work and beaconing land which is occupied by the petitioners for purposes of constructing a water dam. The petitioners aver that they were not aware of the intention to construct a dam within the area and were surprised when the representatives of the respondents visited the area in the company of armed police officers and started surveying the proposed site of the dam and placing beacons during the month of January 2018. The actions of the respondents' agents provoked demonstrations from members of the public who according to the petitioners were protesting at being not informed about the project before hand. The petitioners state that there was no consultation and no public participation had been carried out by the respondents before embarking on carrying out the survey and the feasibility studies to ascertain the viability of the project.

5. The petitioners contend that a project of the magnitude such as Bonyunyu dam would require an Environmental Impact Assessment (EIA) to be carried out and the public to be involved through public participation as stakeholders. The petitioners claim no EIA has been undertaken and there has been no public participation and contend that if the project is allowed to proceed their constitutional rights stand the risk of being violated as they are at the risk of being displaced without due process. The petitioners' rights under Article 40 of the Constitution will be violated if the respondents proceed with the project without compliance with the law. The respondents, the petitioners argue are acting in violation of Article 10(2) relating to the need for public participation, Article 35 relating to access to information and Article 47 relating to right to fair, just and expeditious administrative action. On that account the petitioners seek an order restraining the respondents from proceeding further with any activities relating to the proposed project until the petition is heard.

6. The 1st respondent, Lake Victoria South Water Services Board filed a replying affidavit to the Notice of Motion and a response to the petition. The replying affidavit was sworn by Eng. Petronilla Ogut, the Chief Executive Officer of the 1st respondent. The 1st respondent in response to the motion denies the averments by the petitioners of lack of public participation and details the various consultation meetings and stakeholders forums that have been held under paragraphs 16-36 of the replying affidavit where minutes of the various public meeting and stakeholder forums have been exhibited.

7. The 1st respondent avers that there has been no breach and/or any threatened breach of the petitioners constitutional rights as alleged by the petitioners. The 1st respondent asserts that Bonyunyu Dam Project is a vision 2030 flagship project co-financed by the Kenya Government and the Government of Netherlands. The project envisaged the carrying out of a feasibility study before implementation. The proposed project is to complete on construction of a dam at Bonyunyu, water treatment plant and pipelines and hydro power generation facility in Nyamira and Kisii Counties. The 1st respondent states the approval of the grant was to be in three phases namely; Development/feasibility phase; Implementation phase; and Operational phase. The 1st respondent avers that the initial phase development/feasibility phase entails topographic design, hydrological survey, geotechnical survey, soils and material report, detailed design, environmental impact assessment project plan, agreements on permits, sensitization of the stakeholders by way of public participation and land acquisitions. The proposed project is at this initial stage of undertaking the feasibility study.

8. The 1st respondent further avers that the initial design shows that only about 6 families will be affected by the project and not 600 as alleged by the petitioners. The dam will according to the 1st respondent be sited on two parcels of land namely **East Kitutu/Kebirichi/992** and **993** measuring about 4.5acres owned by the government meaning there will be virtually no displacements of persons from their homes and/or parcels of land. The 1st respondent states that the feasibility study is ongoing and that the members of the public have been involved as stakeholders through the various stakeholder forums that have been held as evidenced by the copies of the meeting minutes annexed to the replying affidavit.

9. The 1st respondent asserts that the petitioners have prematurely come to court and have predicated their case on false and alarming information on the assumption that the project would be implemented on the basis of a preliminary design report prepared by the 4th respondent in 2009 ("**P01**") which is not the case. The petitioners contend that they have made available to the petitioners and the community generally all the information relating to the proposed project through the consultative stakeholder forums that have been held since January 2016 upto the time of the institution of the instant petition. The 1st respondent avers that the present petition has been brought maliciously by persons who are opposed to the project as all information about the project has been put out in the public domain and the majority of the community are in support of and approve the project. The 1st respondent avers the petitioners' application is without merit and/or justification and ought to be dismissed.

10. The 2nd respondent filed grounds of opposition dated 16th March 2018 and filed no replying affidavit. The 2nd respondent contended that it has not been properly enjoined in these proceedings as it is only a mere regulator tasked with issuance of approvals and permits for projects

upon application and no application for any permit has been made to it for the project. The 2nd respondent further asserts the orders sought in the petition and the application are unenforceable against it and contends that the entire suit against it discloses no reasonable cause of action against it and should be dismissed.

11. The 4th respondent, NEMA filed a Notice of Preliminary Objection predicated on the ground that the petition had been filed in High Court which had no jurisdiction as it was the Environment and Land Court which had jurisdiction. This preliminary objection dissipated since the petition was properly directed and is being handled by the Environment and Land Court which was the appropriate court to deal with the matter.

12. The 5th and 6th respondents filed grounds of objection dated 16th March 2018 in opposition to the petition as hereunder:-

- 1. The application and the petition filed herein is premature as the construction works of the proposed dam has not yet commenced.**
- 2. The petitioners have not demonstrated that they have a prima facie case that is meritorious of the orders sought.**
- 3. The petitioners are relying on newspaper excerpts which do not give a true account of the events.**
- 4. The petitioners have failed to demonstrate that the damages suffered cannot be adequately compensated.**
- 5. The application does not disclose any cause of action as against the respondents.**
- 6. The application is frivolous and an abuse of the court process and the same ought to be dismissed.**

13. The petitioners filed a response to the 1st respondent's reply to the Notice of Motion vide the further affidavit by the 3rd petitioner sworn on 14th March 2018. The response affidavit while responding to the issues raised in the replying affidavit is not factual and is argumentative and is more of a submission and to that extent is of limited value.

14. On 20th March 2018 the court directed that the Notice of Motion dated 8th February 2018 be argued by way of written submissions. The petitioners, the 1st respondent, the 2nd respondent and the 5th and 6th respondents have filed their respective submissions. I have perused and considered the filed written submissions by the parties and the issue for the court to determine at this interlocutory stage is whether the petitioners/applicants have satisfied the conditions upon which the court can grant a conservatory and/or injunctive order as sought in the application.

15. The petitioners' case as set out in the petition is that the respondents and notably the 1st respondent are in the process of implementing the Bonyunyu dam project within Nyamira County without following due process. It is the petitioners' assertion that the project is being undertaken in an opaque manner and without any transparency. The petitioners contend that a project of the nature and magnitude as the respondents are undertaking requires consultation by way of public participation and the project proponent needs to make available to the stakeholders and the public all information respecting the project which the petitioners claim the respondents have failed to do. The petitioners thus contend the respondents in embarking on the implementation of the proposed project are acting in contravention of Article 10 of the constitution which enjoins the respondents to ensure there is public participation and all information about the project is made available and there is transparency in the execution of the project.

16. The respondents' position is that the petitioners' allegations respecting contravention and/or threatened violation of their constitutional rights is without jurisdiction, firstly, because the project is not under implementation but rather that a feasibility study is under process and that is being undertaken in compliance with the law. Notably, the 1st respondent insists that contrary to what the petitioners allege, there has been widespread consultation and public participation in executing the project feasibility study. On the whole, it is the respondents' argument that the petitioners' petition is premature as the Environmental Impact Assessment (EIA) study for the project is yet to be undertaken during which time all the petitioners concerns would be taken account of and addressed. The respondents assert the petitioners have not demonstrated a prima facie case to deserve the orders prayed for in the application.

17. Having reviewed the divergent positions put forth by the petitioners and the respondents, I now consider the applicable law and the conditions an applicant for an injunctive relief must satisfy in order to succeed.

18. The petitioners are seeking an interim injunctive relief pending the hearing and determination of the petition. In determining whether to grant or refuse to grant a temporary injunction the court is guided by the principles and/or conditions for grant of injunction as established in the case of **Giella -vs- Cassman Brown Co. Ltd [1973] EA 358** where the court held as per Spry V. P:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. Whereas in a constitutional petition such as the present one other considerations come into play in determining whether or not to grant a conservatory order; such as whether or not there is imminent threat to a party's constitutional rights being violated, the primary consideration remains whether or not on the facts, the petitioner has demonstrated a prima facie case with a probability of success. The Supreme Court of Kenya in the case of **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (Pet No. 2 of 2014) [2014] eKLR** stated as follows in regard to grant of conservatory orders:-

“Conservatory orders bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudication authority of the court, in the public interest. Conservatory orders, therefore are not unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicants case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.” [emphasis mine]

20. Thus whether the court is dealing with a civil case or a constitutional petition, the court in determining whether or not to grant a conservatory order and/or an injunctive relief is called upon to consider the material placed before it to determine whether on the merits of the case the interim relief sought is warranted. The court in the case of **Kenya Association of Manufacturers & 2 Others -vs- Cabinet Secretary Ministry of Environment and Natural Resources & 3 Others [2017] eKLR** in an application premised under Article 23 of the constitution as in the instant case **Eboso, J.** stated thus:-

“...In an application for a conservatory order the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

21. I agree with the learned Judge’s exposition of the law and would like to observe that in the present case, while the petitioners claim to represent the interest of the public, it has equally to be appreciated that the construction and development of the proposed Bonyunyu Dam is an infrastructural development that is intended in the long run to benefit even a larger public extending to the flung out areas of Kisii County. In the premise therefore, in dealing with the matter the court has to strive to strike a balance between the competing interests of those who are supportive of the project and those like the petitioners who oppose the project. The court has to be careful not to unwittingly be caught up in the web of competing and conflicting interest. The court thus has to be satisfied that a prima facie case has been demonstrated by the applicant to warrant the grant of an interim relief.

22. The Court of Appeal in the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** considered what constitutes a prima facie case and stated thus:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case, which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Bosire J.A in the **Mrao Ltd** (supra) Case went on to observe thus:-

“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

23. In the present case having regard to all the material that has been placed before the court, I am not satisfied that the petitioners have demonstrated a prima facie case. The evidence on record shows that the 1st respondent who is the proponent of the proposed Bonyunyu Dam is in the process of undertaking a feasibility study for the project. The 1st respondent has in that regard, set in motion various activities including identifying by way of survey and mapping the project site. Although the petitioners aver there has been no consultation and/or public participation there are various minutes of stakeholders forums attached to the replying affidavit to the application which clearly demonstrate there have been engagements with members of the public and other stakeholders. It is after the completion of the feasibility study that an Environmental Impact Assessment (EIA) study will be carried out. The EIA study will encompass and will entail public participation and during that exercise the petitioners including other members of the public will be in a position to raise whatever concerns they may have respecting the project so that they are addressed before the license, if any, is issued by NEMA.

24. In the premises, I am not persuaded the respondents are undertaking the project in an opaque manner as the evidence suggests the respondents are acting transparently and consequently, I see no infringement of the petitioners’ rights under Articles 10 and 35 of the Constitution. There is no evidence that the petitioners have sought access to any information which they have been denied by the respondents. A project of the nature and magnitude of the proposed project of necessity would require a feasibility study to be undertaken and completed to ascertain its viability and to identify concerns that will require to be factored in if the project was to proceed. There will of course be no project that will receive 100% approval by all persons and there will be no project that will not have benefits and adverse effects. What is critical is what outweighs the other. Is it the benefits likely to accrue and/or the adverse effects? That critical issue can in my view only be answered if a full feasibility study is done and an appropriate EIA study undertaken to identify the potential benefits and the adverse effects and any mitigation measures that may be employed to minimize and/or eliminate the adverse effects. The petitioners suit therefore may in a sense be premature to the extent that the feasibility study for the project has not been completed and to that extent the court does not have the full information to enable it to make an appropriate evaluation respecting the proposed project to determine whether it is the benefits and/or the adverse impacts that outweigh the other.

25. On the basis of the evidence and material before the court, it is evident that there is no clear evidence respecting who will be affected by the project. The respondents’ state not more than 6 families will be affected yet the applicants aver that more than 600 persons stand to be affected and will need to relocate from their parcels of land. This uncertainty of the number of persons to be affected again must be on

account of there being no completed feasibility study which would necessarily define the scope of the project and would clearly show the particulars of the persons and/or parcels of land to be affected. If the project is certified as viable and the appropriate EIA study done, it is my view that any affected persons cannot suffer any injury/damage that cannot be compensated by an award of damages.

26. Article 40 of the Constitution which the petitioners aver the respondents are in violation of makes provision for compensation where land may be required for public purposes. Article 40(3) of the Constitution provides:-

40(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:

(i) Requires prompt payment in full, of just compensation to the person; and

(ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

27. In the proposed project if any person's land shall be required under the provisions of Article 40(3), such land shall be for a public purpose and may be compulsorily acquired under the provisions of Section 107 to 133 of the Land Act No. 6 of 2012 and provided prompt payment in full, of just compensation is made as required, such person will be adequately compensated and therefore in such eventuality the payment of damages would be adequate. The National Land Commission established under Article 67 of the Constitution is the entity mandated under the law to carry out the process of compulsory land acquisition that is required for public purposes. Thus if land shall be required for the project, the National Land Commission will undertake the appropriate process of acquisition.

28. The proposed project is intended for the wider benefit of the public and even on the consideration of the balance of convenience, the balance would tilt against granting the injunction. There is an identified need for the proposed project and it is in the interest of the wider public to permit the feasibility study to proceed to completion unless the court orders and/or directs otherwise upon hearing the petition on its merits. On the whole, I find no merit in the petitioners Notice of Motion dated 8th February 2018. The same is hereby ordered dismissed with no orders as to costs.

29. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 29TH DAY of JUNE, 2018.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Mangi for the Petitioners

Ms. Opiyo for Sala for the 1st respondent

Ms. Kebungo for Olah for the 2nd respondent

N/A for the 3rd respondents

N/A for the 4th respondents

Ms. Opiyo for Fatuma for the 5th & 6th respondents

Ruth Court Assistant

J. M. MUTUNGI

JUDGE