



**REPUBLIC OF KENYA**

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

**HC PETITION No. 13 OF 2018**

JUSTICE AND ENVIRONMENT FOUNDATION ..... 1<sup>ST</sup> PETITIONER  
ISAAC CHEGE ..... 2<sup>ND</sup> PETITIONER  
PETER MACHARIA ..... 3<sup>RD</sup> PETITIONER  
PETER MUGI ..... 4<sup>TH</sup> PETITIONER  
JANE GATHONI NJUGUNA ..... 5<sup>TH</sup> PETITIONER  
ELIZABETH WANGARE WAIHARO ..... 6<sup>TH</sup> PETITIONER  
JANE WANGUI WAINAINA ..... 7<sup>TH</sup> PETITIONER

**VERSUS**

PERRY PATEL MANSUKHLAL KANSAGRA ..... 1<sup>ST</sup> RESPONDENT  
SOLAI GROUP OF COMPANIES ..... 2<sup>ND</sup> RESPONDENT  
KENSALT LIMITED ..... 3<sup>RD</sup> RESPONDENT  
PATEL COFFEE ESTATES LIMITED ..... 4<sup>TH</sup> RESPONDENT  
VINOJ JAYA KUMAR ..... 5<sup>TH</sup> RESPONDENT  
WATER RESOURCES AUTHORITY ..... 6<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENT  
MANAGEMENT AUTHORITY (NEMA) ..... 7<sup>TH</sup> RESPONDENT  
NATIONAL CONSTRUCTION AUTHORITY ..... 8<sup>TH</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT

**RULING**

1. This is a ruling in respect of 1<sup>st</sup> Respondent's Notice of Motion dated 29<sup>th</sup> August 2018, an application pursuant to which the following orders are sought:

**1. Spent**

**2. THAT the Honourable court be pleased to vary its order dated 9<sup>th</sup> August, 2018 restraining the 1<sup>st</sup> respondent from travelling out of the country pending the hearing and determination of the applications dated 8th August 2018 and 27<sup>th</sup>**

**August 2018 to the extent that the 1<sup>st</sup> respondent/applicant be granted leave to travel to India between 13<sup>th</sup> and 18<sup>th</sup> September, 2018.**

2. The application is brought under **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** among others. It is supported by an affidavit sworn by the applicant Perry Mansukh Kansagra who is the 1<sup>st</sup> respondent in the petition. The applicant deposes that he needs to travel to India on 13<sup>th</sup> September 2018 and that he will return on 18<sup>th</sup> September 2018. The purpose of the journey is to visit his child pursuant to orders granted by the High Court in New Delhi in a matter pending before the said court. He adds that he has previously been allowed to travel by the subordinate court in **Naivasha Criminal Case Number 977 of 2018 Republic vs. Perry Mansukh Kansagra & 9 others**.

3. The application is opposed by the petitioners through grounds of opposition dated 30<sup>th</sup> August 2018 and a replying affidavit sworn on 30<sup>th</sup> August 2018 by Godfrey Otieno Onyango who is the chairman of the 1<sup>st</sup> petitioner. The petitioners contend that the applicant is contemptuous of the court and that the application is unsustainable and defective. It is deposed in the replying affidavit that the applicant may abscond and not return if he is allowed to travel this time round. To safeguard the interests of the petitioners, the petitioners urge that if the applicant is allowed to travel, he should as a pre-condition deposit KShs 5 billion in court as is sought in petitioners' Notice of Motion dated 8<sup>th</sup> August 2018.

4. The application was heard inter parte this morning. Owing to the issues raised therein and considering that the Court is on recess until 15<sup>th</sup> September 2018 and that I am on recess duty only until the end of the day today, I have endeavoured to deliver the ruling today.

5. Counsel for the applicant submitted that it is in the best interest of the applicant's child that the applicant be allowed to travel to visit the child. Citing the case of **Shah v. Mbogo & Another [1967] E.A. 116** counsel submitted that the court has discretion in the matter and that the discretion ought to be exercised so as to avoid hardship and injustice. Counsel also relied on **Article 159** of the **Constitution** and urged the court to administer substantive justice in the matter by allowing the application.

6. Counsel for the petitioners submitted that the application is defective since it is made under the **Civil Procedure Act** and **Civil Procedure Rules** as opposed to the rules made under **Article 22(3)** of the **Constitution**. It was further submitted that the criteria for granting and order of review under **Order 45** of the **Civil Procedure Rules** has not been met and that the Applicant is guilty of using improper and contemptuous language towards the court at paragraphs 3 of the Certificate of Urgency and 13 of the Notice of Motion. Accordingly, the applicant is not entitled to the orders sought having approached the court with unclean hands.

7. I have considered the application, the affidavits as well as the submissions. So as to put matters in perspective, it is necessary to give a background.

8. On 7<sup>th</sup> August 2018, the petitioners filed Notice of Motion dated 8<sup>th</sup> August 2018 under Certificate of Urgency seeking among others, an order that the 1<sup>st</sup> and 2<sup>nd</sup> respondents surrender their passports to this court and that they do not travel out of the jurisdiction of the Court. The matter went before my brother Ombwayo J. who was the duty judge then. Upon considering the application at the ex parte stage, the judge granted an order on 9<sup>th</sup> August 2018 restraining the 1<sup>st</sup> respondent from travelling out of the country pending hearing and determination of the application. The judge further ordered that Notice of Motion dated 8<sup>th</sup> August 2018 be heard inter parte on 28<sup>th</sup> August 2018 before the recess duty Judge. Subsequently on 27<sup>th</sup> August 2018, the 1<sup>st</sup> respondent filed Notice of Motion dated 27<sup>th</sup> August 2018, seeking discharge and/or setting aside of the orders of 9<sup>th</sup> August 2018. Being the duty judge, I considered the application at the ex parte stage and ordered the 1<sup>st</sup> respondent to serve it and return for inter parte hearing on 28<sup>th</sup> August 2018 when Notice of Motion dated 8<sup>th</sup> August 2018 was scheduled for inter parte hearing. Come on 28<sup>th</sup> August 2018, I gave directions for filing of replying affidavits and written submissions in respect of both Notice of Motion dated 8<sup>th</sup> August 2018 and Notice of Motion dated 27<sup>th</sup> August 2018 and scheduled the matter for mention on 2<sup>nd</sup> October 2018 to take date of ruling for both applications.

9. On 29<sup>th</sup> August 2018, the 1<sup>st</sup> respondent returned to court under Certificate of Urgency, this time with Notice of Motion dated 29<sup>th</sup> August 2018 – the application that is currently before the court for determination. It is also important to note that the 1<sup>st</sup> respondent is an accused person in a criminal case pending at Chief Magistrate's Court Naivasha being **Naivasha CM Criminal Case Number 977 of 2018 Republic vs. Perry Mansukh Kansagra & 9 others**. The said case concerns criminal law aspects of the incident that led to the filing of the constitutional petition herein. The Naivasha Court granted the 1<sup>st</sup> respondent and his co-accused bond on 9<sup>th</sup> July 2018 and imposed conditions that they deposit their passports or travel documents in the said court, that they do not leave the jurisdiction of the said court without prior permission of the said court and that they report to the offices of the Directorate of Criminal Investigations Nakuru every two weeks until further orders of the said court. The said orders remain in force. The Subordinate Court has on some occasions allowed the 1<sup>st</sup> respondent to travel out of the country.

10. The question I am now confronted with is whether to vary the order of this court dated 9<sup>th</sup> August 2018 and allow the 1<sup>st</sup> respondent to travel out of the country on 13<sup>th</sup> September 2018 and return on 18<sup>th</sup> September 2018. Though the petitioners have argued that the application must fail since it has been brought under the wrong provisions of law, I note that at **Article 159 (2) (d)** the **Constitution** frowns upon procedural technicalities in legal proceedings. Indeed **Article 22(3) (b)** specifically provides that rules made by the Hon. Chief Justice to facilitate enforcement of the Bill of Rights shall ensure that formalities are kept at the minimum. For that reason, I find that the application is validly before the court and I will consider it.

11. There is no dispute that the 1<sup>st</sup> respondent needs to travel out of the country. The only question is whether in the circumstances, he should be allowed to travel out of the country. As I have already pointed out, the 1<sup>st</sup> respondent is an accused person in a criminal case pending before the Chief Magistrate's Court at Naivasha. The said court has made elaborate orders concerning the 1<sup>st</sup> respondent's movement outside the country. There are also orders by the said court requiring the 1<sup>st</sup> respondent to report regularly to the investigators in the said criminal

case. If I were to make a specific order allowing the 1<sup>st</sup> respondent to travel out of the country, I would be tying the hands of the subordinate court as far as that matter is concerned. The trial court in the criminal matter is better placed to determine whether the 1<sup>st</sup> respondent should be allowed to travel on this occasion. In the circumstances, the option which commends itself to me is one which leaves the trial court free to determine if the 1<sup>st</sup> respondent should be allowed to travel on 13<sup>th</sup> September, 2018 as is now sought. So as to further set the subordinate court free, I will stay the orders of 9<sup>th</sup> August 2018. Needless to state, this court will have occasion when considering Notice of Motion dated 8<sup>th</sup> August 2018 and Notice of Motion dated 27<sup>th</sup> August 2018 to determine whether the orders made by the court on 9<sup>th</sup> August 2018 should be confirmed.

12. In view of the foregoing, I make the following orders:

a) The orders made by this court on 9<sup>th</sup> August 2018 are hereby stayed pending hearing and determination of Notice of Motion dated 8<sup>th</sup> August 2018 and Notice of Motion dated 27<sup>th</sup> August 2018.

b) The 1<sup>st</sup> respondent is at liberty to make an appropriate application before the trial court in **Naivasha CM Criminal Case Number 977 of 2018 Republic vs. Perry Mansukh Kansagra & 9 Others** for leave to travel out of the jurisdiction of the said court.

c) Costs in the cause.

13. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of August, 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Masinde for the respondents/applicants

Mr Bosek for the petitioners/respondents

Court Assistant: Lotkomoi