



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. PETITION NO. 7 OF 2017 (FORMERLY HCCC PET 24 OF 2017)

**IN THE MATTER OF: ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS;
AND**

IN THE MATTER OF: THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT;

AND

**IN THE MATTER OF: ARTICLE 19, 20, 21, 22, 23, 42, 69, 70, 165 AND 259 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND COORDINATION
ACT NO. 8 OF 1999**

BETWEEN

CASTLE ROCK GARDENS MANAGEMENT LIMITED.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF ENVIRONMENT

AND NATURAL RESOURCES.....2ND RESPONDENT

THE COUNTY GOVERNMENT EXECUTIVE COMMITTEE MEMBER FOR WATER,

ENERGY, FORESTRY, ENVIRONMENT AND NATURAL RESOURCES, COUNTY

GOVERNMENT OF NAIROBI.....3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH RESPONDENT

NAIROBI WATER & SEWERAGE COMPANY.....5TH RESPONDENT

JUDGEMENT

1. In the Petition dated 27/1/2018, the Petitioner seeks a declaration that it is entitled to a clean and healthy environment and that the Respondents are obligated by Articles 42, 69 and 70 of the Constitution to eliminate all processes and activities that are likely to pollute River Kirichwa and the environment in general including eliminating all pollution sources into Kirichwa River such as raw sewage or waste

which are directly being disposed into this river. The Petitioner is the manager for Castle Rock Apartments situated on L.R. No. 209/12760 situated off Galana Road, Nairobi and bordering Kirichwa River.

2. The Petitioner also seeks an order of mandamus directing the Respondents to undertake an exploratory survey of River Kirichwa from its source to drainage with a view to detecting, arresting and eliminating all sources of pollution into the river within 30 days or such other reasonable duration as the court may direct. It seeks an order of mandamus directing the Respondents to clean up the river and ensure a reasonably clean flow is progressively restored.

3. The Petitioner also seeks a prohibitory injunction to restrain the Respondents or any one acting under them from implicitly or expressly permitting or continuing to allow, neglecting or otherwise failing to prevent or discontinue any action by any person that is harmful to the environmental health of River Kirichwa. It also seeks an order of compensation and costs.

4. The Petition is supported by the affidavit of Kenneth Waithaka Kanyarati who is the Petitioner's director. He is a resident of Castle Rock Apartments and swore that he has observed the deterioration of the river due to wanton pollution by upstream users. He annexed photographs showing the Petitioner's apartment and the river as well as a copy of the letter dated 9/1/2017 addressed to the Cabinet Secretary, Ministry of Environment and Regional Development Authorities, the County Government of Nairobi, National Environment Authority (NEMA) and Nairobi City Water and Sewerage Company. This was a notice of intention to sue these entities over the pollution of River Kirichwa due to the discharge of raw sewage into the river by upstream users.

5. The Director of Water, County Government of Nairobi, Mario Kainga swore the Replying Affidavit in opposition to the petition. He averred that the 3rd Respondent has been diligently undertaking its mandate under the law and has put in place measures to control the pollution of Kirichwa River. The 3rd Respondent employed casual labourers to clean up River Kirichwa from February 2016. An average of 0.5 kilometres of the river was cleaned up each day.

6. The 3rd Respondent formed the Kirichwa River Pollution Control Team on 16/11/2016 to inspect and audit illegal disposal of waste into the river and deal with the transgressors. The County's public health officers have carried out several inspections intended to curb pollution of the river following which notices were issued to landlords whose properties neighbour the river as well as the arrest of the culprits and arraignment in court.

7. The Director deponed that due to increased developments, sewer systems have burst leading to increased effluent being released into the river. A team made up of officials from Nairobi County Department of Water and Sanitation and Nairobi Water and Sewerage Company was deployed to monitor, unblock and repair the burst sewer lines along the river bank. The 3rd Respondent claims that it has undertaken public awareness campaigns in the newspapers and clean-ups which it claimed have been very positive.

8. The 3rd Respondent blamed the Petitioner for hurriedly moving the court without finding out the efforts the 3rd Respondent had put in place to clean up the river. It attached a copy of the Report on the measures and actions taken to control pollution of Kirichwa River.

9. Erick Fredrick Nyalwali Akotsi, the Director, Urban Rivers Restoration swore the 1st and 2nd Respondent's Replying Affidavit in which he claims that the 1st and 2nd Respondents are wrongly joined in this petition since issues in respect of refuse removal, refuse dump, solid waste disposal and the management of garbage and effluence is a devolved function to the County Government pursuant to Schedule 4 Part II of the Constitution of Kenya 2010. Section 9 of the Environmental Management and Coordination Act (EMCA) recognises the 4th Respondent as the principal government agency in the implementation of policies relating to the environment.

10. The Respondents aver that they embarked on mechanical de-sludging of sections of the river between Naivasha Road and Kinyanjui Road which were heavily clogged with solid waste. The 2nd Respondent provided trucks for waste transportation while the County Government provided an excavator. The 2nd Respondent was in the process of procuring heavy machinery for the excavation and transportation of the waste from the river that would cover the whole stretch of Kirichwa Kubwa, Kirichwa Ndogo and sections of Nairobi River traversing Westlands District.

11. The 2nd Respondent averred that it was having consultations with development partners and the private sector to secure funds and partnerships in the provision of Kirichwa Kubwa upstream sewer reticulation.

12. The 2nd Respondent employed casuals to clean up the river manually and identify and report discharge points directed to the river. This is expected to lead to the issuance of stop orders and the arrest and prosecution of offenders. The casuals are also involved in unblocking of blocked and overflowing manholes and sewer lines. The Respondent urged the court to dismiss the petition as being without merit.

13. The 5th Respondent's Acting Regional Technical Coordinator swore the affidavit in opposition to the petition. He depones that the 5th Respondent has undertaken measures to ensure progressive realisation of the Petitioner's right to a clean and healthy environment through installation of sewer systems and disconnecting of illegal connections.

14. The 5th Respondent averred that it has been impeded by the increased walling on the way leaves and heightened pollution caused by the direct storm discharge from private premises that dump sewage into Kirichwa River. The 5th Respondent formed a team to inspect, monitor and audit the illegal disposal of waste into the river. It also worked with the team formed by the 3rd Respondent to oversee preventive measures to stop further pollution of Kirichwa River. The Deponent explained that the high rate of infrastructural growth and housing requires a progressive realisation of the right to a clean and healthy environment. The 5th Respondent argued that there is no basis to justify the grant of the orders sought by the Petitioner since the Respondents have started and continue to undertake adequate measures to clean up the river.

15. The court visited the site on 29/6/2018 in the presence of counsel for all the parties. The court noted that there were several pipes draining sewage into the river and there was a foul smell in the area. There is no access to the river. For the court to access the river, the electric fence next to Castle Rock Apartments had to be disabled. This development is constructed very close to the river. The court had to seek to be allowed to peek into the river from another apartment upstream where it noted that there were broken sewer pipes draining waste into the river. There were manholes near the river intended for the drainage and flow of the waste but which could not be accessed due to the walling of the properties next to the river. Some workers could be seen slashing grass near the river in an attempt to clean it up.
16. Parties filed and exchanged submissions. The Petitioner relied on Articles 22 (1) and (2) and Article 258 of the Constitution on the right to institute these proceedings. It urged that the 3rd to 5th Respondents have a duty to provide a clean and healthy environment to all citizens. It submitted that despite the Respondents admitting that the river was dirty and undertaking to clean it up, this had not been done.
17. The 1st and 2nd Respondents submitted that the people who are polluting the river ought to have been made parties to this suit since the 1st and 2nd Respondents are not responsible for the pollution of the river as alleged in the petition.
18. The 5th Respondent blamed members of the public who have built on the sewer lines along Kirichwa River making it impossible for the 5th Respondent to maintain those sewers. The 5th Respondent submitted that it is the mandate of the 3rd and 4th Respondents to ensure that sewers are not interfered with. It also submitted that there was diversion of sewer lines by members of the public while developing their plots and that the building plans were approved and authorised by the 3rd and 4th Respondents. It admitted that members of the public continued to dispose waste into the river.
19. The 4th Respondent in its submissions maintained that it is the County Government of Nairobi and the Nairobi Water City and Sewerage Company that are responsible for fixing of infrastructure and regulation of waste management in Nairobi County. The 4th Respondent argues that it was wrongly sued in this petition and that it had not violated the Petitioner's rights since the alleged violations fell within the domain of the 3rd and 5th Respondents.
20. The 3rd Respondent urged the court to take note of the fact that men and women could be seen cleaning up River Kirichwa when the court visited the site on 29/6/2018. The 3rd Respondent maintained that the main contributor of pollution to Kirichwa River was sewage bursts and leaks which is attributable to the residents and persons living adjacent to the river including the Petitioner. The Respondents submitted that they have been impeded by the landowners whose plots are adjacent to the river from accessing the river because they have erected electric and high stone walls which have denied the Respondents access to the river for purposes of unblocking and repairing burst sewers and manholes.
21. The Respondent relied on Section 29 of the Physical Planning Act which mandates the County Government to consider and approve all developments and ensure proper implementation of approved Physical Development Plans. The 3rd Respondent maintained that it has dutifully executed its mandate within the law and has put in place measures to ensure that Kirichwa River is kept clean and citizens' rights including the Petitioners under Article 42 of the Constitution are achieved. The Respondent blamed the Petitioner and other persons residing next to the river for substantially contributing to the pollution.
22. The issue for consideration is whether the court should grant the orders sought in the petition. Article 42 of the Constitution guarantees the Petitioner the right to a clean and healthy environment which includes the right to seek redress where this right is violated, denied or threatened. The Applicant does not have to demonstrate that it has incurred loss or suffered injury. The State is enjoined to eliminate processes that are likely to endanger the environment by Article 69 of the Constitution. This Article places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
23. The function of dealing with county health services including refuse removal, refuse dumps and solid waste disposal was devolved to the county under the Constitution. The mandate of providing water and sewerage services to the residents of Nairobi is bestowed upon the 5th Respondent which is wholly owned by the 3rd Respondent.
24. NEMA is tasked by Section 9 of the Environmental Management and Coordination Act (EMCA) to co-ordinate the various environmental management activities being undertaken by lead agencies and promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of the environmental resources. Section 87 of EMCA prohibits any person from discharging or disposing of any wastes in a manner that may cause pollution to the environment or ill health to any person.
25. NEMA is empowered by Section 108 of EMCA to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. The same power is vested on the court by Section 111 of EMCA.
26. Rivers and all land between the high and low water marks form part of public land under Article 62 of the Constitution. Regulation 111 of the Survey Regulations 1994 sets the tidal rivers reservation at not less than 30 meters in width above high water but allows the Minister the discretion to give directions for the reservation to be less than 30 metres in special cases.
27. Section 42 of EMCA makes provision for the protection of rivers, lakes, seas and wetlands including prohibiting any person from erecting any structure or part of it in or under the river or disturbing the river without the approval of the NEMA. Section 87 of EMCA prohibits any person from discharging or disposing any wastes in a manner that causes pollution to the environment.
28. Section 29 of the Physical Planning Act empowers local authorities, which in this case is the County Government of Nairobi, to prohibit

or control the use and development of plots within its area. The section mandates the local authority to consider and grant development permissions. It can also prohibit the subdivision of existing plots into smaller areas. One of the conditions to be complied with in a scheme of subdivision under Section 15 of the same Act is that wayleaves or reserves along any river, stream or water course should be of not less than 10 metres in width on each bank except in areas which flood. The reserves for the lake and ocean beaches are given as 1km and 2km respectively. It is clear from this requirement that the City Council of Nairobi and its successor, the County Government of Nairobi failed to observe this condition when approving the subdivision schemes for plots running along Kirichwa River which is why we have walls and other developments erected along the riparian reserve on Kirichwa River.

29. A local authority or the 3rd Respondent in this case, may serve an enforcement notice on the owner or occupier of land under Section 38 of the Act when it comes to its attention that the development of land was carried out without the required development permission or when the conditions for the grant of the development permission were not complied with. Section 30 prohibits any person from carrying out development within a local authority without being granted development permission.

30. If the Petitioner and the other landowners who have built along the land adjacent to Kirichwa River did not obtain development permission to erect their structures and walls on the riparian reserve, then enforcement notices ought to be served upon them requiring them to take measures within a specified period of time to restore the land along the river to its condition before the development of the walls and other structures took place. This must be done along the entire riparian reserve adjoining Kirichwa river from its source.

31. It is not disputed that Kirichwa River is polluted and that effluent is being discharged into this river at different points of the river. The Respondents have a role to play in the protection of the environment and affording every person the opportunity to enjoy the right to a clean and healthy environment guaranteed by the Constitution.

32. The court agrees with the Petitioner that the Respondents have a duty to eliminate all pollution into Kirichwa River. The 3rd and 5th Respondents are directed to ensure that sewer lines are properly laid out and put in place on the land adjoining the river and that no raw sewage and waste is released into Kirichwa River.

33. The Respondents are directed to undertake a survey of the entire Kirichwa River from its source to determine the riparian reserve and restore this to the state it was in before the developments were carried out along River Kirichwa. The 3rd Respondent is directed to perform its obligations under the law and ensure that the riparian reserve on either side of Kirichwa River is left free and uninterrupted so that sewer lines and manholes can be laid out and maintained for purposes of draining sewage and waste from all the developments abutting Kirichwa River.

34. The Respondents are directed to undertake the clean-up of Kirichwa River and file a report in court to confirm that the river is free of pollution within 6 months of the date of this judgement. The court will review the progress made periodically until the river is clean.

35. The Petitioner is awarded the costs of the petition to be borne by the 3rd and 5th Respondents.

Dated and delivered at Nairobi this 12th day of September 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Genga for the Petitioner

Mr. A. Kamau for the 1st and 2nd Respondents

Mr. Odhiambo for the 3rd Respondent

Mr. I. Wanjohi holding brief for Ms. Nduta for the 5th Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 4th Respondent